I very strongly oppose the proposed changes to Rule 47. With the huge emphasis upon settlements, very few civil cases are tried. In the past, litigators could acquire trial expertise by repetition. Those days are over. the only way we can learn from our mistakes is through open and candid discussion with jurors. Otherwise, we never know what worked and more importantly, what was distracting. This is particularly relevant with the more and more frequent use of hi-tech visuals. The new rules create a culture where interviewing jurors will be the rare exception rather than the rule. "I want to learn from my mistakes and get better" clearly will not be good cause because that cause always exists. In the rare instances that an interview is allowed, the Judge determines what can be asked , how it can be asked and all other parameters of the interview. With all due respects, we are officers of this Honorable Court. We have earned the right to be trusted and respected. The Court through this rule is unnecessarily insulating jurors from the Bar to the huge detriment of the practice of law. Are there some who might abuse the process if broader interviews were allowed: of course. However, the logical and intelligent solution is an instruction to those who serve as jurors that they can but are not required to speak to counsel and that counsel can politely inquire about what they liked, didn't like, etc and what important factors resulted in the verdict. The Judge can draw a line as to what is not permissible and jurors can be instructed that they must report counsel who cross that line. Requiring the judge to be present will have a chilling effect on candid conversations, based on my personal experience, especially with a number of now retired Judges from this Court. The proposed rule will perpetuate bad lawyering to the ultimate detriment of future litigants and to the detriment of developing quality litigators. This rule overly insulates jurors when the desired result can be achieved without the harsh impact of the proposed rule. Respectfully, Scott Silbert

Scott E. Silbert

In my humble opinion the Rule should not be amended as proposed. Instead:

(A) Amend as proposed
(B) No amendment at all
(C) Delete in its entirety

My comments are based on my belief that lawyers can learn a great deal from the observations of jurors, information that will not only aid the lawyers in their future presentations, but will also help lawyers avoid pitfalls that are offensive to jurors and/or waste their time.

I have tried to talk to jurors in state court as often as possible. If they don't want to talk, that's fine. However, most seem very willing to give you their impressions of the process. They are very unlikely to criticize the other attorneys, the judges, or other jurors.

ANDY O'BRIEN

Re the use of "behalves" in LR47.5(B) and LCr23.2(B), see the following quote from the Grammarphobia Blog,
http://www.grammarphobia.com/blog/2010/04/behalf-time.html

" In modern usage, "behalf" is an invariable noun and has no plural form. The old plural "behalves" is considered obsolete and has been for some time.

It's labeled "obsolete," for example, in my 1956 copy of*Webster's New International Dictionary* (the unabridged second edition)."
And it just sounds awful.

Ralph S. Whalen, Jr.

Dear Sirs:

I received a notice of the proposed changes to the Local Civil Rules for the United States District Court for the Eastern District of Louisiana. I read the proposed changes to LR 47.5 and would like to notify you of my request these changes not be made. Basically, the revised rule conflates interviewing a juror with taking testimony from a juror. Under the revised rule, there will be no "interviews" of jurors at all, as the revised rule requires any questions posed to a juror who consents to answer them be made in the presence of the Court and under the Court's direction. I suppose a particular judge may adopt a policy allowing for this to be done in some informal fashion, however, I doubt it. This will be done in Court on the record most of the time. Federal Rule of Evidence 606 (B)(1) already prohibits testimony from jurors regarding how the verdict itself was reached. Under the revised rule, now an informal interview cannot be conducted into those matters either.

I find interviewing jurors often sheds light on the evidence and argument the jurors found persuasive and assists me in identifying mistakes I, or the other lawyers or parties, made. This allows me to learn from those mistakes and, hopefully, improve my skills. In the cases I tried to a jury, none resulted in any challenge to the verdict. I find the vast majority of attorneys I know share similar experiences. Civil attorneys wish to interview jurors to understand why we won or lost, not to dredge up a way to challenge the verdict itself. The opportunity to interview jurors is already so limited in Federal Court (all of the interviews I conducted of jurors were conducted following trials in State court), further limiting such opportunities should be unnecessary.

I remember my first civil jury trial in State court in Louisiana, after which I spoke to virtually every juror (most of whom waited outside the courthouse for the chance to speak with me). I also remember my partner telling me this cannot ordinarily be done in Federal court (even when the jurors WANT to talk to the lawyers). I remember quizzing him about the Federal rules regarding juror interviews and thinking the limitations were pointless. Shouldn't we want to know why the jury did what it collectively decided to do? Shouldn't we want to know what

evidence or argument the jury found most persuasive? Shouldn't we inquire of the jurors to determine how a more effective presentation of a case could be made in the future or how the experience of future juries might be improved? Shouldn't the Court want to know such things? Obviously, I was blinded by youthful enthusiasm!

Nevertheless, Louisiana State Courts are not overwhelmed with challenges to jury verdicts because of post-trial interviews by parties or attorneys. Jurors in Louisiana State Courts are not hounded by overbearing lawyers or parties, despite the high-profile nature of many of the trials. Federal Courts already "bubble wrap" jurors far beyond what is remotely necessary (particularly in civil cases). Piling more bubble wrap atop the inordinate amount already used makes very little sense.

In the nearly 18 years I practiced law, I watched Federal practice and procedure become more complex, more intricate and more about form over substance. Oftentimes, the rules of procedure in Federal Court are used to preclude anyone from getting to justice, rather than as a means of obtaining it. The proposed amendment to LR 47.5 appears to be such a change. I know the Court is concerned about challenges to jury verdicts. (The recent BP criminal case comes to mind immediately.) I would hope, however, the Court would be more concerned about whether or not the verdicts reached by juries were reached in accordance with the law. At the very least, I am hopeful the Court is concerned enough about lawyers understanding why their clients won or lost to leave the old rule in place in civil cases.

Thank you for the opportunity to comment on this proposed rule change.

With kindest regards, I am

Very truly yours,

BY: _____
D. RANDOLPH STREET

DRS/ckr

I make the following comments relative to proposed Local Criminal Rule 23.2.

(A) A petit or grand juror has no obligation to speak to any person about any case and may refuse all interviews or requests for comments.

There is nothing objectionable about this proposal. In fact, it would be sensible to require that all seeking to speak to a former juror be required to inform the juror of the option not to speak, or the option to speak under court supervision.

(B) Attorneys and parties to an action, or anyone acting on their behalves, are prohibited from speaking with, examining or interviewing any juror, except after obtaining leave of court granted upon motion for good cause shown. If leave of court is granted, any such communication must be (a) limited to what is admissible under Federal Rule of Evidence 606(b), (b) conducted only as specifically directed by the court, and (c) occur only in the presence of the court.

This provision is onerous and overbroad. It even seems to prohibit an attorney or party from listening to a juror who approaches the attorney or party on his or her own initiative. Secondly, it would be a fortuitous situation where "good cause" for juror interviews falls into the laps of attorneys or parties without inquiry by the attorneys. It does not seem that the administration of justice should depend on good, or bad, luck.
Wouldn't it make sense to permit a dignified and respectful approach to former jurors? Perhaps requiring a written request for an interview where the juror can opt out of a oral interview? This Court could structure a form approach, including the providing of the opportunity for former jurors to have their questions answered by an unbiased and informed person, prior to any interview by a party.

C) No person may make repeated requests to interview or question a juror <u>after the juror has expressed a desire not to be interviewed</u>. Under no circumstances, except as provided in Federal Rules of Evidence 606(b)(2) <u>in an inquiry conducted under court supervision</u>, may a juror disclose any information concerning:
(1) Any statement made or incident that occurred during the jurors' deliberations;
(2) The effect of anything on that juror's or another juror's vote;
(3) Any juror's mental processes concerning the verdict or indictment; or
(4) The specific vote of any juror other than the juror being interviewed.

The language "after the juror has expressed a desire not to be interviewed" is overbroad. It seems to me that the attorney/party seeking interviews ought to be allowed to state his/her reasons for doing so to the former jurors so that the jurors can make an informed and thoughtful decision. It is easy to imagine a trial judge inquiring of jurors after their verdict whether any desire to speak to anyone about the case, and all jurors declining to do so. That would seem to preclude any further attempt to interview, and that could lead to the precipitous closing off of reasonable lines of inquiry.

I object to the underlined provision relative to the necessity of court supervision unless the juror expresses a desire to speak only under the supervision of the court. Jurors should be given that option.

Steven Lemoine

It appears to me that the proposed rules unnecessarily abridge citizens' First Amendment Rights of Free Speech. Jurors clearly may choose to decline to speak about their deliberations; the District Court can and should remind jurors of this right.

