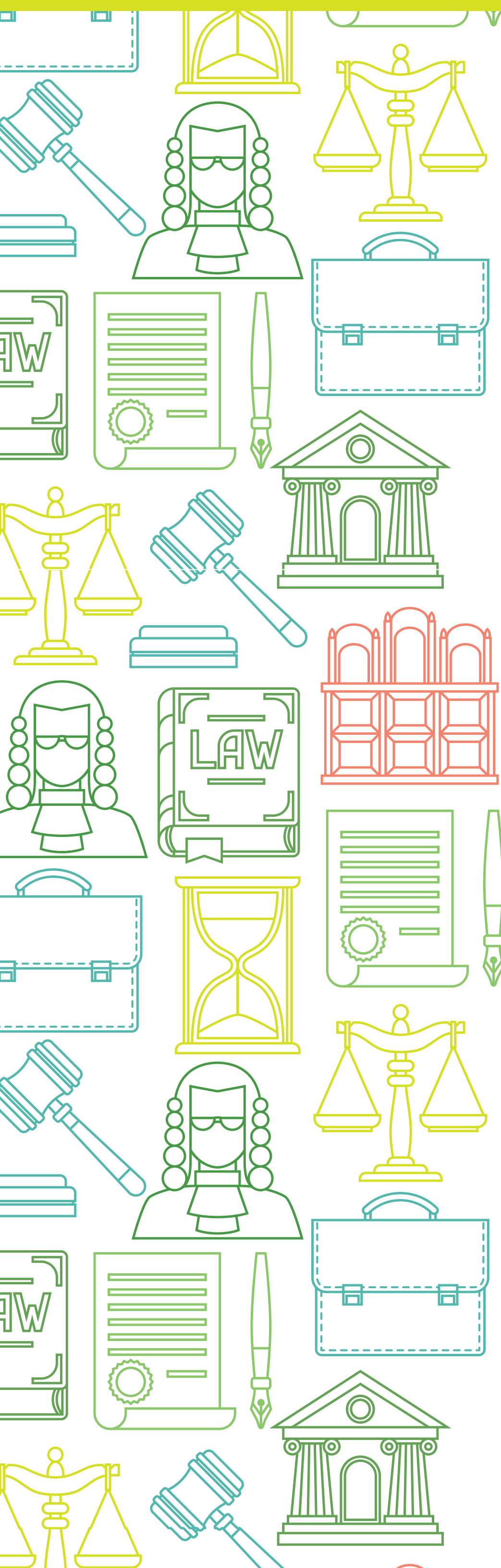

REVIEW OF RECENT CASES:
Dietz v. Bouldin

CAN A DISTRICT COURT RECALL A JURY TO CORRECT A VERDICT?

Audra Ibarra

Parties to a jury trial have the right to untainted jury deliberations. But jury trials are expensive and time consuming for the parties, judiciary, and jurors. So in the past, district courts have been allowed to ask juries to correct inconsistent verdicts *before* the courts dismiss them. "[W]hen the jury is still available, resubmitting an inconsistent verdict best comports with the fair and efficient administration of justice. Allowing the jury to correct its own mistakes conserves judicial resources and the time and convenience of citizen jurors, as well as those of the parties. It also allows for a resolution of the case according to the intent of the original fact finder, while that body is still present and able to resolve the matter. An entirely different situation is present where the jury has been dismissed." *Duk v. MGM Grand Hotel, Inc.*, 320 F.3d 1052, 1058 (9th Cir. 2003), as amended on denial of reh'g (Apr. 17, 2003).

Can a district court ask a jury to correct a verdict even *after* the court has dismissed the jury and the jurors have left the judge's presence? The current answer is: only in limited circumstances. But that answer is under review. The Court of Appeals for the Ninth Circuit recently addressed this question in a case of first impression in this circuit, *Dietz v. Bouldin*, 794 F.3d 1093, 1095, 1100 (9th Cir. 2015), cert. granted, 84 U.S.L.W 3214 (U.S. Jan. 19, 2016) (No. 15-458). And the Supreme Court just granted certiorari.

After Hillary Bouldin's vehicle collided with Rocky Dietz's, Dietz sued Bouldin in Montana state court. But the case was removed to federal court and tried by a jury. Bouldin admitted he was at fault and Dietz had been injured. In fact, the parties stipulated Dietz had already incurred $10,136 in expenses because of the collision. The only disputed issue was the amount of future damages Bouldin owed Dietz. Dietz asked the jury to award him a total of $20,000 in damages, including the stipulated amount. The jury returned a verdict for *Dietz*, but did not award him any damages. When neither Dietz nor Bouldin wanted to poll the jury, the judge thanked the jurors, told them they were "free to go," discharged them, and recessed. *Id.* at 1095–96. The jurors left the courtroom, but were stopped before they left the building. Realizing the verdict was a legal impossibility given the stipulated damages, the judge quickly called back the jurors "moments after having dismissed them." *Id.* at 1096. After questioning the jurors as a group and confirming that they had not "experienced undue outside influence in the period following the dismissal," the judge ordered the jury to reconvene and issue a new verdict consistent with the stipulation. *Id.* Dietz objected to the reempanelment and moved for a mistrial. The jury again returned a verdict for Dietz, but this time awarded him $15,000 in damages. The Ninth Circuit affirmed, holding the district court did not abuse its discretion in recalling the jurors. The case is pending merit review in the Supreme Court.

