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March 3, 2014

Barbara Berenson, Senior Administrative Attorney
Supreme Judicial Court
John Adams Courthouse
One Pemberton Square
Boston MA 02108617-557-1048

RE: Proposed Amendments to MA Rules of Professional Conduct

Dear Ms. Berenson:

Attached please find comments from the Massachusetts Academy of Trial Attorneys and one supporting exhibit.

Please let me know if you have any questions. Thank you.

Very truly yours,

Paul Dullea
Executive Director

Enclosure

Introduction

The overwhelming majority of lawyers who practice within the Commonwealth of Massachusetts do so with the effort, integrity, and competence expected of them. The current Massachusetts Rules of Professional Conduct already provide well articulated guidance to lawyers and assurances to the public. It would not appear that those whose conduct has, at times, fallen short of the standards expected of the profession could reasonably suggest that their conduct was due to a lack of direction. Therefore, the proposed changes to the Rules give the mistaken impression that lawyers are in need of more direction than already exists in order to behave ethically.

Moreover, the tenor of many changes actually suggests that the public is in need of greater protection from lawyers. No one could reasonably deny that there currently exists in our culture a prejudice against lawyers. Shakespeare's acknowledgement (in Part II, Act IV, Scene II of *Henry VI*), that societal order and justice are protected and preserved by lawyers, has been misinterpreted in popular culture as an antithetical slight against lawyers. Other professions do not seem to be subject to a specific line of humor (so-called "Lawyer Jokes") predicated on an apparent shared societal view of categorical dislike. The implication that lawyers require micromanaging or that the public requires a degree of protection from lawyers only serves to further perpetuate negative stereotypes.

Lastly, many of the proposed changes impose additional time burdens upon lawyers for otherwise routine tasks and impede efficient and cost-effective management of legal matters. Although most MATA members work on a contingent fee basis, the vast majority of lawyers must bill for their time. Consequently, every additional task only serves to increase the cost of legal representation. Increased costs of legal representation result in limiting access to lawyers. Certain specific matters of informed consent should be reduced to writing. However, absent a prior agreement to do so, a requirement for all informed consent to be in writing disregards that many clients are not interested in lengthy written explanations or the expense associated with such a communication. Likewise, increased supervision of nonlawyers or interruptions to depositions for client conferences lead to delays and increased costs of pursuing legal remedies. Onerous and unnecessary additional obligations lead to further expense to be borne by clients. MATA proposes an addition to the rules that states "Unless the rules state otherwise, informed consent does not need to be in writing."

MATA respectfully requests that the following be taken into consideration before any changes are implemented.

I. Proposed Rule 1.1 (Competence)-Comments 6 and 7

[6] Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. See also Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(e) (fee sharing), 1.6 (confidentiality) and 5.5(a) (unauthorized practice of law). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the education, experience and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

[7] When lawyers from more than one law firm are providing legal services to the client on a particular matter, the lawyers ordinarily should consult with each other and the client about the scope of their respective representations and the allocation of responsibility among them. See Rule 1.2. When making allocations of responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

II. MATA Proposed Changes to Rule 1.1 (Competence)-Comments 6 and 7

MATA supports the ability of lawyers to retain or contract with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, however, ethical rules should be tailored to the circumstances (e.g. working with co-counsel on a case, hiring contract attorneys to perform specific tasks, using attorneys in foreign states, and using attorneys in foreign countries.) Recognizing the inherent

difficulties supervising lawyers in foreign states and in foreign countries MATA proposes clarification to comment 6 by adding to the last sentence “particularly when retaining or contracting with lawyers in foreign states and in foreign countries.” [The reasonableness of the decision to retain or contract with other lawyers outside the lawyer’s own firm will depend upon the circumstances, including the education, experience and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information, **particularly when retaining or contracting with lawyers in foreign states and in foreign countries.**]

As noted by the MBA, the last sentence of Comment 7 appears to be “superfluous” and the MBA proposed that it should be stricken. MATA proposes clarification to Comment 7 by adding “particularly in the context of discovery” to the last sentence of Comment 7. [When making such an allocation in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules, **particularly in the context of discovery.**] See, “Ethics 20/20 Proposal to Amend Rule 1.1 (Competence)”, by Andrew Perlman, (February 27, 2012): “When making any allocations of responsibility, the proposed Comment reminds lawyers that they (and their clients) might have additional obligations that are a matter of law beyond the scope of these Rules, particularly in the context of discovery.” Link to the article: <http://www.legalethicsforum.com/blog/2012/02/ethics-2020-proposal-on-rule-11-competence-1.html>

III. Proposed Rule 1.3 Diligence – Comment (2)

[2] A lawyer's workload must be controlled so that each matter can be handled competently.

