

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3.4 [California Rules 5-310, 5-220, AND 5-200]

Rule 5-310

Lead Drafter: Croker

Co-Drafters: Cardona, Clinch

Rule 5-220 and 5-200

Lead Drafter: Tuft

Co-Drafters: Chou, Martinez

Meeting Date: May 6 – 7, 2016

I. INTRODUCTION

Proposed Rule 3.4 incorporates several concepts that are intended to promote fair competition in the adversary system of justice, that is, the rule includes prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and so forth. The concepts in Model Rule 3.4, on whose structure proposed Rule 3.4 is based, are found in three current California Rules of Professional Conduct: rule 5-310 (Prohibited Contact With Witnesses); rule 5-220 (Suppression of Evidence); and rule 5-200 (Trial Conduct). In conformance with the Charter principle that the Commission is to start with the relevant California rule, two different drafting teams were assigned the three California rules, one team assigned 5-310 and the other assigned rules 5-200 and 5-220. Acknowledging this Commission's decision early in the rules revision process to recommend adoption of the Model Rules' format and numbering, both drafting teams determined that the three concepts should be combined in a single rule numbered 3.4. The 5-200/5-220 drafting team deferred to the 5-310, which took the initiative on drafting the proposed rule 3.4, but has reserved its right to comment on, and suggest revisions to the draft rule as presented in this Report.

In drafting the proposed rule, the Rule 5-310 drafting team largely agreed with RRC1's approach to its proposed rule 3.4 by:

- (i) retaining rules 5-310 [paragraphs (d) and (e)] and 5-220 [paragraph (b)] largely unchanged into the structure of Model Rule 3.4,
- (ii) incorporating several provisions of Model Rule 3.4 [paragraphs (a), (c) and (f)] that more precisely identify and describe conduct prohibited under the rule;
- (iii) retaining rule 5-200(E) as paragraph (g); and
- (iv) rejecting several provisions of Model Rule 3.4 [MR 3.4(d), (e) and (f)] as vague and overbroad, and likely to chill legitimated advocacy.

II. CURRENT CALIFORNIA RULES

Rule 5-310 Prohibited Contact With Witnesses

A member shall not:

- (A) Advise or directly or indirectly cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of making that person unavailable as a witness therein.

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(B) Directly or indirectly pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the case. Except where prohibited by law, a member may advance, guarantee, or acquiesce in the payment of:

- (1) Expenses reasonably incurred by a witness in attending or testifying.
- (2) Reasonable compensation to a witness for loss of time in attending or testifying.
- (3) A reasonable fee for the professional services of an expert witness.

Rule 5-220 Suppression of Evidence

A member shall not suppress any evidence that the member or the member's client has a legal obligation to reveal or to produce.

Rule 5-200(E) Trial Conduct

In presenting a matter to a tribunal, a member:

* * * * *

(E) Shall not assert personal knowledge of the facts at issue, except when testifying as a witness.

III. DRAFTING TEAM'S RECOMMENDATION AND VOTE

There was consensus among the drafting team members to recommend a proposed amended rule as set forth below in Section IV. The vote was unanimous in favor of making the recommendation.

IV. PROPOSED RULE (CLEAN)

Rule 3.4 Fairness to Opposing Party and Counsel

A lawyer shall not:

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[California Rules 5-310, 5-220, AND 5-200]

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- (a) unlawfully obstruct another party's access to evidence, including a witness, or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
- (b) suppress any evidence that the lawyer or the lawyer's client has a legal obligation to reveal or to produce;
- (c) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
- (d) directly or indirectly pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the case. Except where prohibited by law, a lawyer may advance, guarantee, or acquiesce in the payment of:
 - (1) expenses reasonably incurred by a witness in attending or testifying;
 - (2) reasonable compensation to a witness for loss of time in attending or testifying; or
 - (3) a reasonable fee for the professional services of an expert witness;
- (e) advise or directly or indirectly cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of making that person unavailable as a witness therein;
- (f) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists; or
- (g) in trial, assert personal knowledge of facts in issue except when testifying as a witness.

Comment

[1] Paragraph (a) applies to evidentiary material generally, including computerized information. It is a criminal offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. See, e.g., Penal Code section 135; 18 United States Code section 1501-1520. Falsifying evidence is also generally a criminal offense. See, e.g., Penal Code section 132; 18 United States Code section 1519. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for

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the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. Applicable law may require a lawyer to turn evidence over to the police or other prosecuting authorities, depending on the circumstances. See *People v. Lee* (1970) 3 Cal.App.3d 514, 526 [83 Cal.Rptr. 715]; *People v. Meredith* (1981) 29 Cal.3d 682 [175 Cal.Rptr. 612].

[2] A violation of a civil or criminal discovery rule or statute does not by itself establish a violation of this Rule.

V. PROPOSED RULE (REDLINE TO CURRENT CALIFORNIA RULES 5-310, 5-220, AND 5-200)

~~Rule 5-310 Prohibited Contact With Witnesses~~

Rule 3.4 Fairness to Opposing Party and Counsel

A ~~member~~lawyer shall not:

- (a) unlawfully obstruct another party's access to evidence, including a witness, or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

~~Rule 5-220 Suppression of Evidence~~

- (b) ~~A member shall not~~ suppress any evidence that the ~~member~~lawyer or the ~~member's~~lawyer's client has a legal obligation to reveal or to produce.;
- (A) ~~Advise or directly or indirectly cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of making that person unavailable as a witness therein.~~
- (c) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
- (Bd) ~~Directly~~directly or indirectly pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the case. Except where prohibited by law, a ~~member~~lawyer may advance, guarantee, or acquiesce in the payment of:

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- (1) ~~Expenses~~expenses reasonably incurred by a witness in attending or testifying~~;~~;
- (2) ~~Reasonable~~reasonable compensation to a witness for loss of time in attending or testifying~~;~~ or
- (3) ~~A~~a reasonable fee for the professional services of an expert witness~~;~~;

(e) advise or directly or indirectly cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of making that person unavailable as a witness therein;

(f) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists; or

~~Rule 5-200 Trial Conduct~~

(Eg) ~~Shall not in trial,~~ assert personal knowledge of ~~the~~ facts ~~at in~~ issue~~;~~, except when testifying as a witness.

