

# 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.

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

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## 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)

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Approved on 10-day Ballot, Less than Six Members Opposing Adoption

Vote (see tally below)

Favor Rule as Recommended for Adoption 11

Opposed Rule as Recommended for Adoption 0

Abstain 0

Approved on Consent Calendar

Approved by Consensus

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

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### Stakeholders and Level of Controversy

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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 goals 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.)

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\* 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;"><b>Rule 3.4 Fairness to Opposing Party and Counsel</b></p>  | <p style="text-align: center;"><u>Commission's Proposed Rule*</u></p> <p style="text-align: center;"><b>Rule 3.4 Fairness to Opposing Party and Counsel</b></p>  | <p style="text-align: center;"><u>Explanation of Changes to the ABA Model Rule</u></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) <a href="#">suppress any evidence that the lawyer or the lawyer's client has a legal obligation to reveal or to produce;</a></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. Paragraph (b) makes specific what might be implied by paragraph (a), thus eliminating the possibility of confusion. See also paragraph (d), below.<sup>1</sup></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, <u>or</u> counsel or assist a witness to testify falsely, <del>or offer an inducement to a witness that is prohibited by law;</del></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

| <p align="center"><u>ABA Model Rule</u><br/>Rule 3.4 Fairness to Opposing Party and Counsel</p> | <p align="center"><u>Commission's Proposed Rule*</u><br/>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>(d) <a href="#"><u>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;</u></a></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. Paragraph (d) makes specific what might be implied by paragraph (a), thus eliminating the possibility of confusion. See also paragraphs (a) and (b), above.<sup>2</sup></p> |
|   | <p>(e) <a href="#"><u>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:</u></a></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) <a href="#"><u>expenses reasonably incurred by a witness in attending or testifying;</u></a></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>  |

<sup>2</sup> 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><br/>Rule 3.4 Fairness to Opposing Party and Counsel</p>   | <p align="center"><u>Commission's Proposed Rule*</u><br/>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>(2) <a href="#">reasonable compensation to a witness for loss of time in attending or testifying; or</a></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 their appearance in litigation proceedings.</p> |
|   | <p>(3) <a href="#">a reasonable fee for the professional services of an expert witness.</a></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>(ef) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists; <a href="#">or</a></p> | <p>Paragraph (f) is identical to Model Rule 3.4(c).</p>  |

| <p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 3.4 Fairness to Opposing Party and Counsel</b></p>  | <p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center"><b>Rule 3.4 Fairness to Opposing Party and Counsel</b></p>  | <p align="center"><u>Explanation of Changes to the ABA Model Rule</u></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><del>(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;</del></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. &amp; Prof. C.,§6068(o)(3))</p> <p>The Commission believes that this public policy is sound because: (1) 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 to discipline through other standards (e.g., Bus. &amp; 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 align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 3.4 Fairness to Opposing Party and Counsel</b></p>  | <p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center"><b>Rule 3.4 Fairness to Opposing Party and Counsel</b></p>  | <p align="center"><u>Explanation of Changes to the ABA Model Rule</u></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><del>(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</del></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. Abuses can best be controlled by the trial judge through proper objections by the opponent.</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><del>(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:</del></p> <p><del>(1) the person is a relative or an employee or other agent of a client; and</del></p> <p><del>(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.</del></p>                        | <p>Commenters objected to Model Rule 3.4(f) arguing that it is ambiguous, overly broad and duplicative, and in conflict with paragraph (a). On reconsideration, the Commission agreed.</p>  |

