Former Jurors as Retrial Consultants: A Proposed Model Rule for the Worrisome but Clever Practice of Post-Mistrial Juror Interviews

Susanna E. Cowen
Susanna.Cowen@chicagounbound.edu

Follow this and additional works at: http://chicagounbound.uchicago.edu/uclf

Recommended Citation
Available at: http://chicagounbound.uchicago.edu/uclf/vol2005/iss1/14

This Comment is brought to you for free and open access by Chicago Unbound. It has been accepted for inclusion in University of Chicago Legal Forum by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.
Like all other Californians with jury duty, the panel of jurors who heard Gregory Haidl's rape trial each received the statutorily mandated fifteen dollars per day as compensation for their civic service. Once the jury hung—that is, failed to reach a unanimous verdict—the criminal justice system ceased to limit the value of these jurors’ thoughts and time. In preparation for his client’s retrial, Haidl’s lawyer, Joseph Cavallo, hired members of the first jury as consultants. He paid each of them a five hundred dollar retainer and fifty dollars per hour to be available before and during the trial.

Cavallo’s retainer fee and hourly reward is significantly more lucrative than the California court system’s fifteen dollar per day reimbursement scheme. Critics of Cavallo’s retrial preparation strategy fear that the explicit connection he draws between jury service and profit invites jurors to resist reaching a unanimous verdict, in the hopes that such resistance will result in financial gain. An attorney’s use of former jurors raises more
than this ethical concern; it also invites questions about its constitutionality and systemic consequences. This Comment explores these questions and concerns and finds that current regimes regulating post-trial attorney-juror contact do not adequately police the use of former jurors as retrial consultants.

As Part I explains in detail, all states but one address post-trial contact between attorneys and jurors generally, either through local court rules,\(^4\) rules of professional conduct,\(^5\) legislation,\(^6\) or caselaw.\(^7\) Two general models exist for regulating post-trial communication: (1) those that allow attorneys to contact former jurors only after obtaining court approval,\(^8\) and (2) those that allow attorneys to contact former jurors as long as the contact does not harass or embarrass jurors, or influence their actions in future jury service.\(^9\) These regulations primarily respond

\(^4\) See App 1, Survey of District Court Rules Governing Post-Trial Communication between Attorneys and Jurors (listing, by federal district, court rules that pertain to post-trial attorney-juror contact). See, for example, D Ky Ct Rule 47.1 (current as of Mar 2004) ("Unless permitted by the Court, no party or attorney—or the representative of a party or attorney—may contact, interview, or communicate with a juror on any matter relating to the trial before, during, or after trial.").

\(^5\) See App 2, Survey of State Bar Rules of Professional Conduct Governing Post-Trial Communication between Attorneys and Jurors (listing, by state, rules of professional conduct that pertain to post-trial attorney-juror contact). See, for example, Del Prof Conduct Rule 3.5(c) (Michie 2003) ("A lawyer shall not . . . communicate with a juror or prospective juror after discharge of the jury unless the communication is permitted by court rule.").

\(^6\) See, for example, Cal Code § 206(b) (West 2005) ("Following the discharge of the jury in a criminal case, the defendant, or his or her attorney or representative, or the prosecutor, or his or her representative, may discuss the jury deliberation or verdict with a member of the jury, provided that the juror consents to the discussion and that the discussion takes place at a reasonable time and place.").

\(^7\) See, for example, United States v Kepreos, 759 F2d 961, 967 (1st Cir 1985) (declaring a prospective rule that "henceforth this Circuit prohibits the post-verdict interview of jurors by counsel, litigants or their agents except under the supervision of the district court, and then only in such extraordinary situations as are deemed appropriate").

\(^8\) See, for example, Cuevas v United States, 317 F3d 751, 753 (7th Cir 2003) (approving the idea that, local rules aside, attorneys should obtain the trial judge's permission before beginning post-verdict interviews of jurors); S D Ga Ct Rule 83.8 (current as of Mar 2004) ("No party, attorney, or other person shall, without Court approval, make or attempt any communication relating to any feature of the trial of any case with any regular or alternate juror who has served in such case, whether or not the case was concluded by verdict."); Mass Prof Conduct Rule 3.5(d) (2004) ("A lawyer shall not . . . after discharge of the jury from further consideration of a case with which the lawyer was connected, initiate any communication with a member of the jury without leave of court granted for good cause shown.").

\(^9\) See, for example, State v Webb, 1997 Tenn Crim App LEXIS 188, *36 (finding that the trial court may not prohibit post-trial contact between jurors and defense counsel, as long as counsel follows both court evidentiary rules and court rules that require him to refrain from "asking questions or making comments that tend to harass or embarrass the juror or to influence actions of the juror in future cases") (citation omitted), revd in irrele-
to post-trial scenarios such as attorney investigations of potential juror misconduct\textsuperscript{10} and attorney harassment of jurors.\textsuperscript{11} Indeed, most states lack a specific response to a new and increasingly popular feature of their criminal justice systems: the former juror turned retrial consultant.\textsuperscript{12}

Part II argues that most rules regarding post-trial communication with jurors cannot meaningfully regulate the use of former jurors as retrial consultants. These insufficient models aim to protect two legal rights: the defendant’s right to not have an improper verdict entered against him\textsuperscript{13} and the juror’s right to privacy.\textsuperscript{14} In the context of a mistrial, the former right is irrelevant and the latter is only of slight concern. Existing rules ignore the more important interests at stake in a second trial: (1) the defendant’s interest in a fair retrial, (2) the juror’s interest in choosing whether to aid retrial preparation, and (3) the lawyer’s interest in communicating with jurors to improve her retrial strategy. Existing rules regulating post-trial attorney-juror contact safeguard legal interests of little or no consequence in a mistrial’s wake and police the use of jurors as retrial consultants imperfectly, if at all.

\textsuperscript{10} See, for example, Brassell v Brethauer, 305 S2d 217, 220 (Fla App 1974) (finding that the purpose of the Florida Rules of Professional Conduct’s regulation of post-verdict interviews with former jurors is to preserve the right to interview jurors only where facts indicate a faulty verdict).

\textsuperscript{11} See, for example, Rapp v Disciplinary Board of the Hawaii Supreme Court, 916 F Supp 1525, 1536 (D Haw 1996) (recognizing two compelling state interests that can justify a rule regulating attorney-juror contact: “the public policy holding jury deliberations and verdicts inviolable and the aim of protecting the privacy of jurors”).

\textsuperscript{12} Consider Curtis, Paying Jurors, Cal Bar J (cited in note 3) (detailing how Cavallo’s ability to use former jurors as retrial consultants only hinges on whether there is “a father willing to write a check” for the service); Leonard Post, Hiring Former Jurors as Trial Consultants Catches On: Some Cry ‘Foul,’ Others Call it Good Strategy, Natl L J 6 (Aug 16, 2004) (discussing the phenomenon of jurors as retrial consultants).

\textsuperscript{13} See United States v Moten, 582 F2d 654, 664 (2d Cir 1978) (“[T]he defendant has a right to a trial by an impartial jury.”).

\textsuperscript{14} See Haeberle v Texas International Airlines, 739 F2d 1019, 1022 (5th Cir 1984) (“The first-amendment interests of both the disgruntled litigant and its counsel in interviewing jurors in order to satisfy their curiosity and improve their advocacy are . . . outweighed by the jurors’ interest in privacy. . . .”). See also Rapp, 916 F Supp at 1536.
Part II goes on to examine the ethical and systemic inadequacies of existing post-trial communication rules. These rules protect institutional concerns like maintaining the finality of jury verdicts and encouraging the free flow of ideas in the jury room. Such concerns are central when attorneys seek to impeach a verdict, but peripheral or irrelevant when attorneys prepare for retrial. Existing rules also fail to address the tension between possible incentives for jurors to prevent a unanimous verdict and the need to improve attorney efficacy. Jurors who know that they will be paid for post-trial consultation might purposefully throw the trial, but they can also help the lawyers become more effective. Any rule not tailored to address this paradox will be an ineffective regulatory device.

Part III, accordingly, proposes just such a rule. This proposed rule of criminal procedure, which applies only in the aftermath of a mistrial, both expands and limits the current role that judges play in monitoring post-trial attorney-juror communication. It also caps the amount of money that a former juror may receive as a consultant, thereby allowing lawyers to compensate former jurors for their time, without giving them a financial incentive to ignore the merits of a case in order to hang the jury. The rule balances the needs of the defendant, the victim, and the juror in a way that current state rules and laws fail to do.

I. THE LAW OF POST-MISTRIAL ATTORNEY-JUROR COMMUNICATION

Currently, with the exception of Connecticut, states only indirectly regulate the use of jurors as paid retrial consultants. State regulations of post-mistrial communication between jurors and attorneys fall into two general categories: (1) those policing the communication through broad provisions that monitor post-

---

15 See Jorgensen v York Ice Machinery Corp, 160 F2d 432, 435 (2d Cir 1947) ("[I]t would be impracticable to impose the counsel of absolute perfection that no verdict shall stand, unless every juror has been entirely without bias, and has based his vote only upon evidence he has heard in court. It is doubtful whether more than one in a hundred verdicts would stand such a test; and although absolute justice may require as much, the impossibility of achieving it has induced judges to take a middle course, for they have recognized that the institution could not otherwise survive.").

16 See McDonald v Pless, 238 US 264, 267–68 (1915) (finding that juror testimony may not be used to impeach the verdict the jury arrived at because to allow otherwise would result in a public harm, "the destruction of all frankness and freedom of discussion and conference").
trial contact between attorneys and jurors, and (2) those expressly prohibiting juror compensation for communication with attorneys. While the latter of these two categories assumes the rigid form of a ban, the former group of regulations breaks down into two flexible variants: (1) those requiring court approval before post-trial attorney-juror contact may take place, and (2) those allowing for attorney-juror contact as long as it does not hassle the jurors or influence their conduct in future jury service.

A. General Regulations on Post-Trial Attorney-Juror Contact

Jurisdictions that do not expressly address an attorney’s use of former jurors as paid retrial consultants regulate attorney-juror communication generally through local court rules, rules of professional conduct, and rules developed in court decisions. These general provisions divide into two strains: (1) those allowing for post-trial contact only with the court’s permission; and (2) those allowing for this contact as long as it does not harass or embarrass the jurors, or influence their actions in future jury service.

1. Requirement of the court’s permission.

Many courts, local federal district court rules, and rules of professional conduct require the court that heard the original case to approve any post-trial contact between a juror and a party to the case. The First Circuit addressed this requirement
in the context of post-mistrial contact in *United States v Kepreos*. Here, the court opined that the government may have an "unfair advantage" over the defendant when, in anticipation of jury selection for retrial, it interviews jurors from the original panel without the defendant's knowledge. Ultimately, the First Circuit found that this post-trial contact did not harm the defendant because it neither caused prejudicial evidence to be admitted at trial nor exculpatory evidence to be suppressed there. However, the court declared that, in the future, post-trial interviews could proceed only under the district court's supervision, in "such extraordinary situations as are deemed appropriate." Most court standards are as vague as the First Circuit's "extraordinary circumstances" test. While some courts require that attorneys show "good cause" before granting parties the right to approach, interview, or communicate with former jury members, others make no such demand. The differences in the text

---

23 759 F2d 961 (1st Cir 1985).

24 See id at 967 (noting defense counsel's request for dismissal on the grounds that she would be unable to overcome the "unfair advantage" the government gained in the jury-selection process and the first three days of trial).

25 Id at 968.

26 Id at 967. The court based this prophylactic rule on its unwillingness to tolerate the consequences of the unbridled interviewing of jurors. *Kepreos*, 759 F2d at 967. It found that such unchecked interviewing of jurors "could easily lead to their harassment, to the exploitation of their thought processes, and to diminished confidence in jury verdicts, as well as to unbalanced trial results depending unduly on the relative resources of parties." Id.

27 Jurisdictions in Arizona, the District of Columbia, and Indiana are among those whose district court rules include this "good cause" requirement. See D Ariz Civ Ct Rule 39.2(b) (current as of Mar 2004) ("Approval for the interview of jurors in accordance with the interrogatories and affidavit [that the district court rules require] will be granted only upon the showing of good cause."); D DC Ct Rule 24.2(b) (current as of Mar 2004) ("If no request to speak with jurors is made before discharge of the jury, no party or attorney shall speak with a juror concerning the case except when permitted by the Court for good cause shown in writing."); S D Ind Ct Rule 47.2 (current as of Mar 2004) ("In all criminal cases, any petition for leave of Court to [approach, interview or communicate with any juror after trial] shall require showing of good cause.").

28 District court rules in Colorado, Georgia, and Kansas provide examples of rules that require court approval of attorney requests for post-trial interviews without designating how attorneys should support these requests. See D Colo Civ Ct Rule 47.1 (current as of Mar 2004) ("No party or attorney shall communicate with... a juror or prospective juror before, during, or after any trial without written authority signed by the judicial officer to whom the case is assigned for trial."); S D Ga Ct Rule 83.8 (current as of Mar 2004) ("No... attorney... shall, without Court approval, make or attempt any communication relating to any feature of the trial of any case with any regular or alternate juror who has served in such case, whether or not the case was concluded by verdict."); D Kan Ct Rule 47.1(b) (current as of Mar 2004) ("Under no circumstances except by order of the court in its discretion, and under such terms and conditions as it shall establish, shall any party or any party's attorney or their agents or employees examine or interview any juror.").
of these court rules, however, may have little practical effect. In the absence of an explicit "good cause" requirement in their rules, courts usually impose their own such requirement when deciding whether to grant requests for juror interviews.29

The limited scope of this explicit or implicit "good cause" requirement can prevent these rules from adequately policing attorneys' requests to consult with former jurors after a mistrial. Typically, the "good cause" requirement involves evidence of juror misconduct.30 Attorneys use post-trial interviews to impeach the verdict against their clients.31 Courts, though, do not tolerate pure "fishing expedition[s]" for such misconduct.32 Consequently, some evidence of wrongdoing must exist before the court will grant an interview.33 The "good cause" requirement of most current regimes thus demands some evidence of a need for the interviews based on a juror's past conduct.34 This requirement seems unsuited for monitoring requests for post-mistrial interviews, where attorneys are primarily concerned with shaping the outcome of a retrial.

The court rules for the Western District of Tennessee affirm the presence of this mismatch between the "good cause" requirement and post-mistrial interviews. The rule that applies to post-trial attorney-juror contact provides, in pertinent part, "In the event that a mistrial is ordered due to the jurors' inability to agree on a verdict, any attorney or the attorney's representative may interrogate a juror without prior approval of the court, unless the court determines that appropriate limitations should be established."35 The rule allows for contact that does not have

29 See, for example, United States v Moten, 582 F2d 654, 666 (2d Cir 1978) (finding that when there has been a showing that an investigation is warranted, it is improper for the court to bar all interviewing, including that which takes place under court supervision); United States v Wilburn, 549 F2d 734, 739 (10th Cir 1977) (finding that when an attorney's assertion of jury misconduct is unsubstantiated, the lower court properly denied his motion to interview former jurors); United States v Sanchez, 380 F Supp 1260, 1265-66 (N D Tex 1973) (finding that, where good cause appears, the court allows attorneys to interrogate jurors).

30 See, for example, Moten, 582 F2d at 667 (holding that when a defendant demonstrates the jury's access to extraneous prejudicial information or other improper influence on jury proceedings that warrants an investigation, post-verdict interviews of jurors are necessary).

31 Id.

32 Id.

33 See id.

34 But see E D Wis Ct Rule 47.3 (current as of Mar 2004) ("Good cause includes a trial attorney's request for permission to contact one or more jurors after trial for the trial attorney's educational benefit.").

35 W D Tenn Ct Rule 47.1(b)(2) (current as of Mar 2004).
to be asked for, but may be restricted. In doing so, it recognizes that in the event of a mistrial, the circumstances of the case may justify an attorney’s access to former jurors. This access is presumptively harmless.

Likewise, the unsuitability of the “good cause” requirement to requests for post-mistrial contact with jurors is evident in cases where attorneys seek leave of court to engage in this contact. For instance, in United States v C & C Dairy, Inc, the Northern District of Illinois granted the government’s request for post-mistrial interviews with jurors even though the government’s request did not rise from a traditional “good cause” source. The government sought the interviews to aid in its decision whether or not to retry the defendants. The court consented on the grounds that the interviews would positively impact the government’s retrial preparation. The court’s rationale in this example highlights the difference between post-mistrial interviews with jurors and post-trial attorney-juror contact in general. Unlike more routine requests for post-verdict interviews, the juror interviews that the government requested in C & C Dairy were “not being sought either in an effort to impeach a verdict or to satisfy lawyers’ curiosity or to create a specter in jurors’ minds of their being interrogated in connection with any future jury service.” Instead, access was sought to improve the government’s retrial performance.