Comment

[1] Paragraph (a) applies to evidentiary material generally, including computerized information. It is a criminal offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. See, e.g., Penal Code section 135; 18 United States Code section 1501-1520. Falsifying evidence is also generally a criminal offense. See, e.g., Penal Code section 132; 18 United States Code section 1519. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. Applicable law may require a lawyer to turn evidence over to the police or other prosecuting authorities, depending on the circumstances. See *People v. Lee* (1970) 3 Cal.App.3d 514, 526 [83 Cal.Rptr. 715]; *People v. Meredith* (1981) 29 Cal.3d 682 [175 Cal.Rptr. 612].

[2] A violation of a civil or criminal discovery rule or statute does not by itself establish a violation of this Rule.

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VI. PUBLIC COMMENTS SUMMARY

None.

VII. OCTC / STATE BAR COURT COMMENTS

- **JAYNE KIM, OCTC, DATE:**

[Insert summary of comments.]

- **RUSSELL WEINER, OCTC, 6/15/2010:**

Rule 3.4. Fairness to Opposing Party and Counsel.

1. While OCTC supports the intent of this rule, it is concerned that subsection (f) of this rule, which provides that a lawyer shall not knowingly disobey an obligation under the rules of a tribunal, is vague and potentially overbroad. It is unclear whether “an obligation under the rules of a tribunal” includes, for example, local court rules or a judge’s individualized preferences. Without additional clarification or definition, the intended meaning of this rule will be a major source of debate, confusion, and litigation.

2. OCTC requests clarification from the Commission whether this rule is violated when a lawyer advises a person that he or she need not voluntarily speak with opposing counsel/party in the matter.

3. Many of the Comments cover subjects and discussions best left to treatises, law review articles, and ethics opinions. Some of the Comments are too long and Comment 2 has too many ideas for one comment.

- **MIKE NISPEROS, OCTC, 9/27/2001:**

- **Rule 5-220. ~~Suppression of Evidence~~ Fairness to Opposing Party and Counsel.**

OCTC’s recommends adopting most of the provisions of ABA’s Model Rule 3.4 in place of the current rule. The current version of the rule is too limited in its application and does not address many situations that OCTC has encountered over the years for which there should be a remedy.

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Remove:

~~A member shall not suppress any evidence that the member or the member's client has a legal obligation to reveal or to produce.~~

And replace with:

A member must not:

(A) suppress any evidence that the member or the member's client has a legal obligation to reveal or to produce;

(B) unlawfully obstruct another party's access to evidence or witnesses or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value. A member must not counsel or assist another person to do any such act;

(C) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(D) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists;

(E) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue, except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused;

(F) request a person other than a client to refrain from voluntarily giving relevant information to another party unless the person is a relative or an employee or other agent of a client.

OCTC COMMENTS:

This rule should be amended to incorporate most additional restrictions reflected in proposed Model Rule 3.4.

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○ Rule 5-200. Trial Conduct.

OCTC's recommends clarifying, codifying and making more specific existing law on the subject of trial conduct.

Revise the rule as follows:

In presenting a matter to a tribunal, a member:

* * * * *

~~(E)(J)~~ Shall ~~Must~~ not assert personal knowledge of the facts at issue, except when testifying as a witness.

OCTC COMMENTS:

OCTC has replaced the term "shall" with " must" and for clarity and instruction has listed specific conduct and the actions to be taken by a member in a given situation.

- **State Bar Court:** No comments received from State Bar Court.

VIII. COMPARISON OF PROPOSED RULE TO APPROACHES IN OTHER JURISDICTIONS (NATIONAL BACKDROP)

- **Massachusetts Rule 3.4** is identical to Model Rule 3.4:

Rule 3.4: Fairness to Opposing Party and Counsel

A lawyer shall not:

- (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
- (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
- (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;
- (d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

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(e) in appearing before a tribunal on behalf of a client:

- (1) state or allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence;
- (2) assert personal knowledge of facts in issue except when testifying as a witness; or
- (3) assert a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused, but the lawyer may argue, upon analysis of the evidence, for any position or conclusion with respect to the matters stated herein;

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

- (1) the person is a relative or an employee or other agent of a client; and
- (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information;

(g) pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his or her testimony or the outcome of the case. But a lawyer may advance, guarantee, or acquiesce in the payment of:

- (1) expenses reasonably incurred by a witness in preparing, attending or testifying;
- (2) reasonable compensation to a witness for loss of time in preparing, attending or testifying; and
- (3) a reasonable fee for the professional services of an expert witness;

(h) present, participate in presenting, or threaten to present criminal or disciplinary charges solely to obtain an advantage in a private civil matter; or

(i) in appearing in a professional capacity before a tribunal, engage in conduct manifesting bias or prejudice based on race, sex, religion, national origin, disability, age, or sexual orientation against a party, witness, counsel, or other person. This paragraph does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, or sexual orientation, or another similar factor is an issue in the proceeding.

All jurisdictions have adopted some version of ABA Model Rule 3.4. The ABA State Adoption Chart, entitled "Variations of the ABA Model Rules of Professional Conduct, Rule 3.4: Fairness to Opposing Party and Counsel," revised May 6, 2015, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc

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- Thirty-three jurisdictions have adopted Model Rule 3.4 verbatim.¹ Ten jurisdictions have adopted a slightly modified version of Model Rule 3.4.² Eight jurisdictions have adopted a version of the rule that substantially diverges from Model Rule 3.4.³

IX. CONCEPTS ACCEPTED/REJECTED; CHANGES IN DUTIES; NON-SUBSTANTIVE CHANGES; ALTERNATIVES CONSIDERED

A. Concepts Accepted (Pros and Cons):

1. Recommend that the proposed rule carry forward the substance of current rules 5-310 (Contact with Witnesses), 5-220 (Suppression of Evidence) and 5-200(E) (Trial Conduct), but include provisions from Model Rule 3.4 that identify with specificity conduct that the rule is intended to prevent.

- Pros: There is no evidence that current rules 5-310, 5-220 or 5-200(E) have been ineffective in promoting fair competition within the adversarial system of justice. Nevertheless, a *disciplinary* rule should clarify with precision the kind of the conduct that can subject a lawyer to discipline rather than a generalized prohibition against suppressing evidence, (rule 5-220).

In that regard, there are several provisions in Model Rule 3.4 that identify with more precision than current rule 5-220 the kind of conduct a disciplinary rule intended at least in part to promote fair competition in the adversarial system of justice should prohibit, i.e., MR 3.4(a), (b) and (c), which have been incorporated into the proposed Rule as paragraphs (a), (c) and (f):

- (i) MR 3.4(a) prohibits among other things a lawyer from destroying or altering

¹ The thirty-three jurisdictions are: Alabama, Arizona, Connecticut, Delaware, District of Columbia, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Oklahoma, Rhode Island, South Carolina, South Dakota, Utah, Vermont, West Virginia, Wisconsin, and Wyoming.

