

## Advisory Opinion #2009-01

(adopted November 12, 2009)

### Judge's post-verdict communication with discharged jurors

**Question:** *Do ethical considerations restrict a judge's communications with recently discharged jurors following the conclusion of a jury trial?*

**Opinion:** Yes.

#### *Introduction*

Once a civil or criminal jury trial is concluded, jurors commonly express a desire to speak with the judge. Frequently, discharged jurors will have natural curiosity and questions about the case in which they have just participated. Former jurors' questions and comments may range from uncontroversial, administrative matters (parking, jury accommodations, suggestions for improvement of the jury experience), to substantive matters such as trial procedure, evidentiary rulings, possible criminal sentence, and the possibility of an appeal.

Once discharged, the procedural and ethical restrictions, which previously barred contact with empanelled jurors, cease to apply.<sup>6</sup> Once discharged, a former juror reverts to the role of private citizen, with no further obligations to the judicial system.

A recently discharged juror is in no different role than any other citizen except for the fact that the recently discharged juror often will have an enhanced and natural curiosity about the case, courtroom procedure, subsequent legal activity, and the effect of the verdict the jury has just rendered.

The trial judge often will have a correspondingly understandable desire to be responsive and accessible to the discharged juror. To the extent that dialog contributes to the discharged juror's understanding and respect for the legal system, this communication can be positive.

However, the judge's communications are constrained by the Rules of Professional Conduct<sup>7</sup> and the Code of Judicial Conduct. The scope of those restrictions depends on whether the verdict and discharge of the jury represents the final litigation event (as in the

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<sup>6</sup> This opinion deals only with a judge's post-verdict contact with recently discharged jurors. The subject of mid-trial or mid-deliberation contact with empanelled jurors is beyond the scope of this opinion.

<sup>7</sup> Alaska R. Prof. Conduct Rule 3.5(c) (Impartiality and Decorum of Tribunal) provides that a lawyer may communicate with a former juror unless law or court order specifically prohibits the communication, the juror expresses unwillingness to communicate, the communication involves misrepresentation, duress, coercion or harassment, or the communication is calculated to improperly influence future jury service. Alaska R. Prof. Conduct 3.5(c), enacted by SCO 1680, effective April 15, 2009.

case of a verdict of (not guilty) in a criminal case) or whether subsequent post-verdict proceedings (such as criminal sentencing or post-trial motions in a civil trial) remain before the judge.

*Ethical constraints governing all contacts with discharged jurors regardless of whether matters remain pending before the judge.*

Two ethical provisions govern a judge's contact with all discharged jurors. Canon 2A requires all judges to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary, and avoids the appearance of impropriety. Canon 3B(10) prohibits judges from commending or complimenting jurors on their verdict, but permits an expression of appreciation for their service to the community.

Therefore, when communicating with a discharged juror in any case regardless of its procedural posture a judge may:

- express appreciation for the discharged jurors' service;
- inform the jurors that the attorneys may wish to speak with them, that there is nothing improper with this request, that the choice to speak (or decline to speak) with the attorneys is theirs, and that legal professional ethical rules prohibit attorneys from harassing or engaging in a non-consensual contact with a discharged juror; and may
- request that the jurors report any harassment or non-consensual communication stemming from the jurors' service in the case to the judge or staff.

A judge may not:

- volunteer information about inadmissible, suppressed, confidential or non-public information that could reasonably have the effect of bolstering or undermining the former juror's confidence in the "correctness" of the verdict, but may respond to a juror's question about any public matter including suppressed evidence where the answer is an explanation of the evidence rules and court process;
- offer excessively complimentary or derogatory critique regarding the performance or credibility of the attorneys or witnesses; or
- offer comment regarding the judge's view of the "correctness" of the verdict.

Judges must be mindful that a judge's communication is restricted to a greater degree than that of the attorneys, the trial participants or private citizens. Other trial participants may have a constitutionally protected right to communicate with the discharged juror about the case. Unlike some other jurisdictions, no Alaska statute or court

rule presumptively bars post-verdict communication with a discharged juror.<sup>8</sup>

The attorneys' conduct is governed only by the professional conduct rules, not the Judicial Canons. A private citizens' communication with discharged jurors is unregulated by state statute or court rule. In contrast, the judge's comments are restricted by the Canons referred to above. This distinction serves an important policy goal: the maintenance of an impartial and independent judiciary in appearance and in fact. Therefore, the judge's communication is held to a higher standard than the attorneys' or other private citizens' communications.

