

Snell & Wilmer

LLP.

OFFICE MEMORANDUM

TO: Ad Hoc Committee on Arizona Rules of Evidence
FROM: Subcommittee on Rule 606¹
DATE: June 14, 2010
RE: Rule 606—Competency of Juror as Witness

I. INTRODUCTION

In 1977, Arizona adopted the Rules of Evidence.² Arizona adopted Rule 606(b), Arizona Rules of Evidence (“ARE 606(b)”) almost verbatim from Rule 606(b), Federal Rules of Evidence (“FRE 606(b)”), except that Arizona restricted its application to civil actions, whereas FRE 606(b) applies to both civil and criminal actions. In fact, the only change in ARE 606(b) was the substitution of the words “in a civil action” for “or indictment,” making Arizona’s provision inapplicable to any criminal action.³

The first clause of FRE 606(b) differs as follows from ARE 606(b), with the FRE version underlined:

Upon an inquiry into the validity of a verdict ~~in a civil action~~ or indictment.

The reason Arizona restricted ARE 606(b)’s application to civil actions was because Arizona had already adopted an impeachment rule applying to criminal actions in 1973, when it created Arizona Rules of Criminal Procedure § 24.1(d) (“ACP 24.1(d”). ACP 24.1(d) is substantively different from ARE 606(b) and FRE 606(b).

FRE 606(b) has been twice amended, once in 1987 and again in 2006. In 1987, FRE 606(b) made a technical, non-substantive change, in which it edited the last sentence of 606(b). As of yet, ARE 606(b) has not been modified. FRE 606’s advisory committee notes affirmed that the change was non-substantive, so it is recommended that the Ad Hoc Committee change ARE 606(b).⁴

The last sentence of FRE 606(b) differs as follows from ARE 606(b), with FRE 606(b) underlined:

¹ Memorandum prepared by Ahron D. Cohen, Summer Associate, Snell & Wilmer LLP.
² Jeffrey D. Buchanan, *Impeachment of Jury Verdicts in Arizona*, 21 Ariz. L. Rev. 821, 827 (1979).
³ *Id.*
⁴ Fed. R. Evid. 606 advisory committee’s notes (1987 Amendments).

~~Nor may a juror's affidavit or evidence of any statement by the juror, concerning a matter about which the juror would be precluded from testifying, be received for these purposes. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.~~

In 2006, FRE 606(b) was again amended, this time to “provide that juror testimony may be used to prove that the verdict reported was the result of a mistake in entering the verdict on the verdict form.”⁵ At present, Arizona has yet to amend ARE 606(b) to comport with the federal modifications to allow for juror testimony to prove that the verdict was the result of a mistake in entering the verdict on the verdict form.

FRE 606(b), as amended in 2006, reads:

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. ~~Except that~~ But a juror may testify ~~on the question about~~ about (1) whether extraneous prejudicial information was improperly brought to the jury's attention or, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.

“In 1973, the Arizona Supreme Court adopted Rule of Criminal Procedure 24.1(d) which allowed a court to accept as evidence an affidavit of a juror whenever a verdict was challenged because of jury misconduct.”⁶ ACP 24.1(d) was created to reverse “the traditionally strict Arizona rule against the admission of juror testimony or affidavits to impeach a verdict,” and it “adheres closely to the ABA Standards Relating to Trial by Jury (Approved Draft, 1968).”⁷

II. ACP 24.1(d) DIFFERS FROM ARE 606(b) AND FRE 606(b)

“In 1973, the Arizona Supreme Court adopted Rule of Criminal Procedure 24.1(d) which allowed a court to accept as evidence an affidavit of a juror whenever a verdict was challenged because of jury misconduct.”⁸ ACP 24.1(d) was created to reverse “the traditionally strict Arizona rule against the admission of juror testimony or affidavits to impeach a verdict,” and it “adheres closely to the ABA Standards Relating to Trial by Jury (Approved Draft, 1968).”⁹

⁵ Fed. R. Evid. 606 advisory committee's notes (2006 Amendments).

⁶ Buchanan, *supra* note 2, at 829.

⁷ Ariz. R. Crim. P. 24.1(d), comment.

⁸ Buchanan, *supra* note 2, at 829.

⁹ Ariz. R. Crim. P. 24.1(d), comment (1973).

