

Proposed Rule 4.1 [N/A] “Truthfulness in Statements to Others”

(Draft #1, 10/28/09)

Summary:

| Comparison with ABA Counterpart | |
|--|--|
| Rule | Comment |
| <input type="checkbox"/> ABA Model Rule substantially adopted | <input type="checkbox"/> ABA Model Rule substantially adopted |
| <input type="checkbox"/> ABA Model Rule substantially rejected | <input type="checkbox"/> ABA Model Rule substantially rejected |
| <input type="checkbox"/> Some material additions to ABA Model Rule | <input type="checkbox"/> Some material additions to ABA Model Rule |
| <input type="checkbox"/> Some material deletions from ABA Model Rule | <input type="checkbox"/> Some material deletions from ABA Model Rule |
| <input type="checkbox"/> No ABA Model Rule counterpart | <input type="checkbox"/> No ABA Model Rule counterpart |

Primary Factors Considered

Existing California Law

Rules

Statute

Case law

State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

Other Primary Factor(s)

Stakeholders and Level of Controversy

Minority/Position Included on Model Rule Comparison Chart: Yes No

No Known Stakeholders

The Following Stakeholders Are Known:

Very Controversial – Explanation:

Moderately Controversial – Explanation:

Not Controversial

| <p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 4.1 Truthfulness in Statements to Others</p> | <p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center">Rule 4.1 Truthfulness in Statements to Others</p> | <p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p> |
|--|--|---|
| <p>In the course of representing a client a lawyer shall not knowingly:</p> <p>(a) make a false statement of material fact or law to a third person; or</p> | <p>In the course of representing a client a lawyer shall not knowingly:</p> <p>(a) make a false statement of material fact or law to a third person; or</p> | <p>The Commission recommends adoption of this paragraph.</p> |
| <p>(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.</p> | <p>(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client unless disclosure is prohibited by Rule 1.6 <u>or Business and Professions Code section 6068(e)(1)</u>.</p> | <p>The Commission recommends adoption of this paragraph with the additional reference to section 6068(e).</p> |

* Proposed Rule 4.1, Draft 1 (XX/XX/09). Redline/strikeout showing changes to the ABA Model Rule

| <p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 4.1 Truthfulness in Statements to Others</p> <p align="center">Comment</p> | <p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center">Rule 4.1 Truthfulness in Statements to Others</p> <p align="center">Comment</p> | <p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p> |
|---|---|--|
| <p><i>Misrepresentation</i></p> <p>[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.</p> | <p><i>Misrepresentation</i></p> <p>[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms <u>the truth of a statement of another person that the lawyer knows is false. However, in drafting an agreement on behalf of a client, a lawyer does not necessarily affirm or vouch for the truthfulness of representations made by the client in the agreement. A nondisclosure can be the equivalent of a misrepresentation where a lawyer makes a partially true but misleading material statement or material omission that is the equivalent of an affirmative false statement.</u> Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.</p> | <p>The word "incorporate" is deleted because the term is vague and because it suggests that a client's or third party's statements can be imputed to the lawyer, contrary to principles of respondeat superior and agency. The additional language in the comment also makes clear that in drafting an agreement a lawyer does not vouch for the truthfulness of representations made by the client.</p> <p>The third sentence of ABA Comment [1] is modified to reflect the view in California that partially true statements are viewed as nondisclosures or concealment, not misrepresentations. (See <i>Vega v. Jones, Day, Reavis & Pogue</i> (2004) 121 Cal.App.4th 282, 293, 294 ["[A]ctive concealment may exist where a party 'while under no duty to speak, nevertheless does so, but does not speak honestly or makes misleading statements or suppresses facts which materially qualify those stated. . . . One who is asked for or volunteers information must be truthful, and the telling of a half-truth calculated to deceive is fraud"] [citation omitted].)</p> |
| <p><i>Statements of Fact</i></p> <p>[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under</p> | <p><i>Statements of Fact</i></p> <p>[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under</p> | |

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| <p>generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.</p> | <p>generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.</p> | <p>The last sentence of this comment is not adopted since it does not add materially to an understanding of the Rule and is essentially a practice pointer.</p> |
| <p><i>Crime or Fraud by Client</i></p> <p>[3] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under</p> | <p><i>Crime or Fraud by Client</i></p> <p>[3] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under</p> | |