A jury trial, as opposed to a grand jury inquiry is, or should be, a public event. I believe that the act of justice being administered should be a public matter, and those participating in the process should rightly consider the prospect of being asked about it afterward.

Dale Williams

Ladies and Gentlemen:

In regards to the Notice of Proposed Amendments of Local Civil Rule, LR: 47.5 - Interviewing Jurors, presently in the Eastern District of Louisiana it is custom and practiced in most federal and state courts to allow jurors to use PDA's at court in the witness room and at lunch time. As a result, there is a temptation to do extrinsic evidence research and bring extrinsic evidence into the jury room that is from outside the courtroom. Any inquiry of this jury misconduct could not be discovered under the proposed rule change. You would have to conduct any questioning in the court before the judge, which is a change from the old rule. This is a danger and problem and which the seriousness taints the entire jury process system. Limited questioning of jurors after a trial as to whether extrinsic evidence was viewed by jurors should be allowed, providing they want to talk about the trial.

Yet, the proposed rule would severely restrict interviewing the jurors even further to see if they brought in extrinsic evidence. The rules are unduly restrictive as they are at present and would now require that the interview of jurors being in court only before the judge. This is burdensome and is not of good use of courts time to require after trial interviews are entirely conducted in courtroom settings. I have no objection to the rule that if a juror does not want to talk they can't be interviewed and the interview is to be terminated. That it is acceptable, I agree with that. However, if a juror were willing to talk to the attorney, that information would be valuable to ensure that there wasn't any extrinsic evidence that was brought into the trial

Jury interviews are allowed in state courts without the present or proposed restrictions. I know of no complaints of state judges on this issue. I am not aware of any abuse or problems with this process in state courts. State local rule allows jury interviews if the jurors are willing participants to be interviewed and there is no prohibition unless the judge rules otherwise.

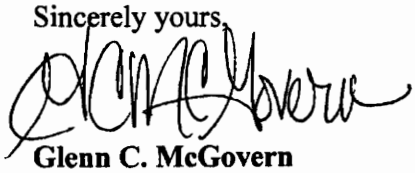
In some states, due to the increasing problem of jurors bringing in extrinsic evidence (i.e. going on Facebook, doing research on plaintiffs, defendants, counsel etc.) and the now increased danger of bringing prohibited extrinsic evidence into the jury room, there has never been a greater need to allow jury interviews.

Also, interviews are a valuable educational tool for the trial attorney to know what went right or wrong in the trial.

There are several articles on jury misconduct by jurors brining in extrinsic evidence from the Internet into the jury deliberations. There have been over 90 mistrials across the U.S. in jury trials reported according several recent publications. I enclose a copy of an article published in the LAJ journal that has several articles cited in footnotes on the danger of jurors bringing in extrinsic evidence to jury deliberations. The problem exists. Without attorneys being able to interview jurors, this misconduct will not be discovered. The judges now give jury instructions not to research on the Internet at the beginning, during and end of trial—there is a good reason for this recent change. Unfortunately jurors still can do it and do such prohibited searches. Some jurors are literally addicted to Facebook. I have discovered jurors clicking on "Like" on Facebook during jury trials. We should allow juror interviews by counsel after trials with reasonable restrictions. This proposed rule would foster jury misconduct and insure it never being discovered. It is not a fair rule with the increasing danger.

With kind regards, I remain,

Sincerely yours,



Glenn C. McGovern

GCMcG/kw
Encl. article by G.C.McGovern

FACEBOOK'S TAINTING THE JURY SYSTEM: FACING THE REALITY OF SOCIAL MEDIA ADDICTION BY JURORS

By Glenn C. McGovern, Attorney
Metairie, La.

There are many reports of Facebook and social media are affecting juries and causing mistrials. In one case involving ground water contamination brought by the City of New York against ExxonMobil Corporation, one juror reported all the jurors had done internet research, another reported the information was used by the jury and another reported it had biased their decision. Several jurors admitted doing Internet research and going on Wikipedia and the New York Times website news articles about the case.[1] At least 90 verdicts were challenged since 1999 was reported in an article in Reuters Legal. The article states that more than half the challenges were in the last two years according to the article written in 2010.[2] New trials or overturned verdicts resulted in 28 cases in the article. [3] The article cited a Florida appellate court overturning a manslaughter conviction of a man when the juror foreman used his iPhone to look up the definition of "prudent" in an online dictionary.[4] In another case cited, the Nevada the Supreme Court granted a new trial to a defendant convicted of sexually assaulting a minor, because the jury foreman searched online for information about the types of injuries suffered by young sexual assault victims. [5]Of the 90 cases Judges granted new trials or overturned verdicts in 28 criminal and civilian cases with 21 since January 2009.[6]

Judges have always instructed juries not to seek information on cases outside the evidence introduced in trial and warned jurors not to communicate with anyone about a case before verdict. Hand-held smartphone devices are carried by the majority of modern jurors. According to the latest recent research, the majority of smartphone users have an addiction to Facebook, their iPhones and Androids. Thus, there is a serious question that this instruction alone will be sufficient to protect the jury deliberations from being tainted. Bear in mind the Reuters article was in 2010. New research shows the problem is not going to be cured by simply reading a jury instruction not to go on the Internet. Some people are addicted to Facebook according to the latest research. They cannot resist going on social media every day according to the research cited below from IDC. It is realistic to believe they will stop during a multi-day of multi-week trial as instructed? The latest research says no.

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[1] See *City of New York v. ExxonMobil Corp. (In re Methyl Tertiary Butyl Ether (MTBE Prods. Liab. Litig.)*, 739 F. Supp. 2d 576, 2010 U.S. Dist. LEXIS 92744

[2] See article, "As Jurors go online, U.S. trials go off track", by Brian Grow Reuters Edition U.S. Dec. 8, 2010

[3] See article, "As Jurors go online, U.S. trials go off track", by Brian Grow Reuters Edition U.S. Dec. 8, 2010

[4] Ibid

[5] Ibid

[6] Ibid

New research from a study from IDC sponsored by Facebook of an online survey of 7,446 18-44 year olds iPhone and Android smartphone owners in the U.S. reveals how extensive the addiction to Facebook is.[7] Facebook has 618 million mobile users. The number of smartphone Facebook uses is growing rapidly. There were 155.1 million are smartphone users in the US with this predicted to be rising to 181.1 million by the end of 2013. 82% responded in the IDC poll they read news feeds daily and 63% said they do this constantly. 49% responded to posts or comments. 38% post status updates. 37 % visit friend's timelines. 33% message friends. What is important is 49% said they "felt more connected when messaging friends". Facebook was found to be the third-most-popular activity on mobile phones, with 78% saying that they check their email and 73% use them for Web browsing. Most of the survey respondents said that Facebook was most useful for staying in touch with members of their community. This need to bond with people is a basic instinct in man. Some people are driven to this electronic bonding with Facebook that is their perception of a community. Telling a juror not go on social media is like exiling them to a leper colony in their perception of their world. And their perception is their reality.

Allowing jurors to have smartphones in the jury room, during trial and not expecting them to use them to bring in extrinsic evidence that taints jury deliberations is like giving a giant lollipop to a small child and saying not to eat it before dinner. The research shows many people are addicted to social media. If you don't believe this look at the IDC report further.[8]

***89% of the 18-24 year olds in the survey said they check their smartphones within 15 minutes of waking up.**

***On average, people spent 32 minutes and 51 seconds per day on Facebook, 41.6 minutes on the weekend and 19.5 minutes on weekdays.**

***Facebook is mostly used when getting ready to go to work or school, during commutes, during lunchtime, during afternoon and evening before bed.**

Most judges still allow jurors to have smartphones during trials. Most judges allow them in the jury room and at lunch. Weekends will result in online activity for most jurors with smartphones. Jurors frequently, after a few days of trial, bond, and have lunch together. With most having a smartphone, the temptation to Google the plaintiff, check their Facebook page, Google the defendant, the attorneys, and do Google research an issue or topic of the particular litigation is overwhelming. There is ground for concern that this is tainting the jury process.

This sort of prohibited activity has resulted in new trials due to juror misconduct with smartphones. A juror in a civil trial was reported as contacting a female defendant on Facebook and sent her a friend request. Jacob Jock was kicked off the jury and

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[7] See article, " Always Connected How Smartphones and Social Keep Us Engaged, An IDC Research Report, Sponsored by Facebook March 27, 2013. http://allfacebook.com/facebook-idc-study-smartphones_b114004

[8] Ibid

admonished. But being a smartphone Facebook addict, , he made a post detailing his being let go, stating, :"Ha, ha, ha, I got out of jury duty." A contempt of court hearing was held reported held by the judge with the possibility of fines and jail time.[9]

The plaintiff's attorney Damian Mallard stated, "If this type of behavior is permitted without there being serious ramifications, it's something we'll see over and over again".

