

McCurdy, Lauren

From: KEVINMOHR04@sprintpcs.com on behalf of Kevin Mohr [kemohr@charter.net]
Sent: Wednesday, October 07, 2009 3:45 PM
To: McCurdy, Lauren; Difuntorum, Randall; Lee, Mimi
Cc: Kevin Mohr G
Subject: RRC - 3.5 [5-300, 5-320] - Ill.OO - October 16, 2009 Meeting Materials
Attachments: RRC - 3-5 [5-300-320] - Dashboard - ADOPT - DFT2 (10-07-09)KEM.doc; RRC - 3-5 [5-300-320] - Rule - DFT5 (10-07-09) - CLEAN.doc; RRC - 3-5 [5-300-320] - Compare - Rule & Comment Explanation - DFT2.1 (10-07-09)KEM-PV.doc; RRC - 3-5 [5-300-320] - Public Comment Chart - By Commenter - DFT2 (10-06-09)KEM.doc; RRC - 3-5 [5-300-320] - Compare - Introduction - DFT3.1 (10-07-09)ERP-KEM-PV.doc

Greetings Lauren:

On behalf of the drafters, I've attached the following for the referenced agenda item, which should be circulated to the Commission per Harry's request:

1. Dashboard, Draft 2 (10/7/09)KEM;
2. Introduction, Draft 3.1 (10/7/09)ERP-KEM-PV
3. Rule & Comment Chart, Draft 2 (10/7/09)KEM-PV
4. Public Comment Chart, Draft 2 (10/6/09)KEM.

Note to Commission: The Drafters have recommended two revisions to the Rule itself, one in Comment [1] and the other in Comment [2]. Please see text associated with footnotes 1 and 2 to the Rule & Comment Chart.

Finally, I've also attached a clean version of new draft 5 (10/7/09), which reflects the proposed changes referenced in the foregoing note.

Please let me know if you have any questions. Thanks,

Kevin

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Kevin E. Mohr
Professor
Western State University College of Law
1111 N. State College Blvd.
Fullerton, CA 92831
714-459-1147
714-738-1000 x1147
714-525-2786 (FAX)

kevin_e_mohr@compuserve.com
kevinm@wsulaw.edu

Proposed Rule 3.5 [5-300][5-320] “Impartiality and Decorum of the Tribunal”

(Draft # 5, 10/7/09)

Summary: Proposed Rule 3.5 concerns the same general subject matter as Model Rule 3.5 but carries forward the specificity of current California Rules 5-300 [Contact with Officials] and 5-320 [Contact with Jurors]. By including specific guidance in the proposed Rule on conduct is prohibited in interacting with the tribunal and jurors, proposed Rule 3.5 better serves these Rules’ purpose of protecting the integrity of the legal system and promoting the administration of justice.

Comparison with ABA Counterpart	
Rule	Comment
<input type="checkbox"/> ABA Model Rule substantially adopted <input checked="" type="checkbox"/> ABA Model Rule substantially rejected <input checked="" type="checkbox"/> Some material additions to ABA Model Rule <input checked="" type="checkbox"/> Some material deletions from ABA Model Rule <input type="checkbox"/> No ABA Model Rule counterpart	<input type="checkbox"/> ABA Model Rule substantially adopted <input type="checkbox"/> ABA Model Rule substantially rejected <input checked="" type="checkbox"/> Some material additions to ABA Model Rule <input checked="" type="checkbox"/> Some material deletions from ABA Model Rule <input type="checkbox"/> No ABA Model Rule counterpart

Primary Factors Considered

Existing California Law

Rules	RPC 5-300, 5-320.
Statute	Cal. Code Civ. Proc. § 206 (Communications with Jurors).
Case law	

State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(14 Members Total – votes recorded may be less than 14 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Public Comment Distribution

Vote (see tally below)

Favor Rule as Recommended for Adoption _____

Opposed Rule as Recommended for Adoption _____

Abstain _____

Approved on Consent Calendar

Approved by consensus

Minority/Position Included on Model Rule Comparison Chart: Yes No

Stakeholders and Level of Controversy

No Known Stakeholders

The Following Stakeholders Are Known:

Very Controversial – Explanation:

Moderately Controversial – Explanation:

Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 3.5*: Impartiality and Decorum of the Tribunal

October 2009

(Draft rule following consideration of public comment)

INTRODUCTION:

1. Proposed Rule 3.5 concerns the same general subject matter as Model Rule 3.5 but carries forward the specificity of current California Rules 5-300 [Contact with Officials] and 5-320 [Contact with Jurors]. Rule 3.5(a)-(c) continue policies of prohibiting (1) the giving or loaning anything of value to a judge, judicial officer, or employee and (2) *ex parte* communications concerning the merits of a matter pending before a tribunal with judges, judicial officers and other judicial personnel, with noted exceptions. Proposed Rule 3.5(d) – (l) continue policies of prohibiting certain communications with jurors, members of jury venires and their families, as well as regulating communications with discharged jurors. The Commission decided not to recommend adoption of Model Rule 3.5 due to its overbreadth and lack of specificity. The Commission believes that proposed Rule 3.5 better serves these Rules’ purpose of protecting the integrity of the legal system and promoting the administration of justice by specifying the conduct that is prohibited.

