ETHICAL AND LOCAL RULE RESTRICTIONS ON INVESTIGATIONS OF POTENTIAL JURORS AND POST-TRIAL CONTACT WITH JURORS

by

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Presented at

American Bar Association
Section of
Intellectual Property Law
December 5-7, 1995

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I. INTRODUCTION AND SUMMARY

Attorneys or litigants who wish to investigate prospective jurors or interrogate jurors after trial must reckon with a hodgepodge of confusing, often conflicting, regulations. From ethical canons and opinions, to local court rules and common law authorities, to the custom of the individual trial judge, the "law" pertaining to such communications is fraught with uncertainty. It is not enough simply for counsel to satisfy himself that a proposed juror contact is permitted by a specific rule of ethics, because that same conduct may violate either a published rule of the court, or even an unpublished standing order of the trial judge. This paper surveys the ethical and legal considerations governing counsel's pre-trial investigation of veniremen, and post-trial communications with jurors.

Prior to trial, the general rule is that an attorney may not contact, directly or indirectly, any venireperson. Such contact is not just unethical; in federal court, it could also be illegal. Both the ethical rules as well as many of the local court rules extend this prohibition to include either the "families" or "relatives" of these individuals. Some courts also prohibit attorneys from contacting "friends," "associates," or "acquaintances" of veniremen. If counsel does attempt to investigate a potential juror without contacting one of these individuals, counsel must still be careful not to conduct an investigation which is either vexatious or harassing.

Once the trial has ended and the jury has been discharged, the rules concerning attorney contact are somewhat more relaxed. Although a judge in any case can prohibit counsel from contacting the jurors, most courts allow some limited post-verdict communication. Many federal courts have implemented means for controlling this inquiry. In most courts, counsel must first obtain the permission of the trial judge before attempting to contact a juror. Some courts also demand that counsel demonstrate "good cause" as to why they should be granted permission to contact a juror. Other courts strictly control the conduct of the juror questioning itself, from approving the substance of the questions to be asked the jurors, to requiring that the questions be asked in court.

II. LIMITATIONS ON PRE-TRIAL INVESTIGATIONS OF POTENTIAL JURORS

Many attorneys believe that the more they can learn about the members of the venire, the better they can be prepared for jury selection. As wise as this view may be, counsel must proceed with extreme caution in conducting an investigation. Both ethically and by local rule, the conduct of such investigations is strictly controlled.

A. Ethical Restrictions

Counsel may generally conduct an investigation of a prospective juror without violating the rules of ethics.[1] There are, however, two significant limitations on such an investigation. First, counsel may not, in the course of their investigation, have any direct or indirect communications with a member of the venire. The Disciplinary Rules of the ABA's Model Code of Professional Conduct ("Model Code"), which has been adopted by most federal district courts,[2] provides in relevant part that:

> Before the trial of a case a lawyer connected therewith shall not communicate with or cause another to communicate with anyone he knows to be a member of the venire from which the jury will be selected for the trial of the case.[3]

The Informal Ethics opinions have also reiterated this view. The ABA has opined that it is unethical for a district attorney to transmit questionnaires to prospective jurors who have been called for service in criminal court.[4] The ABA concluded that "[a] lawyer must never converse privately with the jurors about a case; and both before and during the trial, he should avoid communicating with them, even as to matters foreign to the cause."[5]

Second, an attorney is prohibited from conducting, or causing another to conduct, a "vexatious or harassing investigation of either a venireman or a juror."[6] Both of these limitations apply equally to "family members" of the potential jurors.[7]

Reading these two provisions together, therefore, an attorney may conduct an ethical investigation of a prospective juror, provided that the investigation: (1) involves no direct or indirect contact with either the prospective juror, or any member of the prospective juror's family, and (2) is not "vexatious" or "harassing." The district courts strictly enforce the no pre-trial contact rule; any violation by counsel of this rule may lead to serious consequences.

Such was the case for a South Carolina plaintiff's attorney who hired a private investigator to question prospective jurors and members of the prospective jurors' families prior to their reporting for jury service.[8] During jury selection in a personal injury action, the lawyer used the information he obtained from the investigator to select members of the panel.[9] When several individuals who had been contacted complained

to the trial judge, the court issued an order to show cause why counsel should not be held in criminal contempt for obstructing the administration of justice.[10] The court thereafter convicted counsel of this charge.

