

Vermont Rules of Professional Conduct
Rule 3.5 – Impartiality and Decorum of the Tribunal

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Kennedy's Highlights

(NOT a substitute for full research of the rule & opinions/decisions on it)

- *Rule 3.5 was last amended in 2009.*
- *Blog Posts related to Rule 3.5:*
 - [Don't Be a Jerk](#)
 - [Civility & Making a Difference](#)
 - [Incivility Factors in Substantially Reduced Fee](#)

Rule 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
 - (1) with a judge or other person acting in a judicial or quasi-judicial capacity in a pending or impending adversary proceeding, unless authorized to do so by the Code of Judicial Conduct, by other law, or by court order;
 - (2) with a juror or prospective juror before the court clerk has certified that the juror's term of service is complete, except by leave of court for good cause shown and under such terms as the court shall determine; or
- (c) communicate with a juror or prospective juror after the court clerk has certified that the juror's term of service is complete 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
- (d) engage in undignified or discourteous conduct which is degrading or disrupting to a tribunal.

Comment

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the Vermont 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 or masters, unless authorized to do so under the terms of the Code of Judicial Conduct or by other law or court order. A lawyer also may not communicate with a juror or prospective juror during the juror's term of service except with leave of court on good cause shown and on such terms as the court may determine, which should impose limits designed to protect the juror's privacy. Good cause for contact before completion of a juror's term might include independent research into the dynamics of the jury process, an attorney's desire to improve his or her trial skills, or investigation of juror misconduct.

[3] A lawyer may on occasion want to communicate with a juror or prospective juror after the juror's term is complete. 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.

[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 degrading or disruptive conduct applies to any proceeding of a tribunal, including a deposition. See Rule 1.0(m).

Reporter's Notes — 2009 Amendment

V.R.P.C. 3.5 is amended to incorporate some of the changes in the Model Rule while retaining and updating provisions of the original Vermont rule that differed from the Model Rule. See Reporter's Notes to V.R.P.C. 3.5 (1999).

V.R.P.C. 3.5(a), like Model Rule 3.5(a), is unchanged.

V.R.P.C. 3.5(b) continues to depart from the Model Rule by separating provisions concerning ex parte contact with judges and quasi-judicial officials from those concerning contact with jurors. Subparagraph (1) continues to refer expressly to the Code of Judicial Conduct and incorporates the reference to "impending" proceedings from V.C.J.C. Canon 3.B(7). The inclusion of "court order" (and the necessary stylistic change to "authorized by") are "added to alert lawyers to the availability of judicial relief in the rare instances in which an ex parte communication is needed." ABA Reporter's Explanation.

V.R.P.C. 3.5(b)(2) is amended to provide a standard for permitting communication with a juror before the court clerk certifies that the juror's term of service has ended. Such communication is prohibited except by leave of court for good cause shown and must not intrude on a juror's privacy. See Comment [2]. A juror's term of service is concluded when that juror has been summoned for voir dire three times within a two-year period pursuant to Rules 6 and 9 of the Rules for Qualification, List, Selection and Summoning of All Jurors. The clerk's certification of that date has been selected because it is an easily identifiable event and assures that a juror will be free from inappropriate communication with a lawyer during a period when there is the possibility that the juror and lawyer might both be involved in the same subsequent case.

V.R.P.C. 3.5(c) adapts New Model Rule 3.5(c), incorporating the clerk's certification of the end of a juror's service as the time after which a lawyer may communicate with a juror without leave of court. The ABA Reporter's Explanation is as follows:

Rule 3.5(b) [prohibiting ex parte communication with jurors "except as permitted by law"] 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."

V.R.P.C. 3.5(d) continues to retain language from DR 7-106(C)(6) of the Vermont Code of Professional Responsibility, adding the word "disrupting" to track the Model Rule. Comments [2] and [3] are new to both the Vermont and Model Rules. They have been modified to reflect the differences between the rules discussed above. Comment [5] "makes clear that paragraph (d) applies to any proceeding of a tribunal and calls particular attention to its applicability to depositions." ABA Reporter's Explanation.

The drafters modified ABA Model Rule 3.5(b) in order to clarify that not all ex parte communication with a judge is impermissible and to make this rule consistent with its Vermont Code counterparts. See DR 7-108 and DR 7-110(B).

The drafters also modified paragraph (c) to avoid a subjective standard of proof and to make it consistent with the Vermont Code. See DR 7-106(C)(6). The rule has also been made consistent with Canon 3B(7)(a) of the Vermont Code of Judicial Conduct.