

McCurdy, Lauren

From: Kevin Mohr [kemohr@charter.net]
Sent: Friday, October 02, 2009 6:50 AM
To: McCurdy, Lauren; Difuntorum, Randall; Lee, Mimi; Kevin Mohr G
Subject: RRC - 5-220 [3.4] - III.NN. - October 16-17, 2009 Meeting Materials
Attachments: RRC - 5-220 [3-4] - State Variation (2009).doc; RRC - 5-220 [3-4] - Dash, Intro, Rule, Comment, Pub Com - COMBO - DFT2 (10-02-09)ERP-KEM.pdf; RRC - 5-220 [3-4] - Public Comment Chart - By Commenter - DFT2 (10-02-09)ERP-KEM.doc; RRC - 5-220 [3-4] - Dashboard - ADOPT - DFT2 (10-02-09)ERP-KEM.doc; RRC - 5-220 [3-4] - Compare - Rule & Comment Explanation - DFT2 (10-02-09)ERP-KEM.doc; RRC - 5-220 [3-4] - Compare - Introduction - DFT2 (10-01-09)ERP-KEM.doc

Greetings Lauren:

To make your job a little easier, I've attached all the materials you need for 3.4 in a single, scaled PDF file. The ingredients of the attached file are also attached, in Word.

I reviewed what Ellen submitted and found a few nits and other slight problems, mostly of a "style" nature, that might slow down the process of our BOG submission. Therefore I made the changes to the attached. Please substitute the attached if you still have time to do so. In the long run, I think it will be to our benefit.

In addition to the combination PDF file, here is what I've attached, all in Word:

1. Dashboard, Draft 2 (10/2/09)-ERP-KEM. Changed the characterization in the ABA Rule Comparison on the first page: rather than state that we had substantially adopted the Model Rule, I thought it more accurate to state that there were material additions and deletions to the Model Rule (as to both rule and comment), and removed the reference to stakeholders. We are not treating folks who simply submitted a public comment as a stakeholder.
2. Introduction, Draft 2 10/1/09)-ERP-KEM. A nit here and there.
3. Rule & Comment Chart, 10/2/09)-ERP-KEM. A number of nits.
4. Public Comment Chart, Draft 2 (10/2/09)-ERP-KEM. Just resorted the commenters alphabetically.

Finally, I also made some slight changes to the State Variations document, which I attach. There were a few typos. I don't think you need to circulate that; I'm just sending it to you, Randy and Mimi for future inclusion in our submission.

Please let me know if you have any questions. Thanks,

Kevin

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Kevin E. Mohr
Professor

Proposed Rule 3.4 [5-200(E)][5-220][5-310(A)] “Fairness to Opposing Party and Counsel”

(Draft #6, 09/19/09)

Summary: Proposed Rule 3.4 describes litigation abuses that threaten the goal of the fair administration of justice that is intended to provide a level playing field. The proposed Rule generally tracks Model Rule 3.4, supplemented by provisions from current California rules 5-200, 5-220, and 5-310.

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

Primary Factors Considered

Existing California Law

Rules	Rules 5-220, 5-310
Statute	
Case law	

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

Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(14 Members Total – votes recorded may be less than 14 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Public Comment Distribution

Vote (see tally below)

Favor Rule as Recommended for Adoption _____

Opposed Rule as Recommended for Adoption _____

Abstain _____

Approved on Consent Calendar

Approved by consensus

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

Stakeholders and Level of Controversy

No Known Stakeholders

The Following Stakeholders Are Known:

Very Controversial – Explanation:

Moderately Controversial – Explanation:

Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 3.4* Fairness To Opposing Party And Counsel

October 2009

(Draft rule following consideration of public comment)

INTRODUCTION:

Proposed Rule 3.4 describes litigation abuses that threaten the goal of the fair administration of justice that is intended to provide a level playing field. The proposed rule generally tracks ABA Model Rule 3.4, supplemented by provisions in current California rules 5-200, 5-220, and 5-310.

