

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3.5 **[California Rules 5-300 and 5-320]**

Rule 5-300

Lead Drafter: Stout

Co-Drafters: Ham, Harris

Rule 5-320

Lead Drafter: Kornberg

Co-Drafters: Eaton, Langford

Meeting Date: May 6 – 7, 2016

I. INTRODUCTION

Proposed Rule 3.5 addresses two topics, i.e., contact with judicial officials and jurors, topics that are addressed in two separate rules under the current California Rules of Professional Conduct, rules 5-300 (judicial officers) and 5-320 (jurors). The ABA Model Rules similarly address the topics in a single rule, Model Rule 3.5.

In conformance with the Charter principle that the Commission is to start with the relevant California rule, the two California rules were assigned to two different drafting teams. Acknowledging this Commission's decision early in the rules revision process to recommend adoption of the Model Rules' format and numbering, both drafting teams determined that the two topics could be combined in a single rule numbered 3.5. However, both drafting teams also determined that the substance of the two current California rules, which are more detailed and identify more precisely the kinds of conduct prohibited under the rules, were more appropriate as disciplinary standards. Accordingly, although numbered 3.5, the proposed rule largely carries forward without substantive changes the substance of the two current California rules:

- (i) paragraphs (a) through (c) carry forward the content of current rule 5-300; and
- (ii) paragraphs (d) through (l) carry forward the content of current rule 5-320.

Changes were made to rule 5-300(A) and (C) to conform the rule to recent (2013) changes in the Code of Judicial Ethics and to more accurately delimit the scope of the rule's application.

II. CURRENT CALIFORNIA RULES 5-300 AND 5-320

Rule 5-300 Contact With Officials

- (A) A member shall not directly or indirectly give or lend anything of value to a judge, official, or employee of a tribunal unless the personal or family relationship between the member and the judge, official, or employee is such that gifts are customarily given and exchanged. Nothing contained in this rule shall prohibit a member from contributing to the campaign fund of a judge running for election or confirmation pursuant to applicable law pertaining to such contributions.
- (B) A member shall not directly or indirectly communicate with or argue to a judge or judicial officer upon the merits of a contested matter pending before such judge or judicial officer, except:

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[California Rules 5-300 and 5-320]

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- (1) In open court; or
 - (2) With the consent of all other counsel in such matter; or
 - (3) In the presence of all other counsel in such matter; or
 - (4) In writing with a copy thereof furnished to such other counsel; or
 - (5) In ex parte matters.
- (C) As used in this rule, “judge” and “judicial officer” shall include law clerks, research attorneys, or other court personnel who participate in the decision-making process.

Rule 5-320 Contact With Jurors

- (A) A member connected with a case shall not communicate directly or indirectly with anyone the member knows to be a member of the venire from which the jury will be selected for trial of that case.
- (B) During trial a member connected with the case shall not communicate directly or indirectly with any juror.
- (C) During trial a member who is not connected with the case shall not communicate directly or indirectly concerning the case with anyone the member knows is a juror in the case.
- (D) After discharge of the jury from further consideration of a case a member 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.
- (E) A member 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.
- (F) 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.
- (G) A member 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 member has

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knowledge.

- (H) This rule does not prohibit a member from communicating with persons who are members of a venire or jurors as a part of the official proceedings.
- (I) For purposes of this rule, "juror" means any empanelled, discharged, or excused juror.

III. DRAFTING TEAMS' RECOMMENDATION AND VOTE

There was consensus among both drafting teams to recommend a proposed amended rule as set forth below in Section IV. The vote of both drafting teams was unanimous in favor of making the recommendation.

IV. PROPOSED RULE 3.5 (CLEAN)

Rule 3.5 Contact With Officials and Jurors

- (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 shall 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.

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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.
- (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 or prospective 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

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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 or prospective juror after discharge of the jury, see also 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.

V. PROPOSED RULE 3.5 (REDLINE TO CURRENT CALIFORNIA RULES 5-300 AND 5-320)

Rule ~~5-300~~ 3.5 Contact With Officials and Jurors

(Aa) ~~A member~~ 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 ~~unless the personal or family relationship between the member and the judge, official, or employee is such that gifts are customarily given and exchanged. Nothing contained in this rule shall.~~ This Rule shall not prohibit a ~~member~~ lawyer from contributing to the campaign fund of a judge running for election or confirmation pursuant to applicable law pertaining to such contributions.

(Bb) ~~A member~~ Unless authorized to do so by law, an applicable code of judicial ethics or

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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 ~~such~~ the judge or judicial officer, except:

- (1) ~~In~~ in open court; or
- (2) ~~With~~ with the consent of all other counsel in ~~such~~ the matter; or
- (3) ~~In~~ in the presence of all other counsel in ~~such~~ the matter; or
- (4) ~~In~~ in writing with a copy thereof furnished to ~~such~~ all other counsel in the matter; or
- (5) ~~In~~ in ex parte matters.

- (~~Cc~~) As used in this ~~rule~~ 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.

~~Rule 5-320 Contact With Jurors~~

- (~~Ad~~) A ~~member~~ lawyer connected with a case shall not communicate directly or indirectly with anyone the ~~member~~ lawyer knows to be a member of the venire from which the jury will be selected for trial of that case.
- (~~Be~~) During trial a ~~member~~ lawyer connected with the case shall not communicate directly or indirectly with any juror.
- (~~Gf~~) During trial a ~~member~~ lawyer who is not connected with the case shall not communicate directly or indirectly concerning the case with anyone the ~~member~~ lawyer knows is a juror in the case.
- (~~Dg~~) After discharge of the jury from further consideration of a case a ~~member shall not ask questions of or make comments to a member of that jury that are intended to harass or embarrass the juror or~~ lawyer shall not communicate directly or indirectly with a juror or

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prospective 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~~ juror's actions in future jury service.

- (Eh) A ~~member~~ 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.
- (Fi) All restrictions imposed by this ~~rule~~ 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.
- (Gj) A ~~member~~ 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 ~~member~~ lawyer has knowledge.
- (Hk) This ~~rule~~ Rule does not prohibit a ~~member~~ lawyer from communicating with persons who are members of a venire or jurors as a part of the official proceedings.
- (Il) For purposes of this ~~rule~~ Rule, “juror” means any empanelled, 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).

