

**S281631**

**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA  
REQUEST THAT THE SUPREME COURT OF CALIFORNIA  
APPROVE PROPOSED AMENDED RULE 9.7 OF THE  
CALIFORNIA RULES OF COURT, AND PROPOSED  
AMENDED RULES 1.2 AND 8.4 AND PROPOSED NEW  
RULE 8.4.2 OF THE CALIFORNIA RULES OF  
PROFESSIONAL CONDUCT**



**PREPARED BY  
THE STATE BAR OF CALIFORNIA**

**OFFICE OF GENERAL COUNSEL  
Ellin Davtyan, State Bar Number 238608  
Robert G. Retana, State Bar Number 148677  
Carissa N. Andresen, State Bar Number 278118**

**OFFICE OF PROFESSIONAL COMPETENCE  
Erika Doherty, State Bar Number 283026**

**180 Howard Street                      845 South Figueroa Street  
San Francisco, CA 94105              Los Angeles, CA 90017  
Telephone: (415) 538-2369              Telephone: (213) 765-1000  
Facsimile: (415) 538-2321  
Email: [OGC@calbar.ca.gov](mailto:OGC@calbar.ca.gov)**

**TABLE OF CONTENTS**

I. INTRODUCTION ..... 7

II. BACKGROUND AND PROCEDURAL HISTORY ..... 9

    A. California Civility Task Force Proposals ..... 10

    B. Summary of State Bar Action Following the Board’s  
        Consideration of the CCTF Report ..... 11

        1. Rule of Court 9.7 ..... 11

        2. Rules of Professional Conduct 1.2, 8.4, and 8.4.2..... 13

            a. Referral to COPRAC..... 13

III. PROPOSED RULE OF COURT 9.7 ..... 15

    A. Proposed Rule of Court 9.7 ..... 15

        1. Proposed Paragraph (b)..... 15

        2. Proposed Paragraph (c)..... 15

        3. Proposed Paragraph (d)..... 16

        4. Proposed Paragraphs (e) and (f) ..... 16

    B. Analysis of Public Comment..... 17

        1. Initial 90-day Public Comment..... 17

        2. Additional 30-day Public Comment Period..... 19

IV. PROPOSED RULES OF PROFESSIONAL CONDUCT ..... 21

    A. Proposed Comment [1] to Rule 1.2 ..... 21

    B. Proposed Comments [4] and [6] to Rule 8.4..... 22

    C. Proposed New Rule 8.4.2 [Prohibited Incivility] ..... 23

        1. Proposed Paragraphs (a) and (b)..... 23

        2. Proposed Commentary..... 24

D. Analysis of Public Comment.....	25
1. Public Comments on Proposed Rules 1.2 and 8.4.....	26
2. Public Comments on Proposed Rule 8.4.2 .....	27
V. CONSTITUTIONAL ISSUES .....	30
VI. CONCLUSION.....	33

## TABLE OF AUTHORITIES

### Cases

<i>Connally v. General Constr. Co.</i> (1926) 269 U.S. 385.....	31
<i>Gentile v. State Bar of Nevada</i> (1991) 501 U.S. 1030.....	31
<i>In Grievance Administrator v. Fieger</i> (2006) 476 Mich. 231, cert. denied, (2007) 549 U.S. 1205.....	32
<i>In re Anonymous Member of South Carolina Bar</i> (2011) 392 S.C. 328.....	32, 33
<i>U.S. v. Wunsch</i> (1996) 84 F.3d 1110.....	31
<i>United States v. Hearst</i> (9th Cir. 1980) 638 F.2d 1190 .....	32

### Statutes

California Business & Professions Code	
§ 6067.....	9, 15
§ 6068.....	25, 31, 32
§ 6068(b).....	24
§ 6068(f).....	24
§ 6076.....	7
§ 6077.....	9

### Rules

California Rules of Professional Conduct	
Rule 1.2.....	passim
Rule 8.4.....	passim
Rule 8.4.2.....	passim

### Rules of Court

rule 9.41.1.....	7, 12
rule 9.44.....	8, 12
rule 9.45.....	8, 12
rule 9.46.....	8, 12
rule 9.7.....	passim

Rules of the State Bar

rule 1.10 .....	17, 20
rule 1.10(B) .....	20
rule 2.3 .....	16
rule 2.72 .....	10
rule 4.17 .....	20

## **TABLE OF APPENDICES**

Appendix 1 – Proposed amended rule 9.7 of the California Rules of Court

Appendix 2 – Proposed amended rule 1.2 of the California Rules of Professional Conduct

Appendix 3 – Proposed amended rule 8.4 of the California Rules of Professional Conduct

Appendix 4 – Proposed new rule 8.4.2 of the California Rules of Professional Conduct

Appendix 5 – Board of Trustee’s July 20, 2023, Resolutions

Appendix 6 – COPRAC’s October 25, 2022, Memorandum to the Board

## **TABLE OF SEPARATE ATTACHMENTS**

Attachment A – Public Comment on Rule of Court 9.7 – Initial 90-day Public Comment Period

Attachment B – Public Comment on Rule of Court 9.7 – Additional 30-day Public Comment Period

Attachment C – Public Comment on Rules 1.2, 8.4, and 8.4.2 – Initial 90-day Public Comment Period

Attachment D – Public Comment on Rules 1.2, 8.4, and 8.4.2 – Additional 30-day Public Comment Period

**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

**REQUEST THAT THE SUPREME COURT OF CALIFORNIA  
APPROVE PROPOSED AMENDED RULE 9.7 OF THE  
CALIFORNIA RULES OF COURT, AND PROPOSED  
AMENDED RULES 1.2 AND 8.4 AND PROPOSED NEW  
RULE 8.4.2 OF THE CALIFORNIA RULES OF  
PROFESSIONAL CONDUCT**

**I. INTRODUCTION**

The Board of Trustees (“Board”) of the State Bar of California (“State Bar”) hereby respectfully requests that the Supreme Court approve proposed amended rule 9.7 of the California Rules of Court, proposed amended rules 1.2 and 8.4 of the California Rules of Professional Conduct, and proposed new rule 8.4.2 of the California Rules of Professional Conduct, as adopted by the Board on July 20, 2023, and as set forth in Appendices 1-4, respectively.<sup>1,2</sup> These amendments are intended to improve civility in California’s legal profession.