² The ten jurisdictions are: Alaska, Arkansas, Colorado, Hawaii, Kentucky, Michigan, North Carolina, Pennsylvania, Tennessee, and Virginia.

³ The eight jurisdictions are: California, Florida, Georgia, New York, Ohio, Oregon, Texas, and Washington.

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documents, or counseling or assisting another to do so.

(ii) MR 3.4(b) prohibits a lawyer from falsifying evidence or assisting a witness to testify falsely.

(iii) MR 3.4(c) prohibits a lawyer from knowingly disobeying an obligation under the rules of a tribunal but clarifies that a lawyer may openly refuse to obey based on an assertion that no valid obligation exists.

- Cons: There is no evidence that current rules 5-310, 5-220 and 5-200(E) have been ineffective in preventing the kind of conduct that inhibits fair competition in the adversarial system or that they need to be embellished by addition of the model rule provisions.

2. Recommend adoption of two clarifying comments:

(i) Comment [1] clarifies that a lawyer may take temporary possession of evidence for examination but may not alter or destroy it, and provides cross-references to California statutes and case law that impose further obligations on the handling of evidence. Comment [1] also provides specific references to statutes and case law that impose legal obligations on lawyers and clients to preserve evidence.

(ii) Comment [2] clarifies an important limitation on the rule's application, i.e., that a violation of a civil or criminal discovery rule does not by itself constitute a violation of the rule.

- Pros: Both comments clarify how the rule is applied. Further, by providing cross-references to statutes and case law that impose legal obligations on lawyers and clients to preserve evidence, Comment [1] explains the term “legal obligation” in paragraph (b).
- Cons: Both comments are unnecessary. Comment [1] simply provides cross-references to law with which a lawyer should already be familiar. Comment [2] states the obvious proposition that a violation of a rule or statute does not by itself warrant discipline.

B. Concepts Rejected (Pros and Cons):

1. Recommend adoption of Model Rule 3.4(d), (e) and (f).⁴

⁴ Model Rule 3.4(d) – (f) provide that a lawyer shall not:

- (d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

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- Pros: A disciplinary rule should identify with specificity the kinds of conduct it is intended to prohibit and the violation of which can subject a lawyer to discipline. The aforementioned model rule provisions do that.
- Cons: None of the provisions should be adopted:

(i) MR3.4(d) conflicts with California legislative policy, which provides for: (1) a comprehensive system of discovery remedies (e.g., C.C.P., § 2019 – 2036.050); (2) Court supervision of discovery misconduct and abuse through a variety of means, including sanctions and contempt(e.g., C.C.P., § 1992, 2019.030, 2020.240, 2023.010, 2023.020); and (3) no reporting of attorney sanctions for discovery matters (Bus. & Prof. Code §6068(o)(3)).

This public policy is sound because: (1) the tribunal before which a matter is pending is better equipped to control discovery delay or frivolous requests; (2) discovery misconduct is not necessarily indicative of unfitness to practice law; and (3) more serious discovery abuses can subject a lawyer to discipline through other standards (e.g., Bus. & Prof. C., §6103 – failure to comply with court order; §6068(b) --failure to maintain respect for the courts; or other parts of the proposed rule.)

(ii) MR 3.4(e) is overbroad, ambiguous and is likely to chill legitimate advocacy. Abuses can best be controlled by the trial judge through proper objections by the opponent.

(iii) As noted in public comment received by RRC1, MR 3.4(f), except to the extent it incorporates the concept in rule 5-200(E), is ambiguous, overly broad and duplicative, and is arguably in conflict with paragraph (a).

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

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C. Changes in Duties/Substantive Changes to the Current Rule:

1. The drafting team believes that there are no substantive changes in proposed Rule 3.4. First, the drafting team has not made any substantive changes to current rules 5-200, 5-310 and 5-200(E), carrying them forward largely intact as paragraphs (b), (d), (e) and (f). To the extent the rule incorporates provisions from Model Rule 3.4, they do not add duties but rather elaborate responsibilities that already exist under the current rule provisions, as is appropriate in a disciplinary rule. (See Section IX.A.1, above.)

D. Non-Substantive Changes to the Current Rule:

1. Substitute the term “lawyer” for “member”.
 - Pros: The current Rules’ use of “member” departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice pro hac vice or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)
 - Cons: Retaining “member” would carry forward a term that has been in use in the California Rules for decades.
2. Change the rule number to conform to the ABA Model Rules numbering and formatting (e.g., lower case letters).
 - Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized by various Rules of Court to practice in California to find the California rule corresponding to their jurisdiction’s rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the “Con” that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.
 - Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.
3. As noted in Section C, above, none of the other proposed revisions are intended as substantive changes to current rule 5-310.

E. Alternatives Considered:

None.

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X. OPEN ISSUES/CONCEPTS FOR THE COMMISSION TO CONSIDER

There are no open issues.

XI. COMMENTS FROM DRAFTING TEAM MEMBERS OR OTHER COMMISSION MEMBERS

Croker

- [Date]: Email Comment

Cardona

- [Date]: Email Comment

Clinch

- [Date]: Email Comment

Tuft

- [Date]: Email Comment

Chou

- [Date]: Email Comment

Martinez

- [Date]: Email Comment

XII. RECOMMENDATION AND PROPOSED COMMISSION RESOLUTION

Recommendation:

That the Commission recommend that the Board of Trustees of the State Bar of California adopt proposed amended rule 3.4 [5-310] in the form attached to this report and recommendation.

Proposed Resolution:

RESOLVED: That the Commission for the Revision of the Rules of Professional Conduct recommends that the Board of Trustees adopt proposed amended rule 3.4 [5-310] in the form attached to this Report and Recommendation.

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XIII. DISSENTING POSITION(S)

None.

