

**KENTUCKY BAR ASSOCIATION**  
**Ethics Opinion KBA E-220**  
Issued: July 1979

***This opinion was decided under the Code of Professional Responsibility, which was in effect from 1971 to 1990. Lawyers should consult the current version of the Rules of Professional Conduct and Comments, SCR 3.130 (available at <http://www.kybar.org>), before relying on this opinion.***

**Question:** May a prosecutor secure written affidavit from jurors in a criminal case regarding their feelings as to the accused's penalty with the specific intent to use this information at the sentencing phase of the case?

**Answer:** No.

**References:** RCr 9.84, 11.02; EC 7-30, 7-32

**OPINION**

It is very important to the accused and the Commonwealth that all safeguards of the ancient law concerning jurors and their deliberations be sealed. It is impossible to keep the fountains of justice clean and pure unless the jury is free from contamination and influence. Looking into the minds of the jury after a criminal verdict should not be tolerated except to determine that the verdict was not made by lot.

Under RCr 9.84 it is the juror's prerogative or directive to fix the penalty and punishment for a criminal offense, except where the penalty has been set by law, in which case it should be fixed by the Court. Of course if the defendant pleads guilty then the court may fix the penalty, except in cases involving offenses punishable by death.

In addition under RCr 11.02 sentencing should be imposed without unreasonable delay, and before imposing the sentence the Court should afford the Defendant and his counsel an opportunity to make statements on behalf of the Defendant and if the sentence is fixed by the Court to present any information in mitigation of punishment.

It is important to note that the Rules do not allow the Commonwealth the same latitude as the Defendant at sentencing. We do not understand why the prosecutor or the Court should be interested in the juror's opinion regarding a penalty previously set by the jurors when they rendered the verdict of guilty and set the penalty. Since the courts ordinarily and routinely sentence a Defendant based on the verdict by the jury we can see no need of affidavits by the jurors concerning the punishment or penalty they have previously set. We do not believe that the Commonwealth or the Defendant should be allowed to probe the mind of the jury concerning their intent or feelings. Therefore, our answer to the question is no.

If the Court considers probation or the revocation of probation, then this is a different matter and each party may offer proof.

However, it is doubtful that either party should be allowed to delve into the mental gyrations of the jury. The judiciary and the Bar Association should be protective of the rights of jurors to make decisions free from interference of the parties before or after a verdict.

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***Note to Reader***

*This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530 (or its predecessor rule). The Rule provides that formal opinions are advisory only.*