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|---|---|--|
| <p>paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6.</p> | <p>paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6 or Business and Professions Code section 6068(e).</p> <p>[4] Paragraph (b) requires that the lawyer have actual knowledge of the client's criminal or fraudulent act.</p> | <p>Comment [4] clarifies the scienter of Paragraph (b) by explaining that the lawyer must have actual knowledge of the client's fraudulent or criminal act, and not merely knowledge of the material fact that is not disclosed to the third person. This is consistent with tort and criminal law that "liability for aiding and abetting depends on proof the defendant had actual knowledge of the specific primary wrong the defendant substantially assisted." (<i>Casey v. United States Bank Nat. Assn.</i> (2005)127 Cal.App.4th 1138, 1145.); <i>see also, People v. Rogers</i> (1985) 172 Cal.App.3d 502, 515 and 515, fn. 17 [culpability for aiding an offense requires knowledge of the perpetrator's unlawful purpose].)</p> |

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October 26, 2009 McCurdy E-mail to Drafters (Martinez & Tuft), cc Chair & Staff:

Rule 4.1 & 4.2 Codrafters:

The first draft of the rule & comment comparison table for these rules is attached. The Model Rule text has been dropped into the left column.

The assignments for the November meeting are due this Wednesday, October 28th.

Attachments:

RRC - 2-100 [4-1] - Compare - Rule & Comment Explanation - DFT1 (10-26-09).doc

RRC - 2-100 [4-4] - Compare - Rule & Comment Explanation - DFT1 (10-26-09).doc

October 26, 2009 Tuft E-mail to Martinez, cc Chair & Staff:

Raul, I proposed that we recommend adoption of Model Rule 4.1 without modification.

October 26, 2009 Martinez E-mail to Tuft, cc Chair & Staff:

Mark, I agree, but have problems with some of the comments. I am working on the comparison chart and will send it out shortly for discussion.

October 26, 2009 Martinez E-mail to Tuft, cc Chair & Staff:

Attached is the comparison chart for Rule 4.1.

Attachment:

RRC - 2-100 [4-1] - Compare - Rule & Comment Explanation - DFT2 (10-26-09)RM.doc

October 27, 2009 Tuft E-mail to Martinez, cc Chair & Staff:

Raul, I offer the following comments and suggestions to your draft of the comparison chart for Rule 4.1:

1. I agree with your addition to Rule 4.1(b) and Comment [3].
2. I understand your concern over the use of the terms "incorporate" and "affirm" in the second sentence of Comment [1], but I do not agree that the sentence should be jettisoned because of this concern. I also disagree that the the second sentence is intended to impute another person's statement to the lawyer. The lawyer must affirmatively ratify or adopt a statement of another person the lawyer knows is false. I recommend we retain the second sentence modified as follows:

"A misrepresentation can occur if the lawyer ratifies or affirms a statement of another person the lawyer knows is false."

3. I do not agree the third sentence is inconsistent with California law. Vega v. Jones Day involved fraudulent concealment and did not deal with partially true but misleading statements that constitute false statements. The third sentence can be made more clear to address your concern about omission as follows:

"Misrepresentations can also occur by partially true but misleading statements by the lawyer or by material omissions that are the equivalent of affirmative false statements."

4. I do not object to your deletion of the last sentence in Comment [2].

5. I don't have a problem with the additional sentence at the end of Comment [3] but would make it a separate comment (Comment [4]).

October 27, 2009 Martinez E-mail to Tuft, cc Chair & Staff:

1. My concern with the second sentence is that when a lawyer drafts a contract or other document, the lawyer can easily be accused of affirming the truth of the representations therein. When a client is sued for fraud by the opposing party, the lawyer frequently gets dragged in as well. The comment furthers this kind of abuse. Moreover, lawyers frequently sign contracts by stating the contract is "approved as to form and content." I am concerned about using loose language like "affirm" or "incorporates." The word "ratifies" applies in a principal-agent context and a lawyer doesn't ratify the client's statements because the lawyer is acting as the agent. So I have the same concerns with "ratifies." I think the rule can survive quite well without this sentence.

