JURIES—POST-TRIAL QUESTIONING OF JURORS ENJOINED WHERE FOUND A SEARCHING HOSTILE INQUIRY—CONDUCT NOT HELD UNETHICAL. *United States v. Driscoll* (S.D.N.Y. 1967).

Daniel J. Driscoll was convicted of willful failure to file his federal income tax returns. Shortly after defendant's conviction, a private investigator had telephone conversations with three of the jurors, as well as a more extended face to face interview with a fourth. These interviews centered on the evidence and how it had impressed the jury. The United States Attorney sought an injunction to restrain the defendant, his attorneys and investigators from further interviewing jurors concerning the reasons for their verdict. The attorneys involved indicated that the purpose of the interviews had been to determine which evidence had influenced the jury, rather than to secure evidence of any impropriety. They also expressed the view that, in their experience, such interviews were "common practice among trial attorneys."[1]

On hearing before the Southern District Court of New York, *held*, injunction granted: The investigation was an annoyance and harassment of the jurors. *United States v. Driscoll*, 276 F. Supp. 333 (S.D.N.Y. 1967).

In granting the injunction, Judge McLean discussed two independent aspects of the problem. First, the court concerned itself with the question of whether the requested injunction against further interviewing of jurors should be granted. In condemning the activities of defendant's investigator, the court concluded: (1) The jury room should be free from outside influence, (2) such an external influence would exist if jurors were conscious of the fact they would be subject to interrogation as to what had occurred in the jury room, (3) this would result in a stifling of the jurors' freedom of debate and a checking of independence of thought, and (4) it is the duty of the courts to protect jurors from the annoyance and harassment of such post-verdict interviews.[2]

Relying on a United States Supreme Court decision,[3] the defendant

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1 United States v. Driscoll, 276 F. Supp. 333, 336 (S.D.N.Y. 1967).

2 *Id.* at 237, 239. *Accord*, Bryson v. United States, 238 F.2d 657 (9th Cir. 1956), *rehearing denied*, 243 F.2d 837 (1957), *cert. denied*, 355 U.S. 817 (1957); Rakes v. United States, 169 F.2d 739, 745-46 (4th Cir. 1948), *cert. denied*, 335 U.S. 826 (1948); State v. La Fera, 42 N.J. 97, 199 A.2d 630 (1964).

3 Parker v. Gladden, 385 U.S. 363 (1966); *see* United States *ex rel.* De Lucia v. McMann, 373 F.2d 759 (2d Cir. 1967).

argued that, since that court considered information of juror misconduct which had been discovered after a defendant's conviction, the lawyer should be able to interview jurors to secure such information without impropriety. The *Driscoll* court, however, found the investigation to be "a searching hostile inquiry" and held that such conduct must be enjoined.

Next, the court addressed itself to the ethical aspects of the case, *i.e.*, whether the attorneys who had caused the jurors to be interviewed should be disciplined. Referring to Canon 23 of the American Bar Association's Canons of Ethics[4] and pertinent opinions,[5] the court concluded the area was contradictory, confusing and ambiguous. Therefore, the court stated that it would "give these attorneys the benefit of the doubt and [would] not recommend disciplinary action . . . ."[6]

The *Driscoll* decision is in accord with the prevailing expression of judicial disfavor and suspicion of post-trial interviewing of jurors.[7]

See also Harnsberger, *Amend Canon 23 or Reverse Opinion 109*, 51 A.B.A.J. 157, 158 (1965).

> The propriety of post-trial interviews should be, but has not always been, separated from the problem of whether a juror's testimony is competent to impeach a verdict to which he has consented.

The rationale for American Bar Association Opinion 109 (1934) was couched in terms of the policy reasons against allowing jurors to impeach their verdict. COMMITTEE ON PROFESSIONAL ETHICS, OPINION 319, 53 A.B.A.J. 1127 (1967). "Formal Opinion 109, predicated on a finding that the law prohibited a juror from testifying as to illegalities and irregularities in reaching a verdict . . . ." In the principal case, the court relied extensively on the reasoning of Rakes v. United States, 169 F.2d 739 (4th Cir. 1948), which involved a motion for new trial based on affidavits of jurors as to their misconduct; and State v. La Fera, 42 N.J. 97, 199 A.2d 630 (1964), which involved defendant trying to impeach the verdict by showing a juror's prejudice. Thus, it appears that whenever a question of the propriety of post-trial interviews is raised the courts apply the same policy arguments as used when considering the problem of receiving testimony of jurors to impeach their verdict.

4 ABA CANONS OF PROFESSIONAL ETHICS No. 23.

5 ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 109 (1934); ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL DECISION, No. 535 (1962); COMMITTEE ON PROFESSIONAL ETHICS OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, OPINION 285 (Sept. 28, 1933), and OPINION 767 (Jan. 14, 1952).

6 276 F. Supp. at 340.

7 Stein v. New York, 346 U.S. 156, 178 (1953) (court referred to such investigations as "inquisitions"); McDonald v. Pless, 238 U.S. 264, 267-68 (1914) (if the interviewing of jurors as to what occurred in the jury room were allowed, it would cause "the destruction of all frankness and freedom of discussion and conference" in jury deliberations); Primm v. Continental Cas. Co., 143 F. Supp. 123, 127 (W.D. La. 1956) (post-trial discussions with jurors are "improper, unethical, and subject to punishment for contempt . . ."). *See* Northern Pac. Ry. v. Mely, 219 F.2d 199 (9th Cir. 1954); United States v. Nystrom, 116 F. Supp. 771 (W.D. Pa. 1953), *aff'd*, 237 F.2d 218 (3rd Cir. 1956); United States v. 120,000 Acres of Land, 52 F. Supp. 212 (N.D. Tex. 1943); Sindle v. 766 Ninth Ave. Corp., 127 N.Y.S.2d 258 (Sup. Ct. 1953); Caldwell v. Yeatman, 19 N.H. 150, 15 A.2d 252 (1940); *contra*, Patrick v.

