SMU | Dedman School of Law

SMU Law Review

Volume 34 | Issue 5 Article 3

January 1981

Jury Misconduct in Texas: Trying the Trier of Fact

David E. Keltner

JURY MISCONDUCT IN TEXAS: TRYING THE TRIER OF FACT

by

*David E. Keltner**

THE problem of jury misconduct has plagued attorneys since the adoption of the Magna Carta. Since that time practitioners, concerned that verdicts be reached fairly, have attacked the outcomes of jury trials on the grounds that the jurors violated their oaths and instructions. In addressing jury misconduct, courts have been caught between two conflicting policies. First, courts recognize that every litigant is entitled to a fair trial, free from preconceived prejudices and outside influence. A juror's misconduct can and often does deny this right. On the other hand, the jury's verdict should be certain and final. A subsequent review of the jury's deliberations results in a trial on a trial. In their struggle to choose between these two policies, Texas courts have created a body of law with peculiar rules, practices, and presumptions governing jury misconduct cases that affect every attorney engaged in litigation.

This Article analyzes this body of law by first reviewing the court's history of dealing with jury misconduct. The unique rules and procedures in jury misconduct cases are then examined, focusing on their practical application. Additionally, the Article investigates the two crucial elements of misconduct and identifies the types and degrees of misconduct that usually result in reversals of jury verdicts, as well as the type of conduct that is generally found to be harmless.

I. HISTORY OF JURY MISCONDUCT

A. *Lord Mansfield's Exclusionary Rule*

An historical review of jury misconduct is helpful in analyzing the current status and application of the law. In 1785 Lord Mansfield, in a decision that has affected the jury system for almost two centuries, ruled that jurors could not impeach their verdict by making affidavits or otherwise testifying as to their own misconduct.[1] This radical departure from early common law[2] was based on the principle that a juror should not be al-

* B.A., Trinity University; J.D., Southern Methodist University. Attorney at Law, Fort Worth, Texas.

1. Vaise v. Delaval, 1 Term Rep. 11, 99 Eng. Rep. 944 (K.B. 1785).

2. 5 J. WIGMORE, EVIDENCE § 2352 (2d ed. 1923). Previously litigants were free to seek and introduce affidavits regarding the jury's activities. *See also* 1 C. MCCORMICK & R. RAY, TEXAS LAW OF EVIDENCE § 394 (2d ed. 1956).

lowed to "allege his own turpitude."[3] As a result of Lord Mansfield's rule, evidence of jury misconduct can come only from third persons who overhear or witness the jury's actions, thus allowing eavesdroppers and spies to testify to misconduct, but disallowing testimony of the jurors who have firsthand knowledge of the events.[4]

Unfortunately, Lord Mansfield's exclusionary rule has survived to the present and remains intact in the majority of jurisdictions.[5] The modern rationalization is that the rule chooses between "the lesser of two evils"[6] by deciding that the finality of jury verdicts should outweigh an attempt to obtain perfect justice in each case.[7] Likewise, some commentators have insisted that the rule protects jurors from harassment and the courts from a subsequent trial on a trial.[8]

B. *The Texas Experience*

The Texas experience with Lord Mansfield's exclusion began with a disagreement between the courts and the legislature. The courts wanted to limit the granting of new trials for jury misconduct to give finality to judgments, while the legislature wanted to ensure fair trials at the expense of finality of litigation. In 1905 the Texas Legislature expressly repudiated the exclusionary rule by adopting a statute that allowed jurors to testify during hearings on motions for new trial based on jury misconduct.[9] The statute provided that the trial court could in its discretion grant a new trial if jury misconduct was proved.[10] Initially, the courts disapproved of the statute's abolition of the exclusionary rule because they feared that the jury system would be disrupted with post-judgment attacks on jury verdicts.[11]

---

3. Note, *Evidence—Testimony of Juror to Impeach Verdict*, 10 OHIO ST. L.J. 262 (1949).

4. Crawford v. State, 2 Yer. 60, 67, (Tenn. 1821); J. WIGMORE, *supra* note 2, § 2352 n.2.

5. 8 J. WIGMORE, EVIDENCE § 2354 (McNaughton rev. ed. 1961).

6. McDonald v. Pless, 238 U.S. 264, 267 (1915).

7. *Id. See also* Note, *Affidavits of Jurors as Basis for a New Trial*, 47 COLUM. L. REV. 1373 (1948).

8. Bell, *Restricting Grounds of Jury Misconduct*, 25 TEX. B.J. 275 (1962); Comment, *Jury Misconduct in Personal Injury Litigation in Texas—A Need for Further Reform*, 21 SW. L.J. 494 (1967) [hereinafter cited as Comment, *Jury Misconduct*]; Comment, *Impeachment of Jury Verdicts*, 25 U. CHI. L. REV. 360 (1958).

9. 1905 Tex. Gen. Laws, ch. 18, at 21. The original statute was Tex. Rev. Civ. Stat. Ann. art. 1371, which was subsequently revised in 1911 and 1925. The statute provided:

> Where the ground of the motion is on account of misconduct of the jury or the officer in charge or because of any communication made to the jury, or because the jury received other testimony the court shall hear evidence thereof, and it shall be competent to prove such facts by the jurors or others, by examination in open court; and if the misconduct proven, or the testimony received, or the communication made, be material a new trial may in the discretion of the court be granted.

The bill creating the statute passed quickly through the legislature and appears to have been motivated by a statement in a Texas Supreme Court opinion relating that "the legislature has never seen fit to alter" Lord Mansfield's Rule. St. Louis S.W. Ry. v. Ricketts, 96 Tex. 68, 71, 70 S.W. 315, 317 (1902).

10. 1905 Tex. Gen. Laws, ch. 18, at 21.

11. Kalteyer v. Mitchell, 110 S.W. 462, 467 (Tex. Civ. App. 1908), *aff'd*, 102 Tex. 390,

Therefore, to ensure that successful attacks on verdicts were kept at a minimum, the courts construed the statute to vest the trial court with absolute discretion to review the alleged misconduct[12] because the trial judge was in a unique position to observe the jurors and their reaction to the parties and presentation of the case.[13]

Dissatisfied with the courts' interpretation of the statute, the legislature in 1925 removed the discretionary power of the trial courts by amending the statute to require a new trial if the misconduct was found to be material.[14] The result of the 1925 amendment substantially changed the court's approach to jury misconduct. In interpreting the new statute, the appellate courts ruled that, once the complaining party established misconduct,[15] the burden of proof shifted to the appellee to prove that harm did not result from the misconduct.[16] The verdict had to be set aside if the reviewing court had a reasonable doubt as to whether the misconduct harmed the complaining party.[17] Under the 1925 statute, new trials were granted frequently, often for trivial misconduct.[18] According to one commentator, the appellate courts "*presumed harm* upon a showing of misconduct, reasoning that jury misconduct was a matter of public concern and therefore a matter about which the legislature could speak arbitrarily."[19] This liberality in the granting of new trials based on misconduct lasted from 1925 to 1941, until the adoption of rule 327.

II. MISCONDUCT UNDER RULE 327

The disagreement between the courts and the legislature ended in 1941 with the adoption of rule 327,[20] which was a part of the first court adopted

---

117 S.W. 792 (1909); Foley v. Northrup, 105 S.W. 229, 231 (Tex. Civ. App. 1907, writ ref'd); Comment, *New Trial—Misconduct of Jurors*, 15 TEXAS L. REV. 101, 104 (1936).

12. M.H. Wolfe & Co. v. St. Louis S.W. Ry., 144 S.W. 347 (Tex. Civ. App. — Dallas 1912, writ ref'd); Missouri, K. & T. Ry. v. Brown, 140 S.W. 1172 (Tex. Civ. App. 1911, no writ); Missouri, K. & T. Ry. v. Blalack, 128 S.W. 706 (Tex. Civ. App. 1910), *aff'd*, 105 Tex. 296, 147 S.W. 559 (1912).