IV. MATA Proposed Changes to Rule 1.3 Diligence – Comment (2)

MATA contends that the word “must” may result in a lawyer violating the ethical rule for circumstances beyond that lawyer’s control. The proposed rule assumes that a lawyer’s workload can always be controlled. A lawyer's ability to control one’s workload can significantly change due to unforeseen professional and personal emergencies. Some cases that initially appear to be easily manageable and straightforward can become burdensome and complex.

As noted in the ABA’s 06-441 Formal Opinion, Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere With Competent and Diligent Representation (May 13, 2006) at page 4: “The Rules do not prescribe a formula to be used in determining whether a particular workload is excessive.” When a lawyer realizes that one’s workload has become excessive that lawyer could technically already be in breach of the ethical rule.

MATA agrees with the MBA’s recommendation that the comment state: “A lawyer's workload **should** be controlled so that each matter can be handled competently.” The operative word “should” encourages and requires a standard of professional conduct that a lawyer *must attempt to achieve*. The word “must” mandates a standard of professional conduct that cannot be guaranteed at all times.

Rule 3.3: Candor Toward the Tribunal¹

Proposed Comment 2:

MATA supports this recommendation; however, see Proposed Comment 10.

Current Comment 2A:

In light of the proposed changes to Rule 3.3, MATA agrees with the recommendation that this comment be deleted in its entirety.

Proposed Comment 10:

Proposed Comment 10 extends the duties of Rule 3.3 to depositions, thereby requiring a lawyer to take “reasonable remedial measures” upon becoming aware that a client or a witness called on behalf of the client has offered false testimony at a deposition (See Proposed Rule 3.3(a)(3)). While Proposed Comment 10 provides some guidance as to how and when such measures are to be taken,

¹ MATA supports Proposed Rule 3.3, and recommends clarification to Comment 10 as stated above.

additional clarification is needed regarding how the Rule is to be applied at depositions. MATA recommends that Comment 10 provide, that as an initial remedial measure, the lawyer shall seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence either during the proceeding, or through the use of an errata sheet following a deposition during which such false statements or evidence has been offered.

Rule 3.5: Impartiality and Decorum of the Tribunal

MATA strongly recommends the adoption of ABA Model Rule 3.5 for the reasons set forth in the 2006 MBA Jury Communications Task Force Report to the House of Delegates on the Massachusetts Rules of Professional Conduct, Rule 3.5(d). Allowing lawyer-initiated juror contact as outlined in the Rule will exponentially benefit clients, lawyers, jurors and the Court. In the event that the Court wishes to maintain the general prohibition on lawyer-initiated juror contact, MATA supports Recommendation 2- Proposed Massachusetts Rule 3.5. The MATA Committee attaches the 2006 MBA Jury Communications Task Force to the House of Delegates on the Massachusetts Rules of Professional Conduct, Rule 3.5(d) as Exhibit 1.

Rule 5.3 Responsibilities Regarding Nonlawyer Assistance (Comments 3 and 4)

Nonlawyers Outside the Firm

Proposed Comment 3: A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include the retention of an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and using an Internet-based service to store client information. When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations. The extent of this obligation will depend upon the circumstances, including the education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality. See also Rules 1.1 (competence), 1.2 (allocation of authority), 1.4 (communication with client), 1.6 (confidentiality), 5.4(a) (professional independence of the lawyer), and 5.5(a) (unauthorized practice of law). When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable

assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

MATA Commentary: MATA supports the highlighted portion of the proposed comment. However, MATA cannot support the remaining text as doing so would require a lawyer to engage in a great deal of subjective analysis relative to the varied capacities and backgrounds of those charged with performing otherwise routine tasks. In many instances, such a level of supervision may not be possible and would impede the very purpose of delegation. The additional time a lawyer spends in the task of micromanaging nonlawyers would result in unnecessarily increased costs to the client. Lawyers are already charged with maintaining client confidences, the phrase “reasonable efforts to ensure” should be sufficient to direct any lawyer.