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[9] See article, "Juror could face jail time for 'friending defendant", by Ben Zimmer, WTSP-TV, Tampa-St. Petersburg, Fla. 2/7/12 and USA Today.

Dear Clerk,

Please find attached a comment in opposition to proposed changes to Local Rule 47.5 in the U.S. District Court for the Eastern District of Louisiana.

The comment is by the Reporters Committee for Freedom of the Press, the Louisiana Press Association, Gannett Co., Inc. and Gannett's six Louisiana outlets (WWL-TV (New Orleans); The Town Talk (Alexandria); The Daily Advertiser (Lafayette); The News-Star (Monroe); Daily World (Opelousas); The Times (Shreveport)).

Thanks you for considering this comment.

Sincerely,
Jamie Schuman

--
Jamie Schuman

Dear Chief Judge Vance:

The Reporters Committee for Freedom of the Press, the Louisiana Press Association, and Gannett Co., Inc. and its six Louisiana outlets write in opposition to proposed changes to U.S. Court of Appeals for the Eastern District of Louisiana Local Rule 47.5 (Interviewing Jurors). Specifically, we oppose the proposal, in clause 47.5(C), to ban any juror from ever disclosing the following information outside of an inquiry conducted under court supervision: "(1) Any statement made or incident that occurs during the jurors' deliberations; (2) The effect of anything on that juror's or another juror's vote; (3) Any juror's mental processes concerning the verdict; or (4) The specific vote of any juror other than the juror being interviewed."

While there are in some situations legitimate privacy interests at stake when a single juror discusses deliberations, sweeping restrictions like these that apply to all cases are completely inconsistent with the First Amendment rights of not only the jurors, but also of the news media that covers the courts and the public that needs to know how justice is administered. The proposals are overreaching on their face, and by intimidating jurors into silence for fear of violation of the court's rules, they have an enormous chilling effect on a class of speech that is critically important to the public.

The four restrictions in the proposed rule essentially encompass anything that the public would want to know about jury deliberations. They therefore operate as essentially a complete ban on interviewing jury members. The proposal runs counter to Fifth Circuit precedent and to the U.S. Supreme Court's repeated pronouncements that court proceedings are presumptively to ensure the public that the system is functioning fairly. *See, e.g., Richmond Newspapers v. Virginia*, 448 U.S. 555, 564, 570-73 (1980). The jury is a key component of any trial. A rule that prevents jurors from being asked even basic questions about why they voted as they did dangerously restricts public understanding of the judicial process.

A. The proposed rule runs counter to Fifth Circuit precedent.

In *In re Express-News Corporation*, the U.S. Court of Appeals for the Fifth Circuit struck down a local rule in a Texas federal court that had banned any person from interviewing any juror regarding the deliberations or verdict of

the jury, except by leave of the court. 695 F.2d 807, 808 (5th Cir 1982). The case held that a "court rule cannot ... restrict the journalistic right to gather news unless it is narrowly tailored to prevent a substantial threat to the administration of justice." *Id.* at 810. The ban on interviewing jurors in *In re Express-News Corporation* was not narrowly tailored because it was "unlimited in time and in scope," applied even to jurors willing to speak, and "foreclos[ed] questions about a juror's general reactions as well as specific questions about other jurors' votes that might, under at least some circumstances, be appropriate." *Id.* The proposed rule here is similarly broad and therefore equally invalid. Not only is the ban here unlimited in time, but also it is not narrowly tailored. The four prongs of 47.5(C) – which prevent a juror from discussing anything that occurred during deliberations, "the effect of anything" on his vote, how he came to the verdict and the specific vote of other jurors – leave little, if any, room for the public to obtain information about a jury's decision-making process.

The proposed rule ignores that the public and the press rely on interviews of discharged jurors to explain the outcome of a particular trial, the experience of serving on a jury, and the operation of the judicial system. People cannot receive information regarding the unique perspective of a juror from other sources. Interviews with jurors often lead to stories that expose misconduct and abuse, or that prevent misinformation from flourishing. For instance, a juror can help explain that a highly controversial decision was based on evidence and not on external or otherwise improper factors.

Fifth Circuit decisions interpreting *In re Express-News Corporation* recognize the importance of providing the public with access to jurors. *See U.S. v. Cleveland,* 128 F.3d 267 (5th Cir. 1997); *U.S. v. Brown*, 250 F.3d 907 (5th Cir. 2001). The bans in *Cleveland* and *Brown* only applied to the individual proceedings at hand, so the fact that the Court upheld some restrictions does not justify the sweeping local rule at issue here. *Cleveland,* 128 F.3d at 269; *Brown*, 250 F.3d at 912. Moreover, the Court gave reasons for why secrecy was necessary in those cases. *See Cleveland*, 128 F.3d at 268-69 (explaining that trial, involving two former state senators, already received "great amount" of news coverage); *Brown*, 250 F.3d at 910-11, 922 (finding intense publicity in case involving former governor and other political figures could lead to juror harassment; noting allegations that defendants tried to interfere through judicial process through bribes and other illegalities; and explaining that the media coverage was so pervasive that the "public knew what was going on."). The bans also left room for jurors to discuss the verdict and their general reactions to the proceedings, and allowed jurors to speak on their own initiative. *Cleveland,* 128 F.3d at 269-70; *Brown*, 250 F.3d at 907, 921. However, proposed Local Rule 47.5(C) prohibits jurors from speaking on a sweeping range of topics. As representatives of their communities, jurors have a right to interact freely with the press and public to inform them of their thoughts regarding the public service they just performed. *See Near v. Minn.*, 283 U.S. 697, 713-14 (1931) ("Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press...") (internal citation omitted).

B. Gag orders on parties and attorneys do not justify this proposal.

This Court should not look to gag orders on parties and attorneys, which judges on rare occasions put in place when controversial trials are ongoing, to justify the proposed rule. In the Fifth Circuit, gags on trial participants (not including jurors) are only allowed if there is a "substantial likelihood" that their comments will undermine a defendant's fair trial rights. *U.S. v. Brown*, 218 F.3d 415, 428 (5th Cir. 2000). Unlike the proposed blanket ban here, courts analyze these gags on a case-by-case basis. For instance, *Brown* upheld a gag on parties and attorneys because the parties had tried to "manipulate media coverage" to "gain an upper hand" and because the ban left some room for the participants to speak about the case. *Id.* at 429-30. Moreover, gags on trial participants typically end when the trial concludes and when the defendant's Sixth Amendment rights are no longer at risk. However, 47.5(C)'s proposed ban is not time-bound: it would prohibit anyone – even historical researchers – from learning about a juror's experience even long after the case was decided.

C. The ban is not narrowly tailored, and it disregards the U.S. Supreme Court's justifications for court openness.

The ban here does not directly address another purported harm – threat to jurors' privacy – that could be associated with making jury information available. While some courts have used privacy rationales to disallow jurors from speaking about other jurors' experiences, this rule goes much farther. It would prevent jurors from speaking about even their own experience, where the supposed privacy concerns of fellow jurors are irrelevant.

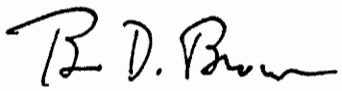
While it is undoubtedly true that a great deal of secrecy is inherent in the process of jury deliberations, it is nonetheless important to allow the public to understand how that process works when jurors are willing to come forward after trial and discuss their roles in the administration of justice. Though deliberations are closed to the public, they are still a part of a judicial system that recognizes that open judicial proceedings are fundamental to the legal system. *See, e.g., Richmond Newspapers*, 448 U.S. 555, 564, 570-73 (1980) ("[T]hroughout its evolution, the trial has been open to all who care to observe."). As Justice Brennan explained in concurrence in *Richmond Newspapers*, chief among the justifications court openness is that "uninhibited, robust, and wide-open debate" about public issues strengthens democracy by giving voters better understanding about government programs. *Richmond Newspapers*, 448 U.S. at 587 (Brennan, J., concurring) (citation omitted). *See also Neb. Press Ass'n.*, 427 U.S. at 586-87 ("A responsible press has always been regarded as the handmaiden of effective judicial administration...Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.").

