Arizona Supreme Court
Judicial Ethics Advisory Committee

ADVISORY OPINION 01-01
(Reissued January 22, 2003)

Contacting or Speaking with Members Of a Discharged Jury

Issues

1. May a trial judge initiate contact with or speak personally to a discharged jury following the return of a verdict?

   Answer: Yes, with qualifications.

2. May the court issue a certificate to jurors in recognition of their service?

   Answer: Yes, with qualifications.

Facts

A superior court judge requests advice on the propriety of a trial judge initiating contact with or speaking personally to a discharged jury (whether in the courtroom or in the jury room) following the return of a verdict. Because of the judiciary's interest in enhancing the juror experience, the judge would also like to know the parameters of any such contact within the ethical rules, including the propriety of giving each juror a certificate of recognition acknowledging his or her service to the community and the administration of justice.

Discussion

These issues reflect the potential for conflict that arises as judges take steps to improve the jury system and the quality of a juror's experience while at the same time upholding their ethical responsibilities to the parties. Under amendments to the civil and criminal rules aimed at encouraging more effective participation, jurors are given copies of the instructions, allowed to take notes, and encouraged to ask questions during a trial. Other than in the context of a motion for new trial based on juror misconduct, however, the issue of contact between the judge and jury after the latter's discharge is not addressed in the rules.

Issue 1

Several canons address some aspects of this issue, directly or indirectly. With exceptions not applicable here, Canon 3B(7) provides that "a judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending matter . . . ." Under Canon 3B(9), a judge may not make any public comment that might reasonably be expected to affect the outcome of a proceeding or impair its fairness, and may not make any non-public comment that might substantially interfere with a fair trial. A judge may not commend or criticize

jurors for their verdict under Canon 3B(10), but may express appreciation for their service to the judicial system and the community. Finally, judges are subject to the overarching requirement of Canon 2A that they act in a manner "that promotes public confidence in the integrity and impartiality of the judiciary."

Canon 3B(7) was adopted in 1990 as part of an overall revision of the Model Code of Judicial Conduct. Its predecessor, former Canon 3A(4) of the 1972 Code, provided that a judge should "neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding." As the commentary explains, both canons proscribe communications concerning a pending or impending proceeding from persons "who are not participants in the proceeding." However, the 1990 amendments limit the proscription to consideration of such communications if they are made outside the presence of the parties. *See generally*, L. Abramson, *The Judicial Ethics of Ex Parte and Other Communications*, 37 Hous. L. Rev. 1343, 1347 (Winter 2000)(hereinafter "Abramson").

Both Canon 3B(7) and former Canon 3A(4) distinguish between "ex parte" and "other" communications. "Ex parte" refers to actions taken "at the instance and for the benefit of one party only, and without notice to, or argument by, any person adversely interested." *Black's Law Dictionary* at 597 (7th ed. 1999). Strictly speaking, then, statements made by jurors in post-verdict discussions are not ex parte communications. To the extent that they contain information that may advantage or disadvantage one of the parties, however, they should be treated in the same manner as ex parte communications. *See* Abramson, *supra*, at 1354.

The purpose of the prohibition against *ex parte* communications is to ensure that every party is given the full right to be heard on matters before the court. "At the very least, participation in *ex parte* communications will expose the judge to one-sided argumentation, which carries the attendant risk of an erroneous ruling on the law or facts. At worst, *ex parte* communication is an invitation to improper influence if not outright corruption." J. Shaman, et al. *Judicial Conduct and Ethics* § 5.01 at 160 (2000). *See also San Carlos Apache Tribe v. Bolton*, 194 Ariz. 68, ¶ 8, 977 P.2d 790, ¶ 8 (1999); Ariz. Op. 95-14, Issue 1. Moreover, when a judge is exposed to or permits such communications, public confidence in the integrity and impartiality of the judicial system may be undermined. Canon 2A.

