Rule 3.4 Fairness to Opposing Party and Counsel
(Proposed Rule Adopted by the Board on November 17, 2016)

A lawyer shall not:

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

(d) 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;

(e) 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;

(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 state a personal opinion as to the guilt or innocence of an accused.

Comment

[1] Paragraph (a) applies to evidentiary material generally, including computerized information. 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 § 135; 18 United States Code §§ 1501-1520. Falsifying evidence is also generally a criminal offense. See, e.g., Penal Code § 132; 18 United States Code § 1519. 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].

[2] A violation of a civil or criminal discovery rule or statute does not by itself establish a violation of this rule.

PROPOSED RULE OF PROFESSIONAL CONDUCT 3.4
(Current Rules 5-310, 5-220 & 5-200(E))
Fairness to Opposing Party and Counsel

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct ("Commission") evaluated current rules 5-310 (Prohibited Contact With Witnesses), 5-220 (Suppression of Evidence) and 5-200(E) (Asserting Personal Knowledge of Facts) in accordance with the Commission Charter. In addition, the Commission considered the national standard of the ABA counterpart, Model Rule 3.4 (Fairness to Opposing Party and Counsel). The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules. The result of the Commission's evaluation is proposed rule 3.4 (Fairness to Opposing Party and Counsel).

Rule As Issued For 90-day Public Comment

Proposed Rule 3.4 in context within the Rules of Professional Conduct. Proposed Rule 3.4 is one of nine rules in Chapter 3 of the proposed Rules of Professional Conduct. The general content, framework and numbering scheme of this subset of the Rules is based on Chapter 3 of the ABA Model Rules, which is entitled "Advocate." Model Rules Chapter 3 corresponds to Chapter 5 of the current California rules, entitled "Advocacy and Representation." The following table shows the Chapter 3 Model Rules and the corresponding California rules:

Model Rule	California Rule
3.1 (Meritorious Claims & Contentions)	3-200 (Prohibited Objectives of Employment)
3.2 (Expediting Litigation)	No Cal. rule counterpart.
3.3 (Candor Toward The Tribunal)	5-200 (Trial Conduct)
3.4 (Fairness to Opposing Party & Counsel)	5-220 (Suppression of Evidence) 5-310 (Prohibited Contact with Witnesses) 5-200(E)
3.5 (Impartiality and Decorum of Tribunal)	5-300 (Contact with Officials) 5-320 (Contact with Jurors)
3.6 (Trial Publicity)	5-120 (Trial Publicity)
3.7 (Lawyer As Witness)	5-210 (Member As Witness)
3.8 (Special Responsibilities of a Prosecutor)	5-110 (Performing the Duty of Member in Government Service) 5-220 (Suppression of Evidence) 5-120 (Trial Publicity)
3.9 (Advocate In Non-adjudicative Proceedings)	No Cal. rule counterpart.

The Commission is recommending the adoption of the Model Rule framework and numbering for this series of rules, but for many of the rules recommends retaining the language of the California rules, which is more specific and precise, and accordingly more appropriate for a set of disciplinary rules and, with respect to rule 3.4, to reject the adoption of language in Model Rule that is vague or ambiguous.

Recommendation that proposed Rule 3.4 be circulated for public comment. Proposed rule 3.4 incorporates several concepts that are intended to promote fair competition in the

adversary system of justice. Specifically, the rule includes prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery, and so forth. The concepts in Model Rule 3.4, on whose structure proposed rule 3.4 is based, are found in three current California Rules of Professional Conduct: rule 5-310 (Prohibited Contact With Witnesses); rule 5-220 (Suppression of Evidence); and rule 5-200 (Trial Conduct). In conformance with the Charter principle that the Commission is to start with the relevant California rule, the Commission began its study of this rule topic with those California rules. However, in acknowledgement of its decision early in the rules revision process to recommend adoption of the Model Rules' format and numbering, the Commission determined that the three concepts should be combined in a single rule numbered 3.4.