On appeal, defendant argued that his conviction should be reversed because his contact of the veniremen did not occur in the presence of the court.[11] In support, defendant relied upon the decision in *United States v. Welch*,[12] wherein the Third Circuit reversed a criminal contempt conviction arising from an attorney's improper interview with several prospective jurors because the nearest such act had occurred at least fourteen miles away from the courthouse.[13]

Rejecting this analogy and affirming the criminal conviction, the Fourth Circuit explained that the attorney's obstruction had indeed occurred in the "presence" of the court:

> If [the attorney] had merely ordered the investigation and contact of prospective jurors, he might rely upon *Welch*. However, he brought this information into the presence of the court and used it to select a jury. The use of ill gotten jury information in the court's presence resulted in a disruption in the administration of justice and is punishable as a criminal contempt.[14]

The Fourth Circuit also reiterated that defendant's conduct was in violation of the disciplinary rules of the State of South Carolina. Subsequent to his conviction, the attorney was disbarred. *See In re Warlick*.[15] In addition, defendant's law partner, who had prepared the questions for use by the investigator under the mistaken belief that his conduct was ethical, was publicly reprimanded for his role in the investigation. *See In re Rivers*.[16]

Similarly, in *State of Louisiana v. Bates*,[17] defendant was convicted of aggravated rape, and was sentenced to 30 years at hard labor.[18] Defendant's conviction was obtained with a jury whose members had been contacted by the prosecution before trial by a letter and questionnaire. These questionnaires were completed and returned to the prosecution for its exclusive use during jury selection.[19] The prosecution collected this information without defendant's knowledge.[20]

The Supreme Court of Louisiana reversed and vacated the conviction, and remanded the matter for a new trial.[21] The court explained that:

> Although men may differ widely as to the merits of the jury system, yet it would seem apparent that unauthorized communications with jurors, such as the one here under consideration, whether by private litigants or by public officials are not calculated to increase respect for the system nor to eliminate its faults.[22]

The Court concluded that: "[s]ecret preliminary questioning is unauthorized, and in our opinion, should not be encouraged. It is open to the danger of many serious abuses and trenches upon the broad ground of fair trial."[23]

B. Local Rule Restrictions

Of the 94 federal district courts in the United States, 37 have promulgated local rules concerning pre-trial communications with prospective jurors.[24] Most of these local rules simply forbid, without condition, any direct or indirect contact of counsel with a prospective juror. For example, the local rules of the Northern District of Ohio provide in no uncertain terms that:

> [c]ontact prior to trial by any counsel, party, or any person acting on behalf of any counsel or party with any prospective juror is absolutely forbidden. Noncompliance with this directive . . . . will lead to [a] contempt of Court citation and other appropriate sanction.[25]

The Middle District of Tennessee instructs that before a trial, "an attorney shall avoid conversing or otherwise communicating with a juror on any subject, whether pertaining to the case or not."[26] Likewise, the local rules of the Middle District of North Carolina prohibit attorneys from

> any extrajudicial contact or communication, either directly or indirectly, with a grand juror, member of the petit jury venire or panel which may reasonably have the effect of influencing, or which is intended to influence, the grand juror, potential petit juror, or sitting petit juror. [27]

While the local federal court rules are clear in their prohibition on contacting or communicating directly with a prospective juror, they are decidedly less clear as to what other people may or may not be contacted during counsel's pre-trial investigation. In 12 federal district courts, the ban on pre-trial communications extends to members of the juror's "families" or their "immediate families".[28] Only two of these courts, however, provide any definition for these terms. In one court, the term "immediate family" is defined as the juror's "spouse, children, mother, father, brother, or sister."[29] Another court defines "families" more broadly to include "natural, adopted and stepchildren, brothers, sisters, nieces, nephews, aunts, uncles, parents, grandparents and spouses."[30]

Significantly, several other courts extend the ban on pre-trial contact beyond the prospective juror's family. Two courts, for example, prohibit counsel from contacting any "friend" or "associate" of a prospective juror.[31] Another court bans pre-trial contacts with a prospective juror's "acquaintances."[32] None of these courts defines what any of these terms means.

III. LIMITATIONS ON POST-TRIAL CONTACTS WITH JURORS

A. Common Law Restrictions

Post-verdict interviews of jurors by or on behalf of counsel are largely disfavored by the federal judiciary, except in "extreme circumstances."[33] As early as 1915, the Supreme Court condemned the practice of unbridled post-trial questioning of jurors in civil cases by litigants or their counsel.[34] The Fourth Circuit has warned that "[h]e who makes studied inquiries of jurors as to what occurred acts at his peril, lest he be held as acting in obstruction of the administration of justice."[35] Numerous other courts have similarly denounced post-verdict juror interviews by counsel as being "reprehensible" and "unethical.[36] One district court has stated flatly: "this Court does not permit the disgusting practice of unbridled interrogation of jurors about their deliberations."[37]

