

**Rule 3.4 [5-200(E), 5-220, 5-310] Fairness to Opposing Party and Counsel  
(Commission's Proposed Rule Adopted on May 6 – 7, 2016 – Clean Version)**

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;
- (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, or state a personal opinion as to the guilt or innocence of an accused.

**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 § 135; 18 United States Code §§ 1501-1520. Falsifying evidence is also generally a criminal offense. See, e.g., Penal Code § 132; 18 United States Code § 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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Synopsis of Public Comments**

**TOTAL = 9**      **A = 3**  
**D = 3**  
**M = 3**  
**NI = 0**

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
X-2016-23	Baruh, Jeffrey A. (8-1-16)	N	A		Expresses concern with the lack of enforcement of Santa Clara's Code of Professionalism. Believes the State Bar and judges should enforce the rules so that they are taken seriously and complied with by lawyers.	Enforcement practices and policies are beyond the scope of the Commission's project to revise the rules. It should be noted, however, that pursuant to its Charter, the Commission is proposing new and amended rules that continue the function of the rules as disciplinary standards. The Commission has further made a deliberate effort to address ambiguities in rule language and to reconcile rules with developments in professional responsibility that have occurred since the rules were last revised. The Commission believes this approach will contribute to the effective enforcement of the rules by the State Bar.
X-2016-43bg	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (9-8-16)	Y	A	3.4	Supports adoption of proposed Rule 3.4.	No response required.
X-2016-66p	San Diego County Bar Association (SDCBA) (Riley) (9-15-16)	Y	A	3.4	Supports adoption of proposed Rule 3.4.	No response required.

<sup>1</sup> A = AGREE with proposed Rule      D = DISAGREE with proposed Rule      M = AGREE ONLY IF MODIFIED      NI = NOT INDICATED

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X-2016-83f	Garrett, Christopher (9-26-16)	N	D	3.4	Rule unnecessarily burdens one's public petition or speech rights.	The commenter's concern is not directed to the substance of proposed rule 3.4 (or rules 3.3 and 3.5), but rather to the definition of "tribunal" as proposed in Rule 1.0.1(m), which the commenter suggests would import rules 3.3 to 3.5 into proceedings before local governmental bodies. As such, no response concerning Rule 3.4 is necessary. Please see Commission's response to the commenter concerning Rule 1.0.1.
X-2016-93i	Los Angeles County Public Defender (Brown) (9-23-16)	Y	M	(e)	Rule lack the necessary mens rea requirement and paragraph (e) should include the term "intentionally."	The Commission has not made the suggested change. The Commission does not understand how a lawyer might "unintentionally" engage in the conduct prohibited by paragraph (e), i.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."
X-2016-97c	Freedman, Daniel (9-27-16)	N	D	3.4	Rule would put land use attorney profession in jeopardy by chilling speech, restricting the attorney's ability to be zealous for the client, and opening attorney to discipline	The commenter's concern is not directed to the substance of proposed rule 3.4 (or rules 3.3 and 3.5), but rather to the definition of "tribunal" as

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					as retribution.	proposed in Rule 1.0.1(m), which the commenter suggests would import rules 3.3 to 3.5 into proceedings before local governmental bodies. As such, no response concerning Rule 3.4 is necessary. Please see Commission's response to the commenter concerning Rule 1.0.1.
X-2016-104al	State Bar of California, Office of Chief Trial Counsel (OCTC) (Dressler) (9-27-16)	Y	M	(f)	<p>1. "Knowing" standard is contrary to established standards of conduct; contrary to the State Bar Act, the current rules and case law interpreting those authorities; misleading to attorneys as to their professional obligations and; creates confusion in disciplinary law making enforcement more difficult.</p> <p>An attorney is required to know or at least search for the rules of a tribunal.</p> <p>2. It's unclear if the "obligation" is provided by established rules or a judge's preference.</p> <p>3. Requests clarification if rule</p>	<p>1. The Commission disagrees. The definition of "knowingly" in Rule 1.0.1(f) makes clear that knowledge can be inferred from the circumstances. With this definition, the Commission believes that the "knowingly" standard is appropriately used in this Rule, which addresses a lawyer's statements and the submission or presentation of evidence to a court.</p> <p>2. The Commission does not understand what is meant by a "judge's preference." An "obligation" or "duty" would typically arise from a statute, rule or a court order, including a local court order.</p> <p>3. <b>[ALT1] The Commission</b></p>

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					applies to when attorney advises a nonclient to not speak with opponent in matter.	believes that the conduct about which the commenter inquires is subsumed in paragraph (e).  [ALT2] The draft that the commenter addressed did not include Model Rule 3.4(f). After further consideration, the Commission has recommended that MR 3.4(f) be included in the rule.
X-2016-126c	Ivester, David (9-27-16)	N	D	3.4	Proposed Rule 1.0.1's broad definition of the word "tribunal" will limit and interfere with administrative law practitioners' ability to advocate for clients in administrative proceedings.	The commenter's concern is not directed to the substance of proposed rule 3.4 (or rules 3.3 and 3.5), but rather to the definition of "tribunal" as proposed in Rule 1.0.1(m), which the commenter suggests would import rules 3.3 to 3.5 into proceedings before local governmental bodies. As such, no response concerning Rule 3.4 is necessary. Please see Commission's response to the commenter concerning Rule 1.0.1.
X-2016-129c	California Building Industry Association (CBIA) (Cammarota) (9-27-16)	Y	M	1.0.1, 3.4	Proposes amended definition of "tribunal" under proposed rule 1.0.1 such that attorney communications are not "chilled" by proposed rule 3.4.	The commenter's concern is not directed to the substance of proposed rule 3.4 (or rules 3.3 and 3.5), but rather to the definition of "tribunal" as proposed in Rule 1.0.1(m),

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