Proposed amendments to Rule of Court 9.7 will ensure that all licensees and most other attorneys authorized to practice law in California (“special admissions attorneys”)<sup>3</sup> take the civility pledge added to the Rules

---

<sup>1</sup> The Board’s July 20, 2023, resolution is provided as Appendix 5.

<sup>2</sup> Business and Professions Code, section 6076 provides: “With the approval of the Supreme Court, the Board of Trustees may formulate and enforce rules of professional conduct for all licensees of the State Bar.”

<sup>3</sup> Special admissions attorneys are those attorneys who are authorized to practice law in California under Rule of Court 9.41.1 (registered military

of Court in 2014. The proposed amendments will require all active, licensed attorneys and most special admissions attorneys to submit a declaration with the civility pledge by February 1, 2024. Additionally, all attorneys will be required to reaffirm the civility pledge annually as part of their license or registration renewal process. Finally, the proposed amendments provide penalties for noncompliance with the civility pledge requirements and authorize the State Bar to create appropriate rules and set appropriate fees.

Proposed amendments to the Rules of Professional Conduct will make it a disciplinable offense for lawyers to engage in incivility in the practice of law, which is defined as significantly unprofessional conduct that is abusive or harassing. The proposed amendments clarify that new rule 8.4.2<sup>4</sup> does not apply to constitutionally protected speech or conduct and will remind lawyers that conduct constituting incivility, as defined, may also violate prohibitions against conduct that is prejudicial to the administration of justice. Finally, proposed amendments to the rules' commentary provide examples of conduct that does not violate the rule and references to resources that provide guidance on what conduct may

---

spouse attorneys), Rule of Court 9.44 (registered foreign legal consultants), Rule of Court 9.45 (registered legal aid attorneys), and Rule of Court 9.46 (registered in-house counsel).

<sup>4</sup> Unless otherwise noted, rule references are to the California Rules of Professional Conduct.



constitute incivility.

If approved, the State Bar respectfully requests that the rules become effective no later than December 1, 2023.<sup>5</sup>

## **II. BACKGROUND AND PROCEDURAL HISTORY**

Current Rule of Court 9.7 was adopted effective May 27, 2014,<sup>6</sup> and added the following language to the oath that all persons are required to take upon admission to practice law: “As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity” (“the civility pledge”). In general, the oath taken by persons admitted to practice law after May 27, 2014, included the civility pledge; however, the oath taken by persons admitted to practice law before that date did not.<sup>7</sup>

The current Rules of Professional Conduct were adopted effective November 1, 2018, as part of a comprehensive set of revisions. At that

---

<sup>5</sup> Business and Professions Code, section 6077 provides: “The Rules of Professional Conduct adopted by the board, when approved by the Supreme Court, are binding upon all licensees of the State Bar.”

<sup>6</sup> Current Rule of Court 9.7 was adopted as Rule of Court 9.4 and was renumbered as rule 9.7 effective January 1, 2018.

<sup>7</sup> Prior to the adoption of the civility pledge in Rule of Court 9.7, the attorney oath requirement was limited to the language of section 6067 of the Business and Professions Code: “Every person on his admission shall take an oath to support the Constitution of the United States and the Constitution of the State of California, and faithfully to discharge the duties of any attorney at law to the best of his knowledge and ability.”

time, the rule amendments did not involve any proposals that expressly concerned attorney civility.

#### **A. California Civility Task Force Proposals**

The California Civility Task Force (“CCTF”) is a joint project of the California Judges Association and the California Lawyers Association, comprised of nearly forty lawyers and judges committed to fairness, justice, and the improvement of the legal profession. In September 2021, the CCTF released a report entitled “Beyond the Oath: Recommendations for Improving Civility,” which made four proposals to improve civility in California’s legal profession.<sup>8</sup> These proposals included, in part, recommendations to revise the Rules of Professional Conduct to clarify that repeated incivility constitutes professional misconduct, and to require that all attorneys affirm and annually reaffirm the civility pledge.<sup>9</sup> In proposing amendments to the text and comments of seven Rules of Professional Conduct, CCTF indicated its hope that “the mere existence of a disciplinary rule prohibiting incivility will spur civility,” but acknowledged that its

---

<sup>8</sup> CCTF September 2021 Report, at <https://caljudges.org/docs/PDF/California%20Civility%20Task%20Force%20Report%209.10.21.pdf> > [as of August 28, 2023].

<sup>9</sup> The CCTF also proposed that the State Bar amend its rules to require one hour of civility training as part of the attorney Minimum Continuing Legal Education (“MCLE”) requirements. The State Bar approved this recommendation through amendments to State Bar Rule 2.72, effective October 1, 2023, which require all licensees to complete one hour of MCLE on civility in the practice of law as part of their education requirements.

proposed amendments could be controversial, potentially raise First Amendment concerns, and create concerns that a single misstep could lead to discipline. (CCTF Report, pp. 12-13.) CCTF made the recommendations concerning the attorney oath, in part, because the majority of California attorneys were licensed prior to 2014 and have never taken the civility pledge, and because the legal profession continues to suffer “from a scourge of incivility,” negatively impacting litigants and the court system, as well as attorneys with “young lawyers, women lawyers, lawyers of color, and lawyers from other marginalized groups . . . disproportionately on the receiving end” of unprofessional conduct. (CCTF Report, pp. 2, 14–15.)

**B. Summary of State Bar Action Following the Board’s Consideration of the CCTF Report**

The Board considered the CCTF’s proposals at its March 24, 2022, meeting and adopted a resolution that in part (1) directed staff to review the proposal regarding the attorney oath requirements and (2) directed the Committee on Professional Responsibility and Conduct (“COPRAC”) to review the proposal to amend the Rules of Professional Conduct.

**1. Rule of Court 9.7**

At its September 22, 2022, meeting, the Board considered and discussed three alternative options for amendments to the Rules of Court to implement the CCTF’s civility oath proposal. Option 1 would substantially adopt the CCTF’s recommendation by amending Rule of Court 9.7 to

require any licensee who did not take the oath with the civility pledge to retake the oath by December 1, 2023, to extend the attorney oath requirement to special admissions attorneys<sup>10</sup> as part of their application or renewal application to practice law, and to require all licensees and special admissions attorneys to take the civility pledge annually when paying licensing fees. Option 2 would amend Rule of Court 9.7 to require that all licensees and special admissions attorneys who did not take the oath with the civility pledge to submit a declaration with the civility pledge, as opposed to being sworn in and retaking the oath and would require annual reaffirmation of the civility pledge. Option 3 would amend Rule of Court 9.7 to require that all licensees and special admissions attorneys annually reaffirm the civility pledge during the license renewal process. This option would not require retaking the oath or submitting a declaration with the civility pledge. All options would require an attorney who fails to affirm or reaffirm the civility pledge to be enrolled as an inactive licensee or have their registration suspended or terminated. State Bar staff recommended that the Board move forward with option 2 or 3 based on feedback from the State Bar's Office of Attorney Regulation & Consumer Resources as to the

---

<sup>10</sup> Special admissions attorneys include registered military spouse attorneys, registered foreign legal consultants, registered legal aid attorneys, and registered in-house counsel who are authorized to practice law in California pursuant to Rules of Court 9.41.1, 9.44, 9.45, or 9.46, respectively.

administrative feasibility of the proposed amendments.<sup>11</sup> At the September 22, 2022, meeting, following staff presentation and Board discussion, the Board recommended that staff prepare a draft of option 2, as described above.