13. Comment, *Jury Misconduct, supra* note 8, at 496.

14. Former Tex. Rev. Civ. Stat. Ann. art. 2234 (1925), provided:

> Where the ground of the motion is misconduct of the jury or of the officer in charge of them, or because of any communication made to the jury or that they received other testimony, the court shall hear evidence thereof from the jury or others in open court, and may grant a new trial if such misconduct proved, or the testimony received, or the communication made, be material.

15. Not all evidence of misconduct was held to be admissible under the rule. *See* text accompanying notes 38-40 *infra*.

16. Sproles Motor Freight Lines, Inc. v. Long, 140 Tex. 494, 168 S.W.2d 642 (1943).

17. *Id.*

18. 1 R. RAY, TEXAS LAW OF EVIDENCE § 394 (Texas Practice 3d ed. 1980).

19. Comment, *Jury Misconduct, supra* note 8, at 496 (emphasis in original). *See also* Parker v. Bailey, 15 S.W.2d 1033 (Tex. Comm'n App. 1929, holding approved). In *Parker* the commission of appeals, prior to the 1925 amendment, acknowledged that the right to trial by jury and the "delicacy of any fact inquiry as to the probable effect of the trial court's misconduct" in communicating with the jury is a "matter of such public concern as to be well within the [legislature's] right to speak arbitrarily." *Id.* at 1035.

20. TEX. R. CIV. P. 327, provides:

> Where the ground of the motion is misconduct of the jury or of the officer in charge of them, or because of any communication made to the jury or that

rules of civil procedure.[21] In drafting rule 327, the supreme court did not return to the unlimited discretionary power vested in the trial court by the 1905 statute. Instead, it merely added a phrase to the 1925 statute that stated that the verdict would be overturned only if the misconduct resulted in "probable injury" to the complaining party.[22] This probable injury rule was adopted as part of a broad scheme in the new rules of civil procedure to eliminate the former practice of granting the reversal of judgments and jury verdicts due to trivial and inconsequential error.[23] The supreme court wished to adopt a rule that would limit appeals and lend finality to judgments except in cases in which the jury misconduct probably caused injury to the complaining party.[24]

A. *The Test for Misconduct Under Rule 327*

The language of rule 327 requires the court to find three elements before it overturns a verdict for jury misconduct: (1) an act of misconduct, (2) that is material, and (3) that causes the complaining party probable injury.[25] In practice, however, the courts assume that any misconduct is material, and hence the only two relevant inquiries are: (1) whether misconduct actually occurred; and, if so, (2) whether it caused probable injury to the complaining party.[26] Rule 327 clearly places the burden of proving both the act of misconduct and the probable injury by a preponderance of the evidence on the complaining party.[27]

> they received other testimony, or that a juror gave an erroneous or incorrect answer on voir dire examination, the court shall hear evidence thereof from the jury or others in open court, and may grant a new trial if such misconduct proved, or the testimony received, or the communication made, or the erroneous or incorrect answer on voir dire examination, be material, and if it reasonably appears from the evidence both on the hearing of the motion and the trial of the case and from the record as a whole that injury probably resulted to the complaining party.

21. In 1941 the legislature gave the supreme court power to adopt rules of civil procedure under certain formalized procedures; at the same time the legislature repealed all laws that dealt with civil procedure. TEX. REV. CIV. STAT. ANN. art. 1731a (Vernon 1962); *see* Calvert, *The Development of the Doctrine of Harmless Error in Texas*, 31 TEXAS L. REV. 1, 8 (1952).

22. TEX. R. CIV. P. 327.

23. Calvert & Perrin, *Is the Castle Crumbling? Harmless Error Revisited*, 20 S. TEX. L.J. 1 (1980).

24. 1 R. RAY, *supra* note 18, § 394. Ray observed that early cases under rule 327 demonstrated a tendency of the supreme court to find probable injury once material misconduct was demonstrated. In fact, he stated: "[I]t may well be doubted whether Rule 327 has wrought any substantial change from the former rule of presumed injury." *Id.* § 394, at 385 and cases cited therein.

25. Pope, *Jury Misconduct and Harm*, 12 BAYLOR L. REV. 355, 360 (1960).

26. Strange v. Treasure City, 23 Tex. Sup. Ct. J. 594, 595 (Sept. 12, 1980) (On motion for rehearing the supreme court withdrew a portion of its judgment affirming the trial court judgment and remanded the case to the court of civil appeals for further proceedings for review of an insufficient evidence point that had been overlooked by that court. 24 Tex. Sup. Ct. J. 46 (Oct. 18, 1980).); 3 R. MCDONALD, TEXAS CIVIL PRACTICE § 14.46.1 (rev. ed. 1970).

27. Pope, *supra* note 25, at 356-57; *Civil Procedure*, 5 TEX. B.J. 168, 170-71 (1942). The first supreme court case to place the burden of proof on the complaining party under rule 327 was Barrington v. Duncan, 140 Tex. 510, 169 S.W.2d 462 (1943). The court, in explain-

B. *Motion for New Trial*

Affidavit Requirement. Rule 327 allows the complaining party to raise the issue of jury misconduct on a motion for new trial.[28] All the requirements under the relevant rules of civil procedure must be satisfied in order properly to present the motion for new trial to the trial court.[29] The supreme court in one of its early decisions under the rule, however, added one additional requirement unique to jury misconduct cases that is not listed in the rules of civil procedure.[30] The actual motion for new trial must be accompanied by affidavits setting out the act of misconduct allegedly committed by the jury.[31] The affidavits must affirmatively show that the affiants are qualified to testify and that the matters sworn to are admissible in evidence at the motion for new trial.[32] If such affidavits are not available, the complainant must set forth a reasonable explanation of the reason the affidavits cannot be obtained, together with a disclosure of the specific allegations of misconduct relied upon.[33] If either the affidavits or the explanations and disclosures are filed, the trial court must hear actual testimony during the hearing on the motion for new trial.[34] Conversely, if neither the affidavits nor the explanations and disclosures are filed, the trial court within its discretion can refuse to hear testimony of the misconduct.[35] The supreme court adopted the practice in the case of *Roy Jones Lumber Co. v. Murphy*,[36] indicating that the rationale for the rule was to

---

ing the new rule, stated: "[I]ts effect is to abolish the prior rule . . . which imposes upon the party asserting misconduct the burden not only of proving by a preponderance of the evidence that such misconduct occurred, but also of showing that such misconduct probably resulted in injury to him." *Id.* at 515, 169 S.W.2d at 464.

28. TEX. R. CIV. P. 327. Actually, there are two procedural vehicles for raising jury misconduct: (1) motion for mistrial and (2) motion for new trial. The choice between the two is determined by the time the misconduct is first discovered by the court or complaining party. Virtually all jury misconduct hearings are heard on motions for new trial since the alleged misconduct usually occurs after the evidence stage of the trial during the jury's deliberation. In some instances, however, the misconduct comes to the attention of the court and parties before the deliberation, and the complaining party should make a motion for mistrial at that time. While the question has never been directly addressed by Texas courts, a failure to make a motion for mistrial apparently does not waive a subsequent motion for new trial on the same acts of alleged jury misconduct. Condra Funeral Home v. Rollin, 158 Tex. 478, 314 S.W.2d 277 (1958).

29. TEX. R. CIV. P. 320-22, 324, 326-29(b).

30. Roy Jones Lumber Co. v. Murphy, 139 Tex. 478, 163 S.W.2d 644 (1942).

31. *Id.* at 482, 163 S.W.2d at 646. Before the decision, there had been conflicting authority as to whether affidavits were necessary on a motion for new trial under rule 327. The commission of appeals, in an opinion adopted by the supreme court, stated that the reason for requiring affidavits was that, "[t]he only remedy against 'fishing expeditions' where misconduct is charged, is to require that, by affidavits, the movant shall prove his good faith, and, by particularizing, demonstrate that his allegations of misconduct are based upon knowledge and not suspicion or hope." *Id.* at 483, 163 S.W.2d at 646 (quoting Freedman Packing Co. v. Harris, 160 S.W.2d 130, 134 (Tex. Civ. App. — Galveston 1942, writ dism'd w.o.m.)).

