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**April 28, 2016 Kehr Email to Tuft:**

Your report at its p. 23 of 31 cites Schaefer v. State Bar, 26 Cal. 2d 738, but I am unable to locate the case. Could you check your notes to see whether there is a typo. Thank you.

**April 29, 2016 Tuft Email to Kehr, cc Difuntorum & Mohr:**

I believe the correct citation is 26 Cal. 2d 739; 160 P. 2d 825. Thanks for putting this out. I am sending this to Kevin and Randy to make a note to fix this in our final report.

**April 29, 2016 McCurdy Email to Drafting Team, cc Difuntorum, Mohr, A. Tuft, Marlaud & Lee:**

OCTC's comments on Rules 5-200 and 5-220 are attached and also pasted below for ease of reference. Please consider these comments in preparation for the May meeting.

Attached:

RRC2 - [5-110 & 5-220][1-400][3-210][3-500][3-310][3-300][3-400][3-410][3-700][4-100][5-210] - 03-25-16 OCTC Memo to RRC2.pdf

**April 28, 2016 OCTC Memo to RRC2:**

**E. Rule 5-200 [Trial Conduct]**

Rule 5-200 is preferable to ABA Model Rule 3.3 because it is broader in scope and provides greater public protection. For example, rule 5-200 prohibits an attorney from asserting personal knowledge of the facts at issue during a trial, except when testifying as a witness. The Model rule does not provide such protection. Additionally, a violation of rule 5-200 may be based upon gross negligence, a violation of the Model rule may not.

However, rule 5-200 should be revised to require an attorney to disclose adverse published legal authority. Model Rule 3.3 appears to apply to all legal authority, published and unpublished. This is contrary to established California law. (See In the Matter of Riley (Review Dept. 2004) 3 Cal. State Bar Ct. Rptr. 91, 109 [Attorneys have an ethical duty to reveal to the court before which they are appearing any controlling precedent which squarely contradicts their position. However, as advocates, they are under no such duty with respect to decisions which do not constitute controlling precedent.].)

Additionally, the rule should prohibit an attorney from referring or alluding to material the attorney knows or reasonably should know is not relevant or admissible, or has been ruled inadmissible. (See Hawk v. Superior Court (1974) 42 Cal.App.3d 108, 118 and In the Matter of Philip E. Kay, Case No. 01-O-193, Slip Op. pp. 17-18).

**G. Rule 5-220 [Suppression of Evidence]**

OCTC does not recommend any revisions to rule 5-220.

OCTC notes that ABA Model Rule 3.4(c) may permit an attorney to disobey a court order where the attorney believed that no valid obligation existed.<sup>1</sup> That exception is inconsistent with California law. (See *Maltaman v. State Bar* (1987) 43 Cal.3d 924, 952 [There can be no plausible belief in the right to ignore final, unchallengeable orders one personally considers invalid.] and *In the Matter of Klein* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 1, 9, fn. 3 [Respondent's belief as to the validity of an order is irrelevant to a section 6103 charge.]<sup>2</sup>)

Attached:

RRC2 - [3-300][4-100][5-100][5-200][5-220][5-300][5-310][5-320][3-310][1.10, 1.11, 1.12] - 04-28-16 OCTC Memo re May 2016 Meeting Rules.pdf

**May 1, 2016 Kehr Email to Drafting Team, cc Difuntorum, Mohr, McCurdy & Lee:**

Your report raises a number of issues, but I will limit myself to one in this message. That is the impact on this Rule of the expanded definition of "tribunal". This is not addressed in your Report and, to the contrary, the Report's discussion of pros and cons appears to be limited to the workings of courts.

Current rule 5-200, its predecessor and companion § 6068(d) and the underlying concept that a lawyer is an officer of the court, all are based on the important role that lawyers have in the proper functioning of the judicial system. Lawyers have no similar function outside of the courts; they are not officers of the executive or legislative branches of government. When dealing with the executive and legislative branches of government, lawyers merely are advocates - and in many circumstances are political advocates - for their clients.

The proposed Rule is shot through with references that were written for, and make sense only within the context of, a lawyer's dealings with a court or its equivalent ((i) a court, an arbitrator, or an administrative law judge acting in an adjudicative capacity and authorized to make a decision that can be binding on the parties involved; or (ii) a special master or other person to whom a court refers one or more issues and whose decision or recommendation can be binding on the parties if approved by the court). These include, for example:

- Paragraph (a)(2) is built around the concept of "evidence". What does that mean in the context of the executive or legislative branches?
- Under paragraph (b), what is the rationale for requiring a lawyer who represents a client with regard to a legislative or executive branch action to argue against the lawyer's client by

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<sup>1</sup> Model Rule 3.4 states in relevant part "A lawyer shall not ... (c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists."

