

Rule 3.5: Impartiality and Decorum of the Tribunal

1. Current Kentucky Rule with Official Comments:

SCR 3.130(3.5) Impartiality and decorum of the tribunal

A lawyer shall not:

- (a) Seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
- (b) Communicate ex parte with such a person as to the merits of the cause except as permitted by law; or
- (c) Engage in conduct intended to disrupt a tribunal.

Supreme Court Commentary

[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.

[2] 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.

2. Proposed Kentucky Rule with Official Comments:

SCR 3.130(3.5) Impartiality and decorum of the tribunal

A lawyer shall not:

- (a) ~~Seek~~ seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
- (b) ~~Communicate~~ communicate ex parte with such a person ~~as to the merits of~~

the cause except as permitted during the proceeding unless authorized to do so by law or court order;

(c) communicate with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known to the lawyer a desire not to communicate;

or

(3) the communication involves misrepresentation, coercion, duress or harassment; or

~~(e)~~ (d) Engage engage in conduct intended to disrupt a tribunal.

Supreme Court Commentary Comment

[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.

[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.

[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.

~~[2]~~ [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.

[5] The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition. See Rule 1.0(m).

3. Discussion and Explanation of Recommendation:

a. Comparison of proposed Kentucky Rule with its counterpart ABA Model Rule.

(1) Proposed KRPC 3.5(b) on ex parte communication clarifies the circumstances in which a lawyer may engage in ex parte communication with the judge. Paragraph (c) deals with post-discharge communication with jurors and prospective jurors and prohibits communication if prohibited by law or court order. It also prohibits communication if a juror has made known a desire not to communicate or if the communication involves misrepresentation or duress.

(2) Proposed Comment [2] paraphrase the text of 3.5(b). Comment [3] clarifies the circumstances in which a lawyer may communicate with jurors after discharge. A lawyer may speak to a juror unless the juror desires not to speak. Lawyers may not engage in improper conduct during communication. Proposed Comment [5] clarifies that the duty to refrain from disruptive conduct also applies to ancillary proceedings.

(3) The ABA Reporter's Explanation of Changes to Rule 3.5 expresses the Committee's view and provides further detail on recommended changes. It is adopted by the Committee for purposes of explaining recommended changes and is quoted below.

- **ABA Reporter's Explanation of Changes -- Model Rule 3.5**

TEXT:

1. Paragraph (b)

The change to specify communication "during the proceeding" was made in light of the Commission's decision to treat post discharge communication with jurors in a new paragraph (c). The reference to "court order" has been added to alert lawyers to the availability of judicial relief in the rare situation in which an ex parte communication is needed.

2. Paragraph (c)

Rule 3.5(b) has been held to be unconstitutionally overbroad when applied to post verdict communications with jurors. See *Rapp v. Disciplinary Board of the Hawaii Supreme Court*, 916 F. Supp. 1525 (D.Hawaii, 1996). The Commission has proposed the addition of a new paragraph (c) that permits such communications unless prohibited by law or court order or the lawyer knows that the juror does not wish to be contacted. Also prohibited, of course, are communications involving misrepresentation, duress, coercion or harassment. The proposal permits more post verdict communication with jurors than the current Rule but affords the juror greater protection than did ABA Model Code of Professional Responsibility DR 7 108(D) which provided, "After discharge of the jury from further consideration of a case with which the lawyer was connected, the lawyer shall not 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 his actions in future jury service."

COMMENT:

[2] and [3] These Comments have been added to reflect the change in the Rule text with respect to communication with jurors after discharge of the jury.

[5] This new Comment makes clear that paragraph (d) applies to any proceeding of a tribunal and calls particular attention to its applicability to depositions.

b. Detailed discussion of reason for variance from ABA Model Rule (if any).

There is no variance in proposed KRPC 3.5 from MR 3.5.

Committee proposal adopted without change. Order 2009-05, eff 7-15-09.