32. Cortez v. Medical Protective Co., 560 S.W.2d 132, 136-37 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.).

33. Roy Jones Lumber Co. v. Murphy, 139 Tex. 478, 163 S.W.2d 644 (1942).

34. *Id.* at 483, 163 S.W.2d at 646.

35. *Id.*

36. 139 Tex. 478, 163 S.W.2d 644 (1942).

prevent "fishing expeditions" into the possibility of jury misconduct.[37] This affidavit requirement, however, does not obviate the necessity of actual testimony on the motion for new trial.

Testimony Requirement.

"Mental Processes" versus "Overt Act." The complainant has the burden of proof and must introduce admissible testimony during the hearing on the motion for new trial.[38] In almost every instance this testimony will come from the jurors themselves. While a juror's testimony regarding jury misconduct is freely admitted in Texas, the scope of inquiry into the process has been severely limited. In another practice unique to jury misconduct cases, Texas courts have adopted the position that jury misconduct cannot be demonstrated by introducing the mental thought processes and motives of the jurors into evidence.[39] Only evidence of overt acts is admissible to prove misconduct.[40] As a result, it is necessary, although often difficult, to distinguish between the inadmissible mental processes and the admissible overt acts of the jurors.

Rationale for the Rule. Initially, the "mental processes" versus "overt act" rule seems illogical because it prevents the jurors from directly testifying as to the effect on them of the alleged acts of misconduct. The rationale for the rule is sound, however, and has as its basis the policy that thought processes are difficult to ascertain and impossible to verify. Texas Supreme Court Justice Pope, after many years on the bench, itemized the justifications for the rule that allows jurors to testify to overt and definable actions, but prevents them from testifying about matters of the mind.[41] First, jurors are not aware of all of the factors that might influence them during a trial of the suit and are not qualified to serve as their own analyst. Secondly, the question of probable harm is a question of law to be decided by the court on the entire record. Thirdly, a juror's subjective thought processes are incapable of verification and thus should not be used to overturn a jury verdict.[42]

Application of the Rule. Although the "mental processes" versus "overt act" rule appears simple in the abstract, it creates a problem in application. As stated by Justice Pope: "The line at which thought becomes act is vaporous."[43] For example, speech is an overt act and is admissible to prove misconduct but thought is a mental process and as such is not admissible.

37. *Id.* at 483, 163 S.W.2d at 646.
38. Barrington v. Duncan, 140 Tex. 510, 169 S.W.2d 462 (1943).
39. Strange v. Treasure City, 23 Tex. Sup. Ct. J. 594, 595 (Sept. 12, 1980); Trousdale v. Texas & N.O.R.R., 154 Tex. 231, 276 S.W.2d 242 (1955); City of Houston v. Quinones, 142 Tex. 282, 177 S.W.2d 259 (1944).
40. Strange v. Treasure City, 23 Tex. Sup. Ct. J. 594, 595 (Sept. 12, 1980).
41. Pope, *The Mental Operations of Jurors*, 40 TEXAS L. REV. 849, 852-53 (1962).
42. *Id.*
43. *Id.* at 853.

Speech, however, is nothing more than a verbal expression of thought,[44] and allowing the former into evidence while excluding the latter seems somewhat specious. The Texas Supreme Court has repeatedly held that evidence of a juror's mental process should never be admitted into evidence at the hearing.[45] Moreover, if the evidence is admitted without objection, it is incompetent evidence and cannot be considered by the courts in overturning a jury verdict.[46]

C. *Findings of Fact and Conclusions of Law: The Implied Finding Rule*

In reviewing the admissible evidence introduced on a motion for new trial, appellate courts have adopted a rule of presumption that disposes of many appeals without an extensive examination of the facts. The implied finding rule provides that if no findings of fact or conclusions of law are filed, the appellate court must presume that all controverted facts were found in favor of the appellee and supported the overruling of the motion for new trial; that is, the misconduct did not occur.[47] Equally important, a comparable rule applies at the trial court level. If the record demonstrates that the evidence is conflicting as to whether the misconduct occurred, in the absence of findings of fact and conclusions of law, the trial court, as the trier of fact, may choose to believe all or part of the testimony presented on the motion for new trial or disregard it completely.[48] This rule does not operate, however, when the trial court's ruling is contrary to all of the conclusive evidence.[49] Likewise, the implied finding rule does not apply to the court's finding of probable harm because such a determination is a question of law rather than a question of fact.[50] As a result, the appellate court is not bound by the trial court's determination on the subject.[51]

Thus the complainant without exception should request conclusions of law and findings of fact in the event that the trial court overrules its motion for new trial.[52] Otherwise, the complainant will be adversely affected by the implied finding rule. The procedures, presumptions, and rules in jury misconduct cases appear to have been created to prevent the granting of

---

44. Comment, *Jury Misconduct, supra* note 8, at 498.

45. Strange v. Treasure City, 23 Tex. Sup. Ct. J. 594, 595 (Sept. 12, 1980); Texas Employers' Ins. Ass'n v. McCaslin, 159 Tex. 273, 317 S.W.2d 916 (1958).

46. Strange v. Treasure City, 23 Tex. Sup. Ct. J. 594, 595 (Sept. 12, 1980).

47. *Id.* Barrington v. Duncan, 140 Tex. 510, 169 S.W.2d 462 (1943); Monkey Grip Rubber Co. v. Walton, 122 Tex. 185, 53 S.W.2d 770 (1932).

48. Maryland Cas. Co. v. Hearks, 144 Tex. 317, 190 S.W.2d 62 (1945). In many cases, the evidence of the jurors is conflicting. In fact, contradictions often occur within the same juror's testimony. Heflin v. Fort Worth & D.C. Ry., 207 S.W.2d 114 (Tex. Civ. App.—Fort Worth 1947, writ ref'd n.r.e.).

49. Strange v. Treasure City, 23 Tex. Sup Ct. J. 594 (Sept. 12, 1980); Fountain v. Ferguson, 441 S.W.2d 506, 507 (Tex.), *cert. denied*, 396 U.S. 959 (1969); Roming v. McDonald, 514 S.W.2d 129 (Tex. Civ. App.—El Paso 1974, writ ref'd n.r.e.).

50. Strange v. Treasure City, 23 Tex. Sup. Ct. J. 594, 595 (Sept. 12, 1980); Trousdale v. Texas & N.O.R., 264 S.W.2d 489, 491 (Tex. Civ. App.—San Antonio 1953), *aff'd*, 154 Tex. 231, 276 S.W.2d 242 (1955).

51. Scoggins v. Curtiss & Taylor, 148 Tex. 15, 219 S.W.2d 451 (1949); Motley v. Mielsch, 145 Tex. 557, 200 S.W.2d 622 (1947).

52. TEX. R. CIV. P. 296.

motions for new trial in all but the most compelling cases; these unique rules often operate to prevent the complainant from presenting an adequate case for reversal.

III. ELEMENTS OF JURY MISCONDUCT

In the four decades since the adoption of rule 327, Texas courts have often dealt with the problem of jury misconduct and an analysis of the court's decisions can best be undertaken by examining the cases according to the two elements of rule 327, that is, (1) whether there was a material act of misconduct, and (2) whether the act caused probable injury. By examining the maze of cases and the various acts that the Texas Supreme Court has deemed to constitute jury misconduct, the Texas practitioner may better determine his chances of success in moving for a new trial.

A. *Acts of Material Misconduct*

Realizing that the best time to prevent jury misconduct is before it occurs, the supreme court adopted rule 226a, which provides for admonitory instructions to be given to the jury panel and jury during various stages in the jury process.[53] The provisions of rule 226a are mandatory, and it is error for a court to refuse to instruct the jury in accordance with the rule.[54] Since the main purpose of the instructions is to ensure a fair trial to all parties, numerous acts of misconduct are mentioned in the instructions; and the jury is warned that any act of misconduct can result in an overturning of the jury verdict.[55] The following subsections illustrate the specific acts of misconduct prohibited by rule 226a and analyze the courts' review of the individual acts of misconduct.