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[\[2\] For guidance on permissible communications with a juror or prospective juror after discharge of the jury, see also 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.](#)

VI. PUBLIC COMMENTS SUMMARY

None.

VII. OCTC / STATE BAR COURT COMMENTS

- **JAYNE KIM, OCTC, DATE:**

[Insert summary of comments.]

- **RUSSELL WEINER, OCTC, 6/15/2010:**

Rule 3.5. Impartiality and Decorum of the Tribunal.

1. OCTC recommends that subparagraph (g) also include that a lawyer shall not communicate to the juror or prospective jurors after discharge when the communication is intended to prevent either the juror with communicating with the other party or the court. (*Lind v. Medevac* (1990) 219 Cal.app.3d 516).) While this has been interpreted under what is now subparagraph (g)(4), it would be clearer and more enforceable if it was its own prohibition.

2. Comment 4 seems more appropriate for a treatise, law review article, or ethics opinion.

- **State Bar Court:** No comments received from State Bar Court.

VIII. COMPARISON OF PROPOSED RULE TO APPROACHES IN OTHER JURISDICTIONS (NATIONAL BACKDROP)

- **Pennsylvania Rule 3.5** is identical to Model Rule 3.5:

Rule 3.5. Impartiality and Decorum of the Tribunal.

A lawyer shall not:

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- (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;
- (d) engage in conduct intended to disrupt a tribunal.

All jurisdictions have adopted some version of ABA Model Rule 3.5. The ABA State Adoption Chart, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 3.5: Impartiality And Decorum Of The Tribunal,” revised May 6, 2015, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_5.authcheckdam.pdf (Last visited March 28, 2016).
- Fifteen jurisdictions have adopted Model Rule 3.5 verbatim.¹ Twenty-one jurisdictions have adopted a slightly modified version of Model Rule 3.5.² Fifteen jurisdictions have adopted a version of the rule that is substantially different to Model Rule 3.5.³

¹ The fifteen jurisdictions are: Arizona, Arkansas, Idaho, Illinois, Indiana, Iowa, Louisiana, Missouri, New Hampshire, New Mexico, Oklahoma, Pennsylvania, Rhode Island, Washington, and Wyoming.

² The twenty-one jurisdictions are: Colorado, Connecticut, Delaware, District of Columbia, Kentucky, Maine, Massachusetts, Michigan, Mississippi, Montana, Nevada, New Jersey, Nebraska, North Dakota, Oregon, South Carolina, South Dakota, Tennessee, Utah, West Virginia, and Wisconsin.

³ The fifteen jurisdictions are: Alabama, Alaska, California, Florida, Georgia, Hawaii, Kansas, Maryland, Minnesota, New York, North Carolina, Ohio, Texas, Vermont, and Virginia.

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IX. CONCEPTS ACCEPTED/REJECTED; CHANGES IN DUTIES; NON-SUBSTANTIVE CHANGES; ALTERNATIVES CONSIDERED

A. Concepts Accepted (Pros and Cons):

1. General: Recommend carrying forward the substance of current rules 5-300 (Contact with Officials) and 5-320 (Contact with Jurors) rather than the adoption of the substance of Model Rule 3.5.
 - Pros: As noted in the introduction, the California rules that comprise proposed Rule 3.5 specify in greater detail than Model Rule 3.5 the conduct that the rule is intended to regulate. It is the consensus of the drafting teams that these detailed provisions are more appropriate for a disciplinary rule than is the spare content of Model Rule 3.5. Carrying forward the specificity of current California rules 5-300 and 5-320 should avoid challenges of overbreadth and vagueness and better serve the purpose of the proposed Rules to protect the integrity of the legal system and promote the administration of justice by specifying the conduct that is prohibited. Finally, defining what conduct is acceptable and what is not better aids judicial personnel, lawyers and jurors from engaging in conduct that might be well meaning, but reflects adversely upon the fairness of the judicial process. This latter effect ultimately should provide better public protection.
 - Cons: None identified.
2. Recommend adopting a rule title that combines the titles of current rules 5-300 and 5-320 (Contact with Officials and Jurors).
 - Pros: The combination title more accurately describes the content of the rule, which, as a disciplinary rule, regulates the extent to which lawyers may engage in contacting judges and jurors. Moreover, the Model Rule title, which refers to “impartiality and decorum” of a tribunal, is inaccurate with the recommendation not to adopt MR 3.5(d), which prohibits a lawyer from engaging “in conduct intended to disrupt a tribunal.”
 - Cons: Even assuming the reference to “decorum” is deleted, the remaining part of the Model Rule title correctly describes the rationale for the rule: maintaining the impartiality of a tribunal. Moreover, the title has been adopted by nearly every jurisdiction in the country.
3. Recommend revising the first sentence of paragraph (a) to conform the proposed rule to amendments to the California Code of Judicial Ethics and to recognize the various codes or standards of conduct or ethics that regulate the conduct of court personnel.
 - Pros: The Code of Judicial Ethics was revised in 2013 to eliminate the exception

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recognized in current rule 5-300(A) for “customary” gifts. Accordingly, the second clause of paragraph (a) that permitted such gifts has been deleted. In addition, the 5-300 drafting team recognized that there are a large number of codes or standards of conduct that regulate the conduct of court personnel. The insertion of the first clause of proposed paragraph (a) is intended to provide an exception for gifts only to the extent they are permitted under such codes or standards.

- Cons: None identified.
- 4. In paragraph (b), add a clause that provides an exception to the prohibited conduct to recognize that a lawyer may be so permitted by law, the Code of Judicial Ethics, a ruling of the tribunal or a court order.
 - Pros: Paragraph (b) specifies the circumstances when ex parte communications with judges, judicial officers and personnel, and jurors are prohibited; when any communications with jurors are prohibited; and when certain communications are permitted in order to create a brighter line for compliance with the law and for establishing proof in disciplinary and regulatory proceedings. This is preferable to the Model Rule, which simply provides for a blanket prohibition “unless authorized to do so by law or court order.”
 - Cons: The addition of the opening clause of paragraph (b) is unnecessary as it states the obvious.
- 5. In paragraph (c), recommend revising the definition of “judge” and “judicial officer” to clarify that it includes administrative law judges, neutral arbitrators, and State Bar Court judges.
 - Pros: The same concerns about ensuring the impartiality of decisions and the corresponding effect it will have on respect for the judicial process applies to decisions made by ALJ’s, neutral arbitrators and State Bar Court judges. The rule should clarify the rule’s application to those neutral decision-makers. The drafting team recommends including language from the Commission’s definition of “tribunal”⁴

