

PROPOSED CHANGES TO RULES OF PROFESSIONAL CONDUCT

Rule 1.0.1 Terminology

Add the following definition:

(*) **“Incivility” means significantly unprofessional conduct [conduct unbecoming a licensee of the State Bar] that is discourteous, abusive, harassing, or harassing, other significantly unprofessional conduct.**

Comment

Incivility*

[4] This definition does not apply to conduct protected by the First Amendment to the United State Constitution or by Article I, section 2 of the California Constitution. This definition includes conduct that violates an attorney’s duties under Business and Professions Code section 6068, subdivisions (b) and (f). (See California Code of Judicial Ethics, Canon 3B, advisory commentary: Canon 3B(2) regarding/for a judge’s responsibility to require lawyers under the judge’s direction and control to be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others.)

Commented [TA1]: As indicated in our general comments and observations, we believe a substantial enforceability issue exists. The edits offer an attempt to address that issue and concern.

The first sentence of new Comment [4] is taken from Rule 8.4.1, Cmt. [4].

We also offer alternative language for you to consider, reflected in the brackets, in the definition language that is lifted from Wunsch. We are not sure this alternate language is better or an improvement, we only offer it for your consideration. “Conduct unbecoming” is derived from military law which may not transfer well as an attorney duty concept.

The subcommittee agrees with the suggestion of the Office of Professional Competence to strike “other significantly unprofessional conduct” because this phrase is too vague and overbroad for a disciplinary standard. We believe that the proposed clarification that incivility means “significantly unprofessional conduct that is discourteous, abusive, or harassing” provides clearer guidance to lawyers. We are concerned about potential First Amendment implications by using this phrase. For similar reasons, we also do not believe the proposed bracketed language—“conduct unbecoming a licensee of the State Bar”—would be appropriate for use in this rule. We propose a definition as shown above.

The subcommittee does not have any concerns with the proposed comment [4], which we believe is important to help ensure the incivility rule amendments are not applied to protected First Amendment activities.

Rule 1.2 Scope of Representation and Allocation of Authority

- (a) Subject to rule 1.2.1, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by rule 1.4, shall reasonably* consult with the client as to the means by which they are to be pursued. Subject to Business and Professions Code section 6068, subdivision (e)(1) and rule 1.6, a lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. Except as otherwise provided by law in a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify. ~~A lawyer does not - violate this rule by acceding to requests of opposing counsel that do not - prejudice the rights of the client, being punctual in fulfilling all professional - commitments, avoiding offensive tactics, and treating with courtesy and - consideration all persons involved in the legal process.~~
- (b) A lawyer may limit the scope of the representation if the limitation is reasonable* under the circumstances, is not otherwise prohibited by law, and the client gives informed consent.*

Comment

[1] A lawyer does not violate this rule by acceding to **reasonable** requests of opposing counsel that do not prejudice the rights of the client, being punctual in fulfilling all professional commitments, avoiding offensive tactics, and treating with courtesy and consideration all persons involved in the legal process.¹

Commented [TA2]: We recommend moving the proposed language to a Comment. As indicated in our general comments and observations, in California the blackletter sets forth minimum standards for discipline. The language of Rule 1.2(a) does not currently imply that the conduct described in the additional language is subject to discipline but for the additional language that is being proposed.

Adding the language into the Comment may be helpful for construing California's rule when it's compared to the rules in the jurisdictions that you have identified.

¹ Numerous other states have similar language in their equivalent version of California's Rule 1.2. See, e.g., *Massachusetts* ("A lawyer does not violate this Rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his or her client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process."); *Michigan* ("A lawyer does not violate this rule by acceding to reasonable requests of opposing counsel that do not prejudice the rights of the client, by being punctual in fulfilling all professional commitments, or by avoiding offensive tactics."); *New York* ("A lawyer does not violate these Rules by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, and by treating with courtesy and consideration all persons involved in the legal process."); *Ohio* ("A lawyer does not violate this rule by acceding to requests of opposing counsel that do not prejudice the rights of the client, being punctual in fulfilling all professional commitments, avoiding offensive tactics, and treating with courtesy and consideration all persons involved in the legal process.").

