

**Rule 3.5 [5-300 5-320] Contact With Judges, Officials, Employees, and Jurors  
(Commission's Proposed Rule Adopted on May 6 – 7, 2016 – Clean Version)**

- (a) Except as permitted by an applicable code of judicial ethics, code of judicial conduct, or standards governing employees of a tribunal,\* a lawyer shall not directly or indirectly give or lend anything of value to a judge, official, or employee of a tribunal.\* This Rule does not prohibit a lawyer from contributing to the campaign fund of a judge running for election or confirmation pursuant to applicable law pertaining to such contributions.
- (b) Unless authorized to do so by law, an applicable code of judicial ethics or code of judicial conduct, a ruling of a tribunal,\* or a court order, a lawyer shall not directly or indirectly communicate with or argue to a judge or judicial officer upon the merits of a contested matter pending before the judge or judicial officer, except:
  - (1) in open court; or
  - (2) with the consent of all other counsel in the matter; or
  - (3) in the presence of all other counsel in the matter; or
  - (4) in writing\* with a copy thereof furnished to all other counsel in the matter; or
  - (5) in ex parte matters.
- (c) As used in this Rule, “judge” and “judicial officer” shall also include (i) administrative law judges; (ii) neutral arbitrators; (iii) State Bar Court judges; and (iv) law clerks, research attorneys, or other court personnel who participate in the decision-making process, including referees, special masters, or other persons\* to whom a court refers one or more issues and whose decision or recommendation can be binding on the parties if approved by the court.
- (d) A lawyer connected with a case shall not communicate directly or indirectly with anyone the lawyer knows\* to be a member of the venire from which the jury will be selected for trial of that case.
- (e) During trial a lawyer connected with the case shall not communicate directly or indirectly with any juror.
- (f) During trial a lawyer who is not connected with the case shall not communicate directly or indirectly concerning the case with anyone the lawyer knows\* is a juror in the case.
- (g) After discharge of the jury from further consideration of a case a lawyer shall not communicate directly or indirectly with a juror 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;
  - (3) the communication involves misrepresentation, coercion, duress or harassment; or
  - (4) the communication is intended to influence the juror's actions in future jury service.
- (h) A lawyer shall not directly or indirectly conduct an out of court investigation of a person\* who is either a member of a venire or a juror in a manner likely to influence the state of mind of such person\* in connection with present or future jury service.
- (i) All restrictions imposed by this Rule also apply to communications with, or investigations of, members of the family of a person\* who is either a member of a venire or a juror.
- (j) A lawyer shall reveal promptly to the court improper conduct by a person\* who is either a member of a venire or a juror, or by another toward a person\* who is either a member of a venire or a juror or a member of his or her family, of which the lawyer has knowledge.
- (k) This Rule does not prohibit a lawyer from communicating with persons\* who are members of a venire or jurors as a part of the official proceedings.
- (l) For purposes of this Rule, "juror" means any empaneled, discharged, or excused juror.

### **Comment**

[1] An applicable code of judicial ethics or code of judicial conduct under this Rule includes the California Code of Judicial Ethics and the Code of Conduct for United States Judges. Regarding employees of a tribunal\* not subject to judicial ethics or conduct codes, applicable standards include the Code of Ethics for the Court Employees of California and 5 U.S.C. § 7353 (Gifts to Federal employees).

[2] For guidance on permissible communications with a juror in a criminal action after discharge of the jury, see Code of Civil Procedure § 206.

[3] It is improper for a lawyer to communicate with a juror who has been removed, discharged, or excused 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.

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  - (1) in open court; or
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- (c) As used in this Rule, “judge” and “judicial officer” shall also include (i) administrative law judges; (ii) neutral arbitrators; (iii) State Bar Court judges; and (iv) law clerks, research attorneys, or other court personnel who participate in the decision-making process, including referees, special masters, or other persons\* to whom a court refers one or more issues and whose decision or recommendation can be binding on the parties if approved by the court.
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  - (4) the communication is intended to influence the juror’s actions in future jury service.

- (h) A lawyer shall not directly or indirectly conduct an out of court investigation of a person\* who is either a member of a venire or a juror in a manner likely to influence the state of mind of such person\* in connection with present or future jury service.
- (i) All restrictions imposed by this Rule also apply to communications with, or investigations of, members of the family of a person\* who is either a member of a venire or a juror.
- (j) Subject to Rule 1.6 and Business and Professions Code § 6068(e), A-a<sup>1</sup> lawyer shall reveal promptly to the court improper conduct by a person\* who is either a member of a venire or a juror, or by another toward a person\* who is either a member of a venire or a juror or a member of his or her family, of which the lawyer has knowledge.
- (k) This Rule does not prohibit a lawyer from communicating with persons\* who are members of a venire or jurors as a part of the official proceedings.
- (l) For purposes of this Rule, “juror” means any empaneled, discharged, or excused juror.

### Comment

[1] An applicable code of judicial ethics or code of judicial conduct under this Rule includes the California Code of Judicial Ethics and the Code of Conduct for United States Judges. Regarding employees of a tribunal\* not subject to judicial ethics or conduct codes, applicable standards include the Code of Ethics for the Court Employees of California and 5 U.S.C. § 7353 (Gifts to Federal employees).

[2] For guidance on permissible communications with a juror in a criminal action after discharge of the jury, see Code of Civil Procedure § 206.

[3] It is improper for a lawyer to communicate with a juror who has been removed, discharged, or excused 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.