Tampering: Contact with Persons Connected with the Litigation. Rule 226a(I)(1)-(2) prohibits jurors from having any contact with persons connected with the litigation in any manner except to exchange casual greetings. Texas courts have dealt harshly with litigants who have violated this rule and have consistently overturned jury verdicts upon a finding of tampering. The leading case on tampering is *Texas Employers' Insurance Association v. McCaslin*.[56] During one of the recesses, the plaintiff went to a juror's office and asked the juror to do all that she could to help the plaintiff.[57] The supreme court found that the contact was an act of misconduct

53. *Id.* 226a. The rule requires that certain oral and written instructions should be given to all jurors during various stages of the examination. The rule is extraordinarily lengthy, and will not be paraphrased or quoted here. The various provisions of the rule, however, will be mentioned in the discussion of the acts of misconduct.

54. Central Power & Light Co. v. Freeman, 431 S.W.2d 897, 900 (Tex. Civ. App.—Corpus Christi 1968, writ ref'd n.r.e.). While the rule requires the trial court to give these admonitory instructions, a party may waive any right to complain if it fails to make a timely objection to the court's failure to so instruct the jury. Dealers Nat'l Ins. Co. v. Simmons, 421 S.W.2d 669, 676 (Tex. Civ. App.—Houston [14th Dist.] 1967, writ ref'd n.r.e.).

55. TEX. R. CIV. P. 226a(I).

56. 159 Tex. 273, 317 S.W.2d 916 (1958).

57. Texas Employers' Ins. Ass'n v. McCaslin, 312 S.W.2d 593 (Tex. Civ. App.—Texar-

and held that some acts are so highly prejudicial "that the burden of going forward with proof of harm is met, prima facie at least, by simply showing the improper act and nothing more."[58] The court based its decision on the Texas Constitution's grant of an inviolate right to a jury trial "unaffected by bribes, promises of rewards [or] improper requests."[59] In reaching this decision, the court appears to have shifted the burden of proof away from the complaining party as called for under rule 327[60] and presumed the existence of probable harm once tampering was demonstrated.[61]

Not every contact between a juror and party to the litigation, however, carries this presumption of harm. The Texarkana court refused to find material misconduct in a case in which a juror solicited a ride from the plaintiff's brother because of evidence that the case was not discussed during the ride.[62] The El Paso court determined that the mere fact that jurors accepted coffee furnished by the plaintiff's lawyer did not cause reversal on the basis of jury misconduct.[63] Thus the presumed harm doctrine of *McCaslin* will not apply in every instance of jury contact with persons allegedly interested in the litigation. Nevertheless, *McCaslin* demonstrates that such contact may result in overturning a jury verdict when parties to the lawsuit deliberately try to approach and influence members of the jury.

Liability Insurance and Ability to Pay. Rule 226a(II)(9) prohibits the jury from considering, discussing, or speculating whether any party is protected by insurance. In its first decision interpreting rule 327, the supreme court in *Barrington v. Duncan*[64] held that the consideration of insurance is an act of material misconduct that mandates reversal of the jury verdict.[65] The

---

kana), *rev'd*, 159 Tex. 273, 317 S.W.2d 916 (1958). The court of civil appeals' opinion also notes that the plaintiff sought to ingratiate herself by calling the juror "honey" and inquiring after the juror's family. 312 S.W.2d at 594.

58. 159 Tex. at 279, 317 S.W.2d at 921.

59. *Id.* at 275, 317 S.W.2d at 919.

60. *See* Barrington v. Duncan, 140 Tex. 510, 169 S.W.2d 462 (1943), *discussed in* note 27 *supra*.

61. For a case following *McCaslin*, see Occidental Life Ins. Co. v. Duncan, 404 S.W.2d 52 (Tex. Civ. App.—San Antonio 1966, writ ref'd n.r.e.). The San Antonio court reversed the trial court and overturned a jury verdict upon proof that the plaintiff, in a trial for total disability benefits, approached a juror and asked for aspirin. The court ruled that the act by its very nature was so prejudicial that probable harm was presumed.

62. Hunnicutt v. Clark, 428 S.W.2d 691 (Tex. Civ. App.—Texarkana 1968, no writ). Although the evidence was in conflict, the court found that the plaintiff's brother had no pecuniary interest in the case, was not a witness, and was therefore so removed from the case as not to come under the prima facie rule announced in *McCaslin*.

63. Texas Employers' Ins. Ass'n v. Moore, 549 S.W.2d 37 (Tex. Civ. App.—El Paso 1977, no writ). Courts have likewise been reluctant to overturn verdicts for jurors' comments on the defendant's ability to pay or the respective wealth of the parties. In McAllen Coca Cola Bottling Co. v. Alvarez, 581 S.W.2d 201 (Tex. Civ. App.—Corpus Christi 1979, no writ), one juror stated during the deliberations that Coca Cola was such a large corporation that it would not be affected by a large verdict. The Corpus Christi court refused to overturn the jury verdict because there was no indication of probable harm to the defendant. *Id.* at 204.

64. 140 Tex. 510, 169 S.W.2d 462 (1943).

65. *Id.* at 516, 169 S.W.2d at 465. The plaintiff sued to recover for personal injuries in an automobile accident. At least one of the jurors who was familiar with the trucking industry stated that a truck such as Barrington's had to carry at least $10,000 worth of insurance to

courts, however, have since retreated from the view expressed in the *Barrington* decision, and by 1956 the supreme court held in *Putman v. Lazarus*[66] that the mere mention of insurance does not constitute material misconduct that would require reversal of the judgment.[67] Since the *Putman* opinion, the courts have repeatedly held that the mention of insurance, especially when not shown to have increased the amount of the verdict, does not require the overturning of the jury verdict.[68]

Attorneys' Fees. Rule 226a(II)(8) prohibits the discussion or consideration of attorneys' fees unless evidence of the fees is admitted into testimony. Early decisions under rule 327 held that jury consideration of attorneys' fees when considering the amount of damages to be awarded the plaintiff was material misconduct.[69] The overturning of the jury verdict was necessary when it was proved that the jury increased the amount of damages to ensure that the plaintiff would have an adequate sum left after paying the lawyer.[70] In *White Cabs v. Moore*[71] the supreme court held that every mention of attorneys' fees does not constitute misconduct sufficient to warrant a reversal.[72] In that case, however, nine jurors testified that some of the jurors had stated that they wanted the plaintiff to have an adequate amount of money left after paying attorneys' fees to get started again in business.[73] The supreme court overturned the jury verdict even though the remarks were swiftly rebuked by the jury foreman because the jury did increase its award after the conversation.[74] In most recent cases, however, courts have been more reluctant to overturn the jury's verdicts for consideration of attorneys' fees[75] based on the rationale that a casual mention of attorneys' fees, which is promptly rebuked, is not material misconduct.[76] A recent court of civil appeals decision demonstrated that although the courts will not reverse a jury verdict for a mere mention of attorneys' fees,

---

operate on state highways. Even though there was evidence that the comment was swiftly rebuked, the jury awarded $10,000, the exact policy limits of Barrington's liability policy.

66. 156 Tex. 154, 293 S.W.2d 493 (1956).

67. *Id.* at 158, 293 S.W.2d at 495.

68. Strange v. Treasure City, 23 Tex. Sup. Ct. J. 594, 598 (Sept. 12, 1980); St. Louis S.W. Ry. v. Gregory, 387 S.W.2d 27, 33 (Tex. 1965); Butler v. Haynes, 426 S.W.2d 642, 644 (Tex. Civ. App.—Beaumont 1968, writ ref'd n.r.e.). *See also* Annot., 47 A.L.R.3d 1299 (1973).

69. White Cabs v. Moore, 146 Tex. 101, 105, 203 S.W.2d 200, 201 (1947).

70. *Id.* at 106, 203 S.W.2d at 202.

71. 146 Tex. 101, 203 S.W.2d 200 (1947).

72. *Id.* at 105, 203 S.W.2d at 201.

73. *Id.* at 106, 203 S.W.2d at 202.