⁴ Proposed Rule 1.0.1(m) provides:

(m) “Tribunal” means: (i) a court, an arbitrator, an administrative law judge, or an administrative body acting in an adjudicative capacity and authorized to make a decision that can be binding on the parties involved; or (ii) a special master or other person 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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to more precisely identify the intended scope of the rule rather than force a lawyer to import that language into the definition to appreciate that scope.⁵

- Cons: It is unnecessary to make the change because this Commission has adopted a definition of “tribunal” that incorporates nearly all of the language that has been added to the definition. The definition should expressly refer to “presiding officers of a tribunal” and by reference to that definition, a lawyer would understand the rule’s scope.
- 6. In paragraphs (d) through (f) and (h) through (l) carry forward the current rule 5-320(A) through (C) and (E) through (I), with only minor changes to conform to this Commission’s style and formatting (e.g., “lawyer” for “member”).
 - Pros: See General recommendation, at paragraph IX.A.1, above.)
 - Cons: None identified.
- 7. In paragraph (g), supplement current rule 5-320(D) with the specific prohibitions set forth in MR 3.5(c).
 - Pros: Model Rule 3.5(c) is an exception to the Model Rules’ approach in that it identifies in detail the conduct that is prohibited. That detailed description is appropriately included in a disciplinary rule.
 - Cons: There is no evidence that current rule 5-320(D) has not been effective in regulating lawyer misconduct in interacting with jurors.
- 8. Recommend adopting Comment [1], which provides examples of codes or standards of conduct referred to in paragraph (a).
 - Pros: The comment clarifies what is intended by the term “applicable code of judicial ethics, code of judicial conduct, or standards governing” court employees by providing examples of such codes or standards.
 - Cons: The referenced term in paragraph (a) is sufficiently precise to not require further elaboration.

⁵ An alternative definition considered but rejected by the 5-300 drafting team was the following:

- (c) As used in this rule, “judge” and “judicial officer” means the presiding officer of a tribunal and shall include law clerks, research attorneys, or other court personnel who participate in the decision-making process, and neutral arbitrators.

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9. Recommend adoption of Comment [2], which provides a cross reference to CCP § 206.
 - Pros: CCP § 206 provides specific guidance on what communications with jurors are permitted.
 - Cons: The comment does not provide interpretive guidance that explains the meaning or application of a black letter provision. It is unnecessary.
10. Recommend adoption of Comment [3] regarding when a lawyer may communicate with a discharged juror.
 - Pros: The comment provides an important clarification that even after a juror is discharged, a lawyer may not communicate with the juror until the entire jury is discharged. This clarifies the duration of the prohibition on communications with such jurors.
 - Cons: None identified.

B. Concepts Rejected (Pros and Cons):

1. Adopt Model Rule 3.5(d), which prohibits a lawyer from engaging “in conduct intended to disrupt a tribunal”.
 - Pros: Including the provision will promote respect for the judicial system by requiring lawyers to maintain not only the impartiality and integrity of a tribunal but also to preserve the decorum of a tribunal.
 - Cons: The provision is vague and overbroad and, in any event, is unnecessary in light of the Commission’s recommendation that Model Rule 8.4(d) (providing it is misconduct for a lawyer to “engage in conduct that is prejudicial to the administration of justice.”
2. In subparagraph (b)(4), (i) include the term “promptly” to modify the requirement under that all other counsel in a matter be *provided* with a copy of the ex parte communication with the judge, and (ii) define the term “promptly”.
 - Pros: Any written ex parte communication should be provided to opposing counsel promptly. The rule should so reflect that requirement.
 - Cons: Any such requirement would be in the rules of procedure or local court rules where the concept could be defined with precision. Discipline is appropriate for an improper ex parte contact. The rule provides that an improper ex parte contact can be disciplined; there is no further need for such a qualifier.

C. Changes in Duties/Substantive Changes to the Current Rule:

1. The changes to paragraph (a) are substantive. (See section IX.A.3, above.)

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2. All other changes are non-substantive. (See Section IX.D, below.)

D. Non-Substantive Changes to the Current Rule:

1. Substitute the term “lawyer” for “member”.
 - **Pros:** The current Rules’ use of “member” departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice pro hac vice or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)
 - **Cons:** Retaining “member” would carry forward a term that has been in use in the California Rules for decades.
2. Change the rule number to conform to the ABA Model Rules numbering and formatting (e.g., lower case letters).
 - **Pros:** It will facilitate the ability of lawyers from other jurisdictions who are authorized by various Rules of Court to practice in California to find the California rule corresponding to their jurisdiction’s rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rules. As to the “Con” that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.
 - **Cons:** There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.
3. The change to paragraph (b), which expressly recognizes exceptions in a code of conduct, law, rule, or ruling of a tribunal, is a non-substantive clarifying change.
4. The change to paragraph (c), which incorporates language from the definition of tribunal, is a non-substantive clarifying change.
5. The change to paragraph (g), which specifies in detail the kinds of communications with jurors that are prohibited, is a non-substantive clarifying change. (See Section IX.A.7,

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above.)

6. All of the proposed comments are non-substantive changes. (See Sections IX.A.8-10, above.)

E. Alternatives Considered:

None.

X. OPEN ISSUES/CONCEPTS FOR THE COMMISSION TO CONSIDER

There are no open issues.

XI. COMMENTS FROM DRAFTING TEAM MEMBERS OR OTHER COMMISSION MEMBERS

Stout

- [Date]: Email Comment

Ham

- [Date]: Email Comment

Harris

- [Date]: Email Comment

Kornberg

- [Date]: Email Comment

Eaton

- [Date]: Email Comment

Langford

- [Date]: Email Comment

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3.5 [California Rules 5-300 and 5-320]

Rule 5-300

Lead Drafter: Stout

Co-Drafters: Ham, Harris

Rule 5-320

Lead Drafter: Kornberg

Co-Drafters: Eaton, Langford

Meeting Date: May 6 – 7, 2016

XII. RECOMMENDATION AND PROPOSED COMMISSION RESOLUTION

Recommendation:

That the Commission recommend that the Board of Trustees of the State Bar of California adopt proposed amended Rule 3.5 [5-300][5-320] in the form attached to this report and recommendation.

