

PROPOSED CHANGES TO RULES OF PROFESSIONAL CONDUCT

REDLINE – COPRAC RECOMMENDED AMENDMENTS TO CCTF AMENDMENTS
COPRAC ADDITIONS IN GREEN HIGHLIGHT AND DELETIONS IN STRIKETHROUGH

1 Rule 1.0.1 Terminology

2 (a) “Belief” or “believes” means that the person* involved actually supposes the fact in question to be
3 true. A person’s* belief may be inferred from circumstances.

4 (b) [Reserved]

5 (c) “Firm” or “law firm” means a law partnership; a professional law corporation; a lawyer acting as a
6 sole proprietorship; an association authorized to practice law; or lawyers employed in a legal services
7 organization or in the legal department, division or office of a corporation, of a government organization,
8 or of another organization.

9 (d) “Fraud” or “fraudulent” means conduct that is fraudulent under the law of the applicable
10 jurisdiction and has a purpose to deceive.

11 (*) “Incivility” means significantly unprofessional conduct that is discourteous, abusive, or harassing, or
12 other significantly unprofessional conduct.

13 (e) “Informed consent” means a person’s* agreement to a proposed course of conduct after the
14 lawyer has communicated and explained (i) the relevant circumstances and (ii) the material risks,
15 including any actual and reasonably* foreseeable adverse consequences of the proposed course of
16 conduct.

17 (e-1) “Informed written consent” means that the disclosures and the consent required by paragraph (e)
18 must be in writing.*

19 (f) “Knowingly,” “known,” or “knows” means actual knowledge of the fact in question. A person’s*
20 knowledge may be inferred from circumstances.

21 (g) “Partner” means a member of a partnership, a shareholder in a law firm* organized as a
22 professional corporation, or a member of an association authorized to practice law.

23 (g-1) “Person” has the meaning stated in Evidence Code section 175.

24 (h) “Reasonable” or “reasonably” when used in relation to conduct by a lawyer means the conduct of a
25 reasonably prudent and competent lawyer.

26 (i) “Reasonable belief” or “reasonably believes” when used in reference to a lawyer means that the
27 lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

28 (j) “Reasonably should know” when used in reference to a lawyer means that a lawyer of reasonable
29 prudence and competence would ascertain the matter in question.

30 (k) “Screened” means the isolation of a lawyer from any participation in a matter, including the timely
31 imposition of procedures within a law firm* that are adequate under the circumstances (i) to protect
32 information that the isolated lawyer is obligated to protect under these rules or other law; and (ii) to

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protect against other law firm* lawyers and nonlawyer personnel communicating with the lawyer with respect to the matter.

(l) “Substantial” when used in reference to degree or extent means a material matter of clear and weighty importance.

(m) “Tribunal” means: (i) a court, an arbitrator, an administrative law judge, or an administrative body acting in an adjudicative capacity and authorized to make a decision that can be binding on the parties involved; or (ii) a special master or other person* 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.

(n) “Writing” or “written” has the meaning stated in Evidence Code section 250. A “signed” writing includes an electronic sound, symbol, or process attached to or logically associated with a writing and executed, inserted, or adopted by or at the direction of a person* with the intent to sign the writing.

Comment

Firm or Law Firm**

[1] Practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a law firm.* However, if they present themselves to the public in a way that suggests that they are a law firm* or conduct themselves as a law firm,* they may be regarded as a law firm* for purposes of these rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm,* as is the fact that they have mutual access to information concerning the clients they serve.

[2] The term “of counsel” implies that the lawyer so designated has a relationship with the law firm,* other than as a partner* or associate, or officer or shareholder, that is close, personal, continuous, and regular. Whether a lawyer who is denominated as “of counsel” or by a similar term should be deemed a member of a law firm* for purposes of these rules will also depend on the specific facts. (Compare *People ex rel. Department of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135 [86 Cal.Rptr.2d 816] with *Chambers v. Kay* (2002) 29 Cal.4th 142 [126 Cal.Rptr.2d 536].)

*Fraud**

[3] When the terms “fraud”* or “fraudulent”* are used in these rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform because requiring the proof of those elements of fraud* would impede the purpose of certain rules to prevent fraud* or avoid a lawyer assisting in the perpetration of a fraud,* or otherwise frustrate the imposition of discipline on lawyers who engage in fraudulent* conduct. The term “fraud”* or “fraudulent”* when used in these rules does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information.

Incivility

[4] This definition does not apply to conduct protected by the First Amendment to the United States 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

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71 judge's responsibility to require lawyers under the judge's direction and control to be patient, dignified
72 and courteous to litigants, jurors, witnesses, lawyers, and others.)