NINTH CIRCUIT RULE

The Ninth Circuit held that "in limited circumstances, a court may recall a jury shortly after it has been dismissed to correct an error in the verdict, but only after making an appropriate inquiry to determine that the jurors were not exposed to any outside influences that would compromise their ability to fairly reconsider the verdict." *Id.* at 1100. Writing for the majority and citing cases from the Second, Third, Fourth, and Seventh Circuits, Judge Raymond Fisher explained, "several courts have recognized that in certain limited circumstances, a district court may recall a jury immediately after dismissal to correct an error in its verdict. These courts look at the totality of circumstances to determine whether the jurors were exposed to prejudicial outside influence before the recall."[1] *Id.* at 1097.[2] The Ninth Circuit noted in those cases that although the juries had been discharged, they had not yet "dispersed." *Id.* at 1097–98. While the circuit court never clearly defined the term dispersed, in this case, it found "[g]iven the court was able to recall the jurors promptly after dismissal, it appears they had not yet dispersed." *Id.* at 1100.

The circuit court also explained that "an individual examination would be preferable to the collective questioning employed here—whether by asking jurors to respond individually or by questioning each juror separately. During such an inquiry the court or counsel could ask specific questions to discern whether any juror was susceptible to prejudicial influence, such as what the jurors did during the dismissal; whether they spoke to anyone, and, if so, the content of their conversations; whether they overheard discussions about the case; whether they used cell phones or other devices to communicate; and whether they were influenced by any discussions they had or overheard." *Id.* at 1101.

SPLIT

The Ninth Circuit acknowledged that the Eighth Circuit and some state courts have held otherwise and have adopted a bright-line rule prohibiting recall once jurors have left the courtroom. *Id.* at 1098.[3] The Ninth Circuit recognized that rule has a few advantages. Most obvious, the bright-line rule is easier to apply and offers more guidance than an amorphous case-by-case rule. Further, "by foreclosing the possibility of recall after the jurors have left the courtroom, it is theoretically more protective of litigants' right to a jury untainted by improper external influence." *Id.* at 1099. Nevertheless, the Ninth Circuit found its rule "strikes a sensible balance between considerations of fair-

ness and economy and allows for a cost-effective alternative to an expensive new trial." *Id.*

TIPS FOR TRIAL ATTORNEYS

As it stands now, in the Ninth Circuit, a district court may recall a jury to correct a verdict even after the jurors have left the judge's presence. Parties may "explicitly" stipulate to this. *Id.* at 1100 n. 6. But otherwise, the circuit court placed two limitations on a judge's ability to recall a jury: (1) the judge must reempanel the jury "shortly after dismissal," and (2) the judge must determine that "the jurors were not exposed to any outside influences that would compromise their ability to fairly reconsider the verdict." *Id.* at 1095, 1100. The Ninth Circuit held that the district court must make "an appropriate inquiry" to make sure these requirements have been met. *Id.* at 1100.

Unless the Supreme Court says otherwise, for the best record, trial attorneys should ask to voir dire individual jurors themselves or, at a minimum, request that the judge ask their proposed questions. If an attorney represents a party that objects to recall, the attorney should ask questions to prove and argue among other things: there was a long delay between dismissal and proposed reempanelment; a juror left the courthouse; a juror discussed the case with someone else (even another juror); a juror received information about the case itself or information relevant to an issue in the case (even a juror's observation of a party's reaction to the initial verdict may be enough to improperly sway the juror's vote). In short, the goal is to show that something happened between the initial verdict and proposed reempanelment that would "undermine the confidence of the court—or of the public—in the verdict." *Id.* Of course, if an attorney represents a party that supports a contentious recall, the attorney should ask questions to argue that nothing happened to taint additional deliberations.

Audra Ibarra is a civil and white-collar appellate attorney. She is a former supervising assistant U.S. attorney, deputy district attorney, and litigator at a large national law firm. She currently serves on the standing Committee on Appellate Courts for the State Bar of California, and as the chair of the Amicus Committee of California Women Lawyers (CWL). She is on the Executive Committee of the Board of Governors of CWL, and the Board of Directors of the California Minority Counsel Program. She is a former commissioner on the Judicial Nominees Evaluation Commission for the State Bar. For more information, please go to www.aiappeals.com and www.calapplaw.com.

Notes

1. Judge Carlos Bea concurred in the judgment, but wrote a separate opinion. He does not agree "that the district court *judge* should be required to undertake 'an appropriate inquiry' into whether prejudicial influences have tainted the jury." *Id.* at 1102 (Bea, J., concurring) (italics in original). He explained that the Ninth Circuit has never held that a judge has a *sua sponte* duty to interrogate jurors to develop the record. If the parties do not stipulate to reempanelment, they can investigate and ask questions of the jurors themselves.
2. Citing *United States v. Rojas*, 617 F.3d 669, 677 (2nd Cir. 2010); *United States v. Figueroa*, 638 F.3d 69, 73 (3rd Cir. 2012); *Summers v. United States*, 11 F.2d 583, 586 (4th Cir. 1926); *United States v. Marinari*, 32 F.3d 1209, 1214 (7th Cir. 1994).
3. Citing *Wagner v. Jones*, 758 F.3d 1030, 1035 (8th Cir. 2014).