Proposed Resolution:

RESOLVED: That the Commission for the Revision of the Rules of Professional Conduct recommends that the Board of Trustees adopt proposed amended Rule 3.5 [5-310][5-320] in the form attached to this Report and Recommendation.

XIII. DISSENTING POSITION(S)

None.

XIV. FINAL COMMISSION VOTE/ACTION

Date of Vote:

Action:

Vote: X (yes) – X (no) – X (abstain)

CURRENT CALIFORNIA RULE 5-300
“Contact With Officials”

I. Text of Current Rule:

Rule 5-300. Contact with Officials

- (A) A member shall not directly or indirectly give or lend anything of value to a judge, official, or employee of a tribunal unless the personal or family relationship between the member and the judge, official, or employee is such that gifts are customarily given and exchanged. Nothing contained in this rule shall prohibit a member from contributing to the campaign fund of a judge running for election or confirmation pursuant to applicable law pertaining to such contributions.
- (B) A member shall not directly or indirectly communicate with or argue to a judge or judicial officer upon the merits of a contested matter pending before such judge or judicial officer, except:
 - (1) In open court; or
 - (2) With the consent of all other counsel in such matter; or
 - (3) In the presence of all other counsel in such matter; or
 - (4) In writing with a copy thereof furnished to such other counsel; or
 - (5) In ex parte matters.
- (C) As used in this rule, “judge” and “judicial officer” shall include law clerks, research attorneys, or other court personnel who participate in the decision-making process. (Amended by order of Supreme Court, operative September 14, 1992.)

II. Background/Purpose:

In 1972, the California State Bar Special Committee to Study the ABA Code of Professional Responsibility proposed Rule 7-109, the predecessor to 5-300, as follows:

- (A) A member of the State Bar shall not directly or indirectly give or lend anything of value to a judge, official, or employee of a tribunal unless the personal or family relationship between the member and the judge, official or employee is such that gifts are customarily given and exchanged.
- (B) A member of the State Bar shall not directly or indirectly, in the absence of opposing counsel, communicate with or argue to a judge or judicial officer, upon the merits of a contested matter

pending before such judge or judicial officer, except in open court; nor shall he, without furnishing opposing counsel with a copy thereof, address a written communication to a judge or judicial officer concerning the merits of a contested matter pending before such judge or judicial officer. The rule shall not apply to ex parte matters.

Comment:

Rule 7-109(A) is the substance of ABA Code DR 7-110(A) as amended. In recommending this Rule, the Committee also had before it the text of the 1971 tentative draft of the Canons of Judicial Ethics, Canon 4(C) and the text of 1971 State Bar Conference of Delegates Resolution 8-2.

Rule 7-109(B) is the identical text of present Rule 16, Rules of Professional Conduct.

(See State Bar of California Special Committee to Study the ABA Code of Professional Responsibility, Final Report (1972) at p. 51.)

In 1975, Rule 7-109 was amended from the proposed version above and was approved by the California Supreme Court as follows:

Rule 7-108. Contact with Officials

- (A) A member of the State Bar shall not directly or indirectly give or lend anything of value to a judge, official, or employee of a tribunal unless the personal or family relationship between the member and the judge, official or employee is such that gifts are customarily given and exchanged.
- (B) A member of the State Bar shall not directly or indirectly, in the absence of opposing counsel, communicate with or argue to a judge or judicial officer, upon the merits of a contested matter pending before such judge or judicial officer, except in open court; nor shall he, without furnishing opposing counsel with a copy thereof, address a written communication to a judge or judicial officer concerning the merits of a contested matter pending before such judge or judicial officer. The rule shall not apply to ex parte matters.

Rule 5-300 was amended in 1989. The 1989 amendments are summarized as follows:

**Proposed Rule 5-300. Contact with Officials.
(Current Rule 7-108)**

Proposed rule 5-300 continues the limitations on attorney contacts with officials found in current rule 7-108.

Paragraph (A) regarding giving anything of value to an official is expanded to state explicitly that campaign contributions are not prohibited.

The proposed amendments to paragraph (B) regarding ex parte contacts with officials are intended merely as a change in format.

Paragraph (C) is new and is intended to define the phrase “judge or judicial officer” as used in this rule. The inclusion of law clerks, research attorneys or other court personnel who participate in the decision-making process is proposed to acknowledge the influence such personnel may have on pending matters and to make the scope of the prohibited communication more in tune with reality.

(See of Bar Misc. No. 5626, “Request That The Supreme Court Of California Approve Amendments To The Rules Of Professional Conduct Of The State Bar Of California, And Memorandum And Supporting Documents In Explanation,” December 1987, p. 51.)

Amendments Operative 1989 (Comparison of Current Rule to Former Rule)

Rule 5-300. ~~7-108~~. Contact with Officials

- (A) A member of the ~~State Bar~~ shall not directly or indirectly give or lend anything of value to a judge, official, or employee of a tribunal unless the personal or family relationship between the member and the judge, official, or employee is such that gifts are customarily given and exchanged. Nothing contained in this rule shall prohibit a member from contributing to the campaign fund of a judge running for election or confirmation pursuant to applicable law pertaining to such contributions.
- (B) A member of the ~~State Bar~~ shall not directly or indirectly, ~~in the absence of opposing counsel~~, communicate with or argue to a judge or judicial officer, upon the merits of a contested matter pending before such judge or judicial officer, except: ~~in open court; nor shall he, without furnishing opposing counsel with a copy thereof, address a written communication to a judge or judicial officer concerning the merits of a contested matter pending before such judge or judicial officer. The rule shall not apply to ex parte matters.~~
- (1) In open court; or
 - (2) With the consent of all other counsel in such matter; or
 - (3) In the presence of all other counsel in such matter; or
 - (4) In writing with a copy thereof furnished to such other counsel; or
 - (5) In ex parte matters.

- (C) As used in this rule, the phrase "judge or judicial officer" shall include law clerks, research attorneys, or other court personnel who participate in the decision-making process.

(See of Bar Misc. No. 5626, "Request That The Supreme Court Of California Approve Amendments To The Rules Of Professional Conduct Of The State Bar Of California, And Memorandum And Supporting Documents In Explanation," December 1987, Enclosure 2.)