Rule 1.3 Diligence

- (a) A lawyer shall not intentionally, repeatedly, recklessly or with gross negligence fail to act with reasonable diligence in representing a client.
- (b) For purposes of this rule, “reasonable diligence” shall mean that a lawyer acts with commitment and dedication to the interests of the client and does not neglect or disregard, or unduly delay a legal matter entrusted to the lawyer.

Comment

[1] This rule addresses only a lawyer’s responsibility for his or her own professional diligence. See rules 5.1 and 5.3 with respect to a lawyer’s disciplinary responsibility for supervising subordinate lawyers and nonlawyers.

[2] See rule 1.1 with respect to a lawyer’s duty to perform legal services with competence.

[3] A lawyer’s duty to act with reasonable diligence does not eliminate a lawyer’s other professional obligations and lawyers should ~~strive~~seek to treat all persons involved in the legal process with dignity and courtesy and respect.²(See Cal. Rules of Court, rule 9.4 [attorney oath].)

Commented [TA3]: “should seek” is used in rule 3.3, Cmt. [4] and we recommend mirroring language structure currently in the rules. The term “strive” is not currently used in the rules.

We offer a formulation of “dignity and courtesy” because it tracks Cal. Rule of Court 9.4.

The Subcommittee agrees that the words “strive” and “respect” be removed from the proposed Comment language and be replaced with “should seek” as consistent with Comment 4 to Rule 3.3.. Additionally, the Subcommittee has concerns with the proposed language “A lawyer’s duty to act with reasonable diligence does not eliminate a lawyer’s other professional obligations” as being too vague for purposes of a disciplinary standard particularly where “other professional obligations” is not defined. If the Office of Professional Competence or State Bar staff wish to keep this language, the Subcommittee would recommend that “eliminate” be changed to “diminish.”

The Subcommittee would propose the following alternative language for Comment 3 that is consistent with the attorney’s oath as set forth in California Rules of Court, rule 9.4, with the goal of civility in mind:

A lawyer should seek to treat all persons involved in the legal process with dignity and courtesy. (See Cal. Rules of Court, rule 9.4 [attorney oath].)

² Numerous other states have similar language in their equivalent version of California’s Rule 1.3. See, e.g., *Alaska* (“The lawyer’s duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.”); *Arizona* (“The lawyer’s duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.”); *Colorado* (“The lawyer’s duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.”); *Delaware* (“The lawyer’s duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.”); *District of Columbia* (“The duty of a lawyer to represent the client with zeal does not militate against the concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm. Thus, the lawyer’s duty to pursue a client’s lawful objectives zealously does not prevent the lawyer from acceding to reasonable requests of opposing counsel that do not prejudice the client’s rights, being punctual in fulfilling all professional commitments, avoiding offensive tactics, or treating all persons involved in the legal process with courtesy and consideration.”); *Florida* (“The lawyer’s duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.”); *Hawaii* (“The lawyer’s duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.”); *Illinois* (“The lawyer’s duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.”); *Massachusetts* (“The

lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect."); *Minnesota* ("The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect."); *New Mexico* ("The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect."); *New York* ("Notwithstanding the foregoing, the lawyer should not use offensive tactics or fail to treat all persons involved in the legal process with courtesy and respect."); *South Carolina* ("The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect."); *Utah* ("The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect."); *Washington* ("The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect."); *Wyoming* ("The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect."); *ABA Model Rules* ("The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.").

Rule 3.3 Candor Toward the Tribunal

- (a) A lawyer shall not:
- (1) knowingly* make a false statement of fact or law to a tribunal* or fail to correct a false statement of material fact or law previously made to the tribunal* by the lawyer;
 - (2) fail to disclose to the tribunal* legal authority in the controlling jurisdiction known* to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel, or knowingly* misquote to a tribunal* the language of a book, statute, decision or other authority; or
 - (3) offer evidence that the lawyer knows* to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence, and the lawyer comes to know* of its falsity, the lawyer shall take reasonable* remedial measures, including, if necessary, disclosure to the tribunal,* unless disclosure is prohibited by Business and Professions Code section 6068, subdivision (e) and rule 1.6. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes* is false.
- (b) A lawyer who represents a client in a proceeding before a tribunal* and who knows* that a person* intends to engage, is engaging or has engaged in criminal or fraudulent* conduct related to the proceeding shall take reasonable* remedial measures to the extent permitted by Business and Professions Code section 6068, subdivision (e) and rule 1.6.
- (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding.
- (d) In an ex parte proceeding where notice to the opposing party in the proceeding is not required or given and the opposing party is not present, a lawyer shall inform the tribunal* of all material facts known* to the lawyer that will enable the tribunal* to make an informed decision, whether or not the facts are adverse to the position of the client.
- (e) In appearing as a lawyer before a tribunal* a lawyer shall