The federal courts have identified a number of interests which they have sought to protect by limiting post-verdict juror questioning. First and foremost, the judiciary wants to protect jurors from harassment by a losing party.[38] Shielding jurors from counsel's prying questions, many courts opine, will foster open debate and discussion during the jury's deliberations.[39] Second, many courts believe that limiting post-trial contact with litigants will help to increase the certainty and finality of the jury's verdict, "lest judges 'become Penelopes, forever engaged in unravelling the webs they wove.'"[40] Third, some courts wish to reduce the possibility of jury tampering and intimidation.[41] Fourth, courts want to reduce the number of meritless post-trial motions by unsuccessful litigants who, through their post-verdict questioning of the jury, hope to discover some basis for challenging the result.[42] Courts that have restricted post-trial juror questioning by parties or their representatives have done so on the basis of some or all of these considerations.[43]

In the context of civil litigation, the issue of whether post-verdict juror questioning will be allowed usually arises when counsel seeks to use evidence obtained from one or more jurors as grounds for a new trial. In *Simmons First Nat'l Bank v. Ford Motor Co*,[44] for example, plaintiff filed a motion for a new trial based upon allegedly improper jury conduct. In support of its motion, plaintiff proffered the affidavits of two jurors, each of whom had averred that in the course of the jury's deliberations, one juror had "coerced and harassed the other jurors into agreeing with her" on a defense verdict.[45]

The district court denied the motion, ruling that the affidavits were inadmissible under Fed. R. Evid. 606(b.)[46] The court instructed that "post-verdict inquiry of the jury as to their thoughts or feelings, even if confused or improper[,] is not permitted."[47]

The district court proceeded to admonish plaintiff's counsel for their post-verdict interrogation of the jurors. The court stated that:

> We are constrained to point out that the conduct of attorneys for plaintiffs in interviewing the jurors as to

> matters transpiring in the jury room was improper and is subject to criticism.[48]

The district court explained that although the matter was civil in nature, counsel, in accordance with the ABA's Standards Relating to the Administration of Criminal Justice, should have notified opposing counsel and the court before attempting to interview the jurors.[49] The court concluded that "[a]lthough this District does not have a specific rule on the subject, such a rule [limiting attorney contact with jurors] may be advisable."[50]

Counsel's request to interrogate jurors about alleged jury errors was also at issue in *Domeracki v. Humble Oil & Refining Co.*[51] In that case, plaintiff, a longshoreman, brought suit against a shipowner for injuries allegedly sustained while plaintiff was loading one of defendant's ships.[52] At the end of the trial, the court provided the jury with special written interrogatories. After the jury had reached its verdict, the foreperson submitted answers to these interrogatories. Mistakenly included with the interrogatory replies were two sheets of paper which the jury had apparently used as scratch paper during their deliberations.[53]

Before delivering the jury's verdict, the court notified counsel that he had "seen some figures [on the scratch paper] which would cause me to wonder whether [the jury] had followed the Court's instructions precisely."[54] The court added that "I happen to know, by that inadvertent glance at that piece of paper, how they arrived at [the verdict]. I shall have to do my best to wipe clean from my mind that information . . . ."[55] Subsequently, the jury returned a verdict in favor of plaintiff in the amount of $270,982.[56]

Defendant moved for a new trial on the basis that the jury had not followed the court's instructions pertaining to damages.[57] The district court denied the motion, and the Third Circuit affirmed. The appellate court explained as follows:

> 'mistake of the testimony, misapprehension of the law, error in computation, irregular or illegal methods of arriving at damages, unsound reasons or improper motives, misconduct during the trial or in the Jury Room, cannot be shown by the evidence of the jurors themselves, as the ground of disturbing the verdict, duly rendered.'[58]

The Third Circuit concluded that if evidence obtained from jurors could be used to impeach the verdict, "'the result would be to make what was intended to be a private deliberation, the constant subject of public investigation -- to the destruction of all frankness and freedom of discussion and conference.'"[59]

Similarly, in *Westmont Tractor Co. v. Touche Ross & Co.*,[60] plaintiff brought suit for failure to conduct a proper audit. A jury returned a verdict in favor of plaintiff for $5,000,000.[61] Included at the bottom of the verdict form were several computations and

language relating to how the damages figure was calculated.[62] After asking all of the jurors if they wanted the computational portion removed, the district court proceeded to cut off the bottom portion of the verdict containing the figures and requested the clerk to seal it.[63] The court refused to allow defendant to inquire of the jurors as to the content of the sealed material, characterizing such an investigation as a "'fishing expedition' for some impropriety in the deliberations . . . ."[64] The court concluded that "[t]here is no reason to permit counsel to see the content of the sealed portion of the verdict, just as there is no reason to permit them to inquire of the individual jurors as to their methods of calculation."[65]

