

COMMONWEALTH OF MASSACHUSETTS

At the Supreme Judicial Court holden at Boston within and for said Commonwealth on the sixteenth day of November, in the year two thousand and seventeen:

present,

<u>HON. RALPH D. GANTS</u>)	Chief Justice
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<u>HON. BARBARA A. LENK</u>)	
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<u>HON. FRANK M. GAZIANO</u>)	Justices
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<u>HON. DAVID A. LOWY</u>)	
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<u>HON. KIMBERLY S. BUDD</u>)	
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<u>HON. ELSPETH B. CYPHER</u>)	
)	
)	
<u>HON. SCOTT L. KAFKER</u>)	

ORDERED: That Chapter Three of the Rules of the Supreme Judicial Court is hereby amended as follows::

Rule 3:07 By inserting after Mass. R. Prof. C. 3.5(c)(3) the following: (4) the communication is initiated by the lawyer without the notice required by law; or

Rule 3:07 By striking out Comment [3] to Mass. R. Prof. C. 3.5 and inserting in lieu thereof the new Comment [3], as attached hereto; and

Rule 3:07 By inserting the new Comments [3A] and [3B], as attached hereto.

The amendments accomplished by this order shall take effect on December 1, 2017.

ORDERED:

<u>HON. RALPH D. GANTS</u>)	Chief Justice
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<u>HON. BARBARA A. LENK</u>)	
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<u>HON. FRANK M. GAZIANO</u>)	Justices
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<u>HON. ELSPETH B. CYPHER</u>)	
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<u>HON. SCOTT L. KAFKER</u>)	

Massachusetts Rules of Professional Conduct

RULE 3.5: IMPARTIALITY AND DECORUM OF THE TRIBUNAL

Comments

[3] A lawyer may on occasion want to communicate with a juror or prospective juror after the jury has been discharged. Subject to the notice requirements discussed below, the lawyer may do so unless the communication is prohibited by law or a court order. For example, in most cases common-law principles bar inquiry into the contents of jury deliberations and the thought processes of jurors, but not into extraneous influences. The lawyer must respect the desire of the juror not to talk with the lawyer. Where a juror makes known to the judge a desire not to communicate with the lawyer, and the judge so informs the lawyer, the lawyer may not initiate contact with that juror, directly or indirectly. The lawyer may not engage in improper conduct during the communication.

[3A] If the lawyer wishes to initiate the communication with a juror or prospective juror after discharge of the jury, the lawyer must send notice of the lawyer's intent to initiate such contact to counsel for the opposing party or parties (or directly to the opposing party or parties, if not represented by counsel) five business days before contacting any juror. The notice must include a description of the proposed manner of contact and the substance of any proposed inquiry to the jurors, and, where applicable, a copy of any letter or other form of written communication the lawyer intends to send. The preferred method of initiating contact with a juror is by written letter, and the letter must include a statement that the juror may decline any contact with the lawyer or terminate contact once initiated. If the lawyer seeks to initiate contact through an oral conversation (whether in person, by telephone, or otherwise), the lawyer is nonetheless required to provide opposing counsel or opposing parties with prior notice of the substance of the intended communication five business days before the contact is initiated. *See Commonwealth v. Moore*, 474 Mass. 541, 551-52 (2016).

[3B] If the juror initiates the communication with the lawyer and seeks to communicate about permissible subjects, such as the existence of extraneous influences on the jury deliberation process or the lawyer's performance during the trial, the lawyer is permitted to communicate with that juror after discharge of the jury without following these notice requirements.