(1) engage in a pattern of incivility;

(2) intentionally or habitually violate any established rule of procedure or of evidence; or

Commented [TA4]: Please see the comments presented to the Rules Revision Commission by OCTC. We believe the series of edits to rules 3.3(e); 3.4(f); and 3.5(c) implicate these concerns.

We believe adding one of these proposed edits may not implicate that concern, and that Comments could be used to advance issues in the rules where you don't add language (e.g., through the use of cross-references).

Among these three proposed edits, we would recommend your group consider which of these proposals is the one the group would most desire to pursue.

One option to consider is an amendment to rule 8.4 to capture this disparate conduct in a single rule.

(3)engage in conduct intended to disrupt the tribunal.*³ =

³ At least one other state has similar language in its equivalent version of California's Rule 3.3. See, e.g., *New York* ("In appearing as a lawyer before a tribunal, a lawyer shall not: (1) fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of the intent not to comply; (2) engage in undignified or discourteous conduct; (3) intentionally or habitually violate any established rule of procedure or of evidence; or (4) engage in conduct intended to disrupt the tribunal.").

Rule 3.4 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) A lawyer shall not ask any question intended to degrade a witness or other person except where the lawyer reasonably* believes that the question will lead to relevant and admissible evidence.**⁴

Commented [TA5]: See comment above.

⁴ Numerous other states have similar language in their equivalent version of California's Rule 3.4. See, e.g., *Texas* ("A lawyer shall not ... ask any question intended to degrade a witness or other person except where the lawyer reasonably believes that the question will lead to relevant and admissible evidence; or (5) engage in conduct intended to disrupt the proceedings."); *Virginia* ("A lawyer shall not ... assert a position, conduct a defense, delay a trial, or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another."). See, also, *Delaware*, in its Notes to Decision for Rule 3.4, citing to a particular case where a lawyer's behavior was uncivil ("New trial was granted where defense counsel's comments to jury included an unjustified attack on the integrity of opposing counsel.").

- (g) 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
- (h) 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.

Rule 3.5 Contact with Judges, Officials, Employees, and Jurors

- (a) Except as permitted by statute, an applicable code of judicial ethics or code of judicial conduct, or standards governing employees of a tribunal,* a lawyer shall not directly or indirectly give or lend anything of value to a judge, official, or employee of a tribunal.* This rule does not prohibit a lawyer from contributing to the campaign fund of a judge or judicial officer running for election or confirmation pursuant to applicable law pertaining to such contributions.
- (b) Unless permitted to do so by law, an applicable code of judicial ethics or code of judicial conduct, a rule or ruling of a tribunal,* or a court order, a lawyer shall not directly or indirectly communicate with or argue to a judge or judicial officer upon the merits of a contested matter pending before the judge or judicial officer, except:
 - (1) in open court;
 - (2) with the consent of all other counsel and any unrepresented parties in the matter;
 - (3) in the presence of all other counsel and any unrepresented parties in the matter;
 - (4) in writing* with a copy thereof furnished to all other counsel and any unrepresented parties in the matter; or
 - (5) in ex parte matters.

(c) A lawyer shall not engage in a pattern of incivility that is degrading to a tribunal.*⁵

Commented [TA6]: See comment above.