As discussed *infra*, the Board approved an initial 90-day public comment period at its November 17, 2022, meeting, as well as an additional 30-day public comment period to receive public comment on proposed Rule of Court 9.7. Following its consideration of all public comment received, on July 20, 2023, the Board adopted proposed Rule of Court 9.7 in the form set forth in Appendix 1.

## **2. Rules of Professional Conduct 1.2, 8.4, and 8.4.2**

### **a. Referral to COPRAC**

Following the Board's March 24, 2022, referral of the CCTF's proposed amendments to the Rules of Professional Conduct, COPRAC submitted an October 25, 2022, memorandum to the Board summarizing its comments and suggested edits to the CCTF's proposal.<sup>12</sup> In its memo, COPRAC noted its concern that CCTF's proposed amendments "would

---

<sup>11</sup> Additional discussion of the State Bar's consideration of the alternative options for amendments to Rule of Court 9.7 can be found in agenda item 704 from the Board of Trustees' September 22, 2022, meeting, at <<https://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000029782.pdf>> [as of August 28, 2023].

<sup>12</sup> COPRAC's October 25, 2022, memo is provided as Appendix 6.

pose interpretation issues, be difficult to enforce as disciplinary standards, and chill a lawyer's protected activities," as well as its belief that the proposed amendments do not "fall within the scope and intended purpose of the rules." COPRAC did not recommend that all of CCTF's proposed amendments be further considered, but instead recommended (1) that the proposed amendments to rules 1.0.1, 1.3, 3.3, 3.4, and 3.5 be incorporated conceptually into new comment [6] to rule 8.4, and (2) modifications to CCTF's proposed amendment to comment [1] to rule 1.2. Additionally, COPRAC suggested that if amendments to the text of the rules are desired, the Board should consider a new standalone rule addressing civility. Subsequently, State Bar staff drafted proposed new rule 8.4.2 for the Board's consideration.

As discussed *infra*, the Board approved an initial 90-day public comment period as well as an additional 30-day public comment period to receive public comment on proposed rules 1.2, 8.4, and 8.4.2. Following its consideration of all public comment received, on July 20, 2023, the Board adopted proposed rules 1.2, 8.4, and 8.4.2 in the form set forth in Appendices 2-4, respectively.

### **III. PROPOSED RULE OF COURT 9.7**

#### **A. Proposed Rule of Court 9.7**

Current Rule of Court 9.7 requires that, as part of the attorney oath required under section 6067 of the Business and Professions Code,<sup>13</sup> all persons upon admission to practice law must take the civility pledge. The proposed amendments add five new paragraphs that describe the civility pledge declaration, annual reaffirmation, and penalties for noncompliance.

##### **1. Proposed Paragraph (b)**

Proposed paragraph (b) adds the requirement that by February 1, 2024, all active licensees and special admissions attorneys submit a declaration to the State Bar containing the civility pledge. All attorneys on inactive status or otherwise not eligible to practice law are required to submit the declaration with the civility pledge prior to being placed on active status.

##### **2. Proposed Paragraph (c)**

Proposed paragraph (c) adds the requirement that all active licensees and special admissions attorneys must reaffirm the civility pledge on an annual basis.<sup>14</sup>

---

<sup>13</sup> Unless otherwise noted, all further statutory references are to the Business and Professions Code.

<sup>14</sup> Note that proposed paragraph (c) as set forth in Appendix 1 contains a redundant clause – “pursuant to the procedure identified by the State Bar” – that should be removed.

### **3. Proposed Paragraph (d)**

Proposed paragraph (d)(1) directs the State Bar to develop an implementation schedule requiring all active licensed attorneys and special admissions attorneys to submit the required declaration by February 1, 2024, and for each to reaffirm the civility pledge annually thereafter.

Proposed paragraph (d)(2) specifies the penalty for noncompliance with either the civility pledge declaration or the annual reaffirmation requirements. Active licensees who fail to comply with either requirement will be enrolled as inactive licensees of the State Bar. Special admissions attorneys who fail to comply with either requirement will have their registration suspended or terminated.

### **4. Proposed Paragraphs (e) and (f)**

Proposed paragraph (e) authorizes the Board to adopt rules and procedures necessary to comply with proposed Rule of Court 9.7.<sup>15</sup>

Proposed paragraph (f) authorizes the State Bar to set and collect appropriate fees and penalties under the proposed rule.

---

<sup>15</sup> On July 20, 2023, the Board adopted State Bar Rule 2.3, which provides procedures for the penalties for noncompliance with the civility pledge declaration and annual reaffirmation, as well as procedures for reinstatement following noncompliance. State Bar Rule 2.3 will only go into effect if the proposed amendments to Rule of Court 9.7 are approved without substantive modifications, and the effective date of State Bar Rule 2.3 will mirror the effective date Rule of Court 9.7, if approved.



## **B. Analysis of Public Comment**

### **1. Initial 90-day Public Comment**

At its November 17, 2022, meeting, the Board approved for a 60-day public comment period the initially proposed amendments to Rule of Court 9.7. At its January 19, 2023, meeting, the Board extended the public comment period to 90 days.<sup>16</sup> Rule of Court 9.7, as initially proposed, would require: (1) active licensees and special admissions attorneys who did not take the oath with the civility pledge to submit a declaration with the civility pledge; (2) inactive licensees who did not take the oath with the civility pledge to submit a declaration with the civility pledge prior to returning to active status; and (3) all attorneys to affirm the civility pledge annually during the license renewal process. The proposed rule would also provide that failure to submit the required initial declaration or to annually affirm the civility pledge would result in the licensee being enrolled as inactive or the special admissions attorney having their registration suspended or terminated.

