

### **6.02.5 Competency of Juror as Witness or to Impeach a Verdict**

**(1) During a trial, a juror may not testify as a witness before the other jurors on a material issue.**

**(2) Except as provided in subdivision three, in an inquiry into the validity of a verdict, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.**

**(3) In an inquiry into the validity of a verdict, a juror may present in an affidavit and testify:**

**(a) that extraneous prejudicial information had been brought to the jury's attention, or that any outside influence was improperly brought to bear upon a juror or the jury;**

**(b) that the juror or another juror acquired information directly material to a point in issue in the trial by engaging in a conscious, contrived experiment, as opposed to having gleaned information from everyday experience;**

**(c) that the juror or another juror engaged in misconduct that prejudiced a party, including, for example, a juror concealing or misrepresenting information about the juror that prejudiced a party, or a juror communicating to the jury that juror's professional expertise on a material issue; and**

**(d) that the juror or another juror had a bias that prejudiced a party.**

## Note

**Subdivision (1)** is derived from the decision in *People v Buford* (69 NY2d 290, 298 [1987]) which stated that “a juror who could be a witness on a material element of the crime charged is grossly unqualified” to be or continue as a juror, citing *People v Harris* (53 AD2d 1007, 1007 [4th Dept 1976] [“The retention of . . . a juror in a position to offer direct testimony regarding an element of the crime charged . . . served to destroy the defendant’s right to a jury trial”]; see Fed Rules Evid rule 606 [a] [“A juror may not testify as a witness before the other jurors at the trial”]; but see *People v Dohring*, 59 NY 374, 378 [1874] [in dicta, stating the historical view that “it is settled, that a juror may be a witness on a trial before himself and his fellows”]).

**Subdivision (2)** incorporates the language of Federal Rules of Evidence rule 606 (b), given the Court of Appeals decision in *Sharrow v Dick Corp.* (86 NY2d 54, 61 [1995]), which stated that “[a]lthough New York has not adopted a statute similar to [Federal Rules of Evidence] rule 606 (b), our case law is consonant with its underlying principles.”

The source of the “underlying principles” begins with *People v De Lucia* (20 NY2d 275 [1967]). *De Lucia* expressly modified the common-law rule that jurors may not impeach their own verdicts. That modification was prompted by the United States Supreme Court decision in *Parker v Gladden* (385 US 363, 470 [1966]), which accepted the post-verdict testimony of jurors that revealed that a defendant’s right of confrontation was violated when a bailiff told a couple of jurors that the defendant was guilty and if there was any error in finding the defendant guilty, the appellate court would correct it. (See CPL 310.10 [1] [“Except when so authorized by the court or when performing administrative duties . . . court officers or public servants . . . may not speak to or communicate with (jurors) or permit any other person to do so”]; *People v Rukaj*, 123 AD2d 277, 280 [1st Dept 1986].)

*De Lucia* began by explaining that the underlying policy reasons for the common-law rule were “not . . . to encourage the posttrial harassing of jurors for statements which might render their verdicts questionable. With regard to juryroom deliberations, scarcely any verdict might remain unassailable, if such statements were admissible. Common experience indicates that at times articulate jurors may intimidate the inarticulate, the aggressive may unduly influence the docile. Some jurors may ‘throw in’ when deliberations have reached an impasse. Others may attempt to compromise. Permitting jurors to testify regarding such occurrences would create chaos” (*De Lucia*, 20 NY2d at 278; see *People v Friedgood*, 58 NY2d

467, 473 [1983] [“as a matter of policy, efforts to undermine a jury’s verdict by systematically questioning the individual jurors long after they have been dismissed in hopes of discovering some form of misconduct should not be encouraged”]; *People v Karen*, 17 AD3d 865, 867 [3d Dept 2005] [the claim that a juror “was coerced or bullied into a compromise verdict raises no question of outside influence but, rather, seeks to impeach the verdict by delving into the tenor of the jury’s deliberative processes”]; *People v Maddox*, 139 AD2d 597, 598 [2d Dept 1988] [a juror’s affidavit, “in which she sought to impeach her verdict by reference to matters occurring during the deliberation process, . . . was incompetent as a matter of law”]; *People v Smalls*, 112 AD2d 173, 175 [2d Dept 1985] [juror statement that “she had been pressured and badgered by the other jurors” was not a basis for impeaching the verdict]; *People v James*, 112 AD2d 380, 382 [2d Dept 1985] [jurors may not impeach their verdict by stating what was discussed during their deliberations]).