Proposed Rule 3.4 omits all or part of Model Rule 3.4(d), (e) and (f), as well as the comment paragraphs associated with those provisions. The Commission believes that adoption of those provisions would chill legitimate advocacy and be inconsistent with legislative policy regarding discovery.

Variations in Other Jurisdictions. Twelve states have revised the substance of ABA Model Rule 3.4. (See State Variation Chart.)

* Proposed Rule 3.4, Draft 6 (9/19/09).

<p style="text-align: center;"><u>ABA Model Rule</u></p> <p style="text-align: center;">Rule 3.4 Fairness to Opposing Party and Counsel</p>	<p style="text-align: center;"><u>Commission's Proposed Rule*</u></p> <p style="text-align: center;">Rule 3.4 Fairness to Opposing Party and Counsel</p>	<p style="text-align: center;"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>NOTE ON THIS DRAFT OF THE RULE & COMMENT COMPARISON CHART. ELLEN PECK WROTE THE FIRST DRAFT, KEM REVISED IT AND THEN INCORPORATED COMMENTS INTO HIS DRAFT THAT RAUL MARTINEZ MADE ON ELLEN PECK'S DRAFT. RAUL'S ORIGINAL COMMENTS ARE PROVIDED IN A FOOTNOTES, BELOW.</p>		
<p>A lawyer shall not:</p> <p>(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;</p>	<p>A lawyer shall not:</p> <p>(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;</p>	<p>Paragraph (a) is identical to Model Rule 3.4(a).</p>
	<p>(b) suppress any evidence that the lawyer or the lawyer's client has a legal obligation to reveal or to produce;</p>	<p>Paragraph (b) carries forward current rule 5-220; it does not have a counterpart in the Model Rule. Retaining the concept of rule 5-220 adds a layer of public protection by prohibiting suppression of evidence. This provision supplements paragraph (a) and operates as a catchall prohibition on suppressing evidence. See also paragraph (d), below.¹</p>
<p>(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;</p>	<p>(bc) falsify evidence, or counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;</p>	<p>Paragraph (c) tracks Model Rule 3.4(b), except the concept of offering an unlawful inducement to a witness has been moved to another paragraph dealing with conduct toward witnesses. (See paragraph (e) below.)</p>

* Proposed Rule 3.4, Draft 6 (9/19/09). Redline/strikeout showing changes to the ABA Model Rule

¹ RM: SHOULD SAY A MORE "SPECIFIC" LAYER SINCE IT CAN BE ARGUED THAT THIS PARAGRAPH SAYS THE SAME THING AS PARAGRAPH (a)]

<p style="text-align: center;"><u>ABA Model Rule</u> Rule 3.4 Fairness to Opposing Party and Counsel</p>	<p style="text-align: center;"><u>Commission's Proposed Rule*</u> Rule 3.4 Fairness to Opposing Party and Counsel</p>	<p style="text-align: center;"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>(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;</p>	<p>Paragraph (d) carries forward current rule 5-310(A); it does not have a Model Rule counterpart. Retaining the concept of rule 5-310(A) adds a layer of public protection by prohibiting a lawyer from advising or causing a person to be unavailable, which is a subset of evidence obstruction and suppression. See also paragraphs (a) and (b), above.²</p>
	<p>(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:</p>	<p>Paragraph (e) melds ABA Model Rule 3.4(b)'s concept of "offer[ing] an inducement to a witness that is prohibited by law. . ." with current rule 5-310(B)'s prohibitions concerning witness compensation that are not found in the Model Rule.</p>
	<p>(1) expenses reasonably incurred by a witness in attending or testifying;</p>	<p>Subparagraph (e)(1) carries forward current rule 5-310(B)(1), which the Commission believes is good public policy that facilitates presentation of witness testimony by compensating for reasonable expenses.</p>
	<p>(2) reasonable compensation to a witness for loss of time in attending or testifying; or</p>	<p>Subparagraph (e)(2) carries forward current rule 5-310(B)(2), which the Commission believes is good public policy that facilitates presentation of witness testimony by compensating witnesses who provide testimony for earnings lost by reason of</p>