The Supreme Court has recognized other reasons for America's tradition of court openness. Transparency helps assure people that "proceedings were conducted fairly" and that decisions are not "based on secret bias or partiality." *Richmond Newspapers*,

448 U.S. at 569. It is impossible for the public to have that assurance if it cannot hear from the very people who decide on guilt or innocence. Additionally, the Supreme Court has explained that open trials provide a "therapeutic value" by providing a way to diffuse the tensions that often rise after a crime has occurred. *Id.* at 570-71. The proposed rule ignores that interest as well.

The Reporters Committee for Freedom of the Press, and the Louisiana media coalition, respectfully request that this Court reject the proposed language of 47.5(C).

Sincerely,



Bruce D. Brown
Gregg P. Leslie
Jamie T. Schuman

Pamela Mitchell, CAE

Barbara W. Wall

To Whom It May Concern:

Please see the attached correspondence expressing the concerns of the Louisiana Association of Criminal Defense Lawyers to the proposed amendments of Local Criminal Rules 23.2 and 47.5.

Should you have any questions, please do not hesitate to contact me.

With kind regards, I remain,

Sincerely yours,

Robert S. Toale

Dear Honorable Judges and Clerk Blevins:

On behalf of the Louisiana Association of Criminal Defense Lawyers (LACDL), I am writing to express our concerns about the proposed amendment of the Eastern District's local rules regarding interviewing former jurors (Local Criminal Rule 23.2 and Local Civil Rule 47.5). LACDL is a state-wide professional organization for criminal trial, appellate, and post-conviction attorneys, and it consists of both private practitioners and public defenders. LACDL members regularly practice in federal court, and the proposed rule would be detrimental to our professional development, the interests of jurors, and the cause of justice.

As an initial matter, attorneys communicate with former jurors for several reasons, and the communication can be beneficial to both the defense team and the jurors. Through our contact with jurors, we can gain valuable professional development, learning what jurors found effective about the defense's presentation, what jurors found confusing about the process, and the things about which jurors would have liked to know more. Using this information, we can not only improve our performance in other cases, but we can enhance the experience of jury service for future jurors.

Likewise, through their contact with attorneys, jurors are given a meaningful opportunity to discuss and reflect on their jury service. As we have learned from years of speaking with jurors in criminal cases, jurors often feel neglected by the court system after having given so much of their time and energy towards participation in a trial. Particularly considering the strict limitation on their ability to discuss the case throughout the trial itself, the chance to speak freely about the trial with others who are familiar with the case has proven to be extremely cathartic for jurors.

Most critically, however, free communication between the parties and former jurors serves the system's ultimate goal of fundamental fairness and the cause of justice. As our combined years of experience have taught us, it is only by virtue of the candid and unstructured dialogue occurring when an attorney interviews a former juror that irregularities and other improprieties like juror misconduct are discovered. Louisiana state law has long adhered to a policy of allowing attorneys and jurors to speak freely about their service subject to the attorney's professional restrictions, *see* La. R. Prof. Conduct R. 3.5. Under such a regime, Louisiana courts have repeatedly protected individuals from being tried and convicted in violation of fundamental fairness. *See, e.g., State v. Sinegal*, 393 So.2d 684 (La. 1981) (ordering a new trial where jurors consulted a superseded law book during deliberations); *State v. Marchand*, 362 So.2d 1090 (La. 1978) (ordering a new trial where bailiff communicated prejudicial information to jurors); *State v. Cantu*, 469 So.2d 1083 (La. App. 2 Cir. 1985) (conviction reversed because of extraneous information provided by alternate juror). Indeed, just recently, the Louisiana Supreme Court remanded the case of *State ex rel. Tyler v. Cain*, No. 2013-KP-0913 (11/22/13), for an evidentiary hearing on a claim that two jurors improperly consulted and read aloud from the Bible while deliberating.[1] Where life and liberty are at stake, the local rules of this Court should provide no less protection to the people of Louisiana.

The proposed amendments, however, would not only prohibit former jurors and attorneys from speaking freely to each other, but they would in many ways make the system even more unfriendly for former jurors. Pursuant to proposed Rule 23.2, attorneys could only speak to jurors "for good cause shown" and, if allowed, "only in the presence of the court." In effect, the rule would require jurors to be hauled into court and placed on the witness stand before they are allowed to discuss with the parties any aspect of the case on which they sat as a juror. This provision strikes us as far more intrusive than the current practice.

Moreover, the proposed amendment is unnecessary, as attorneys practicing in federal court are already limited in their ability to communicate with former jurors, and those limitations are sufficient to protect the interests of jurors in general and in specific cases. Specifically, the rules prohibit communication that is prohibited by law or court order, or where the juror has made known to the attorney a desire not to communicate, or where the communication involves misrepresentation, coercion, duress, or harassment. *See* E.D.LA. R. 83.2.3 (adopting La. R. Prof. Conduct R. 3.5). There is no reason to further limit communications with jurors, which have proven to be beneficial to both attorneys, former jurors, and the justice system more generally.

Thank you for taking the time to consider LACDL's comments and concerns about the proposed amendment to the Court's local criminal rules.

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[1] Additionally, the Supreme Court's order recognized the evidentiary restrictions on jury testimony without burdening the right to speak freely outside of court: "At this hearing, the testimony of jurors will be admissible to show the nature and the circumstances of any reading of the Bible which took place during deliberations. However, under La. Code Evid. art. 606(B), no juror may testify to the actual impact consultation of the Bible had on his mind or verdict. Nor may he speculate as to the impact it had on the mind of another juror." This Court likewise already provides this evidentiary protection in Rule 606(b) of the Federal Rules of Evidence.

Sincerely,

/s/ *Robert S. Toale*

ROBERT S. TOALE

Dear Clerk:

I am attaching a letter outlining some of the potential downfalls of adopting the proposed amendment to local criminal rule 23.2. The letter addresses the areas that, as the region's only innocence project, we have a unique perspective on.

If you or any of the judges considering the rule would like additional information or have any questions about our submission or any of the cases to which we refer, please don't hesitate to contact me or IPNO's case manager, Richard Davis (copied).

Thank you for your time and consideration.

Yours Sincerely,

Emily Maw

Dear Honorable Judges and Clerk Blevins:

I am writing to you as Director of Innocence Project New Orleans (IPNO) to provide information that may be relevant to your consideration of the proposed amendment to Local Criminal Rule 23.2. IPNO is a 501(c)(3) non-profit that provides free representation to prisoners in Louisiana and southern Mississippi with provable cases of actual innocence. Since it was founded in 2001, IPNO has freed or exonerated 24 wrongfully convicted prisoners. In many of these cases, IPNO has interviewed jurors from the original trial, often years after their jury service was complete. As discussed below, it is IPNO's experience that post-trial meetings with defense counsel can provide a benefit to jurors and that jurors can be an important source of information about problems with criminal trials that relate to the accuracy of the verdict. While IPNO's casework experience is with state court convictions, it is my belief that the lessons we have learned from this casework may also apply in federal cases. As a result, IPNO respectfully requests that you take into account the information contained in this letter when considering if there are possible detriments to the proposed amendment to Rule 23.2.

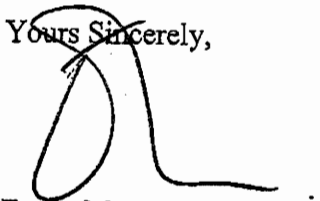
One thing IPNO has learned from interviewing jurors is that they are often interested to learn about evidence of innocence that was not presented at trial. The clearest example of this is a woman named Katherine Hawk Norman who was the foreperson of the jury that sentenced a man named Daniel Bright to death for first-degree murder. After Mr. Bright's trial, Ms. Norman learned from defense counsel of significant evidence of Mr. Bright's innocence that the jury did not hear. This evidence included information in FBI files naming the actual perpetrator. Ms. Norman became a tireless advocate for Mr. Bright's release. I am enclosing an Op-Ed by her that was published in the Times-Picayune in 2003. After Mr. Bright was exonerated, Ms. Norman became the chair of IPNO's board of directors. She served in this position until her death in 2009.

While IPNO's experience with Ms. Norman is the most extreme example of a juror being empowered by information they were denied access to at trial, she is certainly not the only juror IPNO has met with who—upon learning about evidence of innocence they did not hear at trial—have supported the verdict they gave being overturned. It is IPNO's experience that jurors often want to be informed if there is information suggesting they may have convicted an innocent person. A rule that overly restricts contact between defense counsel and jurors risks denying jurors the opportunity to learn such information and the resulting opportunity to act on any information they do learn.