- (d) As used in this rule, “judge” and “judicial officer” shall also include: (i) administrative law judges; (ii) neutral arbitrators; (iii) State Bar Court judges; (iv) members of an administrative body acting in an adjudicative capacity; and (v) law clerks, research attorneys, or other court personnel who participate in the decision-

⁵ Numerous other states have similar language in their equivalent version of California’s Rule 3.5. See, e.g., *Alaska* (“A lawyer shall not ... engage in conduct intended to disrupt a tribunal.”); *Delaware* (“A lawyer shall not ... engage in conduct intended to disrupt a tribunal or engage in undignified or discourteous conduct that is degrading to a tribunal.”); *Hawaii* (“A lawyer shall not harass a judge, juror, prospective juror, discharged juror, or other decision maker or embarrass such person in such capacity.”); *Kansas* (“A lawyer shall not ... engage in undignified or discourteous conduct degrading to a tribunal.”); *Michigan* (“A lawyer shall not ... engage in undignified or discourteous conduct toward the tribunal.”); *Ohio* (“a lawyer shall not ... engage in undignified or discourteous conduct that is degrading to a tribunal.”); *South Carolina* (“A lawyer shall not ... engage in conduct intended to disrupt a tribunal.”); *ABA Model Rules* (“A lawyer shall not ... engage in conduct intended to disrupt a tribunal.”).

making process, including referees, 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.

- (e) A lawyer connected with a case shall not communicate directly or indirectly with anyone the lawyer knows* to be a member of the venire from which the jury will be selected for trial of that case.
- (f) During trial, a lawyer connected with the case shall not communicate directly or indirectly with any juror.
- (g) During trial, a lawyer who is not connected with the case shall not communicate directly or indirectly concerning the case with anyone the lawyer knows* is a juror in the case.
- (h) After discharge of the jury from further consideration of a case a lawyer shall not communicate directly or indirectly with a juror if:
 - (1) the communication is prohibited by law or court order;
 - (2) the juror has made known* to the lawyer a desire not to communicate; or
 - (3) the communication involves misrepresentation, coercion, or duress, or is intended to harass or embarrass the juror or to influence the juror's actions in future jury service.
- (i) A lawyer shall not directly or indirectly conduct an out of court investigation of a person* who is either a member of a venire or a juror in a manner likely to influence the state of mind of such person* in connection with present or future jury service.
- (j) All restrictions imposed by this rule also apply to communications with, or investigations of, members of the family of a person* who is either a member of a venire or a juror.
- (k) A lawyer shall reveal promptly to the court improper conduct by a person* who is either a member of a venire or a juror, or by another toward a person* who is either a member of a venire or a juror or a member of his or her family, of which the lawyer has knowledge.
- (l) This rule does not prohibit a lawyer from communicating with persons* who are members of a venire or jurors as a part of the official proceedings.
- (m) For purposes of this rule, "juror" means any empaneled, discharged, or excused juror.

Comment

[1] An applicable code of judicial ethics or code of judicial conduct under this rule includes the California Code of Judicial Ethics and the Code of Conduct for United States Judges. Regarding employees of a tribunal* not subject to judicial ethics or conduct codes, applicable standards include the Code of Ethics for the Court Employees of California and 5 United States Code section 7353 (Gifts to Federal employees). The statutes applicable to adjudicatory proceedings of state agencies generally are contained in the Administrative Procedure Act (Gov. Code, § 11340 et seq.; see Gov. Code, § 11370 [listing statutes with the act].) State and local agencies also may adopt their own regulations and rules governing communications with members or employees of a tribunal.*

[2] For guidance on permissible communications with a juror in a criminal action after discharge of the jury, see Code of Civil Procedure section 206.

[3] It is improper for a lawyer to communicate with a juror who has been removed, discharged, or excused from an empaneled jury, regardless of whether notice is given to other counsel, until such time as the entire jury has been discharged from further service or unless the communication is part of the official proceedings of the case.

[4] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. In the event that any judicial officer is impatient, undignified, or discourteous, the lawyer may continue to advocate on behalf of the client and stand firm in the position of the client, but this shall not provide justification for the lawyer engaging in any violations of this rule.⁶

Commented [TA7]: See comment above; this Comment might be the type of Comment language that can be used in lieu of additions to the blackletter.

⁶ Numerous other states have similar language in their equivalent version of California's Rule 3.5. See, e.g., *Alaska* ("Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics."); *Colorado* ("Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics."); *Delaware* ("Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. ... An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics."); *District of Columbia* ("Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. ... An advocate can present the cause, protect the record for subsequent review, and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics."); *Florida* ("Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate.

