

Rule 606 Competency of Juror as Witness

(a) At the [T]rial. A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) Inquiry into [V]alidity of [V]erdict. Upon an inquiry into the validity of a verdict, including a sentencing verdict pursuant to 42 Pa. C.S.A. § 9711 (relating to capital sentencing proceedings), a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions in reaching a decision upon the verdict or concerning the juror's mental processes in connection therewith, and a juror's affidavit or evidence of any statement by the juror about any of these subjects may not be received. However, a juror may testify concerning whether prejudicial facts not of record, and beyond common knowledge and experience, were improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.

Comment

Pa.R.E. 606(a) is identical to F.R.E. 606(a). Section (a) is contrary to the traditional common law rule and Pennsylvania law. See 6 Wigmore, *Evidence* § 1910 (Chadbourn rev. 1976); 1 McCormick, *Evidence* '68 (4th ed. 1992); *Howser v. Commonwealth*, 51 Pa. 332 (1866) (jurors are competent witnesses in both civil and criminal cases); *Commonwealth v. Sutton*, 171 Pa. Super. 105, 90 A.2d 264 (1952). Since the adoption of the Federal Rules, most states have enacted or promulgated provisions consistent with the substance of section (a). See 27 Wright & Gold, *Federal Practice and Procedure* § 6071 nn. 59-73 (1990). Of course, the calling of a juror as a witness will be a rarity; voir dire will generally expose a juror's knowledge of facts relevant to a case, which will usually mean disqualification of the juror for cause.

Note that section (a) bars a jury member from testifying "before that jury in the trial of the case in which the juror is sitting." The phrase "before that jury" did not appear in the preliminary draft of F.R.E. 606(a); its addition leads to the conclusion that a juror may testify outside the presence of the rest of the jury on matters occurring during the course of the trial. 3 Weinstein & Berger, *Evidence* [[para]] ¶ 606[02], at 606-18; see also *United States v. Robinson*, 645 F.2d 616 (8th Cir. 1981) (holding that on motion for mistrial, F.R.E. 606 did not bar juror from testifying, out of presence of other jurors, concerning his observation of accused being escorted from court house under guard); *United States v. Day*, 830 F.2d 1099 (10th Cir. 1987) (stating that during course of trial, juror could have been called to testify regarding whether bias arose from remarks between juror and investigating F.B.I. agent). Current Pennsylvania law is in accord. See *Commonwealth v. Santiago*, 456 Pa. 265, 318 A.2d 737 (1974) (jurors permitted to

testify at hearing in chambers during trial on question of whether they received improper prejudicial information).

Pa .R.E. 606(b) is based upon F.R.E. 606(b) with certain language and organizational changes that do not alter substance. The reference to sentencing verdicts in capital cases does not appear in the Federal Rule; it reflects existing Pennsylvania law. See *Commonwealth v. Williams*, 514 Pa. 62, 522 A.2d 1058 (1987). The word "indictment," which is in the Federal Rule, has been removed throughout Pa.R.E. 606(b) because the indicting grand jury has now been abolished throughout Pennsylvania pursuant to Article I, § 10 of the Pennsylvania constitution and 42 Pa. C.S.A. § 8931(b).

For simplification, the Federal Rule language "as influencing the juror to assent to or dissent from," used in connection with effects upon a juror's mind or emotions, has been deleted in favor of the phrase "in reaching a decision upon." No substantive change is intended.

The sentence structure of the Federal rule has been changed. The two exceptions to juror incompetency appear as the second sentence of Pa.R.E. 606(b), and the provision concerning juror affidavits and evidence of juror's statements, with minor language differences, has been moved from the end of the section and placed at the end of the first sentence, since it is to the subjects thereof that it is relevant.

Finally, the words "extraneous prejudicial information" in the first exception of the Federal Rule have been replaced by the phrase "prejudicial facts not of record and beyond common knowledge and experience." This makes clear that the exception is directed at evidence brought before the jury which was not presented during the trial, and which was not tested by the processes of the adversary system and subjected to judicial screening for a determination of admissibility. The qualification of "common knowledge and experience" is a recognition that all jurors bring with them some common facts of life. See *generally*, 27 Wright and Gold, Federal Practice and Procedure: Evidence, § 6075 (1990).

Like its Federal counterpart, the first sentence of Pa.R.E. 606(b), making jurors incompetent to testify about the matters referred to therein, is designed to protect all "components of [a jury's] deliberations, including arguments, statements, discussions, mental and emotional reactions, votes and any other feature of the process." See F.R.E. 606(b) advisory committee notes. This is consistent with Pennsylvania law. See *Commonwealth v. Pierce*, 453 Pa. 319, 309 A.2d 371 (1973); *Commonwealth v. Zlatovich*, 440 Pa. 388, 269 A.2d 469 (1970); *Commonwealth v. Patrick*, 416 Pa. 437, 206 A.2d 295 (1965).

Pennsylvania cases have also recognized the first two exceptions to juror incompetency set forth in the second sentence of Pa.R.E. 606(b). ***Pratt v. St. Christopher's Hospital*, 866 A.2d 313 (Pa. 2005); [*Carter v. U.S. Steel Corp.* 529 Pa. 409, 604 A.2d 1010 (1992).]** *Commonwealth v. Williams*, *supra*; *Welshire v. Bruaw*, 331 Pa. 392, 200

A.2d 67 (1938). Note that when jurors are permitted to testify about facts not of record and outside influences, they may not be questioned about the effect upon them of what was improperly brought to their attention. See [*Carter, supra;*] 3 Weinstein & Berger, *Evidence* [[para]] ¶ 606[5] at pp. 606-53--606-55. **Pa.R.E. 606(b) does not recognize the third exception to juror incompetency that appears in F.R.E. 606(b)-- permitting juror testimony about whether there was a mistake in entering the verdict onto the verdict form. Pennsylvania law deals with possible mistakes in the verdict form by permitting the polling of the jury prior to the recording of the verdict. If there is no concurrence, the jury is directed to retire for further deliberations. See Pa.R.Crim.P. 648(G); *City of Pittsburgh v. DiNardo*, 410 Pa. 376, 189 A. 2d 886 (1963); *Barefoot v. Penn Central Transportation Co.*, 226 Pa. Super. 558, 323 A.2d 271 (1974).** 606(b) does not purport to set forth the substantive grounds for setting aside verdicts because of an irregularity.