

**Rule 3.4 [5-200(E), 5-220, 5,310] Fairness to Opposing Party and Counsel
(Commission's Proposed Rule Adopted on May 6 – 7, 2016 – Clean Version)**

A lawyer shall not:

- (a) unlawfully obstruct another party's access to evidence, including a witness, or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person* to do any such act;
- (b) suppress any evidence that the lawyer or the lawyer's client has a legal obligation to reveal or to produce;
- (c) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
- (d) directly or indirectly pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the case. Except where prohibited by law, a lawyer may advance, guarantee, or acquiesce in the payment of:
 - (1) expenses reasonably* incurred by a witness in attending or testifying;
 - (2) reasonable* compensation to a witness for loss of time in attending or testifying; or
 - (3) a reasonable* fee for the professional services of an expert witness;
- (e) advise or directly or indirectly cause a person* to secrete himself or herself or to leave the jurisdiction of a tribunal* for the purpose of making that person* unavailable as a witness therein;
- (f) knowingly* disobey an obligation under the rules of a tribunal* except for an open refusal based on an assertion that no valid obligation exists; or
- (g) in trial, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the guilt or innocence of an accused.

Comment

[1] Paragraph (a) applies to evidentiary material generally, including computerized information. It is a criminal offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. See, e.g., Penal Code § 135; 18 United States Code §§ 1501-1520. Falsifying evidence is also generally a criminal offense. See, e.g., Penal Code § 132; 18 United States Code § 1519. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. Applicable law may require a lawyer to turn evidence over to the police or other prosecuting authorities, depending on

the circumstances. See *People v. Lee* (1970) 3 Cal.App.3d 514, 526 [83 Cal.Rptr. 715]; *People v. Meredith* (1981) 29 Cal.3d 682 [175 Cal.Rptr. 612].

[2] A violation of a civil or criminal discovery rule or statute does not by itself establish a violation of this Rule.

PROPOSED RULE OF PROFESSIONAL CONDUCT 3.4
(Current Rules 5-310, 5-220 & 5-200(E))
Fairness to Opposing Party and Counsel

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has evaluated current rules 5-310 (Prohibited Contact With Witnesses), 5-220 (Suppression of Evidence) and 5-200(E) (Asserting Personal Knowledge of Facts) in accordance with the Commission Charter, with a focus on the function of the rule as a disciplinary standard, and with the understanding that the rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. In addition, the Commission considered the national standard of the ABA counterpart, Model Rule 3.4 (Fairness to Opposing Party and Counsel). The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules. The result of the Commission’s evaluation is proposed Rule 3.4 (Fairness to Opposing Party and Counsel). This proposed rule has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

Proposed Rule 3.4 in context within the Rules of Professional Conduct. Proposed Rule 3.4 is one of nine rules in Chapter 3 of the proposed Rules of Professional Conduct. The general content, framework and numbering scheme of this subset of the Rules is based on Chapter 3 of the ABA Model Rules, which is entitled “Advocate”. Model Rules Chapter 3 corresponds to Chapter 5 of the current California Rules, entitled “Advocacy and Representation.” The following table shows the Chapter 3 Model Rules and the corresponding California Rules:

Model Rule	California Rule
3.1 (Meritorious Claims & Contentions)	3-200 (Prohibited Objectives of Employment)
3.2 (Expediting Litigation)	No Cal. Rule counterpart.
3.3 (Candor Toward The Tribunal)	5-200 (Trial Conduct)
3.4 (Fairness to Opposing Party & Counsel)	5-220 (Suppression of Evidence) 5-310 (Prohibited Contact with Witnesses) 5-200(E)
3.5 (Impartiality and Decorum of Tribunal)	5-300 (Contact with Officials) 5-320 (Contact with Jurors)
3.6 (Trial Publicity)	5-120 (Trial Publicity)
3.7 (Lawyer As Witness)	5-210 (Member As Witness)
3.8 (Special Responsibilities of a Prosecutor)	5-110 (Performing the Duty of Member in Government Service) 5-220 (Suppression of Evidence) 5-120 (Trial Publicity)
3.9 (Advocate In Non-adjudicative Proceedings)	No Cal. Rule counterpart.

The Commission is recommending the adoption of the Model Rule framework and numbering for this series of rules, but for many of the rules recommends retaining the language of the California Rules, which is more specific and precise, and accordingly more appropriate for a set of disciplinary rules and, with respect to Rule 3.4, to reject the adoption of language in Model Rule that is vague or ambiguous.

Recommendation that proposed Rule 3.4 be circulated for public comment. Proposed Rule 3.4 incorporates several concepts that are intended to promote fair competition in the adversary system of justice. Specifically, the rule includes prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery, and so forth. The concepts in Model Rule 3.4, on whose structure proposed Rule 3.4 is based, are found in three current California Rules of Professional Conduct: rule 5-310 (Prohibited Contact With Witnesses); rule 5-220 (Suppression of Evidence); and rule 5-200 (Trial Conduct). In conformance with the Charter principle that the Commission is to start with the relevant California rule, the Commission began its study of this rule topic with those California rules. However, in acknowledgement of its decision early in the rules revision process to recommend adoption of the Model Rules' format and numbering, the Commission determined that the three concepts should be combined in a single rule numbered 3.4.