Under the Northern District of Illinois’s reasoning, the unique insight former jurors can provide into the original trial performance might meet the “extraordinary situation” requirement of the First Circuit. Under this logic, any “good cause” requirement for granting post-mistrial interviews is superfluous: former jurors can always provide a unique insight into a trial in which they took part. Its presence only confuses courts as to what an attorney must show to receive approval to conduct these interviews. In this way, such a requirement unnecessarily limits an attorney’s access to jurors after a mistrial.

37 See id at *4 (noting that the government’s request for post-mistrial juror interviews to aid in its decision to retry the case “is not at all a ‘routine’ situation”).
38 Id.
39 Id.
41 Id at *2.
42 See id at *4 (noting the unique nature of the government’s request).
2. Post-trial contact cannot distress jurors.

The declaration of a mistrial creates powerful incentives for lawyers to seek information from the jurors post-trial because of the time and effort that attorneys put into trying their cases. In the first noted instance of a defense lawyer paying a former juror to act as a consultant in a retrial, Connecticut attorney Michael Sherman's post-trial contact with former juror Lisa Lord occurred when he ran into her at a pizzeria. Lord's explanation for why she was working as Sherman's consultant was simply, "[h]e asked me to do it and I did it." Whether Sherman planned his run-in with Lord remains the subject of debate. Former jurors like Lord may not know that they have a right not to speak to an attorney post-trial. While some state laws and district court rules require that the court alert jurors to this fact, others recognize this right without any specific requirement that the court notify jurors of it. The possibility that Sherman intentionally tracked down Lord to interview her combined with Lord's seemingly uncritical acquiescence raise concerns that, left to their own devices, lawyers might violate the rights of unsuspecting former jurors.

The American Bar Association's Model Rules of Professional Conduct forbid lawyers from engaging in any post-trial communication with jurors in a way that might coerce or harass them. State codes of professional conduct often elaborate upon this requirement. For instance, in Iowa, post-trial communication between a lawyer and a juror is permissible "so long as the lawyer refrains from asking questions or making comments that tend to harass or embarrass the juror or to influence the actions of the juror in future cases." These rules recognize that an attorney's

43 Gombossy, Ex-Juror Retained as Trial Consultant, Natl L J at 3 (cited in note *).
44 Id.
45 See Jurors For Hire?, Wash Post A12 (Jan 6, 1986).
46 Compare Ca Code Civ Proc § 206(a) (2004) ("Prior to discharging the jury from the case, the judge in a criminal action shall inform the jurors that they have an absolute right to discuss or not discuss the deliberation or verdict with any one."); D DC Crim Ct Rule 24.2 (current as of Mar 2004) ("After a verdict is rendered or a mistrial is declared but before the jury is discharged, an attorney or party may request leave of Court to speak with members of the jury after their discharge. Upon receiving such a request, the Court shall inform the jury that no juror is required to speak to anyone but that juror may do so if the juror wishes."); D Ariz Ct Rule 1.11(c) (current as of Mar 2004) ("Except in response to a Court order, no juror is compelled to communicate with anyone concerning any trial in which the juror has been a participant.") and D Mont Ct Rule 48.2(c) (current as of Mar 2004) (same).
47 ABA Model Rule Prof Conduct 3.5(c)(3) (2004).
48 Iowa Prof Conduct Rule 7-29 (2003). See also Ala Prof Conduct Rule 3.10 (2004)
post-trial interaction with jurors should be proscribed even in the absence of court supervision.

These rules revolve around the broad category of post-trial communication between attorneys and jurors, but they are inefficient means of monitoring the specific problem of post-mistrial juror consultation. They target instances where the jury verdict frustrates an attorney to the extent that he feels justified in behaving unprofessionally toward members of this jury. An attorney seeking consultation may be eager and aggressive when pursuing the help of former jurors to improve his retrial strategy. He is more likely, though, to flatter these former jurors into helping him than to berate them for their inability to reach a verdict. The threat remains that an attorney might employ intense and unwanted practices when obtaining a former juror’s consent to consult. Yet because such practices run counter to the attorney’s interest in attaining retrial assistance, rules protecting jurors from harassment or embarrassment may not meaningfully regulate post-mistrial attorney-juror consultation.

B. Former Jurors May Not Act as Paid Retrial Consultants

Connecticut is the only state that flatly prohibits a former juror from serving as a paid consultant with respect to a retrial of the action that he originally heard. A violation of this statute results in a misdemeanor conviction for the former juror. While the law does not target the attorney who hired this former juror, were a lawyer to pay a juror to be a retrial consultant, he would likely face professional misconduct charges or, more critically, be liable for aiding and abetting a misdemeanor, which itself is a misdemeanor in Connecticut.

("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 the juror’s actions in future jury service.").

49 See, for example, In re Berning, 468 NE2d 843, 845 (Ind 1984) (finding that an attorney violates the Indiana Code of Professional Responsibility when he sends a letter to former jurors out of frustration with an adverse verdict and this letter harshly criticizes the jurors’ decision, thereby causing them to feel harassed, irritated, angry, displeased, and embarrassed); State v Chesnel, 734 A2d 1131, 1140 (Me 1999) (noting that when the lawyer of a convicted murderer contacts a juror who enabled his conviction, the contact “may be an event of particular stress and fear”).

50 Conn Gen Stat Ann § 51-247b.

51 Id.

52 Post, Hiring Former Jurors, Natl L J at 6 (cited in note 12).
The Connecticut legislature enacted this prohibition in 1985, in response to what it felt was an affront to the jury system.\textsuperscript{53} That year, after the jury in his client's rape case failed to reach a unanimous verdict, Michael Sherman, a Connecticut lawyer, hired one of the former jurors as a retrial consultant.\textsuperscript{54} This consultation provided the lawyer with information about the first jury's reaction to witnesses, arguments, and evidence.\textsuperscript{55} Although the second jury also convicted the defendant, the Connecticut legislature enacted this law to prevent money, rather than justice, from motivating jurors in the future.\textsuperscript{56}

Currently, the California legislature is considering whether to enact legislation similar to Connecticut's.\textsuperscript{57} As in Connecticut,

\begin{quote}
\textsuperscript{53} Id.
\textsuperscript{54} Id.
\textsuperscript{55} Luna, From Jury Box to Defense Table, LA Times at B1 (cited in note 3).
\textsuperscript{56} Id.
\end{quote}

At present, California law protects the rights of jurors to not discuss their deliberations or verdicts. Ca Code Civ Proc § 206 (2004). The law provides:

(a) Prior to discharging the jury from the case, the judge in a criminal action shall inform the jurors that they have an absolute right to discuss or not to discuss the deliberation or verdict with anyone. The judge shall also inform the jurors of the provisions set forth in subdivisions (b), (d), and (e).

(b) Following the discharge of the jury in a criminal case, the defendant, or his or her attorney or representative, or the prosecutor, or his or her representative, may discuss the jury deliberation or verdict with a member of the jury, provided that the juror consents to the discussion and that the discussion takes place at a reasonable time and place.

(c) If a discussion of the jury deliberation or verdict with a member of the jury pursuant to subdivision (b) occurs at any time more than 24 hours after the verdict, prior to discussing the jury deliberation or verdict with a member of a jury pursuant to subdivision (b), the defendant or his or her attorney or representative, or the prosecutor or his or her representative, shall inform the juror of the identity of the case, the party in that case which the person represents, the subject of the interview, the absolute right of the juror to discuss or not discuss the deliberations or verdict in the case with the person, and the juror's right to review and have a copy of any declaration filed with the court.

(d) Any unreasonable contact with a juror by the defendant, or his or her attorney or representative, or by the prosecutor, or his or her representative, without the juror's consent shall be immediately reported to the trial judge.

(e) Any violation of this section shall be considered a violation of a lawful court order and shall be subject to reasonable monetary sanctions in accordance with Section 177.5 of the Code of Civil Procedure.

\ldots

\begin{quote}
\textsuperscript{57} Pursuant to Section 237, a defendant or defendant's counsel may, following the recording of a jury's verdict in a criminal proceeding, petition the court for access to personal juror identifying information within the court's records necessary for the defendant to communicate with jurors for the purpose of developing a motion for
the impetus for the drafting of California’s legislation was an attorney’s desire to compensate former jurors for aiding his retrial preparation. Once the attorney, Joseph Cavallo, announced that he would employ former jurors as consultants in his client Gregory Haidl’s retrial, the Orange County District Attorney suggested that the legislature enact a law to forbid such a practice. Two California state legislators subsequently introduced a bill to amend California’s Penal Code to embody the District Attorney’s suggestion. After the legislature failed to enact this bill during its 2003-2004 session, State Senator Ac-
kerman introduced a truncated version of the measure to the California State Senate.62

Senator Ackerman's proposed amendment to the California law would create a new crime of unlawful juror conduct. The bill proscribes, without time limitations, two possible scenarios involving former jurors as retrial consultants.63 First, in reference to the exchange of compensation for information regarding any aspect of the trial in which a former juror served, the proposed statute forbids: (1) former jurors from accepting a benefit for their consultation service, and (2) individuals from conferring or offering to confer a benefit upon former jurors for consultation in anticipation of retrial.64 This proposed statute covers both Cavallo and the former juror to whom he paid a consultant fee.65 As a result, it casts a wider net than the Connecticut regime, which limits responsibility for the consultant relationship to the former juror.66

The current debate surrounding the bill focuses on how the proposed law affects the dynamic between defense attorneys and prosecutors at retrial.67 Senator Ackerman contends that, as long as the legislature continues to allow attorneys to pay former jurors for their thoughts, it "promotes a two-tiered judicial system that grants wealthy defendants alternatives not available to poorer defendants."68 He views the proposed law as a way to close "a loophole in the law that gives lawyers for wealthy defendants

62 Bill 252, Cal State Senate (Feb 15, 2005). Unlike the bill before the legislature in the 2003-2004 term, the bill currently under consideration does not address the issue of whether an attorney and former juror may enter into an agreement that forbids the juror from discussing her impressions of the case she heard with any other party to the case. Id.
63 Id.
64 The text of the proposed bill is as follows:

(a) After conclusion of any civil or criminal proceeding that was tried by a jury, both of the following shall apply: (1) No party to the proceeding or person acting on behalf of that party shall make any payment of money or give anything of value to any person who served as a juror in that proceeding in connection with that person's service as a juror. (2) No person who served as a juror in that proceeding shall accept any payment or anything of value in connection with that person's service as a juror from any party to the proceeding or a person acting on behalf of that party.

65 Bill 252, Cal State Senate (Feb 15, 2005).
66 Conn Gen Stat Ann § 51-247b.
67 See Analysis of Bill 252, Cal State Senate at D (Mar 29, 2005) (detailing the arguments the California Senate Committee on Public Safety deems relevant in its consideration of the bill).
68 Id at E.
a distinct advantage over prosecutors in a retrial.” Ackerman thus believes that his law will lessen two imbalances in the criminal justice system: that between the rich and the poor and that between defense lawyer and prosecutor. Thus, his justification for the law is rooted in an inequality in the criminal justice system that exists despite a case’s merits.

Those who oppose Ackerman’s measure do so on the ground that they believe the proposed law increases an imbalance in the justice system, rather than diminishes one. There is concern with the bill’s criminalization of all post-trial interaction between former jurors and attorneys. In particular, as the bill encompasses a broad range of “payments,” it equates an attorney buying jurors “a cup of coffee while they sit and chat” with an attorney paying former jurors a fifty dollars per hour consultation fee. Additionally, the California Senate Committee evaluating the bill notes that criminalizing all payment to jurors enhances the inherent advantage of the prosecution in criminal cases. This initial advantage stems from the prosecution’s having “the full power of the state behind [it] including the decision whether or not to retry a hung jury.” For this reason, “by criminalizing all payment to the jurors, an additional advantage is given to the prosecutor in that it will be the prosecutor who can decide whether or not to charge an attorney with a misdemeanor for a ‘payment to the juror.’” Likewise, the bill’s opponents reason that contrary to Ackerman’s contention, the bill does not increase the disparity in the representation of the wealthy and the poor:

In the existing system, even a defendant who can afford a private attorney for the first trial may not be able to do so if there is a hung jury and the jury is retried. This puts the advantage with the prosecutor who uses public dollars in deciding to retry and can decide to do so even if the verdict was 1-11.

69 Id.
70 Id at H.
71 Analysis of Bill 252, Cal State Senate (Mar 29, 2005) at H, E.
72 Id at E.
73 Id.
74 Id.
75 Analysis of Bill 252, Cal State Senate (Mar 29, 2005) at H–G.
As these comments reveal, every unfair advantage that Ackerman finds in the absence of a ban on former jurors serving as paid retrial consultants, his opposition finds in its presence.

It remains to be seen how the California legislature will balance these competing views of whether the bill diminishes or enhances the inequities of the criminal justice system. Perhaps the legislature might not even reach the point in their consideration of the bill where such balancing is necessary. Given that the jury convicted Haidl at retrial, it remains to be seen how the California legislature will balance these competing views of whether the bill diminishes or enhances the inequities of the criminal justice system. Perhaps the legislature might not even reach the point in their consideration of the bill where such balancing is necessary. Given that the jury convicted Haidl at retrial, the legislature may lose its concern with the potential advantages that the possibility of paid juror consultants affords.

II. THE IMPLICATIONS OF POST-MISTRIAL CONTACT BETWEEN JURORS AND ATTORNEYS

General regulations of post-trial attorney-juror contact often emphasize the protection of interests that are not in jeopardy in the post-mistrial juror-consultant context. Although they differ in structure, regulations that require court approval for post-trial contact and those that merely proscribe the harassment of jurors balance the same constitutionally protected interests: the defendant's right to a fair trial and the juror's right to privacy.

These regulations seek to guard the integrity of the jury system by favoring the finality of verdicts and protecting jurors from harassment. An exploration of the constitutional, ethical, and systemic implications of post-mistrial juror consultation reveals

---

76 Clare Luna, *Victim Calls Sex Trial an Ordeal; On TV 'Jane Doe' recounts the courtroom drama in the O.C. assault case and says she almost couldn't testify*, LA Times B3 (Mar 30, 2005) (remarking on the guilty verdict the jury rendered in Haidl's retrial).

77 Cavallo believes this legislation is "just politics." *Paying Jurors*, Cal Bar J (Jan 2005) (cited in note 2). He noted that other lawyers would follow his lead if they only "had the guts" to withstand the criticism he has faced, which includes being called "slimy" and "unethical." *Id.*

78 See US Const Amend VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.").

79 See US Const Amend V ("No person shall... be deprived of... liberty... without due process of law."). The Supreme Court has found that the Fifth Amendment's conception of personal liberty, which applies to the states through the Fourteenth Amendment, gives rise to the privacy interest an individual has "in avoiding disclosure of personal matters." *Whalen v Roe*, 429 US 589, 589–99 (1977).

80 See *Cuevas v United States*, 317 F3d 751, 753 (7th Cir 2003) (finding that the purpose of court rules regulating post-trial communication between attorneys and jurors includes increasing the finality of jury verdicts and protecting jurors from harassment); *Rapp v Disciplinary Board of Hawaii Supreme Court*, 916 F Supp 1525, 1536 (D Haw 1996) (finding that the purpose of rules of professional conduct that regulate post-trial communication between attorneys and jurors includes maintaining the inviolability of jury verdicts and guarding against a systemic dismantling of juror privacy).
how these existing regulations protect interests that are either peripheral or irrelevant to retrial consultation. This exploration also shows that the failure of current regimes to effectively regulate juror consultation comes both from a misplaced emphasis on some interests and from a neglect of others.

A. Constitutional Implications

1. Defendants' right to a fair and impartial jury.

The Sixth Amendment guarantees criminal defendants the right to a trial by an impartial jury. 81 This guarantee of impartiality preserves an individual's liberty in the face of criminal prosecution by insisting that a juror's verdict rise only from the evidence developed at trial. 82 The impartiality requirement therefore indicates that criminal convictions should not depend upon a juror's financial and social concerns. 83

The use of former jurors as retrial consultants creates financial and social incentives that may jeopardize a defendant's Sixth Amendment rights. First, the possibility of paid post-trial consultation may skew a juror's decision-making process. 84 The potential financial benefit from consultation services may create perverse incentives for an individual to prevent the jury from reaching a unanimous verdict, regardless of the weight of the evidence before her. 85 This is especially true in heavily publicized cases like Haidl's, where the stakes are high and defense counsel's re-

---

81 US Const Amend VI.
82 Irvin v Dowd, 366 US 717, 723 (1961) ("To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.").
83 See Getter v Wal-Mart Stores, 66 F3d 1119, 1122 (10th Cir 1995) (permitting peremptory challenges for cause where jurors have a direct financial interest in the trial's outcome because such an interest invites the presumption of bias); Nancy S. Marder, Deliberations and Disclosures: A Study of Post-Verdict Interviews of Jurors, 82 Iowa L Rev 465, 469 (1997) (noting that if jurors base their votes on how they think the community will respond when the information becomes available through post-verdict interviews, their impartiality during trial is questionable).
84 See Curtis, Paying Jurors, Cal Bar J (cited in note 2) (noting the belief of many legal scholars that if lawyers pay former jurors for their consultation, the potential for such payment may alter how jurors decide cases); Luna, From Jury Box to Defense Table, LA Times at B1 (cited in note 3) (same).
sources are seemingly unlimited. In such cases, commentators speculate that as jurors come to expect pecuniary rewards for their post-trial services, a "bidding war" will ensue between defense lawyers and government prosecutors. As these bidding wars cause consultant fees to swell, the chance that a juror's financial interests will strip a defendant of his Sixth Amendment rights grows too. Because existing laws and court rules place no caps on these fees, the steady increase of these fees and the perverse incentives that they create could eventually erode a defendant's right to a fair retrial.