74. One commentator has indicated that the supreme court reversed on the cumulative effect of the discussion of attorneys' fees and other misconduct prejudicial to the defendant. Comment, *Jury Misconduct, supra* note 8, at 507 n.103. The clear reading of the case, however, suggests that the sole reason for reversal was the discussion of attorneys' fees.

75. Strange v. Treasure City, 23 Tex. Sup. Ct. J. 594, 597 (Sept. 12, 1980); McAllen Coca Cola Bottling Co. v. Alvarez, 581 S.W.2d 201, 204 (Tex. Civ. App.—Corpus Christi 1979, no writ); Lantex Constr. Co. v. Lejsal, 315 S.W.2d 177, 185-86 (Tex. Civ. App.—Waco 1958, writ ref'd n.r.e.).

76. Strange v. Treasure City, 23 Tex. Sup. Ct. J. 594, 597 (Sept. 12, 1980). In *Strange* there was no evidence that the jury had increased their award as a result of the mention of attorneys' fees.

if the amount of the jury's verdict is affected by the speculation on attorneys' fees, a reversal will result.[77]

Evidence Outside the Record. Rule 226a(II)(5)-(7) prohibits jurors from making independent investigations, inspections, observations, views, or experiments. Additionally, jurors are prohibited from relating any personal experiences or special knowledge to the other jurors and are strictly prohibited from considering any matter outside the record.[78] According to rule 226a(II)(5), all evidence must be presented from the witness stand so that each side may examine the witnesses and make proper objections.

Common Knowledge Versus Special Knowledge. The courts have refused to allow jurors to relate any special knowledge regarding the subject matter of the litigation.[79] Otherwise, jurors become secret witnesses whose testimony is not scrutinized by the attorneys and the court. Jurors are free, however, to discuss matters of common knowledge, which has been defined as "elemental experiences in human nature, commercial affairs, and everyday life as affected by local conditions."[80] Obviously, distinguishing special from common knowledge is a difficult task. *Crawford v. Detering Co.*,[81] a car-truck collision case, is the landmark case distinguishing common knowledge from special knowledge.[82] The special issues submitted in the court's charge required the jury to consider what opportunity a truck driver had to stop his truck. One juror, a bus driver, upon a question from another juror, related to the jury a series of tests conducted on buses that indicated stopping time. Following this comment, three jurors changed their vote, apparently as the result of the information regarding the bus tests. The supreme court reversed the verdict, ruling that information of the tests was specific knowledge and constituted misconduct.[83] In distinguishing between specific and common knowledge, the court adopted a surprisingly practical test. If the other jurors on the panel already know the information, it is common knowledge; if not, it is special knowledge and is prohibited.[84] The test is a subjective one and requires the complain-

77. Kastanos v. Ramos, 581 S.W.2d 740, 741-42 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ). When considering the amount of damages to be awarded plaintiff, the jurors estimated that between 65% and 67% of the award would be given to plaintiff's lawyer. The court assumed that the jury's consideration of attorneys' fees caused a higher verdict to be rendered than would ordinarily have been the case. While evidence of misconduct was introduced at the motion for new trial, the court also had the benefit of a note from the jury foreman inquiring how much of the jury verdict would be given to the plaintiff's attorney. *See also* Missouri Pac. R.R. v. Kennedy, 403 S.W.2d 909, 910-12 (Tex. Civ. App.—Tyler 1966, writ ref'd n.r.e.).

78. 581 S.W.2d 740, 741-42 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ).

79. Motley v. Mielsch, 145 Tex. 557, 200 S.W.2d 622 (1947); Maryland Cas. Co. v. Hearks, 144 Tex. 317, 190 S.W.2d 62 (1945).

80. 30 TEXAS L. REV. 630, 631 (1952).

81. 150 Tex. 140, 237 S.W.2d 615 (1951).

82. Not only is the case a landmark, but it is the only supreme court decision dealing directly with the common knowledge versus special knowledge dichotomy.

83. 150 Tex. at 148, 237 S.W.2d at 619.

84. *Id.*

ant to elicit the extent of the jury's knowledge at the hearing on the motion for new trial.[85] Since *Crawford*, the supreme court has not had another opportunity to consider the special versus common knowledge question,[86] and thus the rule in *Crawford* remains in effect.[87]

Personal Knowledge.[88] Rule 226a(II)(7) prohibits jurors from sharing personal experiences with other jurors. A juror's personal knowledge may involve the case in question, but no information about the case should be divulged unless it has been introduced in evidence. Although error due to injection of personal knowledge can be limited by an effective voir dire examination, the situation may arise during jury deliberations. Rule 327 provides that a new trial may be granted if a juror failed to answer or falsely answered any of the questions on the voir dire examination. If, however, a juror does have some personal knowledge of the event in question or one similar to it and the panel is not adequately examined on voir dire, the courts can hold that any error due to jury misconduct is waived.[89]

Many cases have been decided in Texas dealing with misconduct resulting from a juror's personal knowledge. In *St. Louis & Southwestern Railway v. Gregory*[90] one juror made a personal investigation of the accident that was the subject matter of the lawsuit and discussed that investigation with a fellow juror. The court found that the juror's private investigation and sharing of the information with the jury was material misconduct.[91] The courts have also held that a juror's revelation of a special knowledge of a general business, industry, or area of concern constitutes material misconduct.[92] In *City of Houston v. Quinones*[93] the supreme court ruled that a

85. *Id.* at 153-54, 237 S.W.2d at 622-23 (Wilson, J., dissenting). In a vigorous dissent, Justice Wilson wrote that he believed the juror was using "common knowledge" derived from his own experience in answering the issue and informing the other members of the jury. Justice Wilson argued that the court's holding would endanger most jury verdicts if the complaining party was diligent enough to make a thorough inquiry into the proceedings. Instead, Justice Wilson proposed that verdicts should not be overturned unless the comment "constitutes unsworn testimony of material facts." *Id.* at 157, 237 S.W.2d at 625.

86. *See* Brawley v. Bowen, 387 S.W.2d 383 (Tex. 1965). The court was faced with another opportunity to address the subject in a case in which one juror told the other jurors that he worked in a garage and had peculiar knowledge of repairing automobiles and could tell the extent of damages to the plaintiff's car. The court refused, however, to consider the jury misconduct based on the "implied finding" rule.

87. *But see* Comment, *Jury Misconduct, supra* note 8, at 505, in which the author stated his belief that the *Brawley* decision had the effect of modifying *Crawford*.

88. Special knowledge, discussed in the preceding section, is a juror's knowledge that comes from advanced training or experience in an occupation, thereby giving that juror's opinion added force. Personal knowledge, on the other hand, is knowledge of the actual facts surrounding the case in question or experience in very similar fact situations.

89. St. Louis S.W. Ry. v. Gregory, 387 S.W.2d 27, 29-30 (Tex. 1967).

90. 387 S.W.2d 27 (Tex. 1965).

91. The court did not find, however, that the misconduct caused probable injury to the plaintiffs. *Id.* at 32. Justice Greenhill dissented on the ground that a review of the evidence showed that the jury could have had no other reason to answer as it did except for the evidence it received from Bradford. *Id.* at 34-35.

92. City of Houston v. Quinones, 142 Tex. 282, 177 S.W.2d 259 (1944); Vincent v. Goodman, 568 S.W.2d 907 (Tex. Civ. App.—Eastland 1978, no writ); Lewis v. Cushing, 444 S.W.2d 815 (Tex. Civ. App.—Beaumont 1969, no writ).