<sup>2</sup> However, see *In the Matter of Respondent X* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 592, 604 [In California, a person affected by an injunctive order has available two alternative methods by which he or she may challenge the validity of an order: either appeal the order or disobey it. If the person does not appeal the order, the person may disobey the order and raise his or her jurisdictional contentions when he or she is sought to be punished for such disobedience. If he or she has correctly assessed his or her legal position, and it is therefore, finally determined that the order was issued without or in excess of jurisdiction, the violation of such void order constitutes no punishable wrong. But if it is decided that the order was valid, the attorney is subject to discipline].

citing authority, particularly if the client's presentation has not been based on the judicial concept of governing authority?

- Would a lawyer have a disclosure obligation under paragraph (b) only if in some formal sense the lawyer has appeared for the client (whatever that might mean in a non-judicial context) or would it apply also to a lawyer who only knows of the client's argument to the executive or legislative branch? And when considering this, note that Comment [4] begins: "The duties stated in paragraphs (a), (b) and (c) apply to all lawyers ...."
- What is the meaning of ex parte proceeding out of the judicial context?
- In Comment [1], what is the meaning of an "ancillary proceeding" outside of the judicial context?

Our knowledge of the judicial system permits us to discuss nuances in the possible meaning of and drafting of this Rule. For example, paragraph 8 on p. 25 of 31 recommends drafting so as "to accommodate unique features of California ex parte proceedings." I have no conception of what the drafting of that paragraph or of the balance of this proposed Rule might have in the executive branch or legislative branch contexts that are entirely unknown to me. We are writing a Rule whose meaning and application we do not understand.

**May 1, 2016 Martinez Email to Kehr, cc Drafting Team, Difuntorum, Mohr, McCurdy & Lee:**

The current definition of Tribunal includes an "administrative body acting in an adjudicative capacity." It does not reach all legislative or executive bodies. My read of it is that it only applies to the executive branch and only to administrative agencies therein.

Still, I agree the question is whether the Rule should apply to proceedings involving such things as applications for variances, conditional use permits, or approval of tentative subdivision maps before a planning commission.

"Generally speaking, a legislative action is the formulation of a rule to be applied to all future cases, while an adjudicatory act involves the actual application of such a rule to a specific set of existing facts.' [Citations.] 'Wherever an act undertakes to determine a question of right or obligation, or of property, as the foundation upon which it proceeds, such act is to that extent a judicial one, and not the proper exercise of legislative functions.' [Citations.]" (Patterson v. Central Coast Regional Com. (1976) 58 Cal. App.3d 833, 840-841.) Adjudicatory acts include the granting of variances and conditional use permits, and the approval of tentative subdivision maps. (Arnel Development Co. v. city of Costa Mesa (1980) 28 Cal.3d 511, 518, 523 [169 Cal. Rptr. 904, 620 P.2d 565].) The granting of a zoning amendment is, on the other hand, a legislative decision. (Landi v. County of Monterey (1983) 139 Cal. App.3d 934, 936-937.)

The problem here may be the definition of Tribunal and not so much Rule 3.3. If so, the Commission should revisit Rule 1.0.1.

**May 1, 2016 Tuft Email to Drafting Team, cc Difuntorum, Mohr, A. Tuft, McCurdy & Marlaud:**

Please let me know if we should have a conference call in advance of the meetings on Friday and Saturday to discuss OCTC's comments and also Bob Kehr's email. If so, please send me your availability for a ½ hour call. Thanks.

**May 1, 2016 Martinez Email to Drafting Team, cc Difuntorum, Mohr, A. Tuft, McCurdy & Marlaud:**

I'm not sure what a conference call would accomplish at this point. Even if we revised the draft rule or comments, some members will have relied on the agenda materials and may not have enough time to consider any new changes.

**May 1, 2016 Chou Email to Drafting Team, cc Difuntorum, Mohr, A. Tuft, McCurdy & Marlaud:**

I agree with Raul. In any event, I am not as concerned with the definition of tribunal since it is limited to an administrative agency acting in an adjudicatory capacity and further defines the characteristics of such a proceeding so it is clear adjudicatory in nature. In my view, these rules should apply equally in that limited situation - which is the only extension of tribunal beyond an ALJ adopted by this commission. We expressly omitted a legislative body from the definition so I believe Bob's concern is overstated and is premised on the model rule definition - which we did not adopt.

**May 1, 2016 Tuft Email to Drafting Team, cc Difuntorum, Mohr, A. Tuft, McCurdy & Marlaud:**

I agree. Are we concerned at all about OCTC's comments? I am personally not swayed but we should be clear in our response.

**May 1, 2016 Martinez Email to Drafting Team, cc Difuntorum, Mohr, A. Tuft, McCurdy & Marlaud:**

I don't have a good understanding of how lawyers practice before administrative agencies. I'm sympathetic to Bob Kehr's concerns. A lot of what happen before administrative agencies seems political and I would be concerned that a lawyer facing a non-lawyer opponent would not be playing on a level playing field—the lawyer would have to comply with Rule 3.3 but the non-lawyer would not. I'm not sure the policy concerns about protecting the integrity of judicial proceedings and promoting respect for courts applies to something like a planning commission hearing. The agency would also have its own rules of procedure that perhaps should trump our rules. For example, agency rules may allow and even encourage ex parte communications. I'm not convinced that courts and agencies are analogous bodies such that the same protections should be afforded the latter.