In drafting the proposed rule, the Commission largely agreed with the first Commission's approach to its proposed rule 3.4 by:

(i) retaining rule 5-310 as paragraphs (d) and (e) largely unchanged in the structure of Model Rule 3.4, as these provisions contain specific prohibitions on lawyer conduct;
(ii) retaining rule 5-220 as paragraph (b) as a general statement of the prohibition against suppressing evidence;
(iii) incorporating several provisions of Model Rule 3.4 [paragraphs (a), (c) and (f)] that more precisely identify and describe evidence-suppressing conduct that the rule is intended to prevent;
(iv) retaining rule 5-200(E) in paragraph (g); and
(v) rejecting several provisions of Model Rule 3.4 [Model Rule 3.4(d), (e) and (f)] as vague and overbroad, and likely to chill legitimated advocacy.

The principal reason for the foregoing approach is that a disciplinary rule should clarify with precision the kind of the conduct that can subject a lawyer to discipline rather than simply provide a generalized prohibition against suppressing evidence, (rule 5-220). There are several provisions in Model Rule 3.4 that identify with more precision than current rule 5-220 the kind of conduct a disciplinary rule intended at least in part to promote fair competition in the adversarial system of justice should prohibit. Specifically Model Rule 3.4(a), (b) and (c) have been retained as paragraphs (a), (c) and (f). Several other Model Rule paragraphs, specifically paragraphs (d), (e) and (f), on the other hand, conflict with California law, are overbroad and likely to chill legitimate advocacy, or both.[1]

[1] The rejected Model Rule 3.4 provisions provide that a lawyer shall not:

(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;

(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

(f) 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

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Text of Rule 3.4.

Paragraph (a) is identical to Model Rule 3.4(a) and prohibits a lawyer from destroying or altering documents, or counseling or assisting another to do so.

Paragraph (b) carries forward rule 5-220 to provide a general statement prohibiting the suppression of evidence.

Paragraph (c) is identical to Model Rule 3.4 and prohibits a lawyer from falsifying evidence or assisting a witness to testify falsely.

Paragraph (d) carries forward rule 5-310(B) nearly verbatim, the only change being to substitute "lawyer" for "member."

Paragraph (e) carries forward rule 5-310(A) verbatim.

Paragraph (f) is identical to Model Rule 3.4(c) and prohibits a lawyer from knowingly disobeying an obligation under the rules of a tribunal but clarifies that a lawyer may openly refuse to obey based on an assertion that no valid obligation exists.

Paragraph (g) carries forward the language of rule 5-200(E), but adds a provision from Model Rule 3.4(e) that prohibits a lawyer from stating an opinion about the guilt or innocence of an accused.

There are two comments to proposed rule 3.4, both of which explain how the rule should be applied. Comment [1] clarifies that a lawyer may take temporary possession of evidence for examination but may not alter or destroy it, and provides cross-references to California statutes and case law that impose further obligations on the handling of evidence.

Comment [1] also provides specific references to statutes and case law that impose legal obligations on lawyers and clients to preserve evidence. Comment [2] clarifies an important limitation on the rule's application, i.e., that a violation of a civil or criminal discovery rule does not by itself constitute a violation of the rule.

Non-substantive aspects of the proposed rule include rule numbering to track the Commission's general proposal to use the Model Rules' numbering system and the substitution of the term "lawyer" for "member."

National Background – Adoption of Model Rule 3.4

Every jurisdiction except California has adopted some version of Model Rule 3.4. Thirty-three jurisdictions have adopted Model Rule 3.4 verbatim. Ten jurisdictions have adopted a slightly modified version of Model Rule 3.4. Seven jurisdictions have adopted a version of the rule that substantially diverges from Model Rule 3.4.

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

COMMISSION REPORT AND RECOMMENDATION: RULE 3.4 [5-310, 5-220, and 5-200]

Commission Drafting Team Information

Rule 5-310
Lead Drafter: Mark Tuft
Co-Drafters: Danny Chou, Raul Martinez

Rule 5-220
Lead Drafter: Joan Croker
Co-Drafters: George Cardona, Nanci Clinch

I. INTRODUCTION

Proposed Rule 3.4 incorporates several concepts that are intended to promote fair competition in the adversary system of justice, that is, the rule includes prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and so forth. The concepts in Model Rule 3.4, on whose structure proposed Rule 3.4 is based, are found in three current California Rules of Professional Conduct: rule 5-310 (Prohibited Contact With Witnesses); rule 5-220 (Suppression of Evidence); and rule 5-200 (Trial Conduct). In conformance with the Charter principle that the Commission is to start with the relevant California rule, two different drafting teams were assigned the three California rules, one team assigned 5-310 and the other assigned rules 5-200 and 5-220. Acknowledging this Commission's decision early in the rules revision process to recommend adoption of the Model Rules' format and numbering, both drafting teams determined that the three concepts should be combined in a single rule numbered 3.4.