*Ethical constraints governing contacts with discharged jurors where post-verdict matters are still pending before the judge, where post-trial motions may occur or there is the possibility of a retrial.*

Where there is no verdict, i.e. a jury is unable to come to a decision resulting in a mistrial, judges must exercise extreme caution. Juror deliberations should be afforded the highest protection. While individual jurors cannot be restrained in the scope of their speech once discharged, a judge's interaction with a hung jury as a group may cause extreme discomfort among the jurors in the minority view as to a verdict. Further, if the prosecution decides to retry the matter, the judge's impartiality could be questioned for similar reasons to those that do not allow judges to participate in criminal plea bargains. Consequently, judges should avoid direct communication that goes beyond appreciation for service with a discharged jury that has not reached a verdict.

Commonly, after a guilty verdict is received and the jury discharged, substantive matters still remain before the trial judge. In a criminal case, sentencing is often scheduled several weeks after the return of verdict. In a civil case, post-verdict motions such as motions for new trial are common. It is in this circumstance where a judge must be cautious. Where post-verdict matters are foreseeable or pending before the judge, the judge must take affirmative steps to avoid even the appearance of communications that give the impression of pre-judging upcoming issues or that jurors can influence those decisions.

Where matters are still before the judge, additional provisions of the Judicial Canons apply. With several exceptions not applicable here, Canon 3B(7) prohibits judges from initiating or permitting ex parte communications regarding a pending matter. Canon 3B(9) prohibits judges from making a public comment that may impair the fairness of a pending proceeding.

Where a judge initiates or participates in a dialog with recently discharged jurors, extra care must be taken to insure that the conversation does not stray toward the discharged jurors' favorable or unfavorable opinion regarding a trial participant, witness or the factual merits of the case. In a criminal case, where the jury has found the defendant guilty, but sentencing has not yet occurred, it is foreseeable that the jurors will ask the judge about the

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<sup>8</sup> Alaska R. Evid. 606(b) provides that, where the validity of an indictment or verdict is at issue, a former juror may not testify about jury deliberations or deliberation processes. But, this is an evidence rule that governs admissibility of testimony. This rule does not categorically bar the discharged juror from speaking about the case, or bar any person from seeking to interview the discharged juror.

probable sentence, and express their opinion one way or the other. In a civil case, jurors may ask questions about the financial effect of their verdict upon the litigants, the collateral effect of the verdict, or insurance consequences.

The judge must be particularly on guard because a discharged juror's opinion about the merits of the just-completed trial could convey the impression that the judge will resolve future issues in a certain way. So too, discussing the probative force of the evidence, the performance of the advocates, or the relative culpability of the criminal defendant, could leave an impression of the likely future decisions by the trial judge. If the judge has post-trial matters still pending, the litigants may legitimately view the communication as appearing to influence, however subtly, the judge's ultimate ruling on post-trial matters. Even worse, should the judge express agreement or disagreement with a juror's opinion, the appearance of pre-judgment of any still-pending issue is obvious. A judge in this position runs the risk of inviting a motion for disqualification based upon the communication. A judge may advise the jury of the date for sentencing and the pre-sentence/sentencing process and advise the jury that they are free to attend the sentencing if they choose to do so.

Where matters remain pending, a trial judge must manage any jury conversation with care. While the judge may explain events that occurred on the public record, the judge must not allow or participate in discussion of the merits of the case and must politely decline to answer questions about probable post-verdict rulings.

Before the judge initiates a conversation with the discharged jurors, the judge must inform the litigants of the judge's intent to speak with them.<sup>9</sup> The judge should not engage in a lengthy dialog, as the chances of a questioned communication increase with the length of time the discharged juror spends speaking with the judge. Finally, if the judge is inadvertently exposed to an opinion about the merits of the case, or receives a report of substantive juror misconduct, the judge should immediately inform the parties orally on the record or in writing.

As stated above, mere statements of appreciation for the jurors' service raise no concern. Judges may also distribute various court approved surveys to jurors that assist in addressing court administration concerns, and may explain court procedures or answer questions concerning matters that occurred in open court.

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<sup>9</sup> A private, off-record, meeting between the judge and the discharged jurors, outside the parties' presence, may generate questions about what was said; judges. Judges should determine the best method to address any discomfort by the parties and lawyers, such as allowing litigants the opportunity to be present. or, perhaps most appropriately, having that conversation on the record.