| <p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 3.4 Fairness to Opposing Party and Counsel<br/>Comment</b></p>   | <p align="center"><u>Commission’s Proposed Rule</u></p> <p align="center"><b>Rule 3.4 Fairness to Opposing Party and Counsel<br/>Comment</b></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 procedures<u>s</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 evidence over to the police or other prosecuting</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. <del>Applicable law in many jurisdictions makes it an</del> <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 conducting a limited examination that will not alter or</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"><b>Rule 3.4 Fairness to Opposing Party and Counsel<br/>Comment</b></p>  | <p align="center"><u>Commission's Proposed Rule</u></p> <p align="center"><b>Rule 3.4 Fairness to Opposing Party and Counsel<br/>Comment</b></p>  | <p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>   |
|---|---|---|
| <p>authority, depending on the circumstances.</p>   | <p>destroy material characteristics of the evidence. <del>In such a case, applicable</del> <u>Applicable</u> law may require <del>the a</del> lawyer to turn <del>the</del> evidence over to the police or other prosecuting <del>authority</del><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><del>[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.</del></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 also Rule 4.2.</p>  | <p><del>[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 also Rule 4.2.</del></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></p> <p align="center">Rule 3.4 Fairness to Opposing Party and Counsel<br/>Comment</p> | <p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 3.4 Fairness to Opposing Party and Counsel<br/>Comment</p>  | <p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>   |
|---|--|---|
|   | <p><a href="#">[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.</a></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

(Comparison of the Current Proposed Rule to the initial Public Comment Draft)

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) ~~A lawyer shall not~~ 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; ~~or;~~
- (h) ~~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 the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.~~
  - (2) ~~the person may be required by law to refrain from disclosing the information.~~

#### COMMENT

- [1] The ~~procedure~~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. ~~Nor is this~~This Rule ~~intended~~ to 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.

[5] ~~Paragraph (h) permits a lawyer to request 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 also Rules 4.2 and 4.3.)~~

## Rule ~~5-220~~ ~~Suppression of Evidence~~ 3.4 Fairness to Opposing Party and Counsel

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

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) ~~A member shall not~~ suppress any evidence that the ~~member~~lawyer or the ~~member's~~lawyer's client has a legal obligation to reveal or to produce;
- (c) falsify evidence or counsel or assist a witness to testify falsely;

### ~~Rule 5-310 Prohibited Contact With Witnesses~~

~~A member shall not:~~

- (d) ~~(A) Advise~~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) ~~(B) Directly~~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 ~~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; or
  - (3) ~~A~~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

### ~~Rule 5-200(E) Trial Conduct~~

- (g) ~~(E) Shall not in trial,~~ assert personal knowledge of ~~the~~ facts ~~at~~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.

**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.

## Rule 3.4: Fairness to Opposing Party and Counsel

### STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: Statutes and Standards (2009 Ed.) by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

**Alabama** adds two exceptions that allow a lawyer to ask a non-client not to give information to another party if: “(2) the person may be required by law to refrain from disclosing the information; or (3) the information pertains to covert law enforcement investigations in process, such as the use of undercover law enforcement agents.”

**California:** Compare Rule 5-200 (reprinted in the Selected State Variations following ABA Model Rule 3.3 above) and Rule 5-220, which provides that a lawyer “shall not suppress any evidence that the member or the member’s client has a legal obligation to reveal or to produce.” Also, Rule 5-310 provides that a member shall not:

(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.

(B) 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 member 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.

(3) A reasonable fee for the professional services of an expert witness.

In addition, California Penal Code §135, which was enacted in 1872, provides as follows:

*Destroying evidence.* Every person who, knowing that any book, paper, record, instrument in writing, or other matter or thing, is about to be produced in evidence upon any trial, inquiry, or investigation whatever, authorized by law, willfully destroys or conceals the same, with intent thereby to prevent it from being produced, is guilty of a misdemeanor.

**Connecticut:** Rule 3.4(7), which retains language from DR 7-105 of the old ABA Model Code of Professional Responsibility, forbids a lawyer to “present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.”