2. The policies underlying proposed Rule 3.5 and Model Rule 3.5 are substantially similar.

a. Model Rule 3.5(a) prohibits lawyers from seeking to influence judges, officials and jurors by means prohibited by law. Proposed Rule 3.5(a) prohibits lawyers from giving or lending anything of value to a judge, judicial officer, or employee. By prohibiting acts that historically have resulted in influence peddling, the proposed Rule (1) clarifies, by creating a “bright line” precisely what “seeking to influence” means; and (2) clearly defines what is not prohibited. Proposed Rule 5.3(d) – (l) prevents lawyers from unduly influencing jurors by prohibiting outright certain communications and contacts, while regulating others.

* Proposed Rule 3.5, Draft 5 (10/7/09).

INTRODUCTION (Continued):

b. Model Rule 3.5(b) prohibits all *ex parte* contact with judges, officials and jurors during a proceeding unless authorized to do so by law or court order. Proposed rule 3.5 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.

Defining what conduct is acceptable and what is not better aids judicial personnel, lawyers and jurors from engaging in conduct that may be well meaning, but which reflects adversely upon the fairness of the judicial process, thereby ultimately providing better public protection.

State Variations: Many jurisdictions have revised ABA Model Rule 3.5 to add specificity; some, like California, have opted to retain more specific language similar to current rules 5-300 and 5-320. (See State Variations Chart.)

<p style="text-align: center;"><u>ABA Model Rule</u></p> <p style="text-align: center;">Rule 3.5 Impartiality and Decorum of the Tribunal</p>	<p style="text-align: center;"><u>Commission's Proposed Rule*</u></p> <p style="text-align: center;">Rule 3.5 Impartiality and Decorum of the Tribunal</p>	<p style="text-align: center;"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>A lawyer shall not:</p> <p>(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;</p>	<p>A lawyer shall not:</p> <p>(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;</p>	<p>See Explanation of Changes for proposed paragraph (a), below.</p>
	<p>(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.</p>	<p>See Introduction. Paragraph (a) carries forward nearly verbatim the provisions of current rule 5-300(A) (“lawyer” has been substituted for “member”). The Commission determined that carrying forward the specificity of the provision in current California rules 5-300 and 5-320 would avoid challenges of overbreadth and vagueness and better serve these Rules’ purpose of protecting the integrity of the legal system and promoting the administration of justice by specifying the conduct that is prohibited.</p>
<p>(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;</p>	<p>(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;</p>	<p>See Explanation of Changes for paragraph (a).</p>

* Proposed Rule 3.5, Draft 5 (10/7/09). Redline/strikeout showing changes to the ABA Model Rule.

<p align="center"><u>ABA Model Rule</u> Rule 3.5 Impartiality and Decorum of the Tribunal</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 3.5 Impartiality and Decorum of the Tribunal</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>(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:</p> <ol style="list-style-type: none"> (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. 	<p>See Explanation of Changes for paragraph (a). Paragraph (b) carries forward the substance of current rule 5-300(B). The clause, "Unless authorized to do so by law, the Code of Judicial Ethics, a ruling of a tribunal, or a court order," has been added to track the "unless authorized by to do so by law or court order" in Model Rule 3.5(b).</p>

<p style="text-align: center;"><u>ABA Model Rule</u></p> <p style="text-align: center;">Rule 3.5 Impartiality and Decorum of the Tribunal</p>	<p style="text-align: center;"><u>Commission's Proposed Rule*</u></p> <p style="text-align: center;">Rule 3.5 Impartiality and Decorum of the Tribunal</p>	<p style="text-align: center;"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>(c) As used in this Rule, "judge" and "judicial officer" shall include law clerks, research attorneys, other court personnel who participate in the decisionmaking process, and neutral arbitrators.</p>	<p>See Explanation of Changes for paragraph (a). Paragraph (c) carries forward the substance of current rule 5-300(C). Paragraph (c) clarifies that the prohibitions in paragraphs (a) and (b) extend to any court personnel who participate in decisionmaking and might affect the outcome.</p> <p>The phrase, "and neutral arbitrators" has been added so the Rule will also apply in an arbitration setting. This added phrase recognizes that much of the work of the judicial system now takes place before court-appointed and third party neutrals.</p>
	<p>(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.</p>	<p>See Explanation of Changes for paragraph (a). Paragraph (d) carries forward the substance of current rule 5-320(A) nearly verbatim, with only "lawyer" substituted for "member."</p>
	<p>(e) During a trial a lawyer connected with the case shall not communicate directly or indirectly with any juror.</p>	<p>See Explanation of Changes for paragraph (a). Paragraph (e) carries forward the substance of current rule 5-320(B) nearly verbatim, with only "lawyer" substituted for "member."</p>
	<p>(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.</p>	<p>See Explanation of Changes for paragraph (a). Paragraph (e) carries forward the substance of current rule 5-320(C) nearly verbatim, with only "lawyer" substituted for "member."</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 3.5 Impartiality and Decorum of the Tribunal</p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center">Rule 3.5 Impartiality and Decorum of the Tribunal</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(c) communicate with a juror or prospective juror after discharge of the jury if:</p> <p>(1) the communication is prohibited by law or court order;</p> <p>(2) the juror has made known to the lawyer a desire not to communicate; or</p> <p>(3) the communication involves misrepresentation, coercion, duress or harassment; or</p>	<p>(eg) <u>A lawyer shall not</u> communicate <u>directly or indirectly</u> with a juror or prospective juror after discharge of the jury if:</p> <p>(1) the communication is prohibited by law or court order;</p> <p>(2) the juror has made known to the lawyer a desire not to communicate;or</p> <p>(3) the communication involves misrepresentation, coercion, duress or harassment; or</p> <p>(4) the communication is intended to influence the juror's actions in future jury service.</p>	<p>Paragraph (g) is nearly identical to Model Rule 3.5(c), except communicate is modified by the phrase “directly or indirectly” to conform with the prohibitions in paragraphs (d), (e) and (f). The addition of that language is intended to prevent lawyers from communicating through a third party to avoid the prohibitions of the Rule.</p>
<p>(d) engage in conduct intended to disrupt a tribunal.</p>	<p>(d) engage in conduct intended to disrupt a tribunal.</p>	<p>The Commission recommends that Model Rule 3.5(d) not be adopted because it is vague and subject to overbreadth challenges. See Introduction.</p>
	<p>(h) <u>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.</u></p>	<p>See Explanation of Changes for paragraph (a). Paragraph (h) carries forward the substance of current rule 5-320(E) nearly verbatim, with only “lawyer” substituted for “member.” Paragraph (h) supplements proposed paragraph (g)(4).</p>