73 *Informed Consent* and Informed Written Consent**

74 [45] The communication necessary to obtain informed consent* or informed written consent* will vary
75 according to the rule involved and the circumstances giving rise to the need to obtain consent.

76 *Screened**

77 [56] The purpose of screening* is to assure the affected client, former client, or prospective client that
78 confidential information known* by the personally prohibited lawyer is neither disclosed to other law
79 firm* lawyers or nonlawyer personnel nor used to the detriment of the person* to whom the duty of
80 confidentiality is owed. The personally prohibited lawyer shall acknowledge the obligation not to
81 communicate with any of the other lawyers and nonlawyer personnel in the law firm* with respect to
82 the matter. Similarly, other lawyers and nonlawyer personnel in the law firm* who are working on the
83 matter promptly shall be informed that the screening* is in place and that they may not communicate
84 with the personally prohibited lawyer with respect to the matter. Additional screening* measures that
85 are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and
86 remind all affected law firm* personnel of the presence of the screening,* it may be appropriate for the
87 law firm* to undertake such procedures as a written* undertaking by the personally prohibited lawyer to
88 avoid any communication with other law firm* personnel and any contact with any law firm* files or
89 other materials relating to the matter, written* notice and instructions to all other law firm* personnel
90 forbidding any communication with the personally prohibited lawyer relating to the matter, denial of
91 access by that lawyer to law firm* files or other materials relating to the matter, and periodic reminders
92 of the screen* to the personally prohibited lawyer and all other law firm* personnel.

93 [67] In order to be effective, screening* measures must be implemented as soon as practical after a
94 lawyer or law firm* knows* or reasonably should know* that there is a need for screening.*

95 **COPRAC Subcommittee Comments:**

96 The subcommittee proposes to strike “other significantly unprofessional conduct” from the definition of
97 incivility because this phrase is too vague and overbroad for a disciplinary standard. We are concerned
98 about potential First Amendment implications by using this phrase. We believe that the proposed
99 clarification that incivility means “significantly unprofessional conduct that is discourteous, abusive, or
100 harassing” provides clearer guidance to lawyers.

101 The subcommittee proposes to add comment [4], which we believe is important to help ensure the
102 incivility rule amendments are not applied to protected First Amendment activities. The first sentence of
103 this comment tracks comment [4] to rule 8.4.1.

CHAPTER 1.
LAWYER-CLIENT RELATIONSHIP

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

Allocation of Authority between Client and Lawyer

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. (See, e.g., Cal. Const., art. I, § 16; Pen. Code, § 1018.) A lawyer retained to represent a client is authorized to act on behalf of the client, such as in procedural matters and in making certain tactical decisions. [*] For example, a ~~A~~ lawyer is authorized to ~~does not violate this rule by acceding~~¹ 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 all persons involved in the legal process with dignity, courtesy and integrity. ~~However, a~~ lawyer is not authorized merely by virtue of the lawyer's retention to impair the client's substantive rights or the client's claim itself. (*Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 404 [212 Cal.Rptr. 151, 156].)

[2] At the outset of, or during a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to rule 1.4, a lawyer may rely on such an advance authorization. The client may revoke such authority at any time.

Independence from Client's Views or Activities

[3] A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

Agreements Limiting Scope of Representation

¹ Based on discussion at July COPRAC meeting, we revised to state that a lawyer "is authorized to accede to reasonable requests" We also incorporated as part of comment [1] to provide an example of the lawyer's authorization as to procedural matters and certain tactical decisions.

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[4] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. (See, e.g., rules 1.1, 1.8.1, 5.6; see also Cal. Rules of Court, rules 3.35-3.37 [limited scope rules applicable in civil matters generally], 5.425 [limited scope rule applicable in family law matters].)

COPRAC Subcommittee Comments:

The subcommittee recommends moving the California Civility Task Force's proposed addition to a Comment because California's Rules of Professional Conduct set forth minimum standards for discipline. The proposed additional language does not set forth a minimum disciplinary standard but provides helpful guidance for lawyers.

The subcommittee also recommends adding "reasonable" before "requests of opposing counsel," which tracks language of other states that have adopted 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.").

The subcommittee further recommends incorporating parallel language from California Rules of Court, Rule 9.7.

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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 to treat all persons involved in the legal process with dignity, courtesy and integrity.~~
~~respect.~~

COPRAC Subcommittee Comments:

The subcommittee recommends that “strive” be removed from the proposed Comment language because this word is too vague and subjective. Additionally, the Subcommittee believes the proposed language—“A lawyer’s duty to act with reasonable diligence does not eliminate a lawyer’s other professional obligations”—is too vague for purposes of a disciplinary standard, particularly where “other professional obligations” is not defined. While the subcommittee recommends this language be stricken, if it remains, the subcommittee recommends that “eliminate” be changed to “diminish.”