Second, the promise of retrial consultation could also limit the jury's impartiality due to a juror's desire for notoriety. Specifically, in high profile cases where post-mistrial consultation might link a former juror to a celebrity-defendant, a juror who covets such status might intentionally cause a mistrial. On the other hand, a shy juror might fear the possibility of post-mistrial contact with an attorney and may vote in favor of a judgment she does not believe in, simply to prevent an attorney from seeking out her retrial advice. Although both of these scenarios may be unlikely given the foresight, planning, and disregard for the law that they entail, the possibility still exists that the anticipation of post-verdict interviews will inform a juror's pre-verdict behavior. Voir dire might provide a mechanism for eliminating conflicted jurors from the jury pool. Yet, this mechanism's ultimate effectiveness is questionable given that both prosecutors and de-

86 Srisavasdi, DA Opposes Paying Ex-Jurors to Consult, Orange County Register at 1 (cited in note 59).
87 See Bennett H. Beach, The Juror as Celebrity; Does Postverdict Press Scrutiny Prevent Abuses or Create Them?, Time 42 (Aug 16, 1982) (detailing the advice a prosecutor gave to the jurors being impaneled to hear the case of John Hinckley that, once the trial began, they would "become celebrities of a sort").
88 Joshua Okun explains how the anticipation of any post-trial contact with an attorney taints jury deliberation in Investigation of Jurors by Counsel: Its Impact on the Decisional Process, 56 Georgetown L J 839, 860 (1968). Okun reasons that:

[T]he attorney's inquiry into the juror's motives and actions is made after the conclusion of the trial does not eliminate the possibility that anticipation of this questioning may have affected the juror's thinking while he was still in the jury room. The very fact that he may be called upon to account for or explain his view may consciously or subconsciously cause him to modify his position in the jury room. Perhaps it will not change his vote, but it may well affect the vigor with which he maintains his position, thus affecting the vote of fellow jurors. We should also consider the case of the juror who knows he is under no obligation to talk with anyone following the trial, and who in fact either refuses to respond to inquires or is not even approached. This juror's deliberations may still be influenced by the knowledge that other jurors may reveal his jury-room position to the inquiring party.

Id.
Defense attorneys have a stake in preserving the ability to glean useful information from former jurors. Thus, as long as rules policing post-trial attorney-juror contact focus on protecting the rights of jurors, the threat to a defendant’s Sixth Amendment right remains unchecked.

Post-mistrial contact between an attorney and a former juror may strip a defendant of his right to a fair retrial even when juror awareness of its possibility does not affect deliberation. For instance, when contact occurs between a prosecutor and a former juror at the close of a trial without the defendant’s knowledge, the attorney’s behavior, rather than the juror’s, may constitute a Sixth Amendment violation. In response to this situation, the First Circuit declared a prophylactic rule to govern future requests for post-trial interviews with former jurors. An attorney may proceed with the interview only under the district court’s supervision, in “such extraordinary situations as are deemed appropriate.” Despite announcing this rule, the First Circuit found that the defendant in the case before it suffered no actual harm when the government contacted the former jurors. Its declaration of this rule, in the face of an outcome that appears to deem the rule unnecessary, suggests that the mere possibility of a Sixth Amendment violation is enough to warrant a restrictive rule regarding post-trial access to former jurors. Yet, because the court does not provide guidance for what constitutes an “extraordinary situation,” its rule may be too restrictive to promote the Sixth Amendment rights that it purports to protect.

The First Circuit’s rule may constrain post-mistrial behavior too strictly because an attorney’s access to former jurors can increase the fairness of the defendant’s retrial by increasing lawyer efficacy. Interviews with jurors regarding their impressions of the evidence introduced and witnesses examined during trial can improve lawyers’ trial skills and courtroom performances. Post-

69 Kepreos, 759 F2d at 967.
70 Id.
71 Id.
72 Id at 767–68.
73 Pamela M. Smoljanovich, Post-Trial Interviews with Jurors: An Absence of Regulation in West Virginia, 95 W Va L Rev 1121, 1136 (1993) (“[I]nformation obtained through post-trial interviews may help lawyers improve their advocacy skills in future trials or strengthen a particular case on retrial.”).
74 Karlene S. Dunn, When Can an Attorney Ask: “What Were You Thinking?”—Regulation of Attorney Post-Trial Communication with Jurors After Commission of Lawyer Discipline v Benton, 40 Tex L Rev 1069, 1079–80 (1999) (arguing that because post-trial attorney-juror interviews improves the skills of lawyers, Texas should modify its vague disciplinary rule that prevents this contact in certain situations).
mistrial interviews with former jurors can teach lawyers how to represent their clients better in the future and how to convince the second jury to accept their positions.95 As long as compensation for consultation with former jurors is limited and courts monitor the effect of this consultation on both jurors and defendants alike, former jurors who serve as retrial consultants may, on balance, positively impact a defendant's Sixth Amendment rights.

2. Jurors' right to privacy.

Regulations of post-trial conversations between jurors and lawyers can implicate a juror's right to privacy under the Fourteenth Amendment's concept of personal liberty.96 The Supreme Court's approach to juror privacy rights evinces a concern that the news media are more likely than lawyers to violate these rights, especially during voir dire.97 Regardless, because courts possess the inherent power to protect jurors' privacy,98 this privacy right must inform any court sanctioned procedure, whether it applies to the media or to lawyers.99

The current rules monitoring general post-trial attorney-juror contact already address this concern. When a court considers whether to allow a post-trial interview, the protection of juror privacy serves as a compelling interest against allowing the interview.100 This consideration extends to the context of requests

95 Id.
96 Consider Jones v Superior Court of San Diego County, 26 Cal App 4th 1202, 1210 (1994) (affirming a lower court decision that the release of the addresses or telephone numbers of eight former jurors who had previously informed the court that they did not want to fill out a post-verdict questionnaire would invade juror privacy rights, but declining to address the constitutional issue); Pantos v City and County of San Francisco, 151 Cal App 3d 258, 265 (1984) (denying a commercial jury investigation firm access to questionnaires that potential jurors filled out on the ground that, in this informational age, dissemination of the questionnaire answers threatens to unreasonably intrude on the juror's privacy).
98 See Townsel v Superior Court of Madera County, 979 P2d 963, 967 (Cal 1999) (detailing the court's inherent power to protect jurors).
99 See id at 964 (noting that the court must act as a "gatekeeper to ensure that any juror contact by . . . counsel . . . is both consensual and reasonable"). See also United States v Miller, 284 F Supp 220, 227 (D Conn 1968) (observing that even after the court discharges the jury, it remains responsible for protecting the jurors from inquiry into their deliberations).
100 See Rapp, 916 F Supp at 1536 (recognizing that the aim of protecting juror privacy is one of the compelling state interests that can justify a rule regulating attorney-juror
for post-mistrial interviews, where an attorney may invite a juror who agreed to consult with him to disclose the opinions of one who did not. Most of the rules that currently regulate post-mistrial contact have no mechanism in place to inform a juror of her post-trial privacy rights, or to remind her of the privacy rights of the other members of her jury panel. The absence of this safeguard renders these rules ineffective protections against the invasion of jurors' post-mistrial privacy rights.

3. Jurors' right to free speech.

Rules regulating post-mistrial interviews with jurors also implicate jurors' First Amendment rights because these rules constrain the jurors' ability to share their opinions with attorneys preparing for retrial. The First Amendment guarantees that the government cannot abridge an individual's right to speak and express herself freely. Thus any statute, court rule, or court order limiting the ability of former jurors to converse with parties to the action they heard imposes on this constitutional right. Not all governmental intrusions on free speech are forbidden, however, although only a compelling state interest will justify a court's imposition of prior restraints on jurors' freedom of speech.

Whether such a compelling interest exists in the context of former juror speech remains unsettled. The Tenth Circuit found that a court order banning an attorney from contacting jurors after trial did not implicate the First Amendment rights of the jurors because they remained free to approach the court with any

---

101 See Okun, 56 Georgetown L J at 860 (cited in note 88) (considering "the case of the juror who knows that he is under no obligation to talk with anyone following the trial, and who in fact either refuses to respond to inquiries or is not even approached. This juror's deliberations may still be influenced by the knowledge that other jurors may reveal his jury-room position to the inquiring party.").

102 US Const Amend I.

103 But see Marder, 82 Iowa L Rev at 522–23 (cited in note 83) (arguing that restraints on the post-verdict speech of individual jurors may actually strengthen the speech rights of the jury as a whole: "The jury speaks through its verdict, and its voice may become less clear when individual jurors are able to add their own individual glosses to the jury's pronouncement.").

104 See Times Film Corp v City of Chicago, 365 US 43, 47 (1961) ("It has never been held that liberty of speech is absolute. Nor has it been suggested that all previous restraints on speech are invalid.").

105 See Journal Publishing Co v Mechem, 801 F2d 1233, 1237 (10th Cir 1986) (striking down a judicial order prohibiting press contact with jurors because it was overbroad).
of their concerns.\textsuperscript{106} Courts have yet to address situations in which such an alternative outlet for speech may be inadequate. When a juror is only able to convey her thoughts on the trial to the court, her freedom to aid an attorney in his retrial preparation is constrained.\textsuperscript{107}

Restrictions on jurors’ post-mistrial speech may promote another compelling government interest: the protection of its citizens’ right to privacy.\textsuperscript{108} While courts do not commonly employ this technique, a narrowly tailored restriction on a former juror’s speech could limit the invasion of juror privacy rights, while simultaneously protecting juror speech.\textsuperscript{109} For instance, in the context of post-trial interviews between jurors and the press, a flat ban on these interviews is an overbroad means of promoting juror privacy because “jurors very rarely disclose personal or private matters regarding other panelists.”\textsuperscript{110} If a court limits jurors’ post-mistrial speech in a manner that precludes them from disclosing especially personal, embarrassing, or otherwise inappropriate information gleaned from their deliberations, it protects both juror privacy and speech rights.\textsuperscript{111}

4. Attorneys’ right to free speech.

Just as a ban on post-mistrial contact between jurors and attorneys might curtail a juror’s First Amendment rights, such a ban also might impair an attorney’s right to free speech.\textsuperscript{112} Lawyers play a key role in the criminal justice system, and as a consequence of their special access to information through discovery and client communications, “the State may demand some adher-

\textsuperscript{106} United States v Wilburn, 549 F2d 734, 739 (10th Cir 1977).
\textsuperscript{107} See Smoljanovich, 95 W Va L Rev at 1140 (cited in note 93) (arguing that the constitutional protections of jurors’ speech should be afforded not only to jurors in high-profile cases who speak to the media, but also to jurors with the less profitable goal of relaying their observations to attorneys after trial).
\textsuperscript{108} See, for example, Rapp, 916 F Supp at 1538 (recognizing that the aim of protecting juror privacy is one of the compelling state interests that can justify a rule regulating attorney-juror contact).
\textsuperscript{109} Nicole B. Casarez, Examining the Evidence: Post-Verdict Interviews and the Jury System, 25 Hastings Commun & Enter L J 499, 582–83 (2003) (detailing how judicial orders that generally forbid jurors from discussing their deliberations, such as that the Fifth Circuit upheld in United States v Cleveland, 128 F3d 267 (1997), “restrict both the arguably dangerous speech as well as innocuous expression that serves to educate the public about the jury system”).
\textsuperscript{110} Id at 583.
\textsuperscript{111} Id.
\textsuperscript{112} See Dunn, 40 Tex L Rev at 1092–99 (cited in note 94) (examining an attorney’s constitutional right of free speech in the context of rules of professional conduct that limit this speech with jurors post-trial).
ence to the precepts of that system in regulating their speech as well as their conduct.”

Thus, even when a court recognizes an attorney’s speech right, it still may constrain this right within limits.

Courts have yet to define the limits of this constraint post-mistrial, when a lawyer’s retrial strategy might include communication with former jurors. The Fifth Circuit’s decision in Haeberle v Texas International Airlines, regarding an attorney’s request for “leave to interview jurors in order to learn ‘some lesson’ about the basis of its adverse verdict,” is a useful example. The Fifth Circuit upheld the lower court’s denial of this request after balancing the interests at stake. The court considered the following countervailing concerns: the jurors’ right to privacy, the public’s interest in well-administered justice, and the attorney’s First Amendment rights. When the court weighed the last of these concerns lightly, it reasoned that, unlike reporters who use juror interviews to inform the public about judicial proceedings, attorneys who seek post-trial interviews to “learn some lesson,” serve no higher public good. As post-trial attorney-juror interviews do not affect political behavior, their access to former jurors may be limited in a manner that a journalist’s cannot be.

Like the lawyer in Haeberle, attorneys who want to use former jurors as consultants seek to learn from these jurors. Limitations on the ability to obtain jury consultation impact the ability of lawyers to effectively structure their retrial strategy. Because this goal is both highly specific and likely to effect the next jury’s ability to reach a just verdict, attorneys’ First Amendment rights may be more important than current rules account for.

114 Id.
115 739 F2d 1019 (5th Cir 1984).
116 Id at 1020.
117 Id at 1021–22.
118 Id.
119 Haeberle, 739 F2d at 1022.
120 Id (“Although [an attorney’s interests in satisfying his curiosity and improving his advocacy techniques] are not without first amendment significance, they are not ‘paramount’ like the public’s right to receive information necessary for informed self-government.”). Under In re Express-News Corp, 695 F2d 807, 810 (5th Cir 1982), only a rule “narrowly tailored to prevent a substantial threat to the administration of justice,” may restrict the first amendment right of journalists to gather news from post-verdict juror interviews. Id at 810.
B. Perverse Incentives

The main ethical concern arising from consultations with jurors is the creation of perverse incentives for jurors to thwart a unanimous verdict. The potential for post-mistrial consultation may skew juror deliberation through: (1) its offer of payment for the consultation service, and (2) its offer of a role for former jurors in shaping a retrial strategy.

The prospect of recovering a consultation fee in the aftermath of a mistrial may invite individual jurors to disregard the evidence before them to prevent the jury from reaching a verdict, thereby making themselves viable retrial consultants.\textsuperscript{121} While paid juror-consultants are not yet part of mainstream retrial preparation,\textsuperscript{122} it seems that those defendants who can afford to pay these consultants will do so, given the interest they have in securing an acquittal at retrial. The Haidl case supports this prediction. Cavallo deemed fifty dollars an hour a "reasonable amount" to offer jurors for their consultation,\textsuperscript{123} as part of a larger retrial strategy that depended upon "a nine-member legal defense team, an army of private detectives, O.J. Simpson's jury consultant and a public-relations manager."\textsuperscript{124} The threat of a hidden profit motive driving juror decisions is not limited to the trials of wealthy defendants. Because jurors often are unaware of defendants' and prosecutors' resources, the outcome of all trials are in jeopardy.\textsuperscript{125}

The harms of a financial incentive in this context extend beyond skewing trial outcomes to a coarsening of the humanity of the jury trial. One of the jurors who heard Haidl's first rape case noted this when he explained his choice not to serve as a retrial consultant. He based his decision on a belief that the willingness of former jurors to profit from the criminal justice system essen-

\begin{footnotesize} 
\footnote{121}{Drew, \textit{Should Former Jurors Be Paid to Advise in a Retrial?}, CNN.com (cited in note 85).}  
\footnote{122}{Luna, \textit{From Jury Box to Defense Table}, LA Times at B1 (cited in note 3).}  
\footnote{123}{Post, \textit{Hiring Former Jurors}, Natl L J at 6 (cited in note 12).}  
\footnote{124}{R. Scott Moxley, \textit{Man of the Year}, OC Weekly 10 (Dec 31, 2004).}  
\footnote{125}{See Srisavasdi, \textit{DA Opposes Paying Ex-Jurors to Consult}, Orange County Register at 1 (cited in note 59) (detailing the Orange County DA's assessment that offering consultant fees to former jurors compromises the integrity of the jury system "because future jurors would see a financial incentive to favor one of the parties"). But see Analysis of Bill 252, Cal State Senate (Mar 29, 2005) at G (arguing that jurors will not decide a case in a specific way to get an economic advantage because there are too many uncertainties surrounding this economic advantage, including a lack of knowledge regarding the parties' resources and "which juror an attorney would be interested in talking to").} 
\end{footnotesize}
ially exploits the "unfortunate lives of other people." The money that former jurors receive in compensation for their consultation cannot escape the taint of someone else's misfortune, whether it be that of a victim or a wrongfully accused defendant. As the link between jury service and profit obscures the link between jury service and the administration of justice, bias and exploitation threaten to overtake a juror's understanding of the merits of the case before her.