<p style="text-align: center;"><u>ABA Model Rule</u> Rule 3.5 Impartiality and Decorum of the Tribunal</p>	<p style="text-align: center;"><u>Commission's Proposed Rule*</u> Rule 3.5 Impartiality and Decorum of the Tribunal</p>	<p style="text-align: center;"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>(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.</p>	<p>See Explanation of Changes for paragraph (a). Paragraph (i) carries forward the substance of current rule 5-320(F) nearly verbatim, with only "lawyer" substituted for "member." The addition of that language is intended to prevent lawyers from influencing jurors through communications with, or investigations of, family members of jurors or potential jurors.</p>
	<p>(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.</p>	<p>See Explanation of Changes for paragraph (a). Paragraph (j) carries forward the substance of current rule 5-320(G) nearly verbatim, with only "lawyer" substituted for "member."</p>
	<p>(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.</p>	<p>See Explanation of Changes for paragraph (a). Paragraph (k) carries forward the substance of current rule 5-320(H) nearly verbatim, with only "lawyer" substituted for "member."</p>
	<p>(l) For the purposes of this Rule, "juror" means any empaneled, discharged, removed, or excused juror.</p>	<p>See Explanation of Changes for paragraph (a). Paragraph (l) carries forward the substance of current rule 5-320(I) nearly verbatim. In addition to substituting "lawyer" for "member," proposed paragraph (l) includes "removed" juror within the definition of "juror."</p>

<p align="center"><u>ABA Model Rule</u> Rule 3.5 Impartiality and Decorum of the Tribunal Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 3.5 Impartiality and Decorum of the Tribunal Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the ABA Model Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.</p>	<p>[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the ABA Model Code of Judicial Conduct Ethics and Code Civ. P. § 170.9.¹ with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.</p>	<p>Comment [1] is identical to Model Rule 3.5, cmt. [1], except that it references the California Code of Judicial Ethics, the governing judicial code in California and to Code Civ. P. 170.9, Section 170.9 is a public official gift statute that overlaps with Canon 4D(5) of the Code of Judicial Ethics in restricting judges' acceptance of gifts.</p>
<p>[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.</p>	<p>[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, <u>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.</u>²</p>	<p>Comment [2] is based on Model Rule 3.5, cmt. [2]. The last clause of the Comment has been added to provide guidance to lawyers acting as temporary judges pursuant to proposed Rule 2.4.1 (which in is based on current rule 1-710), a rule that has no counterpart in the Model Rules.</p> <p>The last sentence of this Comment has been added to address concerns over the gamesmanship in which lawyers often engage by which they serve a judge by hand but send a copy to opposing counsel by mail.</p>

¹ **Drafters' Recommendation:** Add reference to section 170.9 in the second sentence of Comment [1]. Section 170.9 is another public official gift statute that overlaps with Canon 4D(5) in restricting judges' acceptance of gifts.

² **Drafters' Recommendation:** Add last sentence to Comment [2] that explains the meaning of "promptly" as used in paragraph (b)(4). We recommend addition of this sentence because lawyers often send emails or hand deliver letters to judges and then send a copy to opposing counsel by snail mail. Merely saying "promptly" in the rule doesn't convey this message.