The Subcommittee also proposes incorporating parallel language from California Rules of Court, Rule 9.4.

CHAPTER 3. ADVOCATE

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:~~

~~(1) engage in a pattern of incivility;~~

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

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

Comment

[1] This rule governs the conduct of a lawyer in proceedings of a tribunal,* including ancillary proceedings such as a deposition conducted pursuant to a tribunal's* authority. See rule 1.0.1(m) for the definition of "tribunal."

[2] The prohibition in paragraph (a)(1) against making false statements of law or failing to correct a material misstatement of law includes citing as authority a decision that has been overruled or a

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statute that has been repealed or declared unconstitutional, or failing to correct such a citation previously made to the tribunal* by the lawyer.

Legal Argument

[3] Legal authority in the controlling jurisdiction may include legal authority outside the jurisdiction in which the tribunal* sits, such as a federal statute or case that is determinative of an issue in a state court proceeding or a Supreme Court decision that is binding on a lower court.

[4] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. If a lawyer knows* that a client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered and, if unsuccessful, must refuse to offer the false evidence. If a criminal defendant insists on testifying, and the lawyer knows* that the testimony will be false, the lawyer may offer the testimony in a narrative form if the lawyer made reasonable* efforts to dissuade the client from the unlawful course of conduct and the lawyer has sought permission from the court to withdraw as required by rule 1.16. (See, e.g., *People v. Johnson* (1998) 62 Cal.App.4th 608 [72 Cal.Rptr.2d 805]; *People v. Jennings* (1999) 70 Cal.App.4th 899 [83 Cal.Rptr.2d 33].) The obligations of a lawyer under these rules and the State Bar Act are subordinate to applicable constitutional provisions.

Remedial Measures

[5] Reasonable* remedial measures under paragraphs (a)(3) and (b) refer to measures that are available under these rules and the State Bar Act, and which a reasonable* lawyer would consider appropriate under the circumstances to comply with the lawyer's duty of candor to the tribunal.* (See, e.g., rules 1.2.1, 1.4(a)(4), 1.16(a), 8.4; Bus. & Prof. Code, §§ 6068, subd. (d), 6128.) Remedial measures also include explaining to the client the lawyer's obligations under this rule and, where applicable, the reasons for the lawyer's decision to seek permission from the tribunal* to withdraw, and remonstrating further with the client to take corrective action that would eliminate the need for the lawyer to withdraw. If the client is an organization, the lawyer should also consider the provisions of rule 1.13. Remedial measures do not include disclosure of client confidential information, which the lawyer is required to protect under Business and Professions Code section 6068, subdivision (e) and rule 1.6.

Duration of Obligation

[6] A proceeding has concluded within the meaning of this rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed. A prosecutor may have obligations that go beyond the scope of this rule. (See, e.g., rule 3.8(f) and (g).)

Ex Parte Communications

[7] Paragraph (d) does not apply to ex parte communications that are not otherwise prohibited by law or the tribunal.*

Withdrawal

[8] A lawyer's compliance with the duty of candor imposed by this rule does not require that the lawyer withdraw from the representation. The lawyer may, however, be required by rule 1.16 to seek permission of the tribunal* to withdraw if the lawyer's compliance with this rule results in a

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deterioration of the lawyer-client relationship such that the lawyer can no longer competently and diligently represent the client, or where continued employment will result in a violation of these rules. A lawyer must comply with Business and Professions Code section 6068, subdivision (e) and rule 1.6 with respect to a request to withdraw that is premised on a client's misconduct.

[9] In addition to this rule, lawyers remain bound by Business and Professions Code sections 6068, subdivision (d) and 6106.

[10] The prohibition in paragraph (e) applies to habitually² 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's violation of paragraph (e) may also constitute a violation of rule 8.4(d).

COPRAC Subcommittee Comments:

Paragraph (e) addressed multiple, disparate types of conduct better suited for explanation in a comment as to the meaning of disruption of the tribunal. The subcommittee believes the phrase "pattern of incivility" is problematic when construed as a disciplinary rule, rather than as guidance because pattern is not defined. Intentionally or habitually violating established rules also may run afoul of other duties without further explanation depending on context. Based on these concerns, the subcommittee recommends moving the referenced language to a comment. We believe "engage in conduct intended to disrupt the tribunal," is more palatable as a black-letter rule. We also suggest adding "solely" before "intended to disrupt the tribunal" to clarify that conduct consistent with an attorney's duty to zealously advocate on behalf of a client will not fall afoul of the rule. For similar reasons, the subcommittee recommends adding the second sentence to comment [10].