The issue of post-verdict juror interviews also arises when trial counsel wants to obtain the jury's feedback about certain aspects of the trial in order to improve counsel's advocacy skills. Several authorities have suggested that this practice is proper. For example, in *United States v. Narciso*,[66] the district court acknowledged that ABA Formal Opinion 319 "permits post-trial discussions with jurors for self-education.'"[67] The court in *Narciso*, nevertheless, found that a prosecutor's post-trial interview with two jurors was "extremely ill advised" when post-trial motions were still pending, and the jurors may have been called as witnesses in resolving the motions.[68] As a result, the court granted defendant a new trial.[69] *See also Irving v. Bullock*, 549 P.2d 1184 (Alas. 1976) (recognizing that it might be proper for counsel to interview jurors for educational purposes).

Notwithstanding these decisions, a number of other district courts have rejected requests by an attorney to interview members of the jury for the stated purpose of improving counsel's trial skills. In *Sixberry v. Buster*,[70] plaintiff's counsel filed a motion in the district court for permission to interview jurors about "which facets of the trial influenced their verdict."[71] The district court rejected the motion. The court explained that:

> Counsel cites no cases, nor does our research disclose any cases, which permit an attorney to conduct a post-trial inquisition of jurors solely to improve the trial skills of the trial attorney.[72]

The court remarked that although the purpose of counsel in improving his trial skills was "a desirable and most laudable endeavor," nevertheless, it would refuse to grant permission for counsel to interview the jurors.[73] The court explained that "[w]e cannot and will not go against the strong and well established policy of the Federal courts . . . . which frowns on post-trial inquiries to juries in a case such as this."[74] *See also Haeberle v. Texas Int'l Airlines*, 739 F.2d 1019 (5th Cir. 1984) (First Amendment interests of losing litigants and counsel in interviewing jurors in order to improve their advocacy skills was outweighed by jurors' interest in privacy and public's interest in the administration of justice); *United States v. Driscoll*, 276 F. Supp. 333 (S.D.N.Y. 1967) (enjoining defense counsels' telephone interrogations of members of the jury, the court rejected the claim that such questioning was to improve counsel's legal abilities and concluded that the duty of zealous representation does not imply the authority to conduct

exploratory post-trial interviews of jurors); *In re Delgado*, 306 S.E.2d 591 (S.C. 1983) (self-education of lawyer is "not a good reason" to allow counsel to approach a juror after trial has ended).

Counsel, therefore, must be aware that any judge, in any court, may exercise his or her power to limit, or prohibit, litigants and their counsel from engaging in post-verdict contact with a former juror.[75] Furthermore, although it appears to be a much less frequent practice, some district courts have ordered jurors themselves not to initiate or respond to contacts with any of the litigants or their attorneys without first securing the court's permission.[76]

B. Ethical Restrictions

The federal district courts also have adopted ethical canons which govern the post-trial conduct of communications between a lawyer and juror. The Disciplinary Rules of the ABA, for example, provide that:

> After discharge of the jury from further considerations of a case with which the lawyer was connected, the lawyer shall not ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence his actions in future jury service.[77]

A similar view is espoused in the ABA's Model Code of Professional Responsibility. The Code explains as follows:

> Were a lawyer to be prohibited from communicating after trial with a juror, he could not ascertain if the verdict might be subject to legal challenge, in which event the invalidity of a verdict might go undetected. When an extrajudicial communication by a lawyer with a juror is permitted by law, it should be made considerately and with deference to personal feelings of the juror.[78]

The ABA Committee on Professional Ethics, in Formal Opinion 319, has interpreted these provisions as being harmonious with a lawyer's duty zealously to represent the client. The ABA Committee opined that "a lawyer, in his obligation to protect his client, must have tools for ascertaining whether or not grounds for a new trial exist."[79] Thus, the opinion concluded, "it is not unethical for [the attorney] to talk to and question jurors," provided that counsel does not "harass, entice, induce, or exert influence on a juror to obtain his testimony."[80]

Other organizations have followed the ABA's ethical rules on juror contact by attorneys. The Code of Trial Conduct of the American College of Trial Lawyers, for example, provides in relevant part as follows:

> it is the lawyer's right, after the jury has been discharged, to interview the jurors to determine whether their verdict is subject to any legal challenge. After discharge of the jury from further consideration of a case with which the lawyer was connected, the lawyer should not ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence his actions in future jury service.[81]