**District of Columbia:** Rule 3.4 provides that a lawyer shall not:

(a) Obstruct another party's access to evidence or alter, destroy, or conceal evidence, or counsel or assist another person to do so, if the lawyer reasonably should know that the evidence, is or may be the subject of discovery or subpoena in any pending or imminent proceeding. Unless prohibited by law, a lawyer may receive physical evidence of any kind from the client or from another person. If the evidence received by the lawyer belongs to anyone other than the client, the lawyer shall make a good-faith effort to preserve it and to return it to the owner, subject to Rule 1.6;...

(g) Peremptorily strike jurors for any reason prohibited by law.

**Florida:** Rule 3.4(a) replaces the ABA phrase "having potential evidentiary value" with the phrase "that the lawyer knows or reasonably should know is relevant to a pending or a reasonably foreseeable proceeding..." Rule 3.4(b) provides that a lawyer shall not "fabricate" evidence, and provides that a lawyer shall not

offer an inducement to a witness, except a lawyer may pay a witness reasonable expenses incurred by the witness in attending or testifying at proceedings; a reasonable, noncontingent fee for professional services of an expert witness; and reasonable compensation to reimburse a witness for the loss of compensation incurred by reason of preparing for, attending, or testifying at proceedings.

Florida Rule 3.4(d) deletes the phrase "to make a reasonably diligent effort," instead providing that a lawyer shall not "intentionally" fail to comply with a legally proper discovery request by an opposing party. Florida Rules 3.4(g)

and (h) expand upon DR 7-105 of the ABA Model Code of Professional Responsibility by providing that a lawyer must not present, participate in presenting, or threaten to present either criminal charges or "disciplinary charges under these rules" solely to obtain an advantage in a civil matter.

**Georgia:** Rule 3.4(b) borrows language from DR 7-109(C) of the ABA Model Code of Professional Responsibility. Georgia omits ABA Model Rules 3.4 (c), (d), and (e) entirely. Georgia Rule 3.4(f) adds that a lawyer may request a person not to volunteer information to another party "if the information is subject to the assertion of a privilege by the client."

Georgia also adds a new Rule 3.4(g), based on ABA Model Rule 4.4, which provides that a lawyer shall not "use methods of obtaining evidence that violate the legal rights of the opposing party or counsel," and a new Rule 3.4(h), taken verbatim from DR 7-105 of the ABA Model Code, which provides that a lawyer shall not "present, participate in presenting or threaten to present criminal charges solely to obtain an advantage in a civil matter."

**Illinois** has adopted ABA Model Rule 3.3(a), (b), and (f) verbatim, but omits Rule 3.4(c) and (d). Illinois also moves some of the topics in ABA Model Rule 3.4 to Illinois Rule 3.3. Specifically, expanding on ABA Model Rule 3.4(b)'s command not to "offer an inducement to a witness that is prohibited by law," Illinois Rule 3.3(a)(15) provides that a lawyer appearing in a professional capacity before a tribunal shall not "pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the witness' testimony or the outcome of the case, but a lawyer may advance, guarantee, or acquiesce in the payment of expenses reasonably incurred in attending or testifying, and a reasonable fee for the professional services of an expert witness." In addition, Illinois moves the

language in Rule 3.4(e) to Illinois Rule 3.3(a)(10), but adds that “a lawyer may argue, on analysis of evidence, for any position or conclusion with respect to the matter stated herein.”

**New Jersey** adds Rule 3.4(g), which provides, based on DR 7-105 of the ABA Model Code of Professional Responsibility that a lawyer shall not “present, participate in presenting, or threaten to present criminal charges to obtain an improper advantage in a civil matter.”

**New York:** Regarding Rule 3.4(a), DR 7-102(A)(3) provides that a lawyer representing a client shall not “[c]onceal or knowingly fail to disclose that which the lawyer is required by law to reveal,” and DR 7-109(A) provides that a lawyer shall not “suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce.” Regarding Rule 3.4(b), DR 7-102(A)(6) provides that a lawyer representing a client shall not “[p]articipate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false,” and DR 7-109(C) provides:

A lawyer shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his or her testimony or the outcome of the case. But 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 the loss of time in attending, testifying, preparing to testify or otherwise assisting counsel.
3. A reasonable fee for the professional services of an expert witness.