Rule 5-300 was again amended in 1992. Those amendments are summarized as follows:

Proposed amendment to paragraph (C) would revise the definition of the phrase "judge or judicial officer" to specifically define the terms "judge" and "judicial officer". No substantive change is intended.

(See "Request That The Supreme Court Of California Approve Amendments To The Rules Of Professional Conduct Of The State Bar Of California, And Memorandum And Supporting Documents In Explanation," December 1991, Supreme Court number 24408, at p. 20.)

Amendments Operative 1992 (Comparison of Current Rule to Former Rule)

Rule 5-300. Contact with Officials

- (A) A member shall not directly or indirectly give or lend anything of value to a judge, official, or employee of a tribunal unless the personal or family relationship between the member and the judge, official, or employee is such that gifts are customarily given and exchanged. Nothing contained in this rule shall prohibit a member from contributing to the campaign fund of a judge running for election or confirmation pursuant to applicable law pertaining to such contributions.
- (B) A member shall not directly or indirectly communicate with or argue to a judge or judicial officer upon the merits of a contested matter pending before such judge or judicial officer, except:
- (1) In open court; or
 - (2) With the consent of all other counsel in such matter; or
 - (3) In the presence of all other counsel in such matter; or
 - (4) In writing with a copy thereof furnished to such other counsel; or
 - (5) In ex parte matters.

- (C) As used in this rule, ~~the phrase~~ "judge" ~~or~~ and "judicial officer" shall include

law clerks, research attorneys, or other court personnel who participate in the decision-making process.

(See “Request That The Supreme Court Of California Approve Amendments To The Rules Of Professional Conduct Of The State Bar Of California, And Memorandum And Supporting Documents In Explanation,” December 1991, Supreme Court number 24408, Enclosure 2.)

III. *Input from the State Bar Office of the Chief Trial Counsel (OCTC):*

A. 2016 Comment

In a [REDACTED], 2016 memorandum to the Commission, OCTC provided the following comment regarding rule 5-300:

(Note: OCTC is expected to provide new comments on this rule. These comments will be distributed to the drafting team when they are received from OCTC.)

B. In its June, 15, 2010, memorandum to the Office of Professional Competence, OCTC made two recommendations with regard to the first Commission’s Proposed Rule 3.5. The Commission’s proposed rule 3.5 included the topic of contact with judges (current rule 5-300) as well as contact with jurors (current rule 5-320). OCTC’s comments only addressed the topic of contact with jurors. First, OCTC recommended that “subparagraph (g) also include that a lawyer shall not communicate to the juror or prospective jurors after discharge when the communication is intended to prevent either the juror with communicating with the other party or the court.” Second, OCTC wrote that “Comment 4 seems more appropriate for a treatise, law review article, or ethics opinion.”

C. In a September 27, 2001 memorandum to the first Commission, OCTC did not comment on rule 5-300.

IV. *Potential Deficiencies in the Current Rule:*

A. See above input from OCTC.

B. Lack of clarity regarding whether the rule 5-300(B) applies in all “adjudicative” proceedings. In State Bar Formal Opinion 1984-82 (“CAL 1984-82”), the Committee concluded that it “believes that a hearing officer (administrative law judge) should be considered a ‘judge or judicial officer’ within the meaning of rule 7-108(B) of the Rules of Professional Conduct, and that the underlying policy considerations compel application of the rule to ex parte communication with such officers.”¹

In *Mathew Zaheri Corp. v. New Motor Vehicle Bd.* (1997) 55 Cal.App.4th 1305 [64 Cal.Rptr.2d 705] (*Mathew Zaheri Corp.*), the court concluded that CAL 1984-82 was incorrect inasmuch as it concluded that an administrative law judge (“ALJ”) is a “judicial officer” under former Rule 7-108. (*Id.* at p. 1316.) “[CAL 1984-82] goes awry in asserting that Rules of Professional Conduct, former rule 7-108 is derived from the American Bar Association (ABA) Model Code of Professional Responsibility, disciplinary rule 7-110(B). Rather, the ABA rule is derived from the California rule. (See ABA proposed Code Prof. Responsibility (final draft July 1, 1969) DR 7-110(B), fn. 92, p. 105.) Former rule 7-108 carries forward the language of former rule 16² of our original rules of professional conduct adopted in 1928. (204 Cal. xciii-xciv.)” (*Ibid.*)

The court went on to hold that while “an ALJ is not within the compass of the term “judicial official” as used in Rules of Professional Conduct . . . , [t]here is no principled basis to distinguish between an ALJ and a judge in the judicial branch for purposes of the ethical strictures against ex parte contacts.” (*Id.* at pp. 1316-1317.) Despite reaching this conclusion, *Mathew Zaheri Corp.* is not a discipline case. Instead, the court was called upon to determine whether an ex parte communication with an ALJ warranted reversal of a judgment under the rubric that “[m]isconduct of court or counsel is a potential ground of reversal in a civil action.” (*Id.* at p. 1314.) In light of the foregoing, there is a potential deficiency to the extent that courts might limit current rule 5-300(B)’s application to certain historical definitions if the rule itself is not amended to clarify the specific officials and circumstances to which the rule is intended to apply.

C. Similar to the above item IV.B, rule 5-300 does not expressly state whether the rule applies to contacts with a neutral arbitrator. The prior Commission recommended that the definition of “judge” and “judicial officer” in rule 5-300(C) should be revised to include a “neutral arbitrator,” in part, based on a recognition that much of the work of the judicial system now takes place before court-appointed and other third-party neutrals.

¹ The opinion also discusses whether former rule 7-108(B) applies to “an agency’s heads or the members of the board or commission constituting the agency.” While the Committee concludes that broadly characterizing these individuals as “judges or judicial officers” for purposes of 7-108(B) would be “impractical and potentially destructive of the smooth functioning of the administrative process,” the Committee concluded that the rule did apply in limited circumstances beyond those discussed above.

² California Rules of Professional Conduct, Rule 16 provides:

A member of The State Bar shall not, in the absence of opposing counsel, communicate with or argue to a judge or judicial officer except in open court upon the merits of a contested matter pending before such a judge or judicial officer; no shall he, without furnishing opposing counsel with a copy thereof, address a written communication to a judge or judicial officer concerning the merits of a contested matter pending before such judge or judicial officer. This rule shall not apply to *ex parte* matters.

(204 Cal. xciii-xciv, emphasis in original.)