Some jury experts, however, believe that the possibility of eventually receiving a consultation fee will not change the way juries work. In fact, as Vanderbilt University law professor Nancy J. King notes, "Most jurors are deeply conscientious about their duty and would be unlikely to throw a trial in the hopes of milking more money out of their jury summons." For this reason, the practice of hiring former jurors as trial consultants may not cause a systemic ethical problem. Yet, because it only takes one juror to keep the jury from reaching a unanimous verdict, a reliance on the general nature of jurors to avoid a system-wide problem may be misplaced, especially in the context of offering former jurors a retrial consultation fee.

126 Srisavasdi, DA Opposes Paying Ex-Jurors to Consult, Orange County Register at 1 (cited in note 59).
127 See Curtis, Paying Jurors, Cal Bar J (cited in note 2) (detailing the belief of Deborah L. Rhode, a Stanford University law professor, that the use of former jurors as paid consultants "commercializes the deliberative process" in ways that may not be "healthy" because jurors should "be thinking about jury service, not selling their advice later"); Luna, From Jury Box to Defense Table, LA Times at B1 (cited in note 3) (detailing how a professional jury consultant finds that "people will not be able to focus on doing justice" when there is a possibility of economic gain from their jury service).
128 See Curtis, Paying Jurors, Cal Bar J (cited in note 2) (noting that Richard C. Wydick, legal ethicist and professor of law at the University of California at Davis, considers it a "long shot" that juries would intentionally aim for a mistrial in order to eventually obtain consultant fees); Luna, From Jury Box to Defense Table, LA Times at B1 (cited in note 3) (noting that Nancy J. King, professor of law at Vanderbilt University, believes that deals with former jurors are unlikely to change how juries function).
129 Luna, From Jury Box to Defense Table, LA Times at B1 (cited in note 3).
130 Id.
131 Post-mistrial juror consultation also invites bias into the jury room by triggering human appetites for attention and appreciation. Performing one's jury service obligation is often executed in anonymity and without thanks. A lawyer's reliance on a former juror's opinion, however, renders post-mistrial consultation a means for former jurors to secure further recognition for the performance of their civic responsibility.

In a high profile trial, this consultation also may generate public attention, as it did for the jurors who sat at Haid's first rape trial, evidence of which lies in the frequent mention of these jurors and their opinions about retrial consultations in the articles covering Cavallo's decision to hire the former jurors as retrial consultants. See, for example, Luna, From Jury Box to Defense Table, LA Times at B1 (cited in note 3); Post, Hiring Former Jurors, Natl L J at 6 (cited in note 12); Srisavasdi, DA Opposes Paying Ex-Jurors to Consult, Orange County Register at 1 (cited in note 59).
Ultimately, the infusion of bias in the jury room might diminish the value of the post-mistrial juror consultation for attorneys in search of aid at retrial. Jurors who forsake their civic duty to act as impartial fact-finders for money and fame convey less meaningful information to lawyers at retrial as those who failed to reach a unanimous verdict in earnest. Yet, because attorneys seek juror consultants to improve their performance at retrial, even a former juror who manipulated the jury system to become a consultant can provide advice on how the attorney may state his case at retrial more persuasively. For this reason, jurors' responses to the perverse incentives that consultant work creates likely will not decrease attorney demand for consultant services.

C. Systemic Implications

The implications of post-mistrial attorney-juror consultation are not limited to cases that actually result in mistrial. Rather, the use of former jurors as retrial consultants impacts the criminal justice system as a whole. Specifically, post-mistrial consultation informs the behavior of lawyers and jurors in general, not only after and during trial, but before the trial even begins.

The systemic consequences of using former jurors as retrial consultants are limited to one cost and one benefit: the cost of a potential decrease in public commitment to jury service and the benefit of a potential increase in attorney efficacy. In contrast, general post-trial inquiries engender a catalog of "evil consequences: subjecting juries to harassment, inhibiting juryroom deliberation, burdening courts with meritless applications, increasing temptation for jury tampering and creating uncertainty in jury verdicts." These fears of "evil consequences" are misplaced in the context of requests for post-mistrial communication, where attorneys seek the communication to improve their retrial strategy, rather than to expose juror misconduct. Likewise, limits on post-trial communications with jurors may be

132 United States v Ianniello, 866 F2d 540, 543 (2d Cir 1989) (citations omitted). See also Diverse v Hohn, 198 F2d 934, 938–39 (3d Cir 1952) (disapproving of the practice of post-verdict juror interviews on the ground that it discourages citizens from serving on juries for fear of later inquiries into their thoughts); Rakes v United States, 169 F2d 739, 745–46 (4th Cir 1948) (finding that a court may hold an attorney who makes studied inquiries of former jurors as to what occurred during deliberations guilty of obstructing the administration of justice); State v LaFera, 199 A2d 630, 635–36 (NJ 1964) (finding that an investigation that avoids interviewing former jurors directly, but involves contacting the jurors' relatives, friends, and associates, undermines the jury system because it obstructs the free debate among jurors for fear of this debate becoming public).
necessary when a verdict is rendered, lest judges constantly deconstruct and analyze past cases.\textsuperscript{133} When the jury cannot reach a unanimous decision, however, there is nothing for a post-mistrial interview to deconstruct. Again, the rules regarding general post-trial contact between attorneys and jurors are an ineffective means of regulating post-mistrial juror consultation specifically.

Post-mistrial attorney-juror contact could also have a systemic impact on a citizen's commitment to fulfilling jury service obligations. Given the financial hardship that jury service can entail and the time commitment it requires, many Americans already fail to appear for jury duty when summoned,\textsuperscript{134} or attempt to get out of serving during the selection process.\textsuperscript{135} Attorney access to jurors after the court discharges them from their service may cause jurors to feel their civic service has extended beyond the bounds of the courtroom, into their daily lives.

Because post-mistrial communication can be seen as prolonging jury service, it may decrease commitment to a civic duty that many already deem inconvenient and unattractive.\textsuperscript{136} One of the jurors who refused Cavallo's offer to serve as his retrial consultant based his refusal on his interest in closure at the end of the trial.\textsuperscript{137} He described his experience as a juror as a "nightmare" and told a reporter, "I want to put these very unfortunate set of circumstances behind me as soon as I can. . . . There were no winners in that trial at all, just us losers—defense, prosecution, and us jurors who couldn't come to a conclusion."\textsuperscript{138}

The Hawaii District Court linked this impulse for closure to larger systemic concerns in \textit{United States v Kanahele},\textsuperscript{139} a case

\begin{footnotes}
\item See \textit{Jorgensen v York Ice Machinery Corp}, 160 F2d 432, 435 (2d Cir 1947) ("[I]t would be impracticable to impose the counsel of absolute perfection that no verdict shall stand, unless every juror has been entirely without bias, and has based his vote only upon evidence he has heard in court. It is doubtful whether more than one in a hundred verdicts would stand such a test.").
\item See Evan R. Seamone, \textit{A Refreshing Jury Cola: Fulfilling the Duty to Compensate Jurors Adequately}, 5 NYU J Legis & Pub Pol 289, 293 (2002) (noting that "as few as forty percent of all summoned jurors . . . respond to the court's summons").
\item See Mark A. Behrens and M. Kevin Underhill, \textit{A Call For Jury Patriotism: Why the Jury System Must Be Improved for Californians Called to Serve}, 40 Cal W L Rev 135, 148 (2003).
\item See \textit{Miller}, 284 F Supp at 228 ("Leaving jurors at the mercy of investigators for both sides to probe into their conduct would make the already difficult task of obtaining competent citizens willing to serve as jurors well nigh impossible.").
\item Srisavasdi, \textit{DA Opposes Paying Ex-Jurors to Consult}, Orange County Register at 1 (cited in note 59).
\item Id.
\item 951 F Supp 928 (D Haw 1996).
\end{footnotes}
where defense counsel’s request to interview former jurors after a mistrial was denied. The court reasoned that such interviews would be particularly taxing to jurors who had already faced intense media attention and a FBI investigation. The court also noted that increasing the burden of jury service through further post-trial attention would make it more difficult to select a jury for retrial. Cavallo’s success in securing nine former jurors as retrial consultants demonstrates that not all jurors view their jury service as a nightmare they want to wake up from. Yet, both the testimony of the former juror who declined Cavallo’s request and the Kahahele court’s reasoning reveal that the use of former jurors as retrial consultants may cause a decline, however slight, in overall commitment to the jury system.

The benefit that post-mistrial juror-consultants offer to the criminal justice system is an improvement in the efficacy of attorneys as advocates. Interviews with former jurors in the aftermath of a mistrial can educate lawyers as to how to better represent their clients in the future by revealing the strengths and weaknesses of their cases. These interviews invite former jurors to offer their impressions of the evidence introduced and the witnesses examined during trial, and they provide an opportunity for lawyers to know what to emphasize or underplay at retrial. Cavallo affirmed this understanding of the value of juror impressions in retrial preparation. Before the Haidl retrial began, Cavallo noted that “[the jurors’] input has been beyond expectations in terms of each phase of the trial.” In fact, he said, one juror actually pointed out a piece of evidence that both his defense team and the prosecution had missed. As Cavallo deemed this piece of evidence as “absolutely critical” to his de-

---

140 Id at 943.
141 Id.
142 Id.
143 Curtis, Paying Jurors, Cal Bar J (cited in note 2).
144 Id (quoting Robert Hirschorn, an attorney turned full-time jury consultant, who described post-mistrial interviews with former jurors as a critically important means of learning about a trial performance’s strengths and weaknesses and which kind of jurors are open to a lawyer’s trial strategy and which kind are not).
147 Id.
fense strategy, his experience underscores how information from former jurors may play a crucial role at retrial.

Although courts disagree as to whether attorney education sufficiently justifies post-trial interviews, the focus of the debate has been on whether such interviews positively impact an attorney's general advocacy skills, rather than his specific ability to prosecute or defend a retrial. Part of the resistance to allowing attorneys to contact jurors for the purpose of education stems from a fear that attorneys disguise simple curiosity about the origin of adverse verdicts with the claim that they are contacting jurors to educate themselves. Because this fear is unfounded in the context of requests for post-mistrial interviews specifically, the concern that interviews in this situation debase the jury system through purposeless intrusions into the jury's thought processes is absent. On the contrary, post-mistrial interviews fortify this system. As these interviews improve a lawyer's ability to advocate for his client at retrial, they guard against both the possibility of another mistrial and a post-trial challenge that the verdict rose from a lawyer's inadequacy.

---

148 Id.
149 See John E. Kidd, *Jury Trials and Mock Jury Trials*, 321 PLI/Pat 137, 175 (1991) (noting that post-trial interviews with jurors provide attorneys with valuable insight on how to present future cases: "You may find that what you viewed as your concept of the best evidence was confusing or that the person you thought was the best witness alienated the jury.").

Of course, neither Sherman nor Cavallo, the attorneys best known for hiring former jurors as retrial consultants, prevailed. Post, *Hiring Former Jurors*, Natl L J at 6 (cited in note 12) (noting the jury conviction in Sherman's case despite his use of a former juror as a paid retrial consultant); Luna, *Victim Calls Sex Trial an Ordeal*, LA Times at B3 (cited in note 76) (marking on the guilty verdict the second jury rendered in Haidl's case). This may suggest that such a strategy does not necessarily increase a lawyer's efficacy at retrial. Yet, because the practice of hiring former jurors is uncommon, any presumption about such efficacy would be premature if it was only based off of these two cases.

150 Compare *United States v Narciso*, 446 F Supp 252, 325 (E D Mich 1977) (finding that a discussion between former jurors and prosecutors regarding the nature of the case and the course of the jury's deliberations for the purpose of the prosecutors' self-education did not require the court to set aside the jury's original verdict) and *Irving v Bullock*, 549 P2d 1184, 1188 n 10 (Alaska 1976) (noting that post-verdict interviews are proper when a lawyer requests them for educational purposes), with *Sixberry v Buster*, 88 FRD 561, 562 (E D Pa 1980) (finding that a post-verdict interview with a juror would not further a lawyer's interest in improving his capabilities as a trial attorney).

151 *In re Delgado*, 306 SE2d 591, 594 (SC 1983) ("Approaching jurors normally serves no purpose other than to satisfy curiosity.").

152 *C & C Dairy, Inc*, 1991 US Dist LEXIS 6238 at *4 (granting the prosecution its request to interview former jurors on the grounds that the government represents in good faith that they are seriously considering the prosecution's future course and that the requested interviews with jurors will help in this process).
III. A PROPOSED MODEL RULE

As Part I demonstrated, the current rules regulating general post-trial contact between attorneys and jurors are ill-equipped to address post-mistrial contact. Part II established that requests for post-mistrial interviews invite a unique set of constitutional, ethical, and systemic concerns. Accordingly, states should adopt a rule that regulates post-mistrial contact between attorneys and former jurors to supplement existing rules that only police general post-trial contact.

The need for this rule is also evident when conflicts arise between local court rules, rules of professional conduct, and caselaw regarding requests for post-trial interviews. In such situations, courts must either privilege one regime over the other, or introduce a new disciplinary rule. To avoid this confusion and to provide predictability in the court system, a rule should be adopted that recognizes the particular interests at stake in the post-mistrial scenario: (1) the interest of a defendant that both his trial and retrial are fair, (2) the interest of a juror that her privacy and right to speech remain intact, and (3) the interest of each state in a trial system that is free from perverse incentives, encourages civic involvement, and is effective in administering justice.

This Comment proposes a model rule that meets these ends. This rule would require, upon a court's declaration of a mistrial, (1) that judges instruct jurors (i) of their post-trial right to communicate or refuse to communicate with attorneys and (ii) that any communication between them and any party to the action requires court approval, (2) that attorneys obtain express leave of (i) the court and (ii) the juror before conducting a post-trial interview with this juror, (3) that the communication between former jurors and attorneys is for the express purpose of retrial preparation, (4) that attorneys pay former jurors for this service no more than the daily rate they received for jury duty, and (5) that punishment for any violation of this rule is left to the discretion of

---

153 See Commonwealth v Solis, 553 NE2d 938, 940–41 (Mass 1990) (privileging a Massachusetts Code of Professional Responsibility rule that allows for the proper initiation of a conversation with a discharged juror without court approval over a prior Massachusetts Supreme Court decision to only allow for post-trial interrogation of jurors upon court approval).

154 Id at 941 (deciding whether to adopt a new disciplinary rule or to rely on prior caselaw).
the courts, but should be directed equally at jurors and attorneys.

A. Proposed Jury Instruction

1. Protection of juror privacy.

The first component of the proposed rule requires that, upon the declaration of a mistrial, the judge instruct the jurors that although their service is over, their privacy interest in their deliberation remains valid.\(^{155}\) To resolve any uncertainty about the jurors’ remaining obligations, the court will formally release the jurors from its prior admonitions not to discuss the case with press or counsel ex parte. These instructions will also stress to the jurors that during any post-mistrial contact with parties to the case, they must respect the privacy and feelings of their fellow jurors. This formal release and reminder to respect the privacy of others is the first safeguard this proposed rule provides for juror rights. Because most jurors may be unaware of their post-trial rights,\(^{156}\) an explicit announcement places these jurors on the same informational plane as the attorneys who seek their advice.

2. Protection of the jury system.

Another systemic benefit of this increase in juror knowledge is the likely increase in the detection of attorney violations of court orders banning post-trial interviews. An attorney’s post-trial behavior towards jurors may be overtly aggressive, as in the case of a Texas lawyer who mailed letters to the jurors who denied his client damages that called the jury’s decision “cold and unfair.”\(^{157}\) In such an instance, jurors will readily sense the impropriety of the attorney’s actions and report them to the court. However, when post-mistrial interaction between jurors and attorneys is more subtle, as in the case of the lawyer asking a for-

\(^{155}\) See Rapp v Disciplinary Board of the Hawaii Supreme Court, 916 F Supp 1525, 1538 (D Haw 1996) (recognizing that post-trial attorney-juror contact implicates the privacy rights of jurors); United States v Miller, 284 F Supp 220, 227 (D Conn 1968) (noting that the court remains responsible for protecting jurors from inquiry into their deliberations, even after releasing them from their service).

\(^{156}\) See United States v Driscoll, 276 F Supp 333, 334–35 (S D NY 1967) (detailing post-trial conversations between counsel and former jurors, where counsel responded to the former jurors’ concern about whether they should talk to him by assuring them that such post-trial interviews were routine).

