

Editor's Note:

State Bar Ethics Opinions cite the applicable California Rules of Professional Conduct in effect at the time of the writing of the opinion. Please refer to the California Rules of Professional Conduct [Cross Reference Chart](#) for a table indicating the corresponding current operative rule. There, you can also link to the text of the current rule.

**THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT

FORMAL OPINION NO. 1988-100**

ISSUE:

May an attorney communicate, with or without notice to other counsel, with a juror who has been discharged for misconduct from an empaneled jury?

DIGEST:

It is improper for an attorney to communicate with a juror who has been removed from an empaneled jury, regardless of whether notice is given to other counsel, until such time as the entire jury has been discharged from further service or unless the communication is part of the official proceedings of the case.

AUTHORITIES**INTERPRETED:**

Rule 7-106 of the Rules of Professional Conduct of the State Bar of California.

DISCUSSION

A juror has been discharged for misconduct from an empaneled jury. The juror may have been removed from the empaneled jury either before or during deliberations. At issue is whether an attorney may communicate with that excused juror prior to discharge of the entire jury. The communication is to be made, not as part of the official proceedings of the case, but for the purpose of learning of juror, and jury, perceptions of the case in order to plan trial strategy or fashion jury instructions. The inquiry does not specify whether the attorney intends to notify other counsel, prior to juror contact, of the intention to communicate with the discharged juror.

This Committee is of the opinion that any contact with the discharged juror while the jury is still empaneled is improper unless the contact is made as part of official proceedings of the case. Officially or judicially sanctioned communications with jurors are of course permitted. (See Rule of Professional Conduct 7-106 (C).)

California Rule of Professional Conduct 7-106 addresses communications with jurors.¹ The subsections applicable to the present inquiry are (B) and (D). Rule 7-106(B) states: "During trial of a case: (1) A member of the State Bar connected therewith shall not communicate directly or indirectly with any member of the jury. (2) A member of the State Bar who is not connected therewith shall not communicate directly or indirectly with a juror concerning the case."

Rule 7-106(D) states: "After discharge of the jury from further consideration of a case with which the member of the State Bar was connected, the member of the State Bar shall not ask questions of or make comments to a member of that jury that are intended to harass or embarrass the juror or to influence the juror's actions in future jury service."

Rule 7-106 subdivisions (B) and (D) speak of contacts with a "juror." No distinction is made between the "juror" sitting on the case and the "juror" of the discharged jury. It is the opinion of this Committee that regardless of whether a juror remains on the empaneled jury through completion of the case, that individual is a "juror" within the meaning of rule 7-106(B) and therefore, any communication with that or any other juror until the entire jury is discharged is prohibited. The Committee's interpretation of 7-106 is reinforced by the requirements, discussed below, that the jury be protected from influence extraneous from official proceedings of trial, and that the case be decided only within the framework of those official proceedings.

California appellate court decisions and California ethics opinions have not addressed the propriety of the type of juror contact discussed herein.² However, two cases recognize the need to protect the jury from extraneous influence and have reversed convictions even where alternate jurors remained in the jury room at the outset of deliberations. (*People v. Bruneman* (1935) 4 Cal.App.2d 75; *People v. Adame* (1973) 36 Cal. App.3d 402.) In *People v. Bruneman, supra*, 4 Cal.App.2d at p. 75, it had been stipulated between the parties that two alternate jurors could accompany the twelve other jurors during deliberations but could not address the other jurors on any matter of the case. That case emphasized that private and confidential jury discussion is a necessity of every case. Interviewing an excused juror about juror or jury perceptions of the case violates the confidentiality requirement discussed in *Bruneman* since the interview allows the attorney to learn of the jurors' perceptions at a time before the case is decided. The attorney then cannot only tailor trial strategy to address properly admitted evidence, but also can respond to those juror perceptions of the case. Moreover, breach of jury confidentiality may exist prior to jury deliberations. Although instructed not to discuss the case prior to its submission, sitting jurors may consciously or subconsciously become aware of other sitting jurors' perceptions of the case based on the constant contact between jurors which inevitably occurs after the jury is empaneled.

Ethics opinions of other jurisdictions have addressed the issue of protection of the jury from extraneous interference.³ Opinion 65-48 of the Ethics Committee of the Florida Bar Association "recognize(s) the policy

that activities in the jury room should be secret and protected as much as possible." Ethics Opinion 8 of the Ethics Committee of the Mississippi State Bar states that "in questioning a jury about the motives prompting the jury's verdict, [the attorney] is indirectly soliciting disclosures about the conduct of other members of the jury without their consent." Contact with jurors "tends to destroy secrecy which should, on account of ancient usage and public policy, safeguard the activities in the jury room."

In order to protect the secrecy of the jury process and to prevent indirect juror contact, this Committee is of the opinion that communication with a discharged juror is ethically proscribed unless the contact is approved by the court as part of the official proceedings or otherwise permitted by law, regardless of whether notice of such contact is given to other counsel.

If the communication with the discharged juror is made *ex parte*, with or without notice, the additional concern of unfair advantage arises. For example, a discharged juror may discuss with one counsel perceptions of sitting jurors, yet that juror refuses to communicate with other counsel on the case. Unilateral access to a discharged juror during trial gives one attorney the advantage of access to extrinsic, and possibly very relevant jury information, which is not available to the other counsel on the case.

All parties to the lawsuit must be secure in the knowledge that the case will be decided only on evidence properly received in court and that jurors will not become a matter of scrutiny and manipulation while they still must decide the case. This Committee is therefore of the opinion that rule 7-106 prohibits communication with any juror, discharged or not, from an empaneled jury unless the juror contact is part of the official proceedings, or unless the entire jury has been discharged from further services on the case.

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of California, its Board of Governors, any persons or tribunals charged with regulatory responsibilities, or any member of the State Bar.

¹ The American Bar Association Model Code of Professional Responsibility and ABA Model Rules of Professional Conduct do not address the issue presented. (See EC 7-29, DR 7-108; Rule 3.5 (b).)

² For a discussion of the impropriety of contact of sitting jurors during the course of a trial, see *In re Possino* (1984) 37 Cal.3d 163.

³ Opinions of ethics committees of other jurisdictions, as well as those in California, have considered only the propriety of juror contact after discharge of the entire jury. (See ABA Formal Opinion 319 (1967); New York City Bar Association Opinion No. 767 (1952); New York State Opinion No. 246 (1972); Illinois Opinion No. 303 (1968); Ohio Opinion No. 27; Arizona Opinion No. 73-35 (1973); Florida Opinion No. 65-48 (1965); Florida Opinion No. 69-17.) However, other ethics opinions permit contact with jurors of discharged juries only if there is reason to believe the verdict is subject to legal challenge. (See Mississippi Opinion No. 8 (1962); Oklahoma Opinion No. 216 (1961).)