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Post-Trial Interviews with Jurors: An Absence of Regulation in West Virginia

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POST-TRIAL INTERVIEWS WITH JURORS: AN ABSENCE OF REGULATION IN WEST VIRGINIA

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I. INTRODUCTION

Lawyers may obtain valuable information by communicating with jurors after a trial. Post-trial interviews may be used for several purposes, such as gaining insight regarding trial strategies to uncovering indiscretions surrounding the verdict. The permissibility of post-trial interviews with jurors is unresolved in West Virginia. This Note submits that more uniform treatment of this educational and informative procedure across the state will decrease potential prejudice and harassment created by abusive lawyers who appear to practice within the confines of the current regulation.

Part II demonstrates the current inconsistencies throughout the state, by reporting the results of an independent survey of West Virginia’s circuit judges regarding their treatment of post-trial interviews in their jurisdiction. Part III reviews existing statutory and case law governing post-trial communications with jurors, and compares the old Code of Professional Conduct to the new Model Rules of Profes-
sional Responsibility. Part IV of this Note presents arguments to support and refute the value and appropriateness of post-trial interviews. Finally, this Note concludes by reaffirming that more precise, uniform regulation of post-trial communications with jurors is needed in West Virginia.

II. SURVEY OF JUDICIAL CIRCUITS

Marked disparities exist among West Virginia’s judicial circuits concerning the legal status of post-trial interviews and other post-trial communications with jurors.\(^1\) A survey of West Virginia’s Circuit Judges confirmed this disparity.\(^2\) Judges from the thirty-one judicial circuits were invited to participate in a survey of their current treatment of post-trial interviews with jurors.\(^3\) Responses received from twenty judges reflected a variety of viewpoints and conflicting rules.

Of the twenty judges who responded to the survey, thirteen either permit or do not expressly prohibit post-trial interviews in some circumstances.\(^4\) Six judges do not permit post-trial interviews until the jurors’ term of service has ended.\(^5\) The primary justification for this stipulation was concern for decreased objectivity of jurors who may participate in future trials involving the interviewing lawyer from a previous trial.\(^6\) One West Virginia judge concerned with juror status

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1. Survey of West Virginia Circuit Judges, 1992 (on file with the West Virginia Law Review) [hereinafter Survey].
2. Id. The survey was mailed in questionnaire format and consisted of the following inquiries: 1) Do you currently permit attorneys in your county to conduct post-trial interviews with jurors? If so, under what circumstances? If not, please indicate the reasons for this prohibition; 2) Is there a particular rule of law or controlling case law that you consider when making such a determination?; 3) How frequently, if ever, has this issue been raised in your jurisdiction?; 4) Have you ever imposed sanctions on an attorney for conducting post-trial interviews with jurors?; 5) What is your opinion on the propriety of such interviews? Do you support them for educational purposes, or would you support a complete ban on post-trial interviews?; 6) Do you object to being quoted in my law review article?
3. Of the thirty-eight judges solicited, twenty responded to the survey. Responses of all judges is greatly appreciated. Because some judges wished to remain anonymous, the names of all judges have been omitted to maintain uniformity.
5. Id.
6. Id. No judges cited W. VA. RULES OF PROFESSIONAL CONDUCT Rule 3.5 as a
emphasized the importance of avoiding the appearance of impropriety.\textsuperscript{7} The significance of juror status has been emphasized in several cases involving the permissibility of post-trial interviews.\textsuperscript{8} Permitting unsupervised communications between lawyers and future jurors places the impartiality of the jurors in question and may result in diminished confidence in jury verdicts.

It is surprising, therefore, that four judges participating in the survey reported that they permit post-trial interviews at any time after trial.\textsuperscript{9} Three of these four never even mentioned juror status as a consideration for permitting post-trial interviews.\textsuperscript{10} Two claimed that participation in post-verdict interviews is entirely within the discretion of the juror, provided that the jurors know that they are not obligated to submit to an interview.\textsuperscript{11} The third reportedly permits interviews in all circumstances.\textsuperscript{12} Of these four, only one judge specifically addressed juror status. He reported that jurors in his circuit serve on an on-call basis for four months. Each juror serves on an average of two to five cases, quite possibly serving on a case with the same attorney again.\textsuperscript{13} Despite this arrangement, attorneys are permitted to talk with jurors following a trial, if the juror agrees. This practice could threaten public perception of the jury process because it invites unethical behavior and lawyer impropriety. The inevitable bias and subjectivity created by this process may currently be controlled because jurors being qualified for subsequent trials must disclose whether they have previously been interviewed by either attorney presiding in the present reason for delaying their permission until after the juror’s term has ended. See supra part III.A.

\textsuperscript{7} Id.

\textsuperscript{8} In re Delgado, 306 S.E.2d 591 (S.C. 1983), cert. denied, 464 U.S. 1057 (1984) (defense attorney found guilty of unethical conduct when he conducted post-trial interviews with a juror in the presence of a person whom he knew was about to serve as a juror in an upcoming trial that he was handling); State v. Socolofsky, 666 P.2d 725 (Kan. 1983) (holding district attorney guilty of violating Rules of Professional Responsibility after anonymously mailing newspaper clippings to prospective jurors following their verdict in a previous trial).