In drafting the proposed rule, the Commission took the following approach to its proposed Rule 3.4 by:

(i) retaining rules 5-310 [paragraphs (d) and (e)] and 5-220 [paragraph (b)] largely unchanged into the structure of Model Rule 3.4,

(ii) incorporating several provisions of Model Rule 3.4 [paragraphs (a), (c) and (f)] that more precisely identify and describe conduct prohibited under the rule;

(iii) retaining rule 5-200(E) as paragraph (g); and

(iv) rejecting several provisions of Model Rule 3.4 [paragraphs (d), (e), and (f)] as vague and overbroad, and likely to chill legitimated advocacy.

II. CURRENT CALIFORNIA RULES

Rule 5-310 Prohibited Contact With Witnesses

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.

Rule 5-220 Suppression of Evidence

A member shall not suppress any evidence that the member or the member's client has a legal obligation to reveal or to produce.

Rule 5-200(E) Trial Conduct

In presenting a matter to a tribunal, a member:

* * * * *

(E) Shall not assert personal knowledge of the facts at issue, except when testifying as a witness.

III. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: October 21 & 22, 2016
Action: Recommend Board Adoption of Proposed Rule 3.4 [5-310][5-320][5-220]
Vote: 14 (yes) – 1 (no) – 0 (abstain)

Board:

Date of Vote: November 17, 2016
Action: Board Adoption of Proposed Rule 3.4 [5-310][5-320][5-220]
Vote: 14 (yes) – 0 (no) – 0 (abstain)

IV. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 3.4 [5-200(E), 5-220, 5-310] Fairness to Opposing Party and Counsel

A lawyer shall not:

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

(d) 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;

(e) 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;

(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 state a personal opinion as to the guilt or innocence of an accused.

Comment

[1] Paragraph (a) applies to evidentiary material generally, including computerized information. 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 § 135; 18 United States Code §§ 1501-1520. Falsifying evidence is also generally a criminal offense. See, e.g., Penal Code § 132; 18 United States Code § 1519. 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].

[2] A violation of a civil or criminal discovery rule or statute does not by itself establish a violation of this rule.

V. COMMISSION'S PROPOSED RULE (REDLINE TO CURRENT CALIFORNIA RULES 5-310, 5-220, AND 5-200)

~~Rule 5-310 Prohibited Contact With Witnesses~~Rule 3.4 Fairness to Opposing Party and Counsel

A ~~member~~lawyer shall not:

(a) unlawfully obstruct another party's access to evidence, including a witness, 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;

~~Rule 5-220 Suppression of Evidence~~

(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~~.~~;

~~(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.~~

(c) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(~~B~~d) ~~Directly~~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~~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~~.~~;

(e) 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;

(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 Trial Conduct**~~

(~~E~~e) ~~Shall not~~in trial, assert personal knowledge of ~~the~~ facts ~~at~~in issue~~,~~ except when testifying as a witness, or state a personal opinion as to the guilt or innocence of an accused.

Comment

[1] Paragraph (a) applies to evidentiary material generally, including computerized information. 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 § 135; 18 United States Code §§ 1501-1520. Falsifying evidence is also generally a criminal offense. See, e.g., Penal Code § 132; 18 United States Code § 1519. 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].

[2] A violation of a civil or criminal discovery rule or statute does not by itself establish a violation of this rule.

VI. RULE HISTORY

A. Rules 5-310 and 5-220

The concept of current rule 5-310 was included in the original 1928 Rules as former rule 15, operative on July 24, 1928. Rule 15 provided: "A member of The State Bar shall not advise a person, whose testimony could establish or tend to establish a material fact, to avoid service of process, or secrete himself or otherwise to make his testimony unavailable." There was no counterpart to current rule 5-220 in the 1928 rules.