---

<sup>16</sup> Pursuant to rule 1.10 of the Rules of the State Bar, rule proposals are circulated for public comment before approval. Proposals are circulated for a 45-day period, which can be extended to a maximum of 90 days, as designated by the Board.

The State Bar received 60 comments on the proposed amendments to Rule of Court 9.7.<sup>17</sup> The majority (52%) of the commenters agreed with the proposed amendments, noting that requiring all attorneys to take the oath with civility language “may help provide the necessary impetus to improve civility in our profession;” that the changes will help judges do their job by, coupled with the MCLE requirement, reducing the number of instances where judges must intervene to correct attorney conduct; and that it makes sense from an equity perspective for all attorneys practicing in California to commit to civility.

Of the 40% of commenters that disagreed with the proposed rule, most stated that changes to the civility pledge requirement will have no real impact on increasing civility in the profession, that the concept of what is uncivil is too vague or subjective, and that incivility can be addressed in other ways, such as by a judge or court staff. Other commenters also stated that the changes would be burdensome, that attorneys are overly regulated, that the requirement is a waste of resources, and that the State Bar should focus on attorney discipline.

Some commenters recommended revisions to the oath, including limiting the oath to conduct in the practice of law or related professional

---

<sup>17</sup> The public comment notice, a summary table of comments received, and the full text of the public comments are provided as separate Attachment A.

activities, based on concerns that the oath is overly broad as “dignity,” “courtesy,” and “integrity” are subjective terms. State Bar staff did not recommend the proposed revisions to the oath, as recommended changes to the proposed Rules of Professional Conduct, discussed infra, would limit the disciplinary rules regarding incivility to conduct occurring in the practice of law. Other commenters recommended revising the oath to include a statement of why the oath is important. State Bar staff did not recommend the proposal, as educating attorneys on the oath’s purpose is appropriately addressed through the proposed requirement for one hour of MCLE training regarding civility.

## **2. Additional 30-day Public Comment Period**

State Bar staff recommended revisions to the proposed rule to require that all attorneys, as opposed to only those whose oath did not include the civility pledge, submit a declaration with the civility pledge. These revisions were based on concerns that applying the declaration requirement to some, but not all, attorneys would pose technological challenges with implementation, as well as challenges with determining who was required to take the civility pledge.<sup>18</sup> At its May 18, 2023,

---

<sup>18</sup> The State Bar revised the attorney oath card following adoption of the civility pledge requirement in 2014. However, applicants have up to five years from the date they pass the California Bar Examination to submit their attorney oath card, resulting in no bright line date that can be used to

meeting, the Board approved for an additional 30-day public comment period the revised amendments to Rule of Court 9.7.<sup>19</sup>

The State Bar received 33 public comments on the revised proposed amendments to Rule of Court 9.7.<sup>20</sup> Similar to the comments received during the initial public comment period, the majority of commenters (61%) agreed with the proposed rule, stating that it puts all attorneys on equal footing, that it promotes access to justice by promoting respectful treatment of self-represented parties, that an annual reminder of civility will indicate its importance, and that attempts to improve civility would reflect well on the judicial system, profession, and administration of justice.

Also similar to the comments received during the initial public comment period, a minority of commenters (32%) disagreed with the proposed rule, stating that incivility is not a problem, that the oath requirements will not change attorney behavior, and that incivility should

---

determine when all attorneys completed the oath with the civility pledge. See State Bar Rule 4.17.

<sup>19</sup> Pursuant to Rule 1.10(B) of the Rules of the State Bar, substantive modifications to rule proposals require additional public comment.

<sup>20</sup> The public comment notice, a summary table of comments received, and the full text of the public comments are provided as separate Attachment B.

be addressed through education.<sup>21</sup> State Bar staff did not recommend any further revisions to proposed Rule of Court 9.7.

Following its consideration of all public comment received, on July 20, 2023, the Board adopted proposed Rule of Court 9.7 in the form set forth in Appendix 1.

#### **IV. PROPOSED RULES OF PROFESSIONAL CONDUCT**

##### **A. Proposed Comment [1] to Rule 1.2**

Rule 1.2 [Scope of Representation and Allocation of Authority], in part, requires lawyers to abide by their clients' decisions concerning the objectives of representation. Current Comment [1] to rule 1.2 emphasizes that the client has the ultimate authority to determine the purposes served by the representation, and the lawyer has the authority to make procedural and certain tactical decisions. Proposed Comment [1] adds the following:

Notwithstanding a client's direction, a lawyer retains the authority to agree to reasonable requests of opposing counsel or self-represented parties that do not prejudice the rights of the client, be punctual in fulfilling all professional commitments, avoid offensive tactics, and treat all persons involved in the legal process with dignity, courtesy, and integrity.

This provision provides helpful guidance to practitioners by providing an example of civility that is within the lawyer's authority as to procedural matters and certain tactical decisions.

---

<sup>21</sup> One commenter raised freedom of speech concerns regarding disciplinary rules for incivility, which is addressed in section IV.D and V., *infra*.

**B. Proposed Comments [4] and [6] to Rule 8.4**

Rule 8.4 [Misconduct] provides that it is professional misconduct for a lawyer to engage in the conduct enumerated in the rule, which includes, in part, certain criminal acts, conduct involving dishonesty, fraud, deceit, or misrepresentation, and assisting violations of professional conduct rules. Specifically, paragraph (d) provides that it is misconduct to “engage in conduct that is prejudicial to the administration of justice.”

Current Comment [4] provides a cross-reference to section 6106 to remind lawyers that they are subject to discipline under that section for acts involving moral turpitude, dishonesty, or corruption. Proposed Comment [4] adds a provision that also provides a cross-reference to proposed new rule 8.4.2 to remind lawyers that they may be subject to discipline for conduct involving “significantly unprofessional conduct that is abusive or harassing.”