\textsuperscript{9} Survey, supra note 1.

\textsuperscript{10} Id.

\textsuperscript{11} Id.

\textsuperscript{12} Id.

\textsuperscript{13} Id.
However, whether such disclosure results in automatic disqualification was not reported.

Judges from two circuits reported that they will consider granting permission for post-trial interviews in special circumstances. Both appear to have adopted procedures parallel to the Local Rules for the United States District Court for the Northern and Southern Districts of West Virginia, which impose a good cause requirement and application to the court before permission for post-trial communications with jurors will be granted. For example, one of the judges reportedly will allow post-trial interviews only under court supervision after good cause has been shown. Interviews must be conducted by hearing before the court, where the judge and both lawyers have the opportunity to question the jurors. This judge bases his decision on the inherent power of the court to protect jurors from harassment and undue pressure to change or cast doubt on their verdict. He also stressed the need to impress upon the parties and the public that the case is over when the verdict has been reached and that jurors are not compelled to answer questions nor attempt to explain or justify their verdict without a showing of good cause.

Similar rules are enforced in another circuit, where permission for post-trial interviews must be sought on a motion to the court, and interviews are permitted only in extraordinary circumstances. Before discharging the jury, the judge instructs the jurors that they are not required to submit to interviews regarding the verdict.

In contrast, post-trial interviews are expressly forbidden in five judicial circuits. One judge opines that jurors are opposed to discussing their verdicts with attorneys, and therefore protects them from intrusive
post-trial inquiries through the inherent power of the court.\textsuperscript{23} He noted that the utmost freedom of debate in the jury room, including open discussion and complete candor, is in the best interest of the public and the judicial system. Further, he states that in discharging their duties and responsibilities, jurors should be able to express their views without fear of personal criticism or the need to explain their actions.\textsuperscript{24}

Judges also cite juror inconvenience and nuisance as primary justifications for prohibiting post-trial interviews.\textsuperscript{25} One judge fears that inquiries into the verdict may have a chilling effect on jurors in future service, as well as on present jurors who fear they may be questioned following their verdict.\textsuperscript{26}

Another judge emphasized the chilling effect that breaching the sanctity of the verdict might have on juror participation.\textsuperscript{27} This judge surmised that jurors would be less likely to participate fully if they thought their words might be repeated to the public or the media and that any benefits from such interviews are outweighed by the need to protect the sanctity of the jury room.\textsuperscript{28} He also noted a historical prohibition of post-trial interviews of jurors in his circuit, and he reported that a straw vote on the issue (for informational purposes only) had been taken at a recent county bar association meeting. Those opposed to post-trial interviews prevailed by a slight margin.\textsuperscript{29}

Several judges neither explicitly permit or prohibit post-trial interviews. One judge who supports a complete ban on such interviews has not had the opportunity to rule on the issue because it has never been raised in his jurisdiction.\textsuperscript{30} It is possible that lawyers in his and other jurisdictions are simply conducting post-trial interviews outside of the knowledge of the court without express authority to do so. Another

\begin{flushleft}
\text{23. Id.} \\
\text{24. Id.} \\
\text{25. Id.} \\
\text{26. Id.} \\
\text{27. Id.} \\
\text{28. Id.} \\
\text{29. Id.} \\
\text{30. Id.}
\end{flushleft}
judge who doesn’t expressly permit or prohibit interviews reported that attorneys that go too far will have to answer for their conduct. The vagueness of such language eliminates its usefulness as a guideline for lawyers who wish to communicate with jurors following a trial. How should “going too far” be interpreted? This example of ambiguity illustrates the need for more distinct regulation of post-trial interviews.

The need for more uniform treatment of post-trial communication with jurors is illustrated by a comparison of two bordering counties in West Virginia. Ironically, post-trial interviews are ordinarily permitted in Monongalia County yet expressly forbidden in Marion County. Such variation creates confusion about acceptable versus unethical behavior, particularly for the novice trial lawyer or one who practices in several states. More distinct and uniform treatment of this issue may avoid confusion, decrease unethical conduct, and protect jurors from unauthorized questioning. An examination of the current rules in West Virginia exposes the source of confusion and underscores the need for statewide uniformity.

III. INTERPRETATION OF LEGAL RESTRICTIONS

A. Rules of Professional Responsibility

The existing rule governing communications with jurors appears in the West Virginia Rules of Professional Conduct. The Supreme Court of Appeals of West Virginia adopted Rule 3.5 of the ABA Model Rules of Professional Conduct verbatim. It states:

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

31. Id.
32. Id.
(b) communicate *ex parte* with such person except as permitted by law; ... 34

Although Rule 3.5 clearly governs lawyers’ communications with jurors, post-verdict extension of the rule is not articulated. Because the rule does not specifically address post-trial contact with jurors, and since there are no other West Virginia court rules which do, the legal status of post-trial interviews in West Virginia is unclear.