A number of states have also embraced the rationale of the ABA's ethics opinions in allowing, within reason, post-trial contact of jurors by counsel. In Connecticut, for example, the Committee on Professional Ethics, reversing an earlier ruling which had not allowed post-trial juror contact, opined that "[s]o long as care is taken to avoid embarrassment, harassment, or improper influence, lawyers may communicate with jurors after trial."[82] The Philadelphia Bar Association Professional Guidance Committee reasoned that counsel may write to jurors in a recently completed case to discuss "the case presentation and their verdict," provided that the communication did not embarrass or harass the jurors, and provided further that the trial judge who heard the case did not object.[83]

Interestingly, even though an attorney's contact of a juror after trial may comport with the applicable canons of ethics to which the courts presumably adhere, some courts nevertheless characterize the communication as "unethical."[84] This inconsistency can make for some interesting, if not illogical, results. For example, the Canons of Ethics adopted by the State of Oregon permits an attorney to ask a discharged juror non-harassing, non-embarrassing questions about the case.[85] Nevertheless, the Oregon state court rules, as well as the rules of the U.S. District Court for the District of Oregon, both prohibit an attorney from having any post-trial contact with a juror.[86] Thus, even though a contact with a juror may be ethical according to the disciplinary rules, because the conduct violates a court rule, it is unethical.[87]

Other bar associations have opined that conducting post-trial juror interviews for the purpose of educating counsel is ethical. *See, e.g.* Phila. B. A. Prof. Guid. Comm., Guidance Opinion 91-27 (November 1991) ("Further, it appears that the Questionnaire is being distributed for the valuable purpose of educating counsel about the jury's reaction to the trial, not for the purpose of searching for a basis for a motion for a new trial through establishing juror, counsel or judicial misconduct.") Some of these jurisdictions, however, have warned counsel to first determine whether such juror contact is permitted by the trial judge. *Id.*

C. Local Rule Restrictions

Despite the fact that post-trial interviews are not necessarily unethical, it is clear from the common law that the federal judiciary does not favor such an inquiry. Consistent with this philosophy, a majority of federal district courts have promulgated

local rules which greatly restrict counsel's ability to conduct post-verdict communications with jurors beyond what the canons of ethics would allow.

As shown in the attached survey, 51 of the 94 federal judicial district courts in the United States currently have placed some form of restriction on post-trial juror interviews by a party or attorney. Counsel should be aware that the scope of these rules varies considerably from jurisdiction to jurisdiction.

Some of the rules are straightforward and unconditional. For example, the local rules of the Middle District of Louisiana tersely provide that "[a]bsent an order of the Court, no juror shall be interviewed by anyone at any time concerning the deliberations of the jury."[88] In both the Middle and Western Districts of Louisiana, on the other hand, the district court rules provide much greater detail as to the limitations of a post-verdict inquiry:

> a. No juror has an obligation to speak to any person about any case and may refuse all interviews or comments;
>
> b. No person may make repeated requests for interviews or questions after a juror has expressed his or her desire not to be interviewed;
>
> c. No juror or alternate who consents to be interviewed may disclose any information with respect to the following:
>
> > 1. The specific vote of any juror other than the juror being interviewed;
> >
> > 2. The deliberations of the jury;
> >
> > 3. For the purposes of obtaining evidence of improprieties in the jury's deliberation.
>
> d. No party or their attorney shall, personally or through another person, contact, interview, examine or question a juror or alternate or any relative, friend or associate thereof, except upon leave of Court granted upon good cause shown.[89]

Despite these differences in form, most of the local district court rules regulating post-verdict interrogations by counsel require that such communications be made with the court's approval.[90] Indeed, 40 of the 51 district courts that have adopted such rules require at least court approval before counsel may communicate with an ex-juror.[91] In addition to obtaining the court's permission, 20 of these 41 courts require the moving

party to demonstrate "good cause" as to why the court should allow counsel to interrogate an ex-juror.[92]

Interestingly, of the courts that require good cause, few indicate what this phrase means. A number of the local court rules requiring a showing of good cause also provide that counsel may only interview a juror if trying to establish a basis for challenging the legal sufficiency of a verdict. For example, in the Middle District of Florida, the local rules provide:

> If a party believes that grounds for legal challenge to a verdict exist, he may move for an order permitting an interview of a juror or jurors to determine whether the verdict is subject to challenge.[93]

Similarly, the rules for the Northern and Southern Districts of Mississippi provide that:

> After the jury has been discharged, neither the attorneys in the action nor the parties shall at any time or in any manner communicate with the jury or any member thereof regarding the verdict. Provided, however, that if any attorney believes in good faith that the verdict may be subject to legal challenge, such attorney may apply ex parte to the trial judge for permission to interview one or more members of the jury . . . .[94]

In these courts, it would appear that "good cause" is limited to establishing grounds for a new trial.[95] The local rules of the Eastern District of Wisconsin, however, provide that "good cause" also includes "a trial attorney's request for permission to contact one or more jurors after trial for the trial attorney's educational benefit."[96] It is noteworthy that the Wisconsin court is the only district court in the United States which expressly permits post-verdict juror contact for the sole purpose of self-education.