XIV. FINAL COMMISSION VOTE/ACTION

Date of Vote:

Action:

Vote: X (yes) – X (no) – X (abstain)

Rule 3.4 Fairness to Opposing Party and Counsel

A lawyer shall not:

- (a) unlawfully obstruct another party's access to evidence, including a witness, or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
- (b) suppress any evidence that the lawyer or the lawyer's client has a legal obligation to reveal or to produce;
- (c) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;¹
- ~~(d) advise or directly or indirectly cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of making that person unavailable as a witness therein;~~
- ~~(e) offer an inducement to a witness that is prohibited by law, or~~ directly or indirectly pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the case. Except where prohibited by law, a lawyer may advance, guarantee, or acquiesce in the payment of:
 - (1) expenses reasonably incurred by a witness in attending or testifying;
 - (2) reasonable compensation to a witness for loss of time in attending or testifying; or
 - (3) a reasonable fee for the professional services of an expert witness;
- ~~(de) advise or directly or indirectly cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of making that person unavailable as a witness therein;~~
- (f) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists; or
- (g) in trial, assert personal knowledge of facts in issue except when testifying as a witness.

Comment

~~[1]—The procedures of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.²~~

¹ Drafting team consensus during 4/11/16 teleconference to move the first clause of RRC1 paragraph (d) back into paragraph (c), where it is located in the Model Rule.

² Drafting team consensus during 4/11/16 teleconference to delete RRC1 Comment [1] because it only states the policy rationale for the rule and does not explain the rule or provide interpretative guidance..

~~[2]~~³ Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Paragraph (a) applies to evidentiary material generally, including computerized information. It is a criminal offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. See, e.g., Penal Code section 135; 18 United States Code section 1501-1520. Falsifying evidence is also generally a criminal offense. See, e.g., Penal Code section 132; 18 United States Code section 1519. ~~Paragraph (a) applies to evidentiary material generally, including computerized information.~~ Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. Applicable law may require a lawyer to turn evidence over to the police or other prosecuting authorities, depending on the circumstances. See *People v. Lee* (1970) 3 Cal.App.3d 514, 526 [83 Cal.Rptr. 715]; *People v. Meredith* (1981) 29 Cal.3d 682 [175 Cal.Rptr. 612].

~~[3]~~ A violation of a civil or criminal discovery rule or statute does not by itself establish a violation of this Rule.⁴ ~~This Rule does not establish a standard that governs civil or criminal discovery disputes.~~⁵

~~[4] Paragraph (e) permits a lawyer to pay a non-expert witness for the time spent preparing for a deposition or trial. Compensation for preparation time or for time spent testifying must be~~

³ Drafting team consensus during 4/11/16 teleconference to revise RRC1 comment [2] as indicated, and renumber it Comment [1].

⁴ Drafting team consensus during 4/11/16 teleconference to retain the first sentence of RRC1 Comment [3] as an important clarification of the rule's application.

⁵ Drafting team consensus during 4/11/16 teleconference to delete second sentence of RRC1 Comment [3] because it appears to conflict w/ RRC2's proposed Rule 1.0(b)(3) and Comment [1] to that Rule. Proposed Rule 1.0(b)(3) provides:

(3) A violation of a rule does not itself give rise to a cause of action for damages caused by failure to comply with the rule. Nothing in these Rules or the comments to the Rules is intended to enlarge or restrict the law regarding the liability of lawyers to others.

Comment [1] to proposed Rule 1.0 provides in part:

Because the Rules are not designed to be a basis for civil liability, a violation of a rule does not itself give rise to a cause of action for enforcement of a rule or for damages caused by failure to comply with the rule. *Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1097 [41 Cal.Rptr.2d 768]. Nevertheless, a lawyer's violation of a rule may be evidence of breach of a lawyer's fiduciary or other substantive legal duty in a non-disciplinary context. *Id.*; *Mirabito v. Liccardo* (1992) 4 Cal.App.4th 41, 44 [5 Cal.Rptr.2d 571]. A violation of a rule may have other non-disciplinary consequences. See e.g., *Fletcher v. Davis* (2004) 33 Cal.4th 61, 71-72 [14 Cal.Rptr.3d 58] (enforcement of attorney's lien); *Chambers v. Kay* (2002) 29 Cal.4th 142, 161 [126 Cal.Rptr.2d 536] (enforcement of fee sharing agreement).

~~reasonable in light of all the circumstances and cannot be contingent upon the content of the witness's testimony or on the outcome of the matter. Possible bases upon which to determine reasonable compensation include the witness' normal rate of pay if currently employed, what the witness last earned if currently unemployed, or what others earn for comparable activity.~~⁶

⁶ Drafting team consensus during 4/11/16 teleconference to delete RRC1 Comment [4] because paragraph (d) is clear and does not require further guidance. Any further explanation is best left to an ethics opinion. See, e.g., State Bar Formal Ethics Op. 1997-149.

CURRENT CALIFORNIA RULE 5-220¹
"Suppression of Evidence"

I. Text of Current Rule:

A member shall not suppress any evidence that the member or the member's client has a legal obligation to reveal or to produce.

II. Background/Purpose:

In 1972, in anticipation of proposed comprehensive amendments to the original 1928 Rules of Professional Conduct, the California State Bar Special Committee to Study the ABA Code of Professional Responsibility proposed rule 7-108(A), the predecessor to current rule 5-220, as stated below. Proposed rule 7-108 carried forward the substance of ABA Code DR 7-109:

Rule 7-108 Contact with Witnesses

(A) A member of the State Bar shall not suppress any evidence that he or his client has a legal obligation to reveal or product.

In 1975, proposed rule 7-108(A) was revised and, as revised was approved by the California Supreme Court as follows:

Rule 7-107 Contact with Witnesses

A member of the State Bar shall not:

(A) Suppress any evidence that he or his client has a legal obligation to reveal or produce.² * * *

¹ The Commission has expedited consideration of rules 5-110 and 5-220 in the context of Model Rule 3.8 and the duty of a prosecutor to disclose exculpatory information. In the context of this limited rule revision exercise, the Commission is considering the addition of a new Discussion sentence in rule 5-220 stating that for the duties of a prosecutor, members should refer to rule 5-110 (as revised to track Model Rule 3.8).

² There were no substantive changes to the version of rule 7-108 proposed in 1972. There was, however, a structural change in the proposed rule, with two paragraphs added in 1975 that provided a member of the State Bar shall not:

(B) Advise or directly or indirectly cause a person to secrete himself or to leave the jurisdiction of a tribunal for the purpose of making him unavailable as a witness therein.

(C) Directly or indirectly pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of his case. Except where prohibited by law, a member of the State Bar may advance, guarantee or acquiesce in the payment of:

In 1989, the California Rules of Professional Conduct underwent another comprehensive revision that included reorganizing and renumbering the rule. As part of this process, paragraph 7-107(A) was moved to a separate rule to highlight the topic and make it easier to locate. As a result, the rule was renumbered 5-220 and given the title “Suppression of Evidence.”³ The revised rule was changed to be gender neutral and provided:

Rule 5-220 Suppression of Evidence

A member shall not suppress any evidence that the member or the member’s client has a legal obligation to reveal or to produce.