² RM: SHOULD SAY A MORE "SPECIFIC" LAYER BECAUSE (d) IS REALLY A SUBSET OF (a)—OBSTRUCTING ACCESS TO EVIDENCE

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 3.4 Fairness to Opposing Party and Counsel</p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center">Rule 3.4 Fairness to Opposing Party and Counsel</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
		<p>their appearance in litigation proceedings.</p>
	<p>(3) a reasonable fee for the professional services of an expert witness;</p>	<p>Subparagraph (e)(3) carries forward current rule 5-310(B)(3), which the Commission believes essential to the ability of litigants to prove cases where expert witnesses are necessary or desirable.</p>
<p>(c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists;</p>	<p>(e) 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</p>	<p>Paragraph (f) is identical to Model Rule 3.4(c).</p>
<p>(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;</p>	<p>(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;</p>	<p>Model Rule 3.4(d) has been rejected because it conflicts with California legislative policy, which provides for: (1) a comprehensive system of discovery remedies (e.g., C.C.P., § 2019 – 2036.050); (2) Court supervision of discovery misconduct and abuse through a variety of means, including sanctions and contempt(e.g., C.C.P., § 1992, 2019.030, 2020.240, 2023.010, 2023.020); and (3) no reporting of attorney sanctions for discovery matters (Bus. & Prof. C.,§6068(o)(3))</p> <p>The Commission believes that this public policy is sound because the tribunal before which a matter is pending is better equipped to control discovery delay or frivolous requests; (2) discovery misconduct is not necessarily indicative of unfitness to practice law; and (3) more serious discovery abuses can subject a lawyer</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 3.4 Fairness to Opposing Party and Counsel</p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center">Rule 3.4 Fairness to Opposing Party and Counsel</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
		<p>to discipline through other standards (e.g., Bus. & Prof. C., §6103 – failure to comply with court order; §6068(b) --failure to maintain respect for the courts; or other parts of this Rule).</p>
	<p><u>(g) in trial, assert personal knowledge of facts in issue except when testifying as a witness.</u></p>	<p>Paragraph (g) is based in part on Model Rule 3.4(e), and in part on current rule 5-200(E).</p>
<p>(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</p>	<p>(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</p>	<p>Except for what has been proposed as paragraph (g), the Commission recommends rejecting Model Rule 3.4(e) because it is overbroad, ambiguous and is likely to chill legitimate advocacy.</p> <p>Access to justice can depend upon a lawyer's abilities to argue the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused. The fine line between legitimate advocacy through rhetoric and argument and statements of opinion can easily be confused by advocate and trier of fact.</p> <p>Disciplining a lawyer for alluding to matter, which may not be relevant or may not be supported by admissible evidence, especially when courts have their own rules on relevancy and admissibility and the power to impose appropriate sanctions, has the potential for chilling legitimate advocacy, adversely affecting access to justice.³</p>

³ KEM NOTE: I revised Ellen's proposed explanation of the RRC's rejection of MR 3.4(e). Raul, however, would simply delete the preceding two paragraphs. He wrote:

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 3.4 Fairness to Opposing Party and Counsel</p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center">Rule 3.4 Fairness to Opposing Party and Counsel</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:</p> <p>(1) the person is a relative or an employee or other agent of a client; and</p> <p>(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.</p>	<p>(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:</p> <p>(1) the person is a relative or an employee or other agent of a client; and</p> <p>(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.</p>	<p>Model Rule 3.4(f) was rejected after three commenters objected to this paragraph arguing that it is ambiguous, overly broad and duplicative, and in conflict with paragraph (a).⁴</p>

I WOULD DELETE THE LAST TWO PARAGRAPHS AND JUST SAY SOMETHING TO THE EFFECT THAT ABUSES CAN BEST BE CONTROLLED BY THE TRIAL JUDGE THROUGH PROPER OBJECTIONS BY THE OPPONENT. ALSO, I DON'T LIKE THE PHRASE "ACCESS TO JUSTICE" IN THIS CONTEXT BECAUSE THE PARTIES ARE ALREADY IN COURT WHERE THERE ARE A PLETHORA OF PROTECTIONS AVAILABLE, RANGING FROM RAISING OBJECTIONS TO APPEALING ERRONEOUS RULINGS