Although most of the local rules prohibit attorneys from contacting jurors without approval until after a verdict is rendered,[97] some courts require counsel to obtain the court's approval before the jurors are discharged.[98] Moreover, to obtain approval, some local rules mandate the filing of a written petition with the trial court.[99] Most of the local court rules, however, do not have such a writing requirement.[100]

A few courts distinguish contacts initiated by counsel from those initiated by the ex-juror. For example, the local rules of the District of Oregon prohibit counsel from "initiat[ing] contact with any juror concerning any case which that juror was sworn to try."[101] If counsel wants to initiate such contact, counsel must demonstrate to the court that there is "reasonable ground to believe" that the verdict was mistakenly recorded, or that a juror has been guilty of fraud or misconduct.[102] The rule in Oregon apparently does not apply when it is the ex-juror who initiates the contact.[103] The overwhelming

majority of other courts, however, do not draw a distinction based on who contacts whom. *See, e.g.* E.D. Pa. R. 15(a) ("After the conclusion of a trial no attorney, party, or witness shall communicate with or cause another to communicate with any member of the jury without first receiving permission of the Court.")

In those jurisdictions that do not have a rule that addresses the issue of post-trial juror contact, individual jurists have not been reluctant to fashion their own limitations on post-trial juror contact by counsel.[104] Whether or not a such rule exists, counsel should take the advice of one district court rule, which warns that "[i]f an attorney or party litigant chooses to contact a juror after such juror has been permanently dismissed and left the courthouse premises, he does so at his own peril." D.S.C. R. 4.03(b).

IV. CONCLUSION

An attorney must exercise extreme caution before attempting to contact a juror or prospective juror, lest he inadvertently expose himself to ethical, civil, or even criminal sanctions. Prudent counsel should determine whether the proposed contact comports with the ethical rules, local rules, common law rules, and the rules of the individual trial judge.

In conducting a pre-trial investigation of the venire, counsel should be certain not to contact either a prospective juror or any of the prospective juror's relatives. Counsel should also determine if the prohibition on contact extends to non-family members. In conducting post-trial juror interviews, counsel must also be certain that the procedure adopted by the court has been followed. Finally, if the court has no rule or procedure in place, the better practice is for counsel to file a motion seeking permission of the court to contact the ex-jurors. While such a motion may not be necessary, by so notifying the court and the opposing party of the intended juror contact, counsel will likely avoid any later criticism for his conduct.

1. *See generally* Model Rules of Professional Conduct DR 7-108 (1980).

2. *See, e.g.*, M.D. Al. R. 1(a)(4); D. Del. R. 83.6(d)(2); M.D. Fla. R. 2.04(c); D. Mont. R. 110-3.

3. DR 7-108(A).

4. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1055 (1975).

5. *Id.*

6. DR 7-108(D).

7. *See* DR 7-108(F).

8. *United States v. Warlick*, 742 F.2d 113 (4th Cir. 1983).

9. *Id.*

10. *Id.*

11. *Id.* at 116.

12. *See* 154 F.2d 703 (3rd Cir. 1946).

13. 742 F.2d at 116 (citing *Welch*, 154 F.2d at 705).

14. 742 F.2d at 116.

15. 339 S.E.2d 110 (S.C. 1985).

16. 331 S.E.2d 332 (S.C. 1984).

17. 508 So.2d 1346 (La. 1987).

18. *Id.*

19. *Id.*

20. *Id.* at 1347.

21. *Id.* at 1349.

22. *Id.*

23. *Id.*

24. A survey of all of the local federal district court rules concerning pre-trial and post-trial juror contact currently in effect in the United States is included as an appendix to this paper.

25. N.D. Ohio R. 1:3.3(d)(1).

26. M.D. Tenn. R. 12(g). *See also* S.D. Fla. R. 11.1E (before trial "a lawyer should avoid conversing or otherwise communicating with a juror on any subject, whether pertaining to the case or not); S.D. Ga. R. 508 (before trial "a lawyer shall avoid conversing or otherwise communicating with a juror on any subject, whether pertaining to the case or not").