<p align="center"><u>ABA Model Rule</u> Rule 3.5 Impartiality and Decorum of the Tribunal Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 3.5 Impartiality and Decorum of the Tribunal Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>[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.</p>	<p>Comment [3] provides a cross-reference to California statutory law for specific guidance on permissible communications with jurors or prospective jurors.</p>
<p>[3] A lawyer may on occasion want to communicate with a juror or prospective juror after the jury has been discharged. The lawyer may do so unless the communication is prohibited by law or a court order but must respect the desire of the juror not to talk with the lawyer. The lawyer may not engage in improper conduct during the communication.</p>	<p>[34]-A It is improper for a lawyer may on occasion want to communicate with a juror who has been removed, discharged, or prospective juror after excused from an empaneled jury, regardless of whether notice is given to other counsel, until such time as the entire jury has been discharged. The lawyer may do so from further service or unless the communication is prohibited by law or a court order but must respect the desire part of the juror not to talk with official proceedings of the lawyer. The lawyer may not engage in improper conduct during the communication case.</p>	<p>The subject matter of proposed Comment [4] is the same as that of Model Rule 3.5, cmt. [3]: communication with jurors or prospective jurors. However, the tenor of the Model Rule Comment has been recast to stress what is prohibited under the Rule rather than what is permitted. The former approach better reflects the primary function of these Rules as disciplinary rules.</p>

<p style="text-align: center;"><u>ABA Model Rule</u> Rule 3.5 Impartiality and Decorum of the Tribunal Comment</p>	<p style="text-align: center;"><u>Commission's Proposed Rule</u> Rule 3.5 Impartiality and Decorum of the Tribunal Comment</p>	<p style="text-align: center;"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[4] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.</p>	<p>[4] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.</p>	<p>The Commission recommends that Model Rule 3.5, cmt. [4], which relates Model Rule 3.5(d), not be adopted as the Commission also recommends that Model Rule 3.5(d) not be adopted.</p>
<p>[5] The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition. See Rule 1.0(m).</p>	<p>[5] The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition. See Rule 1.0(m).</p>	<p>The Commission recommends that Model Rule 3.5, cmt. [5], which relates Model Rule 3.5(d), not be adopted as the Commission also recommends that Model Rule 3.5(d) not be adopted.</p>

Rule 3.5: Impartiality and Decorum of the Tribunal

- (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 decisionmaking 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 Civ. P. § 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.

RRC – Rule 3.5 [5-300, etc.]
Rule – Draft 5 (10/7/09) – CLEAN
October 16-17, 2009 Meeting; Agenda Item III.OO

[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.

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

TOTAL = __ Agree = __
Disagree = __
Modify = __
NI = __

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	COPRAC	M			Delete "confidential" from 3.5(b)(5) because If applicable procedural rules permit a lawyer to communicate with a judicial officer in an ex parte matter that is not confidential it is inappropriate to subject a lawyer to discipline.	Agree with change.
2	Los Angeles County Bar Association (Toby A. Rothschild)	M			<p>3.5(c) should include only neutral arbitrators, not party arbitrators.</p> <p>Commission should write a comment about what "indirectly" means in 3.5(e) and (f) and whether it includes comments to the press.</p> <p>Second sentence of Comment [2]: replace "such persons" with "persons then serving in an official capacity."</p>	<p>Agree with change.</p> <p>Commission did not make the requested revision. The language of paragraphs (e) and (f) is nearly verbatim from current rule 5-320(B) and (C), with only the substitution of "lawyer" for "member." Moreover, an appropriately balanced comment would require a lengthy explanation not appropriate for a rule comment.</p> <p>Commission revised Comment [2] and removed the term "such persons." However, the Commission did not adopt LACBA's proposed language, instead revising the last clause of the comment to clarify that a lawyer who is serving as a temporary judge, referee or court-appointed arbitrator under Rule 2.4.1 may communicate ex parte with judges, masters or jurors in the performance of that service..</p>

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 = __ Agree = __
Disagree = __
Modify = __
NI = __

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
3	Orange County Bar Association (Trudy Levindofske)	M			Clarify whether the reference to “arbitrators” in 3.5(c) means only court appointed/judicial arbitrators or whether private arbitrators are also within the purview of the Rule.	Commission did not make the requested revision. Because the Rule applies to both court-appointed and private arbitrators, no further revision is required.
4	San Diego County Bar Association (Heather L. Rosing)	M			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]. It is aspirational (“should”) rather than mandatory (“must”), so 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.
5	Santa Clara County Bar Association (Christine Burdick)	M			Add the word “removed” to the definition of “juror” because “excused juror” does not necessarily include a removed juror. Then Comment [4] can be deleted.	Agree with change to add the word “removed” to the definition of “juror.” Commission did not delete Comment [4] because that comment remains an important clarification of when a lawyer may communicate with a discharged juror. However, the Commission added the words “discharged, or excused” to conform Comment [4] to the changes in paragraph (l).

Rule 3.5: Impartiality and Decorum of the Tribunal

STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: Statutes and Standards (2009 Ed.)
by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

Arizona clarifies that Rule 3.5(a) applies only to an official “of a tribunal,” and substitutes “likely” for “intended” in Rule 3.5(d).

California: Rule 5-300 provides as follows:

(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.

Florida: Rule 3.5(a) provides that a lawyer shall not seek to influence a judge, juror, prospective juror, or other decision maker “except as permitted by law or the rules of court” Rule 3.5(d), governing communications with jurors, former jurors, and prospective jurors, generally tracks DR 7-108 of the ABA Model Code of Professional Responsibility, but adds that a lawyer shall not:

(4) after dismissal of the jury in a case with which the lawyer is connected, initiate communication with or cause another to initiate communication with any juror regarding the trial except to determine whether the verdict may be subject to legal challenge; provided, a lawyer may not interview jurors for this purpose unless

the lawyer has reason to believe that grounds for such challenge may exist; and provided further, before conducting any such interview the lawyer must file in the cause a notice of intention to interview setting forth the name of the juror or jurors to be interviewed. A copy of the notice must be delivered to the trial judge and opposing counsel a reasonable time before such interview....