In 1975, former rule 15 was revised to incorporate the substance of ABA Model Code of Professional Responsibility, DR 7-109. It was renumbered California rule 7-107 and titled "Contact with Witnesses." Paragraph (A) of this rule introduced a prohibition against suppression of evidence. Rule 7-107 provided:

Rule 7-107 Contact with Witnesses

A member of the State Bar shall not:

(A) Suppress any evidence that he or his client has a legal obligation to reveal or produce.

(B) Advise or directly or indirectly cause a person to secrete himself or to leave the jurisdiction of a tribunal for the purpose of making him unavailable as a witness therein.

(C) Directly or indirectly pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of his case. Except where prohibited by law, a member of the State Bar 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 his loss of time in attending or testifying.

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

Former rule 7-107 was amended in 1989 as part of a comprehensive revision of the Rules of Professional Conduct. Paragraph (A) of former rule 7-107 was deleted and moved in to a new, standalone rule 5-220 "Suppression of Evidence" which provided:

Rule 5-220 Suppression of Evidence

A member shall not suppress any evidence that the member or the member's client has a legal obligation to reveal or to produce.

There were no substantive changes to paragraphs (B) and (C), however, the rule was renumbered as rule 5-310, retitled "Prohibited Contact with Witnesses," and the paragraphs were designated as paragraph (A) and (B). Rule 5-310 provided:

Rule 5-310 Prohibited Contact With Witnesses

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.

Rule 5-310 has not been amended since 1989.

B. Rule 5-200

Current rule 5-200 originated in 1928 as former rule 17, operative on July 24, 1928. (See, *The State Bar Journal* (July 1928) Vol. III, No.1, p. 17.) Rule 17 originally provided:

> "A member of the State Bar shall not intentionally misquote to a judge, judicial officer or jury the testimony of a witness, the argument of opposing counsel or the contents of a document; nor shall he intentionally misquote to a judge or judicial officer the language of a book, statute or decision; nor shall he, with knowledge of its invalidity and without disclosing such knowledge, cite as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional."

In 1975, a new rule 7-105, "Trial Conduct," replaced former rule 17. Rule 7-105 provided:

> **Rule 7-105 Trial Conduct**
>
> In presenting a matter to a tribunal, a member of the State Bar shall:
>
> (1) Employ, for the purpose of maintaining the causes confided to him such means only as are consistent with truth, and shall not seek to mislead the judge, judicial officer or jury by an artifice or false statement of fact or law. A member of the State Bar shall not intentionally misquote to a judge or judicial officer the language of a book, statute or decision; nor shall he, with knowledge of its invalidity and without disclosing such knowledge, cite as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional. A member of the State Bar shall refrain from asserting his personal knowledge of the facts at issue, except when testifying as a witness.
>
> (2) Disclose, unless privileged or irrelevant, the identities of the clients he represents.

The first sentence of former Rule 7-105 incorporated nearly verbatim the language of Bus. & Prof. Code § 6068(d). Other concepts included a new prohibition against a lawyer asserting personal knowledge of the facts at issue except when testifying as a witness.

Former Rule 7-105 was amended in 1989. The amendments included renumbering the rule 5-200. Rule 5-200 provided:

Rule 5-200 Trial Conduct

In presenting a matter to a tribunal, a member:

(A) Shall employ, for the purpose of maintaining the causes confided to the member such means only as are consistent with truth;

(B) Shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law;

(C) Shall not intentionally misquote to a tribunal the language of a book, statute, or decision;

(D) Shall not, knowing of its invalidity, cite as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional; and

(E) Shall not assert personal knowledge of the facts at issue, except when testifying as a witness.

Rule 5-200 continued the restrictions on lawyer conduct when presenting a matter to a tribunal found in former rule 7-105 and divided the rule into paragraphs to make it easier to follow.

Paragraph (A) continued the requirement that an attorney employ only such means as are consistent with truth.

Paragraph (B) continued the prohibition on using an artifice or false statement of law or fact to mislead, but suggests amending the party to be mislead from "judge or judicial officer" to "tribunal". This is intended to make clear that the attorney's duty of candor is equally applicable when the member is appearing before an administrative tribunal.