27. M.D.N.C. R. 112(b).

28. *See* D. Ariz. R. 1.11; D.D.C. R. 115; E.D. La. R. 13.04; M.D. La. R. 13.04; W.D. La. R. 13.04; E.D.N.C. R. 6.02; M.D.N.C. R. 112(b); W.D. Pa. R. 24.1; S.C. R. 4.00; D. Utah R. 315; E.D. Va. R. 9(A)(1); D. Wy. R. 309.

29. W.D. Pa. R. 24.1

30. D.S.C. R. 4.01.

31. D. Conn. R. 12(e); N.D. Tex. R. 8.2(e).

32. D. Utah R. 315(a).

33. *United States v. Sanchez*, 380 F.Supp. 1260, 1265 n.12 (N.D. Tex. 1973).

34. *See McDonald v. Pless*, 238 U.S. 264 (1915). The Court has noted, however, that while unlimited exploration into the deliberations of the jury will not be tolerated, such contact cannot be inflexible "because there might be instances in which such testimony of the juror could not be excluded without 'violating the plainest principles of justice . . . '" *Id.* at 268-69.

35. *Rakes v. United States*, 169 F.2d 739, 745-46 (4th Cir.), *cert. denied*, 335 U.S. 826 (1948).

36. *See United States v. Brasco*, 516 F.2d 816, 819 n.4 (2d Cir.), *cert. denied*, 423 U.S. 860 (1975) ("complicity by counsel in a planned, systematic, broadscale, post-trial inquisition of the jurors by a private investigator or investigators is reprehensible, to say the least . . . . "); *Northern Pac. Ry. v. Mely*, 219 F.2d 199, 201-02 (9th Cir. 1954) ("[m]any courts hold that it is unethical for counsel to communicate with former jurors to discover how they stood in a particular case").

37. *United States v. Sanchez*, 380 F.Supp. 1260, 1265 (N.D. Tex. 1973).

38. *Stein v. New York*, 346 U.S. 156, 178 (1952) (Holding that the Federal Courts strongly disfavor "any public or private post-trial inquisition of jurors as to how they reasoned, lest it operate to intimidate, beset and harass them"); *McDonald v. Pless*, 238 U.S. 264, 267-68 (1915) (stating that the justification for the limitation on post-trial juror contact is to protect participants in the jury system from being "harassed and beset by the defeated party"); *United States v. Hall*, 424 F.Supp. 508, 538 (W.D. Okla. 1975), *aff'd*, 536 F.2d 313 (10th Cir.), *cert. denied*, 429 U.S. 919 (1976).

54. *Id.* at 1247.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 1247-48 (quoting *Capen v. Stoughton*, 82 Mass. (16 Gray) 364, 366 (1860).

59. *Id.* at 1248 (quoting *McDonald v. Pless*, 238 U.S. 264, 267-68 (1915)).

60. 110 F.R.D. 407 (D. Mont. 1986).

61. *Id.* at 408.

62. *Id.*

63. *Id.* at 409.

64. *Id.* at 411.

65. *Id.*

66. 252 F.Supp. 252, 324-25 (E.D. Mich. 1977).

67. *Id.* at 325.

68. *Id.*

69. *Id.*

70. 88 F.R.D. 561 (E.D. Pa. 1980).

71. *Id.* at 561-62. *See also* E.D. Pa. Cr. 15 (local criminal rule which provides that counsel shall not communicate with members of the jury after trial without the court's permission).

72. *Id.* at 562.

73. *Id.*

74. *Id.*

75. *See Miller v. United States*, 403 F.2d 77, 81 (7th Cir. 1968) ("we see no basis for doubting the authority of the trial judge to direct that any interrogation of jurors after a conviction shall be under his supervision"); *United States v. Franklin*, 546 F.Supp. 1133, 1139 (N.D. Ind. 1982) ("It was explicitly conceded at the hearing by counsel for the petitioners that this Court had the authority to permanently enjoin counsel and parties from post-jury interrogation.") One commentator has observed that because courts have "inherent authority to

regulate and protect their internal processes," the law on post-verdict questioning on jurors is largely judge made. Note, *Public Disclosure of Jury Deliberations*, 96 Harv. L. Rev. 886, 888 n.12 (1983) (citing *Venner v. Great N. Ry.*, 209 U.S. 24, 35 (1908)).

