



The State Bar of California

COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT

F.1. Civility
10-14-22 Meeting
Open Session

DATE: October 10, 2022

TO: Members, State Bar Board of Trustees

FROM: COPRAC

SUBJECT: Comments and Suggested Edits to Civility Task Force's Proposed Revisions to Rules of Professional Conduct, Rules 1.0.1, 1.2, 1.3, 3.3, 3.4, 3.5, and 8.4.

BACKGROUND

The California Civility Task Force ("CCTF"), a joint project of the California Judges Association and the California Lawyers Association, proposed changes to the California Rules of Professional Conduct along with other proposals to increase civility in the practice of law. At the March 24, 2002 State Bar Board of Trustees' meeting, the Board agreed upon an action plan that included COPRAC's review of CCTF's recommendations to amend the Rules of Professional Conduct to prohibit repeated incivility and to clarify that civility is not inconsistent with zealous representation. Subsequently, COPRAC evaluated and developed recommended edits to CCTF's proposed amendments that COPRAC believes would be more consistent with the purpose and function of the rules as disciplinary standards. The following discussion sets forth COPRAC's proposed revisions to CCTF's proposed amendments to California Rules of Professional Conduct, Rules 1.0.1, 1.2, 1.3, 3.3, 3.4, 3.5 and 8.4.

As described below, however, COPRAC recommends that the Board alternatively consider a standalone Rule of Professional Conduct to address civility, rather than incorporating various civility standards and guidance as part of disparate Rules or comments.

DISCUSSION

As described below, COPRAC recommends revisions to each of CCTF's proposed civility amendments to the Rules of Professional Conduct.

Moreover, COPRAC does not recommend that all of CCTF's proposed amendments be further considered or presented for public comment. Specifically, even with COPRAC's suggested edits to CCTF's proposed amendments to Rules 3.3 through 3.5, COPRAC is concerned that these amendments would pose interpretive issues, be difficult to enforce as disciplinary standards, and chill a lawyer's protected litigation activities. In addition, COPRAC does not believe that many of CCTF's proposed amendments fall within the scope and intended purpose of the Rules.

As one alternative, COPRAC believes some of CCTF's proposed amendments should be incorporated into Rule 8.4.

As another alternative, COPRAC suggests that the Board consider adopting a single standalone Rule of Professional Conduct addressing civility, similar to Rule 8.4.1 prohibiting discrimination, harassment and retaliation in the legal profession. Many COPRAC members believe that a standalone rule would be more powerful and instructive in promoting civility in the legal profession. Incorporating multiple civility provisions into disparate Rules tends to dilute their strength. As one member explained, trying to force civility rules into multiple rules addressing separate conduct is like trying to put a square peg in a round hole. In addition, the same conduct could lead to multiple rule violations. Given the limited time available to evaluate CCTF's proposed amendments and the limitation of our mandate to provide feedback on the proposed amendments, COPRAC has not prepared a proposed standalone Rule of Professional Conduct for the Board's consideration.

The following displays COPRAC's suggested edits to CCTF's proposed civility amendments to Rules 1.0.1, 1.2, 1.3, 3.3, 3.4, 3.5 and 8.4. CCTF's recommended amendments to the current rules are displayed in redline below, with COPRAC's proposed additions in green highlighting and its deletions in strikethrough. At the end of each Rule, COPRAC included a section labeled "COPRAC Comments" to explain the reasoning supporting COPRAC's proposed changes.

Rule 1.0.1 Terminology

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

(b) [Reserved]

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

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

(*) "Incivility" means significantly unprofessional conduct that is discourteous, abusive, or harassing, or other significantly unprofessional conduct.

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

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

(f) "Knowingly," "known," or "knows" means actual knowledge of the fact in question. A person's* knowledge may be inferred from circumstances.

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

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

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

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

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

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

Informed Consent and Informed Written Consent**

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

*Screened**

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

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

COPRAC Comments:

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

COPRAC proposes to add comment [4], which we believe is important to help ensure the incivility rule amendments are not applied to protected First Amendment activities. The first sentence of 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 lawyer is authorized to 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 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

[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].)

