

Rule 4.1 Truthfulness in Statements to Others
(Commission's Proposed Rule Adopted on June 2 – 3, 2016 – Clean Version)

In the course of representing a client a lawyer shall not knowingly:*

- (a) make a false statement of material fact or law to a third person;* or
- (b) fail to disclose a material fact to a third person* when disclosure is necessary to avoid assisting a criminal or fraudulent* act by a client, unless disclosure is prohibited by Rule 1.6 or Business and Professions Code § 6068(e)(1).

Comment

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms the truth of a statement of another person* that the lawyer knows* is false. However, in drafting an agreement or other document on behalf of a client, a lawyer does not necessarily affirm or vouch for the truthfulness of representations made by the client in the agreement or document. A nondisclosure can be the equivalent of a false statement of material fact or law under paragraph (a) where a lawyer makes a partially true but misleading material statement or material omission. In addition to this Rule, lawyers remain bound by Rule 8.4 and Business and Professions Code § 6106.

[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. For example, in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.*

[3] Under Rule 1.2.1, a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows* is criminal or fraudulent.* See Rule 1.4(a)(5) regarding a lawyer's obligation to consult with the client about limitations on the lawyer's conduct. In some circumstances, a lawyer can avoid assisting a client's crime or fraud* by withdrawing from the representation in compliance with Rule 1.16.

[4] Regarding a lawyer's involvement in lawful covert activity in the investigation of violations of law, see Rule 8.4, Comment [5].

**PROPOSED RULE OF PROFESSIONAL CONDUCT 4.1
(No Current Rule)
Truthfulness In Statements To Others**

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has reviewed and evaluated American Bar Association (“ABA”) Model Rule 4.1 (Truthfulness In Statements To Others) for which there is no California counterpart. The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rule. The evaluation was made with a focus on the function of the rules as disciplinary standards, and with the understanding that the rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. The result of this evaluation is proposed rule 4.1 (Advocate in Nonadjudicative Proceedings). This proposed rule has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

Proposed rule 4.1 prohibits a lawyer from making a false statement of fact or law to a third person and also requires a lawyer to disclose a material fact to avoid assisting a client in a criminal or fraudulent act, subject to the lawyer’s duties under rule 1.6 and Business and Professions Code section 6068(e). The main issue considered when evaluating this proposed rule was whether this rule was necessary as a rule of professional conduct in California.¹ The Commission recommends adoption of ABA Model Rule 4.1 for several reasons. First, the rule provides crucial public protection. The concept embodied in proposed rule 4.1 is an important part of the entire set of rules being recommended and it is intended to supplement other rules proscribing similar conduct in other situations, such as rule 3.3 (Candor to the Tribunal) and rule 1.2.1 (Advising a Client Regarding Criminal or Fraudulent Conduct). Second, the proposed rule provides language that is more precise than either Business and Professions Code sections 6068(d) or 6128 and therefore will provide a clearer disciplinary standard than either of those statutes. Finally, every other jurisdiction has adopted some version of Model Rule 4.1. Adopting this rule helps fulfill one of the principles of the Commission’s Charter which is to eliminate unnecessary differences between California’s rules and the rules used by a preponderance of states in order to help promote a national standard with respect to professional responsibility issues.

There are four comments to the rule. Comment [1] draws the important distinction that while there is generally no affirmative duty to inform the opposing party of relevant facts, incorporation of another’s falsehood into the lawyer’s statement or a material omission in a partially true statement can violate the rule. Comment [2] provides clarifying examples of non-material facts in a common situation in which the rule would apply. Comment [3] alerts lawyers to the relationship of rule 4.1 with rules 1.2.1 (Advising or Assisting the Violation of Law) and 1.16 (Declining or Terminating Representation). Comment [4] directs lawyers to Comment [5] of

¹ Some of the arguments made in opposition to the proposed rule included: (1) gross misconduct with respect to the subject of the proposed rule is already subject to discipline under Business and Professions Code sections 6068(d) and 6106; (2) the “knowledge” standard required by the rule may make it difficult to establish discipline under the rule; (3) the concept of a lawyer’s duty not to adopt or vouch for a client’s or witness’s falsehood is well-established in California; such a disciplinary rule is unnecessary; and (4) as to whether the proposed rule is necessary to assure that lawyers be candid and complete in dealing with opposing parties, the law of civil liability for incomplete statements and disclosures, and even for silence while a client makes an untrue statement, is well established.

proposed rule 8.4, which notes that a lawyer's participation in lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights does not violate that rule's prohibition against a lawyer engaging "in conduct involving moral turpitude, dishonesty, fraud, deceit or reckless or intentional misrepresentation," which would apply equally to rule 4.1.

Although the concepts contained in proposed rule 4.1 are currently addressed in statutes and case law, this proposed rule is a substantive change to the current rules because these obligations are now being included as a rule of discipline.

**Rule 4.1 Truthfulness ~~In~~ Statements ~~To~~ Others
(Redline Comparison of the Proposed Rule to ABA Model Rule)**

In the course of representing a client a lawyer shall not knowingly:*

- (a) make a false statement of material fact or law to a third person;* or
- (b) fail to disclose a material fact to a third person* when disclosure is necessary to avoid assisting a criminal or fraudulent* act by a client, unless disclosure is prohibited by Rule 1.6 or Business and Professions Code § 6068(e)(1).

Comment

Misrepresentation

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms the truth of a statement of another person* that the lawyer knows* is false. ~~Misrepresentations can also occur by~~ However, in drafting an agreement or other document on behalf of a client, a lawyer does not necessarily affirm or vouch for the truthfulness of representations made by the client in the agreement or document. A nondisclosure can be the equivalent of a false statement of material fact or law under paragraph (a) where a lawyer makes a partially true but misleading ~~statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.~~ material statement or material omission. In addition to this Rule, lawyers remain bound by Rule 8.4 and Business and Professions Code § 6106.

Statements of Fact

[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. ~~Under generally accepted conventions~~ For example, in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.* ~~Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.~~

Crime or Fraud by Client

[3] Under Rule ~~1.2(d)~~ 1.2.1, a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows* is criminal or fraudulent.* ~~Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily~~ See Rule 1.4(a)(5) regarding a lawyer's obligation to consult with the client about limitations on the lawyer's conduct. In some circumstances, a lawyer can avoid assisting

a client's crime or fraud* by withdrawing from the representation. ~~Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by in compliance with Rule 1.61.16.~~

[4] Regarding a lawyer's involvement in lawful covert activity in the investigation of violations of law, see Rule 8.4, Comment [5].