An advocate can present the cause, protect the record for subsequent review, and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.”); *Hawaii* (“Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review, and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.”); *Illinois* (“Refraining from abusive or obstreperous conduct is a corollary of the advocate’s right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge’s default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.”); *Massachusetts* (“The advocate’s function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate’s right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge’s default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.”); *Michigan* (“The lawyer may not engage in improper conduct during the communication. The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from undignified or discourteous conduct is a corollary of the advocate's right to speak on behalf of litigants. ... An advocate can present the cause, protect the record for subsequent review, and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.”); *Minnesota* (“Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. ... An advocate can prevent the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.”); *New Mexico* (“Refraining from abusive or obstreperous conduct is a corollary of the advocates right to speak on behalf of litigants. ... An advocate can present the cause, protect the record for subsequent review, and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.”); *New York* (“Refraining from abusive or obstreperous conduct is a corollary of the advocate’s right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge’s misbehavior is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.”); *South Carolina* (“Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. ... An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.”); *Utah* (“Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.”); *Virginia* (“Refraining from abusive or obstreperous conduct is a corollary of the

[5] The duty to refrain from incivility applies to any proceeding of a tribunal,* including a deposition.⁷

Commented [TA8]: See comment above re use of Comments in lieu of additions to the blackletter.

advocate's right to speak on behalf of litigants. A lawyer must stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics."); *Washington* ("Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. ... An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics."); *Wyoming* ("Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics."); *ABA Model Rules* ("Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. ... An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.").

⁷ Numerous other states have similar language in their equivalent version of California's Rule 3.5. See, e.g., *Colorado* ("The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition."); *Delaware* ("The duty to refrain from disruptive, undignified or discourteous conduct applies to any proceeding of a tribunal, including a deposition."); *New Mexico* ("The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition."); *South Carolina* ("The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition."); *Utah* ("The duty to refrain from disruptive conduct applies to any proceedings of a tribunal, including a deposition."); *Washington* ("The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition."); *Wyoming* ("The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition."); *ABA Model Rules* ("The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition.").

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

- (a) violate these rules or the State Bar Act, knowingly* assist, solicit, or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud,* deceit, or reckless or intentional misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official, or to achieve results by means that violate these rules, the State Bar Act, or other law; or
- (e) knowingly* assist, solicit, or induce a judge or judicial officer in conduct that is a violation of an applicable code of judicial ethics or code of judicial conduct, or other law. For purposes of this rule, "judge" and "judicial officer" have the same meaning as in rule 3.5(c).

Comment

[1] A violation of this rule can occur when a lawyer is acting in propria persona or when a lawyer is not practicing law or acting in a professional capacity.

[2] Paragraph (a) does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[3] A lawyer may be disciplined for criminal acts as set forth in Business and Professions Code sections 6101 et seq., or if the criminal act constitutes "other misconduct warranting discipline" as defined by California Supreme Court case law. (See *In re Kelley* (1990) 52 Cal.3d 487 [276 Cal.Rptr. 375].)

[4] A lawyer may be disciplined under Business and Professions Code section 6106 for acts involving moral turpitude, dishonesty, or corruption, whether intentional, reckless, or grossly negligent.

[5] Paragraph (c) 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 and the State Bar Act.

[6] A lawyer violates paragraph (d) by repeated incivility while engaged in the practice of law or related professional activities.⁸

[7] This rule does not prohibit those activities of a particular lawyer that are protected by the First Amendment to the United States Constitution or by Article I, section 2 of the California Constitution.

Commented [TA9]: Based on our experience, we believe the approach of modifying rule 8.4 is a viable option for adding a prohibition against incivility.

If this approach is used, one option would be to adapt the language of proposed Comment [6] for amending the blackletter of rule 8.4(d). In addition, the definition and Comment to the term Incivility proposed in rule 1.0.1, above, could be adapted as a new Comment in rule 8.4.