If the language in ACP 24.1(d) was the same as the language in ARE 606(b), with the only difference being that ACP 24.1(d) applies to criminal actions and ARE 606(b) applies to civil actions, then for the sake of uniformity between the Arizona Rules of Evidence and the Federal Rules of Evidence, it would make sense to conform the two sections, and make ARE 606(b) apply to both civil and criminal actions. The problem, however, is that the language in ACP 24.1(d) is not the same language used in ARE 606(b).

ACP 24.1(d) reads as follows:

Whenever the validity of a verdict is challenged under Rule 24.1(c)(3), the court may receive the testimony or affidavit of any witness, including members of the jury, which relates to the conduct of a juror, official of the court, or third person. No testimony or affidavit shall be received which inquires into the subjective motives or mental processes which led a juror to assent or dissent from the verdict.

Both ARE 606(b) and ACP 24.1(d) prohibit testimony inquiring into jurors' mental processes. ARE 606(b), however, explicitly prohibits juror testimony "as to any matter or statement occurring during the course of the jury's deliberations." FRE 606(b) has this same provision. The notes accompanying the enactment of FRE 606(b) state that "[i]n the interest of protecting the jury system and citizens who make it work, rule 606 should not permit any inquiry into the internal deliberations of the jurors."¹⁰ ACP 24.1(d) does not have comparable language prohibiting inquiries into the jury's deliberations. While ARE and FRE 606(b) place a prohibition on inquiries into jury deliberations, ACP 24.1(c)(3), which is read in connection with ACP 24.1, provides for three specific circumstances when a court may receive testimony which relates to inquiries into deliberations:

24.1(c): The court may grant a new trial or aggravation or penalty hearing for any of the following reasons:

....

(3): A juror or jurors have been guilty of misconduct by:

- (i) Receiving evidence not properly admitted during the trial or the aggravation or penalty hearing;
- (ii) Deciding the verdict by lot;
- (iii) Perjuring himself or herself or willfully failing to respond fully to a direct question posed during the voir dire examination;
- (iv) Receiving a bribe or pledging his or her vote in any other way;
- (v) Becoming intoxicated during the course of the deliberations; or

¹⁰ Fed. R. Evid. 606 advisory committee's notes (1974 Enactment).

(vi) Conversing before the verdict with any interested party about the outcome of the case.

Under ACP 24.1(c)(3), subsections (ii), (iii), and (v) specifically allow for juror testimony or affidavits that are prohibited under ARE and FRE 606(b). First, under ARE 606(b), a juror may provide testimony or an affidavit that she herself failed to disclose bias and prejudice upon inquiry on voir dire, but a juror may not provide testimony or an affidavit that another juror failed to disclose bias and prejudice during voir dire, if that knowledge was gained from jury deliberations.¹¹ ACP 24.1(c)(3)(iii) and (d), however, allow “anyone to testify as to a juror’s failure to [disclose bias or prejudice during] voir dire, including other jurors.”¹²

Secondly, under ARE 606(b), juror testimony showing that the verdict was the product of a “quotient” or “lot” verdict is prohibited to impeach the verdict, because it would necessarily inquire into the jury’s internal deliberations.¹³ Under ACP 24.1(c)(ii) and (d), however, juror testimony showing that the verdict was decided by lot is permissible.

Third, under ACP 24.1(c)(3)(v), anyone can testify that a juror engaged in misconduct by becoming intoxicated during the course of jury deliberations. No Arizona case has interpreted whether such testimony is permitted under ARE 606(b). Under FRE 606(b), however, the United States Supreme Court, in *Tanner v. U.S.*,¹⁴ stated that testimony of a juror’s alcohol or drug use during jury deliberations is barred by 606(b) because it offers testimony as to an effect on a juror’s mind or emotions, which is explicitly prohibited in the rule.

Another difference between ACP 24.1(d) and both ARE and FRE 606(b) is that ARE 606(b) provides for two exceptions (FRE 606(b) provides three exceptions) to the general rule prohibiting juror testimony or affidavits to impeach a verdict: (1) whether extraneous prejudicial information was improperly brought to the jury’s attention, and (2) whether any outside influence was improperly brought to bear upon any juror. These broad exceptions leave the court the discretion to interpret what constitutes “extraneous prejudicial information,” or “outside influence.”¹⁵ ACP 24.1, on the other hand, lists in ACP 24.1(c)(3) all of the exceptions to the general rule of prohibiting juror testimony to impeach a verdict. Although at first glance it appears that ARE 606(b) is more expansive in its allowance of exceptions because its exceptions are not specifically enumerated as they are in ACP 24.1(c)(3), 24.1(c)(3)(i) and (vi) are just as expansive and broad as the exceptions laid out in 606(b). Therefore, ACP 24.1(d) is more expansive in its allowance of juror testimony or affidavits to impeach a verdict because it contains three provisions that allow for juror testimony, as seen in subsections (ii), (iii), and (v), which are prohibited under ARE 606(b).