Proposed Comment [6] adds a new comment that explains that conduct prejudicial to the administration of justice includes engaging in “significantly unprofessional conduct that is abusive or harassing in the practice of law.” The proposed comment clarifies that “standing firm in the position of the client, protecting the record for subsequent review, or preserving professional integrity” does not constitute conduct prejudicial to

the administration of justice. Finally, the proposed comment identifies civility resources where practitioners can find further guidance.<sup>22</sup>

### **C. Proposed New Rule 8.4.2 [Prohibited Incivility]**

Following its review of the CCTF’s proposed amendments to the Rules of Professional Conduct, COPRAC recommended adopting a single standalone rule addressing civility, rather than incorporating various civility standards and guidance as part of separate rules or commentary. COPRAC explained its belief that “a standalone rule would be more powerful and instructive in promoting civility in the legal profession and that incorporating multiple civility provisions into disparate rules tends to dilute their strength...In addition, the same conduct could lead to multiple rule violations.” (See Appendix 6, COPRAC’s October 25, 2022, memo.) The proposed new standalone rule was intended to strike a balance between CCTF’s belief that rule language addressing civility, as opposed to only commentary, is needed, with the concerns expressed by COPRAC regarding interpretation, enforcement, and First Amendment issues.

#### **1. Proposed Paragraphs (a) and (b)**

Proposed paragraph (a) prohibits lawyers, in the course of representing a client, from engaging in incivility in the practice of law.

Proposed paragraph (b) defines “incivility” as “significantly unprofessional

---

<sup>22</sup> If proposed Comment [6] is approved, current Comment [6] will be renumbered as Comment [7].

conduct that is abusive or harassing and shall be determined based on all the facts and circumstances surrounding the conduct.”

## **2. Proposed Commentary**

Proposed rule 8.4.2 includes five comments.

Proposed Comments [1] – [3] parallel the proposed new Comment [6] to rule 8.4 by (1) identifying civility resources where practitioners can find further guidance on what may constitute “significantly unprofessional conduct that is abusive or harassing,” (2) explaining that a lawyer does not violate the proposed rule by “standing firm in the position of the client, protecting the record for subsequent review, or preserving professional integrity,” and (3) reminding lawyers that a violation of the proposed rule may also violate rule 8.4(d) regarding conduct that is prejudicial to the administration of justice.

Proposed comment [4] clarifies that proposed rule 8.4.2 does not apply to speech or conduct protected by the First Amendment to the United States Constitution or Article I, section 2 of the California Constitution. However, the proposed comment also clarifies that violation of an attorney’s duties under subdivision (b) of section 6068 (re the duty to maintain the respect due to the courts) and subdivision (f) of section 6068 (re the duty to advance no fact prejudicial to the honor or reputation of a party or witness) may constitute “incivility” as used in proposed rule 8.4.2. Finally, the proposed comment cross-references advisory comment to



Canon 3B of the California Code of Judicial Ethics to note a judge's responsibility to require lawyers under the judge's direction and control to be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others.

Proposed comment [5] provides that a disciplinary investigation or proceeding for conduct subject to proposed rule 8.4.2 may also be initiated if such conduct warrants discipline under sections 6106 or 6068, this Court's inherent authority to impose discipline, or other disciplinary standards.

#### **D. Analysis of Public Comment**

At its November 17, 2022, meeting, the Board approved for a 60-day public comment period the proposed amendments to the Rules of Professional Conduct. At its January 19, 2023, meeting, the Board extended the public comment period to 90 days.

The State Bar received 65 comments during the initial 90-day public comment period.<sup>23</sup> In response to the public comments received, the State Bar made substantive revisions to each of the proposed rules. At its May 18, 2023, meeting, the Board approved for an additional 30-day public comment period the revised amendments to the Rules of Professional

---

<sup>23</sup> The public comment notice, a summary table of comments received, and the full text of the public comments are provided as separate Attachment C.

Conduct. The State Bar received an additional 26 public comments on the revised proposed amendments.<sup>24</sup>

### **1. Public Comments on Proposed Rules 1.2 and 8.4**

As to both rule 1.2 and rule 8.4, the majority of commenters (66% and 53%, respectively) agreed with the proposed amendments. Most of these comments did not provide specific feedback on the rule proposals, but instead generally supported the amendments as part of the overall civility rule amendments. Commenters disagreeing with proposed rule 1.2 (26%) and rule 8.4 (31%) generally expressed disagreement with the overall concept of adding civility as a component of the requirements set forth in the Rules of Professional Conduct.

Several commenters recommended specific revisions that were accepted and incorporated into the revised proposals. The California Access to Justice Commission (“CAJC”) recommended revisions to Comment [1] to rule 1.2 to clarify that a lawyer retains the authority to agree to reasonable requests of opposing counsel and self-represented parties. CAJC and the Marin County Bar Association both recommended revisions to Comment [4] to rule 8.4 to clarify that there is a separate basis for discipline for incivility under rules 8.4(d) and 8.4.2. Multiple commenters, including the CCTF, recommended revisions to Comment [6] to rule 8.4 to

---

<sup>24</sup> The public comment notice, a summary table of comments received, and the full text of the public comments are provided as separate Attachment D.

narrow its application to only conduct within the practice of law, as opposed to “related professional activities,” based on First Amendment concerns. Finally, in response to comments, the State Bar also revised comment [6] to rule 8.4 to (1) clarify that the comment provides only examples of conduct that, on its own, does not violate the rule and (2) indicate that “significantly unprofessional conduct that is abusive or harassing” is defined in rule 8.4.2.

Of the public comments received on revised proposed rules 1.2 and 8.4, none suggested further modifications to the proposed rules. Similar to the initial proposal, commenters who disagreed with the proposed rules generally took issue with the overall concept of adding civility as a component of the requirements set forth in the rules.

## **2. Public Comments on Proposed Rule 8.4.2**

The majority of commenters (52%) agreed with the proposed rule. Most of these comments did not provide specific feedback on the rule, but instead generally supported the amendments as part of the overall civility rule amendments. Commenters noted how incivility negatively affects access to justice and stated that repercussions for incivility are appropriate, and that incivility should be a disciplinable offense. Of the commenters disagreeing with the proposed rule (31%), many disagreed with the overall concept of adding civility as a component of the requirements set forth in the rules. Commenters also noted that the rule is too broad, the definition of

incivility is too vague or subjective and has a chilling effect, the rule will be weaponized, specifically against zealous advocates, criminal defense attorneys, and those it is intended to protect, and that the rule will create conflicts between a lawyer and their client.

