

COMMISSION PROVISIONAL REPORT AND RECOMMENDATION: RULE 3.4 [5-310, 5-220, and 5-200]

Commission Drafting Team Information

Lead Drafter: Joan Croker

Co-Drafters: George Cardona, Nanci Clinch

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.
- (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. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: October 21 & 22, 2016

Action: Recommend Board Adoption of Proposed Rule 3.4 [5-310][5-320][5-220]

Vote: 14 (yes) – 1 (no) – 0 (abstain)

Board:

Date of Vote: November 17, 2016

Action: Board Adoption of Proposed Rule 3.4 [5-310][5-320][5-220]

Vote: 14 (yes) – 0 (no) – 0 (abstain)

IV. COMMISSION'S PROPOSED RULE 3.4 (CLEAN)

Rule 3.4 [5-200(E), 5-220, 5,310] 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;
- (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.

**V. COMMISSION'S PROPOSED RULE 3.4
(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's~~memberlawyer 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~~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:

(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, 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.

VI. RULE HISTORY

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.

VII. 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 supports subsections (a) through (e), and (g).
2. OCTC has concerns about subsection (f)'s requirement that the attorney "knowingly" disobey an obligation under the rule of a tribunal for the same reasons expressed regarding that term in proposed Rule 1.9, 3.3, and the General Comments section of this letter. Moreover, this rule encourages attorneys not to know the rules of a tribunal. (See *Butler v. State Bar* (1986) 42 Cal.3d 323, 328-329 [circumstances known to the attorney may require an investigation].) An attorney is required to know or at least search for the rules of a tribunal. Mere negligence is not a basis for discipline, but recklessness, gross negligence, or repeated conduct can be. (See current rule 3-110; *In the Matter of Riley* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 91, 113.)
3. Also, it is unclear whether "an obligation under the rules of a tribunal" in subsection (f) includes local court rules, a judge's individualized preferences, or some other matters. Without additional clarification or definition, the intended meaning of this rule will be a major source of debate, confusion, and litigation. This lack of clarity will make it difficult to enforce.
4. OCTC requests clarification from the Commission whether this rule is violated when a lawyer advises a person, who is not a client, that he or she need not voluntarily speak with opposing counsel/party in the matter.
5. OCTC supports the Comments.

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

VIII. PUBLIC COMMENTS & PUBLIC HEARING TESTIMONY

Nine comments, including the comment from OCTC were received. Three agreed with the proposed rule, three disagreed, and three agreed only if modified. A public comment synopsis table, with the Commission's responses to each comment, is provided at the end of this report.

IX. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

Massachusetts Rule 3.4 is identical to Model Rule 3.4.

- 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:

- 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

**X. 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 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

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.

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;
- (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

- 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).

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 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.)

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

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:

See section X.A above. The main alternative considered was whether to retain the existing California structure of separate rules or move to the national standard of a combined rule. ~~None.~~

XI. RECOMMENDATION AND PROPOSED COMMISSION RESOLUTION

Recommendation:

That the Commission recommends adoption of proposed Rule 3.4 [5-310] in the form attached to this report and recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopt proposed Rule 3.4 [5-310] in the form attached to this Report and Recommendation