¹¹ *Richtmyre v. State*, 175 Ariz. 489, 491, 858 P.2d 322, 324 (Ct. App. 1993); *Brooks v. Zahn*, 170 Ariz. 545, 550, 826 P.2d 1171, 1176 (Ct. App. 1991).

¹² *Buchanan*, *supra* note 2, at 836.

¹³ *Moorer v. Clayton Mfg. Corp.*, 128 Ariz. 565, 570, 627 P.2d 716, 721 (Ct. App. 1981).

¹⁴ 483 U.S. 107, 121—122 (1987).

¹⁵ *Buchanan*, *supra* note 2, at 836.

III. “OR INDICTMENT” LANGUAGE IS NOT FOUND IN ARE 606(b) OR ACP 24.1(d)

As previously discussed, Arizona adopted ACP 24.1(d) in 1973, prior to Congress establishing the Federal Rules of Evidence in 1975. Therefore, Arizona did not have FRE 606(b) to turn to when promulgating ACP 24.1(d), so Arizona made no conscious decision to exclude the indictment language from 24.1(d). From its beginning, FRE 606(b) included the “or indictment” language. Thus, in adopting ARE 606(b), Arizona did make a conscious decision to keep the language “or indictment” out of ARE 606(b) and replace it with “civil action.” It is likely that Arizona chose to keep out the “or indictment” language because ACP 24.1(d) already dealt with verdict impeachment by jurors in criminal trials. Therefore, to avoid redundancy, Arizona elected to make ARE 606(b) apply only to civil actions.

Even if Arizona elected to bifurcate FRE 606(b) by making ARE 606(b) apply only to civil actions and ACP 24.1(d) apply only to criminal actions, the question remains why Arizona did not add the “or indictment” language to ACP 24.1(d) at the time it created ARE 606(b). One potential answer is that ACP 24.1 is entitled “Motion for a New Trial,” and the remedies for an occurrence following within subsection (c) are either a new trial, or, in a capital case, an aggravation or penalty hearing.¹⁶ Thus, if juror testimony impeaches a grand jury indictment, the remedy is not technically a new trial, but rather, a new grand jury proceeding. In other words, it is possible that Arizona did not know where to put the “or indictment” language, given that it did not fit within ACP 24.1(d), and ARE 606(b) was intended to only apply to civil actions.

In incorporating the “or indictment” language into FRE 606(b), the legislative history of the rule provides no information as to the policy or intention for doing so.¹⁷ The only discussion of “or indictment” in the Advisory Committee comments is that the Advisory Committee did not feel that there was a conflict between 606(b) and Fed. R. Crim. Pro. 6(e)(2) in its relation to grand jury secrecy.¹⁸ There is no federal case law indicating that a federal court has ever applied 606(b) in the context of a criminal indictment. Furthermore, no Arizona appellate court has ever applied ARE 606(b) or ACP 24.1(d) to impeach an indictment.

IV. THE 2006 AMENDMENT TO RULE 606, FEDERAL RULES OF EVIDENCE

A. Federal policies supporting the amendment.

The purpose of the 2006 amendment to FRE 606(b) was to “respond[] to a divergence between the text of the Rule and the case law that established an exception for proof of clerical errors.”¹⁹ Although the amendment creates a third exception to the general prohibition on juror testimony to impeach a verdict, “the amendment specifically rejects the broader exception, adopted by some courts, permitting the use of juror testimony to prove that

¹⁶ Ariz. R. Crim. P. 24.1(a).

¹⁷ See Joseph M. McLaughlin (ed.), *Rule 606 Historical Appendix*, WEINSTEIN’S FED. EVID. 2D (Vol. 3) (2010).

¹⁸ Fed. R. Evid. 606 advisory committee’s notes (1972 Proposed Rules).

