

**COMMISSION PROVISIONAL REPORT AND RECOMMENDATION:
RULE 3.5 [5-300 and 5-320]**

Commission Drafting Team Information

Rule 5-300

Lead Drafter: Dean Stout
Co-Drafters: James Ham, Lee Harris

Rule 5-320

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I. INTRODUCTION

Proposed Rule 3.5 addresses two topics, 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 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

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.

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 empanelled, discharged, or excused juror.

III. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: January 20 & 21, 2017

Action: Recommend Board Adoption of Proposed Rule 3.5

Vote: 15 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: March 10, 2017

Action: Board Adoption of Proposed Rule 3.5

Vote: X (yes) – X (no) – X (abstain)

IV. COMMISSION'S PROPOSED RULE 3.5 (CLEAN)

Rule 3.5 [5-300 5-320] Contact With Judges, Officials, Employees, and Jurors

- (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.

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

Rule 3.5 [5-300] Contact With Judges, Officials, Employees, and Jurors

- (Aa) ~~A member~~ 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 ~~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 does not prohibit a ~~member~~ 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.
- (Bb) ~~A member~~ 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 ~~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.
- (~~C~~c) As used in this ~~rule~~Rule, “judge” and “judicial officer” shall ~~include~~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.

~~Rule 5-320 Contact With Jurors~~

- (~~A~~d) 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.
- (~~B~~e) During trial a ~~member~~lawyer connected with the case shall not communicate directly or indirectly with any juror.
- (~~G~~f) 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.
- (~~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;
 - (~~D~~3) ~~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~~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.
- (~~E~~h) 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.

- (F*i*) 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.
- (G*j*) 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.
- (H*k*) 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.
- (I*l*) For purposes of this ~~rule~~Rule, “juror” means any ~~empanelled~~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.

VI. RULE HISTORY

A. Rule 5-300

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, as further amended, 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 can be 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.)

B. Rule 5-320

Current rule 5-320 originated in 1975 as former rule 7-106, which was derived from ABA Model Code of Professional Responsibility, DR 7-108 and 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 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.

VII. OCTC / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016**
(In response to 90-day public comment circulation):

1. OCTC supports this rule but 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. (*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. OCTC supports the Comments.

- **Gregory Dresser, Office of Chief Trial Counsel, 1/9/2017**
(In response to 45-day public comment circulation):

1. OCTC supports this rule but 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. (*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. OCTC supports the Comments.

OCTC submitted an identical comment in response to the 45-day public comment circulation. The Commission's response to OCTC remained the same. See 90-day and 45-day Public Comment Synopsis Tables, Attachments ____ and ____.

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

VIII. PUBLIC COMMENTS & PUBLIC HEARING TESTIMONY

Two comments, including the above comment from OCTC, were received. Both agreed, only if modified, with the proposed rule. A public comment synopsis table, with the Commission's responses to each comment, is provided at the end of this report.

IX. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

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

Rule 3.5. Impartiality and Decorum of the Tribunal.

A lawyer shall not:

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

A. ABA Model Rule Adoptions

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 September 15, 2016, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_5.pdf (Last visited January 30, 2017.)
- 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 from Model Rule 3.5.³

X. 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.

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.

- 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 more accurately describes the content of current rules 5-300 and 5-320 than do the current titles of those rules: “Contact With Judges, Officials, Employees, 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 other court officials or employees, and jurors. Moreover, the Model Rule title, which refers to “impartiality *and decorum*” of a tribunal, is inaccurate given the Commission’s 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 statutes, 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 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, State Bar Court judges, and members of an administrative body acting in an adjudicative capacity.
- 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 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

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.

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.

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 X.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.
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.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission’s reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

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

1. The changes to paragraph (a) are substantive. (See Section X.A.3, above.)
2. All other changes are non-substantive. (See Section X.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 X.A.7, above.)
6. All of the proposed comments are non-substantive changes. (See Sections X.A.8-10, above.)

E. Alternatives Considered:

None.

XI. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

That the Board of Trustees of the State Bar of California adopt proposed Rule 3.5 [5-300][5-320] in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 3.5 [5-310] [5-320] in the form attached to this Report and Recommendation.

**Proposed Rule 3.5 [5-300, 5-320] Contact with Judges, Officials,
Employees, and Jurors
Synopsis of Public Comments**

TOTAL = 4 **A = 0**
D = 0
M = 4
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

**Proposed Rule 3.5 [5-300, 5-320] Contact with Judges, Officials,
Employees, and Jurors
Synopsis of Public Comments**

TOTAL = 4 **A = 0**
D = 0
M = 4
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
					purposes of the rule. Instead, the State Bar should rely on the body of common law governing <i>ex parte</i> contact in such situations.	
Y-2016-30	California Special Districts Association (Hessabi) (01-23-17)	Y	M		<p>Agencies operating under the state Administrative Procedure Act currently have <i>ex parte</i> communication rules that prohibit anyone from having substantive contact with agency decision-makers while a proceeding is pending (See Gov. Code §§ 11430.10-11430.80; Cal. Code Regs., tit. 23, § 648, subd. (b).) Attorneys and all other participants in such administrative proceedings must obey those rules. Proposed Rule 3.5 should be amended to make clear that, if an attorney were to obey an agency's applicable <i>ex parte</i> rules, then that attorney would be in compliance with the Rules of Professional Conduct's requirements concerning contact with administrative decision-makers.</p> <p>We also recommend that the State Bar revise proposed Rule 3.5 to state that local agencies' decision-makers are not "administrative bodies" within the scope of the rule. The variety of</p>	

**Proposed Rule 3.5 [5-300, 5-320] Contact with Judges, Officials,
Employees, and Jurors
Synopsis of Public Comments**

TOTAL = 4 **A = 0**
D = 0
M = 4
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
					local decision-making bodies, and forums in which they consider matters, is too broad to state [in] a single rule to establish an ethical rule to cover attorneys' interactions with all of them. Given the body of statutes and common law governing all parties' <i>ex parte</i> contacts in such situations, we recommend that the State Bar rely on that law to govern attorneys' interactions with those decision-makers.	
Y-2016-29	League of California Cities (Leary) (01-19-17)	Y	M		We join the comments to proposed Rule 3.5 submitted by the Association of California Water Agencies.	See response to the Association of California Water Agencies, provided above.
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)(3), has been held to apply to the situation described.

