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## JUROR COMMUNICATIONS

Adopted September 21, 1985.  
Addendum issued 1995.

### *Syllabus*

After a verdict has been returned, it is improper for an attorney who has participated in the trial to tell the jury about information that was not presented at trial, if such information is disclosed to the jury with the intention of or in the spirit of criticizing the jury's decision, influencing the actions of jurors in future jury service, harassing the jury, or otherwise behaving improperly toward jurors in any manner prohibited by the Code of Professional Responsibility. This rule applies whether the information not presented was suppressed or inadmissible pursuant to a ruling by the judge in the case.

### *Applicable Standards and Law*

The following obligation is imposed by DR 7-108(D), of the Colorado Code of Professional Responsibility (the "Code"):

- (d) After discharge of the jury from further consideration 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.

Also pertinent are EC 7-29, 7-30, 7-31 and 7-32, which state as follows:

EC 7-29 To safeguard the impartiality that is essential to the judicial process, veniremen and jurors should be protected against extraneous influences. When impartiality is present, public confidence in the judicial system is enhanced. There should be no extrajudicial communication with veniremen prior to trial or with jurors during trial by or on behalf of a lawyer connected with the case. Furthermore, a lawyer who is not connected with the case should not communicate with or cause another to communicate with a venireman or a juror about the case. After the trial, communication by a lawyer with jurors is permitted so long as he refrains from asking questions or making comments that tend to harass or embarrass the juror or to influence actions of the juror in future cases. 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 the personal feelings of the juror.

EC 7-30 Vexatious or harassing investigations of veniremen or jurors seriously impair the effectiveness of our jury system. For this reason, a lawyer or anyone on his behalf who conducts an investigation of veniremen or jurors should act with circumspection and restraint.

EC 7-31 Communications with or investigations of members of families of veniremen or jurors by a lawyer or by anyone on his behalf are subject to the restrictions imposed upon the lawyer with respect to his communications with or investigations of veniremen and jurors.

EC 7-32 Because of his duty to aid in preserving the integrity of the jury system, a lawyer who learns of improper conduct by or towards a venireman, a juror, or a member of the family of either should make a prompt report to the court regarding such conduct.

See also EC 7-36 of the Code, which states that judicial hearings are to be conducted in a dignified manner, and that an attorney should not engage in conduct that offends the decorum of judicial proceedings.

The American Bar Association *Standards for Criminal Justice: The Prosecution Function* (the “Criminal Justice Standards”), Section 3.54(c) provide:

- (c) After discharge of the jury from further consideration of a case, it is unprofessional conduct for the prosecutor to intentionally make comments to or ask questions of a juror for the purpose of harassing or embarrassing the juror in any way which will tend to influence judgment in future jury service.

The comment to the above-quoted section of the Criminal Justice Standards states in part (footnote omitted):

#### *Post-trial Interrogation*

Since it is vital to the functioning of the jury system that jurors not be influenced in their deliberations by fears that they subsequently will be harassed by lawyers or others who wish to learn what transpired in the jury room, neither defense counsel nor the prosecutor should discuss a case with jurors after trial in a way that is critical of the verdict.

Pursuant to Rule 606(b), Colorado Rules of Evidence, where there is an inquiry into the validity of the jury’s verdict, a juror may not testify about statements made by jurors during the course of deliberations. A juror may, however, “testify on the question whether extraneous prejudicial information was improperly brought to bear” upon him.

If an attorney disclosed to the jury evidence that had been suppressed, there is a risk that where a post-trial inquiry is made, and the jurors subsequently are required to testify pursuant to Rule 606(b), the jurors’ recollections will be tainted by the subsequently received, inadmissible information. It is even possible that a juror would himself initiate such an inquiry on the basis of the evidence that was not admitted at trial. This would lead to uncertainty in jury verdicts.

Still another pertinent consideration is Colorado Jury Instructions Civil 1-16 Mandatory Instruction Upon Discharge. This instruction, like its very similar criminal counterpart, must be repeated by the court upon the discharge of the jury. It states, in pertinent part:

The attorneys or the parties at the conclusion of a jury trial may desire to talk with the members of the jury concerning the reasons for their verdict. For your guidance, you are advised that it is entirely proper for you to talk with the attorneys or the parties and you are at liberty to do so; however, you are not required to do so. Whether you do so is entirely a matter of your own choice.

Undoubtedly, your decision will be respected. However, if you decline to discuss the case and an attorney persists in discussing the case over your objection, or becomes critical of your services as a juror, please report the incident to me.

#### ***Rationale***

The Code contemplates that attorneys may speak with jurors after a trial regarding the proceedings. The practice of talking informally with willing jurors after a trial is a common one in our state courts, although it is not permitted in the federal courts and some attorneys would rather the practice was prohibited.

The Code also imposes a responsibility on attorneys, however, not to say anything to jurors with the intent to create a negative impression by the jurors regarding future jury service. The Criminal Justice Standards, quoted above, impose a slightly different obligation than the Code, that is, the obligation not to discuss the case in a way that is critical of the verdict.

In either a civil or a criminal case, disclosure to the jurors of evidence that was inadmissible or was suppressed, or simply was not introduced, could be designed to be critical of the verdict that had been rendered. This would be true where the evidence not introduced would tend to support a verdict other than the one actually rendered by the jury. In effect, the attorney very well could be telling members of the jury that they were wrong.

Not only is such conduct exactly the kind of conduct that is prohibited by the Criminal Justice Standards, but it also appears to be calculated to embarrass the jurors, by showing them that they made the wrong decision. Such is not permitted, and an attorney who observes or becomes aware of such conduct is required to report it to the court pursuant to EC 7-32.

### ***Conclusion***

After a verdict has been returned, it is improper for an attorney who has participated in the trial to tell the jury about information that was not presented at trial, if such information is disclosed to the jury with the intention of, or in the spirit of, criticizing the jury's decision, influencing the actions of jurors in future jury service, harassing the jury, or otherwise behaving improperly toward jurors in any manner prohibited by the Code of Professional Responsibility.

If an attorney becomes aware of improper communications with a juror by an attorney, *i.e.*, conduct proscribed by any of the above, pursuant to EC 7-32, the attorney who became aware of the improper conduct has an obligation to "make a prompt report to the court regarding such conduct."

### ***1995 Addendum***

The Colorado Rules of Professional Conduct became effective on January 1, 1993, replacing the Code of Professional Responsibility. While the language of the Rules is somewhat different from the Code, the Ethics Committee considers this Opinion to continue to provide guidance to attorneys in this area. Attorneys are cautioned to review Tables A & B: Related Sections in the Colorado Rules of Professional Conduct and The Colorado Code of Professional Responsibility (found in the *Colorado Ethics Handbook*), to update the research contained in this Opinion and to conduct any independent research necessary.

Relevant provisions of the Colorado Rules of Professional Conduct, which should be examined together with this Opinion, are Rule 3.5(a) (regarding improperly influencing jurors); Rule 3.5(c) (concerning conduct intended to disrupt a tribunal); Rule 4.4 (relating to rights of third persons); and Rule 8.4(d) (regarding conduct prejudicial to the administration of justice).