

Rule 3.5 [5-300][5-320] Contact With Judges, Officials, Employees, 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 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) **[ALT1]** To the extent permitted by Rule 1.6 and Business and Professions Code § 6068(e), 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.
- (j) **[ALT2]** 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.

[4] **[ALT1]** 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). See also Rule 3.3(b).

[4] **[ALT2]** A lawyer’s duty under paragraph (j) may be subject to the lawyer’s duty not to reveal information protected by Rule 1.6 and Business and Professions Code § 6068(e).

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- (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
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 - (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.
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 - (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) [ALT1]¹ ~~Subject to~~ To the extent permitted by Rule 1.6 and Business and Professions Code § 6068(e), 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.
- (j) [ALT2]² 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

¹ During the 9/30/16 Commission meeting, it was suggested that the proposed introductory clause, “Subject to ... § 6068(e),” which was included in a response to a COPRAC comment, was too broad, and that any exception from complying with the paragraph should appear only in a Comment. Others pointed out that Comment [4] as drafted directly contradicted paragraph (j), so that comment could not stand alone. During its 10/5/16 teleconference, the drafting team considered various options and determined that the best approach would be to suggest two alternatives :

In ALT1, the introductory clause has been revised to substitute “To the extent permitted by” for “Subject to”. The substituted language is the same language as found in Rule 3.3(b), which the Commission approved. Rule 3.3(b) provides:

(b) A lawyer who represents a client in a proceeding before a tribunal* and who knows* that a person* intends to engage, is engaging or has engaged in criminal or fraudulent* conduct related to the proceeding shall take reasonable* remedial measures to the extent permitted by Rule 1.6 and Business and Professions Code § 6068(e).

Proponents of ALT1 take the position that the substituted clause is narrower than “subject to.” ALT1 Comment [4] clarifies the provision and, with their focus on the duty of confidentiality, the two provisions would be an appropriate check on a lawyer’s duty to disclose the described misconduct to the court. This position is similar to the previous decision the Commission made with respect to proposed Rule 3.3.

ALT2, on the other hand, would retain current rule 5-320(G), which has no exception for Rule 1.6 or § 6068(e). Further, proposed ALT2 Comment [4], rather than reinforcing and clarifying that there is a confidentiality exception to paragraph (j), will instead alert lawyers that their duties under paragraph (j) may be subject to the lawyer’s duties under Rule 1.6 and § 6068(e) without making the policy decision that those sections trump paragraph (j)’s duty to the court. The proponents of ALT2 question whether the Commission should take a position on which policy should prevail: confidentiality or candor to the court. Further, proposed ALT2 has the advantage of not altering the current rule language. The drafting team is not aware of any problems that have arisen under current rule 5-320(G).

Regardless of which alternative the Commission chooses, the drafting recommends that the conflict between a lawyer’s duties of confidentiality and candor to the court be highlighted for the Supreme Court.

² See note 1.

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] [ALT1]³ 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). See also Rule 3.3(b).

[4] [ALT2]⁴ A lawyer’s duty under paragraph (j) may be subject to the lawyer’s duty not to reveal information protected by Rule 1.6 and Business and Professions Code § 6068(e).

³ See note 1.

⁴ See note 1.

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Synopsis of Public Comments**

TOTAL = 9 **A = 0**
D = 2
M = 6
NI = 1

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
X-2016-42	Platten, Christopher (8-11-2016)	N	M	3.5	Modify the rule to provide that contributing funds to a labor organization that represents court personnel does not violate the rule.	The Commission did not make the requested modification. The policy of the proposed rule is to align the propriety of a lawyer's conduct with the propriety of a judicial officer's or judicial employee's conduct. Determining whether a lawyer can make a contribution to a labor organization that represents court employees requires the lawyer's analysis of applicable provisions of the Code of Judicial Ethics (http://www.courts.ca.gov/documents/ca_code_judicial_ethics.pdf) and the standards governing employees of a tribunal (http://www.courts.ca.gov/documents/creating_ethical_handout3.pdf). The intended parallelism of this regulatory policy would be undermined if the Commission resolved issues in Rule 3.5 in a manner that might be inconsistent with the application of those judicial provisions. Rather than revising the black letter text or providing a comment on this topic, the Commission