76. *See, e.g., United States v. Cauble*, 532 F.Supp. 804, 808 (E.D. Tex. 1982) (ordering jurors not to talk to the parties' attorneys or investigators); D. Conn. R. 12(e) ("No juror shall respond to any inquiry as to the deliberations or vote of the jury or of any other individual juror . . . . "); E.D. La. R. 13.05E.c. ("no juror who may consent to be interviewed shall disclose any information with respect to . . . . the deliberation of the jury"). *But see United States v. Franklin*, 546 F. Supp. 1133, 1144 (N.D. Ind. 1982) ("a judge can discourage jurors from communicating about the content of jury deliberations without ordering them to refrain from doing so.")

77. *See* Model Code of Professional Responsibility DR 7-108(D) (1980).

78. Model Code of Professional Responsibility EC 7-30 (1978).

79. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 319 (1968)

80. *Id.*

81. *American College of Trial Lawyers, Code of Trial Conduct*, Standard 19(c) at 10 (rev. 1987).

82. Conn. Bar Ass'n Comm. on Professional Ethics, Formal Opinion No. 36 (1988).

83. Philadelphia Bar Assoc. Professional Guidance Comm., Guidance Opinion No. 91-27 (November 1991).

84. *See Smith v. Cupp*, 457 F.2d 1098, 1100 (9th Cir. 1972) (post-verdict contact of jurors by counsel is unethical); *Northern Pacific Ry. Co. v. Mely*, 219 F.2d 199, 202 (9th Cir. 1954) (same); *Sixberry v. Buster*, 88 F.R.D. 561 (E.D. Pa. 1980) (same).

85. Oregon DR 7-108(D).

86. *See* Oregon UTCR 3-120 and D. Or. R. 245-6.

87. Oregon State Bar Ass'n Board of Governors, Formal Opinion 1995-143 (June 1995).

88. M.D. La. R. 16(A)(5).

89. *See* M. & W.D. La. R. 13.05

90. *See, e.g.*, S.D. Al. R. 12; D. Col. R. 47.2; S.D. Ga. R. 508; D. Md. R. 16.

91. *See* attached survey.

92. *See* D. Ariz. R. 12(b); D. Conn. R. 12(e); D.D.C. R. 115(b); S.D. Fla. R. 11.1(e); N.D. Ind. R. 47.2; S.D. Ind. R. 47.2; D. Kan. R. 123(b); E.D. La. R. 13.05(c); M.D. La. R. 13.05(d); W.D. La. R. 13.05(d); N.D. Miss. R. 1(b)(4); S.D. Miss. R. 1(b)(4); E.D. Mo. R. 16(D); D.N.J. R. 19(B); N.D. Okla. R. 47.2; E.D. Okla. 8; D.R.I. R. 15(g); E.D. Va. 20(D); N.D. W. Va. R. 1.19; E.D. Wis. R. 8.07.

93. M.D. Fla. 5.01(d).

94. N.D. Miss. R. 1(b)(4); S.D. Miss. R. 1(b)(4).

95. *But see* S.D. Tex. R. 12 ("Except with leave of the Court, no attorney, party, nor agent of either of them may communicate with a former juror to obtain evidence of misconduct in the jury's deliberations.")

96. E.D. Wis. 8.07.

97. *See, e.g.*, N.D. Tex. R. 8.2(e); W.D. Tenn. R. 19; W.D. Wash. R. 47(b); N.D.W. Va. R. 1.19.

98. *See, e.g.*, E.D. Tex. R. 10(b) ("after a verdict is rendered but before the jury is discharged from further duty, an attorney may obtain leave of the Judge before whom the action was tried to converse with members of the jury"); D.D.C. R. 115(b) (if no request to interview jury is made until after discharge, permission will only be granted by the court "for good cause shown in writing").

99. *See, e.g.*, S.D. Ala. R. 12; D. Kan. R. 23A.

100. *See, e.g.*, N.D. Miss. R. 1(b)(4); W.D. Tenn. R. 19; N.D. W. Va. R. 1.19.

101. D. Or. R. 245-6(a).

102. *Id.*

103. *See Id.*

104. *See, e.g., Womble v. J.C. Penney Co.*, 47 F.R.D. 350, 352 (E.D. Tenn. 1969) ("There has been an unwritten rule of this Court for many years that attorneys shall not make post-trial inquiries of the members of the jury as to what went on in the jury room during their deliberations without first obtaining consent of the Court. Such inquiries are not proper.") *See also Philadelphia Bar Ass'n Professional Guidance Opinion no. 91-27*, 1991 WL 325886 (November 1991) ("Counsel should be aware that even if a Trial Judge does not specifically advise against contacting jurors, such contact may be prohibited by local rule or custom. Counsel, therefore, should, as a threshold matter, consult court local rules and customs to determine whether prior approval of the Trial Judge is required before contacting the jury.")