\(^{157}\) Commission for Lawyer Discipline v Benton, 980 SW2d 425, 428 (Tex 1998).
mer juror for her advice in a neighborhood pizzeria, jurors may be unsure if the law supports or shuns the attorney’s actions. In this type of situation, jurors will be less likely to alert the court to an attorney’s potentially illegal behavior in the absence of a court instruction.

The proposed rule’s additional requirement that the attorney have the court’s permission to approach former jurors will also benefit jurors. For example, if the judge in United States v Driscoll had informed the jury that a court order was necessary before counsel could approach them, they might not have suffered extended illegal conversations with defense counsel.

While these instructions to respect privacy may extend a juror’s civic responsibility beyond the courtroom, on balance, the benefits of this extension outweigh its costs. These instructions inform jurors of their rights, which not only enhances these rights, but also makes jurors themselves another means of enforcement in policing attorney misconduct. Jurors in especially gruesome or high-profile cases might want nothing more to do with the case they heard after the trial has ended. The proposed rule explicitly informs jurors of their right to refuse to communicate with counsel after trial, and in doing so assures them that they need not fear future reminders of the case through post-mistrial interviews.

B. Proposed Court and Juror Approval

As the proposed rule requires both court approval and juror consent, it gives attorneys the opportunity to improve the presentation of their case for retrial, without undermining the integrity of the jury system or stripping jurors of their privacy rights. To obtain court approval under Section (3) of the pro-

---

158 See Gombossy, Ex-Juror Retained as Trial Consultant, Natl L J at 3 (cited in note *) (detailing a Connecticut lawyer’s use of a former juror as a retrial consultant after approaching her in a pizzeria).
159 276 F Supp 333 (S D NY 1967).
160 See id at 334-35 (detailing improper conversations that took place between a private investigator that defense counsel hired and former jurors).
161 Post, Hiring Former Jurors, Natl L J at 6 (cited in note 12) (noting that often after a trial, jurors “don’t want to talk”).
162 Karlene Dunn proposes a similar rule in an effort to save Rule 3.06 of the Texas Rules of Disciplinary Procedure from being unconstitutionally vague. See Dunn, 40 Tex L Rev at 1112 (cited in note 94). Dunn suggests that Texas replace its rule forbidding post-trial attorney-juror contact that is intended to harass or embarrass jurors or to influence their action in future jury service with a rule that allows for the consent of the juror or the trial court when “good cause” is shown. Id at 1073.
posed rule, an attorney must demonstrate that his request to interview former jurors rises from a good faith desire to inform the future course of his representation. The attorney could demonstrate this by submitting an affidavit outlining the intention to improve his retrial strategy through the use of juror consultants. The affidavit might also include sample questions he plans to pose to the former jurors.

Under the proposed rule, courts would have the discretion to determine whether or not to grant attorneys leave to conduct post-mistrial juror interviews. In the debate regarding whether juror names should be kept confidential, one critic advocated a system in which judges hold hearings to justify restrictions imposed upon the press or public. Such a system, which forces judges to support their decisions with specific, on the record findings, would be useful in this context too. While a hearing requirement imposes administrative costs on the court system, the interest of the defendant in a fair trial and retrial, and of the juror in her privacy may warrant this imposition.

Regardless of the procedure the court uses to determine whether to allow the requested interviews, it should consider how the interviews will impact the interests of the parties and the jurors, as well as the integrity of the jury system as a whole. Because post-verdict interviews can both positively and negatively impact the defendant's trial rights, the judge must specifically examine the nature of the case and the notoriety of the defendant before rendering his decision. For instance, in a high publicity case, where jurors might manipulate the verdict to attain their own celebrity status, a judge might feel access to former jurors would harm a defendant more than it would help him. In this instance, the judge could announce at the beginning of trial that upon the occasion of a mistrial, the court will not grant any requests for juror interviews. While such a limitation on post-mistrial interviews may not curb all juror miscon-

---

163 See, for example, C & C Dairy, 1991 US Dist LEXIS 6238 at *4 (allowing post-trial interviews when attorneys request such interviews "in good faith" for reasons the court deems appropriate).

164 Willis, 37 Suffolk U L Rev at 1214 (cited in note 97) ("By requiring judges to hold hearings justifying restrictions imposed upon the press or the public, courts would avoid summarily restricting the First Amendment, while also protecting juries from harassment.").

165 Id (advocating a standard using "factual, on-the-record findings").

166 See State v Neulander, 801 A2d 255, 272–73 (NJ 2002) (upholding an order preventing the media from interviewing jurors after a mistrial on the ground that such interviews might provide the prosecution with an inappropriate advantage in a retrial).
duct, it likely will decrease juror bias during deliberation, especially for those jurors who consider the personal costs and benefits of declaring a mistrial. Alternatively, where an attorney may have a limited skill set and resources, the court might allow for the interviews, thereby increasing the likelihood that the attorney's retrial preparation will be thorough and effective.\(^{167}\)

The concern that post-trial consultations with jurors strip the jurors of their privacy also falls away under the proposed rule. Subsection (2)(ii) of the proposed rule requires that lawyers obtain express consent from jurors before consulting them. Because the First Amendment grants a juror the right to speak or remain silent as she pleases,\(^{168}\) the court does not have the power to override a juror's refusal to consent.\(^{169}\) Despite the crucial role that a juror consultation might play in an attorney's retrial preparation, the court cannot strip her of her right to silence. Furthermore, as the court noted in *United States v Miller*,\(^{170}\) "A juror ought not even be burdened with the necessity of insisting that he does not wish to be interviewed."\(^{171}\) While this rule may leave defendants worse off than a system in which courts could overrule juror refusal to participate in post-trial interviews, the rule balances the interests and rights of all parties.

Under the proposed rule, the court will supervise the method by which attorneys obtain juror consent.\(^{172}\) In *C & C Dairy*,\(^{173}\) the

\(^{167}\) Courts are reluctant to grant indigent defendants funds for hiring experts on constitutional grounds. See Diana G. Ratcliff, Notes and Comments, *Using Trial Consultants: What Practitioners Need to Know*, 4 J Legal Advoc & Prac 32, 49 (2002), citing *Jackson v Anderson*, 141 F Supp 2d 811 (N D Ohio 2001) ("Indigent defendants may be provided funds for hiring experts, presumably including a trial consultant. Although the results of such requests vary in reported case law, anecdotal accounts suggest that courts occasionally grant these requests. Constitutionally, however, 'a defendant cannot expect the state to provide him a most-sophisticated defense.'"). Indigent defendants cannot force the state to expend its funds on improving an attorney's fundamental skills. See *Moore v Johnson*, 225 F3d 495, 503 (5th Cir 2000). Consequently, it seems unlikely that courts would grant defendants money for juror consultations. This might point to a rule banning compensation for post-verdict interviews entirely to ensure equal rights for defendants of different classes.

\(^{168}\) *In re Express-News Corp*, 695 F2d 807, 811 (5th Cir 1982) ("The jurors' freedom of speech is also freedom not to speak.").

\(^{169}\) But see *Neulander*, 801 A2d at 265 ("The general rule that we distill from the [federal and state court cases concerning the right of media representatives to conduct post-verdict juror interviews] is that post-verdict juror interviews generally are permitted if the juror consents, but jurors are not required to consent.")(emphasis added).

\(^{170}\) 284 F Supp 220, 227 (D Conn 1968).

\(^{171}\) Id at 228.

\(^{172}\) See *Cuevas v United States*, 317 F3d 751, 753 (7th Cir 2003) (noting that judges are in the best position to set the ground rules for post-trial interviews sought to support a claim of juror misconduct).

court offered an administratively efficient means of achieving this oversight: sending out form letters to former jurors. A court-issued letter that reiterates to jurors the rights that were previously enumerated helps ensure that jurors understand their rights regarding requests for post-trial interviews.

C. Proposed Consultant Fee

While many former jurors may be willing to consult with attorneys for free upon mistrial, some will require compensation for their time and thoughts. To guard against the concern that

---

174 Id at *4–5. The form letter that the court in C & C Dairy sent to former jurors appeared as follows:

[Juror Name]
[Address]
[City, State]

Dear:

Now that your federal court service as jurors generally (as well as your specific jury service in the milk antitrust prosecution in my courtroom) has ended, counsel have asked for the opportunity to confer with you about the case. My understanding is that they believe the opportunity to meet and talk with you may be of assistance to them in the future, including the government's decision as to whether or not to proceed with a retrial of defendants Michael Bailey and Michael Stajszczak, Jr.

Let me emphasize a few points:

1. It is entirely your choice as to whether or not to grant such an interview.

2. If you are agreeable to an interview, I would suggest that you consider meeting with both government counsel and defense counsel at the same time. If you indicate that as your preference to whichever lawyer may call you on the subject of such an interview, counsel will make the arrangements.

3. No inference should be drawn from counsel's request or this letter that your verdict is being brought into question. It is not.

Once again I should like to renew the thanks that I expressed for your service at the time the verdict was returned.

Sincerely,

Milton I. Shadur

---

175 Post, Hiring Former Jurors, Natl L J at 6 (cited in note 12) (noting that initially all but one of the nine former jurors that Cavallo sought to pay as consultants "offered to do it for free").

176 See, for example, Beach, The Juror as Celebrity, Time at 42 (cited in note 87) (dis-
the prospect of financial compensation will inform a juror's decisionmaking process, the proposed rule caps this compensation. Section (4) sets the maximum fee at the per diem that states pay their citizens for jury service. Although commentators disagree as to whether this per diem adequately compensates jurors for their service, the consultation fees that lawyers like Cavallo offer former jurors dwarf this daily payment. The best way to guard against jurors placing a higher value on their time outside the courtroom than within it is to cap the amount that an attorney can offer a juror for his consultation.

Setting the amount of consultant compensation at the state's per diem, however, may create confusion. When an attorney offers a former juror the same amount of money for consultant work as the juror received for her jury duty, the juror may be confused as to what acceptance of this second fee entails. If the juror receives the same compensation for her jury and consultation services, she might believe that the law that dictated her behavior during her jury service still constrains her actions. It is likely that the informality of a post-trial interview will signal to the former juror that her obligations to the court system are complete. Still, in order to mitigate possible confusion, the instructions in Section (1) of the proposed rule explicitly inform jurors of their post-trial right to agree or refuse to communicate with attorneys. As a consequence of this informality and the jury instructions, the importance of jury duty will remain undiluted in the minds of former jurors.

cussing the role compensation plays in post-trial interviews between former jurors and the media). Beach writes:

Jurors sometimes have their own reasons for talking. Money is one. When journalists declined to pay a fee to one [John] Hinckley juror [after the jury decided he was not guilty by reason of insanity], her husband complained, "Why should she spend her time so you can make money on her? What's in it for her?"

Id.

Lisa Sink, Jurors Issue Ruling on Their Days in Court, Milwaukee J Sentinel 15 (Oct 8, 2000) (detailing a court administrator's description of the per diem jurors receive as a "token of appreciation").

Cavallo himself admitted that the fifty dollars-an-hour that he is offering as a consultant fee is not the result of a formal assessment of costs to the jurors. Rather, his justification for paying this rate is that "[i]t seems to be a reasonable amount." Post, Hiring Former Jurors, Natl L J at 6 (cited in note 12).
D. Proposed Burden to Follow the Rule

Unlike the statutory scheme regulating post-trial contact with jurors in Connecticut, the burden of adhering to the proposed rule does not rest on the jurors alone. While an attorney in Connecticut may still face charges of professional misconduct for violating the statute or face a misdemeanor charge for aiding and abetting the juror, the statute focuses on juror behavior. Instead, the rule that this Comment proposes acts more like the bill pending in the California State Legislature. Like the California bill, the proposed rule ensures that both attorneys and jurors faithfully adhere to it because it sanctions both equally.

CONCLUSION

Current state statutes, rules of professional conduct, court rules, and caselaw regarding regulation of post-mistrial communication are insufficient and confusing. This Comment enumerates current state practices regarding post-trial attorney-juror contact in general. It also examines how these practices fail to meet the needs of such contact in the particular instance of retrial preparation. From this examination, it seeks to provide an effective and efficient alternative or supplement to these practices.

Because the use of former jurors as consultants has yet to become standard procedure for retrial preparation, the proposed rule might seem premature. Yet, as the attention the press and public have paid to Cavallo's decision to employ this retrial strategy suggests, the time for such a rule is rapidly approaching.

---

179 Conn Gen Stat Ann § 51-247b.
180 Post, Hiring Former Jurors, Natl L J at 6 (cited in note 12).
181 Bill 252, Cal State Senate (Feb 15, 2005).
182 See, for example, Curtis, Paying Jurors, Cal Bar J (cited in note 2) (detailing the current debate among lawyers and academics regarding the costs and benefits of Cavallo's retrial strategy); Graham, Flap Ensues Over Hiring Ex-Jurors, Christian Sci Monitor at 17 (cited in note 146) (same); Srisavasdi, DA Opposes Paying Ex-Jurors to Consult, Orange County Register at 1 (cited in note 59) (detailing the current push by California prosecutors and law makers to prohibit attorneys from paying jurors as consultants through adoption of the Jury Integrity Act); So Cal Lawyer, The Southern California Law Blog: Comment on Former Haidl Jurors to be Hired as Consultants for Re-Trial, available at <http://socallawblog.com/2004/07/19/former-haidl-jurors-to-be-hired-as-consultants-for-re-trial> (last visited Apr 24, 2005) (informally detailing an individual's outrage with Cavallo's retrial strategy).
APPENDIX 1.
SURVEY OF DISTRICT COURT RULES GOVERNING POST-TRIAL COMMUNICATION BETWEEN ATTORNEYS AND JURORS.

<table>
<thead>
<tr>
<th>STATE</th>
<th>RULE(S)**</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>M D Ala Ct Rule 47.1.</td>
</tr>
<tr>
<td></td>
<td>Attorneys, parties, or anyone acting for them or on their behalf shall not, without filing a formal motion therefore with the court and securing the court's permission, interrogate jurors in Civil or Criminal cases, either in person or in writing, in an attempt to determine the basis for any verdict rendered or to secure other information concerning the deliberations of the jury or any members thereof.</td>
</tr>
<tr>
<td>N D Ala Ct Rule 47.1.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Communications with a juror concerning a case on which such person has served as a juror or alternate juror shall not, without prior express approval of a judge of this court, be initiated by any attorney, party, or representative of either, prior to the day following such person's release from jury service for such term of court.</td>
</tr>
<tr>
<td>S D Ala Ct Rule 47.2.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Attorneys, parties or anyone acting for them or on their behalf shall not, without filing a formal petition therefore with the court and securing the court's permission, interrogate jurors, or alternate jurors, either in person or in writing, relative to actions in which they have served.</td>
</tr>
<tr>
<td>Alaska</td>
<td>D Alaska Ct Rule 83.1(h).</td>
</tr>
<tr>
<td></td>
<td>(1) No attorney admitted to practice or appear before this court may [A] seek out, contact, or interview at any time any juror of the jury venire of this court; or [B] without prior approval of the court, allow, cause, permit, authorize or in any way participate in any contact or interview with any juror relating to any case in which the attorney has entered an appearance.</td>
</tr>
<tr>
<td></td>
<td>(2) This subsection will be posted in the jury rooms of this District and jurors will be instructed fully as to this matter.</td>
</tr>
</tbody>
</table>