Georgia: Rule 3.5 adopts most of the pre-2002 version of ABA Model Rule 3.5 verbatim, but alters the introductory phrase to make clear that the prohibitions apply “without regard to whether the lawyer represents a client in the matter.”

Illinois: Rule 3.5 tracks DR 7-108 of the ABA Model Code of Professional Responsibility almost verbatim, but adds the following paragraph (h) prompted by the bribery and “loan” scandals uncovered in Chicago courts during Operation Greylord in the 1980s:

(h) A lawyer shall not give or lend anything of value to a judge, official, or employee of a tribunal, except those gifts or loans which a judge or a member of the judge’s family may receive under Rule 65(C)(4) of the Code of Judicial Conduct, and except that a lawyer may make a gift, bequest, loan or campaign contribution to a judge that the judge is permitted to accept under the Code of Judicial Conduct, provided that no campaign contribution to a judge or candidate for judicial office may be made other than by means of a check, draft, or other instrument payable to or to the order of an entity which the lawyer reasonably believes to be a political committee supporting such judge or candidate, provided further, however, that the provision of volunteer services by a lawyer to a political committee shall not be deemed to violate this Rule.

Illinois Rule 3.5 also adds a new subparagraph (i) that tracks language from DR 7-110.

Maryland: Rule 3.5 includes several sui generis provisions, including a prohibition against discussing employment of a judge before whom the lawyer’s firm has a matter, a limitation on contacts with discharged jurors, and a requirement to report knowledge of improper contacts with jurors or prospective jurors.

Massachusetts: Rule 3.5(d) restricts the ability of lawyers connected to a case to initiate a communication with a member of the jury after discharge without leave of the court.

Michigan: Rule 3.5(c) retains the language of DR 7-106(C)(6) of the ABA Model Code of Professional Responsibility.

Minnesota adds language to Rule 3.5 drawing on DR 7-108 of the ABA Model Code of Professional Responsibility.

Mississippi omits ABA Model Rule 3.5(c)(3).

Nevada: Rule 3.5(c) adds that, subject to limitations imposed by Rule 3.5 or by the law, “it is a lawyer’s right, after the jury has been discharged, to interview the jurors to determine whether their verdict is subject to any legal challenge” -- but the “scope of the interview should be restricted and caution should be used to avoid embarrassment to any juror or to influence his or her action in any subsequent jury service.” Nevada also adds the following new Rule 3.5(e):

(e) Before the jury is sworn to try the cause, a lawyer may investigate the prospective jurors to ascertain any basis for challenge, provided that a lawyer or the lawyer’s employees or independent contractors may not,

at any time before the commencement of the trial, conduct or authorize any investigation of the prospective jurors, through any means which are calculated or likely to lead to communication with prospective jurors of any allegations or factual circumstances relating to the case at issue. Conduct prohibited by this Rule includes, but is not limited to, any direct or indirect communication with a prospective juror, a member of the juror's family, any employer, or any other person that may lead to direct or indirect communication with a prospective juror.

New Jersey: Rule 3.5(b) provides only that a lawyer shall not communicate ex parte with anyone specified in subparagraph (a) "except as permitted by law," and New Jersey Rule 3.5(c) says only that a lawyer shall not "engage in conduct intended to disrupt a tribunal." New Jersey deletes ABA Model Rules 3.5(c)(1)-(3) and Rule 3.5(d).

New York: Regarding ABA Model Rule 3.5(a), New York's DR 9-101(C) provides that a lawyer "shall not state or imply that the lawyer is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official." Regarding Rule 3.5(b), DR 7-110(B) provides:

(B) In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending, except:

(1) In the course of official proceedings in the cause.

(2) In writing if the lawyer promptly delivers a copy of the writing to opposing counsel or to an adverse party who is not represented by a lawyer.

(3) Orally upon adequate notice to opposing counsel or to an adverse party who is not represented by a lawyer.

(4) As otherwise authorized by law, or by the Code of Judicial Conduct.

Regarding Rule 3.5(b) and (c), New York's DR 7-108 provides:

(A) Before the trial of a case a lawyer connected therewith shall not communicate with or cause another to communicate with anyone the lawyer 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 lawyer connected therewith shall not communicate with or cause another to communicate with any member of the jury.

(2) A lawyer who is not connected therewith shall not communicate with or cause another to communicate with a juror concerning the case.

(C) DR 7-108 (a) and (b) do not prohibit a lawyer from communicating with members of the venire or jurors in the course of official proceedings.

Regarding Rule 3.5(d), DR 7-106(C)(6) provides that a lawyer appearing before a tribunal shall not "[e]ngage in undignified or discourteous conduct which is degrading to a tribunal."

North Carolina: Rule 3.5 adds language from DR 7-106(C)(5)-(7), DR 7-108(D), (F), and (G), and DR 7-110(B) of the ABA Model Code of Professional Responsibility.

North Dakota: Rule 3.5(b) provides that a lawyer shall not communicate ex parte with “a judge, impaneled juror, prospective juror or other official concerning a pending or impending proceeding” unless authorized to do so by law or court order.