Before adopting Rule 3.5, West Virginia followed the ABA Model Code of Professional Responsibility.35 Under the former rule, the permissibility of post-trial contact with jurors was apparent. The Model Code explicitly authorized post-trial contacts, provided they were conducted in an ethical fashion.36 An examination of the text of the relevant portion of the Model Code confirms this.

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 his actions in future jury service.37

The language in the Model Code specifically addressed the types of juror contacts authorized *after* trial and provided guidelines for conducting post-trial interviews. Additionally, the Model Code acknowledged that a complete prohibition of all post-trial communications would restrict trial lawyers from ascertaining whether a verdict might be subject to legal challenge.38

Ethical Considerations included in the Model Code offered similar guidelines39 which articulated that any interviews or communications by a lawyer should be conducted with deference to the personal feel-

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34. *Id.*
35. *Id.* editor’s notes.
37. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-108(D) (1980).
38. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-29 (1980).
ings of the jurors. However, "[t]he Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive. They constitute a body of principles upon which the lawyer can rely for guidance in many specific situations."\(^4\)

In 1983, the ABA replaced the Model Code of Professional Responsibility with the Model Rules of Professional Conduct.\(^4^1\) The West Virginia Supreme Court of Appeals adopted the Model Rules in their entirety in 1988,\(^4^2\) thereby replacing DR 7-108(D) with Model Rule 3.5. In doing so, the court eliminated the language from the Model Code regarding post-trial contact.\(^4^3\) Although Rule 3.5 prohibits ex parte communications with jurors "except as permitted by law,"\(^4^4\) nothing in the language of the text of the rule indicates that this refers to communications after trial. In adopting Model Rule 3.5, the West Virginia Supreme Court omitted that portion of the old Code-based rule that specifically addressed post-trial communications. This omission of post-trial language may actually exclude post-trial communications from regulation, compelling individual state courts to adopt additional rules which specifically address such contacts. Thus, where Model Rule 3.5 is adopted verbatim, the absence of additional rules may leave the area of post-trial communications unregulated.

Several other factors indicate that Model Rule 3.5 does not apply to post-trial communications with jurors. It is questionable whether the use of the term "juror" in the new rule encompasses a former juror since discharged from service. Arguably, once a juror is discharged from service, he is no longer a juror. Further, Part Three of the Rules

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40. Id.
42. See supra notes 33-35 and accompanying text.
43. See supra notes 33, 37 and accompanying text.
44. W. Va. RULES OF PROFESSIONAL CONDUCT Rule 3.5 (1993). In discussing post-trial contact with jurors, the annotation to Model Rule 3.5 explains that the rule permits only those contacts otherwise permitted by law. ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, Rule 3.5, at 372 (1992).
of Professional Conduct is primarily concerned with protecting parties and the tribunal from uncompromising advocacy, and Model Rule 3.5 focuses solely on protecting the tribunal from disruptive influences.\textsuperscript{45} This casts further doubt on the applicability of Rule 3.5 to post-trial interviews, because the time has passed for influencing or disrupting the tribunal once the trial has ended. As the issue of post-trial interviews with jurors has never been raised before the Supreme Court of Appeals of West Virginia, the proper interpretation of Rule 3.5 regarding post-trial communications is undetermined. Case law from other jurisdictions interpreting Model Rule 3.5 is equally sparse because most states that have adopted the rule have done so only in the last six years.\textsuperscript{46}

Scholars disagree as to whether Model Rule 3.5 applies to post-trial contact with jurors. Charles W. Wolfram, author of Modern Legal Ethics, claims that the Model Rules “appear to have prohibited most . . . post-trial contact with jurors in Rule 3.5 unless it is expressly permitted by law.”\textsuperscript{47} This interpretation suggests that unless expressly authorized by additional court rules or statutes, post-trial interviews are not permitted in states which have adopted Rule 3.5 verbatim. The American Bar Association has agreed that Rule 3.5(b) allows only those contacts which are otherwise permitted by law.\textsuperscript{48} This is not the likely interpretation of the rule in West Virginia, where post-trial interviews are permitted in many, if not most, of the judicial circuits.\textsuperscript{49} Furthermore, in specifically discussing juror contact following a verdict, the ABA referred to Rule 3.5(a)’s prohibition against influencing jurors “by means prohibited by law.”\textsuperscript{50} This may actually sug-