Several commenters recommended specific revisions, some of which were accepted and incorporated into the revised proposals. In response to a comment from the CCTF raising First Amendment concerns, the clause “related professional activities” was removed to narrow the rule’s application to only conduct within the practice of law. Additionally, several other clarifying revisions were made, including revisions to: Comment [4] to clarify that the prohibition on incivility applies to conduct *and* speech, but does not apply to speech or conduct that is constitutionally protected; Comment [1] to clarify that lawyers should consult the listed authorities for guidance on what constitutes incivility; and Comment [2] to clarify that the examples of conduct that would not violate the rule are not exhaustive.<sup>25</sup>

Of the public comments received on revised proposed rule 8.4.2, none suggested further modifications to the proposed rule. Similar to the initial proposal, commenters who disagreed with the proposed rules

---

<sup>25</sup> For further discussion of recommended revisions that were not accepted or incorporated into the revised proposal, see agenda item 60-4 from the Board’s May 18, 2023, meeting, at <https://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000030732.pdf> [as of August 28, 2023].

generally took issue with the overall concept of adding incivility as a basis for discipline. Generally, commenters expressed concern that the rules will be misused and inconsistently enforced, and that the rule will be subject to constitutional challenges as civility is subjective and the proposed definition of “incivility” is vague and uncertain. Commenters suggested that incivility is best addressed through law school training and by judges at the time incivility occurs.

Commenters who agreed with the rule were generally supportive of making incivility a basis for discipline. CAJC commented that the civility rules will promote the needs and experiences of self-represented parties who often face significant barriers to court access and incivility by attorneys and that the changes “may help reduce bias-based incivility and, therefore, promote racial justice and diversity, equity, and inclusion in the legal profession.” While the Asian Pacific American Women Lawyers Alliance was also supportive of a standalone rule, it cautioned that narrowing the application to the “practice of law” should not be construed as diminishing each attorney’s responsibility to eliminate incivility in the workplace and at professional activities. They also commented that the State Bar must ensure that the rule is applied equitably and cautioned against adverse and disproportionate impact on the same attorneys the rules are intended to protect.

Following its consideration of all public comment received, on July 20, 2023, the Board adopted proposed amended rules 1.2 and 8.4 and proposed new rule 8.4.2 in the form set forth in Appendices 2-4, respectively.

## V. CONSTITUTIONAL ISSUES

The State Bar received public comments from multiple commenters expressing concern that the rule is unconstitutionally vague.<sup>26</sup> Because proposed rule 8.4.2 is limited to conduct within the practice of law and expressly excludes from the definition of “incivility” speech and conduct that is protected under both the United States and California constitutions, the proposed rules are likely to withstand a facial constitutional challenge.<sup>27</sup>

A rule regulating attorney conduct may be impermissibly vague such that it might violate otherwise protected constitutional rights when “it does not sufficiently identify the conduct that is prohibited.” (*U.S. v. Wunsch*

---

<sup>26</sup> For example, commentor Eric Gene Young stressed that it is not clear what conduct would be construed as “significantly unprofessional” and “abusive or harassing” to constitute “incivility” pursuant to proposed rule 8.4.2. (See Attachment D.) Similarly, commentor Marilyn Smith stressed that “civility” differs based on culture, background, and other factors, thereby rendering the proposed rule “impermissibly vague and subject to abuse and inconsistent enforcement.” (See Attachment D.)

<sup>27</sup> The State Bar raised potential constitutional challenges to the civility pledge in connection with its 2014 petition to this Court requesting approval of rule 9.4 (currently rule 9.7). Proposed Rule of Court 9.7 does not revise the civility pledge, which this Court approved in 2014.

(1996) 84 F.3d 1110, 1119.) The void for vagueness doctrine is concerned with a “defendant's right to fair notice and adequate warning that his conduct runs afoul of the law.” (*Gentile v. State Bar of Nevada* (1991) 501 U.S. 1030, 1077–78.) In *Wunsch*, the Ninth Circuit explained that the Fifth Amendment due process clause “requires a statute to be sufficiently clear so as not to cause persons ‘of common intelligence ... necessarily [to] guess at its meaning and [to] differ as to its application[.]’” (*Wunsch*, 84 F.3d at 1119, citing *Connally v. General Constr. Co.* (1926) 269 U.S. 385, 391.)

Additionally, a court may find the law overbroad if it improperly infringes on constitutional rights. When analyzing whether a disciplinary rule violates the First Amendment, the court must balance “the State's interest in the regulation of a specialized profession against a lawyer's First Amendment interest in the kind of speech that was at issue.” (*Gentile*, 501 U.S. at 1073.)

In *Wunsch*, the Ninth Circuit held that former subdivision (f) of section 6068 prohibiting “offensive personality” was unconstitutionally vague, as the term could refer to “any number of behaviors that many attorneys regularly engage in during the course of their zealous representation of their clients' interests, it would be impossible to know when such behavior would be offensive enough to invoke the statute.” (*Wunsch*, 84 F.3d at 1119.) Notably, the *Wunsch* court distinguished the term “offensive personality” from the term “conduct unbecoming of a

member of a bar,” which the Ninth Circuit previously upheld in *United States v. Hearst* (9th Cir. 1980) 638 F.2d 1190, 1197. In *Hearst*, the court found that the phrase “conduct unbecoming of a member of a bar” “refers to the legal profession’s ‘code of behavior’ and ‘lore,’ of which all attorneys are charged with knowledge.” (*Hearst* (9th Cir. 1980) 638 F.2d 1190, 1197.)<sup>28</sup>

Unlike the term “offensive personality” in former subdivision (f) of section 6068, which was not limited to conduct in connection with the practice of law or that was prejudicial to the administration of justice, the proposed civility rules specifically regulate conduct in connection with the practice of law. Further, proposed rule 8.4.2 defines “incivility” to mean “significantly unprofessional conduct that is abusive or harassing and shall be determined on the basis of all the facts and circumstances surrounding the conduct.” These terms are even more exacting than the term “unbecoming of a member of a bar.” A person of common intelligence should therefore be able to determine what is meant by “significantly unprofessional,” “abusive,” and “harassing.”

---

<sup>28</sup> At least two state Supreme Courts have upheld the constitutionality of substantively similar attorney civility rules as those proposed here. See, *In Grievance Administrator v. Fieger* (2006) 476 Mich. 231, cert. denied, (2007) 549 U.S. 1205; *In re Anonymous Member of South Carolina Bar* (2011) 392 S.C. 328, 335.



In analyzing whether these rules are unconstitutionally overbroad, the court would balance the state’s interest in regulating attorney misconduct with restricting speech or conduct. California has an interest in ensuring a system of regulation that prohibits lawyers from attacking each other personally or engaging in abusive and harassing behavior. “Such conduct not only compromises the integrity of the judicial process, [but] it also undermines a lawyer's ability to objectively represent his or her client.” *In re Anonymous Member of South Carolina Bar*, 392 S.C. at 335.