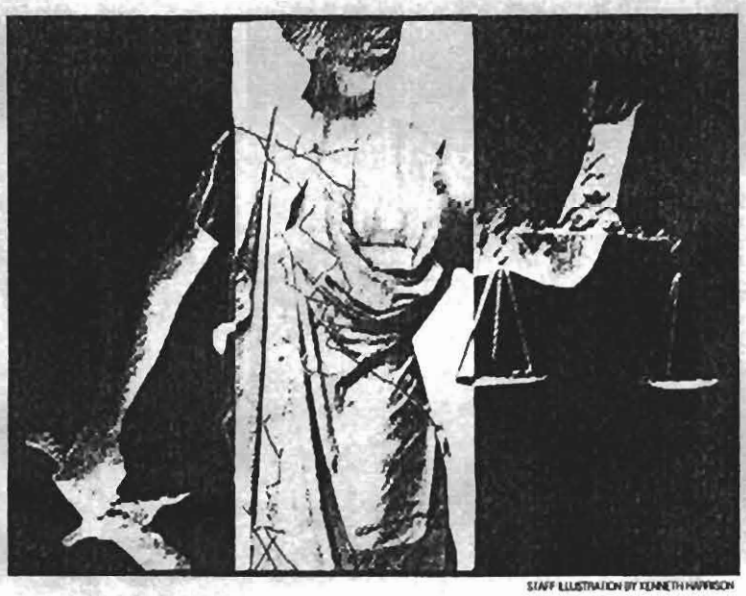
An additional benefit of avoiding an overly restrictive approach to contact between defense counsel and jurors is that jurors can be an important source of information about trials that is not apparent from the trial record. This can be especially valuable when reinvestigating old cases as the record may be incomplete and/or other participants in the original trial may be unavailable. Among other things, jurors can be a source of information about the effectiveness of trial defense counsel's performance. As the Supreme Court has observed, effective defense counsel has the "effect of ensuring against the risk of convicting an innocent person." *Herrera v. Collins*, 506 U.S. 390, 398-99 (1993). While it is not an IPNO case, a well reported example of jurors' ability to provide information about the effectiveness of counsel is the case of Calvin Burdine in Texas, in which jurors were crucial "neutral" witnesses to the fact that defense counsel was asleep for part of trial. *See Burdine v. Johnson*, 262 F. 3d 336, 339 (5th Cir. 2001). In IPNO's cases, we have also discovered evidence of defense counsel's poor performance at trial from interviewing jurors after the fact; evidence that was not apparent from the trial record. If defense attorneys are overly restricted from having contact with jurors, their clients will be denied access to potential evidence that bears on both the fairness of the trial and, even in some cases, the guilt or innocence of the defendant.

Because of the potential benefits to jurors and to the wider integrity of the criminal justice system that comes from contact between defense counsel and jurors, I believe there is a significant detriment to adopting any rule that is overly restrictive of contact between defense counsel and jurors. Thank you for your consideration of this comment. If I can provide any further information, please do not hesitate to contact me at EmilyM@ip-no.org.

Yours Sincerely,



Emily Maw



STAFF ILLUSTRATION BY KENNETH HARRISON

A long wait for justice

KATHLEEN HAWK NORMAN

Point of View

When I answered my summons to serve on a jury in Orleans Parish Criminal District Court, I felt like most of you might. I was reluctant, inconvenienced, distracted and yet responsible enough not to try to dodge it. Truthfully, I probably felt a bit noble for doing my duty as a citizen. That was in 1996, when I had confidence in our system of justice, an illusion that came to haunt me in the years that followed.

What came next was criminal court, a capital murder case, 11 diverse strangers with whom I would be forced into intimacy, a judge, a defense attorney and a cadre of district attorney representatives.

At the end of it all, a man was sentenced to death. I was the jury foreperson. I stood and said "guilty." I stood again and said "death."

I went home feeling traumatized but absolutely certain that a guilty man was justly sentenced. One more bad guy off the streets. Except, as it happens, he didn't commit the crime.

I was on the jury that convicted Dan Bright in the killing of Murray Barnes and sentenced him to die. Mr. Barnes was gunned down in January 1995, minutes after he collected his $1,000 winnings in a football pool at a bar on Lamar Place.

Dan Bright turned himself in after his picture appeared on "America's Most Wanted." But while he was in jail awaiting trial, a high-level FBI informant told agents that Bright wasn't the killer and even gave them the name of another suspect. No one told the jury. And Dan Bright, while no longer on death row, is still in prison.

It seems absurd even to say that the jury deliberations were a difficult ordeal, because unlike Dan Bright, I was never in jeopardy of losing my freedom. However, admitting that I played a part in an unjust capital murder conviction was the most painful admission I've ever faced. And yet, I held fast to my illusions. Surely our system of justice could not have an interest in the detention of an innocent man.

It would take the frustration of challenging the system that allowed this injustice before my blinders were off; years the real killer and I spent enjoying freedom that Dan Bright could not.

Despite all the responsibility heaped on you as a juror, there is much that you don't or can't know: As you are asked to make a determination about someone else's life, you are afforded only observer status. You are completely dependent on information you are fed, and you are limited in deliberations by instructions from the bench.

If there is a presumption of innocence in our system, there is also an assumption that district attorneys, judges and defense attorneys – as sworn officers of the court – will at least ensure truth in the name of justice. But the system that I trusted didn't trust me enough to make sure I had all the facts before it asked me to render a verdict.

Years after my experience on that jury, I came to knew that all the legal players — plus the FBI —knew about the evidence suggesting Dan Bright's innocence. The FBI knew the name of the real killer and refused to produce it even when challenged by post-conviction defense attorneys. The collective or separate decisions to keep information from the jury makes a mockery of our system and turns citizen-jurors into patsies for the state. It also left a killer loose on the street.

Then Judge Martin Feldman did something to restore my hope. His courageous decision to force the FBI to produce an unredacted version of their confidential report for his in-camera review is the first good news for Dan Bright in eight years. On March 6, Judge Feldman will pierce the FBI veil and clearly see the name of the man who killed Murray Barnes in 1996. And it's not Dan Bright.

We have an opportunity in our community to change this broken system. We have a new district attorney, and with his administration comes the promise of a new day for justice.

We've all heard the stories of criminals taking a walk because the system failed in its effort to prosecute. However, the other side of that coin is just as frightening. I'm willing to hang on to my thread of hope because, despite its flaws, our judicial system is the best in the world. But clearly the best can do better, and I'm hoping that District Attorney Eddie Jordan and Judge Feldman will lead the way.

It's the right thing to do for Dan Bright and his family, it's the right thing to do for murder victim Murray Barnes' family, and it's the right thing to do for jurors like me, who were unwittingly made accomplices in the condemnation of an innocent man.

.....

Kathleen Hawk Norman lives in New Orleans. Her e-mail address is kathleenhawknorman@hotmail.com.

Dear Judges of the Eastern District:

The ACLU is our nation's guardian of liberty, to defend and preserve the individual rights and liberties that the Constitution and laws of the United States guarantee everyone in this country. The ACLU of Louisiana, founded in 1956, routinely litigates Constitutional issues in the federal courts of Louisiana and has a vested interest in ensuring the rights of all people of Louisiana.

The ACLU of Louisiana is profoundly disturbed by the Court's proposed amendments to the local rules restricting the speech of jurors and attorneys.[1] We join in the concerns and comments of the Federal Public Defender of the Eastern District of Louisiana and Reporters Committee for the Freedom of the Press and write to specifically address: (1) jurors' First Amendment rights of freedom of speech; (2) attorneys' First Amendment rights of freedom of speech; and (3) Sixth Amendment rights to assistance of counsel.

Protecting jurors from post-verdict harassment and invasions of privacy is a legitimate concern. Part A of the proposed rule is narrowly tailored to prevent such behavior and we take no issue with Part A.

However, Parts B and C of the proposed rules are exceedingly overbroad and prohibit any number of topics and manner of speech by jurors who wish to discuss their jury service and experience, or attorneys who want to learn from their trial experience.

The proposed rules do not limit the restrictions on jurors' speech to cases that are distinguishable from typical trials, rather all forms of speech are limited in all trials. The proposed rules are unlimited in time and scope, apply to both jurors who are willing to speak and to those desiring privacy, and to all communication between attorneys or parties and jurors without leave of court, regardless of the topic. The rules also forbid all manner of speech related to the trial and verdict.

Furthermore, attorneys are prohibited in all cases from speaking with jurors post-trial, without leave of court, to inquire about a juror's perception of the attorney's trial tactics, strategy and style. These topics are areas in which an attorney can learn a great deal from the opinions of a juror. Prohibiting all forms of communication would

[1] For the purpose of this comment we are assuming that the proposals address only post-trial contact and speech of former petit jurors and attorneys.

eliminate this learning tool and severely restrict an attorney's ability to learn from past trials, thus hindering an attorney's ability to prepare sufficient representation for future clients. This type of restriction affects the Sixth Amendment rights of the attorney's future clients.