Current rule 5-220 has not been amended since 1989.

III. *Input from the State Bar Office of the Chief Trial Counsel (OCTC):*

A. 2015 Comments. In a ____, 2015 memorandum from OCTC, OCTC provided the following comment on rule 5-220:

(Note: OCTC is expected to provide new comments on this rule. These comments will be distributed to the drafting team when they are received from OCTC.)

B. 2010 Comments. In a June 15, 2010 memorandum from OCTC, OCTC provided the following comment on proposed rule 3.4 (which was intended to incorporate the concepts in current rule 5-220):⁴

(1) Expenses reasonably incurred by a witness in attending or testifying.

(2) Reasonable compensation to a witness for his loss of time in attending or testifying.

(3) A reasonable fee for the professional services of an expert witness.

³ The other two paragraphs of former Rule 7-107 set forth in footnote 2 became rule 5-310 [Prohibited Contact with Witnesses].

⁴ The black letter text of RRC1 proposed Rule 3.4, which incorporated nearly verbatim the more detailed Model Rule 3.4, provided:

A lawyer shall not:

- (a) unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
- (b) suppress any evidence that the lawyer or the lawyer’s client has a legal obligation to reveal or to produce;
- (c) falsify evidence or counsel or assist a witness to testify falsely;
- (d) advise or directly or indirectly cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of making that person unavailable as a witness therein;

1. While OCTC supports the intent of this rule, it is concerned that subsection (f) of this rule, which provides that a lawyer shall not knowingly disobey an obligation under the rules of a tribunal, is vague and potentially overbroad. It is unclear whether “an obligation under the rules of a tribunal” includes, for example, local court rules or a judge’s individualized preferences. Without additional clarification or definition, the intended meaning of this rule will be a major source of debate, confusion, and litigation.

2. OCTC requests clarification from the Commission whether this rule is violated when a lawyer advises a person that he or she need not voluntarily speak with opposing counsel/party in the matter.

3. Many of the Comments cover subjects and discussions best left to treatises, law review articles, and ethics opinions. Some of the Comments are too long and Comment 2 has too many ideas for one comment.

C. 2001 Comment. In a September 27, 2001 Memo to the first Commission, OCTC provided the following comment on rule 5-220:

Rule 5-220. ~~Suppression of Evidence~~ *Fairness to Opposing Party and Counsel*.

OCTC’s recommends adopting most of the provisions of ABA’s Model Rule 3.4 in place of the current rule. The current version of the rule is too limited in its application and does not address many situations that OCTC has encountered over the years for which there should be a remedy.

Remove:

~~A member shall not suppress any evidence that the member or the member’s client has a legal obligation to reveal or to produce.~~

-
- (e) offer an inducement to a witness that is prohibited by law, or directly or indirectly pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the witness’s testimony or the outcome of the case. Except where prohibited by law, a lawyer may advance, guarantee, or acquiesce in the payment of:
 - (1) expenses reasonably incurred by a witness in attending or testifying;
 - (2) reasonable compensation to a witness for loss of time in attending or testifying; or
 - (3) a reasonable fee for the professional services of an expert witness.
 - (f) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists; or
 - (g) in trial, assert personal knowledge of facts in issue except when testifying as a witness.

And replace with:

A member must not:

(A) suppress any evidence that the member or the member's client has a legal obligation to reveal or to produce;

(B) unlawfully obstruct another party's access to evidence or witnesses or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value. A member must not counsel or assist another person to do any such act;

(C) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(D) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists;

(E) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue, except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused;

(F) request a person other than a client to refrain from voluntarily giving relevant information to another party unless the person is a relative or an employee or other agent of a client.

OCTC COMMENTS:

This rule should be amended to incorporate most additional restrictions reflected in proposed Model Rule 3.4.

IV. Potential Deficiencies in the Current Rule:

A. See above input from OCTC.

B. Whether current rule 5-220 should be amended to precisely identify the conduct that is prohibited under the rule rather than state an obligation that incorporates by reference a standard that acknowledges only that a lawyer is subject to "a legal obligation to reveal or produce." Put another way, should current rule 5-220 be amended to more closely track Model Rule 3.4, which provides in its black letter text specific conduct that is prohibited under the rule?

V. California Context:

With respect to criminal cases, there is a significant difference between a client telling his or her lawyer in confidence of a completed crime and the lawyer taking possession of, and concealing the fruits, or instrumentalities, of that crime. While rule 5-220 states it is the duty of an attorney not to suppress evidence, the issue of an attorney's duty to turn over to the police or prosecution evidence of a crime has been addressed in California case law.

In *People v. Meredith* (1981) 29 Cal.3d 682, the prosecution had called as its witness a defense investigator who testified that he had seen the victim's partially burnt wallet in a burn barrel behind the defendant's residence. Defendant had told his counsel of the location of the wallet and counsel had instructed the investigator to retrieve the wallet. Counsel examined the wallet and then turned it over to the police. It was conceded that the wallet itself was properly admitted into evidence and that the attorney-client privilege protected conversations between defendant, his counsel and the counsel's investigator. The California Supreme Court held that the defense investigator's observation of the location of the wallet, which was the product of a privileged communication between defendant and his counsel, was not protected. Because the defendant had altered the location of the evidence which precluded the prosecution from making the same observation, the investigator's testimony was deemed admissible. (*Id.* 29 Cal.3d at 695.)

In *People v. Lee* (1970) 3 Cal.App.3d 514, a deputy public defender who had been assigned to represent the defendant received a pair of defendant's shoes from defendant's wife. Before the preliminary hearing the public defender was relieved as counsel and a private attorney was appointed to represent the defendant. In order to avoid a charge of suppressing evidence, and to prevent seizure of the evidence by the district attorney without a prior determination of a possible claim of privilege with respect to the evidence, the deputy public defender delivered the shoes to a municipal court judge. The district attorney obtained a search warrant from a second judge and obtained the shoes from the municipal court judge. The appellate court opinion held neither the public defender nor the defendant's substituted counsel had the right to withhold from the prosecution the shoes which had bloodstains that were subsequently determined to be of the same blood type as the victim. The appellate court stated:

A defendant in a criminal case may not permanently sequester physical evidence such as a weapon or other article used in the perpetration of a crime by delivering it to his attorney . . . Such evidence given the attorney during legal consultation for information purposes and used by the attorney in preparing the defense of his client's case, whether or not the case ever goes to trial, could clearly be withheld for a reasonable period of time. It follows that the attorney, after a reasonable period, should, as an officer of the court, on his own motion turn the same over to the prosecution . . . the fact that the client delivered such evidence to his attorney may be privileged, the physical object itself does not become privileged merely by reason of its transmission to the attorney.

