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April 27, 2016 Kehr Email to 3-500 & 3-520 Drafting Teams, cc Difuntorum, Mohr, McCurdy & Lee:

A few comments on the proposed draft of this Rule ---

1) Paragraph (a) extends its prohibition to gifts to any "employee of a tribunal". This would make perfect sense if "tribunal" were limited to its common sense definition of courts or their equivalent, but the Commission has adopted a definition that includes administrative agencies. Current rule 5-300 does not suffer from this problem b/c it does not expansively define "tribunal", and MR 3.5 does not suffer from this problem b/c it does not include "employee". The possible solutions include removing "employee" (which I do not support), fixing the definition of "tribunal" (which I do support), and removing "employee" from paragraph (a) and moving it to paragraph (c) by removing "who participate in the decision-making process" (which I think would have the added benefit of eliminating an apparent conflict between paragraphs (a) and (c)).

2) In the second sentence of paragraph (a), I would change "shall" to "does".

3) Comment [1] seems to say that the California Code of Judicial Ethics applies even if the judge is in another jurisdiction. Isn't the point that the lawyer's conduct should be governed by the rules applicable to judge or judicial officer handling the proceeding? If that were stated, the current citations could be included for informational purposes.

4) Comment [3] appears to add a disciplinary standard. You might consider changing this to say: "A juror who has been removed, discharged, or excused from a jury remains a juror for purposes of paragraph (e)." The alternative would be to add this thought to paragraph (e).

Subject to these few suggestions, I support your draft. Thank you.

April 27, 2016 Ham Email to 3-500 & 3-520 Drafting Teams, cc Difuntorum, Mohr, McCurdy & Lee:

Bob: why shouldn't the rule apply to employees of administrative agencies?

April 27, 2016 Langford Email to 3-500 & 3-520 Drafting Teams, cc Difuntorum, Mohr, McCurdy & Lee:

Isn't the PUC administrative? Karen Clopton is a judge and there are courtrooms. I agree with Jim; the issues are the same.

April 27, 2016 Kornberg Email to 3-500 & 3-520 Drafting Teams, cc Difuntorum, Mohr, McCurdy & Lee:

The point Bob makes about having a consistent definition of "Tribunal" throughout our rules is important, and that definition may require some further clarification to satisfy our goals in drawing a bright line on what is and is not a violation.

April 27, 2016 Ham Email to 3-500 & 3-520 Drafting Teams, cc Difuntorum, Mohr, McCurdy & Lee:

I agree. But what is the issue? Isn't the argument that all government decision makers and their staffs should not be allowed to receive gifts? Or, if gifts are acceptable, why are judges singled out?

I would like to understand Bob's concerns. Is the issue that we want to allow gifts to, for example, zoning administrators?

April 27, 2016 Kehr Email to 3-500 & 3-520 Drafting Teams, cc Difuntorum, Mohr, McCurdy & Lee:

Carol: The first Commission's definition of tribunal covered all courts, including Karen's.

Jim: My concern, first, is separation of powers. The Supreme Court certainly has the authority to make rules that govern the operation of courts, but the application of Rule 3.5 to legislative and administrative bodies would violate separation of powers principles. The direct answer to your question of whether we want to allow gifts to zoning administrators is that I don't believe that is our business. My answer to the implicit question of whether it would be a good idea to have this prohibition is that I don't know, and that I think it would be presumptuous of us to imagine that we can understand the proper functioning of countless agencies and departments whose existence we might not even be aware of. We can leave the operation of legislative and administrative agencies and department to those who understand them. One imagines that most if not all of them already have rules governing these issues, rules on which Rule 3.5 might conflict, and those that don't might have a reason for the omission.

April 28, 2016 Ham Email to 3-500 & 3-520 Drafting Teams, cc Difuntorum, Mohr, McCurdy & Lee:

It is ironic we are discussing separation of powers when the legislature seems to think it controls the State Bar of California. Perhaps some big mistakes were made years ago by tolerating legislative meddling with judicial authority and jurisdiction, but that is water over the dam now.

On the merits, I am not sure there is a separation of powers issue. Doesn't the rule regulate the conduct of lawyers? It seems to me that the rule can regulate lawyers giving gifts to certain persons without violating separation of powers.

Preventing corruption and dishonesty is paramount in protecting the public. Corruption and dishonesty are very serious problems. This rule is a step in the right direction.

I will need to think about these drafting points further, but I am not convinced at this time that there is any separation of powers issue.

April 28, 2016 OCTC Memo to RRC2:

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H. Rule 5-300 [Contact with Officials]

Rule 5-300 should be revised to expressly include administrative law judges and arbitrators.