Paragraph (C) continued the prohibition on intentionally misquoting authorities and proposes that "judge or judicial officer" be changed to "tribunal" for the reasons outlined above.

Paragraph (D) continued the prohibition on knowingly citing as authority a case, or statue that has been overruled, repealed, or declared unconstitutional.

Paragraph (E) continued the prohibition on asserting personal knowledge of the facts at issue.

Paragraph (2) of the former rule 7-105 which required an attorney to disclose, unless privileged or irrelevant, the identity of the client was deleted as unnecessary.

Rule 5-200 has not been amended since 1989.

VII. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016 (In response to 90-day public comment circulation):**

1. OCTC supports subsections (a) through (e), and (g).

   Commission Response: No response required.

2. OCTC has concerns about subsection (f)'s requirement that the attorney "knowingly" disobey an obligation under the rule of a tribunal for the same reasons expressed regarding that term in proposed Rules 1.9, 3.3, and the General Comments section of this letter. Moreover, this rule encourages attorneys not to know the rules of a tribunal. (See *Butler v. State Bar* (1986) 42 Cal.3d 323, 328-329 [circumstances known to the attorney may require an investigation].) An attorney is required to know or at least search for the rules of a tribunal. Mere negligence is not a basis for discipline, but recklessness, gross negligence, or repeated conduct can be. (See current rule 3-110; I*n the Matter of Riley* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 91, 113.)

   Commission Response: The Commission disagrees. The definition of "knowingly" in Rule 1.0.1(f) makes clear that knowledge can be inferred from the circumstances. With this definition, the Commission believes that the "knowingly" standard is appropriately used in this Rule, which addresses a lawyer's statements and the submission or presentation of evidence to a court.

3. Also, it is unclear whether "an obligation under the rules of a tribunal" in subsection (f) includes local court rules, a judge's individualized preferences, or some other matters. Without additional clarification or definition, the intended meaning of this rule will be a major source of debate, confusion, and litigation. This lack of clarity will make it difficult to enforce.

   Commission Response: The Commission does not understand what is meant by a "judge's preference." An "obligation" or "duty" would typically arise from a statute, rule or a court order, including a local court order.

4. OCTC requests clarification from the Commission whether this rule is violated when a lawyer advises a person, who is not a client, that he or she need not voluntarily speak with opposing counsel/party in the matter.

   Commission Response: The Commission believes that the conduct about which the commenter inquires is subsumed in paragraph (e).

5. OCTC supports the Comments.

   Commission Response: No response required.

- **State Bar Court:** No comments received from State Bar Court.

VIII. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, nine public comments were received. Three comments agreed with the proposed Rule, three comments disagreed, and three comments agreed only if modified. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

IX. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law – Rule 5-310

1. Discipline for Advising Witness to Make Themselves Unavailable as a Witness

In *Snyder v. State Bar* (1976) 18 Cal.3d 286, 291 the Supreme Court of California disbarred attorney Snyder, concluding among other things, that his "advising his clients on two occasions to make their testimony unavailable as deposition witnesses, despite court orders, constituted willful violations of [former] rule 15, Rules of Professional Conduct." *Id*.

In *Waterman v. State Bar* (1936) 8 Cal.2d 17, the Supreme Court of California suspended attorney Herbert Waterman for six months for, among other things, violating former rule 15 by advising his client and two other witnesses not to appear to testify as part of a local bar association investigation for unprofessional conduct by Waterman. *Id.* at 19-20.

2. Penal Code § 136.1 - Intimidation of Witnesses

In addition to a lawyer being subject to discipline for improper contacts with witnesses, the intimidation of witnesses is punishable as a crime. Threats and intimidation of witnesses, such as preventing or dissuading a witness from testifying at either a civil or criminal trial, is a misdemeanor. Penal Code § 136.1 provides, in part:

> (a) Except as provided in subdivision (c), any person who does any of the following is guilty of a public offense and shall be punished by imprisonment in a county jail for not more than one year or in the state prison:
>
> > (1) Knowingly and maliciously prevents or dissuades any witness or victim from attending or giving testimony at any trial, proceeding, or inquiry authorized by law.
> >
> > (2) Knowingly and maliciously attempts to prevent or dissuade any witness or victim from attending or giving testimony at any trial, proceeding, or inquiry authorized by law.