**Subdivision (3) (a).** While not abrogating the common-law rule, *De Lucia* created an exception, holding that the policy reasons for the rule were outweighed when there were allegations of prejudicial “ ‘outside influences’ on a jury” that constituted a violation of a defendant’s Sixth Amendment rights. (*De Lucia*, 20 NY2d at 279; *see* Fed Rules Evid rule 606 [b] [2] [“A juror may testify about whether: (A) extraneous prejudicial information was improperly brought to the jury’s attention; (or) (B) an outside influence was improperly brought to bear on any juror”]; CPL 330.30 [2] [authorizing a motion to set aside a verdict when “during the trial there occurred, out of the presence of the court, improper conduct by a juror, or improper conduct by another person in relation to a juror, which may have affected a substantial right of the defendant and which was not known to the defendant prior to the rendition of the verdict”].)

In other words: “Generally, a jury verdict may not be impeached by proof of the tenor of its deliberations, but it may be upon a showing of improper influence. . . . Improper influence, of course, embraces not merely corrupt attempts to affect the jury process, but even well-intentioned jury conduct which tends to put the jury in possession of evidence not introduced at trial.” (*People v Brown*, 48 NY2d 388, 393 [1979].)

Thus, when, as alleged in *De Lucia*, several jurors made an unauthorized visit to the alleged crime scene (and there, reenacted the crime) and thereby became unsworn witnesses not subject to cross-examination by the defendant, a hearing on the allegations at which the jurors were competent to testify was authorized. (*See* CJI2d[NY] Jury Admonitions in Preliminary Instructions [“Our law also does not

permit you to visit a place discussed in the testimony. . . . (O)nce you go to a place discussed in the testimony to evaluate the evidence in light of what you see, you become a witness, not a juror. As a witness, you may now have an erroneous view of the scene that may not be subject to correction by either party. That is not fair”]; PJI 1:10 [Do Not Visit or View Scene].)

*De Lucia* concluded that “proof of the fact of the unauthorized visit is sufficient to warrant a new trial without proof of how such visit may have influenced individual jurors in their juryroom deliberations. Such a visit, in and of itself, constitutes inherent prejudice to the defendants.” (*De Lucia*, 20 NY2d at 280; accord *People v Crimmins*, 26 NY2d 319 [1970]; but see *People v McKenzie*, 281 AD2d 236, 236 [1st Dept 2001] [“an inadvertent, nonprejudicial exposure of jurors to a crime scene does not warrant reversal”].) The Court of Appeals, however, has held that in a civil case, there is not “inherent prejudice” in an unauthorized visit (*Alford v Sventek*, 53 NY2d 743, 745 [1981]). In *Alford*, the plaintiff sought to vacate a verdict on the grounds that a juror visited the scene of the accident; the Court declined to vacate the verdict, finding that the juror did not communicate “observations which could harm plaintiff’s case,” and the juror was the only one to vote in plaintiff’s favor (*id.* at 745). *Alford* concluded that while they had held in a criminal case that an unauthorized juror visit to the scene was “inherently prejudicial,” “we decline to hold that such a visit would be inherently prejudicial in a civil matter” (*id.* at 745).

Prejudicial outside influences may come from a variety of sources. (*See* CJI2d[NY] Jury Admonitions in Preliminary Instructions [“our law requires that you not read or listen to any news accounts of the case, and that you not attempt to research any fact, issue, or law related to the case”]; PJI 1:11 [“do not do any independent research on any topic you might hear about in this case”]; *People v Thomas*, 184 AD2d 1069, 1069 [4th Dept 1992] [the foreperson improperly acquired prejudicial information by library research on a material issue and communicated that information to the jury]; *People v Smith*, 87 AD2d 357, 360 [1st Dept 1983] [a verdict “may be overturned” where a deadlocked jury makes use of information which they “learned from a newspaper account of the case”]; *cf.* *Sheppard v Maxwell*, 384 US 333, 363 [1966] [prejudicial publicity].)

While it stands to reason, as stated in the second sentence of subdivision (2), that “[t]he court may not receive a juror’s affidavit or evidence of a juror’s statement on” matters the juror may not testify about (*see People v Rukaj*, 123 AD2d 277, 280 [1st Dept 1986]), the converse is true for matters a juror may testify about. (*People v Ciaccio*, 47 NY2d 431, 436 [1979] [“uncontroverted” sworn

affidavits of two jurors were sufficient to find that the court clerk improperly told the jury when they seemed deadlocked that “the Judge had stated that a lot of time and money are invested in the case and they should keep on deliberating”].)

**Subdivision (3) (b)**, dealing with a juror’s testimony about an experiment to test or verify a key fact in a case, is derived from *Brown* (48 NY2d 388). In that case a juror testified to engaging in what the Court determined was a “conscious, contrived experimentation” that gained information “directly material to a point at issue in the trial” (*Brown* at 394), as opposed to gleaned the information by the “application of everyday experience” (*id.*). That information, which bolstered the identification of the defendant, was passed to the other jurors, creating a “substantial risk of prejudice to the rights of the defendant” that warranted a new trial. (*Id.*; accord *People v Legister*, 75 NY2d 832, 833 [1990] [“the juror’s conduct was conscious, contrived experimentation, directly material to a critical point at issue in the trial,” in that it “bolstered” the victim’s identification of the defendant “with nonrecord evidence not subject to challenge by the defendant”]; *People v Stanley*, 87 NY2d 1000, 1001-1002 [1996] [“The jurors’ orchestrated experiment . . . was pointedly aimed at authenticating the eyewitness’s version of the crime”; “the two jurors became unsworn witnesses, incapable of being confronted by defendant, and their experiment created nonrecord evidence, which defendant could not test by cross-examination”].)