200 **COPRAC Comments:**

201 COPRAC recommends moving CCTF's proposed addition to Rule 1.2 to a Comment because California's
202 Rules of Professional Conduct set forth minimum standards for discipline. The proposed additional
203 language does not set forth a minimum disciplinary standard but provides helpful guidance for lawyers.
204 COPRAC suggests CCTF's proposed addition be incorporated as part of Comment [1] to provide an
205 example of the lawyer's authorization as to procedural matters and certain tactical decisions. For similar
206 reasons, COPRAC revised CCTF's proposed language "does not violate this rule by" to state that a lawyer
207 "is authorized to accede to reasonable requests of opposing counsel"

208 COPRAC also recommends adding "reasonable" before "requests of opposing counsel," which tracks
209 language of other states that have adopted similar language in their equivalent version of California's Rule
210 1.2. *See, e.g., Massachusetts* ("A lawyer does not violate this Rule, however, by acceding to reasonable
211 requests of opposing counsel which do not prejudice the rights of his or her client, by being punctual in
212 fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and
213 consideration all persons involved in the legal process."); *Michigan* ("A lawyer does not violate this rule by
214 acceding to reasonable requests of opposing counsel that do not prejudice the rights of the client, by being
215 punctual in fulfilling all professional commitments, or by avoiding offensive tactics.").

216 COPRAC further recommends incorporating parallel language from California Rules of Court, Rule 9.7.

217

218 **Rule 1.3 Diligence**

219 (a) A lawyer shall not intentionally, repeatedly, recklessly or with gross negligence fail to act with
220 reasonable diligence in representing a client.

221 (b) For purposes of this rule, “reasonable diligence” shall mean that a lawyer acts with commitment
222 and dedication to the interests of the client and does not neglect or disregard, or unduly delay a legal
223 matter entrusted to the lawyer.

224 **Comment**

225 [1] This rule addresses only a lawyer’s responsibility for his or her own professional diligence. See
226 rules 5.1 and 5.3 with respect to a lawyer’s disciplinary responsibility for supervising subordinate lawyers
227 and nonlawyers.

228 [2] See rule 1.1 with respect to a lawyer’s duty to perform legal services with competence.

229 ~~[3] A lawyer’s duty to act with reasonable diligence does not eliminate a lawyer’s other professional~~
230 ~~obligations and lawyers should strive~~ ~~to~~ ~~treat all persons involved in the legal process with dignity,~~
231 ~~courtesy and integrity~~ ~~respect.~~

232 **COPRAC Comments:**

233 As an initial matter, COPRAC believes that this comment does not necessarily fit within the scope and
234 intended purpose of Rule 1.3, which is focused on diligence in representing a client. As noted in the first
235 two introductory paragraphs to this section, the Board should consider moving this provision to Rule 8.4 or
236 incorporating it as part of a standalone rule.

237
238 In the event the Board elects to consider CCTF’s proposed amendments to Rule 1.2, COPRAC suggests the
239 edits shown above. COPRAC recommends that “strive” be removed from the proposed Comment
240 language because this word is too vague and subjective. Additionally, COPRAC believes the proposed
241 language—“A lawyer’s duty to act with reasonable diligence does not eliminate a lawyer’s other
242 professional obligations”—is too vague for purposes of a disciplinary standard, particularly where “other
243 professional obligations” is not defined. While COPRAC recommends this language be stricken, if it
244 remains, COPRAC recommends that “eliminate” be changed to “diminish.”

245
246 COPRAC also proposes incorporating parallel language from California Rules of Court, Rule 9.7-“dignity,
247 courtesy and integrity.”
248

250 **Rule 3.3 Candor Toward the Tribunal***

251 (a) A lawyer shall not:

252 (1) knowingly* make a false statement of fact or law to a tribunal* or fail to correct a false
253 statement of material fact or law previously made to the tribunal* by the lawyer;254 (2) fail to disclose to the tribunal* legal authority in the controlling jurisdiction known* to the
255 lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel, or
256 knowingly* misquote to a tribunal* the language of a book, statute, decision or other authority; or257 (3) offer evidence that the lawyer knows* to be false. If a lawyer, the lawyer's client, or a witness
258 called by the lawyer, has offered material evidence, and the lawyer comes to know* of its falsity,
259 the lawyer shall take reasonable* remedial measures, including, if necessary, disclosure to the
260 tribunal,* unless disclosure is prohibited by Business and Professions Code section 6068,
261 subdivision (e) and rule 1.6. A lawyer may refuse to offer evidence, other than the testimony of a
262 defendant in a criminal matter, that the lawyer reasonably believes* is false.263 (b) A lawyer who represents a client in a proceeding before a tribunal* and who knows* that a
264 person* intends to engage, is engaging or has engaged in criminal or fraudulent* conduct related to the
265 proceeding shall take reasonable* remedial measures to the extent permitted by Business and
266 Professions Code section 6068, subdivision (e) and rule 1.6.