⁴ RM: ONLY 3 COMMENTERS? SOUNDS LIKE WE CAVED IN TO A SQUEAKY WHEEL. WE NEED TO TELL THE BOARD OUR OWN OBJECTIVE VIEW OF THIS RULE. AS I RECALL, THE CONCERN WAS THAT THE PROHIBITION WAS TOO BROAD AND THE COMMISSION COULD NOT AGREE ON PERMISSIBLE EXCEPTIONS. SO THE COMPROMISE WAS TO DUMP THE RULE.

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 3.4 Fairness to Opposing Party and Counsel Comment</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 3.4 Fairness to Opposing Party and Counsel Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[1] The procedure 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.</p>	<p>[1] The <u>procedures</u> 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.</p>	<p>Comment [1] adopts Model Rule 3.4, comment [1], only making "procedure" plural.</p>
<p>[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. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. 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. In such a case, applicable law may require the lawyer to turn the</p>	<p>[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. Applicable law in many jurisdictions makes it an <u>It is a criminal</u> offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. <u>(See, e.g., Penal Code section 135; 18 United States Code section 1501-1520.)</u> Falsifying evidence is also generally a criminal offense. <u>(See, e.g., Penal Code section 132; 18 United States Code section 1519.)</u> 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</p>	<p>Comment [2] largely tracks Model Rule 3.4, deleting only the reference to law in other jurisdictions and adding California citations to support the principles stated in the Comment.</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 3.4 Fairness to Opposing Party and Counsel</p> <p align="center">Comment</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 3.4 Fairness to Opposing Party and Counsel</p> <p align="center">Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>evidence over to the police or other prosecuting authority, depending on the circumstances.</p>	<p>conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, applicable <u>Applicable</u> law may require the a lawyer to turn the evidence over to the police or other prosecuting authority<u>authorities</u>, depending on the circumstances. <u>(See <i>People v. Lee</i> (1970) 3 Cal.App.3d 514, 526 [83 Cal.Rptr. 715]; <i>People v. Meredith</i> (1981) 29 Cal.3d 682 [175 Cal.Rptr. 612].)</u></p>	
<p>[3] With regard to paragraph (b), it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.</p>	<p>[3] With regard to paragraph (b), it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.</p>	<p>The Commission recommends that Comment [3] to Model Rule 3.4 be rejected because (1) the first sentence is too general to provide definition of the rule or guidance; and (2) the second sentence is unnecessary because it refers to common law in other jurisdictions, which is irrelevant to the common law of California and therefore can provide little guidance. Moreover, the topic is more comprehensively addressed in proposed paragraph (e).</p>
	<p><u>[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.</u></p>	<p>Proposed comment [3] has no counterpart in the Model Rule; it clarifies the scope of the Rule. In that regard, the Comment is intended to prevent abuse of the Rule by parties who might attempt to claim that a discovery violation under the rules regulating discovery is equivalent to a breach of professional obligations under this Rule.</p>
<p>[4] Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. See</p>	<p>[4] Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. See</p>	<p>The Commission recommends that Comment [4] to Model Rule 3.4, which clarifies Model Rule 3.4(f) be rejected because the Commission's has proposed deleting of paragraph (f).</p>

<p align="center"><u>ABA Model Rule</u> Rule 3.4 Fairness to Opposing Party and Counsel Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 3.4 Fairness to Opposing Party and Counsel Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>also Rule 4.2.</p>	<p>also Rule 4.2.</p>	
	<p>[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.</p>	<p>Comment [4] has no counterpart in the Model Rule. It attempts to provide guidance regarding application of this Rule. (See e.g., California State Bar Formal Opn. No. 1997-149.)</p>