In reaching a resolution of this issue, it is important to clarify the status of jurors following discharge, the posture of the case, and the nature of the communications at issue. The rights of litigants that may be affected by discussions between the judge and jury must also be identified, as well as steps that can be taken to protect those rights while at the same time promoting the positive benefits to jurors and to the court system that flow from giving jurors an opportunity to ask questions and talk about the legal proceeding in which they have just been called upon to play a decisive role.

Obviously a judge should not communicate with jurors after they have retired to deliberate, and before they have returned a verdict, unless the parties and counsel have been notified and given an opportunity to be present. *See Perkins v. Komarnyckyj*, 172 Ariz. 115, 834 P.2d 1260 (1992); *State v. Sammons*, 156 Ariz. 51, 749 P.2d 1372 (1988). *See* generally

Annotation, 43 A.L.R. 4th 410 (1986). Once a verdict has been returned and the jury has been discharged, however, the jurors generally have no further role or responsibility in the case. They return to their status as members of the general public. The only matters remaining before the trial judge are post-trial motions, which may involve allegations of juror misconduct, and, in criminal cases, sentencing. The parties clearly have a right to know of any information disclosed to the judge that may provide grounds for a new trial. In criminal cases, they also have the right to know of any information or opinion communicated to the judge from any source regarding sentencing.

To the extent that judge-juror discussions involve an explanation of the trial process, they do not involve the substance of a claim or the merits of an issue yet to be decided, and therefore do not violate Canon 3B(7). But for their selection to the jury, individual jurors would have been free to attend any of the hearings in the case, whether before, during or after the trial, and would have been privy to any of the matters discussed in open court from which they were so carefully sheltered while serving on the jury. This would include hearings on discovery, disclosure, evidentiary motions and, in criminal cases, sentencing. If a class of high school students attended any such hearing or sat through the trial, at the conclusion the judge could properly answer their questions regarding the law and court procedure. Canon 3B(9); *cf.* Canon 4B; Ariz. Op. 95-04. The judge could explain why certain evidence was ruled admissible or inadmissible, why the case had eight jurors while others have twelve, what statutory range of sentence applies to a particular offense and similar matters. In responding to such questions, the judge is doing no more than giving information that is a matter of public record. Providing such information is entirely consistent with Canon 3B. Similarly, distribution of a voluntary written questionnaire evaluating the juror's experience and requesting suggestions for improvement is permissible. Such questionnaires may address the quality of juror notebooks, length of voir dire and manner of questioning, presenting depositions versus live testimony, and other similar questions.

A common theme running through the sparse commentary on this issue is a concern that meeting with the jury outside the presence of the parties may undermine public confidence in the openness and fairness of all judicial proceedings. This concern is legitimate and should be taken into account in deciding whether and under what circumstances it is appropriate to meet with the jury. However, encouraging this kind of dialogue does not violate Canon 3B(7) provided that appropriate safeguards are put in place to protect the rights of the parties and prevent prohibited communications.

First, counsel for all parties should be informed of the judge's intention to meet with the jurors and given an opportunity to be present, or to request that the meeting be on the record, or both. *See* commentary to Canon 3B(7)("To the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge"). *See also ABA Standards for Criminal Justice Discovery and Trial by Jury §15-4.3* (3d ed. 1996); Ga. Op. 231 (1998) (relying on Canon 3B(10) as well as concerns for public confidence in the openness and fairness of all judicial proceedings).

Second, the judge must admonish the jurors before the meeting that he or she cannot answer questions regarding matters still pending (such as sentencing) and must prohibit any statements on such matters. It may be preferable to give this admonition in court on the record. So long as the post-verdict discussion with jurors does not involve a matter on which the judge has yet to rule, neither party is thereby advantaged or disadvantaged, the right to be heard is not abridged, and Canon 3B(7) is not implicated. This does not preclude the judge from giving a general explanation of the sentencing process in criminal cases and the range of sentences applicable to the defendant. However, the discussion may not include the jurors' opinions or recommendations as to the sentence the judge should impose in a specific case.