\textsuperscript{46} Telephone Interview with Liz Cohen, Assistant Editor for the Center for Professional Responsibility, ABA Ethics Committee (Sept. 15, 1992).
\textsuperscript{47} Charles W. Wolfram, Modern Legal Ethics § 11.4.4, at 608 (Practitioners ed. 1986) (emphasis added).
\textsuperscript{48} Annotated Model Rules of Professional Conduct, Rule 3.5, at 372 (1992); ABA/BNA Lawyers’ Manual on Professional Conduct, No. 121 at 61:804 (1992) (stating that other court rules or case law within the jurisdiction must be referred to in order to determine whether certain ex parte communications are legitimate).
\textsuperscript{49} Survey, supra note 1.
\textsuperscript{50} ABA/BNA Lawyers’ Manual on Professional Conduct, No. 121 at 61:806
gest the opposite view, that Rule 3.5 permits post-trial contact with jurors unless additional court rules or case law in the jurisdiction specifically prohibit them. This seems to be the view of Hazard & Hodes, authors of The Law of Lawyering, a leading treatise on the Model Rules of Professional Conduct.\(^{51}\) The authors state that the duties in Rule 3.5 are enforced through court rules and common law.\(^ {52}\) By suggesting that additional court rules or common law are required for enforcement of Rule 3.5, the authors support the theory that absent such outside authority, a jurisdiction that has adopted Rule 3.5 is without law on the issue of post-trial contact with jurors. This view is more consistent with the current practice in West Virginia, where the permissibility of post-trial communication with jurors appears to remain entirely within the discretion of the judge in a particular jurisdiction.\(^ {53}\) In fact, of the twenty judges who responded to the survey,\(^ {54}\) none were able to articulate a particular rule of law used when deciding whether to allow an attorney to conduct post-trial interviews with jurors.\(^ {55}\)

Hazard & Hodes further note that the Model Code refers to juror communications before, during, and after trial,\(^ {56}\) while Rule 3.5 may not apply to all three situations. The authors intimate that Rule 3.5 does not prohibit post-trial communications by their suggestion that under Rule 3.5, “it is not improper to interview jurors after a trial (in order to assess effectiveness of one’s trial tactics, for example), [but] it would be improper to chastise a juror for a ‘wrong’ verdict, or insist on interviewing an unwilling juror.”\(^ {57}\)

Although the Hazard and Hodes imply that Rule 3.5 does not govern post-trial contact, they explain that any matters not included in

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\(^{51}\) Hazard & Hodes, supra note 45, § 3.5:101 at 654.

\(^{52}\) Id.

\(^{53}\) Id.

\(^{54}\) Id.

\(^{55}\) Id. Of the twenty judges responding to the question of whether they used a particular rule of law to decide whether to permit post-trial interviews with jurors, eighteen responded “none,” while two others cited the inherent power of the court. Id.

\(^{56}\) 1 Hazard & Hodes, supra note 45, § 4.4:101 at 754.

\(^{57}\) Id.
Rule 3.5 on improper influence should be considered covered by Rule 4.4 of the Rules of Professional Conduct. This rule states that "[i]n representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person." Therefore, Rule 4.4 may be a plausible alternative to a complete absence of regulation of post-trial contact in jurisdictions which have adopted the Model Rules, because although representation arguably ends with the trial, in reality lawyers may perform various client services pertaining to trial long after its conclusion. The application of Rule 4.4 to post-trial contact would result in a resurgence of the language of Model Code DR 7-108(D), permitting post-trial contact which is not unduly harassing or embarrassing.

The apparent conflict among scholars, as well as the diverse treatment of the concrete issue in West Virginia, illustrates Model Rule 3.5's inadequate regulation of post-trial communications with jurors. Perhaps that is why the earlier Model Code remains in force in several jurisdictions, and why many states which have adopted Model Rule 3.5 have done so with provisions for post-trial contact. For example, Maryland, Illinois, and Minnesota have adopted Model Rule 3.5 but have retained the language of DR 7-108(D) regarding post-trial contacts with jurors. Even the states that have significantly altered the ABA model have generally retained portions of the relevant Model Code provisions. Equal treatment of Rule 3.5 is needed in West Virginia to provide more uniform regulation of post-trial contact.

58. Id.
63. MINN. RULES OF PROFESSIONAL CONDUCT Rule 3.5(c) (1992).
64. ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT, No. 121 at 61:802 (1992).
The issue of post-trial communications with jurors has been more clearly defined in West Virginia's federal courts. In both the Northern and Southern Districts, post-trial communication with jurors is authorized only by permission of the court. However, a peculiar distinction exists between the two federal districts. In the Northern District, authorization of post-trial interviews hinges upon the requesting party's demonstration of good cause. In contrast, the Southern District permits post-trial contact unless the opposing party shows good cause to deny it. Therefore, the opponent in the Southern District bears the burden of demonstrating why the contact should be prohibited. Despite this variation, the Local Rules for the United States District Court for the Northern and Southern Districts of West Virginia do provide practitioner with reliable guidance when attempting to communicate with jurors after trial. Although neither rule specifically defines the good cause requirement, both set forth the proper procedure and prerequisites for post-trial contacts with jurors.