Proposed Comment 4: Where the client directs the selection of a particular nonlawyer service provider outside the firm, the lawyer ordinarily should agree with the client concerning the allocation of responsibility for monitoring as between the client and the lawyer. See Rule 1.2. When making such an allocation in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

MATA Commentary: MATA cannot support any part of this proposed comment. The delegation of responsibility to the client, even by agreement, protects neither the client nor the lawyer. A client may not understand or be capable to supervising a nonlawyer consistent with the standard of “the professional obligations of the lawyer” of 5.3(b). Additionally, the lawyer should not be subject to discipline for potential failures with regard to monitoring of nonlawyers when that monitoring is outside the control or even knowledge of the lawyer. This comment does not actually provide guidance and seems to complicate rather than further explain the rule.

Proposed Changes to Rule 7.1, Comments 2 and 3

Comments 2 and 3

The MATA Committee objects to proposed Comment 2 to Rule 7.1. The MATA Committee believes that Comment 2 injects unnecessary ambiguity into a rule that has generally worked well. In any disciplinary rule, it is important to make the lines as clear as possible. Comments 2 and 3, on the other hand impose mind reading of a mythical reasonable person. One can only imagine the litigation debating what would lead a reasonable person to have unjustified expectations or that a comparison is substantiated. The rule also assumes a level of unsophistication by the public of lawyer advertising that is not warranted. Study upon study show that the overwhelming majority of the public are very suspicious of lawyers. The question the MATA committee asks is whether there is some issue presently with lawyer advertising to add such unclear and ambiguous

language to an existing rule.

7.2

The MATA Committee is in favor of removing the 2 year retention requirement contained in current 7.2(b). In an age where a lot of lawyers are using the internet, specifically their website, to promote their services, the retention requirement for all forms of the website was too onerous and unnecessary. The MATA committee supports the majority position of the SAC that the retention obligation was burdensome and wasteful as there is no evidence that the retention obligation lead to better or more truthful advertising. In fact, the retention requirement acts as a disincentive to refreshing the website with new and useful material and an incentive to allowing stale information to remain there for the public.

7.3

The MATA Committee supports the changes to Rule 7.3.
Not join in the comments against the 2 year record requirement

7.4

The MATA Committee supports the changes to Rule 7.4.

7.5

The MATA Committee supports the changes to Rule 7.5.

REPORT TO THE HOUSE OF DELEGATES ON
THE MASSACHUSETTS RULES OF PROFESSIONAL CONDUCT, RULE 3.5(d)

I. Introduction

The Jury Communications Task Force¹ has completed an initial review of Rule 3.5(d) of the Massachusetts Rules of Professional Conduct, which governs post-trial communications between counsel and jurors.² The rule seems ambiguous and poorly understood, appears unnecessarily restrictive, and may be contrary to the interests of justice. The Task Force recommends that the Massachusetts Bar Association initiate a process to join with other bar

^{1/} The members of the Jury Communications Task Force are listed in Appendix A. The Task Force was formed following the report of the MBA Committee on Professional Ethics to the Jury Contact Rule Committee regarding the propriety of counsel's request for instructions by the court on communication with counsel following the trial, which is attached as Appendix B.

^{2/} The entire text of Rule 3.5 of the Massachusetts Rules of Professional Conduct, entitled "Impartiality and Decorum of the Tribunal," states:

A lawyer shall not:

- (a) seek to influence a judge, juror, prospective juror, or other official by means prohibited by law;
- (b) communicate ex parte with such a person except as permitted by law;
- (c) engage in conduct intended to disrupt a tribunal;
- (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 processes.

associations, District Attorneys offices, the Committee for Public Counsel Services, and the Trial Court judges, as well as any other appropriate groups, to re-examine and re-write Massachusetts Rule 3.5(d). Some members of the Task Force are in favor of recommending the adoption of ABA Model Rule 3.5 (2003), while others feel that a broad based group examining the Rule should start with a clean slate free of a specific recommendation.³

II. History of the Rule

Until 1991, DR 7-108(D), which governed post-trial attorney-juror contact, permitted attorneys to communicate with jurors so long as the communication was not calculated merely to harass or embarrass the juror or influence the juror in future jury service.⁴ We found no evidence

^{3/} ABA Model Rule 3.5 (2002) follows. The comments to that rule appear in Appendix C.

