

## **DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 4.1 [No California Rule Counterpart]**

**Lead Drafter:** Langford  
**Co-Drafters:** Cardona, Clopton  
**Meeting Date:** June 2-3, 2016

### **I. CURRENT CALIFORNIA RULE**

There is no California rule counterpart to ABA Model Rule 4.1.<sup>1</sup>

### **II. 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 III. The vote was unanimous in favor of making the recommendation.

### **III. PROPOSED RULE 4.1 (CLEAN)**

#### **Rule 4.1 Truthfulness in Statements to Others**

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6 or Business and Professions Code section 6068(e)(1).

#### **Comment**

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms the truth of a statement of another person that the lawyer knows is false. However, in drafting an agreement on behalf of a client, a lawyer does not necessarily affirm or vouch for the truthfulness of representations made by the client in the agreement. A nondisclosure can be the equivalent of a misrepresentation where a lawyer makes a partially true but misleading material statement or material omission that is the equivalent of an affirmative false statement. For dishonest conduct that does not amount to a

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<sup>1</sup> The blackletter of Model Rule 4.1 provides:

#### **Rule 4.1 Truthfulness In Statements To Others**

In the course of representing a client a lawyer shall not knowingly:

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- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

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false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. For example, in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.

[3] Under Rule 1.2.1, a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. See Rule 1.4(a)(5) regarding a lawyer's obligation to consult with the client about limitations on the lawyer's conduct. In some circumstances, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation in compliance with Rule 1.16.

[4] Regarding a lawyer's involvement in lawful covert activity in the investigation of violations of law, see Rule 8.4, Comment [5].

### IV. PROPOSED RULE 4.1 (REDLINE TO MODEL RULE 4.1)

#### Rule 4.1 Truthfulness In Statements To Others

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6 [or Business and Professions Code section 6068\(e\)\(1\)](#).

#### Comment

##### ~~Misrepresentation~~

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms [the truth of](#) a statement of another person that the lawyer knows is false. ~~Misrepresentations can also occur by~~ [However, in drafting an agreement on behalf of a client, a lawyer does not necessarily affirm or vouch for the truthfulness of representations made by the client in the agreement. A nondisclosure can be the equivalent of a misrepresentation where a lawyer makes a](#) partially true but misleading ~~statements or omissions that are~~ [material statement or material omission that is](#) the equivalent of [an](#)

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affirmative false ~~statements~~statement. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

### *Statements of Fact*

[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. ~~Under generally accepted conventions~~ For example, in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. ~~Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.~~

### *Crime or Fraud by Client*

[3] Under Rule ~~1.2(d)~~ 1.2.1, a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. ~~Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily~~ See Rule 1.4(a)(5) regarding a lawyer's obligation to consult with the client about limitations on the lawyer's conduct. In some circumstances, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. ~~Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by~~ in compliance with Rule ~~1.6~~ 1.16.

[4] Regarding a lawyer's involvement in lawful covert activity in the investigation of violations of law, see Rule 8.4, Comment [5].

## V. PUBLIC COMMENTS SUMMARY

None.

## VI. OCTC / STATE BAR COURT COMMENTS

- GREG DRESSER, OCTC, \_\_\_\_\_, 2016:  
A comment on proposed Rule 4.1 is anticipated.

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- **RUSSELL WEINER, OCTC, 4/12/2010:**<sup>2</sup>

1. OCTC's concern is one it has stated before: that this proposed rule requires knowing conduct and is thus inconsistent with well-established law that gross negligence can support a finding of moral turpitude and culpability under section 6068(d). (See, for example, *In the Matter of Chestnut* (Rev.Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 173-174 [respondent's unqualified and unequivocal statements under circumstances that should have caused him at least some uncertainty were at minimum deceptive, in violation of section 6068(d) and 6106]; *In the Matter of Harney* (Rev.Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 281-282 [violation of section 6068(d) and 6106 through gross negligence].
2. The Comments to this rule are too general and should be eliminated.

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

OCTC did not comment on ABA Model Rule 4.1 in 2001.

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

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

**Model Rule 4.1.** The ABA State Adoption Chart for Model Rule 4.1, entitled Variations of the ABA Model Rules of Professional Conduct Rule 4.1," revised May 6, 2014, is available at:

- [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_4\\_1.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_4_1.authcheckdam.pdf) [Last visited 1/29/16]
- Every jurisdiction except California has adopted some version of ABA Model Rule 4.1. Among these jurisdictions, thirty have adopted the rule verbatim,<sup>3</sup> nine have adopted substantially similar variations of the Model Rule,<sup>4</sup> and eleven have a substantially modified version of Model Rule 1.2.<sup>5</sup>

<sup>2</sup> OCTC submitted a comment on the public comment version of RRC1's proposed Rule 4.1. After public comment, RRC1 recommended that proposed Rule 4.1 not be adopted and the Board agreed.

