

## COMMISSION PROVISIONAL REPORT AND RECOMMENDATION: RULE 4.1

### Commission Drafting Team Information

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

**[There is no California Rule that corresponds to Model Rule 4.1,  
from which proposed Rule 4.1 is derived.]**

#### **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.

#### **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 a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. 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 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), 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, 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 Rule 1.6.

## **II. FINAL VOTES BY THE COMMISSION AND THE BOARD**

### **Commission:**

Date of Vote: October 21 & 22, 2016

Action: Recommend Board Adoption of Proposed Rule 4.1

Vote: 15 (yes) – 0 (no) – 0 (abstain)

### **Board:**

Date of Vote: November 17, 2016

Action: Board Adoption of Proposed Rule 4.1

Vote: 14 (yes) – 0 (no) – 0 (abstain)

## **III. COMMISSION'S 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 Business and Professions Code § 6068(e)(1) or Rule 1.6.

### **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 or other document 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 or document. A nondisclosure can be the equivalent of a false statement of material fact or law under

paragraph (a) where a lawyer makes a partially true but misleading material statement or material omission. In addition to this Rule, lawyers remain bound by Business and Professions Code § 6106 and 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)(4) 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. COMMISSION'S 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 [Business and Professions Code § 6068\(e\)\(1\) or](#) Rule 1.6.

##### **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 or other document 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 or document. A nondisclosure can be the equivalent of a false statement of material fact or law under paragraph \(a\) where a lawyer makes a](#) partially true but misleading ~~statements or omissions that are the equivalent of affirmative false statements. 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, material statement or material omission. In addition to this Rule, lawyers remain bound by Business and Professions Code § 6106 and 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)(4) 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. RULE HISTORY**

Although the origin and history of Model Rule 4.1 was not the primary factor in the Commission's consideration of proposed Rule 4.1, that information is published in "A Legislative History, The Development of the ABA Model Rules of Professional Conduct, 1982 – 2013," Art Garwin, Editor, 2013 American Bar Association, at pages 545 – 554 ISBN: 978-1-62722-385-0. (A copy of this excerpt is on file with the State Bar.)

## **VI. OCTC / STATE BAR COURT COMMENTS**

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016**  
**(In response to 90-day public comment circulation):**

1. OCTC is concerned that this proposed rule requires “knowingly” for the same reasons expressed regarding that term in proposed Rule 1.9, proposed Rule 3.3, and the General Comments section of this letter. Moreover, an attorney’s unqualified and unequivocal statements to judges under circumstances that should have caused him or her at least some uncertainty are, at a minimum, deceptive and support a finding of culpability. (In the Matter of Chesnut (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 173-174.) As discussed, California disciplines attorneys for a lack of candor, dishonesty, or moral turpitude, based on gross negligence, recklessness, or willful blindness. (See sections 6068(d) and 6106 and rule 5-200; Vaughn v. State Bar (1972) 6 Cal.3d 847, 857 and 859; In the Matter of Harney (Review Dept. 1995) 3 Cal. State Bar 266, 2381-2382; In the Matter of Chesnut (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 173-174; In the Matter of Dale (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 798 [gross negligence in representation to third party]; In the Matter of Loftus (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 80; In the Matter of Casey (Review Dept. 2008) 5 Cal. State Bar Ct. Rptr. 117.)

While what constitutes recklessness or gross negligence to a third party is not the same as to a client or a court, California disciplinary law also recognizes that an attorney can be disciplined for gross negligence to others. (See Vaughn v. State Bar (1972) 6 Cal.3d 847, 859 [“In some instances, as in the matter before us, an attorney’s gross negligence may also affect non-clients with whom he deals or even the public generally”]; In the Matter of Yee (Review Dept. 2014) 5 Cal. State Bar Ct. Rptr. 330 [failure to verify MCLE compliance before affirming it constitutes gross negligence amounting to moral turpitude for discipline purposes] .)

2. OCTC is concerned with the use of the term “knowingly” in Comment 1 for the same reasons expressed to the use of that word in the rule itself.

3. OCTC supports Comments 2, 3, and 4.

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

## **VII. PUBLIC COMMENTS & PUBLIC HEARING TESTIMONY**

Seven comments, including the comment above from OCTC, were received and all agreed with the proposed rule. A public comment synopsis table is provided at the end of this report.

## VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

### A. Related California Law

Concerning the law of civil liability for incomplete statements and disclosures, and for inexcusable silence while a client makes untrue statements, see: *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.

### B. ABA Model Rule Adoptions

**Model Rule 4.4.** 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>1</sup> nine have adopted substantially similar variations of the Model Rule,<sup>2</sup> and eleven have a substantially modified version of Model Rule 1.2.<sup>3</sup>
- **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.

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<sup>1</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>2</sup> The nine jurisdictions are: Georgia, Iowa, Kentucky, New Mexico, Ohio, Pennsylvania, Texas, Vermont and Wisconsin.

<sup>3</sup> The eleven Jurisdictions are: Hawaii, Maryland, Michigan, Minnesota, Mississippi, New Jersey, New York, North Carolina, North Dakota, Tennessee and Virginia.

- **Maryland Rule 4.1** is a substantial departure from the Model Rule in its adoption of paragraph (b), under which Maryland Rule 4.1 supersedes a lawyer's duty of confidentiality:

### **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.

## **IX. 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 that is 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 statements and disclosures, and even for silence while a client makes untrue statements, is well established.<sup>4</sup>

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<sup>4</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.



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>5</sup>

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<sup>5</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 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.

- 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.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

### **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.

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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.

- 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 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.

### **X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION**

#### **Recommendation:**

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 Board of Trustees adopts proposed Rule 4.1 in the form attached to this Report and Recommendation.