A lawyer shall not:

- (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
- (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;
- (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; or
- (d) engage in conduct intended to disrupt a tribunal.

^{4/} S.J.C. Rule 3:07, DR 7-108(D) read:

After discharge of the jury from further consideration of a case with which the lawyer was connected, the lawyer shall not ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence his actions in future jury service.

of disciplinary abuse of that rule or complaints of attorney harassment of discharged jurors during the years when this rule was in effect.

In 1979, the Supreme Judicial Court decided Commonwealth v. Fidler, 377 Mass. 192, 385 N.E. 2d 513 (1979). A juror in a criminal case contacted defense counsel following trial to report misconduct in the jury deliberations, and the juror's testimony by affidavit was submitted to impeach the jury verdict. The Court explained that a juror may testify about "the existence of an improper influence on the jury," but not about "the role which the improper influence played in the jury's deliberations." 377 Mass. at 196. The distinction the Court drew in that case was between "extraneous influences on the jury" and "part of the internal decision making process of jury deliberations." Id. at 198. The Court felt that this rule properly balanced the jurors' interest in avoiding harassment, the justice system's interest in private candid juror discussions and in finality of verdicts, and the litigants' interest in a fair trial decision. Id. at 195-198.

The Fidler court then in *dictum* set out guidelines for questioning a juror after trial: the questioning (1) must be by court order only, generally under the supervision of a judge, (2) may be initiated only upon a preliminary showing of extraneous influence, and (3) may not involve the jury's thought processes. Id. at 201-204. DR 7-108(D) was not amended at that time to reflect the Fidler guidelines.

A decade later, in Commonwealth v. Solis, 407 Mass. 398, 553 N.E.2d 938 (1990), the trial judge ordered a new trial based on a juror's testimony about statements made to the jury by court officers, which the court found had subjected the jury to extraneous influences that might have prejudiced the criminal defendant. The defense counsel had waited at the courthouse elevators and engaged the juror in conversation about the case and the jury's deliberations,

including “the jury’s reasoning processes.” 407 Mass. at 399-400. The Court noted that this information was obtained from the juror in contravention of the Fidler guidelines, but not in violation of DR 7-108(D). Id. at 399. See also Id. at 402-403 (explaining the differences). It held that no exclusionary rule should apply in this situation, and the information was admissible to impeach the verdict, which was tainted, and the defendant was properly granted a new trial. Id. at 401-402.

The Court then stated its inclination to amend the disciplinary rule which governed such matters to comport with the Fidler restrictions. It nevertheless recognized that those restrictions were “more rigorous than those generally in effect elsewhere in the country,” Id. at 403, and expressed concern that “there will be no process, within the defendant’s control, by which the defendant can seek to discover whether there were extraneous influences on the jury....” Id. at 404.

The following year, in 1991, the Supreme Judicial Court amended DR 7-108(D), to include, verbatim, the current language contained in Massachusetts Rule 3.5(d)⁵, essentially codifying the Fidler procedure.⁶

⁵/ See note 2, supra.

⁶/ Justice Wilkins, the author of the Solis opinion, joined by then Chief Justice Liacos, issued a *Statement of Opposition to the Adoption of Revised Supreme Judicial Court Rule 3:07, DR 7-108(D)*, published in *Massachusetts Lawyers Weekly*, August 26, 1991:

I decline to join in the promulgation of a rule that apparently is intended to deal with a problem that is not shown to exist. For almost twenty years we...have never had a discipline problem with a lawyer speaking to a juror after the jury’s discharge. The new rule will inhibit counsel’s attempts to discover flaws in the administration of justice...[and] may impinge on rights of free speech, ...the effective assistance of counsel, and...due process....It will surely tend to inhibit the appropriate disclosure of misconduct in the administration of justice.

