

1 Rule 3.5. Impartiality and Decorum of the Tribunal.

2 A lawyer shall not:

3 (a) Seek to influence a judge, juror, prospective juror or other official by means
4 prohibited by law; or

5 (b) Communicate *ex parte* in an adversary proceeding as to the merits of the case
6 with a judge, juror, prospective juror or other official during the proceeding, prior to full
7 discharge of that person's duties in the proceeding, unless authorized to do so by law,
8 rule or court order;~~with a juror or prospective juror before the discharge of the jury~~
9 ~~except as permitted by law; or~~

10 (c) ~~In an adversary proceeding, communicate, or cause another to communicate, as~~
11 ~~to the merits of the cause with a judge or other official before whom a matter is pending,~~
12 ~~except:~~ communicate with a juror or prospective juror after discharge of the jury if:

13 (c)(1) In the course of official proceedings in the cause the communication is
14 prohibited by law, rule or court order;

15 (c)(2) In writing if the lawyer promptly delivers a copy of the writing to opposing
16 counsel or to the adverse party if such party is not represented by a lawyer the juror has
17 made known to the lawyer a desire not to communicate; or

18 (c)(3) Orally upon adequate notice to opposing counsel or to the adverse party if
19 such party is not represented by a lawyer the communication involves
20 misrepresentation, coercion, duress or harassment; or

21 (4) As otherwise authorized by law; or

22 (d) Engage in conduct intended to disrupt a tribunal.

23 Comment

24 [1] Many forms of improper influence upon a tribunal are proscribed by criminal law.
25 Others are specified in the Utah Code of Judicial Conduct, with which an advocate
26 should be familiar. A lawyer is required to avoid contributing to a violation of such
27 provisions.

28 [2] ~~The advocate's function is to present evidence and argument so that the cause~~
29 ~~may be decided according to law. Refraining from abusive or obstreperous conduct is a~~
30 ~~corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm~~
31 ~~against abuse by a judge but should avoid reciprocation; the judge's default is no~~

32 ~~justification for similar dereliction by an advocate. An advocate can present the cause,~~
33 ~~protect the record for subsequent review and preserve professional integrity by patient~~
34 ~~firmness no less effectively than by belligerence or theatrics. During a proceeding a~~
35 ~~lawyer may not communicate *ex parte* with persons serving in an official capacity in the~~
36 ~~proceeding, such as judges, masters or jurors, unless authorized to do so by law, rule or~~
37 ~~court order.~~

38 [2a] Paragraph (b) of Utah Rule 3.5 differs from the ABA Model Rule by inclusion of
39 the qualifying phrases “in an adversary proceeding,” “as to the merits” and “prior to full
40 discharge of that person’s duties in the proceeding.” In the interest of fairness and
41 impartiality, these additional qualifications give the practitioner more guidance and more
42 clearly define the types of *ex parte* communications that are prohibited. Consistent with
43 treatment elsewhere in these Rules, the exceptions stated in paragraphs (b) and (c)(1)
44 of the Utah Rule also include “by rule” where the ABA Model Rule does not.

45 [3] A lawyer may on occasion want to communicate with a juror or prospective juror
46 after the jury has been discharged. The lawyer may do so unless the communication is
47 prohibited by law, rule or a court order but must respect the desire of the juror not to talk
48 with the lawyer. The lawyer may not engage in improper conduct during the
49 communication.

50 [4] The advocate’s function is to present evidence and argument so that the cause
51 may be decided according to law. Refraining from abusive or obstreperous conduct is a
52 corollary of the advocate’s right to speak on behalf of litigants. A lawyer may stand firm
53 against abuse by a judge but should avoid reciprocation; the judge’s default is no
54 justification for similar dereliction by an advocate. An advocate can present the cause,
55 protect the record for subsequent review and preserve professional integrity by patient
56 firmness no less effectively than by belligerence or theatrics.

57 [5] The duty to refrain from disruptive conduct applies to any proceedings of a
58 tribunal, including a deposition. See Rule 1.0(m).

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