⁸ Numerous other states have similar language in their equivalent version of California's Rule 8.4. See, e.g., *District of Columbia* ("A lawyer violates paragraph (d) by offensive, abusive, or harassing conduct that seriously interferes with the administration of justice. Such conduct may include words or actions that manifest bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status."); *Florida* ("Subdivision (d) of this rule proscribes conduct that is prejudicial to the administration of justice. Such proscription includes the prohibition against discriminatory conduct committed by a lawyer while performing duties in connection with the practice of law. The proscription extends to any characteristic or status that is not relevant to the proof of any legal or factual issue in dispute. Such conduct, when directed towards litigants, jurors, witnesses, court personnel, or other lawyers, whether based on race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, physical characteristic, or any other basis, subverts the administration of justice and undermines the public's confidence in our system of justice, as well as notions of equality. This subdivision does not prohibit a lawyer from representing a client as may be permitted by applicable law, such as, by way of example, representing a client accused of committing discriminatory conduct."); *Utah* ("The Standards of Professionalism and Civility approved by the Utah Supreme Court are intended to improve the administration of justice. An egregious violation or a pattern of repeated violations of the Standards of Professionalism and Civility may support a finding that the lawyer has violated paragraph (d).").

Rule 3.3 Candor Toward the Tribunal

(a) A lawyer shall not:

- (1) knowingly* make a false statement of fact or law to a tribunal* or fail to correct a false statement of material fact or law previously made to the tribunal* by the lawyer;
- (2) fail to disclose to the tribunal* legal authority in the controlling jurisdiction known* to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel, or knowingly* misquote to a tribunal* the language of a book, statute, decision or other authority; or
- (3) offer evidence that the lawyer knows* to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence, and the lawyer comes to know* of its falsity, the lawyer shall take reasonable* remedial measures, including, if necessary, disclosure to the tribunal,* unless disclosure is prohibited by Business and

Professions Code section 6068, subdivision (e) and rule 1.6. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes* is false.

(b) A lawyer who represents a client in a proceeding before a tribunal* and who knows* that a person* intends to engage, is engaging or has engaged in criminal or fraudulent* conduct related to the proceeding shall take reasonable* remedial measures to the extent permitted by Business and Professions Code section 6068, subdivision (e) and rule 1.6.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding.

(d) In an ex parte proceeding where notice to the opposing party in the proceeding is not required or given and the opposing party is not present, a lawyer shall inform the tribunal* of all material facts known* to the lawyer that will enable the tribunal* to make an informed decision, whether or not the facts are adverse to the position of the client.

(e) In appearing as a lawyer before a tribunal, a lawyer shall not engage in conduct intended to disrupt the tribunal

Comment

[10] The prohibition in paragraph (e) applies to habitually engaging in incivility or intentionally violating established rules of procedure or evidence. The latter should not be conflated with an advocate standing firm in the position of the client, protecting the record for subsequent review, or preserving professional integrity by patient firmness.

Subcommittee Notes: Paragraph (e) addressed multiple, disparate types of conduct better suited for explanation of a comment as to the meaning of disruption of the tribunal. "Pattern of incivility" is still problematic when construed as a statute rather than as guidance because pattern is not defined despite the fact that incivility is. Intentionally or habitually violating established rules also may run afoul of other duties without further explanation depending on context, so both were put into a comment with "engage in conduct intended to disrupt the tribunal," which is more palatable as a black-letter rule. By focusing on "intended to disrupt," we make sure that intent to zealously advocate will not fall afoul of the rule. The other suggested language can be found in the comment to 8.4 below.

Rule 3.4 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) A lawyer shall not ask any question solely intended to degrade a witness or other person;

(g) 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

(h) 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

[3] Paragraph (f) does not apply to impeaching a witness or developing theories intended to impeach a witness, or where the question seeks relevant information that is reasonably calculated to lead to relevant and admissible evidence. The language in paragraph (f) is purposefully narrow to avoid interference with an attorney's duties of zealous advocacy. However, questions solely intended to degrade a witness or other person is prejudicial to the administration of justice. (See rule 8.4 paragraph (d).)

Subcommittee Notes: The rule as written here includes the sub-committee's discussion on "solely" to clean up the meaning,

while including a comment to address the other concerns discussed. We included language about the scope of relevant discovery derived from CCP section 2017.010 because that goes beyond impeachment but is constrained to reasonably permissible bases. Additional language is added concerning the narrow reading of the rule that we believe drives at the intent of the rule and the desire to avoid chilling an advocate's legitimate strategies. We also referenced Rule 8.4 and its comment may refer back to this.