(3) For purposes of this section, evidence that the defendant was a family member who interceded in an effort to protect the witness or victim shall create a presumption that the act was without malice.

(b) Except as provided in subdivision (c), every person who attempts to prevent or dissuade another person who has been the victim of a crime or who is witness to a crime from doing any of the following is guilty of a public offense and shall be punished by imprisonment in a county jail for not more than one year or in the state prison:

(1) Making any report of that victimization to any peace officer or state or local law enforcement officer or probation or parole or correctional officer or prosecuting agency or to any judge.

(2) Causing a complaint, indictment, information, probation or parole violation to be sought and prosecuted, and assisting in the prosecution thereof.

(3) Arresting or causing or seeking the arrest of any person in connection with that victimization.

In *In re Lee* (1988) 47 Cal.3d 471, attorney Lee was found to have engaged in moral turpitude and was disbarred for soliciting the intimidation of a witness by force or threat when he sought the murder of a potential witness against him in violation of California Penal Code § 653f.[1]

3. Prosecutorial Misconduct

In a criminal proceeding, witness intimidation by a prosecutor may be grounds for a finding of prosecutorial misconduct. See: *People v. Hill* (1998) 17 Cal.4th 800; and *Earp v. Ornoski* (9th Cir. 2005) 431 F.3d 1158. See also; 1 CA Criminal Practice: Motions, Jury Instructions and Sentencing § 12:8.

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[1] California Penal Code section 653f, subdivision (a):

Every person who, with the intent that the crime be committed, solicits another to offer, accept, or join in the offer or acceptance of a bribe, or to commit or join in the commission of carjacking, robbery, burglary, grand theft, receiving stolen property, extortion, perjury, subornation of perjury, forgery, kidnapping, arson or assault with a deadly weapon or instrument or by means of force likely to produce great bodily injury, or, by the use of force or a threat of force, to prevent or dissuade any person who is or may become a witness from attending upon, or testifying at, any trial, proceeding, or inquiry authorized by law, shall be punished by imprisonment in a county jail for not more than one year or pursuant to subdivision (h) of Section 1170, or by a fine of not more than ten thousand dollars ($10,000), or the amount which could have been assessed for commission of the offense itself, whichever is greater, or by both the fine and imprisonment.

B. Related California Law – Rule 5-220

With respect to criminal cases, there is a significant difference between a client telling his or her lawyer in confidence of a completed crime and the lawyer taking possession of, and concealing the fruits, or instrumentalities, of that crime. While rule 5-220 states it is the duty of an attorney not to suppress evidence, the issue of an attorney's duty to turn over to the police or prosecution evidence of a crime has been addressed in California case law.

In *People v. Meredith* (1981) 29 Cal.3d 682, the prosecution had called as its witness a defense investigator who testified that he had seen the victim's partially burnt wallet in a burn barrel behind the defendant's residence. Defendant had told his counsel of the location of the wallet and counsel had instructed the investigator to retrieve the wallet. Counsel examined the wallet and then turned it over to the police. It was conceded that the wallet itself was properly admitted into evidence and that the attorney-client privilege protected conversations between defendant, his counsel and the counsel's investigator. The California Supreme Court held that the defense investigator's observation of the location of the wallet, which was the product of a privileged communication between defendant and his counsel, was not protected. Because the defendant had altered the location of the evidence which precluded the prosecution from making the same observation, the investigator's testimony was deemed admissible. (*Id*. 29 Cal.3d at 695.)