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

TOTAL =4 Agree = 1
 Disagree = __
 Modify = 3
 NI = __

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	COPRAC	A			Typo in subparagraph (d); the introductory phrase "a lawyer shall not" should be deleted since it is redundant.	Commission revised (d) to eliminate the typo
2	Los Angeles County Bar Association (Toby A. Rothschild)	M			<p>Proposed Rule 3.4(a) may be subject to broad interpretation because "unlawfully" is not limited to knowing or intentional obstruction or destruction of evidence.</p> <p>Comment [3] gives insufficient guidance concerning the conduct in addition to a violation of a discovery rule that would constitute a violation.</p> <p>Proposed Rule 3.4(h) should be deleted; it substantially increases the types of behavior in dealing with witnesses that would be considered violations. Additionally, the scope of the term "request a person ... to refrain from voluntarily giving relevant information to another party" is ambiguous.</p> <p>If (h) is not deleted, consider adding comment about implications of talking with opposing counsel or an investigator for another party is not a violation of the Rule.</p> <p>Typos: in (d), delete "a lawyer shall not"; add a semicolon at the end of subparagraphs (1) and (2). Add an "and/or" after the semicolon</p>	<p>No response needed.</p> <p>Commission included Comment [3] for the limited purpose of identifying a possible area of concern.</p> <p>Commission agreed and deleted (h).</p> <p>Commission agreed and deleted (h).</p> <p>Commission revised (d).</p>

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

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

TOTAL =4 Agree = 1
Disagree = __
Modify = 3
NI = __

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					At end of subparagraph (2). Add a period at end of subparagraph (3). In (h), add a semicolon followed by "or" at end of subparagraph (1).	
3	San Diego County Bar Association (Heather L. Rosing)	M			<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>
4	Santa Clara County Bar Association (Christine Burdick)	M			<p>Paragraph 3.4(f) needs more clarity or a comment to explain and provide examples.</p> <p>Delete paragraph 3.4(h) because it appears to conflict with subpart (a) and creates a situation where the attorney's obligation in protecting the best interests of the client may conflict with the obligation under (h)(1) to the non-client.</p>	<p>Commission did not make the requested revision, in part, because it is a longstanding duty of an attorney to obey court orders and respect courts and udicial offices.</p> <p>Agree with change.</p>

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

TOTAL =4 **Agree = 1**
Disagree = __
Modify = 3
NI = __

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					Comment [2]: add sentence about how applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authorities.	Comment [2] was revised, in part, to address the commenter's request for additional guidance

**RRC – Rule 3.4 [5-220]
E-mails, etc. – Revised (10/13/2009)**

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October 11, 2009 Sapiro E-mail to RRC List:	33

August 27, 2009 McCurdy E-mail to Peck, cc Chair, Vapnek, Tuft & Staff:

Given the recent measures taken to expedite the completion of the rule revision project, the purpose of this letter is to lay out the assignments for which you are a lead drafter that are scheduled to be discussed during the Commission's upcoming September, October and November meetings. A "rolling assignments agenda" is enclosed that covers all of the matters that must be completed at those meetings. This agenda format is being used due to the short turnaround time between these meetings and the interest of many Commission members in working on assignments for future meetings when they have an opportunity to do so. The assignments are considered "rolling" because, for example, any rule that is not completed at the September meeting should be treated as automatically re-assigned and carried forward to the October meeting. Accordingly, the Commission is facing a significant challenge to complete fully each assigned rule in order to avoid a domino effect of rules that are not finished.

Because the Commission has been given a mandate to meet a rigorous schedule of deliverables to the Board for action, it is very important that all assignments be submitted by the assignment due dates. As emphasized by the Chair, if a lead drafter anticipates a conflict, or a conflict unexpectedly arises, that interferes with the ability to complete an assignment, the lead drafter must take the initiative to make alternate arrangements with the codrafters so that the assignment can be submitted by the due date.

Below is a list of your lead draft assignments for the next meeting, September 11, 2009, to be held at the San Diego State Bar Annual Meeting. Enclosed are materials for those assignments. Below that list is a list of assignments for the subsequent meetings in November and October. Materials for those assignments will be distributed soon. If you need any those materials immediately, then please send me an email with a copy to Randy and Kevin. Codrafter responsibilities are not listed. Please refer to the rolling agenda document which identifies the drafting team for each rule assignment. In addition staff will prepare an updated chart listing all rule assignments by Commission member.