<sup>3</sup> The thirty jurisdictions are: Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Florida, Idaho, Illinois, Indiana, Kansas, Louisiana, Maine, Massachusetts, Missouri, Montana, Nebraska, Nevada, New Hampshire, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Utah, Washington, West Virginia and Wyoming.

<sup>4</sup> The nine jurisdictions are: Georgia, Iowa, Kentucky, New Mexico, Ohio, Pennsylvania, Texas, Vermont and Wisconsin.

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- **Colorado Rule 4.1** is identical to Model Rule 4.1:

#### **Colorado Rule 4.1 Truthfulness In Statements To Others**

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

- **Maryland Rule 4.1** is a substantial departure from the Model Rule:

#### **Maryland Rule 4.1 Truthfulness In Statements To Others**

- (a) In the course of representing a client a lawyer shall not knowingly:
  - (1) make a false statement of material fact or law to a third person; or
  - (2) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.
- (b) The duties stated in this Rule apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

### **VIII. CONCEPTS ACCEPTED/REJECTED; CHANGES IN DUTIES; NON-SUBSTANTIVE CHANGES; ALTERNATIVES CONSIDERED**

#### **A. Concepts Accepted (Pros and Cons):**

1. Recommend adoption of the black letter of Model Rule 4.1, which prohibits a lawyer from making a false statement of fact or law to a third person and also requires a lawyer to disclose a material fact to avoid assisting a client in a criminal or fraudulent act, subject to the lawyer's duties under Rule 1.6 and Bus. & Prof. Code § 6068(e).
  - Pros: There are numerous reasons in support of recommending Rule 4.1's adoption:
    - (1) Public Protection. The rule provides crucial public protection. It is an important part of the entire set of rules being recommended, intended to supplement other rules proscribing similar conduct in other situations, such as Rule 3.3 (candor to the tribunal) and Rule 1.2.1 (advising a client regarding criminal or fraudulent conduct).
    - (2) Articulate Standard of Discipline. The proposed Rule provides language is that is

<sup>5</sup> The eleven Jurisdictions are: Hawaii, Maryland, Michigan, Minnesota, Mississippi, New Jersey, New York, North Carolina, North Dakota, Tennessee and Virginia.

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more precise than either Bus. & Prof. Code §§ 6068(d) or 6128 and thus will provide a clearer disciplinary standard than either of those Rules.

Section 6068(d) employs 19th Century language that presents ambiguous direction to lawyers in modern practice ("to employ...those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law"). In fact, this Commission has rejected that very language in proposed Rule 3.3.

Section 6128(a) is also an inadequate substitute because it is limited to acts of deceit or collusion that constitute criminal misconduct.

Section 6106 employs the amorphous concept of moral turpitude, dishonesty or corruption and could apply to conduct proscribed by many of the rules this Commission has already proposed, e.g., Rule 8.4.

(3) Advocacy Not Chilled. Model Rule 4.1 has been in existence for over 30 years and has been shown not to chill legitimate advocacy. ( See Restatement (3d) The Law Governing Lawyers §98 and the ABA Annot. Model Rules.)

(4) Relationship to proposed Rule 3.9. Proposed Rule 3.9 requires lawyers to do two things: to announce in certain legislative and administrative circumstances that they are acting as advocates for others (because failing to do so would be dishonest), and to comply with Rule 4.1, which imposes on lawyers a duty to tell the truth when appearing as an advocate in a non-adjudicative proceeding, e.g., before a legislature, an agency acting in its rule-making capacity, etc. To recommend against adoption of Rule 4.1 would leave proposed Rule 3.9 largely impotent in regulating lawyer conduct before those official bodies.

(5) Widespread adoption. Every jurisdiction has adopted some version of Model Rule 4.1. (See Section VII.) As noted, its widespread adoption has not been shown to have chilled legitimate advocacy.

- Cons: There are several reasons that militate against adopting Model Rule 4.1:
  - (1) Gross misconduct with respect to the subject of the Model Rule is already subject to discipline under Business and Professions Code sections 6068(d) and 6106.
  - (2) What knowledge is required to establish a lawyer's "knowledge" of a statement's untruth or what constitutes "incorporation" by a lawyer of a client's untrue statement reflect subtleties of language in the Model Rule do not lend themselves to a disciplinary rule.
  - (3) The concept of a lawyer's duty not to adopt or vouch for a client's or witness's falsehood is well-established; there is no need for a disciplinary rule to that effect.
  - (4) As to whether Rule 4.1 is necessary to assure that lawyers be candid and complete in dealing with opposing parties, the law of civil liability for incomplete

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statements and disclosures, and even for silence while a client makes untrue statements, is well established.<sup>6</sup>

2. Recommend adoption of several comments, all of which provide guidance on interpreting the rule or its application.

- Pros: Each comment assists in interpreting or applying the Rule:

Comment [1] draws the important distinction that while there is generally no affirmative duty to inform the opposing party of relevant facts, incorporation of another's falsehood into the lawyer's statement or a material omission in a partially true statement can violate the rule.