D. Rule 5-300(B) includes an exception for “ex parte matters” but this might be too narrow to account for situations where ex parte communications are specifically authorized by a ruling of a tribunal, the Code of Judicial Ethics, or other law. Model Rule 3.5 imposes a prohibition that includes a broad exception for communications authorized by law or court order.

V. California Context:

A. California law related to current rule 5-300.

Gifts to Judges.

With regard to 5-300(A), California Code of Civil Procedure Section 170.9 and California Code of Judicial Ethics, Canon 4D(5) govern acceptance of gifts. (See: [California Judges Association Judicial Ethics Committee Opinion 44 \(1995\)](#) re Limitations on Accepting Gifts Under the Code of Judicial Ethics and CCP Sec. 170.9; [Committee on Judicial Ethics Formal Opinion 2014-005 \(2014\)](#) Accepting Gifts Of Little Or Nominal Value Under The Ordinary Social Hospitality Exception; and [Committee on Codes of Conduct Advisory Opinion No. 98](#) Gifts to Newly Appointed Judges, United States Courts, Guide to Judicial Policy, Vol. 2B, Ch. 2, page 98-1.)

Ex Parte Communications.

Varied authorities overlap with the ethical conduct governed by 5-300(B). Pursuant to the California Code of Judicial Ethics, a judge may communicate ex parte only in certain enumerated instances. (See Cal. Code Jud. Ethics, Canon 3B(7).) Moreover, case law holds that ex parte communications between attorney and judge are severely disfavored. (*Haluck v. Ricoh Electronics, Inc.* (2007) 151 Cal.App.4th 994, 1002 [60 Cal.Rptr.3d 542] [“Generally ex parte contacts between a judge and counsel are improper, and if not unjust in actuality, give the appearance of injustice.”], citing *In re Hancock* (1977) 67 Cal.App.3d 943, 947–949 [136 Cal.Rptr. 901].) Ex parte communications with a judge are also specifically governed by separate authority in the criminal context. (See Penal Code sections 1203,1204; *In re Hancock* (1977) 67 Cal.App.3d 943, 947-949 [136 Cal.Rptr. 901]; *In re Calhoun* (1976) 17 Cal.3d 75, 83-85 [130 Cal.Rptr. 139].)

VI. Approach In Other Jurisdictions (National Backdrop):

A. Model Rule 3.5(b) is the closest counterpart to rule 5-300. The ABA Comparison Chart, entitled “American Bar Association CPR Policy Implementation Committee, Variations of the ABA Model Rules of Professional Conduct, Rule 3.5: Impartiality and Decorum of the Tribunal” revised May 6, 2015, is available at:

http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_5.authcheckdam.pdf (Last visited March 3, 2016).

B. According to the ABA Chart, fourteen (14) states have adopted Model Rule 3.5 verbatim.³ Nineteen (19) jurisdictions have adopted a slightly modified version of Model Rule 3.5.⁴ Eighteen (18) states have adopted a version of the rule that is substantially different to Model Rule 3.5.⁵

VII. *Public Comment Received by the First Commission:*

A. The clean text of a proposed new rule 3.5 drafted by the first Commission and adopted by the Board to replace rule 5-300 is enclosed with this assignment, together with the synopsis of public comments received on that proposed rule and the full text of those comments. Although the proposed rule differs from current rule 5-300, the drafting team might consider to what extent, if any, the public comments received on the proposed rule provide helpful information in analyzing the current rule.

To facilitate the review and to appreciate the relevance of these public comments, a redline comparison of the proposed rule showing changes to rule 5-300 is also enclosed with the public comments received. However, given the Board's charge to engage in a comprehensive review of the current rules and to retain the historical nature of the California Rules as "a clear and enforceable articulation of disciplinary standards," a drafting team that considers amendments developed by the first Commission should not presume that the approach taken by the first Commission was appropriate to achieve those objectives.

VIII. *Possible Issues Identified by Professional Competence Staff Following Review of the Rule Developed by the First Commission and Adopted by the Board:*

Bearing in mind the Commission's Charter to engage in a comprehensive review of the current rules and to retain the historical nature of the California Rules as "a clear and enforceable articulation of disciplinary standards," Professional Competence staff identified the following rule amendment issue that the drafting team might consider. The drafting team need not address any of the issues. For example, if after critically evaluating an issue addressed by a revision made by the first Commission, the drafting team determines that the revision does not address an actual (as opposed to theoretical) public protection deficiency in the current rule, then the drafting team should hesitate to recommend a change to the current rule despite the prior decision by the first

³ The fourteen states are: Arizona, Arkansas, Idaho, Illinois, Indiana, Iowa, Louisiana, Missouri, New Hampshire, Oklahoma, Pennsylvania, Rhode Island, Washington, and Wyoming.

⁴ The nineteen jurisdictions are: Alaska, Colorado, Connecticut, Delaware, District of Columbia, Kentucky, Maine, Massachusetts, Michigan, Mississippi, Nebraska, New Mexico, North Dakota, Oregon, South Carolina, South Dakota, Tennessee, Utah, and Wisconsin.

⁵ The eighteen states are: Alabama, California, Florida, Georgia, Hawaii, Kansas, Maryland, Minnesota, Montana, Nevada, New Jersey, New York, North Carolina, Ohio, Texas, Vermont, Virginia, and West Virginia.

Commission and the Board to address the issue. (Note: For the sake of completeness and ease of reference, the issue listed below may have already been mentioned in connection with other information provided above, such as in connection with the approaches taken in other jurisdictions or prior public comment. Multiple mentions of an issue do not necessarily warrant the drafting team taking action on an issue.)

1. Whether the rule should be amended to clarify that the definition of “judge or judicial officer” includes administrative law judges (see *Mathew Zaheri Corp. v. New Motor Vehicle Bd.* (1997) 55 Cal.App.4th 1305, 1316 – 1317).
2. Whether the rule should be amended to clarify that the definition of “judge or judicial officer” includes a neutral arbitrator.
3. Whether the rule’s limited exception for an ex parte matter should be amended to more broadly include communications that are specifically authorized by a ruling of a tribunal, the Code of Judicial Ethics, or other law.

