

Rule 3.5 Impartiality and Decorum of the Tribunal. [Sorted by Commenter]						TOTAL = <u>3</u> Agree = <u>1</u> Disagree = <u> </u> Modify = <u>2</u> NI = <u> </u>
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
2	Office of Chief Trial Counsel ("OCTC")	M	Yes		<p>1. OCTC recommends that subparagraph (g) also include that a lawyer shall not communicate to the juror or prospective jurors after discharge when the communication is intended to prevent the juror from communicating with the other party or the court. (<i>Lind v. Medevac</i> (1990) 219 Cal.app.3d 516.) While this has been interpreted under what is now subparagraph (g)(4), it would be clearer and more enforceable if it was its own prohibition.</p> <p>2. Comment [4] seems more appropriate for a treatise, law review article, or ethics opinion.</p>	<p>1. The Commission disagrees that a specific prohibition is necessary or desired, given that paragraph (g)(4) has already been found to apply in the described circumstances.</p> <p>2. The Commission disagrees with the commenter's assessment and has concluded that Comment [4] provides clarification of the black letter and guidance to lawyers on the duration of the described duty.</p>
1	San Diego County Bar Association	M	Yes		Delete requirement that lawyers be familiar with the Code of Judicial Ethics.	Commission did not make the requested revision. The clause comes from MR 3.5, cmt. [1]. The clause is aspirational ("should") rather than mandatory ("must"), so it would not have disciplinary consequences. Moreover, it is in the comment to the Rule, not the Rule itself. It does not "impose" a requirement on lawyers. Finally, an advocate who regularly appears before tribunals should be familiar with the Code of Judicial Ethics.

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

**Rule 3.5 Impartiality and Decorum of the Tribunal.
[Sorted by Commenter]**

TOTAL = 3 Agree = 1
 Disagree =
 Modify = 2
 NI =

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
3	State Bar Committee on Professional Responsibility and Conduct (COPRAC)	A	Y		Supports rule as drafted.	No response necessary.

Rule 3.5 Impartiality and Decorum of the Tribunal
(Commission's Proposed Rule – Clean Version)

- (a) Except as permitted by the Code of Judicial Ethics, 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 lawyer and the judge, official, or employee is such that gifts are customarily given and exchanged. This Rule shall not prohibit a lawyer from contributing to the campaign fund of a judge running for election or confirmation pursuant to applicable law pertaining to such contributions.
- (b) Unless authorized to do so by law, the Code of Judicial Ethics, 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;
 - (2) with the consent of all other counsel in the matter;
 - (3) in the presence of all other counsel in the matter;
 - (4) in writing with a copy thereof furnished promptly to all other counsel; or
 - (5) in ex parte matters as permitted by law.
- (c) As used in this Rule, “judge” and “judicial officer” shall include law clerks, research attorneys, other court personnel who participate in the decision making process, and neutral arbitrators.
- (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 a trial a lawyer connected with the case shall not communicate directly or indirectly with any juror.
- (f) During a 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) A lawyer shall not communicate directly or indirectly with a juror or prospective juror after discharge of the jury if:
 - (1) the communication is prohibited by law or court order;
 - (2) the juror has made known to the lawyer a desire not to communicate;
 - (3) the communication involves misrepresentation, coercion, duress or harassment; or
 - (4) the communication is intended to influence the juror’s actions in future jury service.
- (h) A lawyer shall not directly or indirectly conduct an out of court investigation of a person who is either a member of a venire or a juror in a manner likely to influence the state of mind of such person in connection with present or future jury service.

- (i) All restrictions imposed by this Rule also apply to communications with, or investigations of, members of the family of a person who is either a member of a venire or a juror.
- (j) 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 the purposes of this Rule, “juror” means any empaneled, discharged, removed, or excused juror.

COMMENT

- [1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the Code of Judicial Ethics and Code of Civil Procedure section 170.9, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.
- [2] During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters or jurors, unless authorized to do so by law or court order, but a lawyer who is serving as a temporary judge, referee or court-appointed arbitrator under Rule 2.4.1 may do so in the performance of that service. “Promptly” as used in paragraph (b)(4) of this Rule means that a copy of a communication to a judge should be

sent to opposing counsel by means likely to result in receipt of the copy of the communication substantially simultaneously to its receipt by the judge.

- [3] For guidance on permissible communications with a juror or prospective juror after discharge of the jury, see also Code of Civil Procedure, section 206.

- [4] 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.