Your continued hard work and dedication to this important project is appreciated, and don't forget that staff and the Commission Consultant are here to help so please feel free to contact us for assistance.

ASSIGNMENTS FOR SEPTEMBER MEETING

September 11, 2009 Meeting

Assignments Due: Wed., 9/2/09

- 1. III.S. Rule 5.5 Unauthorized Practice of Law; MJP [1-300] (Dec. 2008 Comparison Chart – Post Public Comment Rule Draft #8 dated 6/27/09)
Codrafters: Martinez, Tuft**

Assignment: (1) a chart comparing proposed Rule 5.5 to MR 5.5; (2) a "dashboard" cover sheet; and (3) a chart summarizing the public comment received and the Commission's response.

ASSIGNMENTS FOR OCTOBER MEETING

October 16 & 17, 2009 Meeting

Assignments Due: Wed., 9/30/09

**1. III.BB. Rule 8.4 Misconduct [1-120] (Dec. 2008 Comparison Chart)
Codrafters: VAPNEK (Co-Lead), Tuft**

Assignment: (1) a chart comparing proposed Rule 8.4 to MR 8.4; (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.

**2. III.GG. Rule 8.4.1 Prohibited Discrimination in Law Practice [2-400]
(Post Public Comment Draft #7.1 dated 6/27/08) Codrafters: Martinez**

Assignment: (1) a chart comparing proposed Rule 8.4.1 to RPC 2-400; (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.

3. III.NN. Rule 3.4 Fairness to Opposing Party/Counsel [5-200(E)][5-220][5-310] (Post Public Comment Draft #5.1 dated 10/15/08 to be revised following the October 2008 meeting) Codrafters: Martinez, Voogd

Assignment: (1) a chart comparing proposed Rule 3.4 to MR 3.4; (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.

(NOTE: This is in addition to any assigned rule not completed at the September meeting.)

ASSIGNMENTS FOR NOVEMBER MEETING

November 6 & 7, 2009 Meeting

Assignments Due: Wed., 11/28/09

No lead drafter assignments.

(NOTE: This is in addition to any assigned rule not completed at the October meeting.)

September 18, 2009 McCurdy E-mail to Drafters (Peck, Martinez & Voogd), cc RRC:

Ellen & Codrafters (Raul & Tony):

This message provides the assignment background materials for Rule 3.4 on the October agenda. **The assignment deadline is Wednesday, September 30, 2009.**

As previously indicated, the materials provided are templates or drafts. Please don't hesitate to ask for further assistance or additional materials.

Attachments:

- Dashboard, Draft Template (9/18/09)
- Introduction, Template (9/18/09)
- Rule & Comment Chart, Template (9/18/09)
- Public Comment Chart, Draft 1 (9/18/09)
- State Variations (2009)

September 19, 2009 KEM E-mail to Drafters, cc RRC:

I've attached a revised Introduction template for Rule 3.4 (all I did was add the rule title and draft number & date in the footnote on the first page).

October 1, 2009 Peck E-mail to Drafters, cc Chair & Staff:

Belatedly, here are the materials for rule 3.4. Apologies to Tony and Raul for not getting this done in time for pre-distribution comment.

I leave to Randy and Lauren, the order of presentation in the agenda. I hope that you can still get this out.

October 2, 2009 KEM E-mail to McCurdy, cc Difuntorum & Lee:

To make your job a little easier, I've attached all the materials you need for 3.4 in a single, scaled PDF file. The ingredients of the attached file are also attached, in Word.

I reviewed what Ellen submitted and found a few nits and other slight problems, mostly of a "style" nature, that might slow down the process of our BOG submission. Therefore I made the changes to the attached. Please substitute the attached if you still have time to do so. In the long run, I think it will be to our benefit.

