DISTRICT OF COLUMBIA BAR

DIVISION IV

COMMITTEE ON

THE DISTRICT COURT

PROPOSED REPORT ON

PUBLIC DISCLOSURE OF JURORS' IDENTITIES

AND REGULATION OF JUROR-ATTORNEY CONTACTS

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I. INTRODUCTION

The Committee on the District Court, Division IV of the Unified Bar, has been requested by the Board of Governors to study and report on the issue of whether, and under what circumstances, the identities of jurors may be concealed from the public. During the Committee's investigation of this question, a related question arose which is also discussed in this report. This issue concerns the wisdom of the District Court's Local Rule which regulates post-verdict contact between attorneys and jurors.

II. THE DISCLOSURE OF JURORS' IDENTITIES

Consideration of this issue should begin with a brief summary of the present procedures followed by the United States District Court when selecting jurors to sit in civil and criminal cases. The statutory basis for jury selection in the federal courts is found in the Federal Jury Selection Act, 28 U.S.C. §1861 et seq. The Act requires that jury selection in federal courts be standardized to the greatest extent possible and that "all litigants in federal courts entitled to trial by jury shall have the right to grand and petit juries at random from a fair cross section of the community . . . ." Pursuant to §1863 of the Act, each United States District Court must devise and place into operation a written plan for the

random selection of grand and petit jurors. By virtue of subsection 1863(b)(8), the plan for each district shall

> fix the time when the names drawn from the qualified jury wheel shall be disclosed to parties and to the public. If the plan permits these names to be made public, it may nevertheless permit the chief judge of the district court, or such other district court judge as the plan may provide, to keep these names confidential in any case where the interests of justice so require. [Emphasis supplied.]

The United States District Court for the District of Columbia has established its plan for the random selection of grand and petit jurors. A copy of the plan, as amended through March 22, 1978, is attached to this report. Paragraph H of the plan provides as follows:

> The contents of the master jury box and the qualified jury box which have become inactive as hereinbefore stated and all related records regarding the qualifications, selection, and use of jurors shall be preserved by the Jury Commission for a period of four years from the date of inactivity and be available for public inspection in that office during regular business hours for the purpose of determining the validity of the selection of any jury. [Emphasis supplied.]

It seems apparent upon reading the Jury Selection Act and the Local Plan promulgated thereunder that the disclosure provisions of the Act and the Plan relate mainly to the issue

of whether the Jury Commission has utilized a fair and non-discriminatory procedure to secure a pool of randomly-selected individuals to sit as jurors in individual cases. While the language of §1863 conceivably could be invoked by judge in precluding access to the identities of jurors in an individual case, it would seem that the Jury Selection Act provides no real authority for such an order.*/

Finding no explicit statutory directive on this subject, we next consider the procedure now followed by the United States District Court in individual civil and criminal cases. The author interviewed Mrs. Lillian Cohen of the Criminal Dockets Division of the Clerk's Office and Mrs. Margaret Whitacre, Supervisor of the Courtroom Division of the Clerk's Office. They both maintain that in no case of which they are aware, whether civil or criminal, has any federal judge ever sealed from public view the identities of the individual jurors selected to sit on a case. Although this is contrary to rumors heard by some members of our Committee, it certainly suggests that the practice of non-disclosure is far from widespread. Indeed, according to Mrs. Whitacre, the routine practice is as follows: During the voir dire examination, counsel are given a "master jury list" which contains the names, addresses, ages, and occupations of all prospective jurors who have been summoned by the Jury Commission for jury

*/ Additionally, the Local Plan does not provide that the Chief Judge or other District Court Judge may in a given case keep the names confidential.

service during that particular period. In addition, counsel are provided with a list containing the names of the individual jurors (usually approximately 40) who have been called from the master list into the courtroom for jury selection. It is from that list of approximately 40 prospective jurors that the final panel of twelve (plus alternates) is eventually selected. At the conclusion of jury selection, the courtroom clerk retrieves the "master jury list" for use in subsequent trials, but counsel are permitted to retain their copies of the sub-list of 40 prospective jurors.

Additionally, at the conclusion of the jury selection, the courtroom clerk will place into the official court file a form containing the names of the regular jurors and alternates selected for that case. That list (which contains the name of every juror and alternate, but not the address, age, or occupation) remains in the court file and is always available for public inspection. Inclusion of the addresses, ages, and occupations of the individual trial jurors is apparently considered by the Clerk's Office (or by the Court) as inappropriate because of the jurors' presumed desire that their addresses not be made public. According to Mrs. Whitacre, there are no plans at present to change this procedure.

(PROPOSED) RECOMMENDATION

Given the absence of evidence that the District Court Judges are regularly (or even occasionally) withholding from public view the identities of individual trial jurors, and assuming that the present practice of including jurors' names in the court file continues, there seems to be no reason for this Committee to recommend any change in the status quo. Under the Jury Selection Act and the specific plan for this Court, counsel can always obtain access to the master juror information for purposes of attacking the manner in which the jurors were selected and summoned for jury service. In individual cases, counsel and the parties have access not only to each juror's identity, but also to his address, age, and occupation. Finally, the press and public have routine access to each trial juror's name. For these reasons, the author suggests that this Committee make no recommendations for change in the present District Court practice.