93. 142 Tex. 282, 177 S.W.2d 259 (1944).

juror's statement that he had driven the same kind of machine as the defendant and that the defendant could have seen the plaintiff from the driver's seat of the machine constituted material misconduct and warranted the reversal of the jury verdict.[94] Additionally, courts have found jury misconduct in numerous other instances in which jurors related personal experiences or knowledge in the jury room. For example, misconduct has been found in a child custody case in which (1) one juror stated that the child's father could provide government scholarship funds,[95] (2) members of the jury visited the scene of the event in question,[96] (3) a juror revealed knowledge of the settlement offers in the case,[97] (4) a juror revealed the cost of a college education for minor survivors in a wrongful death case,[98] and (5) jurors testified to the jobs that a plaintiff could obtain.[99] The general rule stated throughout the personal knowledge cases is that jurors must not be allowed to become secret witnesses in the jury room by attempting to influence other members of the jury with evidence that did not come from the witness stand.[100]

Calculator or Slide Rule. Texas courts have consistently held that, absent contrary instructions from the judge, jurors may use slide rules and calculators during their deliberations.[101] In *Solana v. Hill*[102] the jurors were required to consider relative speeds and distances in order to answer the negligence issues. One juror used a slide rule to calculate the various speeds and distances that were introduced into evidence.[103] The juror announced to the jury the results of his calculations, which indicated that two of the defendants were not negligent. The plaintiff moved for a new trial, evidently arguing that the use of the slide rule constituted new evidence in the jury room and therefore was outside the record.[104] The Eastland court of civil appeals ruled that no misconduct resulted as long as the calcula-

94. *Id.* at 289, 177 S.W.2d at 263. The supreme court overturned a jury verdict because a juror stated his personal opinion on a crucial issue. The crucial issue in the case was whether the defendant-driver had failed to keep a proper lookout.

95. Lewis v. Cushing, 444 S.W.2d 821, 822 (Tex. Civ. App.—Beaumont 1969, no writ).

96. Rodman Supply Co. v. Jones, 370 S.W.2d 951 (Tex. Civ. App.—Amarillo 1963, no writ).

97. Lewis v. Yaggi, 584 S.W.2d 487, 496 (Tex. Civ. App.—Tyler 1979, writ ref'd n.r.e.).

98. Allen v. Riedel, 425 S.W.2d 665, 676-77 (Tex. Civ. App.—Eastland 1968, no writ).

99. Elston v. Sherman Coca-Cola & Dr. Pepper Co., 596 S.W.2d 215, 217 (Tex. Civ. App.—Texarkana 1980, no writ).

100. *Id.*

101. Queen City Land Co. v. State, 601 S.W.2d 527, 530 (Tex. Civ. App.—Austin 1980, no writ); Bobbie Brooks, Inc. v. Goldstein, 567 S.W.2d 902, 907 (Tex. Civ. App.—Eastland 1978, writ ref'd n.r.e.); Solona v. Hill, 348 S.W.2d 481, 483-84 (Tex. Civ. App.—Eastland 1961, writ ref'd n.r.e.).

102. 348 S.W.2d 481 (Tex. Civ. App.—Eastland 1961, writ ref'd n.r.e.).

103. *Id.* at 483-84. All of the testimony on the motion for new trial showed that all figures used in the calculation were introduced into evidence.

104. *Id.* at 483. Unfortunately, the opinion did not state what specific grounds were used in alleging jury misconduct; the language indicated, however, that the complaint was based on new evidence.

tions were on figures introduced in evidence.[105] To date, no Texas court has dealt with a juror's use of a slide rule or calculator in a case in which the juror used figures that might be outside the record, though there is little doubt that such a calculation and the jury's use of the results would constitute material misconduct.[106]

Quotient Verdict. Rule 226a(III)(5) prohibits jurors from deciding damages by use of a quotient verdict. The term "quotient verdict" is given to describe the frequent practice of the jurors' adding the sum that each one thinks proper and dividing the total by the total number of jurors[107] in order to determine damages. The quotient verdict practice is material misconduct.[108] To establish misconduct because of a quotient verdict, the complaining party must prove two elements: first, an agreement among the jurors to be bound by the final result;[109] and secondly, the actual result of arriving at a verdict based on the figures.[110] The rationale for the rule prohibiting quotient verdicts is that the practice substitutes an arbitrarily ascertained figure for one reached by intelligent deliberation.[111] Courts, however, are reluctant to determine that a jury reached a verdict by the quotient practice and seldom find that jurors agreed to be bound by the final figure that was reached.[112] A good example is *Queen City Land Co. v. State*,[113] an eminent domain proceeding in which the plaintiff sought to acquire an easement for a highway project. During the deliberations one group of jurors adopted the valuation figure argued by the state, while one juror held out for a considerably higher figure. In an effort to reach a verdict, the jurors added the two figures and divided the total by two. The court refused to reverse the trial court because there had been no advance agreement to be bound by the figure.[114] The court also stated that the verdict was reached by compromise, but compromise alone does not constitute misconduct.[115]

Consideration of Effect of Answer. Rule 226a(III)(4) directs jurors not to consider the effect of their answers. Material misconduct results when jurors attempt to answer special issues in an effort to ensure judgment for

105. *Id.*

106. Ornelas v. Moore Serv. Bus Lines, 410 S.W.2d 919, 922 (Tex. Civ. App.—El Paso 1966, writ ref'd n.r.e.). The court, without so holding, implied that calculating figures not in evidence would be material misconduct.

107. R. McDONALD, *supra* note 26, § 14.13.

108. Ruffo v. Wright, 425 S.W.2d 663 (Tex. Civ. App.—San Antonio 1968, no writ).

109. Landreth v. Reed, 570 S.W.2d 486 (Tex. Civ. App.—Texarkana 1978, no writ).

110. *Id.* at 491; *see* R. McDONALD, *supra* note 26. According to McDonald, the actual harm in a quotient verdict is not great since the procedure is not a fatal resort to chance but the result of an average of all the jurors' thoughts.

111. *See* R. McDONALD, *supra* note 26.

112. Landreth v. Reed, 570 S.W.2d 486, 490 (Tex. Civ. App.—Texarkana 1978, no writ); J. Weingarten, Inc. v. Azios, 384 S.W.2d 160 (Tex. Civ. App.—Houston 1964, writ ref'd n.r.e.).

113. 601 S.W.2d 527 (Tex. Civ. App.—Austin 1980, no writ).

114. *Id.* at 529.

115. *Id.*

one of the parties. To prove misconduct, the complainant must demonstrate that the jury has a "design or purpose" to give one of the parties a judgment. Often jurors are intelligent enough to realize the outcome of their answers, but misconduct does not result without an obvious scheme to give one party a judgment. In *Bell v. Buddies Super-Market*,[116] a personal injury case, the court found that the jurors, by answering the liability issues in the negative and subsequently neglecting to answer the damage issue, indicated that the jury realized the effect of its answers.[117] The court did not grant a new trial for misconduct, however, because there was "no design on the part of the jury to effect an end by their findings regardless of the evidence."[118]

Personal Bias or Prejudice. Rule 226a(III)(1) directs jurors not to allow bias, prejudice, or sympathy to play a part in their verdict. A juror's personal bias or prejudice for or against a party or a type of lawsuit can be material misconduct if it is proved that a juror prejudged the case as a result of the bias or prejudice.[119] In *Compton v. Henrie*[120] the supreme court considered a case in which a juror displayed hostility toward both the type of lawsuit and the person who brought it. The juror repeatedly testified that he did not believe in bringing a lawsuit to collect for personal injuries, that he had been in a wreck and had made no claim for benefits, and that he would not want anyone to "bleed" him.[121] The supreme court ruled that there was no material misconduct since the statements of the juror revealed no prejudgment or implication of partiality.[122] In *Strange v. Treasure City*[123] the supreme court considered a situation in which a juror, for unknown reasons, was prejudiced toward the plaintiff. The juror demonstrated that she was prejudiced in the plaintiff's favor by stating that she "had personal reasons to give [plaintiff] as much money as possible."[124] The supreme court found that the statement was misconduct but did not cause the defendant probable injury.[125] These two supreme court cases indicate the reluctance of the courts to grant new trials based on bias and prejudice.