In *People v. Lee* (1970) 3 Cal.App.3d 514, a deputy public defender who had been assigned to represent the defendant received a pair of defendant's shoes from defendant's wife. Before the preliminary hearing the public defender was relieved as counsel and a private attorney was appointed to represent the defendant. In order to avoid a charge of suppressing evidence, and to prevent seizure of the evidence by the district attorney without a prior determination of a possible claim of privilege with respect to the evidence, the deputy public defender delivered the shoes to a municipal court judge. The district attorney obtained a search warrant from a second judge and obtained the shoes from the municipal court judge. The appellate court opinion held neither the public defender nor the defendant's substituted counsel had the right to withhold from the prosecution the shoes which had bloodstains that were subsequently determined to be of the same blood type as the victim. The appellate court stated:

> A defendant in a criminal case may not permanently sequester physical evidence such as a weapon or other article used in the perpetration of a crime by delivering it to his attorney . . . Such evidence given the attorney during legal consultation for information purposes and used by the attorney in preparing the defense of his client's case, whether or not the case ever goes to trial, could clearly be withheld for a reasonable period of time. It follows that the attorney, after a reasonable period, should, as an officer of the court, on his own motion turn the same over to the prosecution . . . the fact that the client delivered such evidence to his attorney may be privileged, the physical object itself does not become privileged merely by reason of its transmission to the attorney.

Id. 3 Cal.App.3d at 526.

In *People v. Superior Court (Fairbank)* (1987) 192 Cal.App.3d 32, the defense counsel came into possession of physical evidence related to charges against the client, and the issue was whether that evidence must be turned over to the police and/or prosecution. This appellate court, citing the *Meredith* and *Lee* decisions, above, held that the obligation to provide the prosecution with access to physical evidence and information about its alteration is absolute. This court concluded by saying:

> *Meredith* means what it says. The defense decision to remove or alter evidence is a tactical choice. If counsel or an agent of counsel choose to remove, possess, or alter physical evidence pertaining to the crime, counsel must immediately inform the court of the action. The court, exercising care to shield privileged communications and defense strategies from prosecution view, must then take appropriate action to ensure that the prosecution has timely access to physical evidence possessed by the defense and timely information about alteration of any evidence.
>
> *Id.* 192 Cal.App.3d at 39-40.

C. Related California Law – Rule 5-200(E)

See Section VI on the history of the current rule. In addition, the current rule 5-210 (Member as Witness) (see proposed rule 3.7.)

D. ABA Model Rule Adoptions

All jurisdictions have adopted some version of ABA Model Rule 3.4. The ABA State Adoption Chart, entitled "Variations of the ABA Model Rules of Professional Conduct, Rule 3.4: Fairness to Opposing Party and Counsel," revised September 15, 2016, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_4.authcheckdam.pdf [Last visited 2/6/16]

- Thirty-three jurisdictions have adopted Model Rule 3.4 verbatim.[2] Ten jurisdictions have adopted a slightly modified version of Model Rule 3.4.[3] Eight jurisdictions have adopted a version of the rule that substantially diverges from Model Rule 3.4.[4]

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[2] The thirty-three jurisdictions are: Alabama, Arizona, Connecticut, Delaware, District of Columbia, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Oklahoma, Rhode Island, South Carolina, South Dakota, Utah, Vermont, West Virginia, Wisconsin, and Wyoming.

[3] The ten jurisdictions are: Alaska, Arkansas, Colorado, Hawaii, Kentucky, Michigan, North Carolina, Pennsylvania, Tennessee, and Virginia.

[4] The eight jurisdictions are: California, Florida, Georgia, New York, Ohio, Oregon, Texas, and Washington.

X. CONCEPTS ACCEPTED/REJECTED; CHANGES IN DUTIES; NON-SUBSTANTIVE CHANGES; ALTERNATIVES CONSIDERED

A. Concepts Accepted (Pros and Cons):

1. Recommend that the proposed rule carry forward the substance of current rules 5-310 (Contact with Witnesses), 5-220 (Suppression of Evidence) and 5-200(E) (Trial Conduct), but include provisions from Model Rule 3.4 that identify with specificity conduct that the rule is intended to prevent.

   - Pros: There is no evidence that current rules 5-310, 5-220 or 5-200(E) have been ineffective in promoting fair competition within the adversarial system of justice. Nevertheless, a *disciplinary* rule should clarify with precision the kind of the conduct that can subject a lawyer to discipline rather than a generalized prohibition against suppressing evidence, (rule 5-220).

     In that regard, there are several provisions in Model Rule 3.4 that identify with more precision than current rule 5-220 the kind of conduct a disciplinary rule intended at least in part to promote fair competition in the adversarial system of justice should prohibit, i.e., Model Rule 3.4(a), (b) and (c), which have been incorporated into the proposed Rule as paragraphs (a), (c) and (f):

     (i) Model Rule 3.4(a) prohibits among other things a lawyer from destroying or altering documents, or counseling or assisting another to do so.