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

268 (d) In an ex parte proceeding where notice to the opposing party in the proceeding is not required
269 or given and the opposing party is not present, a lawyer shall inform the tribunal* of all material facts
270 known* to the lawyer that will enable the tribunal* to make an informed decision, whether or not the
271 facts are adverse to the position of the client.272 (e) In appearing as a lawyer before a tribunal,* a lawyer shall not:273 (1) engage in a pattern of incivility;274 (2) intentionally or habitually violate any established rule of procedure or of evidence; or275 (3) engage in conduct solely intended to disrupt the tribunal.*276 **Comment**277 [1] This rule governs the conduct of a lawyer in proceedings of a tribunal,* including ancillary
278 proceedings such as a deposition conducted pursuant to a tribunal's* authority. See rule 1.0.1(m) for
279 the definition of "tribunal."280 [2] The prohibition in paragraph (a)(1) against making false statements of law or failing to correct a
281 material misstatement of law includes citing as authority a decision that has been overruled or a statute
282 that has been repealed or declared unconstitutional, or failing to correct such a citation previously made
283 to the tribunal* by the lawyer.284 *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 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 repeatedly~~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's violation of paragraph (e) may also constitute a violation of rule 8.4(d).

COPRAC Comments:

As explained further in the introductory paragraphs to this section, COPRAC recommends that certain aspects of CCTF's proposed amendments to Rules 3.3 through 3.5 be incorporated into Rule 8.4. As an alternative, COPRAC suggests that certain aspects be incorporated into a standalone rule addressing civility.

In the event the Board of Trustees decides to consider CCTF's proposed amendments to Rule 3.3, COPRAC suggests the above edits. COPRAC recommends that the majority of CCTF's proposed new paragraph (e) be moved to a new comment [10]. COPRAC suggests that CCTF's proposed new paragraph (e) be limited to prohibiting "conduct solely intended to disrupt the tribunal," which is more palatable as a black-letter rule. COPRAC suggests 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 violate the rule. COPRAC believes the other subsections of CCTF's new paragraph (e) address multiple, disparate types of conduct that are better suited for explanation in a new comment relating to the meaning of disruption of the tribunal.

In addition to moving these other subsections to new comment [10], COPRAC proposes other clarifying revisions that it believes are more consistent with the purpose and function of the rules as disciplinary standards and will help avoid interfering with a lawyer's zealous advocacy on behalf of a client. COPRAC recommends removing the phrase "pattern of incivility" because this phrase is problematic when construed as a disciplinary rule as "pattern" is not defined. COPRAC suggests replacing "pattern of incivility" with "repeatedly" engaging in civility. COPRAC also considered the term "habitually" used in CCTF's proposed amendments. However, concerns were raised about "habitually" being misconstrued given the precise meaning of this term in the criminal context. We believe the term "repeatedly" is clearer. "Repeatedly" is also used in Rules 1.1 and 1.3 regarding the lawyer's duties of competence and diligence. However, COPRAC suggests that the Board also consider prohibiting incivility that is "severe" even if it is not "repeated" as an isolated incident of incivility may be sufficiently severe to warrant discipline. By analogy, California employment law standards prohibit "severe or pervasive" harassment and COPRAC believes these established standards are also appropriate in evaluating uncivil conduct that is sufficiently severe or pervasive to warrant discipline.

COPRAC does not believe that CCTF's proposed prohibition on "intentionally or habitually violat[ing] any established rule or procedure or evidence" is necessary as the parties and assigned judge to a proceeding already have other available tools and remedies to address this type of conduct. If the Board of Trustees further consider this prohibition, COPRAC suggests removing "habitually" from the prohibition on violating established rules of procedure or evidence for the reasons explained above. In addition, COPRAC believes the prohibition should be limited to intentionally violating established rules of procedure or evidence, so discipline is not imposed for a lawyer's inadvertent or unknowing violation of a rule of procedure or evidence. The use of the term "intentionally" may need to be defined in the context of this rule and to distinguish this term from the definition of "willful" in Rule 1.0, which does not require a lawyer's bad faith or actual knowledge of the rule provision which is violated. However, COPRAC notes that the term "intentionally" is already used in Rules 1.1 and 1.3. As an alternative, Rule 8.4 uses the term "knowingly" in subsections (a) and (f) which should also be considered in place of "intentionally."

