

With Jurors, Make Sure Goodbye Means ‘Forever’

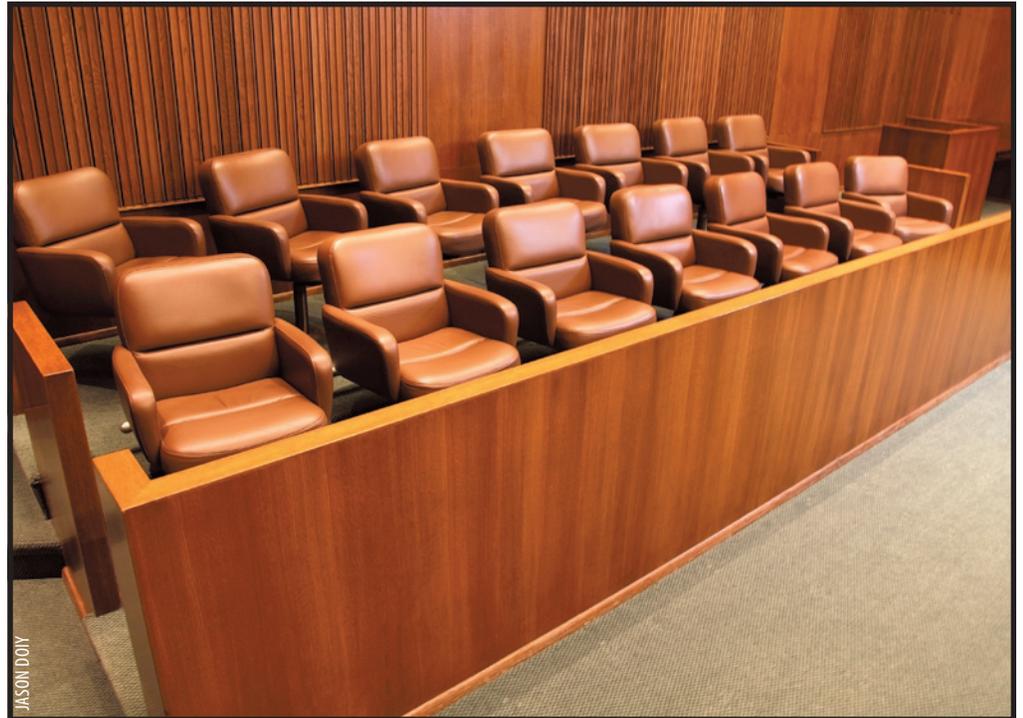
A pending decision from the Supreme Court shows how problems arise when a jury is recalled.

BY AARON S. BAYER

In general, once a jury has been discharged, the trial judge cannot recall the jury to reconsider the verdict it rendered. The reasoning behind this principle is that jurors may have discussed the case with others or been exposed to outside influences and may no longer be able to act fairly and without prejudice. In *Dietz v. Bouldin*, recently argued before the U.S. Supreme Court, the justices could resolve a circuit split and decide whether to establish a bright-line rule prohibiting recall or grant limited discretion to district judges to recall a discharged jury.

What seems like a straightforward issue raises interesting and difficult questions about the role of the jury, the psychology of being a juror and the advantages and disadvantages of a bright-line rule. It also serves as a reminder to trial counsel to pause, before the judge dismisses the jury, to think through any lingering problems that the jury could correct.

Dietz is a simple car accident case from Montana. The defendant admitted fault, and the parties stipulated that the plaintiff had \$10,136 in past medical



expenses caused by the accident. The only disputed issue at trial was what future damages should be awarded. The jury returned a verdict for the plaintiff, but awarded \$0 in damages. The judge discharged the jury, but a few minutes later realized that—given the stipulated damages—the verdict was invalid.

The judge had court personnel retrieve the jurors, who had already left the courtroom. Over the objection of the plaintiff's counsel, who argued that

the discharged jury could not be recalled and instead wanted a new trial, the judge questioned the jurors to satisfy himself that they had not discussed the case with others. He then directed them to deliberate again and instructed them that the verdict had to be \$10,136 in stipulated medical expenses plus some compensation for the injury. The jury deliberated and returned a verdict of \$15,000.

The U.S. Court of Appeals for the Ninth Circuit affirmed. It rejected a bright-line rule

prohibiting recall of a discharged jury, a rule the Eighth Circuit has embraced. Instead, it held that a district court has authority to recall a jury shortly after it is discharged to correct an error in the verdict, but only after examining the totality of circumstances and determining that the jurors were not exposed to any outside influence compromising their ability to reconsider the verdict fairly.

The oral argument before the Supreme Court showed the difficulty of fashioning clear guidance for the lower courts. A threshold question is when has a jury actually been discharged: when the judge dismisses the jury or after some grace period immediately following that formal pronouncement? The plaintiff argued, and some justices seemed to accept, that it is when the jurors have left the judge's "presence and control," a standard that itself is subject to interpretation.

Nor is it a simple matter to set a geographic limit or time limit on recalling a jury. Justice Ruth Bader Ginsburg wondered whether the court should "draw a line at, say, the courthouse door." Or would a stricter rule be more appropriate, barring recall once jurors have left the courtroom itself?

Perhaps geography is less important today, as jurors with smart phones have the ability instantly to access information and

communicate with anyone anywhere. The defendant, and the U.S. solicitor general arguing as amicus, contended that the touchstone should not be location or time, but whether jurors have actually been subject to outside influence and recalling them would cause actual prejudice. If actual prejudice is the standard, though, Justice Sonia Sotomayor wondered "why can't we recall a jury six months later?"

Some of the justices focused on the many subtle things that might influence a discharged juror psychologically, even moments after discharge. Sotomayor noted that a courtroom officer might simply say "good job" to jurors and positively influence their view of the verdict. Or jurors might see family members talking to each other, crying or visibly conveying their emotions about the verdict in other ways, all of which could alter how a juror views the case and the verdict. Justice Elena Kagan noted that, even absent encounters with anyone, jurors effectively "take off [their] juror hat psychologically, mentally" once they are discharged, and may begin to question whether they did the right thing as a juror.

A host of other questions are involved in recalling a jury. Must the judge question each juror separately to determine prejudice? Should counsel be permitted to

voir dire the jurors? Can a discharged juror, who is now an ordinary citizen, be compelled by the court to return and resume service as a juror if he refuses to do so voluntarily?

There are additional concerns in a criminal case, where, as Justice Anthony Kennedy commented, "A defendant who thinks he's been acquitted, five minutes later, an hour later, can find out that he's guilty."

A bright-line rule barring recall of a discharged jury would avoid these thorny issues, but it would entail very substantial costs. In many cases, it will be difficult to justify the burden and cost of a new trial on the parties and the court, especially if the jury has been discharged for only a few minutes and could, if recalled, easily correct the flaw in the verdict.

One thing is clear. If there are potential problems with a jury verdict when it is delivered—including, for example, possible inconsistent verdicts or inconsistent answers on the verdict form or problems with a damages award—trial counsel should take the time to determine whether the jury should be asked address those questions before it is discharged. If necessary, counsel should ask the court to briefly defer discharging the jury so that counsel can review the verdict more thoroughly.



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