** "N/A" denotes that the author found no applicable court rule. All rules are current as of March 2004.
<table>
<thead>
<tr>
<th>STATE</th>
<th>RULE(S)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arizona</td>
<td>D Ariz R Ct Rule 1.11(b).</td>
</tr>
<tr>
<td></td>
<td>Interviews with jurors after trial by or on behalf of parties involved in the trial are prohibited except on condition that the attorney or party involved desiring such an interview file with the Court written interrogatories proposed to be submitted to the juror(s), together with an affidavit setting forth the reasons for such proposed interrogatories, within the time granted for a motion for a new trial. Approval for the interview of jurors in accordance with the interrogatories and affidavit so filed will be granted only upon the showing of good cause. See Federal Rules of Evidence, Rule 606(b). Following the interview, a second affidavit must be filed indicating the scope and results of the interviews with jurors and setting out the answers given to the interrogatories.</td>
</tr>
<tr>
<td>Arkansas</td>
<td>E D Ark Ct Rule 47.1.</td>
</tr>
<tr>
<td></td>
<td>No juror shall be contacted without express permission of the Court and under such conditions as the Court may prescribe.</td>
</tr>
<tr>
<td>W D Ark Ct Rule 47.1.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>No juror shall be contacted without express permission of the Court and under such conditions as the Court may prescribe.</td>
</tr>
<tr>
<td>California</td>
<td>C D Cal N/A</td>
</tr>
<tr>
<td></td>
<td>E D Cal N/A</td>
</tr>
<tr>
<td></td>
<td>N D Cal N/A</td>
</tr>
<tr>
<td></td>
<td>S D Cal N/A</td>
</tr>
<tr>
<td>Colorado</td>
<td>D Colo Ct Rule 24.1.</td>
</tr>
<tr>
<td></td>
<td>No party or attorney shall communicate with, or cause another to communicate with, a juror or prospective juror before, during or after any trial without written authority signed by the judicial officer to whom the case is assigned for trial.</td>
</tr>
<tr>
<td>Connecticut</td>
<td>D Conn N/A</td>
</tr>
<tr>
<td>Delaware</td>
<td>D Del N/A</td>
</tr>
<tr>
<td>District of Columbia</td>
<td>D DC Crim Ct Rule 24.2(b).</td>
</tr>
<tr>
<td></td>
<td>After a verdict is rendered or a mistrial is declared but before the jury is discharged, an attorney or party may request leave of Court to speak with members of the jury before their discharge. Upon receiving such a request, the Court shall inform the jury that no juror is required to speak to anyone but that a juror may do so if the juror wishes. If no request to speak with jurors is made before discharge of the jury, no party or attorney shall speak with a juror concerning the case except when permitted by the Court for good cause shown in writing. The Court may grant permission to speak with a juror upon such conditions as it deems appropriate, including but not limited to a requirement that the juror be examined only in the presence of the Court.</td>
</tr>
<tr>
<td>STATE</td>
<td>RULE(S)</td>
</tr>
<tr>
<td>--------</td>
<td>-------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Florida</td>
<td>M D Fla Ct Rule 5.01(d). No attorney or party shall undertake, directly</td>
</tr>
<tr>
<td></td>
<td>or indirectly, to interview any juror after trial in any Civil or</td>
</tr>
<tr>
<td></td>
<td>Criminal case except as permitted by this Rule. If a party believes that</td>
</tr>
<tr>
<td></td>
<td>grounds for legal challenge exist, he may move for an order permitting</td>
</tr>
<tr>
<td></td>
<td>an interview of a juror or jurors to determine whether the verdict is</td>
</tr>
<tr>
<td></td>
<td>subject to the challenge. . . . If the interview is permitted, the</td>
</tr>
<tr>
<td></td>
<td>Court may prescribe the place, manner, conditions and scope of the</td>
</tr>
<tr>
<td></td>
<td>interview. N D Fla N/A</td>
</tr>
<tr>
<td></td>
<td>S D Fla Ct Rule 11.1(E). Before, during, and after the trial, a lawyer</td>
</tr>
<tr>
<td></td>
<td>should avoid conversing or otherwise communicating with a juror on any</td>
</tr>
<tr>
<td></td>
<td>subject, whether pertaining to the case or not. Provided, however, after</td>
</tr>
<tr>
<td></td>
<td>the jury has been discharged, upon application in writing and for good</td>
</tr>
<tr>
<td></td>
<td>cause shown, the Court may allow counsel to interview jurors to determine</td>
</tr>
<tr>
<td></td>
<td>whether their verdict is subject to legal challenge. In this event, the</td>
</tr>
<tr>
<td></td>
<td>Court shall enter an order limiting the time, place, and circumstances</td>
</tr>
<tr>
<td></td>
<td>under which the interviews shall be conducted. The scope of the</td>
</tr>
<tr>
<td></td>
<td>interviews should be restricted and caution should be used to avoid</td>
</tr>
<tr>
<td></td>
<td>embarrassment to any juror and to avoid influencing the juror's action</td>
</tr>
<tr>
<td></td>
<td>in any subsequent jury services.</td>
</tr>
<tr>
<td>Georgia</td>
<td>M D Ga N/A</td>
</tr>
<tr>
<td></td>
<td>N D Ga N/A</td>
</tr>
<tr>
<td></td>
<td>S D Ga Ct Rule 83.8. No party, attorney, or other person shall, without</td>
</tr>
<tr>
<td></td>
<td>Court approval, make or attempt any communication relating to any feature</td>
</tr>
<tr>
<td></td>
<td>of the trial of any case with any regular or alternate juror who has</td>
</tr>
<tr>
<td></td>
<td>served in such case, whether or not the case was concluded by verdict.</td>
</tr>
<tr>
<td>Hawaii</td>
<td>D Haw N/A</td>
</tr>
<tr>
<td>Idaho</td>
<td>D Idaho N/A</td>
</tr>
<tr>
<td>Illinois</td>
<td>C D Ill Ct Rule 47.2(2). No attorney, party, or representative of either</td>
</tr>
<tr>
<td></td>
<td>may interrogate a juror after the verdict has been returned without</td>
</tr>
<tr>
<td></td>
<td>prior court approval of the presiding judge. Approval of the presiding</td>
</tr>
<tr>
<td></td>
<td>judge shall be sought only by application made by counsel orally in open</td>
</tr>
<tr>
<td></td>
<td>court or upon written motion which states the grounds and purpose of the</td>
</tr>
<tr>
<td></td>
<td>interrogation. If a post-verdict interrogation of one or more of the</td>
</tr>
<tr>
<td></td>
<td>members of the jury should be approved, the scope of the interrogation</td>
</tr>
<tr>
<td></td>
<td>and other appropriate limitations upon the interrogation will be</td>
</tr>
<tr>
<td></td>
<td>determined by the presiding judge prior to the interrogation.</td>
</tr>
<tr>
<td>STATE</td>
<td>RULE(S)</td>
</tr>
<tr>
<td>-------</td>
<td>---------</td>
</tr>
<tr>
<td></td>
<td>N D Ill Ct Rule 83.53.5(d).</td>
</tr>
<tr>
<td></td>
<td>After discharge of the jury from further consideration of a case in the United States District or Bankruptcy Courts of this District with which the lawyer was connected, the lawyer shall not ask questions of or make comments to a juror without first obtaining leave of court, nor shall the lawyer thereafter ask questions of or make comments to a member of the venire that are calculated to harass or embarrass the juror or to influence such juror's actions in future jury service.</td>
</tr>
<tr>
<td></td>
<td>S D Ill Ct Rule 53.</td>
</tr>
<tr>
<td></td>
<td>No attorney, party, or representative of either may interrogate a juror after the verdict has been returned without prior approval of the presiding judge. Approval of the presiding judge shall be sought only by application made by counsel orally in open court or upon written motion which states the grounds and purpose of the interrogation. If a post-verdict interrogation of one or more of the members of the jury should be approved, the scope of the interrogation and other appropriate limitations upon the interrogation will be determined by the presiding judge prior to the interrogation.</td>
</tr>
<tr>
<td>Indiana</td>
<td>N D Ind Ct Rule 47.2.</td>
</tr>
<tr>
<td></td>
<td>No attorney or party appearing in this court, or any of their agents or employees, shall approach, interview, or communicate with any member of the jury except on leave of court granted upon notice to opposing counsel and upon good cause shown. This rule applies to any communication before trial members of the venire from which the jury will be selected, as well as any communication with members of the jury during trial, during deliberations, or after return of a verdict. Any juror contact permitted by the court shall be subject to the control of the judge.</td>
</tr>
<tr>
<td></td>
<td>S D Ind Ct Rule 47.2.</td>
</tr>
<tr>
<td></td>
<td>No attorneys (or pro se litigants) appearing in this Court, or any of their agents or employees, shall approach, interview, or communicate any member of the jury following a trial except on leave of Court granted upon notice to opposing counsel. In all criminal cases, any petition for leave of Court to make such contact or communication shall require showing of good cause.</td>
</tr>
<tr>
<td>Iowa</td>
<td>N D Iowa Ct Rule 47.1.</td>
</tr>
<tr>
<td></td>
<td>Except by leave of court, no party or attorney, and no other person acting on their behalf may contact, interview, examine or question any trial juror or potential trial juror before, during, or after a trial concerning the juror’s actual or potential jury service.</td>
</tr>
<tr>
<td></td>
<td>S D Iowa Ct Rule 47.1.</td>
</tr>
<tr>
<td></td>
<td>Except by leave of court, no party or attorney, and no other person acting on their behalf may contact, interview, examine or question any trial juror or potential trial juror before, during, or after a trial concerning the juror's actual or potential jury service.</td>
</tr>
<tr>
<td>STATE</td>
<td>RULE(S)</td>
</tr>
<tr>
<td>--------</td>
<td>---------</td>
</tr>
<tr>
<td>Kansas</td>
<td>D Kan Court Rule 47.1.</td>
</tr>
<tr>
<td></td>
<td>(a) No juror has any obligation to speak to any person about any case and may refuse all interviews or comments. No person may make repeated requests for interviews or comments after a juror has expressed his or her desire not to be interviewed or questioned.</td>
</tr>
<tr>
<td></td>
<td>(b) Under no circumstances except by order of the court in its discretion, and other such terms and conditions as it shall establish, shall any party or any party's attorney or their agents or employees examine or interview any juror, either orally or in writing, nor shall any juror consenting to be interviewed disclose any information with respect to the specific vote of any juror other than the juror being interviewed, or the deliberations of the jury.</td>
</tr>
<tr>
<td></td>
<td>(c) At the time that a jury is discharged from further consideration of a case upon the return of a verdict, the declaration of a mistrial or otherwise, and when jurors (including alternates) are excused after commencement of a trial, the court shall advise all jurors so discharged or excused of the provisions of this rule.</td>
</tr>
<tr>
<td>Kentucky</td>
<td>E D Ky Ct Rule 47.1.</td>
</tr>
<tr>
<td></td>
<td>Unless permitted by the Court, no party or attorney—or the representative of a party or attorney—may contact, interview, or communicate with any juror before, during, or after trial.</td>
</tr>
<tr>
<td></td>
<td>W D Ky Ct Rule 47.1.</td>
</tr>
<tr>
<td></td>
<td>Unless permitted by the Court, no party or attorney—or the representative of a party or attorney—may contact, interview, or communicate with any juror before, during, or after trial.</td>
</tr>
<tr>
<td>Louisiana</td>
<td>E D La Ct Rule 47.5E.</td>
</tr>
<tr>
<td></td>
<td>(A) No juror has any obligation to speak to any person about any case and may refuse all interviews or comments</td>
</tr>
<tr>
<td></td>
<td>(B) No person may make repeated requests for interviews or questions after a juror has expressed a desire not to be interviewed</td>
</tr>
<tr>
<td></td>
<td>(C) Under no circumstances except by leave of court granted upon good cause shown shall any attorney or party to an action or anyone acting on their behalf examine or interview any juror. No juror who may consent to be interviewed shall disclose any information with respect to the following: (1) The specific vote of the juror being interviewed; (2) The deliberations of the jury; or (3) For the purposes of obtaining evidence of improprieties in the jury's deliberations.</td>
</tr>
<tr>
<td></td>
<td>M D La Ct Rule 47.5E.</td>
</tr>
<tr>
<td></td>
<td>(A) No juror has any obligation to speak to any person about any case and may refuse all interviews or comments</td>
</tr>
<tr>
<td></td>
<td>(B) No person may make repeated requests for interviews or questions after a juror has expressed a desire not to be interviewed</td>
</tr>
<tr>
<td></td>
<td>(C) Under no circumstances except by leave of court granted upon good cause shown shall any attorney or party to an action or anyone acting on their behalf examine or interview any juror. No juror who may consent to be interviewed shall disclose any information with respect to the following: (1) The specific vote of the juror being interviewed; (2) The deliberations of the jury; or (3) For the purposes of obtaining evidence of improprieties in the jury's deliberations.</td>
</tr>
<tr>
<td>STATE</td>
<td>RULE(S)</td>
</tr>
<tr>
<td>--------------</td>
<td>---------------------------------------------</td>
</tr>
<tr>
<td></td>
<td>W D La Ct Rule 47.5E.</td>
</tr>
<tr>
<td></td>
<td>(A) No juror has any obligation to speak to any person about any case and may refuse all interviews or comments</td>
</tr>
<tr>
<td></td>
<td>(B) No person may make repeated requests for interviews or questions after a juror has expressed a desire not to be interviewed</td>
</tr>
<tr>
<td></td>
<td>(C) Under no circumstances except by leave of court granted upon good cause shown shall any attorney or party to an action or anyone acting on their behalf examine or interview any juror. No juror who may consent to be interviewed shall disclose any information with respect to the following: (1) The specific vote of the juror being interviewed; (2) The deliberations of the jury; or (3) For the purposes of obtaining evidence of improprieties in the jury's deliberations.</td>
</tr>
<tr>
<td>Maine</td>
<td>D Me</td>
</tr>
<tr>
<td></td>
<td>N/A</td>
</tr>
<tr>
<td>Maryland</td>
<td>D Md Civ Ct Rule 107(16).</td>
</tr>
<tr>
<td></td>
<td>Unless permitted by the presiding judge, no attorney or party shall directly or through an agent interview or question any juror, alternate juror or prospective juror with respect to that juror's jury service.</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>D Mass</td>
</tr>
<tr>
<td></td>
<td>N/A</td>
</tr>
<tr>
<td>Michigan</td>
<td>E D Mich</td>
</tr>
<tr>
<td></td>
<td>N/A</td>
</tr>
<tr>
<td></td>
<td>W D Mich</td>
</tr>
<tr>
<td></td>
<td>N/A</td>
</tr>
<tr>
<td>Minnesota</td>
<td>D Minn Ct Rule 42.7.</td>
</tr>
<tr>
<td></td>
<td>Except by leave of Court, no party, or any investigator, attorney, or other person acting for a party, shall interview, examine, or question any grand or trial juror while such juror is still subject to call or recall during the juror's term of service. Nothing in this rule prohibits federal law enforcement authorities from contacting jurors in extraordinary circumstances without Court approval pursuant to a jury tampering or related investigation. In such extraordinary circumstance, the government shall notify the Court as soon as possible.</td>
</tr>
<tr>
<td>Mississippi</td>
<td>N D Miss Ct Rule 83.1(B)(4).</td>
</tr>
<tr>
<td></td>
<td>Upon the return of a verdict by the jury in any Civil or Criminal action, neither the attorneys in the action nor the parties may, in the courtroom or elsewhere, express to the members of the jury their pleasure or displeasure with the verdict. 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, the attorney may apply ex parte to the trial judge for permission to interview one or more members of the jury regarding any fact or circumstance claimed to support the legal challenge. If satisfied that good cause exists, the judge may grant permission for the attorney to make the requested communication and shall prescribe the terms and conditions under which the same may be conducted.</td>
</tr>
<tr>
<td>STATE</td>
<td>RULE(S)</td>
</tr>
<tr>
<td>-----------</td>
<td>-------------------------------------------------------------------------</td>
</tr>
<tr>
<td></td>
<td>S D Miss Ct Rule 83.1(B)(4).</td>
</tr>
<tr>
<td></td>
<td>Upon the return of a verdict by the jury in any Civil or Criminal action, neither the attorneys in the action nor the parties may, in the courtroom or elsewhere, express to the members of the jury their pleasure or displeasure with the verdict. 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, the attorney may apply ex parte to the trial judge for permission to interview one or more members of the jury regarding any fact or circumstance claimed to support the legal challenge. If satisfied that good cause exists, the judge may grant permission for the attorney to make the requested communication and shall prescribe the terms and conditions under which the same may be conducted.</td>
</tr>
<tr>
<td>Missouri</td>
<td>E D Mo Ct Rule 47-7.01(B)(1).</td>
</tr>
<tr>
<td></td>
<td>Petit jurors shall not be required to provide any information concern-</td>
</tr>
<tr>
<td></td>
<td>ing any action of the petit jury, unless ordered to do so by the Court. Attorneys and parties to an action shall not, directly or indirectly, communicate with any petit juror, relative, friend or associate thereof at any time concerning the action, except with leave of Court. If an attorney or party receives evidence of misconduct by a petit juror, the attorney or party shall inform the Court and the Court may conduct an investigation to establish the accuracy of the misconduct allegations.</td>
</tr>
<tr>
<td>Montana</td>
<td>D Mont Ct Rule 48.2(b).</td>
</tr>
<tr>
<td></td>
<td>Interviews with jurors after trial by or on behalf of parties involved in the trial are prohibited, unless the attorney or party involved desiring such an interview files proposed written interrogatories with the Court, together with an affidavit setting for the reasons for such proposed interrogatories, within the time granted for a motion for a new trial. Approval of the interview of jurors in accordance with the interrogatories and affidavit so filed will be granted only upon the showing of good cause. See Federal Rules of Evidence 606(b). Following the interview, a second affidavit must be filed indicating the scope and results of the interviews with jurors and setting out the answers given to the interrogatories.</td>
</tr>
<tr>
<td>Nebraska</td>
<td>D Neb</td>
</tr>
<tr>
<td></td>
<td>N/A</td>
</tr>
<tr>
<td>Nevada</td>
<td>D Nev Ct Rule 48-1.</td>
</tr>
<tr>
<td></td>
<td>Unless otherwise permitted by the court, no party, attorney or other interested person shall communicate with or contact any juror until the jury concludes its deliberations and is discharged.</td>
</tr>
<tr>
<td>New Hampshire</td>
<td>D NH Ct Rule 47.3.</td>
</tr>
<tr>
<td></td>
<td>No attorney, party, or witness, acting directly or through the use of an agent, shall attempt to communicate with any juror, prospective juror, or former juror concerning the person's service as a juror without obtaining prior approval of the court. The court will not approve a request to communicate with a juror except in extraordinary circumstances and for good cause shown.</td>
</tr>
<tr>
<td>STATE</td>
<td>RULE(S)</td>
</tr>
<tr>
<td>---------------</td>
<td>-------------------------------------------------------</td>
</tr>
<tr>
<td>New Jersey</td>
<td>D NJ Civ Ct Rule 47.1(e).</td>
</tr>
<tr>
<td></td>
<td>No attorney or party to an action shall personally or through an investigator or other person acting for such attorney or party, directly or indirectly interview, examine or question any juror, relative, friend or associate thereof during the pendency of the trial or with respect to the deliberations or verdict of the jury in any action, except on leave of Court granted upon good cause shown.</td>
</tr>
<tr>
<td>New Mexico</td>
<td>D NM N/A</td>
</tr>
<tr>
<td>New York</td>
<td>E D NY N/A</td>
</tr>
<tr>
<td></td>
<td>N D NY Ct Rule 47.5(1).</td>
</tr>
<tr>
<td></td>
<td>At any time after the Court has called a jury panel from which jurors shall be selected to try cases for a term of Court fixed by the presiding judge or otherwise impaneled, no party or attorney, or anyone associated with the party or the attorney, shall have any communication or contact by any means or manner with any juror until such time as the panel of jurors has been excused and the term of court ended.</td>
</tr>
<tr>
<td></td>
<td>S D NY N/A</td>
</tr>
<tr>
<td></td>
<td>W D NY N/A</td>
</tr>
<tr>
<td>North Carolina</td>
<td>E D NC Crim Ct Rule 24.2(c).</td>
</tr>
<tr>
<td></td>
<td>Following the discharge of a jury from further considera-</td>
</tr>
</tbody>
</table>
|               | tion of a case, no attorney or party litigant shall indivi-
<p>|               | dually or through an investigator or any person acting for such attorney or party litigant ask questions of or make comments to a member of that jury or the members of the family of such a juror that are calculated merely to harass or embarrass the such a juror or member of such juror's family or to influence the actions of such a juror or a member of such juror's family in future jury service. |
|               | M D NC Ct Rule 47.1(b).                               |
|               | (1) All parties, witnesses, and attorneys shall avoid any extra- |
|               | judicial contact or communication with a grand juror or member of a petit jury venire or panel who has been or may be selected in a case in which that person is involved. No person may have any extra-judicial contact or communication, either directly or indirectly, with a grand juror or a member of a 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. |
|               | (4) No provision of this rule is intended to prohibit communication with a petit juror after the juror has been dismissed from further service, so long as the communication does not tend to harass, humiliate or intimidate the juror in any fashion. |
|               | W D NC Ct Rule 47.2.                                  |
|               | No attorney or party to an action shall personally or through their designees, directly or indirectly, interview, examine or question any juror, relative, friend or associate thereof during the pendency of the trial or with respect to the deliberations or verdict of the jury in any action, except on leave of the presiding judge upon good cause shown. |</p>
<table>
<thead>
<tr>
<th>STATE</th>
<th>RULE(S)</th>
</tr>
</thead>
<tbody>
<tr>
<td>North Dakota</td>
<td>D ND</td>
</tr>
<tr>
<td></td>
<td>N/A</td>
</tr>
<tr>
<td>Ohio</td>
<td>N D Ohio</td>
</tr>
<tr>
<td></td>
<td>N/A</td>
</tr>
<tr>
<td></td>
<td>S D Ohio Civ Ct Rule 47.1.</td>
</tr>
<tr>
<td></td>
<td>No attorney, party, or anyone acting as an agent or in concert with them connected with the trial of an action shall personally, or acting through an investigator or other person interview, examine or question any juror with respect to the verdict or deliberations of the jury in the action except with leave of the Court.</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>E D Ok Ct Rule 47.2.</td>
</tr>
<tr>
<td></td>
<td>No person shall communicate with any juror concerning the juror's service in any trial prior to the juror's discharge from the case. Upon discharge from service, each juror is free to discuss or refuse to discuss that juror's service with any person, if the juror so desires. Attorneys who are officers of this Court, and those acting on behalf of such attorneys, are prohibited from approaching jurors in any manner at any time concerning a juror's service, except upon leave of the Court after a showing of good cause.</td>
</tr>
<tr>
<td></td>
<td>N D Ok Ct Rule 47.2.</td>
</tr>
<tr>
<td></td>
<td>No person shall communicate with any juror concerning said juror's services in any trial prior to the juror's discharge from the case. Upon discharge from service, each juror is free to discuss, or refuse to discuss, said juror's service with any person if the juror so desires. Attorneys who are officers of this court and those acting on behalf of such attorneys are prohibited from approaching jurors in any matter at any time concerning said juror's service, except on leave of court upon a showing of good cause.</td>
</tr>
<tr>
<td></td>
<td>W D Ok Civ Ct Rule 47.1.</td>
</tr>
<tr>
<td></td>
<td>At no time, including after a case has been completed, may attorneys approach or speak to jurors regarding the case unless authorized by the Court, upon written application.</td>
</tr>
<tr>
<td>Oregon</td>
<td>D Or Ct Rule 48.4.</td>
</tr>
<tr>
<td></td>
<td>Notwithstanding DR 7-108(D), after the verdict an attorney may not initiate contact with jurors except as authorized by the court.</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>E D Pa Crim Ct Rule 24.1(c).</td>
</tr>
<tr>
<td></td>
<td>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.</td>
</tr>
<tr>
<td></td>
<td>M D Pa Ct Rule 83.2.8.</td>
</tr>
<tr>
<td></td>
<td>No Attorney or party or anyone acting on behalf of such attorney or party shall, without express permission from the court, initiate any communication with any juror pertaining to any case in which that juror may be drawn, is participating or has participated.</td>
</tr>
<tr>
<td></td>
<td>W D Pa</td>
</tr>
<tr>
<td></td>
<td>N/A</td>
</tr>
</tbody>
</table>