2. My problem with the third sentence is that making a partially true statement comes under the rubric of concealment not misrepresentation. Vega states: "active concealment may exist where a party '[w]hile under no duty to speak, nevertheless does so, but does not speak honestly or makes misleading statements or suppresses facts which materially qualify those stated.'" But I don't disagree with the concept and would propose that the third sentence read as follows:

"A nondisclosure can be the equivalent of a misrepresentation where a lawyer makes a partially true but misleading material statement or material omission that is the equivalent of an affirmative false statement."

October 27, 2009 Tuft E-mail to Martinez, cc Chair & Staff:

I think it is a stretch that the sentence would result in Rule 4.1 applying to reps and warranties in contracts or other documents a lawyer drafts for a client. The object of the rule is the lawyer's communication of a material fact on behalf of a client with a nonclient that the lawyer knows to be false. In that sense, the rule is a counterpart to the duty to the tribunal under Rule 3.3(a)(1). However, I do not have time to research whether the rule has been applied as you fear. I suggest we include your proposed revision with a note that you and I disagree whether it is sufficiently foreseeable that the rule would be applied in the manner you suggest to depart from the Model Rule comment.

I agree with your suggested revision to the third sentence.

October 27, 2009 Martinez E-mail to Tuft, cc Chair & Staff:

I don't think it's a stretch and have seen it in suits against lawyers by plaintiffs looking for deep pockets. It's not farfetched that a lawyer in drafting an agreement for a client will be sued for "affirming" or "incorporating" the client's representations. I am handling an appeal where the plaintiff is claiming that the agreement drafted by the defendant lawyers was fraudulent. Here is a snippet of what the opening brief alleges:

"The Agreement contains many representations that were rendered false and misleading because of other facts that the [attorney] defendantsknew but withheld. For instance, the Agreement represented that [client] had the authority to enter into the Agreement, but did not disclose....[The Lawyers] failed to disclose it to the [plaintiffs] in the Agreement or elsewhere."

October 27, 2009 Tuft E-mail to Martinez, cc Chair & Staff:

Your case seems to involve an alleged failure to disclose or an alleged concealment rather than a false statement of material fact. I have not seen a case where rule 4.1 was found to apply in a civil action based on the wording of this sentence in the comment. But I haven't had the time to research it. I don't feel that strongly about the sentence so you may delete it if you believe it would lead to greater lawyer liability.

October 28, 2009 Martinez E-mail to Tuft, cc Chair & Staff:

Mark, I have revised Comment [1] by leaving in the ABA's second sentence, but deleting the word "incorporates" and adding the sentence: "However, in drafting an agreement on behalf of a client, a lawyer does not necessarily affirm or vouch for the truthfulness of representations made by the client in the agreement."

Also, note another concern I have in requiring lawyers to disclose "truthful" facts to the opposing party is the conflict of interest that arises between the duty to the client and the lawyer's interest in self-preservation. So if the lawyer knows that a recital in a negotiated agreement is false or a half truth, does the lawyer have a duty to tell the other side, especially given the lawyer's obligation of undivided loyalty to the client? The ABA rule doesn't require withdrawal from representation, but rather, can be read to require disclosure to the opponent. This is especially problematic in gray area situations where the lawyer will be tempted to err in favor of fuller disclosures to the other side in order to avoid a suit against the lawyer for fraud--even in arms length transactions. So the ABA rule tends to run counter to CA cases to the effect that "an attorney has no duty to protect the interests of an adverse party for the obvious reasons that the adverse party is not the intended beneficiary of the attorney's services, and that the attorney's undivided loyalty belongs to the client." *Skarbrevik v. Cohen, England & Whitfield* (1991) 231 Cal.App.3d 692, 702.

Attachment:

RRC - 2-100 [4-1] - Compare - Rule & Comment Explanation - DFT2.1 (10-28-09)RM.doc

October 28, 2009 Tuft E-mail to Martinez, cc Chair & Staff:

Your change to Comment [1] is an improvement and I am satisfied with the sentence you have drafted. I can also live with your second sentence as well although I am less concerned with the need to change the wording.