Regarding Rule 3.4(c), DR 7-106(A) provides that a lawyer shall not “disregard or advise a client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take appropriate steps in good faith to test the validity of such rule or ruling.” New York has no counterpart to Rule 3.4(d). Regarding Rule 3.4(e), DR 7-106(C) provides that in appearing as a lawyer before a tribunal, a lawyer shall not:

- (1) State or allude to any matter that he or she has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.
- (2) Ask any question that he or she has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person.
- (3) Assert personal knowledge of the facts in issue, except when testifying as a witness.
- (4) Assert a personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but the lawyer may argue, upon analysis of the evidence, for any position or conclusion with respect to the matters stated herein.
- (5) Fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of the intent not to comply.
- (6) Engage in undignified or discourteous conduct which is degrading to a tribunal.
- (7) Intentionally or habitually violate any established rule of procedure or of evidence.

Regarding Rule 3.4(f), New York's DR 7-104(A)(2) provides that a lawyer shall not "[g]ive advice to a party who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such party are or have a reasonable possibility of being in conflict with the interests of the lawyers client," and DR 7-109(B) provides that a lawyer "shall not advise or cause a person to hide or to leave the jurisdiction of a tribunal for the purpose of making the person unavailable as a witness therein."

**North Carolina:** Rule 3.4(b) adds that a lawyer shall not "counsel or assist a witness to hide or leave the jurisdiction for the purpose of being unavailable as a witness." Rule 3.4(c) provides that a lawyer shall not "advise a client to disobey" an obligation under the rules of a tribunal, except that "a lawyer acting in good faith may take appropriate steps to test the validity of such an obligation." Rule 3.4(f)(1) limits the "employee" exception to a "managerial employee."

**Ohio:** The exception clause in Ohio Rule 3.4(c) applies to an open refusal based on a "good faith" assertion that no valid obligation exists. Rule 3.4(d) provides that a lawyer engaged in pretrial procedure shall not "intentionally or habitually" make a frivolous "motion or" discovery request. Ohio omits Rule 3.4(f) because it is inconsistent with a lawyer's obligations under Ohio law, and Ohio adds a new Rule 3.4(g) that provides that a lawyer shall not "advise or cause a person to hide or to leave the jurisdiction of a tribunal for the purpose of becoming unavailable as a witness."

**Oklahoma** omits the clause "other than the testimony of a defendant in a criminal matter" in the last sentence of Rule 3.4(a)(3). In addition, Oklahoma adds a new Rule 3.4(a)(4), which provides that a lawyer "shall not knowingly... fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client."

**Oregon:** Rules 3.4(b) and (g) provide that a lawyer shall not:

(b) falsify evidence; counsel or assist a witness to testify falsely; offer an inducement to a witness that is prohibited by law; or pay, offer to pay, or acquiesce in payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the case; except that 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 the witness's loss of time in attending or testifying; or

(3) a reasonable fee for the professional services of an expert witness.

(g) threaten to present criminal charges to obtain an advantage in a civil matter unless the lawyer reasonably believes the charge to be true and if the purpose of the lawyer is to compel or induce the person threatened to take reasonable action to make good the wrong which is the subject of the charge.

**Pennsylvania:** Rule 3.4(b) deletes the ABA phrase "or offer an inducement to a witness that is prohibited by law" and substitutes language nearly identical to DR 7-109(C) of the ABA Model Code of Professional Responsibility. Pennsylvania deletes ABA Model Rule 3.4(c) and substitutes the language of DR 7-106(C)(4). Pennsylvania deletes subparagraphs (d) and (e) of ABA Model Rule 3.4, and adds "and such conduct is not prohibited by Rule 4.2" at the end of Pennsylvania Rule 3.4(d), which is equivalent to ABA Model Rule 3.4(f).