IX. Research Resources:

1. California Rule of Professional Conduct 5-320
2. ABA Model Rules of Professional Conduct, Rule 3.5
3. [*Heavey v. State Bar of California* \(1976\) 17 Cal.3d 553 \[131 Cal.Rptr. 406\]](#)
4. [*Mathew Zaheri Corp. v. New Motor Vehicle Bd.* \(1997\) 55 Cal.App.4th 1305 \[64 Cal.Rptr.2d 705\]](#)
5. [California State Bar Formal Op. No. 1984-78](#) (Communication with Judge without Notice to Opposing Counsel)
6. [California State Bar Formal Op. No. 1984-82](#) (Communication with hearing officer (administrative law judge), agency head or members of the board or commission)
7. Cal. Code Jud. Ethics, Canon 3B(7)
8. Cal. Code Jud. Ethics, Canon 4D(5)
9. Cal. Code of Civ. Pro. § 170.9
10. [California Judges Association Judicial Ethics Committee Opinion 44 \(1995\)](#)
11. [Committee on Judicial Ethics Formal Opinion 2014-005 \(2014\)](#)
12. [Committee on Codes of Conduct Advisory Opinion No. 98](#)

CURRENT CALIFORNIA RULE 5-320
"Contact With Jurors"

I. Text of Current Rule:

Rule 5-320 Contact With Jurors

- (A) A member connected with a case shall not communicate directly or indirectly with anyone the member knows to be a member of the venire from which the jury will be selected for trial of that case.
- (B) During trial a member connected with the case shall not communicate directly or indirectly with any juror.
- (C) During trial a member who is not connected with the case shall not communicate directly or indirectly concerning the case with anyone the member knows is a juror in the case.
- (D) After discharge of the jury from further consideration of a case a member 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.
- (E) A member 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.
- (F) 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.
- (G) A member 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 member has knowledge.
- (H) This rule does not prohibit a member from communicating with persons who are members of a venire or jurors as a part of the official proceedings.
- (I) For purposes of this rule, "juror" means any empaneled, discharged, or excused juror. (Amended by order of Supreme Court, operative September 14, 1992.)

II. Background/Purpose:

Current rule 5-320 originated in 1975 as former rule 7-106, which provided:

Rule 7-106. Communication with or Investigation of Jurors

- (A) Before the trial of a case, a member of the State Bar connected therewith shall not communicate directly or indirectly with anyone he knows to be a member of the venire from which the jury will be selected for the trial of the case.
- (B) During the 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.
- (C) Rule 7-106 (A) and (B) do not prohibit a member of the State Bar from communicating with veniremen or jurors as a part of the official proceedings.
- (D) 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.
- (E) A member of the State Bar shall not conduct directly or indirectly an out of court investigation of either a venireman or a juror of a type likely to influence the state of mind of such venireman or juror present or future jury service.
- (F) All restrictions imposed by rule 7-106 upon a member of the State Bar also apply to communications with or investigations of, members of a family of a venireman or a juror.
- (G) A member of the State Bar shall reveal promptly to the court improper conduct by a venireman or a juror, or by another toward a venireman or a juror or a member of his family of which the member of the State Bar has knowledge.

As part of the comprehensive revision of the Rules of Professional Conduct, rule 7-106 was renumbered to 5-320 and became operative in 1989. While no substantive amendments were recommended at that time, rule 5-320 provided:

Rule 5-320. ~~7-106. Communication with or Investigation of~~ Contact with Jurors

- (A) ~~Before the trial of a case, a~~ A member of the State Bar connected therewith ~~with a case~~ shall not communicate directly or indirectly with anyone ~~he~~ the

member knows to be a member of the venire from which the jury will be selected for ~~the~~ trial of ~~the~~ that case.

- (B) During ~~the trial of a case~~ (1) ~~A~~ a member of the ~~State Bar~~ connected ~~therewith~~ with the case shall not communicate directly or indirectly with any member of the jury.
- (C) During trial (2) ~~A~~ a member of the ~~State Bar~~ who is not connected ~~therewith~~ with the case shall not communicate directly or indirectly ~~with a juror~~ concerning the case with anyone a member knows is a juror in the case.
- ~~(C) Rule 7-106 (A) and (B) do not prohibit a member of the State Bar from communicating with veniremen or jurors as a part of the official proceedings.~~
- (D) After discharge of the jury from further consideration of a case ~~with which the member of the State Bar was connected~~, ~~the~~ a 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.
- (E) A member of the ~~State Bar~~ shall not conduct directly or indirectly an out of court investigation of either a venireman or a juror of a type likely to influence the state of mind of such venireman or juror present or future jury service.
- (F) All restrictions imposed by rule ~~7-406~~ 5-320 upon a member of the ~~State Bar~~ also apply to communications with or investigations of, members of a the family of a venireman or a juror.
- (G) A member of the ~~State Bar~~ shall reveal promptly to the court improper conduct by a venireman or a juror, or by another toward a venireman or a juror or a member of his or her family, of which the member of the ~~State Bar~~ has knowledge.
- (H) Rule 5-320 does not prohibit a member from communicating with veniremen or jurors as a part of the official proceedings.

In 1992, rule 5-320 was further revised. The amendment to paragraph (B) expanded the prohibition to encompass the definition of “juror” proposed in new paragraph (I) and precluded members from communicating with empaneled, discharged or excused jurors during a trial. In conjunction with amended paragraph (B), paragraph (I) expanded the rule to prohibit communications with discharged or excused jurors during the pendency of the trial. The amendment was intended to protect the administration of justice by preventing a member from learning about the jury’s deliberations during such trial.

Amendment to paragraphs (E), (F), (G), and (H) replaced the terms “venireman” and “veniremen” with gender neutral language.

The 1992 amendments to rule 5-320 provided:

Rule 5-320. Contact with Jurors

- (A) A member connected with a case shall not communicate directly or indirectly with anyone the member knows to be a member of the venire from which the jury will be selected for trial of that case.
- (B) During trial a member connected with the case shall not communicate directly or indirectly with any ~~member of the jury~~ juror.
- (C) During trial a member who is not connected with the case shall not communicate directly or indirectly concerning the case with anyone a ~~the~~ member knows is a juror in the case.
- (D) After discharge of the jury from further consideration of a case a member 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.
- (E) A member shall not ~~conduct~~ directly or indirectly conduct an out of court investigation of a person who is either a venireman member of a venire or a juror of a type in a manner likely to influence the state of mind of such venireman or juror person in connection with present or future jury service.
- (F) All restrictions imposed by this rule 5-320 ~~upon a member~~ also apply to communications with, or investigations of, members of the family of a ~~venireman~~ person who is either a member of a venire or a juror.
- (G) A member shall reveal promptly to the court improper conduct by a ~~venireman~~ person who is either a member of a venire or a juror, or by another toward a ~~venireman~~ person who is either a member of a venire or a juror or a member of his or her family, of which the member has knowledge.
- (H) This Rule 5-320 ~~Rule 5-320~~ does not prohibit a member from communicating with ~~veniremen~~ persons who are members of a venire or jurors as a part of the official proceedings.
- (I) For purposes of this rule, "juror" means any empaneled, discharged, or excused juror.