B. *Acts Causing Probable Injury*

The second element of jury misconduct is probable injury. In order to overturn a jury verdict for misconduct, the complainant must demonstrate

116. 516 S.W.2d 447 (Tex. Civ. App.—Tyler 1974, writ ref'd n.r.e.).
117. *Id.* at 451.
118. *Id.*
119. Strange v. Treasure City, 23 Tex. Sup. Ct. J. 594 (Sept. 12, 1980); Compton v. Henrie, 364 S.W.2d 179 (Tex. 1963).
120. 364 S.W.2d 179 (Tex. 1963).
121. *Id.* at 180. On voir dire examination the juror had refused to admit that he was prejudiced against personal injury suits.
122. *Id.* at 182.
123. 23 Tex. Sup. Ct. J. 594, 596-97 (Sept. 12, 1980).
124. *Id.* at 596.
125. *Id.* at 597.

by a preponderance of the evidence that the misconduct probably caused injury.[126] The probable injury rule has always been used to prevent jury verdicts from being overturned because of trivial and inconsequential error.[127] In recent years, Texas courts have demonstrated an increasing tendency to find that the jury misconduct did not result in probable injury to the complainant. In order to determine whether probable injury resulted, courts have consistently looked to several factors.

Nature and Subject Matter of Misconduct. Some forms of misconduct are treated more seriously than others. For example, the mere occurrence of jury tampering has been held to be evidence of probable harm,[128] while the mention of insurance,[129] attorneys' fees,[130] or the comparative wealth of the parties have traditionally been found not harmful.[131] If these statements are repeated and are shown to have a definite effect on the jury's verdict, however, they will be deemed to constitute probable harm.[132]

Statements of Fact or Opinion. The courts have adopted the view that a juror's statement that he knows something as a matter of fact is more harmful than the expression of an opinion.[133] For example, in *Trousdale v. Texas & New Orleans Railroad*,[134] a personal injury case, a juror stated that the answers to the negligence and unavoidable accident issues were immaterial after the damage issue had been answered. The supreme court held that the statement was material misconduct,[135] but since it was a statement of opinion, it did not result in probable injury.[136] Expressions of fact, however, are often found to be harmful.[137] For example, in *Scoggins v. Curtiss & Taylor*[138] the supreme court reversed the trial court and court of civil appeals when it was demonstrated that several jurors made various factual comments during the jury deliberation.[139] One juror stated that the plaintiff was not a poor man and needed no consideration. Another juror

126. *Id.* at 595; Fountain v. Ferguson, 441 S.W.2d 506, 507 (Tex.), *cert. denied*, 396 U.S. 959 (1969).

127. R. RAY, *supra* note 18, § 394.

128. Texas Employers' Ins. Ass'n v. McCaslin, 159 Tex. 273, 317 S.W.2d 916 (1958).

129. Strange v. Treasure City, 23 Tex. Sup. Ct. J. 594 (Sept. 12, 1980); Putman v. Lazarus, 156 Tex. 154, 293 S.W.2d 493 (1956).

130. *See* note 66 *supra*.

131. McAllen Coca Cola Bottling Co. v. Alvarez, 581 S.W.2d 201, 204 (Tex. Civ. App.—Corpus Christi 1979, no writ).

132. Kastanos v. Ramos, 581 S.W.2d 740 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ).

133. Trousdale v. Texas & N.O.R.R., 154 Tex. 231, 276 S.W.2d 242 (1955).

134. 154 Tex. 231, 276 S.W.2d 242 (1955).

135. *Id.* at 235, 276 S.W.2d at 244.

136. *Id.* at 237, 276 S.W.2d at 245.

137. Crawford v. Detering Co., 150 Tex. 140, 237 S.W.2d 615 (1951); Elston v. Sherman Coca-Cola & Dr. Pepper Co., 596 S.W.2d 215 (Tex. Civ. App.—Texarkana 1980, no writ). The *Elston* court reversed the trial court's refusal to overturn the verdict when it was established that jurors stated that they knew of jobs the plaintiff could obtain. *Id.* at 217.

138. 148 Tex. 15, 219 S.W.2d 451 (1949).

139. 148 Tex. at 19, 219 S.W.2d at 453; *accord* City of Houston v. Quinones, 142 Tex. 282, 177 S.W.2d 259 (1944).

claimed to have personal knowledge of the scene of the accident that supported the defendant's theory of the case. The Eastland court reached such a conclusion in *Vincent v. Goodman*[140] when jurors recalled personal experiences similar to the facts in controversy since it held that personal experiences were statements of fact.[141]

Casual Versus Significant Conduct. Another important consideration of the reviewing court is whether the act of misconduct is casual or significant. If a juror makes a remark only once, there may be no probable injury. If the misconduct is continuously repeated by the jury, however, a finding of probable injury is mandated.[142] For example, the mere mention of attorneys' fees has routinely been found not to cause injury.[143] In *Kastanos v. Ramos*,[144] however, the jury's obsession with attorneys' fees, as evidenced by the jury's note to the judge asking what percentage of the recovery would go to the attorney, required a reversal.[145] Additionally, the number of jurors involved in the misconduct is significant, since the involvement of a larger number of jurors is more likely to result in injury.[146] Conversely, because rule 292[147] allows a split of ten against two in the verdict, if only one juror was affected by the misconduct, no probable injury is established.[148]

Rebuke by Jurors or Court. Texas courts have readily found that a rebuke of misconduct can cure any harm,[149] because the court considers the rebuke to be equivalent to the court's reprimand of the misconduct.[150] In *Dutton v. Southern Pacific Transportation*[151] one juror, confused by the court's definition of proximate cause, looked up the word "proximate" in a pocket dictionary and related it to the jury. The foreman promptly rebuked the juror and reread the court's definition. The trial judge found that the juror's dictionary search was material misconduct but did not cause probable injury.[152] While probable harm can be negated by the re-

140. 568 S.W.2d 907 (Tex. Civ. App.—Eastland 1978, no writ).

141. *Id.* at 909-10.

142. Kastanos v. Ramos, 581 S.W.2d 740, 741 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ).

143. Strange v. Treasure City, 23 Tex. Sup. Ct. J. 594, 597 (Sept. 12, 1980); McAllen Coca Cola Bottling Co. v. Alvarez, 581 S.W.2d 201, 204 (Tex. Civ. App.—Corpus Christi 1979, no writ).

144. 581 S.W.2d 740 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ).

145. *Id.* at 742.

146. Pope, *supra* note 25, at 364.

147. TEX. R. CIV. P. 292.

148. State Highway Dep't v. Pinner, 531 S.W.2d 851, 857 (Tex. Civ. App.—Beaumont 1975, no writ).

149. Strange v. Treasure City, 23 Tex. Sup. Ct. J. 594, 597-98 (Sept. 12, 1980); Putman v. Lazarus, 156 Tex. 154, 293 S.W.2d 493 (1956); Landreth v. Reed, 570 S.W.2d 486 (Tex. Civ. App.—Texarkana 1978, no writ).

150. Pope, *supra* note 25, at 366.

151. 561 S.W.2d 892 (Tex. Civ. App.—El Paso), *rev'd on other grounds*, 576 S.W.2d 782 (Tex. 1978).

152. 561 S.W.2d at 896. The court also ruled that the plaintiff failed to prove that the definition in the dictionary was different from the court's charge.

buke of a fellow juror, misconduct following the rebuke will not be cured.[153]

The Point in the Deliberation when the Misconduct Occurred. Texas courts have recognized that the time at which the misconduct occurs during the jury's deliberation can be crucial in establishing probable injury. The supreme court has refused to consider whether probable harm existed when no proof was presented as to when during the deliberation the misconduct occurred.[154] The time of the misconduct in the deliberation is important because jury misconduct that occurs after the jury has answered the issues usually does not cause probable injury.[155] On the other hand, misconduct that occurs during discussions of vital issues may well be critical.[156] For example, in the recent case of *Kastanos v. Ramos*[157] the jury's note to the judge asking what percentage of the award would be paid to the plaintiff's attorney, coupled with jurors' testimony about the consideration of attorneys' fees, was an indication that the jurors' misconduct occurred at a crucial time during the deliberations. The Houston [14th District] court of civil appeals found that since the misconduct occurred during the consideration of damages the misconduct constituted probable harm.[158]

Changes in Jury Votes and Damage Amount. While jurors may not testify as to the ways in which they were influenced, they may testify as to how they stood numerically on the issues before and after the misconduct,[159] since evidence of changed votes or damages may be indicative of probable injury.[160] In some cases, a change of vote is no indication of probable harm because of a "natural inclination on the part of [a] small minority to go along ultimately with the majority."[161] In the majority of cases, however, evidence of a change in vote or damage amount after an act of misconduct will warrant a finding of probable injury.

