

**Rule 3.4 Fairness to Opposing Party and Counsel.
[Sorted by Commenter]**

TOTAL = 3 Agree = 1
Disagree =
Modify = 2
NI =

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	COPRAC	A	Yes		Support as drafted.	No response required.
2	San Diego County Bar Association	M	Yes		<p>Paragraph (e)(3) is overbroad and unnecessary to accomplish the policy objective of preventing improper influence of witness testimony. It should be limited to prevent undue influence of fact witnesses and an attorney should not be penalized if an expert is paid an amount that another person believes is too high to be objectively or subjectively reasonable.</p> <p>Paragraph (h) is overbroad because it is not limited to the discovery or litigation context and is unnecessary and duplicative in light of section (a).</p>	<p>Commission did not make the requested revision, in part, because, expert witness fees are addressed in the existing rule and the Commission was not aware of any manifest problems.</p> <p>Commission deleted paragraph (h).</p>
3	Office of Chief Trial Counsel	M	Yes	3.4(f)	While OCTC supports the intent of this rule, it is concerned that subsection (f) of this rule is vague and potentially overbroad. It is unclear whether "an obligation under the rules of a tribunal" includes, for example, local court rules or a judge's individualized preferences. Without additional clarification or definition, the intended meaning of this rule will be a major source of debate, confusion, and litigation.	

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

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				Comment [2]	OCTC requests clarification from the Commission whether the Proposed Rule is violated when a lawyer advises a person that he or she need not voluntarily speak with opposing counsel/party in the matter. Many of the Comments cover subjects and discussions best left to treatises, law review articles, and ethics opinions. Some of the Comments are too long and Comment [2] has too many ideas for one Comment.	

Rule 3.4 Fairness to Opposing Party and Counsel
(Commission's Proposed Rule – Clean Version)

A lawyer shall not:

- (a) unlawfully obstruct another party's access to evidence, 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 or counsel or assist a witness to testify falsely;
- (d) 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;
- (e) offer an inducement to a witness that is prohibited by law, or 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.
- (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.

Comment

- [1] The procedures of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.
- [2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. 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 section 135; 18 United States Code section 1501-1520. Falsifying evidence is also generally a criminal offense. See, e.g., Penal Code section 132; 18 United States Code section 1519. Paragraph (a) applies to evidentiary material generally, including computerized information. 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].)

- [3] A violation of a civil or criminal discovery rule or statute does not by itself establish a violation of this Rule. This Rule does not establish a standard that governs civil or criminal discovery disputes.
- [4] Paragraph (e) permits a lawyer to pay a non-expert witness for the time spent preparing for a deposition or trial. Compensation for preparation time or for time spent testifying must be reasonable in light of all the circumstances and cannot be contingent upon the content of the witness's testimony or on the outcome of the matter. Possible bases upon which to determine reasonable compensation include the witness' normal rate of pay if currently employed, what the witness last earned if currently unemployed, or what others earn for comparable activity.