     (ii) Model Rule 3.4(b) prohibits a lawyer from falsifying evidence or assisting a witness to testify falsely.

     (iii) Model Rule 3.4(c) prohibits a lawyer from knowingly disobeying an obligation under the rules of a tribunal but clarifies that a lawyer may openly refuse to obey based on an assertion that no valid obligation exists.

   - Cons: There is no evidence that current rules 5-310, 5-220 and 5-200(E) have been ineffective in preventing the kind of conduct that inhibits fair competition in the adversarial system or that they need to be embellished by addition of the Model Rule provisions.

2. Recommend adoption of two clarifying Comments:

   (i) Comment [1] clarifies that a lawyer may take temporary possession of evidence for examination but may not alter or destroy it, and provides cross-references to California statutes and case law that impose further obligations on the handling of evidence.

   Comment [1] also provides specific references to statutes and case law that impose legal obligations on lawyers and clients to preserve evidence.

(ii) Comment [2] clarifies an important limitation on the rule's application, i.e., that a violation of a civil or criminal discovery rule does not by itself constitute a violation of the rule.

- Pros: Both Comments clarify how the rule is applied. Further, by providing cross-references to statutes and case law that impose legal obligations on lawyers and clients to preserve evidence, Comment [1] explains the term "legal obligation" in paragraph (b).

- Cons: Both Comments are unnecessary. Comment [1] simply provides cross-references to law with which a lawyer should already be familiar. Comment [2] states the obvious proposition that a violation of a rule or statute does not by itself warrant discipline.

B. Concepts Rejected (Pros and Cons):

1. Recommend adoption of Model Rule 3.4(d), (e), and (f).[5]

   - Pros: A disciplinary rule should identify with specificity the kinds of conduct it is intended to prohibit and the violation of which can subject a lawyer to discipline. The aforementioned model rule provisions do that.

   - Cons: None of the provisions should be adopted:

     (i) Model Rule3.4(d) 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. Code §6068(o)(3)).

     This public policy is sound because: (1) the tribunal before which a matter is

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[5] Model Rule 3.4(d) – (f) provide that a lawyer shall not:

(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;

(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

(f) 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

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

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. & Prof. C., §6103 – failure to comply with court order; §6068(b) --failure to maintain respect for the courts; or other parts of the proposed rule.)

(ii) Model Rule 3.4(e) 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.

(iii) As noted in public comment received by the first Commission, Model Rule 3.4(f), except to the extent it incorporates the concept in rule 5-200(E), is ambiguous, overly broad and duplicative, and is arguably in conflict with paragraph (a).

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

C. Changes in Duties/Substantive Changes to the Current Rule:

1. The Commission believes that there are no substantive changes in proposed Rule 3.4. First, the Commission has not made any substantive changes to current rules 5-200, 5-310 and 5-200(E), carrying them forward largely intact as paragraphs (b), (d), (e), and (f). To the extent the rule incorporates provisions from Model Rule 3.4, they do not add duties but rather elaborate responsibilities that already exist under the current rule provisions, as is appropriate in a disciplinary rule. (See Section X.A.1, above.)

D. Non-Substantive Changes to the Current Rule:

1. Substitute the term "lawyer" for "member".

   - Pros: The current Rules' use of "member" departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice pro hac vice or as military counsel. (See, e.g., rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)

   - Cons: Retaining "member" would carry forward a term that has been in use in the California Rules for decades.

2. Change the rule number to conform to the ABA Model Rules numbering and formatting (e.g., lower case letters).

    - Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized by various Rules of Court to practice in California to find the California rule corresponding to their jurisdiction's rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the "Con" that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.

    - Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.

3. As noted in Section X.C, above, none of the other proposed revisions are intended as substantive changes to current rule 5-310.

E. Alternatives Considered:

See Section X.A, above. The main alternative considered was whether to retain the existing California structure of separate rules or move to the national standard of a combined rule.

XI. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 3.4 in the form attached to this report and recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 3.4 in the form attached to this Report and Recommendation