Communicating With Jurors

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When may a lawyer ethically communicate with a juror or potential juror? Rule 3.5, Minnesota Rules of Professional Conduct, addresses this issue, setting out a clear prohibition on such communications before or during a trial, while placing only some restrictions on the lawyer once the jury has been discharged.

The basic approach of Minnesota's Rules 3.5(a) and (b) is that before or during the course of a trial, a lawyer should have no communications with a juror or a member of the jury venire, except within the normal course of the proceeding itself. The lawyer should be equally sure that his or her associates follow this proscription, and also be aware that the restrictions apply to family members of the juror or potential juror. While an attorney may investigate jurors or potential jurors for the legitimate purposes of trial preparation, the rule makes a vexatious or harassing investigation subject to discipline. Perhaps because this rule is quite clear, few complaints about Minnesota lawyers are made to the Director's Office alleging a potential violation of Rule 3.5, with only one admonition for a violation of this rule issued by the director in the past several years.

After the trial is completed and the jury has been discharged, may a lawyer contact jurors to discuss the case or the jury's impressions of the attorney's performance? Generally, the answer is yes. Rule 3.5(c) allows an attorney to contact jurors after the discharge of the jury, unless the contact is being made to harass or embarrass the juror, or to influence their views for future jury service. Thus, lawyers may contact discharged jurors, and frequently do, to seek input on the attorney's performance, or how jurors perceived a particular issue. The attorney should respect the juror's wishes, however, if they indicate that they do not desire to talk to the attorney.

Minnesota's version of Rule 3.5 is not the same as the American Bar Association’s (ABA) Model Rule. The current ABA Model Rules' treatment of juror contact is limited to the statements that "[a] lawyer shall not [s]eek to influence a . . . juror [or] prospective juror . . . by means prohibited by law," and "shall not . . . communicate *ex parte* with such a person except as permitted by law." The ABA's focus thus is shifted more to the possible influence that such a communication may have on the individual. When adopting the then new Rules of Professional Conduct in 1985, the Minnesota Supreme Court rejected the ABA's proposed new rule and instead retained the more detailed language from the former Code of Professional Responsibility's DR7-108 dealing with jury contact. Minnesota's rule, therefore, has preserved the former Code's *per se* prohibition on pretrial and trial communications.

Rule 3.5(f) requires a lawyer to disclose to the court known juror misconduct or an improper contact with a juror or a member of a juror's family. So may a lawyer contact a juror if she suspects juror misconduct? Will that affect a lawyer's ability to request a *Schwartz* hearing concerning jury misconduct? *See Schwartz v. Minneapolis Suburban Bus Co.*, 258 Minn. 325, 104 NW.2d 301 (1960), Minn. R. Civ. Pro. 59.01, Minn. R. Crim. Pro. 26.04, Subd. 1.

Lawyers in Minnesota are not to initiate contact with a juror for the purpose of discovering jury misconduct. *Olberg v. Minneapolis Gas Co.,* 291 Minn. 334, 191 NW.2d 418 (1971). Doing so not only has been ruled improper, but will result in a subsequent request for a *Schwartz* hearing almost certainly being denied. *See Baker v. Gile,* 257 NW.2d 376 (Minn. 1977), *Arney v. Helbig*, 383 NW.2d 4 (Minn. App. 1986).

Can the rule and these cases be reconciled? Well, certainly any attorney who contacts a juror must walk a fine line. The lawyer should never raise the issue of jury misconduct or be perceived as digging for such information. If the juror, during the course of an otherwise proper conversation, initiates discussion that reveals possible misconduct, then the best course for the lawyer to follow is to promptly terminate the conversation and advise the juror to contact the court, and indicate that the lawyer will have to do so as well. The lawyer must be aware, however, that the availability of a *Schwartz* hearing already may have been compromised.