The 1992 amendments were the last revisions of rule 5-320.

III. *Input from the State Bar Office of the Chief Trial Counsel (OCTC):*

A. 2015 Comments. In a ____, 2015 memorandum from OCTC, OCTC provided the following comment on rule 5-320:

(Note: OCTC is expected to provide new comments on this rule. These comments will be distributed to the drafting team when they are received from OCTC.)

B. 2010 Comments. In a June 15, 2010 memorandum from OCTC, OCTC provided the following comment on proposed rule 3.5 (current rule 5-320):

1. OCTC recommends that subparagraph (g) also include that a lawyer shall not communicate to the juror or prospective jurors after discharge when the communication is intended to prevent either the juror with communicating with the other party or the court. (*Lind v. Medevac* (1990) 219 Cal.app.3d 516).) While this has been interpreted under what is now subparagraph (g)(4), it would be clearer and more enforceable if it was its own prohibition.
2. Comment 4 seems more appropriate for a treatise, law review article, or ethics opinion.

IV. *Potential Deficiencies in the Current Rule:*

A. See above input from OCTC.

B. Attorneys are permitted to communicate with jurors regarding a civil case after the conclusion of the trial, and may contact the jurors to determine whether there is a basis for challenging the jury verdict.

V. *California Context:*

A. California Code of Civil Procedure. Pursuant to California Code of Civil Procedure §206, jurors have a right to not discuss the deliberations or verdict in a criminal matter. The judge must explain this statutory right to the jury before discharging them from the case. An attorney in the case must inform jurors of the statutory right prior to any discussion regarding jury deliberations or the verdict.

B. Related California law. Attorneys are permitted to communicate with jurors regarding a civil case after the conclusion of the trial, and may contact the jurors to determine whether there is a basis for challenging the jury verdict (See *Lind v. Medevac, Inc.* (1990) 219 CA3d 516).

VI. *Approach In Other Jurisdictions (National Backdrop):*

A. Model Rule 3.5 Variations. All jurisdictions have adopted some version of ABA Model Rule 3.5. The ABA State Adoption Chart, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 3.5: Impartiality And Decorum Of The Tribunal,” revised May 6, 2015, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_5.authcheckdam.pdf [Last visited 3/28/16]
- Fifteen states have adopted Model Rule 3.5 verbatim.¹ Twenty-one jurisdictions have adopted a slightly modified version of Model Rule 3.5.² Fifteen states have adopted a version of the rule that is substantially different to Model Rule 3.5.³

VII. Public Comment Received by the First Commission:

A. The clean text of proposed new rule 3.5 drafted by the first Commission and adopted by the Board to replace rule 5-320 is enclosed with this assignment, together with the synopsis of public comments received on those proposed rules and the full text of those comments. Although the proposed rule differs from current rule 5-320, the drafting team might consider to what extent, if any, the public comments received on the proposed rule provide helpful information in analyzing the current rule.

To facilitate the review and to appreciate the relevance of these public comments, a redline comparison of the proposed rule showing changes to rule 5-320 is also enclosed with the public comments received. However, given the Board's charge to engage in a comprehensive review of the current rules and to retain the historical nature of the California Rules as "a clear and enforceable articulation of disciplinary standards," a drafting team that considers amendments developed by the first Commission should not presume that the approach taken by the first Commission was appropriate to achieve those objectives.

VIII. Potential Issues Identified by Professional Competence Staff Following Review of the Proposed Rule Developed by the First Commission and Adopted by the Board:

Bearing in mind the Commission's Charter to engage in a comprehensive review of the current rules and to retain the historical nature of the California Rules as "a clear and enforceable articulation of disciplinary standards," Professional Competence staff identified the following rule amendment issues (in no particular order) that the drafting team might consider. The drafting team need not address any of the issues. For example, if after critically evaluating an issue addressed by a revision made by the first

¹ The fifteen states are: Arizona, Arkansas, Idaho, Illinois, Indiana, Iowa, Louisiana, Missouri, New Hampshire, New Mexico, Oklahoma, Pennsylvania, Rhode Island, Washington, and Wyoming.

² The twenty-one jurisdictions are: Colorado, Connecticut, Delaware, District of Columbia, Kentucky, Maine, Massachusetts, Michigan, Mississippi, Montana, Nevada, New Jersey, Nebraska, North Dakota, Oregon, South Carolina, South Dakota, Tennessee, Utah, West Virginia, and Wisconsin.

³ The fifteen states are: Alabama, Alaska, California, Florida, Georgia, Hawaii, Kansas, Maryland, Minnesota, New York, North Carolina, Ohio, Texas, Vermont, and Virginia.

Commission, the drafting team determines that the revision does not address an actual (as opposed to theoretical) public protection deficiency in the current rule, then the drafting team should hesitate to recommend a change to the current rule despite the prior decision by the first Commission and the Board to address the issue. (Note: For the sake of completeness and ease of reference, some of the issues listed below may have already been mentioned in connection with other information provided above, such as in connection with the approaches taken in other jurisdictions or prior public comment. Multiple mentions of an issue do not necessarily warrant the drafting team taking action on an issue.)

(1) Whether to subject a lawyer to discipline for a communication with a juror, or a prospective juror after discharge, when such communication is prohibited by law or court order.

(2) Whether to prohibit a lawyer from communicating with a juror, or a prospective juror after discharge, when the juror has made known to the lawyer a desire not to be contacted.

IX. Research Resources:

- In re Loftus (Rev. Dept. 2007) 5 Cal. State Bar Ct. Rptr. 80
- In the Matter of Respondent A (Rev. Dept.1990) 1 Cal. State Bar Ct. Rptr. 255
- [CAL 1988-100](#)
- [CAL 1987-95](#)
- [CAL 1976-39](#)