[4] Paragraph (j) does not require a lawyer to reveal to the court information that would violate the lawyer’s duty of confidentiality to a client. For example, if the source of a lawyer’s knowledge of improper juror conduct is a confidential client communication, then the lawyer would only be permitted to reveal information to the court where the client has given informed consent or the disclosure is permitted by Rule 1.6 or Business and Professions Code § 6068(e).<sup>2</sup>

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<sup>1</sup> Drafting team consensus in response to COPRAC written comment (X-2016-43bh COPRAC (Baldwin) [3.5]-FS.pdf). COPRAC recommends that the duty in para. (j) be made expressly subject to a lawyer’s duty of confidentiality. The Drafting team agrees, in part, because similar limitations are imposed on the duty of candor in proposed Rule 3.3 (see 3.3(a)(3) and (b)).

<sup>2</sup> The addition of an explanatory comment to augment the black letter change made in response to COPRAC’s comment (see note 1) was discussed by the drafting team but no consensus was reached. It is included here for the sole purpose of presenting an open issue for the full Commission’s consideration of whether to include a comment.

**Proposed Rule 3.3 [5-200(A)] Candor Toward the Tribunal  
Synopsis of Public Comments**

<b>TOTAL = XX</b>	<b>A = X</b>
	<b>D = X</b>
	<b>M = X</b>
	<b>NI = X</b>

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
2016-32h	Law Professors (Zitrin) (07-25-16)	Yes	A	3.3(c)	<p>The first ethics professors' letter recommended that the duty of candor must continue until the conclusion of the proceeding. Allowing candor to conclude upon termination of the representation was a recipe for disaster.</p> <p>The commission has now removed the offending language. The commenters congratulate the commission for this decision.</p>	No response required.
2016-43x	COPRAC (Baldwin) (8-12-16)	Yes	M	3.3(d)	<p>Add to the end of paragraph (d) the words "to the position of the client" to clarify the adversity.</p> <p>In Comment [5], the reference to "Rule 1.4(b)(4)" should be to "Rule 1.4(a)(4)".</p>	<p>The Commission has made the requested change.</p> <p>The Commission agrees and has made the change.</p>
2016-47	Elliot Bien (8-17-16)	No	M	3.3	<p>The commenter's position is that the rule should be modified to specifically address plagiarism. Such modification would address the recent increase in judicial attention paid to plagiarism. The existing language of the rule is too uncertain to be helpful on the subject of plagiarism. Such modification will bolster public confidence in the legal profession.</p> <p>The commenter further asserts</p>	<p>The Commission considered the commenter's proposal and rejected it. In the original Report &amp; Recommendation submitted by the Rule 3.3 drafting team, it was identified as a "Concept Considered But Rejected." The Report stated:</p> <p>A specific prohibition on plagiarism is not necessary and not appropriate in a disciplinary rule. In any event, such conduct would</p>

<sup>1</sup> A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

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					<p>that the Commission failed to address the concern he raised re plagiarism because “it did not vote against [his] proposal,” and “[no]” vote was even called. The Commission silently accepted its drafting committee’s recommendation to remain silent on this subject.”</p>	<p>be better addressed under proposed Rule 8.4(c) or Bus. &amp; Prof. Code § 6106.<sup>2</sup> Moreover, there is no evidence that adopting such a provision would promote a national standard as the drafting team is unaware of any jurisdiction that has expressly addressed plagiarism in its Rules.</p> <p>The Commission’s position has not changed.</p> <p>The commenter was also afforded an opportunity to present his position at a regularly scheduled Commission meeting. That no Commission member made a motion to vote on the commenter’s proposal does not mean that the Commission “failed to address” or consider it.</p>
2016-52p	Law Professors (Zitrin) (08-24-16)	Yes	A	3.3(c)	<p>The first ethics professors’ letter recommended that the duty of candor must continue until the conclusion of the proceeding. Allowing candor to conclude upon</p>	<p>No response required.</p>

<sup>2</sup> Proposed Rule 8.4(c) provides it is professional misconduct for a lawyer to:

(c) engage in conduct involving moral turpitude, dishonesty, fraud, deceit or reckless or intentional misrepresentation.

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					<p>termination of the representation was a recipe for disaster.</p> <p>The commission has now removed the offending language. The commenters congratulate the commission for this decision.</p>	
Public Hearing	Menaster, Albert (Provided oral public hearing testimony on July 26, 2016. See pages 34-38 of the public hearing transcript.)	No	D	(a)(2); cmt. 4	<p>Defense lawyer’s duty to disclose adverse authority to court amounts to violations of fifth and sixth amendments.</p> <p>Fifth amendment issue: a person charged with a crime shouldn’t have a duty to assist the government with his or her conviction.</p> <p>Sixth amendment issue: a defense lawyer has a duty of loyalty to client to not volunteer information harmful to client.</p> <p>Recounts example where defendant is convicted because attorney was required to provide case authority saying that what he has done is in violation of the law.</p> <p>In response to an inquiry from the hearing panel, the commenter noted that the counterpart ABA rule does not appear to be enforced against defense lawyers</p>	No change to paragraph (a) or Comment [4] is required. The first clause in paragraph (a)(2) is verbatim from Model Rule 3.3(a)(2), which has been the rule for many years in the vast majority of jurisdictions and, as noted by the commenter, has not resulted in Fifth or Sixth Amendment problems for criminal defense lawyers. The Commission is not aware of authority supporting the commenter’s position that a criminal defense lawyer’s failure of candor to a court about the applicable law is always protected by constitutional principles. In the event a constitutional issue were to arise, the last sentence in comment [4] provides that the obligations of a lawyer under these Rules and the State Bar Act are subordinate to applicable constitutional provisions. In summary, the Commission

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					as his office's research has not revealed any cases on this issue.	does not recommend a provision under which a criminal defense lawyer's failure of candor to a court about the applicable law is always protected by constitutional principles and that such conduct can never be disciplined. Such a determination is for the court.