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

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						believes that appropriate guidance may be obtained from a bar association legal ethics committee or from the Committee on Judicial Ethics Opinions http://www.courts.ca.gov/documents/CJEO-Rules.pdf .
X-2016-43bh	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (9-8-16)	Y	M	(j)	Modify (j) to make clear that the requirement to reveal information to the court is subject to a lawyer's duty of confidentiality.	<p>[ALT1] The Commission has made a modification to paragraph (j) as suggested by the commenter and also included a clarifying comment. (See Cmt. [4].) Although the Commission believes that the issue posed might only arise in rare instances, a comparable clarification is present in proposed Rule 3.3 concerning the duty of candor to a tribunal (see proposed Rules 3.3(a)(3) and (b)).</p> <p>[ALT2] The Commission declines to make the suggested change to the text of the rule. The language is taken from current rule 5-320(G). The Commission is not aware of any problems that have arisen from the inclusion of that language without qualification. Nevertheless, the Commission has added a</p>

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						clarifying comment to alert lawyers to the possibility that their duty of confidentiality might be implicated in certain rare circumstances. (See Cmt. [4].)
X-2016-66j	San Diego County Bar Association (SDCBA) (Riley) (9-15-16)	Y	M	(b)(5)	Language of (b)(5) is not specific enough and should read "properly scheduled ex parte matters."	The Commission declines to make the suggested change. The Commission is not aware of any problems that have arisen from the inclusion of that language without further qualification in proposed paragraph (b)(5), which is taken verbatim from current rule 5-300(B)(5).
X-2016-76j	Los Angeles County Bar Association (LACBA) (Schmid) (9-21-16)	Y	M	(a), (g)(3), (g)(4)	<p>Paragraph (a) imposes an unreasonable burden on lawyers as it requires them to become familiar with a set of rules that don't apply to the majority of lawyers in the state. The exception contained in 5-300 should be retained.</p> <p>Paragraph (g)(3) & (4) should be clarified to not preclude a lawyer not involved in the case from which the juror was discharged from giving the juror advice.</p>	The Commission declines to make the suggested change. The language of current rule 5-300(A), which formerly conformed to the Code of Judicial Ethics, now conflicts with the Code, which stringently limits a judge's ability to accept gifts, even where there is a relationship between lawyer and judge "such that gifts are customarily given." To avoid similar conflicts between the Rules and Code in the future, the Commission determined that the most sensible approach was to refer lawyers to the applicable Judicial Codes.

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X-2016-83g	Garrett, Christopher (9-26-16)	N	D	1.0.1(m), 3.3, 3.4, 3.5	The definition of tribunal in proposed rule 1.0.1(m), in particular that part that includes “an administrative body acting in an adjudicative capacity and authorized to make a decision that can be binding on the parties involved,” would arguably include hearings, petitions and meetings with local governments, such as cities and counties. Rules 3.3, 3.4 and 3.5, which apply to proceedings before a tribunal, would threaten to a lawyer’s ability to advocate for the lawyer’s clients in these settings. Imported into these proceedings, the rules unnecessarily burdens one’s public petition or speech rights.	The commenter’s concern is not directed to the substance of proposed rule 3.5 (or rules 3.3 and 3.4), but rather to the definition of “tribunal” as proposed in Rule 1.0.1(m), which the commenter suggests would import rules 3.3 to 3.5 into proceedings before local governmental bodies. As such, no response concerning Rule 3.5 is necessary. Please see Commission’s response to the commenter concerning Rule 1.0.1.
X-2016-97d	Freedman, Daniel (9-27-16)		NI	1.0.1(m), 3.3, 3.4, 3.5	Although the rules [3.3, 3.4 and 3.5] are reasonable as applied to proceedings before the judiciary, they cannot reasonably be applied to administrative and adjudicatory proceedings held by local governmental bodies. However, by virtue of the proposed definition of “tribunal,” these rules will be applied to those local bodies.	The commenter’s concern is not directed to the substance of proposed rule 3.5 (or rules 3.3 and 3.4), but rather to the definition of “tribunal” as proposed in Rule 1.0.1(m), which the commenter suggests would import rules 3.3 to 3.5 into proceedings before local governmental bodies. As such, no response concerning Rule 3.5 is necessary. Please see Commission’s response to the commenter concerning Rule 1.0.1.