Comment [2] provides clarifying examples of non-material facts in a common situation in which the rule would apply, negotiation.

Comment [3] alerts lawyers to the relationship of Rule 4.1 with Rules 1.2.1 [Advising or Assisting the Violation of Law] and 1.16 [Declining or Terminating Representation].

Comment [4] directs lawyers to Comment [5] of proposed Rule 8.4, which notes that a lawyer's participation in lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights does not violate that rule's prohibition against a lawyer engaging "in conduct involving moral turpitude, dishonesty, fraud, deceit or reckless or intentional misrepresentation," which would apply equally to Rule 4.1.

- Cons: If the rule in fact provides an articulable standard for discipline, there should be no need for any comments to the Rule.

### **B. Concepts Rejected (Pros and Cons):**

1. Recommend adoption of a black letter provision that would expressly except from the application of the Rule a lawyer's participation in lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights. (Such a provision, based on Oregon Rule 8.4(b), was recommended by RRC1 in its initial public comment draft of Rule 4.1.<sup>7</sup>

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<sup>6</sup> See, e.g., *Vega v. Jones, Day, Reavis & Pogue* (2004) 121 Cal.App.4th 282, 293, 294; *Roberts v. Ball, Hunt, Hart etc.* (1976) 57 Cal.App.3d 104; *Cicone v. URS Corporation* (1986) 183 Cal.App.3d 194, 208; and *Pumphrey v. K.W.Thompson Tool Co.* (9 Cir 1995) 62 F.3d 1128.

<sup>7</sup> RRC1's proposed Rule 4.1(b) provided:

- (b) This Rule does not apply where a lawyer advises clients or others about, or supervises, lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules. "Covert activity," as used in this Rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other

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- Pros: The comment in Rule 8.4 establishes an exception to the application of both Rule 4.1 and 8.4 and should be in the black letter of either rule.
- Cons: First, the concept is adequately addressed by the Comment to Rule 8.4 because the comment provides guidance on how that rule's general prohibition on dishonest conduct, Rule 8.4(c), should be applied. Second, the concept is more appropriately addressed in relation to proposed Rule 8.4(c), which contains a general prohibition on a lawyer engaging in dishonest conduct.

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

1. The inclusion of proposed Rule 4.1's concept, although addressed in statutes and case law, is nevertheless a substantive change in that the concept is now being included as a disciplinary rule.

### D. Non-Substantive Changes to the Model Rule:

1. In paragraph (b), include the statutory duty of confidentiality.
  - Pros: In California, the duty of confidentiality resides in the State Bar Act so it is appropriate to include that reference in addition to the reference to rule 1.6 [3-100].
  - Cons: None identified.
2. Implement clarifying edits to the Model Rule comment language recommended for the proposed rule.
  - Pros: In the second sentence of Comment [1], adding the words "the truth of" before "statement of another person" is more precise than the Model Rule language because it emphasizes the nature of the misrepresentation involved. In the second sentence of Comment [2], substitute "[f]or example" for "[u]nder generally accepted

subterfuge. Covert activity may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place, or will take place in the foreseeable future.

Oregon Rule 8.4(b) provides:

- (b) Notwithstanding paragraphs (a) (1), (3) and (4) and Rule 3.3 (a)(1), it shall not be professional misconduct for a lawyer to advise clients or others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules of Professional Conduct . "Covert activity," as used in this rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. "Covert activity" may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future.

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- conventions” to eliminate ambiguity as to whether the illustration that follows is, in fact, just one example.
- Cons: For purposes of national uniformity, non-substantive changes to Model Rule comments should be done sparingly.

**E. Alternatives Considered:**  
None.

### **IX. OPEN ISSUES/CONCEPTS FOR THE COMMISSION TO CONSIDER**

None.

### **X. COMMENTS FROM DRAFTING TEAM MEMBERS OR OTHER COMMISSION MEMBERS**

**Cardona**

- [Date]: Email Comment
- [Date]: Email Comment

**Langford**

- [Date]: Email Comment
- [Date]: Email Comment

**Zipser**

- [Date]: Email Comment
- [Date]: Email Comment

### **XI. RECOMMENDATION AND PROPOSED COMMISSION RESOLUTION**

**Recommendation:**

That the Commission recommend that the Board of Trustees of the State Bar of California adopt proposed rule 4.1 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 rule 4.1 in the form attached to this Report and Recommendation.

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Lead Drafter:     Langford Co-Drafters:     Cardona, Clopton Meeting Date:    June 2-3, 2016
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<b>XII.     DISSENTING POSITION(S)</b>
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None.
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<b>XIII.    FINAL COMMISSION VOTE/ACTION</b>
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Date of Vote:
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Action:
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Vote: X (yes) – X (no) – X (abstain)
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