Id. 3 Cal.App.3d at 526.

In *People v. Superior Court (Fairbank)* (1987) 192 Cal.App.3d 32, the defense counsel came into possession of physical evidence related to charges against

the client, and the issue was whether that evidence must be turned over to the police and/or prosecution. This appellate court, citing the *Meredith* and *Lee* decisions, above, held that the obligation to provide the prosecution with access to physical evidence and information about its alteration is absolute. This court concluded by saying:

Meredith means what it says. The defense decision to remove or alter evidence is a tactical choice. If counsel or an agent of counsel choose to remove, possess, or alter physical evidence pertaining to the crime, counsel must immediately inform the court of the action. The court, exercising care to shield privileged communications and defense strategies from prosecution view, must then take appropriate action to ensure that the prosecution has timely access to physical evidence possessed by the defense and timely information about alteration of any evidence.

Id. 192 Cal.App.3d at 39-40.

VI. Approach In Other Jurisdictions (National Backdrop):

A. Model Rule 3.4 Variations. All jurisdictions except California have adopted some version of ABA Model Rule 3.4. The ABA State Adoption Chart, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 3.4: Fairness to Opposing Party and Counsel,” revised May 6, 2015, is available at:

http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_4.authcheckdam.pdf [Last visited 3/22/16]

Twenty-seven jurisdictions have adopted Model Rule 3.4 verbatim.⁵ Eleven jurisdictions have adopted a slightly modified version of Model Rule 3.4.⁶ Thirteen jurisdictions have adopted a version of the rule that is substantially different from Model Rule 3.4.⁷

VII. Public Comment Received by the First Commission:

A. The clean text of proposed new rule 3.4 drafted by the first Commission and adopted by the Board to retain the provision contained rule 5-220 is enclosed with this assignment, together with the synopsis of public comments received on

⁵ The twenty-seven jurisdictions are: Arizona, Arkansas, Delaware, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, Oklahoma, Rhode Island, South Carolina, South Dakota, Utah, Vermont, West Virginia, Wisconsin, and Wyoming.

⁶ The eleven jurisdictions are: Alaska, Colorado, Connecticut, District of Columbia, Kentucky, Maine, Michigan, New Jersey, North Carolina, North Dakota, and Washington.

⁷ The thirteen jurisdictions are: Alabama, California, Florida, Georgia, Hawaii, Massachusetts, New York, Ohio, Oregon, Pennsylvania, Indiana, Texas, and Virginia.

those proposed rules and the full text of those comments. Although the proposed rule differs from current rule 5-220 (in form, not content), the drafting team might consider to what extent, if any, the public comments received on the proposed rule provide helpful information in analyzing the current rule.

To facilitate the review and to appreciate the relevance of these public comments, a redline comparison of the proposed rule showing changes to rule 5-200 is also enclosed with the public comments received. However, given the Board's charge to engage in a comprehensive review of the current rules and to retain the historical nature of the California Rules as "a clear and enforceable articulation of disciplinary standards," a drafting team that considers amendments developed by the first Commission should not presume that the approach taken by the first Commission was appropriate to achieve those objectives.

VIII. Potential Issues Identified by Professional Competence Staff Following Review of the Proposed Rule Developed by the First Commission and Adopted by the Board:

Bearing in mind the Commission's Charter to engage in a comprehensive review of the current rules and to retain the historical nature of the California Rules as "a clear and enforceable articulation of disciplinary standards," Professional Competence staff identified the following rule amendment issues (in no particular order) that the drafting team might consider. The drafting team need not address any of the issues. For example, if after critically evaluating an issue addressed by a revision made by the first Commission, the drafting team determines that the revision does not address an actual (as opposed to theoretical) public protection deficiency in the current rule, then the drafting team should hesitate to recommend a change to the current rule despite the prior decision by the first Commission and the Board to address the issue. (Note: For the sake of completeness and ease of reference, some of the issues listed below may have already been mentioned in connection with other information provided above, such as in connection with the approaches taken in other jurisdictions or prior public comment. Multiple mentions of an issue do not necessarily warrant the drafting team taking action on an issue.)

(1) Whether to recommend the adoption of a provision that is the same or similar to Model Rule 3.4(a), which requires a lawyer to not unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value.

(2) Whether to recommend the adoption of a provision that is the same or similar to Model Rule 3.4(c), which requires a lawyer to not knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists.

(3) Whether to recommend the adoption of a provision that is the same or similar to Model Rule 3.4(d), which requires a lawyer to not make a frivolous discovery

request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party.

(4) Whether to recommend the adoption of a provision that is the same or similar to Model Rule 3.4(e), which requires a lawyer to not allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.

(5) Please note: ABA Model Rule 3.4(b) requires a lawyer to not falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law. Model Rule 3.4(f) prohibits a lawyer from requesting a person other than the client to refrain from voluntarily giving relevant information to another party unless the person is a relative or an employee or other agent of a client; and the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information. Although these provisions have an analog in California under current rule 5-310 (Prohibited Contact With Witnesses), this drafting team is not precluded from considering these provisions in addition to those mentioned above.

IX. Research Resources:

- *People v. Meredith* (1981) 29 Cal.3d 682 [175 Cal.Rptr. 612]
- *People v. Lee* (1970) 3 Cal.App.3d 514 [83 Cal.Rptr. 715]
- *People v. Superior Court (Fairbank)* (1987) 192 Cal.App.3d 32 [193 Cal.Rptr.3d 32]
- [CAL 1986-89](#) (responsibilities of an attorney who accepts stolen property)
- [CAL 1984-76](#) (attorney who receives, or knows location of, evidence of crime)
- [CAL 1981-58](#) (may attorney disclose opinion of an expert to third parties)
- [LA 466](#) (disclosure of evidence of crime received from client)
- [ABA Model Rule 3.4](#) (Fairness to Opposing Party and Counsel)

CURRENT CALIFORNIA RULE 5-310
"Prohibited Contact With Witnesses"

I. Text of Current Rule:

A member shall not:

- (A) Advise or directly or indirectly cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of making that person unavailable as a witness therein.
- (B) Directly or indirectly pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the case. Except where prohibited by law, a member may advance, guarantee, or acquiesce in the payment of:
 - (1) Expenses reasonably incurred by a witness in attending or testifying.
 - (2) Reasonable compensation to a witness for loss of time in attending or testifying.
 - (3) A reasonable fee for the professional services of an expert witness.