Ohio replaces the term “judge” with the term “judicial officer” throughout Rule 3.5. Ohio adds Rule 3.5(a)(2), which provides that a lawyer shall not “lend anything of value or give anything of more than *de minimis* value to a judicial officer, official, or employee of a tribunal.” Ohio Rule 3.5(a)(3) provides that a lawyer shall not communicate ex parte with “(i) a judicial officer or other official as to the merits of the case during the proceeding unless authorized to do so by law or court order” or “(ii) a juror or prospective juror during the proceeding unless otherwise authorized to do so by law or court order.” Ohio also adds a new Rule 3.5(b), which provides that a lawyer “shall reveal promptly to the tribunal improper conduct by a juror or prospective juror, or by another toward a juror, prospective juror, or family member of a juror or prospective juror, of which the lawyer has knowledge.”

Texas: Rule 3.05 is substantially the same as DR 7-110(B) of the ABA Model Code of Professional Responsibility. Rule 3.06 borrows heavily from DR 7-108, but rearranges the order somewhat, adds references to an “alternate juror,” and provides in Rule 3.06(A)(2) that a lawyer shall not “seek to influence a venireman or juror concerning the merits of a pending matter by means prohibited by law or applicable rules of practice or procedure.”

Utah: Rule 3.5(b) provides that a lawyer shall not communicate ex parte “in an adversary proceeding as to the merits of the case with a judge, juror, prospective juror or court official during the proceeding, prior to full discharge of

that person’s duties in the proceeding,” unless authorized to do so by law or court order.

Virginia: Rule 3.5(a)(2) generally tracks DR 7-108(D) of the ABA Model Code of Professional Responsibility but adds that a lawyer shall not “after discharge of the jury from further consideration of a case: (i) ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence the juror’s actions in future jury service.” A new Rule 3.5(e) adds exceptions to the rule against ex parte communications with a judge.

Wyoming: Rule 3.5(b) provides that a lawyer shall not communicate ex parte “with an official acting in an adjudicative capacity concerning any substantive or procedural issue before him, or which is likely to be before him,” unless authorized to do so by law or court order.

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August 27, 2009 McCurdy E-mail to Snyder, cc Chair, Vapnek, Tuft & Staff:

Given the recent measures taken to expedite the completion of the rule revision project, the purpose of this letter is to lay out the assignments for which you are a lead drafter that are scheduled to be discussed during the Commission's upcoming September, October and November meetings. A "rolling assignments agenda" is enclosed that covers all of the matters that must be completed at those meetings. This agenda format is being used due to the short turnaround time between these meetings and the interest of many Commission members in working on assignments for future meetings when they have an opportunity to do so. The assignments are considered "rolling" because, for example, any rule that is not completed at the September meeting should be treated as automatically re-assigned and carried forward to the October meeting. Accordingly, the Commission is facing a significant challenge to complete fully each assigned rule in order to avoid a domino effect of rules that are not finished.

Because the Commission has been given a mandate to meet a rigorous schedule of deliverables to the Board for action, it is very important that all assignments be submitted by the assignment due dates. As emphasized by the Chair, if a lead drafter anticipates a conflict, or a conflict unexpectedly arises, that interferes with the ability to complete an assignment, the lead drafter must take the initiative to make alternate arrangements with the codrafters so that the assignment can be submitted by the due date.

Below is a list of your lead draft assignments for the next meeting, September 11, 2009, to be held at the San Diego State Bar Annual Meeting. Enclosed are materials for those assignments. Below that list is a list of assignments for the subsequent meetings in November and October. Materials for those assignments will be distributed soon. If you need any those materials immediately, then please send me an email with a copy to Randy and Kevin. Codrafter responsibilities are not listed. Please refer to the rolling agenda document which identifies the drafting team for each rule assignment. In addition staff will prepare an updated chart listing all rule assignments by Commission member.

Your continued hard work and dedication to this important project is appreciated, and don't forget that staff and the Commission Consultant are here to help so please feel free to contact us for assistance.

ASSIGNMENTS FOR SEPTEMBER MEETING

September 11, 2009 Meeting

Assignments Due: Wed., 9/2/09

No lead assignments for this meeting.

ASSIGNMENTS FOR OCTOBER MEETING

October 16 & 17, 2009 Meeting

Assignments Due: Wed., 9/30/09

1. III.Z. Rule 1.2(a), (b) & (c) Advising Violation of Law (Draft #1 7/6/09 to be revised following July 2009 meeting) Codrafters: Peck, Tuft

Assignment: (1) a chart comparing proposed Rule 1.2 to MR 1.2; (2) a "dashboard" cover sheet; and (3) a chart summarizing the public comment received and the Commission's response.

- 2. III.OO. Rule 3.5 Impartiality of the Tribunal [5-300, 5-320] (Post Public Comment Draft #4 dated 9/28/08) Codrafters: Peck, Ruvolo, Vapnek**
Assignment: (1) a chart comparing proposed Rule 3.5 to MR 3.5; (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.

(NOTE: This is in addition to any assigned rule not completed at the September meeting.)