Part (B)

Prohibiting attorneys and parties to an action, or anyone on their behalf, from speaking with a juror without leave of court granted upon a motion for good cause shown is a restraint on jurors and attorneys' First Amendment rights of freedom of speech. Prohibiting attorneys and parties from speaking with a juror will essentially restrain a juror's speech because attorneys and parties will not be willing to speak to the juror without fear of reprisal from the court for not first seeking leave. The proposed rules are so broadly written that it appears an attorney may not even speak a greeting to a former juror at anytime post-trial. There is no limit to the time and scope of the Court's proposed ban on speech. Under the proposed rules it an attorney's communication with a former juror would be restricted in perpetuity, even in social settings. Would an attorney be subject to contempt charges for speaking a greeting or engaging in social conversation with a former juror at a Saints' game or cocktail party months or even years after the trial is concluded? Under the proposed language, this would be the result.

Additionally, requiring an attorney or juror to seek leave of court prior to speaking to one another is directly contrary to the Fifth Circuit's prior rulings. A court may not impose a restriction on post-verdict interviews with jurors and then condition the restriction by requiring "those who would speak freely to justify special treatment by carrying the burden of showing good cause." *U.S. v. Cleveland*, 128 F.3d 267, 270 (5th Cir. 1997), citing *In re The Express-News Corp.*, 695 F.2d 807, 810 (5th Cir. 1982). It is significant that the Fifth Circuit's rulings addressing supression of jurors' First Amendments rights have been addressed in individual cases with unique factual circumstances and not in a sweeping context as proposed by these rules.

Part (C)

> Under no circumstances, except as provided in Federal Rules of Evidence 606(b)(2) in an inquiry conducted under court subervision, may a juror disclose any information concerning:
> (1) Any statement or incident that occurred during the jurors' deliberation;
> (2) The effect of anything on that juror's or another juror's vote;
> (3) Any juror's mental process concerning the verdict or indictment; or
> (4) The specific vote of any juror other than the juror being interviewed.

Of particular concern are subsections (2) and (3) prohibiting a juror from discussing anything that had an effect on their own vote or their own mental process concerning the verdict. These sections prohibit a juror from discussing their general reactions to the trial proceedings and are not limited to jury deliberations. Furthermore, Part (C) is

not limited to communication with attorneys, parties or the press and may extend to jurors' conversations with their relatives, friends, and associates. Like Part B, this section is overly broad and abridges the freedom of speech of jurors in perpetuity. Jurors would be prohibited from revealing their impressions of the trial years after the event, in personal memoirs or in private conversations.

The proposed rules are: (1) grossly overbroad; (2) not limited in time and scope; (3) place an undue burden on both jurors and attorneys who wish to speak; (4) are not narrowly tailored to prevent any known substantial threat to the administration of justice; and (5) will severely restrict the Constitional rights of both lawyers and jurors, as well as hampering the ability of attorneys to protect the rights of their future clients.

We join the Federal Public Defender of the Eastern District of Louisiana in encouraging the Court to consider the ABA Principles for Juries and Jury Trials, Principles 18(C)-(E) & 19(B)(2) for instructions to jurors, parties and attorneys post-trial.

We would be glad to discuss these issues further with the Court at any time.

Sincerely,

Marjorie R. Esman

Dear Mr. Blevins:

I write on behalf of NOLA.com | The Times-Picayune to comment on the proposed amendments to Local Rule 47.5. We appreciate the opportunity to provide our perspective on the proposed amendments. For the reasons set forth below, we believe the proposed amendments present significant First Amendment concerns, unwisely curtail the discretion of district judges to address matters attendant to jurors and jury deliberations, and go far beyond the interests we assume the Court intends to address.

Proposed Local Rule 47.5(B)

If amended, Local Rule 47.5(B) would state:

> Attorneys and parties to an action, or anyone acting on their behalves, are prohibited from speaking with, examining or interviewing any juror, except after obtaining leave of court granted upon motion for good cause shown. If leave of court is granted, any such communication must be (a) limited to what is admissible under Federal Rule of Evidence 606(b), (b) conducted only as specifically directed by the court, and (c) occur only in the presence of the court.

Thus, the proposed amendment prohibits *any* non-court-supervised communication with a juror, regardless of the circumstances or subject matter of the communication. The proposed amendment further limits the discretion of district judges to allow such communications by mandating that, even when authorized, they occur in the presence of the court and address only subjects admissible under Federal Rule of Evidence 606(b).

Under Fifth Circuit precedent, a district judge may require parties and their attorneys to first show "specific instances of misconduct" before they may obtain leave to interrogate an individual juror about a jury's deliberations. *Wilkerson v. Amco Corp.*, 703 F.2d 184, 185 (5th Cir. 1983); *Big John, B.V. v. Indian Head Grain Co.*, 718 F.2d 143, 149 (5th Cir. 1983). The Fifth Circuit has summarized the "very cogent reasons" for requiring such a showing before requiring jurors to submit to interrogation:

> [There are] "very cogent reasons" for requiring parties to make a showing of likely misconduct before allowing such an inquiry: protecting the jury from post-verdict misconduct and the courts from time-consuming and futile proceedings; reducing the "chances and temptations" for tampering with the jury; and increasing the certainty of civil verdicts. We continue to decline to "denigrate jury trials by afterwards ransacking the jurors in search of some ground ... for a new trial" unless a preliminary showing is made.

Wilkerson, 703 F.2d at 185-86 (quoting *O'Rear v. Fruehauf Corp.*, 554 F.2d 1304, 1309 (5th Cir. 1977)).

The proposed amendment to Local Rule 47.5(B) goes much further than precedent would allow. First, it does not just protect against "ransacking" of jurors – it prohibits a party or attorney from even "speaking with" any juror without leave of court. This prohibition would proscribe conversations unrelated to the jury's deliberations or even any other aspect of a trial; it would proscribe conversations years after the trial is over. Taken to its logical extreme, the rule even prohibits one from saying hello to a juror, years after trial. Surely there is no justification for such an overbroad – indeed, all-encompassing – prohibition of speech.

Even with leave of court, the proposed amendment restricts the content of any communication to "what is admissible under Federal Rule of Evidence 606(b)" – that is, to whether "extraneous prejudicial information was improperly brought to the jury's attention"; whether "an outside influence was improperly brought to bear on any jury"; and whether "a mistake was made in entering the verdict on the verdict form." The proposed amendment also directs that communications may be exchanged "only as specifically directed by the court" and "only in the presence of the court." These additional restrictions are far more than necessary, absent special circumstances, to protect jury deliberations from unwarranted interrogations by parties and their attorneys. Absent special circumstances, any additional restriction cannot be said to be "narrowly tailored to prevent real threats to the administration of justice." *United States v. Brown*, 250 F.3d 907, 921 (5th Cir. 2001) ("The only restriction placed on such interviews is the court's instruction that jurors may not be interviewed concerning juror deliberations absent a special order from the judge.").

These additional restrictions divest district judges, who otherwise have broad discretion to manage their cases, of the authority to handle such matters as they deem proper, *see United States v. Harrelson*, 713 F.2d 1114, 1117 (5th Cir.1983) ("A federal judge is not the mere moderator of a jury trial; he is its governor for the purpose of insuring its proper conduct. As such, he exercises a broad discretion, based on the law and on his own and common experience, over many of its aspects: the admission and exclusion of evidence, the extent of examination and cross-examination, and the handling of the jurors. It is for him to decide, for example, whether or not they are to be sequestered, what restrictions are to be placed on their access to outside information, and the like.") (citations omitted); and deny jurors, who may wish to talk to a party about any number of things, of their freedom of speech, *see Brown*, 250 F.3d at 921 (5th Cir. 2001) ("If jurors voluntarily ... consent to interviews on matters other than jury deliberations, so be it.").

Given that the proposed amendment would impose a greater burden on speech, without an apparent justification, at the expense of district judges' autonomy and jurors' own freedom of speech, the Court should decline to adopt it.

Proposed Local Rule 47.5(C)

If amended, Local Rule 47.5(C) would state:

> No person may make repeated requests to interview or question a juror after the juror has expressed a desire not to be interviewed. Under no circumstances, except as provided in Federal Rules of Evidence 606(b)(2) in an inquiry conducted under court supervision, may a juror disclose any information concerning:
>
> (1) Any statement made or incident that occurred during the juror's deliberations;
> (2) The effect of anything on that juror's or another juror's vote;
> (3) Any juror's mental processes concerning the verdict; or
> (4) The specific vote of any juror other than the juror being interviewed.

