



# The State Bar of California

## **Rule 3.5 Contact with Judges, Officials, Employees, and Jurors (Rule Approved by the Supreme Court, Effective November 1, 2018)**

- (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 rule or 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;
  - (2) with the consent of all other counsel and any unrepresented parties in the matter;
  - (3) in the presence of all other counsel and any unrepresented parties in the matter;
  - (4) in writing\* with a copy thereof furnished to all other counsel and any unrepresented parties 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; or
  - (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 United States Code section 7353 (Gifts to Federal employees). The statutes applicable to adjudicatory proceedings of state agencies generally are contained in the Administrative Procedure Act (Gov. Code, § 11340 et seq.; see Gov. Code, § 11370 [listing statutes with the act].) State and local agencies also may adopt their own regulations and rules governing communications with members or employees of a tribunal.\*

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

**NEW RULE OF PROFESSIONAL CONDUCT 3.5**  
**(Former Rules 5-300 and 5-320)**  
**Contact With Judges, Officials, Employees and Jurors**

**EXECUTIVE SUMMARY**

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) evaluated current rules 5-300 (Contact With Officials) and 5-320 (Contact With Jurors) in accordance with the Commission Charter. In addition, the Commission considered the national standard of ABA Model Rule 3.5 (Impartiality and Decorum of the Tribunal). The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules. The result of the Commission’s evaluation is proposed Rule 3.5 (Contact With Judges, Officials, Employees and Jurors).

**Rule As Issued For 90-day Public Comment**

Proposed rule 3.5 is one of ten rules in Chapter 3 of the proposed Rules of Professional Conduct. The general content, framework and numbering scheme of this subset of the Rules is based on Chapter 3 of the ABA Model Rules, which is entitled “Advocate”. Model Rules Chapter 3 corresponds to Chapter 5 of the current California Rules, entitled “Advocacy and Representation.” The following table shows the Chapter 3 Model Rules and the corresponding California Rules:

<b>Model Rule</b>	<b>California Rule</b>
3.1 (Meritorious Claims & Contentions)	3-200 (Prohibited Objectives of Employment)
3.2 (Expediting Litigation)	No Cal. Rule counterpart.
3.3 (Candor Toward The Tribunal)	5-200 (Trial Conduct)
3.4 (Fairness to Opposing Party & Counsel)	5-220 (Suppression of Evidence) 5-310 (Prohibited Contact with Witnesses) 5-200(E)
3.5 (Impartiality and Decorum of Tribunal)	5-300 (Contact with Officials) 5-320 (Contact with Jurors)
3.6 (Trial Publicity)	5-120 (Trial Publicity)
3.7 (Lawyer As Witness)	5-210 (Member As Witness)
3.8 (Special Responsibilities of a Prosecutor)	5-110 (Performing the Duty of Member in Government Service) 5-220 (Suppression of Evidence) 5-120 (Trial Publicity)
3.9 (Advocate In Non-adjudicative Proceedings)	No Cal. Rule counterpart.
3.10 (Threatening Criminal, Administrative, or Disciplinary Charges)	5-100 (Threatening Criminal, Administrative, or Disciplinary Charges)

The Commission is recommending the adoption of the Model Rule framework and numbering for this series of rules, but for many of the rules recommends retaining the language of the California Rules, which is more specific and precise, and accordingly more appropriate for a set of disciplinary rules.

Proposed Rule 3.5 addresses two topics, (i) contact with judicial officials and (ii) contact with jurors, topics that are addressed in two separate rules in the current California Rules of

Professional Conduct, rules 5-300 (judicial officers) and 5-320 (jurors). The ABA Model Rules address those two 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 separately assigned. However, acknowledging the Commission's decision early in the rules revision process to recommend adoption of the Model Rules' format and numbering, the Commission determined that the two topics could be combined in a single rule numbered 3.5. Further, the Commission 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, proposed rule 3.5 largely carries forward, without substantive change, the language of current California rules 3-500 and 3-520:

- (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.

There are two principal reasons for this recommendation. First, 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. Second, defining what conduct is or is not acceptable 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.

The **title of the rule** was also revised by in part combining the titles of current rules 5-300 and 5-320, and adding references to "judges" and "employees," to more accurately describe the content of the rule, which, as a disciplinary rule, regulates the extent to which lawyers may engage in communicating with judges and jurors.