ASSIGNMENTS FOR NOVEMBER MEETING

November 6 & 7, 2009 Meeting

Assignments Due: Wed., 11/28/09

- 1. IV.E. Rule 6.1 Voluntary Pro Bono Service [N/A] (new matter assigning the preparation of a first draft rule in a MR comparison chart format) Codrafters: Foy, Julien, Ruvolo, Voogd**
Assignment: (1) a chart comparing proposed Rule 6.1 to MR 6.1; and (2) a “dashboard” cover sheet. (If a California version of the MR is not recommended, then the chart should show the MR as stricken.)
- 2. IV.F. Rule 6.2 Accepting Appointments [N/A] (new matter assigning the preparation of a first draft rule in a MR comparison chart format) Codrafters: Foy, Ruvolo**
Assignment: (1) a chart comparing proposed Rule 6.2 to MR 6.2; and (2) a “dashboard” cover sheet. (If a California version of the MR is not recommended, then the chart should show the MR as stricken.)

(NOTE: This is in addition to any assigned rule not completed at the October meeting.)

September 18, 2009 McCurdy E-mail to Drafters (Snyder, Peck, Ruvolo, Vapnek), cc RRC:

Dom & Codrafters (Paul, Ellen & Nace):

This message provides the assignment background materials for Rule 3.5 on the October agenda. **The assignment deadline is Wednesday, September 30, 2009.**

As previously indicated, the materials provided are templates or drafts. Please don't hesitate to ask for further assistance or additional materials.

Attachments:

- Dashboard, Draft Template (9/18/09)
- Introduction, Template (9/18/09)
- Rule & Comment Chart, Template (9/18/09)
- Public Comment Chart, Draft 1 (9/18/09)
- State Variations (2009)

September 19, 2009 KEM E-mail to Drafters, cc RRC:

I've attached a revised Introduction template for Rule 3.5 (all I did was add the rule title and draft number & date in the footnote on the first page).

September 26, 2009 Vapnek E-mail to Drafters, cc Chair & Staff:

I just spent a couple of hours reviewing all the background material. I need help in drafting everything, as we have only the bare bones materials. We need the Introduction, the Dashboard, and the ALL the explanations for the rule and its comments. Any volunteers for any of this?

September 28, 2009 Peck E-mail to Vapnek, cc Drafters & KEM:

I would be happy to help or finish it all. All the best, Ellen

September 28, 2009 Vapnek E-mail to Peck, cc Drafters & KEM:

Want to try the Introduction? I'll work on the rest.

September 28, 2009 Peck E-mail to Vapnek, cc Drafters & KEM:

Sorry it took so long. Here is the introduction. No pride of authorship. Just change what you want.

Attached: Introduction, Draft 1 (9/28/09)ERP

September 28, 2009 KEM E-mail to Drafters:

I've attached a slightly revised version of Ellen's Intro that retains the substance but make some style and nit revisions. Clean word version -- Draft 2 (9/28/09)ERP-KEM, and a PDF that compares Draft 2 to Draft 1, the draft Ellen sent out yesterday.

I hope the attached is OK by you. Please let me know if you have any questions.

KEM NOTE: Check to make sure this Introduction made it into the agenda materials.

September 28, 2009 Peck E-mail to Drafters:

I approve.

September 30, 2009 Vapnek E-mail to Drafters, cc Chair & Staff:

What with all the stuff to review and approve, this Rule simply can't be finished today. I'll be working on it over the weekend, shooting for Monday submission.

October 6, 2009 KEM E-mail to Vapnek, cc Staff:

As requested, I've attached a scaled PDF file that includes the following documents:

1. Dashboard, Draft 1 (10/6/09)KEM.
2. Introduction, Draft 3 (10/6/09)ERP-KEM. The only change from draft 2 (my style revisions of the introduction that Ellen had drafted) that you saw earlier is that I've added the last sentence to paragraph 1 of the Introduction.
3. Rule & Comment Chart, Draft 1 (10/6/09)KEM. I gave this my best shot based on my understanding of the Commission's decision to carry forward the more specific 5-300 and 5-320.
4. Public Comment Chart, Draft 2 (10/6/09)KEM. I took the staff-prepared chart and added our reasons for rejection (most of which can be found in the 9/15/08 Drafters Memo to the RRC (following public comment)).

I've also attached the Word versions and copied staff w/ this. If it's OK by you, just say so and we'll circulate it to the Commission as Harry requested.

Please let me know if you have any questions.

October 6, 2009 Vapnek E-mail to Drafters (Peck, Ruvolo & Snyder), cc KEM:

Drafters: Please review the attached material asap as Harry wants our input today so that this Rule can go to the Commission before the next meeting. I've spotted some minor stuff, typos, missing words, etc., but nothing major. With your input I'll fix up the final version and get it to Lauren for distribution.

October 6, 2009 Snyder E-mail to Drafters, cc KEM:

I am awed by the tremendous work that you have all put into this rule. It appears that you have carefully considered the existing California rules and have incorporated them, as needed. Since I do not work in litigation, I would defer to those with more expertise on the subject as to whether this creates a standard which is workable and/or overbroad or vague. I'm sure that Nace's comments will be insightful on this.

I do have one comment. The Introduction states in paragraph 1. "The Commission decided not to adopt" – don't we actually make recommendations to the Supreme Court – not actually "adopt"? Would it be preferable to say that the Commission "recommends against the adoption of. . ." Just wondering – it's a small matter.