¹⁹ Fed. R. Evid. 606 advisory committee’s notes (2006 Amendment).

the jurors were operating under a misunderstanding about the consequences of the result they agreed upon.”²⁰ This broader exception to the general prohibition on juror testimony “is rejected because an inquiry into whether the jury misunderstood or misapplied an instruction goes to the jurors’ mental processes underlying the verdict, rather than the verdict’s accuracy in capturing what the jurors had agreed upon.”²¹ The exception created by the 2006 amendment is a narrow one, and “is limited to cases such as ‘where the jury foreperson wrote down, in response to an interrogatory, a number different from that agreed upon by the jury, or mistakenly stated that the defendant was guilty when the jury had actually agreed that the defendant was not guilty.’”²²

B. Federal case law interpreting the new language.

At this point, because the exception is very narrow, and mistakes in entering the verdict onto the verdict form do not occur in great frequency, no federal court has applied the language added in the 2006 amendment. Because no court has interpreted FRE 606(b)’s third exception language, it is unclear what exactly the remedy would be if the court accepts the juror’s testimony that a mistake occurred in entering the verdict onto the verdict form. In two federal cases interpreting whether a mistake in entering the verdict was prohibited under pre-2006 amendment FRE 606(b), both courts, after receiving affidavits from the jurors, amended the ultimate award to reflect the clerical error.²³

C. Arizona case law interpreting a mistake exception under ARE 606(b).

No Arizona appellate court has looked at whether juror testimony or an affidavit showing a mistake in entering the verdict onto the verdict form is prohibited under ARE 606(b) or ACP 24.1(d). Only one Arizona case has ever dealt with a mistake in entering the verdict onto the verdict form. The case was decided in 1956, so the court did not apply ARE 606(b) in its analysis. In the case, *Southern Pac. R. Co. v. Mitchell*,²⁴ the jury left the amount blank on the verdict as to the second count, with the omission not discovered until the jury was discharged. The plaintiff obtained the affidavits of all twelve jurors, indicating their intention to award a particular amount in the second count, and the trial judge granted the motion to amend the verdict.²⁵ The Arizona Supreme Court affirmed the trial court and held that “while jurors will not be heard to impeach a verdict duly rendered by them. . . affidavits of jurors are admissible to show that the verdict, as received and entered of record, by reason of a mistake does not embody the true finding of the jury . . . or to remove an ambiguity.”²⁶ The holding in *Southern Pac. R. Co.* suggests that Arizona’s judicial policy would comport with the 2006 amendment to FRE 606(b).

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Id.

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Id.

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Id. (citing *Robles v. Exxon Corp.*, 862 F.2d 1201, 1208 (5th Cir. 1989)).

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Eastridge Dev. Co. v. Halpert Assoc., 853 F.2d 772, 783 (10th Cir. 1988); *Attridge v. Cencorp Div. of Dover Techs. Int’l, Inc.*, 836 F.2d 113, 116 (2d Cir. 1987).

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80 Ariz. 50, 65, 292 P.2d 827, 837 (1956).

²⁵

Id.

²⁶

Id. at 66.

V. RECOMMENDATION

Because ACP 24.1(d) provides for a more expansive opportunity for jurors to offer testimony to impeach a verdict than does ARE or FRE 606(b), and because this difference appears to be intentional, the Subcommittee recommends that ARE 606(b) does not adopt FRE 606(b)'s application to criminal trials.

Because ACP 24.1(d) relates only to criminal trials, and because ARE 606(b) relates only to civil actions, the Subcommittee recommends that neither ARE 606(b) nor ACP 24.1(d) adopt FRE 606(b)'s language of "or indictment." However, the Subcommittee does recommend that Arizona look at whether it should create an analogous rule in Rule 13 of the Arizona Rules of Criminal Procedure—Indictment and Information, granting the ability for grand jurors to offer testimony or affidavits to impeach the grand jury indictment.

In light of the fact that the policy rationale for creating a third exception in FRE 606(b)'s 2006 amendment (i.e., allowing for juror testimony to show a mistake in entering the verdict onto the verdict form) is compelling, the Subcommittee recommends that ARE 606(b) adopt the 2006 amendment. The result of ARE 606(b) adopting the 2006 FRE amendment is that the mistake exception will only apply to civil actions in Arizona. Therefore, the Subcommittee also recommends that ACP 24.1(d) adopt an analogous mistake exception. If ACP 24.1(d) does adopt a mistake exception, the language needs to be very explicit that the remedy will not be a new trial, but rather, an amendment of the jury's verdict in order to represent the true intent of the jury.

Finally, as discussed on page 1, *supra*, the Subcommittee recommends that ARE 606(b) adopt FRE 606(b)'s 1987 non-substantive stylistic change to better comport with FRE 606(b).