

**Rule 3.5 Contact With Judges, Officials, Employees, and Jurors**  
**(Proposed Rule Adopted by the Board on March 9, 2017)**

- (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 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.
- (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.

**PROPOSED RULE OF PROFESSIONAL CONDUCT 3.5  
(Current 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 in context within the Rules of Professional Conduct.** Proposed rule 3.5 is one of nine 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.

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.

**Recommendation that proposed Rule 3.5 be circulated for public comment.** 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 Modifications to 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:

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: . . . .

2. Revise paragraph (c) as follows:

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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.

- (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).



## **COMMISSION 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**

**Lead Drafter:** Howard Kornberg  
**Co-Drafters:** Daniel Eaton, Carol Langford

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### **I. INTRODUCTION**

Proposed Rule 3.5 addresses 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 (Contact With Officials) and 5-320 (Contact With 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, 2017

Action: Recommend Board Adoption of Proposed Rule 3.5

Vote: 15 (yes) – 0 (no) – 0 (abstain)

#### **Board:**

Date of Vote: March 9, 2017

Action: Board Adoption of Proposed Rule 3.5

Vote: 11 (yes) – 0 (no) – 0 (abstain)

### **IV. COMMISSION'S PROPOSED RULE (CLEAN)<sup>1</sup>**

#### **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

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<sup>1</sup> At its March 9, 2017 meeting, the Board revised the Commission's final version of this proposed rule. The version of paragraph (b) that the Commission submitted to the Board was modified by the Board to clarify that the reference to "counsel" includes any "unrepresented parties in the matter." These changes are implemented in this clean version of the proposed rule and this report has been adapted to account for these changes. Refer to the proposed rule 3.5 executive summary for more information about the changes made by the Board.

In addition, the rule 3.5 executive summary addresses alternatives considered by not adopted by the Board that relate to a memorandum identifying issues of concern dated March 17, 2017 submitted by Board members Michael G. Colantuono and Sean M. SeLegue. This memorandum is provided with the rule 3.5 executive summary.

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 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.
- (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 (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 and any unrepresented parties in ~~such~~the matter; or
  - (3) ~~In~~in the presence of all other counsel and any unrepresented parties in ~~such~~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.
- (Cc) 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~~**

- (Ad) 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.
- (Be) During trial a ~~member~~lawyer connected with the case shall not communicate directly or indirectly with any juror.
- (Cf) 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;
  - (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.
- (I) 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 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 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 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 ~~7-106~~ 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. OFFICE OF CHIEF TRIAL COUNSEL / 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.

Commission Response: 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.

2. OCTC supports the Comments.

Commission Response: No response required.

- **Gregory Dresser, Office of Chief Trial Counsel, 1/9/2017**

**(In response to 45-day public comment circulation):**

For the 45-day public comment version of the rule, OCTC re-submitted substantially the same comments as on the 90-day public comment version of the rule and the Commission's responses to OCTC remained the same.

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

## VIII. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & 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.

During the 90-day public comment period, nine public comments were received. Two comments disagreed, six comments agreed only if modified, and one comment did not indicate a position. During the 45-day public comment period, two public comments were received. Both comments agreed with the proposed Rule. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

## IX. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

### A. Related California Law

#### 1. California law related to current rule 5-300.

##### *Gifts to Judges.*

With regard to 5-300(A), California Code of Civil Procedure Section 170.9 and California Code of Judicial Ethics, Canon 4D(5) govern acceptance of gifts. (See: [California Judges Association Judicial Ethics Committee Opinion 44 \(1995\)](#) re Limitations on Accepting Gifts Under the Code of Judicial Ethics and CCP Sec. 170.9; [Committee on Judicial Ethics Formal Opinion 2014-005 \(2014\)](#) Accepting Gifts Of Little Or Nominal Value Under The Ordinary Social Hospitality Exception; and [Committee on Codes of Conduct Advisory Opinion No. 98](#) Gifts to Newly Appointed Judges, United States Courts, Guide to Judicial Policy, Vol. 2B, Ch. 2, page 98-1.)