3.5 Contact with judges, jurors, etc.

Black letter "pattern" of incivility is problematic

Rule 3.5 Contact with Judges, Officials, Employees, and Jurors

(a) Except as permitted by statute, an applicable code of judicial ethics or code of judicial conduct, or standards governing employees of a tribunal,* a lawyer shall not directly or indirectly give or lend anything of value to a judge, official, or employee of a tribunal.* This rule does not prohibit a lawyer from contributing to the campaign fund of a judge or judicial officer running for election or confirmation pursuant to applicable law pertaining to such contributions.

(b) Unless permitted to do so by law, an applicable code of judicial ethics or code of judicial conduct, a rule or ruling of a tribunal,* or a court order, a lawyer shall not directly or indirectly communicate with or argue to a judge or judicial officer upon the merits of a contested matter pending before the judge or judicial officer, except:

- (1) in open court;
- (2) with the consent of all other counsel and any unrepresented parties in the matter;
- (3) in the presence of all other counsel and any unrepresented parties in the matter;
- (4) in writing* with a copy thereof furnished to all other counsel and any unrepresented parties in the matter; or

(5) in ex parte matters.

~~(c) A lawyer shall not engage in a pattern of incivility that is degrading to a tribunal.~~

(d) As used in this rule, "judge" and "judicial officer" shall also include: (i) administrative law judges; (ii) neutral arbitrators; (iii) State Bar Court judges; (iv) members of an administrative body acting in an adjudicative capacity; and (v) law clerks, research attorneys, or other court personnel who participate in the decision-making process, including referees, 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.

(e) A lawyer connected with a case shall not communicate directly or indirectly with anyone the lawyer knows* to be a member of the venire from which the jury will be selected for trial of that case.

(f) During trial, a lawyer connected with the case shall not communicate directly or indirectly with any juror.

(g) During trial, a lawyer who is not connected with the case shall not communicate directly or indirectly concerning the case with anyone the lawyer knows* is a juror in the case.

(h) After discharge of the jury from further consideration of a case a lawyer shall not communicate directly or indirectly with a juror if:

- (1) the communication is prohibited by law or court order;
- (2) the juror has made known* to the lawyer a desire not to communicate; or
- (3) the communication involves misrepresentation, coercion, or duress, or is intended to harass or embarrass the juror or to influence the juror's actions in future jury service.

(i) A lawyer shall not directly or indirectly conduct an out of court investigation of a person* who is either a member of a venire or a juror in a manner likely to influence the state of mind of such person* in connection with present or future jury service.

(j) All restrictions imposed by this rule also apply to communications with, or investigations of, members of the family of a person* who is either a member of a venire or a juror.

(k) A lawyer shall reveal promptly to the court improper conduct by a person* who is either a member of a venire or a juror, or by another toward a person* who is either a member of a venire or a juror or a member of his or her family, of which the lawyer has knowledge.

(l) This rule does not prohibit a lawyer from communicating with persons* who are members of a venire or jurors as a part of the official proceedings.

(m) For purposes of this rule, "juror" means any empaneled, discharged, or excused juror.

Comment

...

[4] The advocate’s function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate’s right to speak on behalf of litigants. In the event that any judicial officer is impatient, undignified, or discourteous, the lawyer may continue to advocate on behalf of the client and stand firm in the position of the client, protect the record for subsequent review, and preserve professional integrity by patient firmness, but this shall not provide justification for the lawyer engaging in any violations of this rule.

Subcommittee Notes: We do not recommend adoption of this rule. First, “pattern of incivility” is undefined. Second, as a black-letter rule, this rule will have a chilling effect on the zealous advocacy required in other rules. To the extent this rule is proposed, we suggest the comment be amended to be more consistent with the ABA comment (and give more guidance to what *is* permissible).

Comment to 8.4 (Misconduct)

[6] A lawyer may violate paragraph (d) by engaging in conduct intended to disrupt a tribunal by habitually engaging in incivility or intentionally violating established rules of procedure or evidence. The latter should not be conflated with an advocate standing firm in the position of the client, protecting the record for subsequent review, or preserving professional integrity by patient firmness. A lawyer may also violate paragraph (d) by asking a question solely intended to degrade a witness or other person, or engaging in a pattern of incivility intended to degrade a tribunal, including at a deposition.

Subcommittee Notes: This proposed comment includes language removed from other black-letter proposals that the subcommittee discussed as being problematic.