I understand your additional concern, but do not believe the rule will change the law on duties to third persons in California from what case law already requires. First, there is no duty to disclose under this rule if the information is protected by rule 1.6 or section 6068(e)(1). Second, rule 1.2(d) would affect the lawyer's duties in the situation you posit. In fact, I believe rule 4.1 is intended to work with rule 1.2(d) in situations where the lawyer known the document the lawyer prepares contains material false statements of fact. The solution does not simply lie with this rule but is influenced by other rules as well, including rules 1.4, 1.16 as well as 1.2. In the end, the lawyer's duty of loyalty to the client obligates the lawyer to counsel the client to resolve the falsehood, such as allowing the lawyer to change the document or disclose the truthful facts, to protect the client and not just the third party. I have little sympathy for lawyers who fail to understand that they are not mere agents of their clients and who believe they are simply acting out of self preservation in complying with the rule.

October 28, 2009 Martinez E-mail to Tuft, cc Chair & Staff:

Oh, if life were that simple when the sharks circle the water in search of deep pockets.

October 31, 2009 Kehr E-mail to RRC:

Here are my comments on this draft:

1. I respectfully disagree with the omission of “incorporate or” from Comment [1]. Let me provide the following example: A lawyer “knows” that a client committed perjury while providing deposition testimony. The lawyer then utilizes the perjurious information to negotiate the settlement of the litigation. The lawyer did not “affirm the truth” of the perjurious testimony, but he incorporated it in his pitch when negotiating the settlement. While I’m not certain whether this conduct is best described as a violation of Rule 3.3(b), of Rule 4.1 or of 8.4(c) or (d), I would not want our changes to the Model Rule to suggest that this lawyer’s conduct was acceptable. The third column explains the change by reference to the vagueness of “incorporate”. However, this is only the Comment. I might be concerned if the rule used that term, but it doesn’t. I would retain the MR language.
2. I would like to discuss the third sentence of Comment [2] (“Under generally accepted conventions”) as I don’t understand what is meant by a negotiating convention. My view is that a lawyer’s statement can be an estimate or a guess or an expression of hope or fear, or it can be a statement of fact, but that there is nothing in between. A lawyer who makes an assertion of fact should be bound by it. I think the fourth sentence is correct and flows nicely from the second sentence. I would omit the third sentence, which I think takes most of the teeth out of the rule and makes it not much more than a best practices pointer.

**RRC – Rule 4.1 [MR 4.1]
E-mails, etc., -- Revised (11/3/2009)**

3. At the end of the second sentence of Comment [3] (“Paragraph (b) states”), I would insert: “See Rule 1.4(a)(6) regarding a lawyer’s obligation to consult with the client about limitations on the lawyer’s conduct.”
4. At the end of the third sentence of Comment [3] (“Ordinarily, a lawyer”), I would insert: “... in compliance with Rule 1.16.”
5. If the Commission decides that the scienter requirement of civil law should apply to paragraph (b), I am not certain that the addition of Comment [4] will have the desired result. The Comment arguably changes paragraph (b) substantively. This possible interpretation would follow from reading the introductory use of “knowingly” as knowingly failing to disclose rather than knowing of the client’s criminal or fraudulent act (and “knowingly” is an adverb so that it should modify the verb, which is “disclose”). One solution would be to place the scienter requirement in the rule. A possible alternative would be to revise Comment [4] in a way that makes it clear that is only explaining paragraph (b) and not changing it, for example: “A lawyer acts “knowingly” in the situation addressed in paragraph (b) only if the lawyer knows of the client’s criminal or fraudulent act. See Rule 1.0.1(____) for the definitions of “knowingly” and “knows”.”

November 1, 2009 Sapiro E-mail to RRC List:

1. I agree with proposed paragraph (a).
2. I am grateful to the drafting committee for adding the exclusion for Section 6068(e)(1) to paragraph (b).
3. However, as I discussed in my email about proposed Rule 3.9, Comment [3], paragraph (b) encourages lack of candor by lawyers when dealing with a legislative body or government agency. And it encourages lawyers to make material omissions unless doing so would assist the client in committing a crime or fraud.
4. However, as discussed in my comments regarding proposed Rule 3.9, I think proposed paragraph (b) does not go far enough. I think the problem is caused by Model Rule 4.1 assuming that the lawyer is dealing with an opponent when making disclosures to third parties. That is suggested by the first sentence of proposed Comment [1]. However, when a lawyer deals with a regulatory agency or a legislative body, that entity is not an “opponent” in the classic sense. For example, if a lawyer is advocating on behalf of a client for a conditional use permit, the local planning commission or board of supervisors should be entitled to candor from the lawyer. The lawyer should not be permitted to conceal material facts from the governmental agency in such a situation except as prohibited by Business & Professions Code section 6068(e)(1) or by Rule 1.6. The fact that the client, in obtaining the permit, license, or other right may not be committing a crime or a fraud does not mean that a lawyer should be able to deceive the administrative agency by failing to disclose material facts. If, on behalf of a client, I prepare and file a permit application with the Department of Corporations, and I fail to disclose material facts, even if the client, itself, is not committing a crime or fraud for whatever technical reasons, should I be permitted to fail to disclose material facts in that application? I submit that I should not.

5. To me, the governmental body or administrative agency is entitled to complete candor unless the lawyer's duties of confidentiality to the client preclude candor. In that case, the lawyer may have to withdraw but should not be permitted to deceive the legislative body or administrative agency.

6. I would allow material omissions if the nonclient person, government body or administrative agency is in litigation or other adversarial position with respect to the client. For example in a civil enforcement or criminal investigation by the government agency, the lawyer should not have a duty to volunteer information, unless doing so would be obstruction of justice. In civil litigation, an opponent can take discovery, and the lawyer is not obliged to "tell all." But to me, proposed paragraph (b) goes too far in encouraging lawyers to be less than candid when dealing with others.

7. My concern is amplified by proposed Comment [4]. If a lawyer is permitted to conceal material facts unless the lawyer actually knows that the client is committing a crime or fraud, the lawyer has a built in excuse for lack of candor.

8. I am grateful to the drafting committee for adding to Comment [3] the confidentiality exclusion. I would add to that Comment a statement that, if the lawyer is precluded from candor by duties of confidentiality, the lawyer may have to withdraw.

November 2, 2009 Lampion E-mail to RRC:

My only concern is with Comment [3]. How do we square disaffirming an opinion, document, affirmation or the like with 6068(e)? I think the reference to 6068(e) needs to be moved up and tied to both disaffirming and disclosing. I would suggest the Comment read:

[3] Under 1.2(d) a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. However, when doing so, the lawyer must not reveal information relating to the representation of the client that is protected by Business and Professions Code section 6068(e)(1). Sometimes, it may be necessary for the lawyer to give notice of the fact of withdrawal. Unless disclosure is prohibited under Rule 1.6 or Business and Professions Code section 6068(e), in some cases, it may be necessary for the lawyer to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If a lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph (b), the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6 or Business and Professions Code section 6068(e)."

I did not include the reference to 6068(e) in the penultimate sentence in the Comment. I have been debating whether it should be there.

November 2, 2009 Tuft E-mail to RRC:

My comments respond to the numbers in Bob's email sent on all hallows eve.

1. Bob's comment persuades me that we should retain "incorporate in or" in comment [1]. I know Raul has a different point of view, but I think the addition of the third sentence helps explain what conduct is prohibited under the rule.

2. I disagree with Bob that statements in settlement negotiations are either factual and, thus, covered by the rule or statements of opinion or an expression of emotion. The second sentence in Comment [2] serves to point out that exchanges in settlement negotiations that appear to be statements of fact if made in a different setting are not regarded as such in under accepted conventions in settlement negotiations. For example, "my client will not take a dollar less than \$10,000" or "my client will not authorize me to offer more than \$10,000" are literally statements of fact but are considered to be part of the bargaining process that occurs in "under generally accepted conventions in negotiation" and do not violate the rule. Debatable questions can occur in the ethics of negotiation that make for great topics in law school ethics courses but do not necessarily violate the rule. The second sentence adds value in pointing this out.

3. ok

4. ok

5. Bob raises an interesting question whether "knowingly: modifies disclose or the client's criminal or fraudulent act. It is difficult to imagine that a lawyer would violate paragraph (b) without knowing that the conduct is criminal or fraudulent. In any event, the scienter requirement for paragraph (b) should be consistent with rule 1.2(d). To make that clear, I suggest we change Comment [4] to read:

[4] Paragraph (b) requires that the lawyer knows that the client's conduct is criminal or fraudulent.