B. The Need For Uniformity

West Virginia's circuit courts need a more uniform rule to protect jurors from undue harassment by unregulated lawyers and to prevent the unethical behavior by uninformed lawyers. Absent a case ruling by the West Virginia Supreme Court involving post-trial contact, uniformity and precision can occur only through modification to the Rules of Professional Conduct. Without some type of guidance on this issue, West Virginia lawyers may be misinformed when communicating with jurors, doing what they believe may be acceptable in their jurisdiction. Under the present state regulation, intrusive badgering may be excused in one jurisdiction, while responsible inquiries may be prohibited in another. This creates difficulty for lawyers in discerning what is considered acceptable conduct in a particular county.

69. See supra notes 65-68 and accompanying text.
70. Id.
The Supreme Court of Appeals of West Virginia has several available options to achieve more uniform regulation of post-trial interviews. First, the court may retain Model Rule 3.5 but reinstate the portion of the Model Code pertaining to post-trial contact. This would authorize all post-trial contact with jurors that is not harassing or prejudicial. However, the imprecise language of the Model Code invites misinterpretation. Before true uniformity can be realized, any resurgence of the old Model Code will require an explicit definition of "harassing and prejudicial," as well as further explanation of "calculat-ed merely to influence future service." Without this clarification, the regulation would condone post-trial communication without defining the permissible boundaries of such contacts.

Alternatively, the court may promulgate an entirely new rule concerning post-trial interviews. The court may follow the federal model, which authorizes post-trial interviews only through express permission of the court. This method is reportedly followed in at least one West Virginia judicial circuit. In similar manner, the Supreme Judicial Court of Massachusetts recently ordered an amendment of its Code of Professional Responsibility by adopting a new rule which forbids lawyers from communicating with jurors after a trial without first obtaining permission from the court.

Requiring court approval may ensure that more control is maintained over post-trial communications, greatly reducing the opportunity for abusive and unnecessary interviews. However, reserving this power to the courts threatens uniformity because the ultimate consent for

71. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-108(D) (1980).
72. Id.
73. See supra notes 65, 66 and accompanying text.
74. See supra notes 15-22 and accompanying text.
75. Formerly, MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-108(D) was followed.
76. MASS. CT. RULE 3:07 (1992). For a developmental perspective of the court’s treatment of post-trial interviews, see Commonwealth v. Fidler, 385 N.E.2d 513 (Mass. 1979) (court warned that lawyers should refrain from initiating post-trial contact with jurors); Commonwealth v. Solis, 553 N.E.2d 938 (Mass. 1990) (refusing to exclude evidence about jurors' improper contact with a court official, which was discovered through a post-trial interview; the court stated that the lawyer’s conduct violated Fidler but not any ethics rules, signaling that a change in the ethics rule was needed).
post-trial interviews still remains within the discretion of the judge. Accordingly, statewide inconsistent treatment of this issue would persist. Aspiring for uniformity in application compels more precise legislation with less emphasis on individual judicial interpretation.

Additionally, a good cause requirement creates an impossible situation. Communicating with jurors following a trial may be a lawyer’s only means of discovering grounds to impeach the verdict; however, obtaining a court’s permission to contact jurors hinges on the presentation of sufficient grounds. Thus, the availability of post-trial interviews may be limited to celebrities and those involved in highly publicized trials, where there is a greater probability that juror misconduct will be exposed. Lawyers may be forced to risk ethics violations to obtain evidence necessary to satisfy the good cause requirement.

Finally, rather than amending the existing regulation, the court may provide insight and guidance by issuing a ruling which interprets Model Rule 3.5. Because the issue of post-trial interviews is infrequently raised in West Virginia’s circuit courts, this is not likely to occur in the near future.

IV. DEBATE: NOTABLE PRACTICE OR DANGEROUS MANEUVER?

Regardless of the method chosen, several considerations may be helpful in revising the existing regulation. Arguments which support and attack post-trial interviews, as well as constitutional considerations, may provide guidance to the court in amending the existing regulation.

A. Justifications For Post-Trial Interviews

1. Educational Benefits

Trial lawyers regularly seek reaction to their performance in the courtroom. Feedback is an important tool in evaluating performance

77. In reporting how frequently the issue of post-trial juror interviews was raised in their jurisdiction, all judges responded “infrequently,” “once or twice,” “seldom,” “not very often,” or “never.” Survey, supra note 1.
and modifying human behavior.\textsuperscript{78} Thus, beyond satisfying curiosity or assuaging bruised egos, post-trial interviews with jurors may assist trial lawyers in improving litigation skills and increasing overall effectiveness in the courtroom.