There was also general discussion regarding whether proposed amendments to 3.3, 3.4, and 3.5 should be moved to 8.4.³

² Concerns were made at last meeting about "habitually" being misconstrued given precise meaning in criminal context. We should consider replacing with severe or habitual or repeated. Also consider pervasive in place of habitual or repeated to track established language used in employment law cases.

³ We should discuss how to address this comment from our last meeting. It appears the comment we propose to add to Rule 8.4 addresses this suggestion

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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 except where the lawyer reasonably* believes that the question will lead to relevant and admissible evidence;

~~(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., Pen. Code, § 135; 18 U.S.C. §§ 1501-1520.) Falsifying evidence is also generally a criminal offense. (See, e.g., Pen. Code, § 132; 18 U.S.C. § 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. See rule 3.8 for special disclosure responsibilities of a prosecutor.

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[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).)~~ A lawyer's violation of paragraph (f) may also constitute a violation of rule 8.4(d).

COPRAC Subcommittee Comments:

Like the subcommittee's recommended edits to rule 3.3, the subcommittee recommends "solely" be added to the Civility Task Force's proposed new subsection (f) to ensure that the rule is not interpreted to apply to conduct consistent with a lawyer's duty of zealous advocacy. For similar reasons, the subcommittee recommends adding comment [3]. This proposed new comment includes language about the scope of relevant discovery derived from California Code of Civil Procedure section 2017.010 in addition to impeachment. The remaining language is intended to avoid chilling an advocate's legitimate strategies.

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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.*~~

~~(ed)~~ 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.

~~(de)~~ 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.

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

~~(fg)~~ 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.

~~(gh)~~ 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.

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

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

376 (j) A lawyer shall reveal promptly to the court improper conduct by a person* who is either a member
377 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
378 member of his or her family, of which the lawyer has knowledge.

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

381 (l) For purposes of this rule, “juror” means any empaneled, discharged, or excused juror.

382 **Comment**

383 [1] An applicable code of judicial ethics or code of judicial conduct under this rule includes the California
384 Code of Judicial Ethics and the Code of Conduct for United States Judges. Regarding employees of a
385 tribunal* not subject to judicial ethics or conduct codes, applicable standards include the Code of Ethics
386 for the Court Employees of California and 5 United States Code section 7353 (Gifts to Federal employees).
387 The statutes applicable to adjudicatory proceedings of state agencies generally are contained in the
388 Administrative Procedure Act (Gov. Code, § 11340 et seq.; see Gov. Code, § 11370 [listing statutes with
389 the act].) State and local agencies also may adopt their own regulations and rules governing
390 communications with members or employees of a tribunal.*

391 [2] For guidance on permissible communications with a juror in a criminal action after discharge of the
392 jury, see Code of Civil Procedure section 206.

393 [3] It is improper for a lawyer to communicate with a juror who has been removed, discharged, or
394 excused from an empaneled jury, regardless of whether notice is given to other counsel, until such time
395 as the entire jury has been discharged from further service or unless the communication is part of the
396 official proceedings of the case.

397 ~~[4] The advocate’s function is to present evidence and argument so that the cause may be decided~~
398 ~~according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate’s right~~
399 ~~to speak on behalf of litigants. In the event that any judicial officer is impatient, undignified, or~~
400 ~~discourteous, the lawyer may continue to advocate on behalf of the client and stand firm in the position~~
401 ~~of the client, protect the record for subsequent review, and preserve professional integrity by patient~~
402 ~~firmness, but this shall not provide justification for the lawyer engaging in any violations of this rule.~~

403 ~~[5] The duty to refrain from incivility applies to any proceeding of a tribunal,* including a deposition.~~

404 **COPRAC Subcommittee Comments:**

405 The subcommittee does not recommend adoption of the Civility Task Force’s proposed new subsection
406 (c). This rule generally addresses ex parte communications and related procedural issues relating to the
407 manner of communicating with judicial officers. The proposed addition does not belong in this rule. In

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408 addition, “pattern of incivility” is undefined. As a black-letter disciplinary rule, this rule will likely have a
409 chilling effect on zealous advocacy.

410

CHAPTER 8.
MAINTAINING THE INTEGRITY OF THE PROFESSION

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

(f) 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 ~~engaging in conduct intended to disrupt a tribunal by~~ habitually engaging^[SB1] in incivility while engaged in the practice of law or related professional activities, or by 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 violation of rule 3.3(e) or rule 3.4(f) may also constitute a violation of paragraph (d). ~~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.~~ repeated incivility while engaged in the practice of law or related professional activities.

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448 [67] This rule does not prohibit those activities of a particular lawyer that are protected by the First
449 Amendment to the United States Constitution or by Article I, section 2 of the California Constitution.

450 **COPRAC Subcommittee Comments:**

451 We believe it is appropriate for clarity to include some language from the Civility Task Force’s proposed
452 revisions to rule 3.3.

453