Although the Fifth Circuit has upheld court orders that prohibit or restrict the public's communications with jurors in individual cases, *see, e.g., Brown*, 250 F.3d 907; *United States v. Cleveland*, 128 F.3d 267 (5th Cir. 1997), it has never approved such prohibitions or restrictions in the form of a mandatory rule of general applicability. Even in cases in which it has upheld court orders, it has placed the prohibition or restriction in context, finding that the justifying reasons are "obvious and compelling." *E.g., Brown*, 250 F.3d at 916 ("Evidence supporting the court's fears of an imminent and serious threat from both these sources was abundant. Two of the defendants had been charged in the indictment and pled guilty to witness tampering and another to misprision of a felony. This particular prosecution involved charges of interfering with state

judicial processes through attempted bribery of a judge, attempting illegally to terminate a federal investigation, and influencing a court-appointed special master. ...").

The proposed amendment to Local Rule 47.5(C), by contrast, establishes a rule of general applicability that not only restricts the juror's right to speak but the news media's and the public's respective rights to gather and receive information. *E.g., In re Express-News Corp.*, 695 F.2d 807, 808 (5th Cir. 1982) (invalidating local rule that prohibited any person from interviewing a juror without leave of court; "The first amendment's broad shield for freedom of speech and of the press is not limited to the right to talk and to print. The value of these rights would be circumscribed were those who wish to disseminate information denied access to it, for freedom to speak is of little value if there is nothing to say."). A rule that thus restricts the right to speak or publish information is a prior restraint and is presumptively unconstitutional. *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 559 (1976) ("prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights"); *New York Times Co. v. U.S.*, 403 U.S. 713, 714 (1971) (holding that the government had not met "heavy burden" required to justify prior restraint against the media on national security grounds).

"The operation of the ... judicial system itself ... is a matter of public interest, necessarily engaging the attention of the news media." *Landmark Communications v. Virginia*, 435 U.S. 829, 839 (1978). "The public has no less a right under the first amendment to receive information about the operation of the nation's courts than it has to know how other governmental agencies work and to receive other ideas and information." *In re Express-News Corp.*, 695 F.2d 807, 809 (5th Cir. 1982). The news media plays an essential role in educating the public – and thereby facilitating the public scrutiny that guards against miscarriages of justice:

> A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.

Sheppard v. Maxwell, 384 U.S. 333, 350 (1966). *See also Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 492 (1975) ("With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice."). Moreover, particularly in controversial cases, the news media, by giving the public an opportunity to hear from jurors willing to speak, helps the public understand and accept the outcome.

Any such restriction must be necessitated "by a compelling governmental interest" and "narrowly tailored to serve that interest." *Id.* at 808-809.

Although protecting jurors from harassment is a "legitimate" (notably, not "compelling") interest in this Circuit, *see Brown*, 250 F. 3d at 921, there is no evidence that the proposed amendment is narrowly tailored to serve that interest. The proposed amendment does not allow, for instance, for the passage of time or for the discovery of new information that may bear on the juror's decision. A juror who expresses a desire not to be interviewed immediately after a trial might, after the passage of time, be open to such a request. By prohibiting, without exception, "repeated requests to interview a juror," the proposed amendment unnecessarily chills protected communications.

There is no reason the interest in protecting jurors from harassment cannot be served by direct instructions to the jury. District judges already instruct juries that "you have no obligation to speak" and, in cases warranting it, "absent a special order from me, no juror may be interviewed by anyone concerning the deliberations of the jury." *See Cleveland*, 128 F.3d at 269. Such instructions, delivered directly, arguably are more effective at informing jurors and the news media of their respective rights and the limits of their communications than a local rule, which may go unnoticed, would be.

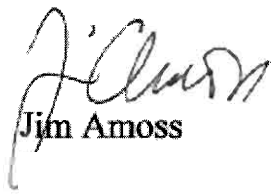
In addition, the proposed amendment, which purports to apply to "any person," is unenforceable as applied to "any person" not subject to this Court's jurisdiction. It thus risks unfairly restricting only the local news media's access to information.

Finally, and perhaps most importantly, while the Fifth Circuit has upheld restrictions on jurors' freedom to speak on "*the particulars of jury deliberations,*" *see Cleveland*, 128 F.3d at 270 (quoting *Harrelson*, 713 F.3d at 1118), the proposed amendment would go much further by prohibiting a juror from disclosing "any information" regarding "the effect of anything" on that juror's vote, or the juror's own "mental processes" regarding the verdict. The proposed amendment cannot be reconciled either with this Court's precedent or a juror's own freedom of speech. *See, e.g., In re Express-News Corp.*, 695 F.2d at 810 ("Absent good cause for restraint, petit jurors are free to discuss their service if they choose to do so … While a statute makes it unlawful to record or listen to the proceedings of a grand or petit jury, the statute does not forbid jurors to speak after their deliberations are completed. The Federal Rules of Criminal Procedure forbid grand jurors to 'disclose matters occurring before the grand jury,' but also provide, 'No obligation of secrecy may be imposed on any person except in accordance with this rule.'") (citations omitted). Worse, its existence will chill the speech of jurors who may otherwise be willing and anxious to discuss their experiences as a juror with the public; many jurors may question their ability to determine what constitutes their "mental processes" and will therefore elect not to speak at all rather than risk a court's sanction.

Because the proposed amendment is not narrowly tailored, presents problems of enforceability, and is overbroad, this Court should decline to adopt it.

Given the foregoing, this Court should eschew rules of general applicability for interviews of jurors and leave such matters in the sound discretion of district judges, who may implement appropriate controls on a case-by-case basis. We hope this Court, after careful consideration, will decline to adopt the proposed amendments to Local Rule 47.5.

Sincerely,

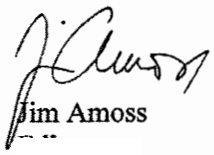


Jim Amoss

This letter follows my letter to you of August 18, 2014 in which I commented, on behalf of NOLA.com | The Times-Picayune, regarding the proposed amendments to the local rules related to interviewing jurors.

For clarification, although my letter specifically cites Local Civil Rule 47.5, the text of the proposed amendments to Local Rule 47.5(B) and (C) is identical to the text of the proposed amendments to Local Criminal Rule 23.2(B) and (C), and my comments were intended to address both.

Sincerely,



Jim Amoss

Dear Mr. Blevins:

On behalf of the U.S. Attorney's Office for the Eastern District of Louisiana, I offer the following comment to the proposed amendment to Rule 23.2(A) of the Local Criminal Rules for the Eastern District of Louisiana.

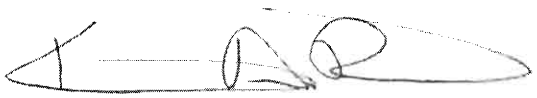
The proposed amendment states, in pertinent part: "A petit or **grand juror** has no obligation to speak to any person about any case and may refuse all interviews or request for comments." LCrR 23.2(A) (Proposed Amendment) (emphasis added). As currently stated, the proposed amendment places discretion in the hands of a grand juror regarding whether to speak about any case.

However, a grand juror's ability to reveal the grand jury's secrets is constrained by Rule 6(e)(2)(B)(i) of the Federal Rules of Criminal Procedure which prohibits a juror from disclosing any matter occurring before the grand jury. While there are exceptions to the general rule (see Fed. R. Crim. P. 6(e)(3)(A-D)), the prohibition against disclosure of the grand jury's deliberations or any grand jury vote is absolute. See Fed. R. Crim. P. 6(e)(3)(A).

Instead, the Office suggests that you delete the words "or grand" from the proposed amendment, so that it reads: "A petit juror has no obligation to speak to any person about any case and may refuse all interviews or request for comments."

Thank you for your consideration.

Sincerely,



KENNETH ALLEN POLITE, JR.

Your Honors:

We write in response to proposed Local Criminal Rule 23.2. In particular, this letter addresses sections B and C of the proposed rule.[1]

As we understand the proposed rule, LCrR 23.2(A) reasserts a familiar rule: no juror has an "obligation to speak to any person about a case," and each juror is free to "refuse all interviews or requests for comment." Section B of the proposed amendment addresses the post-verdict juror contact by attorneys and parties to the litigation. Part C prohibits any person from making"repeated requests to interview or question a juror after the juror has expressed a desire not to be interviewed." Section C also directly restricts a juror's right, post-verdict,to disclose information about the deliberations. For the reasons set forth below, we respectfully urge the Court to reconsider sections B and C of the proposed rule.