Post-trial interviews may assist lawyers in identifying specific evidentiary problems, such as jury confusion or comprehension of arguments, or interpretation of factual arguments. Moreover, lawyers may obtain personal feedback on how their own appearance or particular mannerisms were perceived. Although the verdict provides gross feedback on the accuracy of predictions, more refined feedback may be obtained from those who issued the verdict.\textsuperscript{79} In fact, post-trial interviews may be helpful in voir dire in future trials, actually serving as pre-trial surveys of prospective jurors.\textsuperscript{80}

Post-trial interviews may also illicit information regarding jurors’ impressions of witnesses, which could be highly useful to lawyers who repeatedly use the same expert witness. The value of this information was underscored by the acquittals of Faez Boukarum and John DeLorean.\textsuperscript{81} Following Boukarum’s trial, confidential post-trial interviews revealed that the jurors, although strongly opposed to drug-trafficking, acquitted the defendant because the jurors felt that the government’s witness lacked credibility.\textsuperscript{82} The prosecution employed the same government witness in Delorean’s trial, which also resulted in an acquittal.\textsuperscript{83} Thus, a jury’s overall impression of a witness, particularly in terms of credibility, is a critical aspect in choosing an expert. Because clients are often charged exorbitant fees for the use of expert witnesses, advocates are obligated to provide an experts who effectively communicate juries and and juror feedback is often critical to fulfilling this function.

\textsuperscript{78} A.C. Catina, Learning (2d ed. 1984).
\textsuperscript{80} Id. at 93.
\textsuperscript{81} See Marjorie Fargo, Make the Post-Trial Interview Work For You: Don’t Make the Same Mistake Delorean’s Prosecutors Made, 3 Crim. Just. 2 (1988).
\textsuperscript{82} Id.
\textsuperscript{83} Id.
In sum, information obtained through post-trial interviews may help lawyers improve their advocacy skills in future trials or strengthen a particular case on retrial. Given the limited opportunities for lawyers to enhance their trial skills and increase their understanding of juries, this may be continuing legal education at its finest.

Many jurisdictions acknowledge the educational value of post-trial interviews and authorize them for such purposes. The American Bar Association also approves of post-trial interviews for educational objectives. However, several courts have held that post-trial contact with jurors for the purpose of self-education is improper. West Virginia’s circuit judges also disagree as to the value of post-trial interviews. This difference of sentiment illustrates the need for more specific guidance in West Virginia which delineates the permissible uses of post-trial interviews.

In addition to direct post-verdict contact with jurors, trial lawyers may employ other methods to gain insight about juries and improve their skills in the courtroom. Mock trials, for example, help attorneys sharpen their presentation and formulate trial strategy. Additionally,

84. United States v. Narciso, 446 F. Supp. 252 (E.D. Mich. 1976) (permitted post-trial discussions with jurors for the purpose of self-education, based on formal opinion of the ABA); Elisovsky v. State, 592 P.2d 1221 (Alaska 1979) (holding that sanctioning an attorney for talking to jurors after a criminal trial is improper if the questions were asked in order to educate the attorney and help sharpen trial skills); Irving v. Bullock, 549 P.2d 1184 (Alaska 1976) (recognizing that it might be proper for counsel to interview jurors for educational purposes).


86. Haeberle v. Texas Int’l Airlines, 739 F.2d 1019 (5th Cir. 1984) (improper for attorney to interview jurors in order to satisfy own curiosity and improve advocacy); Sixberry v. Buster, 88 F.R.D. 561 (E.D. Pa 1980) (lawyer not entitled to post-verdict communication with jurors to improve his skills as a lawyer absent a showing of evidence of juror impropriety); United States v. Driscoll, 276 F. Supp. 333 (S.D.N.Y. 1967) (held that interviewing jurors who had returned a guilty verdict for the purpose of instructing the attorneys as a guide to future trial strategies was improper and unethical); In re Delgado, 306 S.E.2d 591 (S.C. 1983) (lawyer approaching juror after verdict “does so at his own peril”; self-education is not a good reason), cert. denied, 464 U.S. 1057 (1984).

87. Survey, supra note 1. Of those who commented on the educational value of post-trial interviews, four judges conveyed their appreciation of the educational merits of such interviews, while four others recognized no educational benefits.

they provide trial-like conditions under which clients and witnesses may experience direct and cross-examination and aid in the jury selection process.\textsuperscript{89} The expense of mock trials, however, limits their availability to clients who can afford them. Further, their simulated nature necessarily limits their validity and adaptation to actual trials.

Equally limited is the use of shadow juries, employed during an actual trial by the parties themselves. Shadow juries, which follow the judge's instructions and all testimony presented at trial, provide lawyers with continuous feedback concerning their impressions of evidence and witnesses, and comment on the overall progress of the case.\textsuperscript{90} Although conducted in a realistic setting, the inherent unpredictability of juries and the lack of responsibility and legal significance of a shadow jury's final decision weaken the reliability of this technique. Comparatively, post-trial communications with actual jurors provide better feedback and a better examination of a trial lawyer's performance and its resulting effect on jury determinations.

2. Impeaching the Verdict

After a verdict is returned, in certain situations, an advocate may want to interview members of the jury to determine whether misconduct tainted the jury's verdict. Post-trial juror interviews may play a crucial role in protecting a defendant's right to a fair trial as the only available means of uncovering indiscretions surrounding a verdict. The Sixth Amendment guarantee of the right to a fair trial includes the right to information which might have prejudiced a jury verdict against a criminal defendant\textsuperscript{91} and the Seventh Amendment provides similar protection for civil litigants.\textsuperscript{92} Without direct testimony, however, this information could be reserved to those involved in highly publicized trials, where heightened media attention may cause more careful scrutiny of the jury and increase the likelihood that indiscretions will be discovered.