By contrast, information gleaned from common, everyday experience does not necessarily impeach a verdict. (*People v Smith*, 59 NY2d 988, 990 [1983] [“the juror’s evaluation of the ability to observe the interior of an automobile through its rear window, made while walking to dinner between deliberations and again while riding in a bus with jurors to the hotel after being sequestered, is properly classified as an everyday experience and, therefore, not misconduct”].)

And “where the jurors attempt to re-enact the crime during their deliberations in accordance with their own recollection of the testimony, their conduct constitutes nothing more than an ‘application of everyday perceptions and common sense to the issues presented in the trial’ ” (*People v Harris*, 84 AD2d 63, 105 [2d Dept 1982]).

**Subdivision (3) (c)** permits a juror to testify to that juror’s or another’s “misconduct” that prejudiced a party. (*See* CPL 330.30 [2].)

“Misconduct” that a juror can testify to may take varying forms. (*See People v Neulander*, 34 NY3d 110, 114-115 [2019] [A juror’s “blatant disregard for the

court's instructions (not to discuss the case with others and to avoid media reports) coupled with her purposeful dishonesty and deception (including the destruction of evidence of her misconduct) when her actions and good faith as a juror came into question vitiate the premise that (the juror) was fair and impartial"].)

“Misconduct” can stem from a juror misleading or lying to the parties and the court during a voir dire about the juror's background, and if the defendant was prejudiced thereby, a new trial will be warranted. (See *People v Southall*, 156 AD3d 111, 119 [1st Dept 2017] [“due to the juror's concealment of material information regarding her job application (to be an assistant district attorney in the same office that was prosecuting the defendant), which also demonstrated a predisposition in favor of the prosecution, defendant was deprived of an impartial jury comprised of 12 jurors”]; cf. *People v Rodriguez*, 100 NY2d 30, 33, 36 [2003] [a juror “intentionally concealed that he and (an assistant district attorney in the office prosecuting the defendant) knew each other,” but given that the juror had “no contact with (the assistant) during the trial and unequivocally stated that his relationship with (the assistant) did not influence his deliberations in the slightest,” the trial court's finding that the misconduct did not result in “substantial prejudice” to the defendant was “supported by the record”]; *People v Ceresoli*, 88 NY2d 925 [1996]; *People v Clark*, 81 NY2d 913 [1993].)

Another form of cognizable post-verdict misconduct was found in the testimony of jurors that “during deliberations [in a homicide case] they were informed of and influenced by two nurse-jurors' professional opinions” on the critical issue of what caused the deceased's death. (*People v Maragh*, 94 NY2d 569, 571 [2000].) *Maragh* differentiated “ordinary and professional opinions of jurors,” noting that the misconduct is in jurors using “their professional expertise to insert facts and evidence outside the record with respect to material issues into the deliberation process” (*id.* at 576; see *People v Santi*, 3 NY3d 234, 249-250 [2004] [“Jurors are not, however, required to ‘check their life experiences at the courtroom door’ ”]). In *Santi*, a juror was a “patient care associate” at a hospital who had “limited” experiences in the medical field; she was not an expert; and “she merely gave her lay opinions regarding the introduction of an I.V. line, drawing on both her life experiences and the trial evidence. This was proper” (*id.*).

**Subdivision (3) (d)** permits post-verdict testimony of a juror relating to that juror's or another juror's bias that prejudices the defendant (*People v Leonti*, 262 NY 256, 257-258 [1933] [where the defendant testified and identified himself as a Sicilian, a verdict of guilt was set aside because of uncontroverted affidavits which stated that one of the jurors “wouldn't believe a Sicilian under oath, and none of

the jurors would”]; *People v Estella*, 68 AD3d 1155, 1156 [3d Dept 2009] [a juror “had engaged in misconduct by failing to disclose, during voir dire, his prejudice and preexisting personal opinion of defendant’s guilt based upon race”]; *People v Rivera*, 304 AD2d 841, 842 [2d Dept 2003] [“reversal is warranted where a juror had an undisclosed preexisting prejudice that would have resulted in his or her disqualification if it had been revealed during voir dire, such as an undisclosed, pretrial opinion of guilt against the defendant”]; *cf. People v Blyden*, 55 NY2d 73, 74 [1982] [“the trial court committed reversible error when it refused to discharge for cause a prospective juror who voiced hostility to racial minorities”]).