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X-2016-104am	Office of Chief Trial Counsel (OCTC) (Dresser) (9-27-16)		M	3.5, (g)(4)	<p>1. OCTC supports adoption of the rule.</p> <p>2. However, OCTC recommends that the rule also prohibit communications to a juror or prospective juror that are intended to prevent or encourage the juror from communicating with the other party or the court after their discharge. (<i>Lind v. Medevac</i> (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.</p>	<p>1. No response required.</p> <p>2. The Commission declines to make the suggested change, particularly given that a current rule provision, which has been carried forward in the proposed rule as paragraph (g)(4), has been held to apply to the situation described.</p>
X-2016-104am	Ivester, David (9-27-16)		M	1.0.1(m), 3.3, 3.4, 3.5	<p>Proposed Rule 3.5 refers to “tribunals,” but it is plain that the rule pertains to judicial proceedings. For instance, Proposed Rule 3.5(b), which prohibits ex parte communications with “a judge or judicial officer.” Proposed Rule 3.5(c) defines “judge or judicial officer” to refer to other court personnel. It does not use terminology that translates quasi-adjudicatory land use and similar types of proceedings.</p> <p>If Proposed Rule 3.5(b) is read to prohibit ex parte communications in “quasiadjudicative</p>	<p>The commenter’s concern is not directed to the substance of proposed rule 3.5 (or rules 3.3 and 3.4), but rather to the definition of “tribunal” as proposed in Rule 1.0.1(m), which the commenter suggests would import rules 3.3 to 3.5 into proceedings before local governmental bodies. As such, no response concerning Rule 3.5 is necessary. Please see Commission’s response to the commenter concerning Rule 1.0.1.</p>

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					proceedings,” the unintended and unwarranted result would be that a client and other non-lawyers could engage in legal ex parte communications in a quasi-adjudicatory proceeding, but lawyers, who clients hire to communicate with government on their behalf, could not.	
X-2016-104am	California Building Industry Association (Cammarota) (9-27-16)	Y	D	1.0.1(m), 3.3, 3.4, 3.5	<p>We draw your attention to the definition of “Tribunal” contained in Proposed Rule 1.01. The definition should make clear that “Tribunal” does not include public agencies acting in a legislative or quasi-adjudicatory capacity. When public agencies act on land use proposals they typically act in a quasi-adjudicator (or quasi-judicial) capacity.</p> <p>It may be appropriate to apply the Proposed Rules 3.3, 3.4, and 3.5 – which apply the definition of “Tribunal” – to courts, administrative law judges, arbitrators or even to a public agency that exclusively performs judicial functions. However, there are significant differences between judicial proceedings and quasi-judicial proceedings that militate extending those restrictions.</p>	The commenter’s concern is not directed to the substance of proposed rule 3.5 (or rules 3.3 and 3.4), but rather to the definition of “tribunal” as proposed in Rule 1.0.1(m), which the commenter suggests would import rules 3.3 to 3.5 into proceedings before local governmental bodies. As such, no response concerning Rule 3.5 is necessary. Please see Commission’s response to the commenter concerning Rule 1.0.1.