\textsuperscript{89} Id.
\textsuperscript{90} Id. § 3.15 at 97, 98.
\textsuperscript{91} U.S. Const. amend. VI.
\textsuperscript{92} U.S. Const. amend. VII.
Despite constitutional protection, lawyers have historically been extremely limited in using information provided by jurors to reverse a jury verdict. In the infamous 1785 English case, \textit{Vaise v. Delaval},\textsuperscript{93} Lord Mansfield ruled that a juror would not be permitted to impeach his own verdict, reasoning that a juror who would engage in misconduct is not competent to testify about it.\textsuperscript{94} The rule was adopted in the United States, but exceptions were developed as well.\textsuperscript{95} In \textit{McDonnell v. Pless},\textsuperscript{96} the Supreme Court of the United States articulated its reasons for following the Mansfield rule: freedom of deliberation, stability and finality of verdicts, and protection of jurors from harassment and embarrassment.\textsuperscript{97}

The Mansfield rule and the exceptions that followed have been codified in Rule 606(b) of the Federal Rules of Evidence.\textsuperscript{98} Accordingly, jurors may testify or provide affidavits to impeach their own verdict only where extraneous forces influenced their decision.\textsuperscript{99} In other words, nothing intrinsic to the jury may be used to impeach the verdict, regardless of the unfairness of the outcome. This includes


\textsuperscript{94} Id.

\textsuperscript{95} United States v. Reid 53 U.S. (12 How.) 361 (1851) (adopting the Mansfield rule, but noting that exceptions might be appropriate in the interest of justice); Wright v. Illinois & Mississippi Tel. Co., 20 Iowa 195 (1866) (juror affidavits may impeach the verdict provided they did not concern subject matter inherent in the verdict itself); Mattox v. United States, 146 U.S. 140 (1892) (recognizing an exception to Mansfield Rule and admitting juror affidavits to impeach a verdict because they concerned extraneous influence on the jury rather than something inherent in the jury itself).

\textsuperscript{96} 238 U.S. 264 (1915).

\textsuperscript{97} Id.

\textsuperscript{98} Rule 606(b) states:
Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any other outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

\textsuperscript{99} Fed. R. Evid. 606(b) (emphasis added).

\textsuperscript{99} Id.
reaching a quotient verdict,\textsuperscript{100} confusion over jury instructions,\textsuperscript{101} coercion or pressure by other jurors,\textsuperscript{102} and intoxication of jurors.\textsuperscript{103}

In contrast, evidence may be accepted to impeach a verdict which was tainted by extraneous influence, including prejudicial documents introduced into the jury room,\textsuperscript{104} coercion or bribery by nonjurors,\textsuperscript{105} and outside threats to jurors or family members.\textsuperscript{106}

Although excluding evidence inherent to the jury is justifiable,\textsuperscript{107} rendering all verdicts completely untouchable "can only promote irregularity and injustice."\textsuperscript{108} The Advisory Committee emphasized this concern by noting that Rule 606(b) "offers an accommodation between these competing considerations."\textsuperscript{109} Despite attempts to maintain a balance between these conflicting interests, the evidentiary restriction imposed by Rule 606(b) has produced unjust decisions.\textsuperscript{110}

Although West Virginia does not have a parallel state evidentiary rule, its common law recognizes a general rule of incompetency of

\begin{footnotes}
\footnotetext{100}{McDonald v. Pless, 238 U.S. 264 (1915); Scogin v. Century Fitness, Inc., 780 F.2d 1316 (8th Cir. 1985).}
\footnotetext{103}{See infra note 108.}
\footnotetext{104}{Mattox v. United States, 146 U.S. 140 (1892); United States v. Thomas, 463 F.2d 1061 (7th Cir. 1972).}
\footnotetext{105}{Remmer v. United States, 347 U.S. 227 (1954).}
\footnotetext{106}{Krause v. Rhodes, 570 F.2d 563 (6th Cir. 1977), \textit{cert denied}, 435 U.S. 924 (1978).}
\footnotetext{107}{See supra notes 93-97 and accompanying text.}
\footnotetext{108}{Notes of Advisory Committee on Proposed Rules, \textit{Fed. R. Evid.} 606(b).}
\footnotetext{109}{Id.}
\footnotetext{110}{For an extreme illustration, see Tanner v. United States, 483 U.S. 107 (1987) (although jurors were reportedly drunk and stoned during trial and deliberations, judge refused to use such intrinsic evidence to impeach the verdict). \textit{But see} United States v. Provenzano, 620 F.2d 985 (3d Cir. 1980), \textit{cert. denied}, 449 U.S. 899 (1980) (evidence that jurors were intoxicated and had been smoking marijuana admissible under Rule 606(b)).}
\end{footnotes}
jurers to impeach their own verdict.\textsuperscript{111} Therefore, lawyers who uncover jury misconduct or indiscretion through post-trial interviews may be unable to utilize that information to correct injustice.