In addition to the combination PDF file, here is what I've attached, all in Word:

1. Dashboard, Draft 2 (10/2/09)-ERP-KEM. Changed the characterization in the ABA Rule Comparison on the first page: rather than state that we had substantially adopted the Model Rule, I thought it more accurate to state that there were material additions and deletions to the

Model Rule (as to both rule and comment), and removed the reference to stakeholders. We are not treating folks who simply submitted a public comment as a stakeholder.

2. Introduction, Draft 2 10/1/09)-ERP-KEM. A nit here and there.
3. Rule & Comment Chart, 10/2/09)-ERP-KEM. A number of nits.
4. Public Comment Chart, Draft 2 (10/2/09)-ERP-KEM. Just resorted the commenters alphabetically.

Finally, I also made some slight changes to the State Variations document, which I attach. There were a few typos. I don't think you need to circulate that; I'm just sending it to you, Randy and Mimi for future inclusion in our submission.

Please let me know if you have any questions.

October 2, 2009 Martinez E-mail to Drafters, cc Chair & Staff:

Here are my comments (just a few) regarding the comparison chart (in caps and hi-lighted in yellow). Because of time constraints, I suggest this item not be put on the agenda for the Oct meeting.

October 2, 2009 KEM E-mail to McCurdy:

Per our telephone conversation, here is the revised comparison chart that incorporates Raul's comments.

Attached:

Rule & Comment Chart, Draft 2.1 (10/2/09)ERP-KEM-RM

October 2, 2009 KEM E-mail to Martinez, cc McCurdy & Difuntorum:

Before you sent in your comments, I had revised Ellen's rule comparison chart and sent it on to Lauren for inclusion in the agenda materials. When your e-mail came in, I inserted your comments as footnotes or simply made the change you requested where I didn't think there would be much controversy.

Anyway, attached is what will be sent out today. I hope it's OK by you. In addition, Rule 3.4 had originally been set for the consent agenda but it is now on the discussion agenda in light of your comments.

October 2, 2009 Sondheim E-mail #1 to Martinez, cc Drafters & Staff:

As you will see in an e-mail I am about to send out, I am trying to reduce the time constraints at the meeting and therefore want to keep this rule on the agenda in the hope that we can finish it (maybe wishful thinking).

October 2, 2009 KEM E-mail to Sondheim, cc McCurdy & Difuntorum:

I've attached a revised rule & comment comparison chart for Rule 3.4 that is being included in the agenda materials. I had revised Ellen's rule comparison chart (nits, etc.) and sent it on to Lauren for inclusion in the agenda materials. Then Raul sent in his comments this morning on Ellen's version. To avoid the confusion of dueling charts, I inserted Raul's comments as footnotes or simply made the change he requested where I didn't think there would be much controversy.

Anyway, attached is what is being sent out today. That's not really why I'm writing -- you'll get your copy of the attached along with the rest of the Manhattan phone that is being shipped later today. I'm writing to advise you that I asked Lauren to take 3.4 off the consent agenda in light of Raul's comments. Raul was the lead drafter on this Rule, which went through a number of contentious deliberations. That he now took issue with the chart we intend to send to BOG in November suggested it would be wiser for us to place it on the Discussion agenda to address his concerns. Perhaps he and Ellen can resolve this before the meeting. As for taking it off consent, we didn't have time to call you; the Bar's in-house print shop was on Lauren's other line asking for the go-ahead to print the materials so we made a quick decision. I hope that is OK by you.

October 2, 2009 Sondheim Reply to KEM, cc McCurdy & Difuntorum:

Fine by me.

October 2, 2009 Martinez E-mail to Sondheim, cc Drafters & Staff:

That's fine, but the materials for this Rule as presently drafted by Ellen should not be sent out with the agenda materials. Ellen should be given a chance to look at my comments and then she can send out a revised chart via e-mail. And Tony has not had a chance to weigh in at all.

October 2, 2009 Sondheim E-mail #2 to Martinez, cc Drafters & Staff:

Because of time constraints (namely, getting everything ready for overnight mail), the materials have already been printed for mailing tonight. I suggest Ellen send an e-mail to the Commission advising the members that there will probably be changes for 3.4 and therefore the members should defer looking at the materials for this rule until Ellen has had a chance to reflect upon what changes need to be made.