**Texas:** Rule 3.04(a)'s prohibition on unlawfully altering, destroying, or concealing evidence applies "in anticipation of a dispute." (Regarding "unlawfully," Texas Penal Law §37.09 makes it a felony if a person "knowing that an investigation or official proceeding is pending or in progress... alters, destroys, or conceals any record, document, or thing with intent to impair its verity, legibility, or availability as evidence," but §37.09 does not apply to items that are "privileged" or "work product.") Texas Rule 3.04(b) retains the substance of DR 7-109(C) of the ABA Model Code of Professional Responsibility. Rule 3.04(c) retains language from DR 7-106(C), and Rule 3.04(c)(5) provides that a lawyer shall not "engage in conduct intended to disrupt the proceedings." Rule 3.04(d) provides that a lawyer shall not knowingly disobey "or advise the client to disobey" an obligation under the tribunal's "standing rules" or under a "ruling" by the tribunal, except for an open refusal based either on an assertion that no valid obligation exists "or on the client's willingness to accept any sanctions arising from such disobedience."

**Virginia** eliminates the word "unlawfully" from Rule 3.4(a), and provides that a lawyer shall not alter, destroy or conceal material having potential evidentiary value "for the purpose of obstructing a party's access to evidence." Rule 3.4 (b) and (c) incorporates language from DR 7-109(B) and (C) of the ABA Model Code of Professional Responsibility. Rule 3.4(i), which expands on DR 7-105 of the Model Code, provides that a lawyer shall not present or threaten to present criminal "or disciplinary" charges solely to obtain an advantage in a civil matter, and Rule 3.4(j) is taken verbatim from DR 7-102(A)(1) of the Model Code but adds "or initiate criminal charges" to the list of forbidden conduct.

**Washington** omits ABA Model Rule 3.4(f) (which sets forth circumstances in which a lawyer may ask a person other than a client to refrain from voluntarily giving

information to another party). A Comment explains that the Model Rule is "inconsistent with Washington law," and that "[a]dvising or requesting that a person other than a client refrain from voluntarily giving information to another party may violate other Rules," such as Rule 8.4(d).

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

TOTAL = 5 Agree = 1  
Disagree =     
Modify = 4  
NI =   

| No. | Commenter   | Position <sup>1</sup> | 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>Commission made no change, in part, because it believes that "unlawful" obstruction to or destruction of evidence is the correct disciplinary standard.</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> |

<sup>1</sup> 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 = 5 Agree = 1  
Disagree =      
Modify = 4  
NI =    

| No. | Commenter  | Position <sup>1</sup> | 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).   | Commission revised (d).   |
| 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 judicial offices.</p> <p>Agree with change.</p>                            |

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

**TOTAL = 5 Agree = 1  
Disagree =      
Modify = 4  
NI =**

| No. | Commenter  | Position <sup>1</sup> | Comment on Behalf of Group? | Rule Paragraph | Comment   | RRC Response   |
|-----|--|-----------------------|-----------------------------|----------------|---|--|
|     |  |                       |                             |                | <p>Comment [2]: add sentence about how applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authorities.</p>  | <p>Comment [2] was revised, in part, to address the commenter's request for additional guidance</p>  |
| 5   | State Bar Office of the Chief Trial Counsel (OCTC) | M                     |                             |                | <p>The phrase "an obligation under the rules of a tribunal" is vague.</p> <p>The exceptions in paragraph (h) should be deleted.</p> <p>An additional comment should be added to distinguish between a lawyer requesting that a person refrain from giving relevant information and a lawyer advising a person that he or she need not voluntarily speak with another party in the matter.</p> | <p>Commission did not modify this language, in part, because it is the exact language used in the Model Rule counterpart.</p> <p>Commission deleted paragraph (h), including the exceptions.</p> <p>Commission deleted paragraph (h) which the Commission believes is the basis of this concern.</p> |