II. Background/Purpose:

The concept of current rule 5-310 was included in the original 1928 Rules as former rule 15, operative on July 24, 1928. Rule 15 provided: "A member of The State Bar shall not advise a person, whose testimony could establish or tend to establish a material fact, to avoid service of process, or secrete himself or otherwise to make his testimony unavailable."

In 1975, former rule 15 was substantially revised in conformance with ABA Model Code of Professional Responsibility, DR 7-109, renumbered California rule 7-107, and titled "Contact with Witnesses." Rule 7-101 provided:

Rule 7-107 Contact with Witnesses

A member of the State Bar shall not:

- (A) Suppress any evidence that he or his client has a legal obligation to reveal or produce.
- (B) Advise or directly or indirectly cause a person to secrete himself or to leave the jurisdiction of a tribunal for the purpose of making him unavailable as a witness therein.
- (C) Directly or indirectly pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of his case. Except where prohibited by law, a member of the State Bar may advance, guarantee or acquiesce in the payment of:

- (1) Expenses reasonably incurred by a witness in attending or testifying.
- (2) Reasonable compensation to a witness for his loss of time in attending or testifying.
- (3) A reasonable fee for the professional services of an expert witness.

Former rule 7-107 was amended in 1989 as part of a comprehensive revision of the Rules of Professional Conduct. The amendments included renumbering the rule 5-310 and retitling the rule “Prohibited Contact with Witnesses.” Paragraph (A) of former rule 7-107 was deleted and moved in to a new, standalone rule 5-220 “Suppression of Evidence.” There were no substantive changes to 7-107(B) and (C). Rule 5-310 provided:

Rule 5-310 Prohibited Contact With Witnesses

A member shall not:

- (A) Advise or directly or indirectly cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of making that person unavailable as a witness therein.
- (B) Directly or indirectly pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the witness’s testimony or the outcome of the case. Except where prohibited by law, a member may advance, guarantee, or acquiesce in the payment of:
 - (1) Expenses reasonably incurred by a witness in attending or testifying.
 - (2) Reasonable compensation to a witness for loss of time in attending or testifying.
 - (3) A reasonable fee for the professional services of an expert witness.

Rule 5-310 has not been amended since 1989.

III. *Input from the State Bar Office of the Chief Trial Counsel (OCTC):*

A. 2015 Comments. In a ____, 2015 memorandum from OCTC, OCTC provided the following comment on rule 5-310:

(Note: OCTC is expected to provide new comments on this rule. These comments will be distributed to the drafting team when they are received from OCTC.)

B. 2010 Comments. In a June 15, 2010 memorandum from OCTC, OCTC provided the following comment on proposed Rule 3.4 (Fairness to Opposing Party and Counsel):

1. While OCTC supports the intent of this rule, it is concerned that subsection (f) of this rule, which provides that a lawyer shall not knowingly disobey an obligation under the rules of a tribunal, is vague and potentially overbroad. It is unclear whether "an obligation under the rules of a tribunal" includes, for example, local court rules or a judge's individualized preferences. Without additional clarification or definition, the intended meaning of this rule will be a major source of debate, confusion, and litigation.
2. OCTC requests clarification from the Commission whether this rule is violated when a lawyer advises a person that he or she need not voluntarily speak with opposing counsel/party in the matter.
3. Many of the Comments cover subjects and discussions best left to treatises, law review articles, and ethics opinions. Some of the Comments are too long and Comment 2 has too many ideas for one comment.

C. 2001Comments. In a September 27, 2001 memorandum, OCTC did not expressly address current rule 5-310, but did make the following statement regarding 5-220 (Suppression of Evidence), whose concept is also included in Model Rule 3.4:

This rule should be amended to incorporate most additional restrictions reflected in proposed Model Rule 3.4.

As part of its 5-220 recommendation, OCTC requested that MR 3.4(f), which roughly corresponds to current rule 5-310(A), be included in the rule. MR 3.4(f) provides that a lawyer shall not:

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client;
and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

IV. Potential Deficiencies in the Current Rule:

- A. See above input from OCTC, specifically Section III.B.2 and III.C.

V. California Context:

A. Discipline for Advising Witness to Make Themselves Unavailable as a Witness

In *Snyder v. State Bar* (1976) 18 Cal.3d 286, 291 the Supreme Court of California disbarred attorney Snyder, concluding among other things, that his “advising his clients on two occasions to make their testimony unavailable as deposition witnesses, despite court orders, constituted willful violations of [former] rule 15, Rules of Professional Conduct.” *Id.*

In *Waterman v. State Bar* (1936) 8 Cal.2d 17, the Supreme Court of California suspended attorney Herbert Waterman for six months for, among other things, violating former rule 15 by advising his client and two other witnesses not to appear to testify as part of a local bar association investigation for unprofessional conduct by Waterman. *Id.* at 19-20.

B. Penal Code § 136.1 - Intimidation of Witnesses

In addition to a lawyer being subject to discipline for improper contacts with witnesses, the intimidation of witnesses is punishable as a crime. Threats and intimidation of witnesses, such as preventing or dissuading a witness from testifying at either a civil or criminal trial, is a misdemeanor. Penal Code section 136.1 provides, in part:

(a) Except as provided in subdivision (c), any person who does any of the following is guilty of a public offense and shall be punished by imprisonment in a county jail for not more than one year or in the state prison:

(1) Knowingly and maliciously prevents or dissuades any witness or victim from attending or giving testimony at any trial, proceeding, or inquiry authorized by law.

(2) Knowingly and maliciously attempts to prevent or dissuade any witness or victim from attending or giving testimony at any trial, proceeding, or inquiry authorized by law.

(3) For purposes of this section, evidence that the defendant was a family member who interceded in an effort to protect the witness or victim shall create a presumption that the act was without malice.

(b) Except as provided in subdivision (c), every person who attempts to prevent or dissuade another person who has been the victim of a crime or who is witness to a crime from doing any of the following is guilty of a public offense and shall be punished by imprisonment in a county jail for not more than one year or in the

state prison:

- (1) Making any report of that victimization to any peace officer or state or local law enforcement officer or probation or parole or correctional officer or prosecuting agency or to any judge.
- (2) Causing a complaint, indictment, information, probation or parole violation to be sought and prosecuted, and assisting in the prosecution thereof.
- (3) Arresting or causing or seeking the arrest of any person in connection with that victimization.