III. THE WISDOM OF THE LOCAL RULE REGULATING POST-VERDICT CONTACT BETWEEN JURORS AND ATTORNEYS

Local Rule 1-28 of the United States District Court provides as follows:

> Communication with Jurors
>
> (a) COMMUNICATIONS DURING TRIAL
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> No attorney for a party shall converse with a member of the jury during the trial of a case.
>
> (b) COMMUNICATIONS AFTER VERDICT AND PRIOR TO DISCHARGE
>
> After a verdict is rendered but before the jury is discharged from the case, counsel may request leave of the court to converse with members of the jury. Upon receiving such a request, the court will inform the jury that no juror has the obligation to speak with counsel but that any juror may do so if he wishes.
>
> (c) COMMUNICATIONS AFTER DISCHARGE
>
> After the jury is discharged, no attorney for a party shall converse with a member of the jury concerning the case except by leave of court for good cause shown in writing. If the court is satisfied that good cause exists, it will set the matter for a hearing at which time counsel may propound his questions to the juror.

The use of local rules to regulate or preclude communications between attorneys and jurors has become common. Our Committee's investigation has determined that at least fourteen

district courts, including the District of Columbia, have rules dealing with attorney-jury contact before, during, or after trial. The majority of these rules, however, deal exclusively with post-trial interrogation. A compilation of them is attached to this report.

It should be noted that subsection (b) of Local Rule 1-28 appears to require that the Court, upon receiving a request from counsel to interview a juror, inform the jury that "no juror has the obligation to speak with counsel but that any juror may do so if he wishes." So long as counsel's request is made after the verdict is rendered but before the jury is discharged, Local Rule 1-28(b) appears clearly to entitle counsel to request a post-verdict interview. Where, however, the jury has been discharged, the lawyer's entitlement to interview jurors is severely circumscribed by subsection (c) of the Rule. Leave of court must first be sought in writing and obtained. When leave of court is granted, the interrogating attorney is required to propound his questions to the juror in open court at a hearing set by the judge.

Aside from protecting jurors from possible embarrassment, annoyance, or harassment arising from post-trial inquiries by counsel concerning the jurors' deliberations, Local Rule 1-28(c) serves no purpose. Indeed, the rule in practice

precludes trial counsel from inquiring of jurors concerning (1) the jurors' perceptions regarding the relative performance of counsel; and (2) more importantly, the possibility that the verdict was brought about by extraneous prejudicial information that was improperly presented to the jury. This result obtains because of the Rule's inflexible requirement that counsel demonstrate "good cause" before he is entitled even to communicate with the jurors. A respectable argument surely exists for the proposition that an attorney should always have the opportunity, with a juror's consent, to interview a juror. No harm would result from such a procedure, which is no different than a juror voluntarily consenting to an interview with a member of the press. If an attorney harasses a juror, he obviously should be subject to discipline. Unfortunately, the present rule prevents all informal post-trial contact between attorneys and jurors and thereby precludes most attorneys from gathering the very kind of "good cause" evidence required under the Local Rule to secure a hearing.

Rule 606(b) of the recently-enacted Federal Rules of Evidence provides a powerful policy argument in favor of a relaxation of the requirements of Local Rule 1-28(c). Under Rule 606, a juror may never testify

> as to any matter or statement occurring during the course of the jury's deliberations

> or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith. . . .

Since Rule 606 absolutely prohibits a juror from impeaching his own verdict as to his mental operations and emotional reactions, there is simply no risk that every verdict would be placed at the mercy of jurors if post-verdict interviews between counsel and jurors were permitted. On the other hand, Rule 606(b) does provide that upon an inquiry into the validity of a verdict or indictment, a juror may testify

> ...on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.

In short, under the Federal Rules of Evidence, there is no danger that post-trial interviews between jurors and attorneys (i.e., interviews after discharge of the jury) would foster unjustified attacks on the jury's verdict, because such evidence is simply not admissible. On the contrary, such interviews could only serve to identify situations (which are never discovered under the present "good cause" rule) where improper information or influence has been brought to bear upon a jury's verdict. The author believes that the present language of Local Rule 1-28(c) is unnecessarily rigid and should be relaxed or eliminated completely.

(PROPOSED) RECOMMENDATION

For the reasons previously stated, the author suggests that subsection (c) of Local Rule 1-28 be repealed in its entirety. Repeal would permit counsel to enjoy the same unrestricted right to interview jurors after discharge (with their consent) as is now enjoyed by the news media and other private parties. Sanctions would remain available through the court for the attorney who harasses or annoys a juror, and the Federal Rules of Evidence would prescribe the kind of information that could be admitted in court from such an interview. (Rule 606(b) prohibits the use of affidavit evidence on any matter about which the juror would be precluded from testifying under the rule.)

Alternatively, the present version of Local Rule 1-28(c) could be modified to reflect the principles found in Local Rule 12 of the United States District Court for the District of Arizona. That rule provides:

> Rule 12. Communication with Trial Jurors.
>
> (a) Before or During Trial. Absent an order of court and except in the course of in court proceedings, no one shall directly or indirectly communicate with or cause another to communicate with a juror or prospective juror or his family before or during a trial.
>
> (b) After Trial. Interviews with jurors after trial are prohibited except on condition that the attorney or party involved file with the court written interrogatories, together with an affidavit setting forth the reasons for such proposed interrogatories, within the time granted for a motion for new trial.

> Approval for the interview of jurors in accordance with the interrogatories and affidavit so filed will then be automatically granted. Following the interview, a second affidavit must be filed indicating the scope and results of the interviews with jurors and setting out the answers given to the interrogatories.
>
> (c) Jurors' Rights. Except in response to a court order, no juror is compelled to communicate with anyone concerning any trial in which the juror has been a participant.

It has been suggested that subsection (b) of the Arizona rule be changed to delete the requirement that a second affidavit be filed indicating the scope and results of the interviews, and that the Arizona rule as modified be adopted for the United States District Court in the District of Columbia. It has also been suggested that counsel be required to file with the court a certificate executed either by the attorney or the juror attesting that the interview was conducted on a voluntary basis. The author leaves to the discretion of the entire Committee the decision whether to include any or all of these variations in the Committee's final recommendation.