183 See Appendix 2.
<table>
<thead>
<tr>
<th>STATE</th>
<th>RULE(S)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rhode Island</td>
<td>D RI Ct Rule 15(g)(2).</td>
</tr>
<tr>
<td></td>
<td>After a verdict is rendered but before the jury is discharged from the case, counsel may request leave of the Court to converse with members of the jury. Upon receiving such a request, the Court will inform the jury that no juror has any obligation to speak with counsel or parties but that any juror may do so if he wishes.</td>
</tr>
</tbody>
</table>
| South Carolina | D SC  
<p>|              | N/A                                                                    |
| South Dakota | D SD Ct Rule 47.2.                                                      |
|              | None of the parties or their lawyers or anybody acting on their behalf shall contact jurors after a trial until the jurors have completed their term of service as jurors. The Court may order exceptions to this rule in various instances, but not limited to the instance of a hung jury. |
| Tennessee    | E D Tenn Ct Rule 48.1.                                                  |
|              | No attorney, party, or representative of either may interrogate a juror after a verdict has been returned or the trial has been otherwise concluded, without prior permission of the court. |
|              | M D Tenn Ct Rule 12(h).                                                |
|              | No attorney, party, or representative of either may interrogate a juror after the verdict has been returned without prior approval of the court. Approval of the Court shall be sought only by an application made by counsel orally in open court, or upon written motion which states the grounds and the purpose of the interrogation. If a post-verdict interrogation of one or more members of the jury should be approved, the scope of the interrogation and other limitations upon the interrogation will be determined by the Judge prior to the interrogation. |
|              | W D Tenn 47.1(b)(2).                                                   |
|              | In the event that a mistrial is ordered due to the jurors' inability to agree on a verdict, any attorney or the attorney's representative may interrogate a juror without prior approval of the court, unless the court determines that the interrogation should not take place or determines that appropriate limitations should be established. |
| Texas        | E D Tex Crim Ct Rule 24(b).                                            |
|              | (2) 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. |
|              | (3) Nothing in this rule shall be construed to limit the power of the judge before whom an action is being or has been tried to permit conversations between jurors and attorneys. |
|              | N D Tex Crim Ct Rule 24.1.                                             |
|              | A party, attorney, or representative of a party or attorney, shall not, before or after trial, contact any juror, unless explicitly permitted to do so by the presiding judge. |
|              | S D Tex Crim Ct Rule 24.1.                                             |
|              | Except with leave of 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. |</p>
<table>
<thead>
<tr>
<th>STATE</th>
<th>RULE(S)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Utah</td>
<td>D Utah Civ Ct Rule 47-2(b).</td>
</tr>
<tr>
<td></td>
<td>The court will instruct jurors that they are under no obligation to</td>
</tr>
<tr>
<td></td>
<td>discuss their deliberations or verdict with anyone, although they</td>
</tr>
<tr>
<td></td>
<td>are free to do so if they wish. The court may set special conditions</td>
</tr>
<tr>
<td></td>
<td>or restrictions upon juror interviews or may forbid such interviews.</td>
</tr>
<tr>
<td>Vermont</td>
<td>D Vt</td>
</tr>
<tr>
<td></td>
<td>N/A</td>
</tr>
<tr>
<td>Virginia</td>
<td>E D Va Crim Ct Rule 24(C).</td>
</tr>
<tr>
<td></td>
<td>No attorney or party litigant shall personally, or through any</td>
</tr>
<tr>
<td></td>
<td>investigator or any other person acting for the attorney or party</td>
</tr>
<tr>
<td></td>
<td>juror interview, examine, or question any juror or alternate juror</td>
</tr>
<tr>
<td></td>
<td>with respect to the verdict or deliberations of the jury in any Crim</td>
</tr>
<tr>
<td></td>
<td>action except on leave of Court granted upon good cause shown and</td>
</tr>
<tr>
<td></td>
<td>upon such conditions as the Court shall fix.</td>
</tr>
<tr>
<td></td>
<td>W D Va</td>
</tr>
<tr>
<td></td>
<td>N/A</td>
</tr>
<tr>
<td>Washington</td>
<td>E D Wash</td>
</tr>
<tr>
<td></td>
<td>N/A</td>
</tr>
<tr>
<td></td>
<td>W D Wash</td>
</tr>
<tr>
<td></td>
<td>N/A</td>
</tr>
<tr>
<td>West Virginia</td>
<td>N D W Va</td>
</tr>
<tr>
<td></td>
<td>N/A</td>
</tr>
<tr>
<td></td>
<td>S D W Va Ct Rule 3.04.</td>
</tr>
<tr>
<td></td>
<td>After the conclusion of a trial, no party, nor his or her agent or</td>
</tr>
<tr>
<td></td>
<td>attorney, shall communicate or attempt to communicate with any</td>
</tr>
<tr>
<td></td>
<td>member of the jury about the jury's deliberations or verdict without</td>
</tr>
<tr>
<td></td>
<td>first applying for (with notice to all other parties) and obtaining for</td>
</tr>
<tr>
<td></td>
<td>good cause an order allowing such communication.</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>E D Wis Ct Rule 47.3.</td>
</tr>
<tr>
<td></td>
<td>This rule applies to any communication before trial with members</td>
</tr>
<tr>
<td></td>
<td>of the venire from which the jury will be selected, as well as any</td>
</tr>
<tr>
<td></td>
<td>communication with members of the jury during trial, deliberations,</td>
</tr>
<tr>
<td></td>
<td>and after the return of a verdict. No attorneys appearing in any</td>
</tr>
<tr>
<td></td>
<td>branch of this Court, or any of their agents or employees, shall</td>
</tr>
<tr>
<td></td>
<td>approach, interview or communicate with any member of the jury</td>
</tr>
<tr>
<td></td>
<td>except on leave of Court granted upon notice to opposing counsel and</td>
</tr>
<tr>
<td></td>
<td>upon good cause shown. Good cause includes a trial attorney's request</td>
</tr>
<tr>
<td></td>
<td>for permission to contact one or more jurors after trial for the</td>
</tr>
<tr>
<td></td>
<td>trial attorney's educational benefit. The juror(s) must be advised at</td>
</tr>
<tr>
<td></td>
<td>the outset of any communication that his or her participation is</td>
</tr>
<tr>
<td></td>
<td>voluntary. Any juror contact permitted by the Court under this rule</td>
</tr>
<tr>
<td></td>
<td>must be subject to the control of the Court.</td>
</tr>
<tr>
<td>STATE</td>
<td>RULE(S)</td>
</tr>
<tr>
<td>----------</td>
<td>----------------------------------------------</td>
</tr>
<tr>
<td>Wyoming</td>
<td>D Wyo Crim Ct Rule 24.1.</td>
</tr>
</tbody>
</table>

(b) No juror has any obligation to speak to any person about any case and may refuse all interviews and comments. No person may make repeated requests for interviews or comments after a juror has expressed a desire not to be interviewed or questioned. If any person violates this prohibition against repeated requests of a juror for interviews or comments after the juror’s refusal, the juror or jurors involved shall promptly advise the Court of the facts and circumstances. The Court shall take such action as it deems appropriate, which may include a contempt citation to the offending party or parties.

c) If any juror consents to be interviewed after trial, under no circumstances shall such juror disclose or be asked to disclose any information with respect to the specific vote of any juror, other than the juror being interviewed or with respect to the deliberations of the jury.

d) Following the rendition of a verdict by a jury, counsel in the case shall not thank the jury for their verdict.

e) At the time that a jury is discharged from further consideration of a case upon return of a verdict or the declaration of a mistrial or otherwise, and when jurors are excused or discharged after commencement of a trial the Court shall advise all jurors so discharged or excused of this rule.
APPENDIX 2.
SURVEY OF STATE BAR RULES OF PROFESSIONAL CONDUCT GOVERNING POST-TRIAL COMMUNICATION BETWEEN ATTORNEYS AND JURORS.

<table>
<thead>
<tr>
<th>STATE</th>
<th>RULE(S)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>Ala Prof Conduct Rule 3.5.</td>
</tr>
<tr>
<td></td>
<td>A lawyer shall not (b) communicate ex parte with [a judge, juror, prospective juror or other official] except as permitted by law.</td>
</tr>
<tr>
<td>Alaska</td>
<td>Alaska Prof Conduct Rule 3.10.</td>
</tr>
<tr>
<td></td>
<td>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 the juror's actions in future jury service.</td>
</tr>
<tr>
<td>Arizona</td>
<td>Ariz Prof Conduct Rule 3.5.</td>
</tr>
<tr>
<td></td>
<td>A lawyer shall not (c) communicate with a juror or prospective juror after discharge of the jury if: (1) the communication is prohibited by law or court order; (2) the juror has made known to the lawyer a desire not to communicate; or (3) the communication involves misrepresentation, coercion, duress or harassment.</td>
</tr>
<tr>
<td>Arkansas</td>
<td>Ark Prof Conduct Rule 3.5.</td>
</tr>
<tr>
<td></td>
<td>A lawyer shall not: (b) communicate ex parte with [a judge, juror, prospective juror, or other official] on the merits of the cause except as permitted by law.</td>
</tr>
<tr>
<td>California</td>
<td>Cal Prof Conduct Rule 5-320.</td>
</tr>
<tr>
<td></td>
<td>(D) After discharge of the jury from further consideration of a case a member shall not ask questions of or make comments to a member of that jury that are intended to harass or embarrass the juror or to influence the juror's actions in future jury service.</td>
</tr>
<tr>
<td></td>
<td>(F) All restrictions imposed by this rule also apply to communications with, or investigations of, members of the family of a person who is either a member of the venire or a juror.</td>
</tr>
<tr>
<td>Colorado</td>
<td>Colo Prof Conduct Rule 3.5.</td>
</tr>
<tr>
<td></td>
<td>A lawyer shall not (b) communicate ex parte with [a judge, juror, prospective juror or other official] except as permitted by law.</td>
</tr>
</tbody>
</table>