As such, the proposed rules should withstand vagueness and overbreadth challenges.

## **VI. CONCLUSION**

The Board respectfully requests that this Court approve: amendments to rule 9.7 of the Rules of Court, as set forth in Appendix 1; amendments to rules 1.2 and 8.4 of the Rules of Professional Conduct, as set forth in Appendices 2 and 3; and proposed new rule 8.4.2 of the Rules of Professional Conduct, as set forth in Appendix 4. If this Court adopts and approves the proposed rules, the Board additionally requests that they become effective no later than December 1, 2023.

Dated: August 28, 2023

Respectfully submitted,

ELLIN DAVTYAN  
ROBERT G. RETANA  
CARISSA N. ANDRESEN

By: /s/ *CARISSA N. ANDRESEN*  
CARISSA N. ANDRESEN

Assistant General Counsel  
Office of General Counsel  
The State Bar of California

# **APPENDIX 1**

## **Rule 9.7. Attorney Oath and Reaffirmation of Oath**

### **(a) Oath required when admitted to practice law**

In addition to the language required by Business and Professions Code section 6067, the oath to be taken by every person on admission to practice law is to conclude with the following: "As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity."

### **(b) Declaration requirements for admitted and special admissions attorneys**

- (1) Each attorney whose license is on active status with the State Bar ("active licensed attorney") and each attorney permitted to practice law in the State of California under rule 9.41.1, 9.44, 9.45, or 9.46 of the California Rules of Court ("special admissions attorney") must, pursuant to the procedure identified by the State Bar, submit a declaration containing the language set forth in subparagraph (a) by February 1, 2024.
- (2) An attorney whose license is on inactive status with the State Bar or who is not eligible to practice law, except for those attorneys who have submitted a declaration as required by subparagraph (b)(1) of this rule, must, pursuant to the procedure identified by the State Bar, submit a declaration containing the language set forth in subparagraph (a) prior to being placed on active status.

### **(c) Reaffirmation of Civility Pledge**

Each active licensed attorney and special admissions attorney must, pursuant to the procedure identified by the State Bar, reaffirm the civility pledge described in subparagraph (a) of this rule on an annual basis pursuant to the procedure identified by the State Bar.

### **(d) Implementation schedule and penalty for failure to comply**

- (1) The State Bar must develop a schedule for implementation that requires all active licensed attorneys who must submit a declaration under (b)(1) of this rule to submit such declaration by February 1, 2024, and reaffirm the civility pledge under (c) annually thereafter. The State Bar must develop a schedule for implementation that requires all special admissions attorneys who must submit a declaration under (b)(1) of this rule to submit such declaration by the renewal of their application to practice law in the State of California by February 1, 2024, and reaffirm the civility pledge under (c) annually thereafter.
- (2) An active licensed attorney who fails to submit the required declaration or reaffirm the civility pledge as required by this rule must be enrolled as an inactive licensee of the State Bar under rules adopted by the Board of Trustees of the State Bar. A special admissions attorney who fails to submit the required declaration or reaffirm the civility pledge as required by this rule must have their registration suspended or terminated under rules adopted by the Board of Trustees of the State Bar.

**(e) Authorization for the Board of Trustees of the State Bar to adopt rules and procedures**

The Board of Trustees of the State Bar is authorized to adopt such rules and procedures as it deems necessary and appropriate in order to comply with this rule.

**(f) Fees and penalties**

The State Bar has the authority to set and collect appropriate fees and penalties.

# **APPENDIX 2**

## **Rule 1.2 Scope of Representation and Allocation of Authority**

(a) Subject to rule 1.2.1, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by rule 1.4, shall reasonably\* consult with the client as to the means by which they are to be pursued. Subject to Business and Professions Code section 6068, subdivision (e)(1) and rule 1.6, a lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. Except as otherwise provided by law in a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer may limit the scope of the representation if the limitation is reasonable\* under the circumstances, is not otherwise prohibited by law, and the client gives informed consent.\*

### **Comment**

#### *Allocation of Authority between Client and Lawyer*

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. (See, e.g., Cal. Const., art. I, § 16; Pen. Code, § 1018.) A lawyer retained to represent a client is authorized to act on behalf of the client, such as in procedural matters and in making certain tactical decisions. Notwithstanding a client's direction, a lawyer retains the authority to agree to reasonable requests of opposing counsel or self-represented parties that do not prejudice the rights of the client, be punctual in fulfilling all professional commitments, avoid offensive tactics, and treat all persons involved in the legal process with dignity, courtesy, and integrity. However, a lawyer is not authorized merely by virtue of the lawyer's retention to impair the client's substantive rights or the client's claim itself. (*Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 404 [212 Cal.Rptr. 151, 156].)

[2] At the outset of, or during a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to rule 1.4, a lawyer may rely on such an advance authorization. The client may revoke such authority at any time.

#### *Independence from Client's Views or Activities*

[3] A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

#### *Agreements Limiting Scope of Representation*

[4] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. (See, e.g., rules 1.1, 1.8.1, 5.6; see also Cal. Rules of Court, rules 3.35-3.37 [limited scope rules applicable in civil matters generally], 5.425 [limited scope rule applicable in family law matters].)

# **APPENDIX 3**



## **Rule 8.4 Misconduct**

It is professional misconduct for a lawyer to:

- (a) violate these rules or the State Bar Act, knowingly\* assist, solicit, or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud,\* deceit, or reckless or intentional misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official, or to achieve results by means that violate these rules, the State Bar Act, or other law; or
- (f) knowingly\* assist, solicit, or induce a judge or judicial officer in conduct that is a violation of an applicable code of judicial ethics or code of judicial conduct, or other law. For purposes of this rule, "judge" and "judicial officer" have the same meaning as in rule 3.5(c).

### **Comment**

[1] A violation of this rule can occur when a lawyer is acting in propria persona or when a lawyer is not practicing law or acting in a professional capacity.

[2] Paragraph (a) does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[3] A lawyer may be disciplined for criminal acts as set forth in Business and Professions Code sections 6101 et seq., or if the criminal act constitutes "other misconduct warranting discipline" as defined by California Supreme Court case law. (See *In re Kelley* (1990) 52 Cal.3d 487 [276 Cal.Rptr. 375].)

[4] A lawyer may be disciplined under Business and Professions Code section 6106 for acts involving moral turpitude, dishonesty, or corruption, whether intentional, reckless, or grossly negligent. A lawyer also may be disciplined regarding significantly unprofessional conduct that is abusive or harassing, see rule 8.4.2.