For example, the court refused to accept the attorney's explanation that the interviewing was done for educational purposes only. Also, in response to one juror's testimony that he did not feel the investigator had harassed him, Judge McLean stated, "[i]t is 'searching hostile inquiry,' whether juror Martin recognized it as such or not."[8] The disfavor is primarily based on the judicial belief that post-trial interviewing of jurors threatens the efficiency of the jury system itself. Therefore, the courts respond to these threats in terms of the public policy to be served by protecting the jury system.[9]

Notwithstanding strong judicial opinion to the contrary, the American College of Trial Lawyers[10] and, recently, the American Bar Association,[11] express the belief that such interviewing, properly conducted within certain limits, is an acceptable practice and affronts no ethical standards. The result of the conflict in viewpoint between the bench and bar is a decision such as *Driscoll*; conduct sufficiently improper to warrant an injunction and, yet, still within the realm of ethical behavior.

To the attorney, the practice of post-trial interviewing of jurors serves useful and lawful purposes which fall short of any attempt to obstruct or destroy the jury system. Studies of juror behavior may be helpful in improving the functions of juries[12] which would im-

Yellow Cab Co., 102 Ohio App. 312, 114 N.E.2d 735 (1953). "[T]here is no rule or provision of law or public policy that prohibits the informal interrogation of a juror after the return of the verdict."

8 276 F. Supp. at 338.

9 United States v. Nystrom, 116 F. Supp. 771, 777 (W.D. Pa. 1953). "[T]he court must choose between redressing the injury of the private litigant and inflicting the public injury which would result if jurors were permitted to testify as to what had happened in the jury room. I am compelled to unequivocally disapprove the practice of interviewing a juror after a trial as to his state of mind during the trial." State v. La Fera, 42 N.J. 97, 199 A.2d 630 (1964) (where it was reasoned that the promise of secrecy of deliberation insures free debate in the jury room which public policy requires); Rex v. Armstrong, [1922] 2 K.B. 55, 568 (the revelation of jury deliberations would diminish public confidence in the jury system). See discussion of Formal Opinion 109, ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 109 (1934).

10 AMERICAN COLLEGE OF TRIAL LAWYERS, CODE TRIAL CONDUCT 6 (1963).

11 Opinion 319, 53 A.B.A.J. 1127 (1967):

> Where the law governing the procedure for an action allows the testimony of a juror by affidavit or otherwise to be used in support of or against a motion for a motion for new trial, it is not unethical for a lawyer after trial to talk to or question members of the jury. In states where it is not illegal, a lawyer may communicate with jurors after the trial for the purpose of self-education. The lawyer must not in either case harass, entice, induce or exert improper influence on the juror.

12 Harnsberger, *Amend Canon 23 or Reverse Opinion 109*, 51 A.B.A.J. 157, 158 (1965): "The people and the Bar must have information regarding it [the jury system] in order to debate intelligently its value and proposed changes in its methods of operation."

prove the overall judicial process of which the jury system is a part. Also, by interviewing jurors as to their response to his presentation, the lawyer may be able to improve his personal efficiency in future trials. Further, the attorney may prevent a miscarriage of justice by being sure there was no juror misconduct during the course of his client's trial. The question is how this can be accomplished without interviewing the jurors themselves.[13]

Thus, the situation arises where the lawyer is pursuing seemingly legitimate objectives that the courts are weighing against the advantages which result from having a jury system with its traditional concepts of secrecy of deliberations and freedom of debate. Yet the only judicial guidelines given the attorney are such as were set forth in *Rakes v. United States*;[14]

> He who makes studied inquiries of jurors as to what occurred there acts at his peril, lest he be held as acting in obstruction of the administration of justice.[15]

This statement appears to express a philosophy of do it if you want but watch out if someone complains.

ABA Formal Opinion 319[16] appears to be a compromise position. It recognizes the judicial disfavor of interviewing jurors as well as the lawyer's needs, and attempts to limit each by the other. If the courts will accept its dictates, *Driscoll* may be looked to for a factual expansion of the type of conduct which will exceed the limits of Opinion 319. Initially, the investigator should inform the juror that he need not discuss the case if he does not wish to. Secondly, the investigator should avoid mention of any previous trial of the defendant and what the jury decided in that instance. The *Driscoll* court was inclined to believe that questioning along these lines was equivalent to an implied criticism of this jury's decision. Also, the investigator should not argue a particular plea to the juror, lest he be held as attempting to entice the juror to change his mind. Generally, any conduct or questioning which may give the impression that the investigator is simply "fishing" for something with which to impeach the verdict should be avoided. Finally, it should be kept in

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[13] In speaking of the absolute privilege of jurors to have kept secret their deliberations, Justice Cardozo, in Clark v. United States, 289 U.S. 1, 14 (1932), states that absolute protection is "paying too high a price for the assurance to a juror of serenity of mind."

[14] 169 F.2d 739 (4th Cir. 1948).

[15] *Id.* at 745, 746.

[16] *See* note 11 *supra.*

mind that whether the interrogation is held to amount to harassment, enticement or inducement will be determined on the basis of what the usually skeptical judge thinks and not what the attorney or even the juror feels.

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