373 **Rule 3.4 Fairness to Opposing Party and Counsel**

374 A lawyer shall not:

375 (a) unlawfully obstruct another party's access to evidence, including a witness, or unlawfully alter,
376 destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not
377 counsel or assist another person* to do any such act;

378 (b) suppress any evidence that the lawyer or the lawyer's client has a legal obligation to reveal or to
379 produce;

380 (c) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness
381 that is prohibited by law;

382 (d) directly or indirectly pay, offer to pay, or acquiesce in the payment of compensation to a witness
383 contingent upon the content of the witness's testimony or the outcome of the case. Except where
384 prohibited by law, a lawyer may advance, guarantee, or acquiesce in the payment of:

385 (1) expenses reasonably* incurred by a witness in attending or testifying;

386 (2) reasonable* compensation to a witness for loss of time in attending or testifying; or

387 (3) a reasonable* fee for the professional services of an expert witness;

388 (e) advise or directly or indirectly cause a person* to secrete himself or herself or to leave the
389 jurisdiction of a tribunal* for the purpose of making that person* unavailable as a witness therein;

390 (f) A lawyer shall not ask any question engage in conduct solely intended to degrade a witness or
391 other person except where the lawyer reasonably* believes that the question will lead to relevant and
392 admissible evidence;

393 ~~(f)~~g knowingly* disobey an obligation under the rules of a tribunal* except for an open refusal based
394 on an assertion that no valid obligation exists; or

395 ~~(g)~~h in trial, assert personal knowledge of facts in issue except when testifying as a witness, or state a
396 personal opinion as to the guilt or innocence of an accused.

397 **Comment**

398 [1] Paragraph (a) applies to evidentiary material generally, including computerized information. It is a
399 criminal offense to destroy material for purpose of impairing its availability in a pending proceeding or one
400 whose commencement can be foreseen. (See, e.g., Pen. Code, § 135; 18 U.S.C. §§ 1501-1520.) Falsifying
401 evidence is also generally a criminal offense. (See, e.g., Pen. Code, § 132; 18 U.S.C. § 1519.) Applicable law
402 may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of
403 conducting a limited examination that will not alter or destroy material characteristics of the evidence.
404 Applicable law may require a lawyer to turn evidence over to the police or other prosecuting authorities,
405 depending on the circumstances. (See *People v. Lee* (1970) 3 Cal.App.3d 514, 526 [83 Cal.Rptr. 715]; *People*
406 *v. Meredith* (1981) 29 Cal.3d 682 [175 Cal.Rptr. 612].)

407 [2] A violation of a civil or criminal discovery rule or statute does not by itself establish a violation of
408 this rule. See rule 3.8 for special disclosure responsibilities of a prosecutor.

409 [3] Paragraph (f) does not apply to impeaching a witness or developing theories intended to impeach
410 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 Comments:

Consistent with CORPAC's recommended edits to rule 3.3, we recommend "solely" be added to CCTF's proposed new subsection (f) to help ensure that the rule is not interpreted to apply to conduct consistent with a lawyer's duty of zealous advocacy. For similar reasons, COPRAC recommends adding comment [3]. COPRAC's 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 suggested language is intended to avoid chilling an advocate's legitimate strategies.

As COPRAC noted in connection with its proposed revisions to CCTF's proposed amendments to Rule 3.3, COPRAC also believes the Board should consider "knowingly" in place of "intended." Similar to our comments above, COPRAC also believes that this aspect of the rule will be difficult to enforce as a disciplinary standard, and the assigned judge already has established tools and remedies for curbing an attorney's uncivil conduct in questioning a witness.

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

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

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

439 (1) in open court;

440 (2) with the consent of all other counsel and any unrepresented parties in the matter;

441 (3) in the presence of all other counsel and any unrepresented parties in the matter;

442 (4) in writing* with a copy thereof furnished to all other counsel and any unrepresented parties in the
443 matter; or

444 (5) in ex parte matters.

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

446 ~~(cd)~~ As used in this rule, “judge” and “judicial officer” shall also include: (i) administrative law judges;
447 (ii) neutral arbitrators; (iii) State Bar Court judges; (iv) members of an administrative body acting in an
448 adjudicative capacity; and (v) law clerks, research attorneys, or other court personnel who participate in
449 the decision-making process, including referees, special masters, or other persons* to whom a court refers
450 one or more issues and whose decision or recommendation can be binding on the parties if approved by
451 the court.