Third, the judge must also expressly and firmly prohibit any discussion of the jury's deliberations. *Cf.* Ariz. R. Evid. 606(b), 17A A.R.S. Again, the judge may prefer to give this admonition on the record. While such a dialogue might be helpful to jurors and, in most cases, probably would not involve prohibited communications, the potential benefits are outweighed by countervailing considerations. Such a topic is rife with opportunities for disclosures that might provide grounds for a motion for new trial. Unless the prohibition is clearly understood and enforced, the judge is placing himself or herself in a position where prohibited communications must be anticipated. This alone may undermine public confidence in the fairness of the proceedings.

Notwithstanding a judge's admonition and establishment of clear parameters for the post-verdict discussion, there remains the possibility that a juror may volunteer information a judge would be prohibited from hearing outside the presence of the parties, if at all. *Harris v. United States,* 738 A.2d 269 (D.C. Ct. App. 1999). Such information should be treated like any other unsolicited communication to the judge. It must be promptly disclosed to all parties on the record, and they must be given an opportunity to be heard on the matter. *See State v. Jackson*, 186 Ariz. 20, 918 P.2d 1038 (1996) (post-verdict letter from foreperson explaining jury's temporary deadlock should have been disclosed to counsel); *cf. State v. Perkins*, 141 Ariz. 278, 686 P.2d 1248 (1984) (disclosure of letter from co-defendant). Depending on the circumstances of the case and the content of the communication, the judge may be required to disqualify himself or herself. *State v. Valencia*, 124 Ariz. 139, 602 P.2d 807 (1979). However, the possibility of this occurrence should not preclude a dialogue that is otherwise permissible under the canons with appropriate safeguards in place.

Issue 2

Canon 3B(10) authorizes expressions of appreciation for jury service and prohibits only the commendation or criticism of a particular verdict. Certificates or letters of appreciation that simply acknowledge a juror's performance of his or her civic duty without reference to the outcome of a particular case are entirely consistent with this canon. Some jurisdictions have expressed concern that letters to jurors might be improperly used to garner support for a judge's reelection. Ala. Op. 82-126; Tex. Op. 63 (1983). Such concerns are not present if the letter is limited to a generic expression of appreciation for jury service and if the judge routinely sends such letters to all jurors.

Applicable Code Sections

Arizona Code of Judicial Conduct, Canons 2A, 3B(7), 3B(9) and 4B (1993).

Legal References

Arizona Rules of Evidence, Rule 606(b), 17A A.R.S.

Harris v. United States, 738 A.2d 269 (D.C. Ct. App. 1999).

Perkins v. Komarnyckyj, 172 Ariz. 115, 834 P.2d 1260 (1992).

San Carlos Apache Tribe v. Bolton, 194 Ariz. 68, 977 P.2d 790 (1999).

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Advisory Opinions

Alabama Judicial Inquiry Commission, Opinion 82-126.

Arizona Judicial Ethics Advisory Committee, Opinions 95-14 (June 21, 1995); 95-04 (March 21, 1995).

Georgia Judicial Qualifications Commission, Opinion 231 (1993).

Texas Committee on Judicial Ethics, Opinion 63 (1983).

Other References

Leslie W. Abramson, *The Judicial Ethics of Ex Parte and Other Communications*, 37 Houston Law Review. 1343 (Winter 2000).

American Bar Association, *Standards for Criminal Justice Discovery and Trial by Jury,* §15-4.3 (3d ed. 1996).

Black's Law Dictionary (7th ed. 1999).

John P. Ludington, Annotation, *Postretirement Out-of-Court Communications Between Jurors and Trial Judge as Grounds for New Trial or Reversal in Criminal Case*, 43 A.L.R. 4th 410 (1986).

Jeffrey M. Shaman, Steven Lubet & James J. Alfini, *Judicial Conduct and Ethics* (3d ed. 2000).

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