

[May 22, 1989]

DELAWARE STATE BAR ASSOCIATION  
COMMITTEE ON PROFESSIONAL ETHICS

OPINION 1989-3

The inquiring attorney has been appointed in a post-conviction relief case to represent a person convicted of murder and sentenced to death. The client's conviction occurred in January, 1982. Counsel proposes to question the former trial jurors and, if appropriate, offer evidence derived from such interviews at the upcoming post-conviction relief hearing. He seeks the Committee's opinion concerning the propriety of his conduct under the Delaware Lawyers' Rules of Professional Conduct (the "Rules").

ISSUE PRESENTED

May an attorney contact jurors following trial and the jury's discharge in an effort to obtain evidence for a criminal defendant's use in a post-conviction relief proceeding?

CONCLUSION

Yes, if the attorney proceeds with the sensitivity for the juror's rights required by Rule 4.4 and confines his inquiry to a determination of whether the juror was exposed to extraneous prejudicial information or improper outside influence during his service as a juror.

DISCUSSION

Prior to 1985, an attorney was ethically prohibited from contacting a juror at any time following a trial. This ethical restriction arose out of DR 7-108(D) which provided:

(D) after discharge of the jury from further consideration of a case with which the lawyer was connected, a lawyer shall not ask questions of or make comments to a member of that Jury.<sup>1</sup>

However, even during the period that DR 7-108(D) was in effect, there was uncertainty among members of the trial Bar as to the ethical obligations imposed by the Rule. See Dutton v. State, Del. Supr. 452 A.2d 127, n. 4 (1982).

With Delaware's adoption of the ABA Model Rules of Professional Conduct in October, 1985, the express prohibition against post-trial juror contact was eliminated. The most commonly cited justification for permitting post-trial contact is that it can provide a valuable means of attorney selfeducation with respect to trial strategy, effectiveness of cross-examination techniques and closing arguments, which educational considerations are not present in this case. (ABA Formal Opinion 319, August 26, 1967). Notwithstanding the elimination of DR7-108(D), the conduct of an attorney must still be guided by the ethical constraints found in Rule 4.1 (truthfulness in statements to others); Rule 4.3 (dealing with unrepresented person); and Rule 4.4 (respect for rights of third persons).

Apart from the general restraints which Rules 4.1-4.4 impose on attorneys dealing with persons other than clients, the rules of evidence limit inquiry into the validity of a jury verdict. DRE 606(b). This Rule provides:

(b) Inquiry into Validity of Verdict or Indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of

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<sup>1</sup> DR7-108(D) probably would not have been applicable to the inquiring attorney who was not connected to the case when it was tried before the jury.

the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

The Delaware Supreme Court has interpreted DRE 606(b) as prohibiting "any inquiry into jury deliberations except in a case where the juror is exposed to prejudicial information or improper outside influence." Rurke v. State, Del. Supr. 484 A.2d 490, 500 (1984). The Court, citing U.S. v. Brooks, D.C. Cir., 677 F.2d 907 (1982), concluded that the rule prohibits an inquiry into a juror's mental processes, and that the effect a defendant's actions in court had upon a juror's mind or emotions, was not a subject open to further consideration under the rules of evidence. Id. at 500.

Although the foregoing ruling arose in the context of an evidentiary hearing, an attorney contemplating juror contact should be mindful of the evidentiary limitations. In this case, evidence of the jurors' impressions and deliberative process is not admissible. Exploration of these subjects may be viewed as lacking any substantial purpose other than to embarrass or burden the juror, a purpose prohibited by Rule 4.4. Because of the potential for harassment and intimidation involved in the post-verdict questioning of jurors, the evidentiary constraint of DRE 606(b) should serve to limit the permissible inquiry of a lawyer who contacts a juror in an effort to obtain evidence to support a post-conviction relief petition.

The Supreme Court is presently considering whether to amend the Rules to incorporate the prior prohibition relating to post-trial juror contact. The Court's current interest in reinstating the provisions of DR 7-108(D), serves to emphasize the importance of proceeding cautiously with plans to communicate with the jurors and to do so only where a substantial purpose may be served. The inquiring attorney may wish to consider the past practice of seeking court approval prior to contacting jurors, specifying the scope and purpose of his proposed inquiry.

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