October 2, 2009 Sondheim E-mail #3 to Martinez, cc Drafters & Staff:

I just read the e-mail from Kevin which is set forth below and I think that solves the problem. This rule is no longer a consent matter.

See **October 2, 2009 KEM E-mail to Sondheim, cc McCurdy & Difuntorum:**

October 7, 2009 Kehr E-mail to RRC:

Here are my comments on these materials:

1. If the Commission is inclined to support Raul's fn. 1 suggestion (and I would join in that), then the same change should be made with paragraph (d), which arguably is part of the MR paragraph (a) or (b) prohibition on obstructing access to evidence or to honest testimony. If the Commission makes this decision, then I would eliminate the statement in the paragraph (b) and (d) explanations that there is no MR counterpart. One way of handling this would be to ---
 - a. Change the paragraph (b) explanation to say: "Paragraph (b) carries forward current rule 5-220 in order to state specifically a prohibition that arguably is implied by Model Rule paragraph (a). Retaining the concept of rule 5-220 adds a layer of public protection by prohibiting suppression of evidence. See also paragraph (d), below."
 - b. Change the paragraph (d) explanation to say: "Paragraph (d) carries forward current rule 5-310(A) in order to state specifically a prohibition that arguably is implied by Model Rule paragraph (a) or (b). Retaining the concept of rule 5-310(A) adds a layer of public protection by prohibiting a lawyer from advising or causing a person to be unavailable, which is a subset of evidence obstruction and suppression. See also paragraphs (a) and (b), above."
2. In the second paragraph of the explanation for the Commission's rejection of MR paragraph (d), at the end of the first line, insert ": (1)"
3. I have no strong feeling about the drafting issue highlighted by fn. 3 except that I agree with Raul that "access to justice" is the wrong phrase. Also, there is a drafting error in the paragraph two phrase "the culpability of a civil litigation". If the Commission decides to keep the three paragraph explanation for the rejection of MR paragraph (e), I would change the first sentence of the second paragraph to read: "A lawyer should have the freedom to argue the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused without fear of professional discipline under this Rule because of an error in judgment."
4. I support Raul's recommendation in fn. 4. We could deal with this simply by adding: "On reconsideration, the Commission agreed."
5. In the Commenter chart, I wonder why no response is needed to the first of the L.A. comments. Shouldn't we say that the Commission made no change because it believes that "unlawful" obstruction to or destruction of evidence is the correct disciplinary standard?
6. In the response to the first Santa Clara comment, third line, the "j" is missing from "judicial".

October 9, 2009 Sondheim E-mail to RRC:

In the Commentater Chart, p. 387, RRC response to LACBA states "No response needed." I think a response is needed.

Page 388, RRC response, third paragraph, the letter "j" is missing from judicial.

October 9, 2009 Kehr E-mail to RRC:

I don't have the materials here, but isn't your first comment the same as my comment 5. See my 10/7/09 e-mail.

October 11, 2009 Sapiro E-mail to RRC List:

I offer some suggestions regarding this report.

1. In the Introduction, first line, I would change "goal" to "goals." I would change "that is intended to provide" to "and providing."
2. Responding to footnote 1, I agree with Raul.
3. I still oppose the wording of paragraph (e)(2). In my experience, expert witness fees are almost never "reasonable." If a lawyer does not pay whatever the expert demands, the expert refuses to participate. Requiring a lawyer only to pay a "reasonable" fee to an expert witness invites discipline of innocent lawyers. We changed 1.5(a) and should change this rule too.
4. In the explanation of changes column for the deletion of paragraph (e), at page 4 of 8, next to last paragraph on that page, I think the word "litigation" should be "litigant" and would delete the phrase "by advocate and trier of fact."
5. I would reword the explanation of changes of the deletion of paragraph (f). We should say that we deleted it because it is ambiguous, overbroad, duplicative, and in conflict with paragraph (a). I also agree with Raul's comments in footnote 4.