In drafting the proposed rule, the Commission largely agreed with the first Commission's approach to its proposed rule 3.4 by:

- (i) retaining rule 5-310 as paragraphs (d) and (e) largely unchanged in the structure of Model Rule 3.4, as these provisions contain specific prohibitions on lawyer conduct;
- (ii) retaining rule 5-220 as paragraph (b) as a general statement of the prohibition against suppressing evidence;
- (iii) incorporating several provisions of Model Rule 3.4 [paragraphs (a), (c) and (f)] that more precisely identify and describe evidence-suppressing conduct that the rule is intended to prevent;
- (iv) retaining rule 5-200(E) in paragraph (g); and
- (v) rejecting several provisions of Model Rule 3.4 [MR 3.4(d), (e) and (f)] as vague and overbroad, and likely to chill legitimated advocacy.

The principal reason for the foregoing approach is that a disciplinary rule should clarify with precision the kind of the conduct that can subject a lawyer to discipline rather than simply provide a generalized prohibition against suppressing evidence, (rule 5-220). There are several provisions in Model Rule 3.4 that identify with more precision than current rule 5-220 the kind of conduct a disciplinary rule intended at least in part to promote fair competition in the adversarial system of justice should prohibit. Specifically MR 3.4(a), (b) and (c) have been retained as paragraphs (a), (c) and (f). Several other Model Rule paragraphs, specifically paragraphs (d), (e) and (f), on the other hand, conflict with California law, are overbroad and likely to chill legitimate advocacy, or both.¹

¹ The rejected Model Rule 3.4 provisions provide that a lawyer shall not:

- (d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;
- (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or
- (f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
 - (1) the person is a relative or an employee or other agent of a client; and
 - (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Text of Rule 3.4.

Paragraph (a) is identical to Model Rule 3.4(a) and prohibits a lawyer from destroying or altering documents, or counseling or assisting another to do so.

Paragraph (b) carries forward rule 5-220 to provide a general statement prohibiting the suppression of evidence.

Paragraph (c) is identical to Model Rule 3.4 and prohibits a lawyer from falsifying evidence or assisting a witness to testify falsely.

Paragraph (d) carries forward rule 5-310(B) nearly verbatim, the only change being to substitute “lawyer” for “member”.

Paragraph (e) carries forward rule 5-310(A) verbatim.

Paragraph (f) is identical to Model Rule 3.4(c) and prohibits a lawyer from knowingly disobeying an obligation under the rules of a tribunal but clarifies that a lawyer may openly refuse to obey based on an assertion that no valid obligation exists.

Paragraph (g) carries forward the language of rule 5-200(E), but adds a provision from Model Rule 3.4(e) that prohibits a lawyer from stating an opinion about the guilt or innocence of an accused.

There are two comments to proposed Rule 3.4, both of which explain how the rule should be applied. Comment [1] clarifies that a lawyer may take temporary possession of evidence for examination but may not alter or destroy it, and provides cross-references to California statutes and case law that impose further obligations on the handling of evidence.

Comment [1] also provides specific references to statutes and case law that impose legal obligations on lawyers and clients to preserve evidence. Comment [2] clarifies an important limitation on the rule’s application, i.e., that a violation of a civil or criminal discovery rule does not by itself constitute a violation of the rule.

Non-substantive aspects of the proposed rule include rule numbering to track the Commission’s general proposal to use the Model Rules’ numbering system and the substitution of the term “lawyer” for “member.”

National Background – Adoption of Model Rule 3.4

Every jurisdiction except California has adopted some version of Model Rule 3.4. Thirty-three jurisdictions have adopted Model Rule 3.4 verbatim.² Ten jurisdictions have adopted a slightly modified version of Model Rule 3.4.³ Seven jurisdictions have adopted a version of the rule that substantially diverges from Model Rule 3.4.⁴

² The thirty-three jurisdictions are: Alabama, Arizona, Connecticut, Delaware, District of Columbia, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Oklahoma, Rhode Island, South Carolina, South Dakota, Utah, Vermont, West Virginia, Wisconsin, and Wyoming.

³ The ten jurisdictions are: Alaska, Arkansas, Colorado, Hawaii, Kentucky, Michigan, North Carolina, Pennsylvania, Tennessee, and Virginia.

⁴ The seven jurisdictions are: Florida, Georgia, New York, Ohio, Oregon, Texas, and Washington.

~~Rule 5-310 Prohibited Contact With Witnesses~~ Rule 3.4 Fairness to Opposing Party and Counsel

(Redline Comparison of the Proposed Rule to Current California Rule)

A ~~member~~lawyer shall not:

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

~~Rule 5-220 Suppression of Evidence~~

(b) ~~A member shall not~~ suppress any evidence that the ~~member's~~memberlawyer or the ~~member's~~lawyer's client has a legal obligation to reveal or to produce.;

~~(A) Advise or directly or indirectly cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of making that person unavailable as a witness therein.~~

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

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

(1) ~~Expenses~~expenses reasonably* incurred by a witness in attending or testifying.;

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

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

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

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

~~Rule 5-200 Trial Conduct~~

(Eg) ~~Shall not~~in trial, assert personal knowledge of ~~the~~ facts at issue, except when testifying as a witness, or state a personal opinion as to the guilt or innocence of an accused.

Comment

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

[2] A violation of a civil or criminal discovery rule or statute does not by itself establish a violation of this Rule.