

**Rule 3.5 [5-300 5-320] Contact With Judges, Officials, Employees, and Jurors
(Commission's Proposed Rule Adopted on October 21–22, 2016 – Clean Version)**

- (a) Except as permitted by statute, an applicable code of judicial ethics or 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 or judicial officer running for election or confirmation pursuant to applicable law pertaining to such contributions.
- (b) Unless permitted 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; (iv) members of an administrative body acting in an adjudicative capacity; and (v) 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, or duress, or is intended to harass or embarrass the juror or to influence the juror's actions in future jury service.
- (h) A lawyer shall not directly or indirectly conduct an out of court investigation of a person* who is either a member of a venire or a juror in a manner likely to influence the state of mind of such person* in connection with present or future jury service.
- (i) All restrictions imposed by this Rule also apply to communications with, or investigations of, members of the family of a person* who is either a member of a venire or a juror.
- (j) A lawyer shall reveal promptly to the court improper conduct by a person* who is either a member of a venire or a juror, or by another toward a person* who is either a member of a venire or a juror or a member of his or her family, of which the lawyer has knowledge.
- (k) This Rule does not prohibit a lawyer from communicating with persons* who are members of a venire or jurors as a part of the official proceedings.
- (l) For purposes of this Rule, "juror" means any empaneled, discharged, or excused juror.

Comment

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

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

[3] It is improper for a lawyer to communicate with a juror who has been removed, discharged, or excused from an empaneled jury, regardless of whether notice is given to other counsel, until such time as the entire jury has been discharged from further service or unless the communication is part of the official proceedings of the case.

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Employees, and Jurors
Synopsis of Public Comments**

TOTAL = 2 **A = 0**
D = 0
M = 2
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
Y-2016-19	Association of California Water Agencies (Wiley) (01-09-17)	Y	M		<p>This rule should be amended to clarify potential uncertainty relating to how to comply with ethical obligations related to state proceedings. Specifically, representing clients before the State Water Resources Control Board where the Board concurrently holds proceedings which are quasi-adjudicatory and quasi-legislative.</p> <p>For example, presentations in the quasi-legislative Bay-Delta proceeding could be interpreted as “indirect” communications with Board members related to issues presented in the quasi-adjudicatory California WaterFix hearing.</p> <p>These issues are similar to concerns with the proposed rule’s effect on attorney contact with decision-makers in local proceedings.</p> <p>In the case of local agencies, commenter recommends that the rule be revised to state that the agencies’ decision-makers are not “administrative bodies” for</p>	<p>The Commission did not make the suggested revision. The Commission believes that the rules adopted and followed by local agencies regarding ex parte contacts with decision makers control and that Rule 3.5 rule does not supersede the ex parte contact rules adopted by those agencies.</p> <p>The Commission construes the example provided by the commenter as possibly indicating that an agency is uncertain about its own rules. If so, then stakeholders should seek to have the agency promulgate clear and understandable rules. A particular ambiguous agency rule cannot be fixed through an amendment to a lawyer disciplinary rule of general application.</p>

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

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					purposes of the rule. Instead, the State Bar should rely on the body of common law governing ex parte contact in such situations.	
Y-2016-21w	State Bar Office of Chief Trial Counsel (OCTC) (Dresser) (01-09-17)	Y	M		OCTC supports rule but recommends that the rule also bar communications with a juror or prospective juror that are intended to prevent or encourage the juror from communicating with the other party or the court after discharge.	The Commission has not made the suggested change, 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.