In 1996, the Supreme Judicial Court's Committee on Rules of Professional Conduct recommended, and the Court adopted, a revised set of rules of professional conduct, most modeled after the ABA's Model Rules. The Committee reported that it had preserved the unique Massachusetts post-trial juror contact limitation in the new Rule 3.5(d), rather than recommend the ABA's Rule 3.5(c), although it noted that "the committee unanimously oppose[d] it." In their commentary on the proposed rules, the MBA, the BBA, the Attorney General, and the Committee for Public Counsel Services, among others, opposed the adoption of the special Massachusetts version of Rule 3.5(d).

III. Problems with the Rule

The Task Force has identified numerous concerns that have arisen in the fifteen years the restrictive rule has been in force. First, the rule appears to be ambiguous and poorly understood. Many attorneys and judges believe it does not allow any contact between counsel and the discharged juror, or any questioning of the juror by counsel. What the language apparently prohibits, however, is for counsel to initiate contact or to inquire about the "jury's deliberation processes." The Task Force felt that the area of inquiry that was defined as "off-limits" was rather ambiguous. The phrase probably refers to the jury's "thought processes" and the effect of extraneous influences, as opposed to the existence of extraneous influences, as delineated in Fidler, but the intended line between the two is by no means apparent. Also unclear is what conduct is prohibited. In its July 25, 2005, opinion on the rule, the MBA Committee on Professional Ethics noted: "[t]he restriction read literally says that a lawyer may listen to a juror

comment about the deliberation process but may not ask anything.”⁷ Do encouraging nods count?

The rule also makes it more difficult for criminal defendants and civil parties to discover illegal extraneous influences on the verdict.⁸ If counsel must wait for a juror to come forward and volunteer such information, improprieties will remain undiscovered, and improper verdicts will go unchallenged.⁹ Some members of the Task Force feel that the Constitutional jury trial rights of criminal defendants may be implicated, as well as the right of all parties in both civil and criminal cases to a fair jury decision inherent in the Constitutional guarantees of due process of law. They feel that although Constitutional rights can be restricted, the state needs strong interests to do so, and must be careful in the restrictions it imposes. Without addressing the Constitutional issues raised by some members, the Task Force members all agree that the interests of the justice system certainly include insuring fairness in the proceedings, and the Court has decided that verdicts tainted with extraneous influence are unfair. Some mechanism is needed for facilitating the discovery of improprieties that may have tainted a verdict.

The Rule takes from jurors an opportunity to discuss their experience. There is some evidence that many jurors are willing to discuss their experience as jurors with the lawyers, but that the current practices discourage such communication. Judges frequently speak privately

⁷/ See Note 1, supra.

⁸/ The court may decide that improprieties other than extraneous influences warrant overturning a verdict using juror testimony.

⁹/ The Rule may create a difficult choice for a lawyer who has received some information from a juror that the jury used extraneous evidence in rendering its verdict, but feels that it is not enough to convince a judge to call the juror in for questioning. Assuming that the Rule does not permit the lawyer to contact the juror for clarification and the judge has or will decline to allow the juror to be approached, client loyalty, coupled with the stakes involved in litigation, may tempt the attorney to break the rule, as in Solis.

with jurors after a verdict and occasionally allow the attorneys to speak with the jury in a supervised setting, usually in the courtroom with the jury in the jurybox. Anecdotally, jurors, judges, and lawyers react quite positively to such discussions. It is unlikely, however, that juror improprieties would be revealed in such a setting.

Finally, the Rule tends to inhibit development of trial techniques designed to increase juror comprehension. Much work is being done to find new trial techniques to help the jury better understand the facts and the applicable law in a trial. Some, like jury binders for documentary evidence, juror note taking, and jurors asking questions are well known. Others, like plain English instructions, ongoing discussion of evidence, and giving instructions and mini-summations during the trial, are less known, but coming. But there is no mechanism for judges and lawyers to find out if these techniques helped. Indeed, there is no mechanism for the jury to give the lawyer feedback on the lawyer's trial technique at all. Professional development as a trial lawyer is difficult when the impact of our performance is shielded from us.