In *In re Lee* (1988) 47 Cal.3d 471, attorney Lee was found to have engaged in moral turpitude and was disbarred for soliciting the intimidation of a witness by force or threat when he sought the murder of a potential witness against him in violation of California Penal Code section 653f.¹

C. Prosecutorial Misconduct

In a criminal proceeding, witness intimidation by a prosecutor may be grounds for a finding of prosecutorial misconduct. See: *People v. Hill* (1998) 17 Cal.4th 800; and *Earp v. Ornoski* (9th Cir. 2005) 431 F.3d 1158. See also; 1 CA Criminal Practice: Motions, Jury Instructions and Sentencing § 12:8.

VI. ***Approach In Other Jurisdictions (National Backdrop):***

A. Model Rule 3.4 Variations. All jurisdictions have adopted some version of ABA Model Rule 3.4. When tallying the number of states using the ABA State Adoption Chart, only paragraphs (b) and (f) were considered. The ABA State Adoption Chart, entitled "Variations of the ABA Model Rules of Professional Conduct, Rule 3.4: Fairness to Opposing Party and Counsel," revised May 6, 2015, is available at:

¹ California Penal Code section 653f, subdivision (a):

Every person who, with the intent that the crime be committed, solicits another to offer, accept, or join in the offer or acceptance of a bribe, or to commit or join in the commission of carjacking, robbery, burglary, grand theft, receiving stolen property, extortion, perjury, subornation of perjury, forgery, kidnapping, arson or assault with a deadly weapon or instrument or by means of force likely to produce great bodily injury, or, by the use of force or a threat of force, to prevent or dissuade any person who is or may become a witness from attending upon, or testifying at, any trial, proceeding, or inquiry authorized by law, shall be punished by imprisonment in a county jail for not more than one year or pursuant to subdivision (h) of Section 1170, or by a fine of not more than ten thousand dollars (\$10,000), or the amount which could have been assessed for commission of the offense itself, whichever is greater, or by both the fine and imprisonment.

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_4.pdf [Last visited 3/28/16]
- Thirty-three jurisdictions have adopted Model Rule 3.4 verbatim.² Ten jurisdictions have adopted a slightly modified version of Model Rule 3.4.³ Eight jurisdictions have adopted a version of the rule that substantially diverges from Model Rule 3.4.⁴

VII. Public Comment Received by the First Commission:

A. The clean text of proposed new rule 3.4 drafted by the first Commission and adopted by the Board to replace rule 5-310 is enclosed with this assignment, together with the synopsis of public comments received on those proposed rules and the full text of those comments. Although the proposed rule differs from current rule 5-310, the drafting team might consider to what extent, if any, the public comments received on the proposed rule provide helpful information in analyzing the current rule.

To facilitate the review and to appreciate the relevance of these public comments, a redline comparison of the proposed rule showing changes to rule 5-310 is also enclosed with the public comments received. However, given the Board's charge to engage in a comprehensive review of the current rules and to retain the historical nature of the California Rules as "a clear and enforceable articulation of disciplinary standards," a drafting team that considers amendments developed by the first Commission should not presume that the approach taken by the first Commission was appropriate to achieve those objectives.

VIII. Potential Issues Identified by Professional Competence Staff Following Review of the Proposed Rule Developed by the First Commission and Adopted by the Board:

Bearing in mind the Commission's Charter to engage in a comprehensive review of the current rules and to retain the historical nature of the California Rules as "a clear and enforceable articulation of disciplinary standards," Professional Competence staff identified the following rule amendment issues (in no particular order) that the drafting team might consider. The drafting team need not address any of the issues. For example, if after critically evaluating an issue addressed by a revision made by the first

² The thirty-three jurisdictions are: Alabama, Arizona, Connecticut, Delaware, District of Columbia, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Oklahoma, Rhode Island, South Carolina, South Dakota, Utah, Vermont, West Virginia, Wisconsin, and Wyoming.

³ The ten jurisdictions are: Alaska, Arkansas, Colorado, Hawaii, Kentucky, Michigan, North Carolina, Pennsylvania, Tennessee, and Virginia.

⁴ The eight jurisdictions are: California, Florida, Georgia, New York, Ohio, Oregon, Texas, and Washington.

Commission, the drafting team determines that the revision does not address an actual (as opposed to theoretical) public protection deficiency in the current rule, then the drafting team should hesitate to recommend a change to the current rule despite the prior decision by the first Commission and the Board to address the issue. (Note: For the sake of completeness and ease of reference, some of the issues listed below may have already been mentioned in connection with other information provided above, such as in connection with the approaches taken in other jurisdictions or prior public comment. Multiple mentions of an issue do not necessarily warrant the drafting team taking action on an issue.)

(1) Whether to retain paragraphs current rule 5-310 as a standalone rule that addresses contact with witnesses or to merge rule 5-310 with the concept in current rule 5-220 that prohibits suppression of evidence. The ABA does so in Model Rule 3.4, as did RRC1 in its proposed Rule 3.4.⁵

(2) Whether to recommend the adoption of a provision that is the same or similar to Model Rule 3.4(b), which requires a lawyer to not falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law.⁶

(3) Whether to recommend the adoption of a provision that is the same or similar to Model Rule 3.4(f), which prohibits a lawyer from requesting a person other than the client to refrain from voluntarily giving relevant information to another party unless the person is a relative or an employee or other agent of a client; and the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

IX. Research Resources:

- [Business and Professions Code § 6068\(d\)](#)
- [CAL 1997-149 \(Compensating Non-Expert Witness\)](#)
- [California Rules of Court, Appendix C, proposed guideline 2](#) (role as representative of the court)
- Snyder v. State Bar (1976) 18 Cal.3d 286 [133 Cal.Rptr. 864]
- Waterman v. State Bar (1936) 8 Cal.2d 17 [63 P.2d 1133]

⁵ As part of its charge, the drafting team for Rule 5-220, which consists of Tuft (lead), Chou and Martinez, are considering Model Rule 3.4, paragraphs (a) through (e).

The drafting team for this rule 5-310 is requested to consider paragraph (f) of MR 3.4 in addition to rule 5-310. (See

⁶ Please note that the 5-220 drafting team will also address this provision as it relates to falsifying evidence generally. Coordination with that drafting team regarding this provision is recommended.