3. The First Amendment

The right of free speech guaranteed by the First Amendment\textsuperscript{112} is pertinent to any decision specifically authorizing or restricting post-trial interviews. Absent a specific gag order from the court,\textsuperscript{113} jurors are free to disclose their previous courtroom experiences to the media.\textsuperscript{114} Jurors often receive handsome profits for their rendition of jury deliberations, particularly in highly publicized trials.\textsuperscript{115} This same constitutional protection should be afforded to jurors with less profitable intentions who wish to relay their experiences to lawyers after a trial. If members of the media are permitted to approach jurors after trial, lawyers seeking information to educate themselves and improve trial performance deserve equal access. Any restrictions imposed on communications between jurors and lawyers should be equally imposed on media members with purely financial interests.

B. Disadvantages of Post-Trial Interviews

Countless arguments have been advanced in opposition to post-trial interviews.\textsuperscript{116} Most notable is the need to protect the sanctity of the verdict and preserve the integrity of the jury process. "Public policy

\begin{thebibliography}{116}
\bibitem{111} State v. Scotchel, 285 S.E.2d 384 (W. Va. 1981) (stating that a jury verdict may not ordinarily be impeached based on matters that occur during the deliberative process, but recognizing that a verdict may be impeached based on extrinsic matters relating to the verdict).
\bibitem{112} U.S. CONST. amend. I.
\bibitem{113} Jurors are enjoined by specific directives from the court from discussing juvenile cases, and may be equally forbidden to discuss cases of an extremely sensitive sexual nature. Survey, supra note 1.
\bibitem{114} However, evidentiary rules prohibit jurors from testifying about certain experiences. See supra notes 100-05 and accompanying text.
\bibitem{116} For detailed treatment of the arguments against post-trial interviews, see Note, Public Disclosures of Jury Deliberations, 96 HARV. L. REV. 886 (1983).
\end{thebibliography}
POST-TRIAL JUROR INTERVIEWS

requires a finality to litigation. And common fairness requires that absolute privacy be preserved for jurors to engage in the full and free debate necessary to the attainment of just verdicts.\(^{117}\) Historically, juries have been protected from intrusive inquiry, particularly regarding their ultimate conclusions. Condoning an invasion of the jury process may undermine the public's confidence in the justice system and its passive acceptance of jury verdicts. Several West Virginia judges expressed similar concerns in the survey.\(^{118}\)

Further, jurors should be free to deliberate without fear of retaliation or criticism. Authorizing post-trial interviews without court supervision may increase the likelihood of harassment of former jurors in the name of advocacy or education. Without the assurance of privacy, the possibility of exposure may inhibit the open and candid exchange crucial to reaching a fair verdict. Additionally, jurors may be intimidated to return a socially acceptable verdict consistent with perceived community preference. Although jurors are often required to take a public stand, their "willingness to depart from community expectations becomes even less probable if a wide audience may discover precisely how much each individual contributed to an unpopular verdict, or which jurors delayed or thwarted a popular one."\(^{119}\) Knowledge of such pressure may discourage prospective juror participation, threatening the future of the entire jury system.

Equally problematic is the inherent potential for abuse in the conduct of post-trial juror interviews.\(^{120}\) First, lawyers may refuse to accept a juror's decision to decline an interview and attempt to badger him or her into submission. Similarly, jurors who do consent to an interview may be subject to relentless questioning, humiliation, and personal criticism of their verdict. Second, jurors may be persuaded that their verdict was tainted. The prospect of a second chance may tempt lawyers to offer bribes or to conduct baseless fishing expedi-


\(^{118}\) Survey, supra note 1.

\(^{119}\) Note, supra note 116, at 887 (footnote omitted).

\(^{120}\) For an excellent set of guidelines on how to conduct ethical post-trial interviews and obtain optimum results, see NATIONAL JURY PROJECT, JURYWORK: SYSTEMATIC TECHNIQUES §§ 13.02-.04 (1991).
tions, which would ultimately result in unwarranted attacks on verdicts and excessive motions for retrial. Existential dockets are too crowded to accommodate the resulting floodgate of litigation.

V. CONCLUSION

A uniform rule is needed in West Virginia to correct the arbitrary regulation of post-trial interviews with jurors. More consistent guidelines will ensure fairness to clients and jurors throughout the state and promote a common understanding among trial lawyers of acceptable post-trial behavior.

The Supreme Court of Appeals West Virginia should modify existing rules to include specific language regarding post-trial communications with jurors. An immediate exercise of the court’s inherent power to regulate the bench and bar will best serve the goals of efficient and fair administration of justice in West Virginia and promote public confidence in our judicial system.

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121. However, this problem is limited somewhat by evidentiary rules which restrict jurors from impeaching their own verdict. See supra notes 98-113 and accompanying text.