*** "N/A" denotes that the author found no applicable state bar rule of professional conduct.
<table>
<thead>
<tr>
<th>STATE</th>
<th>RULE(S)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Connecticut</td>
<td>Conn Prof Conduct Rule 3.5.</td>
</tr>
<tr>
<td></td>
<td>A lawyer shall not (b) communicate ex parte with [a judge, juror, prospective juror or other official] except as permitted by law.</td>
</tr>
<tr>
<td>Delaware</td>
<td>Del Prof Conduct Rule 3.5.</td>
</tr>
<tr>
<td></td>
<td>A lawyer shall not (c) communicate with a juror or prospective juror after discharge of the jury unless the communication is permitted by court rule.</td>
</tr>
<tr>
<td>District of Columbia</td>
<td>DC Prof Conduct Rule 3.5.</td>
</tr>
<tr>
<td></td>
<td>A lawyer shall not (b) communicate ex parte with [a judge, juror, prospective juror or other official] except as permitted by law.</td>
</tr>
<tr>
<td>Florida</td>
<td>Fla Prof Conduct Rule 4-3.5(d).</td>
</tr>
<tr>
<td></td>
<td>A lawyer shall not (4) after dismissal of the jury in a case with which the lawyer is connected, initiate communication with or cause another to initiate communication with any juror regarding the trial except to determine whether the verdict may be subject to legal challenge; provided, a lawyer may not interview jurors for this purpose unless the lawyer has reason to believe that grounds for such challenge may exist; and provided further, before conducting any such interview the lawyer must file in the cause a notice of intention to interview setting forth the name of the juror or jurors to be interviewed. A copy of the notice must be delivered to the trial judge and opposing counsel a reasonable time before such interview. The provisions of this rule to do not prohibit a lawyer from communicating with members of the venire or jurors in the course of official proceedings or as authorized by court rule or written order of the court.</td>
</tr>
<tr>
<td>Georgia</td>
<td>Ga Prof Conduct Rule 3.5.</td>
</tr>
<tr>
<td></td>
<td>A lawyer shall not, without regard to whether the lawyer represents a client in the matter: (b) communicate ex parte with [a judge, juror, prospective juror or other official] except as permitted by law.</td>
</tr>
<tr>
<td>STATE</td>
<td>RULE(S)</td>
</tr>
<tr>
<td>---------</td>
<td>-------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Hawaii</td>
<td>Haw Prof Conduct Rule 3.5(e)(4).</td>
</tr>
<tr>
<td></td>
<td>A lawyer shall not: after dismissal of the jury in a case with</td>
</tr>
<tr>
<td></td>
<td>which the lawyer is connected, communicate with a juror regarding the</td>
</tr>
<tr>
<td></td>
<td>trial except that:</td>
</tr>
<tr>
<td></td>
<td>(i) upon leave of the court, which leave shall be freely granted, a</td>
</tr>
<tr>
<td></td>
<td>lawyer may ask questions of, or respond to questions from, jurors about</td>
</tr>
<tr>
<td></td>
<td>the trial, provided that the lawyer does so in a manner that is not</td>
</tr>
<tr>
<td></td>
<td>calculated to harass or embarrass any juror and does not seek to</td>
</tr>
<tr>
<td></td>
<td>influence the juror's actions in future jury service in any particular</td>
</tr>
<tr>
<td></td>
<td>case; and (ii) upon leave of court for good cause shown, a lawyer who</td>
</tr>
<tr>
<td></td>
<td>believes there are grounds for legal challenge to a verdict may</td>
</tr>
<tr>
<td></td>
<td>conduct an in-court examination of jurors or former jurors to determine</td>
</tr>
<tr>
<td></td>
<td>whether the verdict is subject to challenge. A motion for in-court</td>
</tr>
<tr>
<td></td>
<td>examination of discharged jurors under this subsection (ii) shall be</td>
</tr>
<tr>
<td></td>
<td>served no later than ten (10) days after the judgment has been entered</td>
</tr>
<tr>
<td></td>
<td>unless good cause is shown for the failure to serve the motion within</td>
</tr>
<tr>
<td></td>
<td>that time. If the examination is permitted, the court shall prescribe</td>
</tr>
<tr>
<td></td>
<td>the time, manner, place and scope of the investigation.</td>
</tr>
<tr>
<td>Idaho</td>
<td>Idaho Prof Conduct Rule 3.5.</td>
</tr>
<tr>
<td></td>
<td>A lawyer shall not (c) communicate with a juror or prospective juror</td>
</tr>
<tr>
<td></td>
<td>after discharge of the jury if: (1) the communication is prohibited by</td>
</tr>
<tr>
<td></td>
<td>law or court order; (2) the juror has made known to the lawyer a desire</td>
</tr>
<tr>
<td></td>
<td>not to communicate; or (3) the communication involves misrepresentation,</td>
</tr>
<tr>
<td></td>
<td>coercion, duress or harassment.</td>
</tr>
<tr>
<td>Illinois</td>
<td>Ill Prof Conduct Rule 3.5.</td>
</tr>
<tr>
<td></td>
<td>(d) After discharge of the jury from further consideration of a case</td>
</tr>
<tr>
<td></td>
<td>with which the lawyer was connected, the lawyer shall not ask questions</td>
</tr>
<tr>
<td></td>
<td>of or make comments to a juror until the venire of which such juror is</td>
</tr>
<tr>
<td></td>
<td>a member has been discharged, nor shall the lawyer thereafter ask</td>
</tr>
<tr>
<td></td>
<td>questions of or make comments to a member of the venire that are</td>
</tr>
<tr>
<td></td>
<td>calculated merely to harass or embarrass the juror or to influence such</td>
</tr>
<tr>
<td></td>
<td>juror's actions in future jury service.</td>
</tr>
<tr>
<td></td>
<td>(f) All restrictions imposed by Rule 3.5 also apply to communi-</td>
</tr>
<tr>
<td></td>
<td>cations with or investigations of the families of members of the</td>
</tr>
<tr>
<td></td>
<td>venire or jury.</td>
</tr>
<tr>
<td>Indiana</td>
<td>Ind Prof Conduct Rule 3.5.</td>
</tr>
<tr>
<td></td>
<td>A lawyer shall not (b) communicate ex parte with [a judge, juror,</td>
</tr>
<tr>
<td></td>
<td>prospective juror or other official] except as permitted by law.</td>
</tr>
<tr>
<td>STATE</td>
<td>RULE(S)</td>
</tr>
<tr>
<td>-------------</td>
<td>----------------------------------------------</td>
</tr>
<tr>
<td>Iowa</td>
<td>Iowa Prof Conduct Rule 7-29.</td>
</tr>
<tr>
<td></td>
<td>To safeguard the impartiality that is essential to the judicial process, venirepersons and jurors should be protected against extraneous influences. . . After the trial, communication by a lawyer with jurors is permitted so long as the lawyer 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, the lawyer could not ascertain if the verdict might be subject to legal challenge, in which even 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.</td>
</tr>
<tr>
<td>Kansas</td>
<td>Kan Prof Conduct Rule 3.5.</td>
</tr>
<tr>
<td></td>
<td>A lawyer shall not (b) communicate or cause another to communicate with a member of a jury or the venire from which the jury will be selected about the matters under consideration other than in the course of official proceedings until after the discharge of the jury from further consideration of the case.</td>
</tr>
<tr>
<td>Kentucky</td>
<td>Ky Prof Conduct Rule 3.5.</td>
</tr>
<tr>
<td></td>
<td>A lawyer shall not (b) communicate ex parte with a [judge, juror, prospective juror or other official] as to the merits of the cause except as permitted by law.</td>
</tr>
<tr>
<td>Louisiana</td>
<td>La Prof Conduct Rule 3.5.</td>
</tr>
<tr>
<td></td>
<td>A lawyer shall not: (c) communicate with a juror or prospective juror after discharge of the jury if: (1) the communication is prohibited by law or court order; (2) the juror has made known to the lawyer the desire not to communicate; or (3) the communication involves misrepresentation, coercion, duress or harassment.</td>
</tr>
<tr>
<td>Maine</td>
<td>Me Prof Conduct Rule 3.7(f)(2).</td>
</tr>
<tr>
<td></td>
<td>After discharge of a juror from further jury service, a lawyer may ask or answer questions and make comments to the former juror provided the questions or comments are not intended to harass or embarrass the juror or influence the juror's action in future jury service.</td>
</tr>
<tr>
<td>Maryland</td>
<td>N/A</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>Mass Prof Conduct Rule 3.5.</td>
</tr>
<tr>
<td></td>
<td>A lawyer shall not: (d) after discharge of the jury from further consideration of a case with which the lawyer was connected, initiate any communication with a member of the jury without leave of court granted for good cause shown. If a juror initiates a communication with such a lawyer, directly or indirectly, the lawyer may respond provided that the lawyer shall not ask questions of or make comments to a member of that jury that are intended only to harass or embarrass the juror or to influence his or her actions in future jury service. In no circumstances shall such a lawyer inquire of a juror concerning the jury's deliberation process.</td>
</tr>
<tr>
<td>STATE</td>
<td>RULE(S)</td>
</tr>
<tr>
<td>--------------</td>
<td>----------------------------------------------------------</td>
</tr>
<tr>
<td>Michigan</td>
<td>Mich Prof Conduct Rule 3.5.</td>
</tr>
<tr>
<td></td>
<td>A lawyer shall not (b) communicate ex parte with [a judge, juror, prospective juror or other official] except as permitted by law.</td>
</tr>
<tr>
<td>Minnesota</td>
<td>Minn Prof Conduct Rule 3.5.</td>
</tr>
<tr>
<td></td>
<td>(c) 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 the juror's actions in future jury service.</td>
</tr>
<tr>
<td></td>
<td>(d) A lawyer shall not conduct or cause another, by financial support or otherwise, to conduct a vexatious or harassing investigation of a juror or prospective juror.</td>
</tr>
<tr>
<td></td>
<td>(e) All restrictions imposed by this rule apply also to communications with or investigations of members of a family of a juror or prospective juror.</td>
</tr>
<tr>
<td>Mississippi</td>
<td>Miss Prof Conduct Rule 3.5.</td>
</tr>
<tr>
<td></td>
<td>A lawyer shall not (b) communicate ex parte with [a judge, juror, prospective juror or other official] except as permitted by law.</td>
</tr>
<tr>
<td>Missouri</td>
<td>Mo Prof Conduct Rule 3.5.</td>
</tr>
<tr>
<td></td>
<td>A lawyer shall not (b) communicate ex parte with [a judge, juror, prospective juror or other official] except as permitted by law.</td>
</tr>
<tr>
<td>Montana</td>
<td>Mont Prof Conduct Rule 3.5.</td>
</tr>
<tr>
<td></td>
<td>A lawyer shall not (b) communicate ex parte with [a judge, juror, prospective juror or other official] except as permitted by law.</td>
</tr>
<tr>
<td>Nebraska</td>
<td>N/A</td>
</tr>
<tr>
<td>Nevada</td>
<td>Nev Prof Conduct Rule 3.5.</td>
</tr>
<tr>
<td></td>
<td>A lawyer shall not (2) communicate ex parte with [a judge, juror, prospective juror or other official] except as permitted by law.</td>
</tr>
<tr>
<td>New Hampshire</td>
<td>NH Prof Conduct Rule 3.5.</td>
</tr>
<tr>
<td></td>
<td>A lawyer shall not (b) communicate ex parte with [a judge, juror, prospective juror or other official] except as permitted by law.</td>
</tr>
<tr>
<td>New Jersey</td>
<td>NJ Prof Conduct Rule 3.5.</td>
</tr>
<tr>
<td></td>
<td>A lawyer shall not (b) communicate ex parte with [a judge, juror, prospective juror or other official] except as permitted by law.</td>
</tr>
<tr>
<td>New Mexico</td>
<td>NM Prof Conduct Rule 3.5.</td>
</tr>
<tr>
<td></td>
<td>A lawyer shall not (b) communicate ex parte with [a judge, juror, prospective juror or other official] except as permitted by law.</td>
</tr>
<tr>
<td>New York</td>
<td>N/A</td>
</tr>
<tr>
<td>STATE</td>
<td>RULE(S)</td>
</tr>
<tr>
<td>--------------</td>
<td>---------------------------------------------</td>
</tr>
<tr>
<td>North Carolina</td>
<td>NC Prof Conduct Rule 3.5.</td>
</tr>
<tr>
<td></td>
<td>(a) A lawyer shall not (2) communicate ex parte with a juror or a prospective juror except as permitted by law.</td>
</tr>
<tr>
<td></td>
<td>(b) All restrictions imposed by this rule also apply to communications with, or investigations of members of the family of a juror or a prospective juror.</td>
</tr>
<tr>
<td></td>
<td>Comment 3. After the jury has been discharged, a lawyer may communicate with a juror unless the communication is prohibited by law or court order. The lawyer must refrain from asking questions or making comments that tend to harass or embarrass the juror or to influence actions of the juror in future cases, and must respect the desire of the juror not to talk with the lawyer. The lawyer may not engage in improper conduct during the communication.</td>
</tr>
<tr>
<td>North Dakota</td>
<td>N/A</td>
</tr>
<tr>
<td>Ohio</td>
<td>N/A</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>Ok Prof Conduct Rule 3.5.</td>
</tr>
<tr>
<td></td>
<td>A lawyer shall not (a) seek to influence a judge, juror, prospective juror or other decision maker except as permitted by law or the rules of a tribunal; (c) communicate directly or through another with a juror or prospective juror except as permitted by law or the rules of court.</td>
</tr>
<tr>
<td>Oregon</td>
<td>Or Prof Conduct Rule 7-108(D).</td>
</tr>
<tr>
<td></td>
<td>After discharge of the jury from further consideration of a case with which the lawyer was connected, the lawyer shall not ask questions or make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence the juror's actions in future jury service.</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>Pa Prof Conduct Rule 3.5.</td>
</tr>
<tr>
<td></td>
<td>A lawyer shall not (c) communicate with a juror or prospective juror after discharge of the jury if: (1) the communication is prohibited by law or court order; (2) the juror has made known to the lawyer a desire not to communicate; or (3) the communication involves misrepresentation, coercion, duress or harassment.</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>RI Prof Conduct Rule 3.5.</td>
</tr>
<tr>
<td></td>
<td>A lawyer shall not (b) communicate ex parte with [a judge, juror, prospective juror or other official] except as permitted by law.</td>
</tr>
<tr>
<td>South Carolina</td>
<td>SC Prof Conduct Rule 3.5.</td>
</tr>
<tr>
<td></td>
<td>A lawyer shall not (b) communicate ex parte with [a judge, juror, prospective juror or other official] except as permitted by law.</td>
</tr>
<tr>
<td>South Dakota</td>
<td>SD Prof Conduct Rule 3.5.</td>
</tr>
<tr>
<td></td>
<td>A lawyer shall not (c) communicate with a juror or prospective juror after the discharge of the jury if (1) the communication is prohibited by law or court order; (2) the juror has made known to the lawyer a desire not to communicate; or (3) the communication involves misrepresentation, coercion, duress or harassment.</td>
</tr>
<tr>
<td>STATE</td>
<td>RULE(S)</td>
</tr>
<tr>
<td>-----------</td>
<td>----------------------------------------------</td>
</tr>
<tr>
<td>Tennessee</td>
<td>Tenn Prof Conduct Rule 3.5.</td>
</tr>
<tr>
<td></td>
<td>A lawyer shall not (c) communicate with a juror after completion of the juror's term of service if the communication is prohibited by law, or is calculated merely to harass or embarrass the juror or to influence the juror's actions in future jury service.</td>
</tr>
<tr>
<td>Texas</td>
<td>N/A</td>
</tr>
<tr>
<td>Utah</td>
<td>N/A</td>
</tr>
<tr>
<td>Vermont</td>
<td>Vt Prof Conduct Rule 3.5.</td>
</tr>
<tr>
<td></td>
<td>A lawyer shall not (b) communicated ex parte (2) with a juror or prospective juror during the juror's term of service, except as permitted by law.</td>
</tr>
<tr>
<td>Virginia</td>
<td>Va Prof Conduct Rule 3.5.</td>
</tr>
<tr>
<td></td>
<td>A lawyer shall not (2) after discharge of the jury from further consideration of a case (i) 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 the juror's actions in future jury service; (ii) communicate with a member of that jury if the communication is prohibited by law or court order; or (iii) communicate with a member of that jury if the juror has made known to the lawyer a desire not to communicate; or (3) conduct or cause, by financial support or otherwise, another to conduct a vexatious or harassing investigation of either a juror or a member of a venire.</td>
</tr>
<tr>
<td>Washington</td>
<td>Wash Prof Conduct Rule 3.5.</td>
</tr>
<tr>
<td></td>
<td>A lawyer shall not (b) communicate ex parte with [a judge, juror, prospective juror or other official] except as permitted by law.</td>
</tr>
<tr>
<td>West Virginia</td>
<td>W Va Prof Conduct Rule 3.5.</td>
</tr>
<tr>
<td></td>
<td>A lawyer shall not (b) communicate ex parte with [a judge, juror, prospective juror or other official] except as permitted by law.</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>Wis Prof Conduct Rule 3.5.</td>
</tr>
<tr>
<td></td>
<td>A lawyer shall not (b) communicate ex parte with [a judge, juror, prospective juror or other official] except as permitted by law or for scheduling purposes permitted by the court.</td>
</tr>
<tr>
<td>Wyoming</td>
<td>N/A</td>
</tr>
</tbody>
</table>