

Table of Contents

April 28, 2016 OCTC Memo to RRC2:.....	1
April 29, 2016 Kehr Email to Drafting Team, cc Difuntorum, Mohr, McCurdy & Lee:.....	1
May 2, 2016 Martinez Email to Drafting Team, cc 5-200 Drafting Team, Difuntorum, Mohr, A. Tuft, McCurdy & Marlaud:	1

April 28, 2016 OCTC Memo to RRC2:

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I. Rule 5-310 [Prohibited Contact with Witnesses]

OCTC does not recommend any revisions to rule 5-310.

April 29, 2016 Kehr Email to Drafting Team, cc Difuntorum, Mohr, McCurdy & Lee:

This is another Rule in which problems are created by the Commission's expansive definition of "tribunal". This has two paragraphs that refer to tribunals ---

(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;

One can picture what these two paragraphs mean in the judicial context, and we can agree that a lawyer who violates these standards has interfered with the administration of justice and should be subject to professional discipline. How could one picture what these standards might mean for those legislative and administrative agencies and bodies that are within the adopted definition of "tribunal", in what circumstances (if any) should moral blame should attach, whether this would impose standards that are inconsistent with the standards of any particular legislative or administrative agency or body, or whether this would impose standards where there are none (perhaps because none are needed)? This also involves the separation of powers issue.

These two paragraphs should not extend beyond: (i) courts, arbitrators, administrative law judges acting in an adjudicative capacity and authorized to make a decision that can be binding on the parties involved; and (ii) special masters or other persons 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.

May 2, 2016 Martinez Email to Drafting Team, cc 5-200 Drafting Team, Difuntorum, Mohr, A. Tuft, McCurdy & Marlaud:

Please see below regarding this cross-over issue which arose out of OCTC's comment regarding Rule 5-200.

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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.

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.