---

153. Sproles Motor Freight Lines, Inc. v. Long, 140 Tex. 494, 168 S.W.2d 642 (1943).

154. Mrs. Baird's Bread Co. v. Hearn, 157 Tex. 159, 300 S.W.2d 646, 649 (1957); *see* Pope, *supra* note 25, at 371, in which Justice Pope emphasizes the court's reliance on the time of the misconduct:

> [M]ost cases place some emphasis upon the point at which the misconduct occurred, for the time factor may render an error either reversible or harmless. If misconduct touching an issue occurs before the jury votes upon the issue, prejudice is more probable than if the misconduct occurs after the vote.

155. Fountain v. Ferguson, 441 S.W.2d 506, 508 (Tex.), *cert. denied*, 396 U.S. 959 (1969).

156. Lewis v. Yaggi, 584 S.W.2d 487, 494 (Tex. Civ. App.—Tyler 1979, writ ref'd n.r.e.); Norman v. First Bank & Trust, 557 S.W.2d 797, 804 (Tex. Civ. App.—Houston [1st Dist.] 1977, writ ref'd n.r.e.).

157. 581 S.W.2d 740 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ).

158. *Id.* at 742.

159. *See* Trousdale v. Texas & N.O.R.R., 154 Tex. 231, 276 S.W.2d 242 (1955); White Cabs v. Moore, 146 Tex. 101, 203 S.W.2d 200 (1947); Roming v. McDonald, 514 S.W.2d 129 (Tex. Civ. App.—El Paso 1974, writ ref'd n.r.e.).

160. White Cabs v. Moore, 146 Tex. 101, 203 S.W.2d 200 (1947); City of Houston v. Quinones, 142 Tex. 282, 177 S.W.2d 259 (1944).

161. Trousdale v. Texas & N.O.R.R., 154 Tex. 231, 237, 276 S.W.2d 242, 245 (1955).

The Entire Record. In considering whether the alleged act of misconduct caused probable injury, the courts consider the "record as a whole."[162] Accordingly, the effect of the misconduct is weighed against all of the evidence introduced at trial in order to determine if the misconduct caused probable harm.[163] As a result, if the evidence in the trial court overwhelmingly favored the appellee, the misconduct may be found to be harmless; if the result is a close one, however, the misconduct may be found to cause probable harm.[164] In considering probable harm, the supreme court has repeatedly held that the complainant must demonstrate by a preponderance of the evidence that it was the actual misconduct and not the state of the evidence that resulted in an adverse verdict.[165] If the record shows that the facts favored the appellee, the misconduct will be held harmless.[166] As a result, the complainant must bring forth a complete record of the trial court proceedings on appeal to be successful in reversing a judgment on the jury's verdict.[167]

Cumulative Error Rule. In determining probable injury, Texas courts have recognized that while several minor acts of misconduct standing alone would not cause probable injury, together they may result in injury.[168] In interpreting cumulative error, courts have held that the rule "does not abrogate the requirement to prove probable injury, caused by the several acts of misconduct."[169] The application of the rule, however, has not been consistent. For example, in one case considerations of insurance and attorneys' fees were deemed to result in probable harm.[170] In another case[171] jurors discussed attorneys' fees; the foreman stated from his personal knowledge, that a settlement offer had been rejected; and the jury consid-

162. Fountain v. Ferguson, 441 S.W.2d 506, 508 (Tex.), *cert. denied*, 396 U.S. 959 (1969); *accord*, Walker v. Texas Employers' Ins. Ass'n, 155 Tex. 617, 291 S.W.2d 298 (1956); Barrington v. Duncan, 140 Tex. 510, 169 S.W.2d 462 (1943).

163. Fountain v. Ferguson, 441 S.W.2d 506, 508 (Tex.), *cert. denied*, 396 U.S. 959 (1969); Western Textile Prods. Co. v. Sidran, 153 Tex. 21, 262 S.W.2d 942 (1953); Tudor v. Tudor, 311 S.W.2d 733 (Tex. Civ. App.—Amarillo), *writ ref'd per curiam*, 158 Tex. 559, 314 S.W.2d 793 (1958).

164. Fountain v. Ferguson, 441 S.W.2d 506 (Tex.), *cert. denied*, 396 U.S. 959 (1969); Walker v. Texas Employers' Ins. Ass'n, 155 Tex. 617, 291 S.W.2d 298 (1956).

165. *See, e.g.*, Fountain v. Ferguson, 441 S.W.2d 506 (Tex.), *cert. denied*, 396 U.S. 959 (1969); City of Galveston v. Hill, 151 Tex. 139, 246 S.W.2d 860 (1952).

166. Fountain v. Ferguson, 441 S.W.2d 506, 509 (Tex.), *cert. denied*, 396 U.S. 959 (1969).

167. Fountain v. Ferguson, 441 S.W.2d 506 (Tex.), *cert. denied*, 396 U.S. 959 (1969); City of Galveston v. Hill, 151 Tex. 139, 246 S.W.2d 860 (1952). In *Fountain v. Ferguson* the supreme court identified the term "record as a whole" as being broadly construed to include all parts of the trial court's proceedings that may "throw light" on the question of injury. As a result, only parts of the statement of fact that could have no bearing on injury should be omitted from the appellate record. The best practice is to submit the complete record of the trial court's proceedings to the appellate courts.

168. Strange v. Treasure City, 23 Tex. Sup. Ct. J. 594, 598 (Sept. 12, 1980); Scoggins v. Curtiss & Taylor, 148 Tex. 15, 219 S.W.2d 451 (1949); Liberty Mut. Ins. Co. v. Rodriguez, 537 S.W.2d 522 (Tex. Civ. App.—San Antonio 1976, no writ).

169. Lewis v. Yaggi, 584 S.W.2d 487, 496 (Tex. Civ. App.—Tyler 1979, writ ref'd n.r.e.).

170. Plains Creamery, Inc. v. Denny, 277 S.W.2d 755 (Tex. Civ. App.—Amarillo 1954, writ ref'd n.r.e.).

171. Lewis v. Yaggi, 584 S.W.2d 487 (Tex. Civ. App.—Tyler 1979, writ ref'd n.r.e.).

ered that the plaintiff would probably remarry and, therefore, should not receive a great deal of money. The court held, however, that this misconduct did not result in cumulative error.[172] Apparently, while the cumulative error rule is still alive, the complainant must clearly demonstrate that the combined acts of misconduct caused probable harm.

IV. CONCLUSION

Texas courts have surrounded the jury misconduct practice with a set of complicated rules and procedures. Without exception, these rules and procedures are roadblocks to the granting of new trials based on jury misconduct. The probable injury element of rule 327 was designed to prevent the reversal of jury verdicts for trivial misconduct. The court's adoption of other common law rules, however, has further complicated the complainant's task. For example, the "implied findings" rule actually prevents appellate courts from reviewing many acts of misconduct when findings of fact and conclusions of law are not filed. The uncodified affidavit requirement under rule 327, designed to prevent "fishing expeditions," serves as another obstacle for the complainant.

The Texas supreme court also has shown a reluctance to interfere with the jury's verdict unless the record demonstrates not only misconduct, but a clear and convincing case of probable injury. In the balancing test between finality of judgments and attempts to ensure fair jury trials, the supreme court has adopted the view that the finality of jury verdicts should outweigh other considerations. Post-judgment attacks on jury verdicts can still be successful, however, if the practitioner understands and adheres to the court's rules and procedures. To demonstrate misconduct that will require the overturning of a jury verdict, the complainant must prove an act by the jurors or opposing party that amounts to a denial of the right to a fair jury trial, and such act of misconduct must be shown by overt acts to have affected the jurors' answers to special issues.

172. *Id.* at 496.