##### *Ex Parte Communications.*

Varied authorities overlap with the ethical conduct governed by 5-300(B). Pursuant to the California Code of Judicial Ethics, a judge may communicate ex parte only in certain enumerated instances. (See Cal. Code Jud. Ethics, Canon 3B(7).) Moreover, case law holds that ex parte communications between attorney and judge are severely disfavored. (*Haluck v. Ricoh Electronics, Inc.* (2007) 151 Cal.App.4th 994, 1002 [60 Cal.Rptr.3d 542] ["Generally ex parte contacts between a judge and counsel are improper, and if not unjust in actuality, give the appearance of injustice."], citing *In re Hancock* (1977) 67 Cal.App.3d 943, 947-949 [136 Cal.Rptr. 901].) Ex parte communications with a judge are also specifically governed by separate authority in the criminal context. (See Penal Code sections 1203,1204; *In re Hancock* (1977) 67 Cal.App.3d 943, 947-949 [136 Cal.Rptr. 901]; *In re Calhoun* (1976) 17 Cal.3d 75, 83-85 [130 Cal.Rptr. 139].)

## 2. California law related to current rule 5-300.

### *California Code of Civil Procedure*

Pursuant to California Code of Civil Procedure §206, jurors have a right to not discuss the deliberations or verdict in a criminal matter. The judge must explain this statutory right to the jury before discharging them from the case. An attorney in the case must inform jurors of the statutory right prior to any discussion regarding jury deliberations or the verdict.

### *Related California law.*

Attorneys are permitted to communicate with jurors regarding a civil case after the conclusion of the trial, and may contact the jurors to determine whether there is a basis for challenging the jury verdict (See *Lind v. Medevac, Inc.* (1990) 219 Cal.App.3d 516).

## **B. 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](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_5.pdf) (Last visited February 7, 2017.)
- Fifteen jurisdictions have adopted Model Rule 3.5 verbatim.<sup>2</sup> Twenty-one jurisdictions have adopted a slightly modified version of Model Rule 3.5.<sup>3</sup> Fifteen jurisdictions have adopted a version of the rule that is substantially different from Model Rule 3.5.<sup>4</sup>

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<sup>2</sup> The fifteen jurisdictions are: Arizona, Arkansas, Idaho, Illinois, Indiana, Iowa, Louisiana, Missouri, New Hampshire, New Mexico, Oklahoma, Pennsylvania, Rhode Island, Washington, and Wyoming.

<sup>3</sup> 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.

<sup>4</sup> The fifteen jurisdictions are: Alabama, Alaska, California, Florida, Georgia, Hawaii, Kansas, Maryland, Minnesota, New York, North Carolina, Ohio, Texas, Vermont, and Virginia.

**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.
  - 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 Commission that these detailed provisions are more appropriate for a disciplinary rule than is the 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 Model Rule 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 Commission 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 Commission recommends including language from the Commission’s definition of “tribunal”<sup>5</sup> to more precisely identify the intended scope of the

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<sup>5</sup> 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.

Rule rather than force a lawyer to import that language into the definition to appreciate that scope.<sup>6</sup>

- Cons: It is unnecessary to make the change because this Commission has adopted a definition of “tribunal” that incorporates nearly all of the language 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 (l), with only minor changes to conform to this Commission’s style and formatting (e.g., “lawyer” for “member”).
- Pros: See General recommendation, at Section X.A.1, above.
  - Cons: None identified.
7. In paragraph (g), supplement current rule 5-320(D) with the specific prohibitions set forth in Model Rule 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.

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<sup>6</sup> 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.

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 proposed 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 (and any unrepresented parties) 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:**

Refer to the rule 3.5 executive summary and the provided March 17, 2017 memorandum from Board members Michael G. Colantuono and Sean M. SeLegue. At its March 9, 2017 meeting, the Board considered but did not adopt alternatives for revising the Commission's proposed.

### **XI. RECOMMENDATION AND PROPOSED BOARD RESOLUTION**

#### **Recommendation:**

The Commission recommends adoption of 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.