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

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

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

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

460 (1) the communication is prohibited by law or court order;

461 (2) the juror has made known* to the lawyer a desire not to communicate; or

462 (3) the communication involves misrepresentation, coercion, or duress, or is intended to harass or
463 embarrass the juror or to influence the juror’s actions in future jury service.

(h) 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.

(i) 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.

(j) 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.

(k) 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.

(l) 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, 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.~~

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

COPRAC Comments:

COPRAC does not recommend adoption of CCTF’s proposed new subsection (c). This rule generally addresses *ex parte* communications and related procedural issues relating to the manner of communicating with judicial officers. The proposed addition does not belong in this rule. In addition, “pattern of incivility” is undefined. As a black-letter disciplinary rule, this rule will likely have a chilling effect on zealous advocacy.

503 As described in the introductory paragraphs to this section, COPRAC instead suggests incorporating
504 provisions of CCTF's comments to comments to rule 8.4(d) or incorporating them into comments to a
505 standalone civility rule.
506

507 **CHAPTER 8.**
508 **MAINTAINING THE INTEGRITY OF THE PROFESSION**

509 **Rule 8.4 Misconduct**

510 It is professional misconduct for a lawyer to:

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

523 **Comment**

524 [1] A violation of this rule can occur when a lawyer is acting in propria persona or when a lawyer is not
525 practicing law or acting in a professional capacity.

526 [2] Paragraph (a) does not prohibit a lawyer from advising a client concerning action the client is
527 legally entitled to take.

528 [3] A lawyer may be disciplined for criminal acts as set forth in Business and Professions Code sections
529 6101 et seq., or if the criminal act constitutes "other misconduct warranting discipline" as defined by
530 California Supreme Court case law. (See *In re Kelley* (1990) 52 Cal.3d 487 [276 Cal.Rptr. 375].)

531 [4] A lawyer may be disciplined under Business and Professions Code section 6106 for acts involving
532 moral turpitude, dishonesty, or corruption, whether intentional, reckless, or grossly negligent.

533 [5] Paragraph (c) does not apply where a lawyer advises clients or others about, or supervises, lawful
534 covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the
535 lawyer's conduct is otherwise in compliance with these rules and the State Bar Act.

536 [6] A lawyer violates paragraph (d) by ~~engaging in conduct intended to disrupt a tribunal by~~
537 ~~repeatedly~~ ~~habitually~~ engaging in incivility while engaged in the practice of law or related professional
538 activities, or by ~~if~~ intentionally violating established rules of procedure or evidence. The latter should not
539 be conflated with an advocate standing firm in the position of the client, protecting the record for
540 subsequent review, or preserving professional integrity by patient firmness. A violation of rule 3.3(e) or
541 rule 3.4(f) may also constitute a violation of paragraph (d) ~~A lawyer may also violate paragraph (d) by asking~~
542 ~~a question solely intended to degrade a witness or other person, or engaging in a pattern of incivility~~
543 ~~intended to degrade a tribunal, including at a deposition~~ ~~repeated incivility while engaged in the practice~~
544 ~~of law or related professional activities.~~

545 [67] This rule does not prohibit those activities of a particular lawyer that are protected by the First
546 Amendment to the United States Constitution or by Article I, section 2 of the California Constitution.

547 **COPRAC Comments:**

548 COPRAC has incorporated some of the provisions from CCTF's proposed amendments to Rule 3.3 (as
549 modified by COPRAC) into a comment to Rule 8.4(d) to provide guidance on uncivil conduct that would
550 result in a violation of rule 8.4(d). As noted in connection with our comments to CCTF's proposed
551 amendments to Rule 3.3, COPRAC also suggests the Board of Trustees consider prohibiting "severe"
552 incivility in addition to "repeated" incivility." In the context of this rule, COPRAC has also added the
553 clarifying language "while engaged in the practice of law or related professional activities," which is
554 consistent with Comment [4] to ABA Model Rule 8.4(g), which clarifies that "[c]onduct related to the
555 practice of law includes representing clients; interacting with witnesses, coworkers, court personnel,
556 lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice;
557 and participating in bar association, business or social activities in connection with the practice of law."

558 As noted in the introductory paragraphs to this section, some COPRAC members believe that only
559 including civility provisions as a comment to Rule 8.4(d) is not strong enough to improve civility in the legal
560 profession. Instead, the Board of Trustees should consider a standalone rule.

561