

[date], 2016

Ms. Audrey Hollins
Office of Professional Competence, Planning and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

Re: Proposed Rules of Professional Conduct 3.5 [5-300/5/-320]
Contact With Judges, Officials, Employees and Jurors

Dear Ms. Hollins:

The Professional Responsibility and Ethics Committee of the Los Angeles County Bar Association (“PREC”) appreciates the opportunity to comment on the draft rules of conduct (the “Proposed Rules”) proposed by the State Bar’s Commission for the Revision of the Rules of Professional Conduct (the “Rules Revision Commission”). Please see our letter dated [date], 2016, describing PREC and praising the efforts of the Rules Revision Commission.

Paragraph (a) of Proposed Rule 3.5 imposes an unreasonable burden on lawyers. While PREC supports a rule prohibiting lawyers from attempting to influence judges, compliance with the Proposed Rule requires that lawyers become familiar with the code of judicial ethics, code of judicial conduct and standards governing employees of a tribunal – none of which apply to the vast majority of lawyers in the state. As written, the Proposed Rule would prohibit a lawyer from making a gift or loan to a judge, official or employee of a tribunal, if such gift or loan is not permitted by the code of judicial ethics, code of judicial conduct or standards governing employees of a tribunal applicable to the recipient of such gift or loan. The lawyer making a gift or loan would be in violation of this Proposed Rule if the judge, official or employee of a tribunal were in violation for receiving such gift or loan – thereby putting the burden on the lawyer of being knowledgeable of both the status of the recipient (e.g., whether he or she is employed by a tribunal) and the applicable code of judicial ethics, code of judicial conduct and standards governing employees of a tribunal.

As a result, paragraph (a) of this Proposed Rule would put a lawyer at risk of discipline for giving a gift or making a loan to a family member or close friend who incidentally happens to be a judge or employee of a tribunal, unless the lawyer knows that the recipient is permitted to accept such gift or loan. This prohibition applies whether or not the lawyer is appearing or might ever appear before the judge or tribunal, and whether or not the lawyer is even engaged in a practice area or jurisdiction such that there were even a possibility of such an appearance (i.e., where improper influence might occur).

Rather than referring to rules that are inapplicable (and therefore unknown) to the vast majority of lawyers in the state, PREC recommends that the exception contained in current Rule 5-300 be retained: namely, that gifts or loans be prohibited “unless the personal or family relationship between the member and the judge, official, or employee is such that gifts are

customarily given and exchanged.” Unlike the proposed exception, the existing exception is clear, unambiguous, and easily followed.

In addition, clauses (3) and (4) of paragraph (g) prohibit a lawyer from communicating with a discharged juror if “(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.” These prohibitions are overbroad and contrary to public policy. The Proposed Rule should not preclude a lawyer (not involved in the case from which the juror was discharged) from providing helpful, lawful, and potentially sought-after advice to the juror about the juror’s conduct in the case or in future cases. For example, if the juror were to admit to a lawyer that the juror misrepresented to the court his or her impartiality, the lawyer should not be at risk of discipline for cautioning the juror that such conduct was improper and to not make misrepresentations in future jury service.

As a result, we recommend that clauses (3) and (4) of paragraph (g) be clarified to read as follows:

- “(3) the communication involves misrepresentation, coercion, duress or harassment **by the lawyer**; or
- (4) the communication is intended to **improperly** influence the juror’s actions in future jury service.”

Thank you again for the opportunity to comment on the Proposed Rules.

Very Truly Yours,