[1] We write in our individual capacities. While we are all professors at Tulane Law School, the views we express are our own; we do not speak for Tulane Law School or for Tulane University.

I. Comments on Section Bof the Proposed Rule

A. Section B is Overbroad; It Prohibits All Post-Verdict Communication with Jurors, Regardless of the Content or Context of that Communication

Section B of the proposed amendment would prohibit"attorneys and parties to an action ... from speaking with, examining, or interviewing any juror, except after obtaining leave of court granted upon motion for good cause shown." The plain language of this provision constitutes a vast, perpetual restraint on speech. It prevents attorneys and parties from *any* communication with former jurors, in all contexts and about all subjects; the rule applies regardless of whether the contact is at a social event, a parent-teacher conference, or a business meeting, and regardless of whether the communication is related to the former trial. Thus, the plain language of the proposed amendment could work significant harm upon the lives and livelihoods of attorneys, jurors and parties, long after a verdict becomes final.

Imagine, for example, that after the conclusion of a trial, a juror finds him or herself teaching one of the trial attorney's children. As written, proposed LCrR 23.2(B) would preclude the child's attorney-parent from "speaking with" the former juror "without leave of court." Further, the rule would require that the communication between the attorney-parent and the teacher-juror be "limited to what is admissible under Federal Rule of Evidence 606(b)" and "occur only in the presence of the court." We assume that the Court did not intend such a result. Accordingly, we respectfully suggest that the Court amend the proposed rule so that it accurately reflects the Court's focus on post-verdict communicationsabout the jury's deliberations.

B. Section B is Unduly Restrictive

Even if Section B is amended so that it addresses only those post-verdict communications related to jury deliberations, we respectfully note our concern that Section B is unduly restrictive. Section B requires judicial consent before any attorney engages in any post-verdict juror contact. Moreover, the second sentence of section (B) restricts the content of that post-verdict contact to "what is admissible under Federal Rules of Evidence 606(b)." It alsorequires that any interview be "conducted only as specifically directed by the court, and occur only in the presence of the court." We respectfully suggest that such a rule unduly restricts counsel and jurors and imposes an unnecessary burden upon trial courts.

Section B suggests a fundamental distrust of the attorneys who appear before the court. If a juror indicates that he or she does not wish to speak with counsel, counsel has no right to harass, intimidate, or badger the juror. However, absent a case-specific reason to prohibit counsel from post-verdict contact with former jurors, Section B operates as a broad and sweeping prior restraint, unsupported by any specific showing of good cause.This blanket prohibition on post-verdict communication impinges upon counsel's free speech rights and may inhibit counsel in the full exercise of his or her Sixth Amendment obligations. Further, Section B inhibits trial attorneys' ability to improve their trial practice by speaking with the jurors who watched and assessed their trial performance. For all of these reasons, we respectfully urge the Court to amend the proposed rule by rewriting Section B to reflect the post-verdict rules suggested in the Principles for Juries and Jury Trials drafted by the American Bar Association.

Principles 18(c) – (e) of the ABA's Principles for Juries and Jury Trialsstate that:

> C. At the conclusion of the trial, the court should instruct the jurors that they have the right either to discuss or to refuse to discuss the case with anyone, including counsel or members of the press.
>
> D. Unless prohibited by law, the court should ordinarily permit the parties and their counsel to contact jurors after their terms of jury service have expired, subject, in the court's discretion, to reasonable restrictions.[2]
>
> E. Courts should inform jurors that they may ask for the assistance of the court in the event that individuals persist in questioning jurors, over their objection, about their jury service.[3]

The ABA principles fully protect jurors' rights to be free from post-verdict harassment. At the same time, they protect the free speech and association rights of counsel and the parties. Indeed, with its explicit advice to jurors about their right to judicial recourse in the event of harassment, the ABA formulation deters such harassing conduct. Moreover, the ABA encourages the use of judicial discretion in formulating case-specific restrictions upon post-verdict contact. Such a rule properly recognizes that the individual trial judge is in the best position to

[2] We have inserted the term "and their counsel" to clarify the intent of 18(D).

[3] ABA Principles for Juries and Jury Trials, Principles 18(C) – (E), available online at http://www.americanbar.org/content/dam/aba/migrated/2011_build/american_jury/final_commentary_july_1205.authcheckdam.pdf (last visited August 18, 2014).

determine the need for additional restrictions. For all these reasons, we urge the Court to adopt the formulation set forth in Principles 18(c) – (e) of the ABA's Principles for Juries and Jury Trials.

II. Comments on SectionC of the Proposed Rule

A. Section C's Prohibition on Repeated Requests for Post-Verdict Contact with Jurors Should be Supplemented

The first sentence of Section C provides that "No person may make repeated requests to interview or question a juror after the juror has expressed a desire not to be interviewed." We fully support this position. We further urge the Court to add the following language: "If counsel knows that a person has made such repeated requests after a juror has expressed a desire not to be interviewed, counsel shall promptly alert the court and all other parties to the trial."Such a statement would strengthen the Court's effort to protect jurors from repeated requests for post-verdict contact. It would also formalize the expectation that counsel shares in the responsibility to protect jurors from harassment. Accordingly, we respectfully urge the Court to add the requested language to Section C.

B. Section C is Overbroad; It Inhibits Jurors' Free Speech and Prohibits Jurors from a Wide Range of Post-Verdict Communications, Including Communications with Their Spiritual Advisors, Counsel, and Mental Health Providers

Section C of the proposed amendment unduly restricts a juror's right to free speech following their jury service. As drafted, Section C constitutes a blanket prohibition that preventspost-verdict jurors from speaking to anyone about their jury deliberations without prior judicial consent and court supervision. In particular, the proposed rule provides:

> Under no circumstances, except as provided in Federal Rules of Evidence 606(b)(2) in an inquiry conducted under court supervision, may a juror disclose any information concerning:
>
> (1) Any statement made or incident that occurred during the jurors' deliberations;

(2) The effect of anything on that juror's or another juror's vote;

(3) Any juror's mental processes concerning the verdict or indictment; or,

(4) The specific vote of any juror other than the juror being interviewed.

We have three concerns about this part of the proposed rule. First, as written, the rule would forbid a juror who has completed his or her service from reporting to anyone, including the court, misconduct that occurred during deliberations. The only exception would arise if the juror was answering "an inquiry conducted under court supervision." However, if the rule prohibits post-verdict jurors from *sua sponte* disclosures, how would a court ever be in a position to initiate such an inquiry?

Second, the proposed rule prevents a juror from speaking, post-verdict with*anyone*, including a priest, a psychologist, a lawyer, or loved one about their experience in jury deliberations. Thus, the proposed rule may deter the most conscientious citizens from serving on a jury. As this Court knows, jury service requires scrupulous compliance with the juror's legal obligations in the context of a fact-intensive criminal proceeding. In the course of deliberations, conscientious jurors may learn a great deal about their own biases, instincts, and thought-processes. Jurors who work in the legal system or in a field related to the subject of the trial may find themselves rethinking their personal and professional choices. Jurors who sit on a case that contains evidence of violent crime may end their jury service feeling troubled - or even traumatized - by graphic physical evidence or by emotionally gripping testimony. In all of these circumstances, jurors should be free to consult with their spiritual advisors, mental health providers, and loved ones. A potential juror who cares deeply about jury service might well prefer *not* to serve, if service will bar that juror both from meaningful personal reflection about the process, and from meaningful first amendment communication about this important public service.

Finally, the proposed rule prevents jurors from freely speaking to the public or the press, depriving the jurors of their rights to free speech and association and depriving the public of information about the operation of the criminal justice system. The United States Constitution promises the defendant and the community that criminal trials will take place in a public courtroom before a citizen-jury. The public nature of the jury trial right helps assure the protection of individual rights and legitimizes the outcome of criminal trials. Precluding jurors from speaking about their service suggests a fundamental mistrust of the integrity

of the jury process. It also deprives the public of valuable information about the jury system. For all these reasons, we respectfully urge the Court to delete the second sentence of Section C of the proposed rule.

III. Conclusion

We share the Court's deep respect for the jury's role and are appreciative of the Court's interest in soliciting comments about proposed LCrR 23.2. We respectfully submit that, as written, proposed LCrR 23.2 is overly broad and unduly infringes upon the constitutional rights of the parties, attorneys and jurors. We hope that our comments will be of use to the Court as it considers this proposed change to the local rules of criminal procedure.

Sincerely,

Pamela R. Metzger

Jane Johnson

Janet C. Hoeffel

Herbert Larson

Katherine M. Mattes

Stacy Seicshnaydre

George Marion Strickler, Jr.

Tania Tetlow

Keith Werhan