Otherwise, I think this is a tremendous effort to send to the Commission for consideration. Thank you one and all.

October 6, 2009 Ruvolo E-mail to Drafters, cc KEM:

Great job. I am sure that there will be some suggested changes to the Introduction to conform it to others Introductions, but I will leave it to others to offer their suggestions (no time today). However, there are two points I would like us to consider for this rule.

First, in (a) consider adding a reference to CCP 170.9, which is another public official gift statute that overlaps with Canon 4D(5) restricting judges' acceptance of gifts.

Second, consider adding a comment explaining that "promptly" as used in (b)(4), means it is expected that counsel sending a written communication to the court will use a means of transmission to opposing counsel likely to result in counsel receiving the communication simultaneously with the court's receipt of the communication. Too often, lawyers send emails or hand deliver letters to judges and then send a copy to opposing counsel by snail mail. Merely saying "promptly" in the rule doesn't convey this message.

October 6, 2009 Vapnek E-mail to Ruvolo, cc Drafters, cc KEM:

Good points; will do my best to incorporate them in the materials. BTW, the credit should go to Kevin for assembling the stuff on very short notice.

October 6, 2009 KEM E-mail to Vapnek, cc Drafters:

If you consider making changes to the rule or comments themselves, please just drop a footnote w/ the recommendation. If approved (e.g., by no one objecting), then we (staff) can make the revisions to the parallel clean version of each rule we're keeping. If you actually make a change in the second column, there's a risk we may overlook it in compiling the final version of the rules.

October 6, 2009 Vapnek E-mail to KEM, cc Drafters:

Will do; thanks for the heads up.

October 6, 2009 KEM E-mail to Drafters:

Dom's exactly right. We've usually stated "The Commission recommends that paragraph ____ not be adopted, etc." I didn't pick up on that. We'll make the changes before we submit the materials to BOG.

October 7, 2009 Vapnek E-mail to McCurdy, cc Drafters & Staff:

I'm forwarding the revised materials for the October meeting. I'm not as proficient as Kevin so I couldn't footnote the changes. However I can describe them: Introduction: Paragraph 1, 6 lines down, deleted "adopt" and added "recommend adoption of." In Paragraph 2, line 3 changed the 2 to a 1 (a typo) and added "Rule" in front of 5.3 (d) in line 4. In the Rule and Comment chart, on Page 3 of 8, in the right hand column explanation for (c) added the word "place" in the last line of the second paragraph between "takes" and "before." On page 6 of 8, I added (per Nace's suggestion) in the middle column, comment 1, after "Ethics" in the 4th line "and CCP section 179.9" and in the same column, for comment 2, again per Nace's suggestion, a new last sentence: "Promptly" as used in (b)(4) in the 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."

That's all that has been changed.

October 7, 2009 KEM E-mail to McCurdy, cc Difuntorum & Lee:

On behalf of the drafters, I've attached the following for the referenced agenda item, which should be circulated to the Commission per Harry's request:

1. Dashboard, Draft 2 (10/7/09)KEM;
2. Introduction, Draft 3.1 (10/7/09)ERP-KEM-PV
3. Rule & Comment Chart, Draft 2 (10/7/09)KEM-PV
4. Public Comment Chart, Draft 2 (10/6/09)KEM.

Note to Commission: The Drafters have recommended two revisions to the Rule itself, one in Comment [1] and the other in Comment [2]. Please see text associated with footnotes 1 and 2 to the Rule & Comment Chart.

Finally, I've also attached a clean version of new draft 5 (10/7/09), which reflects the proposed changes referenced in the foregoing note.

Please let me know if you have any questions.

October 10, 2009 Kehr E-mail to RRC:

I vote to forward these materials to the Board subject to the following comments:

1. It might be rather late in the process for this observation, but I notice that some of the Dashboards list the commenters as stakeholders and other do not. I caught this in the supplemental mailing in comparing the Dashboard for this Rule with the one for Rule 1.8.1. I don't know if we have a policy on this.
2. In the third line of paragraph 1 of the Introduction, I would insert "judicial" before "employee".
3. In the third line of paragraph 2.a. of the Introduction, I would insert "stating" before "precisely".
4. In the second line of paragraph 2.b. of the Introduction, "rule" should be capitalized.
5. In the last line of the second paragraph of the explanation of the paragraph (c) changes, I would insert "other" before "third party". I don't know how we have handled this in elsewhere, but "third party" is a compound adjective that modifies "neutral", and it should be hyphenated.
6. I join in the Drafters' fn. 1 and 2 recommendations.
7. The second paragraph of the Comment [2] explanation makes the categorical statement that "lawyers often engage" in gamesmanship by delaying opposing counsel's receipt of a message to the court. We have no basis for that statement, and it might be read as demonstrating that the Commission has a biased view of lawyers. I would change the sentence to say: "The last sentence of this Comment has been added to address concerns over possible gamesmanship in which a lawyer uses a slow method to deliver to opposing counsel a communication the lawyer has delivered quickly to a court, thus interfering with opposing counsel's ability to participate."
8. I notice that Comment [1] uses the section symbol while Comment [3] spells out the word. I don't know if we have a style for this, but we should stick to one method (I prefer the symbol for brevity).