### **Text of Rule 3.5.**

Paragraph (a) carries forward current rule 5-300(A), but the first sentence has been revised to recognize the various codes or standards of conduct or ethics that regulate the conduct of court personnel and point lawyers to the different sources of law besides the proposed rule that regulate their conduct in giving gifts to judges or court personnel. The second sentence remains unchanged.

Paragraph (b) carries forward rule 5-300(B), amended to recognize exceptions to its application. It specifies circumstances when ex parte communications with judges, judicial officers and personnel, and jurors are prohibited. It is preferable to the Model Rule, which simply provides for a blanket prohibition "unless authorized to do so by law or court order."

Paragraph (c) revises the definition of "judge" and "judicial officer" in rule 5-300(C) to include administrative law judges, neutral arbitrators, and State Bar Court judges. The change clarifies the rule's application to those additional neutral decision-makers.

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"). As noted, these provisions provide more specificity regarding prohibited conduct in relation to jurors, which should enhance compliance and facilitate enforcement. Paragraph (k) recognizes that a lawyer can address a juror as part of the proceedings and paragraph (l) defines "juror" to mean "any empaneled, discharged, or excused juror."

Paragraph (g) supplements current rule 5-320(D) with the specific prohibitions set forth in Model Rule 3.5(c). The Commission determined that 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.

There are three comments to the proposed rule, each of which provides interpretative guidance or clarifies how the proposed rule, which is intended to govern a broad array of situations, should be applied. Comment [1] provides examples of codes or standards of conduct referred to in paragraph (a). It clarifies what is intended by the clause "applicable code of judicial ethics, code of judicial conduct, or standards governing" court employees in paragraph (a) by providing examples of such codes or standards. Comment [2] refers to CCP § 206, which provides specific guidance on what communications with jurors are permitted. Comment [3] clarifies when a lawyer may communicate with a discharged juror. It provides an important clarification that even after a particular juror is discharged, a lawyer may not communicate with the juror until the entire jury is discharged.

In addition to the recommended provisions, the Commission declined to recommend Model Rule 3.4(d), which prohibits a lawyer from engaging "in conduct intended to disrupt a tribunal." The Commission determined it is unnecessary in light of the Commission's recommended adoption of Model Rule 8.4(d) as proposed Rule 8.4(d) (providing it is misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice")

Non-substantive aspects of the proposed rule include rule numbering to track the Commission's general proposal to use the Model Rules' numbering system and the substitution of the term "lawyer" for "member."

### **National Background – Adoption of Model Rule 3.5**

Every jurisdiction except California has adopted some version of Model Rule 3.5. Fifteen jurisdictions have adopted Model Rule 3.5 verbatim. Twenty-one jurisdictions have adopted a slightly modified version of Model Rule 3.5. Fourteen jurisdictions have adopted a version of the rule that diverges substantially from Model Rule 3.5.

### **Post Public Comment Revisions**

After consideration of comments received in response to the initial 90-day public comment period, the Commission made several amendments to the text of proposed Rule 3.5.

In paragraph (a), the Commission added the term "statute" in the first sentence and the term "judicial officer" in the second sentence.

In paragraph (b), the term "permitted" was substituted for "authorized."

In paragraph (c), the following clause was added to the definition of "judge" or "judicial officer": "(iv) members of an administrative body acting in an adjudicative capacity."

In paragraph (g), the Commission merged subparagraphs (g)(3) and (4) and replaced the draft language with language from current rule 5-320(D).

With these changes, the Board authorized an additional 45-day public comment period on the revised proposed rule.

## **Final Commission Action on the Proposed Rule Following 45-Day Public Comment Period**

After consideration of comments received in response to the additional 45-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

### **Board's Consideration of the Commission's Proposed Rule on March 9, 2017**

At its meeting on March 9, 2017, the Board revised the Commission's final version of the proposed rule. Paragraph (b) was revised as follows (underscore indicates additions):

- (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 and any unrepresented parties in the matter; or
  - (3) in the presence of all other counsel and any unrepresented parties in the matter; or
  - (4) in writing\* with a copy thereof furnished to all other counsel and any unrepresented parties in the matter; or
  - (5) in ex parte matters.

