

## RESOLUTION 06-01-05

### DIGEST

#### Professional Conduct: Retention of Former Jurors as Consultants

Amends Rule 5-320 of the Rules of Professional Conduct to prohibit attorneys from hiring former jurors as consultants or paying them for their silence.

### RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

#### History:

No similar resolutions found.

#### Reasons:

This resolution amends Rule 5-320 of the Rules of Professional Conduct to prohibit attorneys from hiring former jurors as consultants or paying them for their silence. This resolution should be disapproved because it is too broad and would prohibit legitimate and accepted forms of post-trial jury contacts by attorneys.

The proponent points out that there have been several recent cases in which a hung jury occurred and an attorney for one of the litigants then paid former jurors to act as jury consultants during the retrial of the matter. Admittedly, in such extreme cases there might be a danger to the integrity of the jury system. However, there is no evidence that such practices are as widespread as the proponent fears, and in any event, serious transgressions can be handled by the court on a case-by-case basis. Most significantly, the resolution would prohibit jurors from receiving *any* compensation – even parking fees or a cup of coffee – from an attorney for being interviewed after a verdict. After suffering the inconvenience of sitting a long trial with next to no compensation, jurors should not be discouraged further from speaking with the attorneys on the case. Barring attorneys from giving former jurors any benefit at all for their time and knowledge is an unnecessary and onerous restriction.

A recent bill attempted to address the potential problem, but died in committee because it would have imposed criminal penalties on jurors. (Assembly Bill No. 473 [2003-2004 Reg. Sess.].) Although it makes more sense, as the proponent suggests, to sanction the attorney rather than the juror, this resolution is still too restrictive.

### SECTION/COMMITTEE REPORTS

#### STATE BAR PROFESSIONAL COMPETENCE UNIT

NO RECOMMENDATION

Resolution 6-1-2005 seeks an amendment to the Rules of Professional Conduct, specifically rule 5-320 [re contact with jurors]. At this time, the Competence Unit does not approve or disapprove the proposed rule amendment. For the benefit of the Conference, the Competence Unit addresses current State Bar procedure for considering amendments to the Rules of Professional Conduct.

The State Bar is considering amendments to the Rules of Professional Conduct through the work of its Special Commission for the Revision of the Rules of Professional Conduct (“Rules Revision Commission”). The Rules Revision Commission is charged with conducting a cover-to-cover review of the California rules and proposing comprehensive amendments for consideration by the State Bar Board of Governors. The comprehensive review will include rule 5-320. In the interest of national uniformity, the Rules Revision Commission’s charter also includes the task of studying the amendments to the American Bar Association’s Model Rules of Professional Conduct developed by the American Bar Association’s Ethics 2000 Commission, including Model Rule 3.5(c) [re contact with a juror after discharge of the jury].

Accordingly, the Competence Unit believes that the general subject matter of the proponent's desired initiative is in process appropriately with the State Bar through its Rules Revision Commission. Should the Conference approve Resolution 6-1-2005, the Conference's good work, including the written reports received on the resolution will be very helpful to the State Bar in referring the Conference's proposed rule amendment to the Rules Revision Commission. In addition, as the Rules Revision Commission largely meets in open session, the proponents and any other interested members of the Conference would be welcomed to attend the Rules Revision Commission's meetings.

*This position is solely that of the State Bar's Professional Competence Unit ("Competence Unit") and has not been adopted or endorsed by the State Bar's Board of Governors.*

## TEXT OF RESOLUTION

RESOLVED that the Conference of Delegates of California Bar Associations recommends that Rule 5-320 of the Rules of Professional Conduct be amended as follows:

- 1 Rule 5-320  
2 (A) A member connected with a case shall not communicate directly or indirectly with anyone  
3 the member knows to be a member of the venire from which the jury will be selected for trial of that  
4 case.  
5 (B) During trial a member connected with the case shall not communicate directly or indirectly  
6 with any juror.  
7 (C) During trial a member who is not connected with the case shall not communicate directly  
8 or indirectly concerning the case with anyone the member knows is a juror in the case.  
9 (D) (1) After discharge of the jury from further consideration of a case a member shall not ask  
10 questions of or make comments to a member of that jury that are intended to harass or embarrass  
11 the juror or to influence the juror's actions in future jury service.  
12 (2) A member connected with a case shall not confer, or offer or agree to confer, any  
13 payment or benefit upon a former juror in that case, or upon a third person who is acting on behalf of  
14 a former juror in that case, in consideration for the former juror or third person supplying consultation  
15 or any other services to a party to that case concerning any aspect of the subject matter at issue in  
16 the case in which the former juror served in connection with a retrial of the case.  
17 (3) A member connected with a case shall not enter into or participate in an agreement  
18 between a former juror and a party to that case that would preclude the former juror from discussing  
19 the case in which the juror served with any other party to that case or any agent of another party to  
20 the case.  
21 (E) A member shall not directly or indirectly conduct an out of court investigation of a person  
22 who is either a member of a venire or a juror in a manner likely to influence the state of mind of such  
23 person in connection with present or future jury service.  
24 (F) All restrictions imposed by this rule also apply to communications with, or investigations  
25 of, members of the family of a person who is either a member of a venire or a juror.  
26 (G) A member shall reveal promptly to the court improper conduct by a person who is either a  
27 member of a venire or a juror, or by another toward a person who is either a member of a venire or  
28 a juror or a member of his or her family, of which the member has knowledge.  
29 (H) This rule does not prohibit a member from communicating with persons who are  
30 members of a venire or jurors as a part of the official proceedings.  
31 (I) For purposes of this rule, "juror" means any empaneled, discharged, or excused juror.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Bar Association of San Francisco

STATEMENT OF REASONS

Existing Law: Permits attorneys to pay jurors as consultants on the retrial of a case on which the juror formerly served.

This Resolution: Makes paying a former juror as a consultant on retrial of the same case a basis for professional discipline.

The Problem: Rule 5-320 of the Rules of Professional Conduct regulates attorneys' contacts with jurors in cases in which an attorney participates. However, the rule contains no prohibition against paying former jurors as consultants in the retrial of a case in which the former juror served, nor is there any rule on contracting with a former juror to prevent that juror from speaking with another party to the case.

Recently, some attorneys have entered into paid consulting arrangements with jurors in cases which resulted in mistrials in connection with the retrial of the case. The consulting arrangements also stipulate that the former jurors are consultants to the attorney and that the other party or parties to the case are prohibited from contacting the former jurors.

Although jurors are woefully underpaid for their important service, California attorneys should not be implicitly or explicitly offering jurors a financial incentive to "hang" the first jury so they can be consultants on a retrial. A rule prohibiting attorneys in all cases, not just criminal cases, from agreeing to pay jurors or contracting with former jurors to prevent contact with other parties would remove this incentive.

The legislature has recently attempted to address this situation. Assembly Bill 473, which was introduced in the last legislative session, would have made it a criminal offense for jurors and attorneys alike to enter into paid consulting arrangements in connection with a retrial of a criminal case. The bill died in committee. This resolution would solve the problem posed by such arrangements without creating the onerous possibility of a criminal sanction.

In accordance with CDCBA rules, BASF timely offers this resolution for consideration. Consistent with traditional CDCBA practice, the Proponent reserves the right to timely withdraw or amend the resolution.

#### IMPACT STATEMENT

The proposed resolution does not affect any other statute, rule or regulation.

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**RESPONSIBLE FLOOR DELEGATE:** Patrick H. Fabian

#### COUNTERARGUMENT

##### ORANGE COUNTY BAR ASSOCIATION

This resolution seeks to address a serious concern with respect to using former jurors as paid consultants. However, as written, it goes farther than need be. Jury participation is a basic civic duty and privilege, much like voting. Jurors should be able to express their opinions about their jury service, and parties should be free to poll jurors after a case, much like voters are polled after casting their ballots in an election. The intent of discouraging jurors from intentionally "hanging" a case on the hopes of becoming highly paid consultants upon retrial is a laudable, and section (D)(3) is narrowly crafted to address that concern. However, section (D) (2) of the resolution is ambiguous enough that it could be read to bar *any* jury polling in which the juror is compensated for their time. While it is a reality that jurors are barely compensated for their civic service, it is not realistic to expect them to express their opinions voluntarily in any depth after a trial if the jurors are not fairly paid. It serves the parties and the interests of justice to

learn from the jurors' experience, and this resolution could unnecessarily chill that learning process.