**May 1, 2016 Martinez Email to Drafting Team, cc Difuntorum, Mohr, A. Tuft, McCurdy & Marlaud:**

I don't agree with OCTC's comments either. My thoughts:

--I don't agree that gross negligence is the relevant test. Under California law, gross negligence is defined as either (1) a want of even scant care or (2) an extreme departure from the ordinary standard of conduct. (City of Santa Barbara v. Superior Court (2007) 41 Cal.4th 747, 753-754.) How that test fits this rule is a mystery to me. Wilful is the test and "reasonable care" is not the issue.

--We have addressed the duty to disclose adverse authority

--Asserting personal knowledge of the facts and alluding to material the attorney knows or reasonably should know is not admissible are standards that courts consider in granting a new trial. They should be handled by the courts. For example, in *Mendelson v. Peton* (1955) 135 Cal.App.2d 390, 394 counsel told the jury during closing argument he had personally measured a distance that was disputed in the case. The court of appeal held the argument, while improper, was not prejudicial because the trial judge immediately admonished the jury to disregard counsel's statement. It is also improper for counsel to allude to his personal knowledge of facts in argument to the jury. *Garden Grove School Dist. v. Hendler* (1965) 63 Cal.2d 141, 143. But these problems are better handled by the courts and should not rise to the level of discipline because they occur in the heat of battle and the issues are usually not black and white.

**May 1, 2016 Chou Email to Drafting Team, cc Difuntorum, Mohr, A. Tuft, McCurdy & Marlaud:**

I agree that the OCTC comments do not warrant further response.

While I agree that administrative agencies may have varying practices, the fact that the definition of tribunal requires the agency to act in an adjudicatory capacity akin to a court should avoid those situations that Bob is concerned about. In any event it can be addressed on a case-by-case basis.

**May 2, 2016 Tuft Email to Drafting Team, cc Difuntorum, Mohr, A. Tuft, McCurdy & Marlaud:**

I agree.

**May 2, 2016 Tuft Email to Martinez, cc Drafting Team, Difuntorum, Mohr, A. Tuft, McCurdy & Marlaud:**

I think your last point in regard to OCTC's comment on vouching should be addressed in regard to Rule 3.4 and not Rule 3.3.

**May 2, 2016 Martinez Email to Drafting Team, cc Difuntorum, Mohr, A. Tuft, McCurdy & Marlaud:**

I agree it fits more into Rule 3.4. However, Rule 3.4 is under-inclusive. There are many other examples of attorney misconduct at a trial or hearing. If we are going to go this route, then the Rule should include the following equally serious examples of misconduct:

Personal attacks by counsel on the character or motive of an adverse party, witness, or counsel constitute misconduct. *Stone v Foster* (1980) 106 Cal.App. 3d 334, 355.

It is misconduct for counsel to suggest either directly or indirectly (through hints, suggestions, and insinuations), without support in the record, that an opposing party willfully suppressed evidence.

Questions or argument of counsel concerning the race, nationality, or religion of a party is improper when irrelevant to the issues in the case. *Kolaric v Kaufman* (1968) 261 Cal.App. 2d 20, 27, 67.

**RRC2 – Rule 5-200 [3.3]**  
**E-mails, etc. – Revised (May 2, 2016)**  
**Drafting Team: Tuft (Lead), Chou, Martinez**

Commenting on an adverse party's failure to produce a witness may be improper. In general, a party has no duty to call any particular witness without a showing of special circumstances. *Neumann v Bishop* (1976) 59 Cal.App. 3d 451, 481.

Questions of witnesses asked not to obtain answers but to present facts, inferences, and suggestions that cannot be supported by the record have been characterized as misconduct. *People v Hamilton* (1963) 60 Cal 2d 105, 116

Attempts by counsel "to appeal to the prejudice, passions or sympathy of the jury are misconduct." *Stone v Foster* (1980) 106 Cal.App. 3d 334, 355.

Appealing to the jury's social or economic prejudices by reference to a party's wealth or poverty is misconduct. *Hoffman v Brandt* (1966) 65 Cal.2d 549, 553.

It is misconduct to appeal to the jury's sympathy based on the size or status of a corporate defendant.

It is misconduct to appeal to the jurors' self-interest as taxpayers to persuade them to mitigate their verdict. *Brokopp v Ford Motor Co.* (1977) 71 Cal.App. 3d 841, 861.

Reference to insurance during trial when not relevant to an issue.

Motions and speaking objections made in the jury's presence to curry favor or to influence a verdict constitute misconduct.

Why does the Model Rule include only some misconduct scenarios but not others? On the other hand, if the Rule attempts to be more all-inclusive, then it will read like a rule of civil procedure.