The added explicit reference to unrepresented parties in the above language was made as a non-substantive clarifying change. In making this revision, the Board considered one of several similar examples from the California Rules of Court that clarify the use of "counsel" by referring to "an unrepresented party." (See, e.g., rule 8.454 of the Rules of Court.)

The Board also discussed but did not adopt three possible alternatives for revising the application of paragraph (b) to an administrative body.<sup>1</sup>

1. Revise paragraph (b) as follows:

- (b) Unless ~~permitted to do so~~ prohibited 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 may 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: . . . .

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<sup>1</sup> After the Board meeting, Board members Michael G. Colantuono and Sean M. SeLegue submitted a March 17, 2017 memorandum identifying issues of concern related to the alternatives discussed by the Board. The full text of this Board member memorandum follows this executive summary.

2. Revise paragraph (b) as follows:

(b) Unless permitted to do so by law, an applicable code of judicial ethics or code of judicial conduct, a ruling of a tribunal,\* practice and custom of the 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: . . . .

3. Revise paragraph (c) as follows:

(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 (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.

Each of the above modifications to the Commission’s final recommended rule were discussed as possible alternative responses to written public comments objecting to the applicability of paragraph (b)’s ex parte contact prohibition to an administrative body acting in an adjudicative capacity that does not have express rules governing ex parte contacts. Such comments included comments submitted by the Association of California Water Agencies and the California Special Districts Association. It was observed that although major administrative bodies (for example, the Workers’ Compensation Appeals Board), have rules governing ex parte contact with officials (such as the standards imposed by Article 7 of the California Administrative Procedures Act), there are many bodies that do not have formal rules governing such conduct. It was observed that the applicability of the prohibition in those situations might unfairly burden parties represented by counsel because parties not represented by counsel would not be restricted by rule 3.5 and would have the advantage of access to administrative officials through ex parte contacts. In addition, it was noted that a fourth alternative, which would involve a change to the definition of “tribunal” in proposed rule 1.0.1(m), would be more sweeping because of the effect it would also have on lawyer duties under other rules such as proposed Rule 3.3 (Candor Toward The Tribunal) and 3.4 (Fairness to Opposing Party and Counsel).

The Board adopted proposed rule 3.5 at its March 9, 2017 meeting.

### **Supreme Court Action (May 10, 2018)**

The Supreme Court approved the rule as modified by the Court to be effective November 1, 2018. A stylistic change was made in the title of the rule. In the introductory phrase of paragraph (b), the terms “rule or” were added before “ruling.” At the end of subparagraphs (b)(1) through (b)(3), the word “or” was deleted. At the end of subparagraph (g)(2), the word “or” was added.

At the end of Comment [1], the following two new sentences were added: “The statutes applicable to adjudicatory proceedings of state agencies generally are contained in the Administrative Procedure Act (Gov. Code, § 11340 et seq.; see Gov. Code, § 11370 [listing statutes with the act].) State and local agencies also may adopt their own regulations and rules governing communications with members or employees of a tribunal.\*”



**Rule ~~5-300~~3.5 Contact with Judges, Officials, Employees, and Jurors  
(Redline Comparison to the California Rule Operative Until October 31, 2018)**

- (A~~a~~) ~~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.
- (B~~b~~) ~~A member~~Unless permitted to do so by law, an applicable code of judicial ethics or code of judicial conduct, a rule or 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~~and any unrepresented parties in the matter; ~~or~~
  - (3) ~~In~~in the presence of all other counsel ~~in such~~and any unrepresented parties in the matter; ~~or~~
  - (4) ~~In~~in writing\* with a copy thereof furnished to ~~such~~all other counsel and any unrepresented parties in the matter; or
  - (5) ~~In~~in ex parte matters.
- (C~~c~~) As used in this 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.

- (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.
- (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; or
  - (D3) ~~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.
- (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 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 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.
- (Hl) For purposes of this 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 United States Code section 7353 (Gifts to Federal employees). The statutes applicable to adjudicatory proceedings of state agencies generally are contained in the Administrative Procedure Act (Gov. Code, § 11340 et seq.; see Gov. Code, § 11370 [listing statutes with the act].) State and local agencies also may adopt their own regulations and rules governing communications with members or employees of a tribunal.\*

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