IV. Concerns, Considerations and Solutions

Good public policy reasons, as well as the potential legal considerations which may be implicated,¹⁰ counsel that any restrictions on juror contact should be supported by strong governmental interests. The interests usually advanced are three: preventing juror harassment, maintaining secrecy for deliberations to encourage candid expression, and promoting finality of verdicts. See, e.g., Commonwealth v. Fidler, 377 Mass. at 195.

^{10/} ABA Model Rule 3.5 was apparently revised to address issues of prior restraint in an out-of-state case where the rule employed language that the federal district court found was vague and not narrowly enough tailored. See Rapp v. Disciplinary Board of the Hawaii Supreme Court, 916 F. Supp. 1525, 1535-1538 (D. HI 1996).

Concerns that counsel will “harass” jurors presume rather unprofessional conduct from litigation attorneys. And the absence of recorded complaints during the decades lawyers operated under the former Rule demonstrates that the presumption is largely unfounded. To be sure, counsel may initiate contact with jurors, but it would be both counterproductive and unexpectedly impolite to harass one after the juror makes it known that he or she does not wish to talk further. On the other hand, some lawyers may have no shame, and the belief by jurors that lawyers may harass them can discourage service as a juror. The Task Force endorses an explicit restriction on harassment, generally defined as any contact after the juror has indicated that he or she does not want contact, in order to meet this valid interest. But the complete ban on lawyer-initiated contact, no matter how professional, polite and acceptable the contact, is probably overly broad.

Secrecy of the deliberations certainly encourages candor, but the Task Force wonders whether jurors really think their deliberations will be secret. Jurors know that in many trials, the jurors are interviewed by the press, often extensively. Moreover, the interest in secrecy is arguably only in the jury’s thought processes, which are protected by the aspect of the rule regarding what evidence may be used to impeach the verdict. There appears to be no legitimate interest in keeping secret the fact that significant extraneous influences were presented to the jury. The line between the two may be blurry, but that is the line the Court says must be drawn in deciding what evidence can be used to impeach the verdict. On the other hand, an informal poll of one civil and two criminal juries seems to show that jurors are generally willing to talk to the trial lawyers on all topics in civil cases, while in criminal cases, they are quite willing to talk about the lawyer’s trial technique, less willing to talk about what evidence they found important

in their decision making process, and generally unwilling to talk to the lawyers about extraneous or improper influences that may have affected the verdict.

Finally, although there is a valid interest in stability of verdicts, it should not extend to illegal verdicts, tainted by extraneous influences. In protecting juries and verdicts, we must not lose sight of the fact that the system's overarching goal is to provide a just and accurate result in accordance with the law, and that goal is inconsistent with leaving unquestioned those verdicts that have been tainted with improper extraneous influences. In some states, such concerns are the stated reason for permitting lawyers to communicate with jurors following a trial.¹¹ The challenge here will be to find an acceptable mechanism for detecting jury improprieties, which may be through lawyer contact with the jurors, or may be something else.

The Massachusetts rule is among the most restrictive in the nation. Most states, and the American Bar Association in its Model Rules, have resolved the valid governmental concerns without essentially eliminating post-trial attorney-juror contact. The majority of the states, 32 in total, have adopted the ABA rule, some variation of it, or they have no rule whatsoever.¹²

^{11/} The comments to the New York rule, for example, state: "Were a lawyer to be prohibited from communicating after trial with a juror, he could not ascertain if the verdict might be subject to legal challenge, in which event the invalidity of a verdict might go undetected." Note, New York Disciplinary Rule 7-108 [1200:39]. See also, Nevada Rule 176(3).

^{12/} These include: Alaska, Arizona, Arkansas, California, Colorado, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Minnesota, Nebraska, Nevada, New York, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Wisconsin, and Wyoming.

V. Recommendation

The Task Force believes that the Massachusetts rule needs to be reconsidered and suggests a process for achieving that result. We recommend that the Massachusetts Bar Association initiate a coordinated effort with other bar associations, groups of lawyers, judges, and any other appropriate groups or agencies, to examine Massachusetts Rules of Professional Conduct Rule 3.5(d) for the purpose of proposing to the Supreme Judicial Court a rule change which would permit appropriate post-trial lawyer-juror contact.

Respectively submitted,

THE JURY COMMUNICATIONS TASK FORCE

Dated: May 9, 2006

JURY COMMUNICATIONS TASK FORCE

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