[5] Paragraph (c) does not apply where a lawyer advises clients or others about, or supervises, lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these rules and the State Bar Act.

[6] A lawyer's violation of paragraph (d) includes engaging in significantly unprofessional conduct that is abusive or harassing in the practice of law as defined in rule 8.4.2. A lawyer does not violate paragraph (d) merely by, for example, standing firm in the position of the client, protecting the record for subsequent review, or preserving professional integrity.

For further guidance, a lawyer should consult the current California Attorney Guidelines of Civility and Professionalism and other applicable civility authorities, such as the local rules of court and bar associations' codes of civility.

[7] This rule does not prohibit those activities of a particular lawyer that are protected by the First Amendment to the United States Constitution or by Article I, section 2 of the California Constitution.

# **APPENDIX 4**

## **Rule 8.4.2 Prohibited Incivility**

(a) In representing a client, a lawyer shall not engage in incivility in the practice of law.

(b) For purposes of this rule, “incivility” means significantly unprofessional conduct that is abusive or harassing and shall be determined on the basis of all the facts and circumstances surrounding the conduct.

### **Comment**

[1] For guidance on conduct that may be significantly unprofessional that is abusive or harassing, a lawyer should consult the current California Attorney Guidelines of Civility and Professionalism and other relevant legal authorities, such as the local rules of court and bar associations’ codes of civility.

[2] A lawyer does not violate this rule merely by, for example, standing firm in the position of the client, protecting the record for subsequent review, or preserving professional integrity.

[3] A lawyer’s violation of this rule may also constitute a violation of rule 8.4(d).

[4] “Incivility” as used in this rule does not apply to speech or conduct protected by the First Amendment to the United States Constitution or by Article I, section 2 of the California Constitution. “Incivility” as used in this rule may include speech or conduct that violates an attorney’s duties under Business and Professions Code section 6068, subdivisions (b) and (f). (See California Code of Judicial Ethics, Canon 3B, advisory commentary: Canon 3B(2) noting a judge’s responsibility to require lawyers under the judge’s direction and control to be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others.)

[5] A disciplinary investigation or proceeding for conduct coming within this rule may also be initiated and maintained if such conduct warrants discipline under California Business and Professions Code sections 6106 and 6068, the California Supreme Court’s inherent authority to impose discipline, or other disciplinary standard.

# **APPENDIX 5**



# The State Bar of California

---

## RESOLUTION ADOPTED BY THE BOARD OF TRUSTEES

AGENDA ITEM 705: PROPOSED RULE AMENDMENTS BASED ON RECOMMENDATIONS BY THE CALIFORNIA CIVILITY TASK FORCE (RULE 9.7 AND RULES OF PROFESSIONAL CONDUCT 1.2, 8.4, AND NEW RULE 8.4.2): RETURN FROM PUBLIC COMMENT AND REQUEST FOR APPROVAL

**I. Should the Board of Trustees concur in the proposed action on the proposed amendments to Rule of Court 9.7, staff recommends that the Board of Trustees adopt the following resolution:**

**RESOLVED**, following notice and publication for comment, that the Board of Trustees, adopts proposed amendments to Rule of Court 9.7 as set forth in Attachment A; and it is

**FURTHER RESOLVED**, that staff is directed to submit the proposed amendments to Rule of Court 9.7 to the California Supreme Court with a request that the proposed amendments be approved.

**II. Should the Board of Trustees concur in the proposed action on the proposed Title 2, Division 1, proposed new rule 2.3 of the State Bar Rules, staff recommends that the Board of Trustees adopt the following resolutions:**

**RESOLVED**, that the Board of Trustees, following consideration of public comments received, adopts Title 2, Division 1, proposed new rule 2.3 of the State Bar Rules as set forth Attachment C; and it is

**FURTHER RESOLVED**, that the approval of Title 2, Division 1, proposed new rule 2.3 of the State Bar Rules is subject to the California Supreme Court's approval of proposed amendments to Rule of Court 9.7 without any material changes; and it is

**FURTHER RESOLVED**, that the effective date of Title 2, Division 1, proposed new rule 2.3 of the State Bar Rules would be the effective date of proposed amendments to Rule of Court 9.7 if the California Supreme Court approves proposed new Rule of Court 9.7 without any material changes.

**III. Should the Board of Trustees concur in the proposed action on the Rules of Professional Conduct, staff recommends that the Board of Trustees adopt the following resolutions:**

**RESOLVED**, that the Board of Trustees, following consideration of public comments received, adopts proposed amendments to rules 1.2 and 8.4 of the California Rules of Professional Conduct and proposed new rule 8.4.2 as set forth in Attachment E; and it is

**FURTHER RESOLVED**, that staff is directed to submit the proposed amendments to Rules of Professional Conduct 1.2 and 8.4 and proposed new Rule of Professional Conduct 8.4.2 to the California Supreme Court with a request that the proposed amendments and new rule be approved.

I hereby certify that the foregoing is full, true and correct copy of the resolution adopted by the Board of Trustees at its meeting held on July 20, 2023, by hybrid format in Los Angeles and Zoom.



---

Louisa Ayrapetyan, Board Secretary

**VOTE ON RESOLUTION I.**

Moved by Shelby, seconded by Cisneros

Ayes – (9) Buenaventura, Cisneros, Knoll, Shelby, Sowell, Stallings, Toney, Trejo, Duran

Noes – (0)

Abstain – (0)

Absent – (3) Broughton, Chen, Good

*Motion carried.*

**VOTE ON RESOLUTION II.**

Moved by Cisneros, seconded by Knoll

Ayes – (9) Buenaventura, Cisneros, Knoll, Shelby, Sowell, Stallings, Toney, Trejo, Duran

Noes – (0)

Abstain – (0)

Absent – (3) Broughton, Chen, Good

*Motion carried.*

**VOTE ON RESOLUTION III.**

Moved by Cisneros, seconded by Knoll

Ayes – (9) Buenaventura, Cisneros, Knoll, Shelby, Sowell, Stallings, Toney, Trejo, Duran

Resolution Adopted by the Board of Trustees

August 21, 2023

Page 3

Noes – (0)

Abstain – (0)

Absent – (3) Broughton, Chen, Good

*Motion carried.*



# **APPENDIX 6**



ATTACHMENT C

**DATE:** October 25, 2022

**TO:** Members, Board of Trustees

**FROM:** Committee on Professional Responsibility and Conduct

**SUBJECT:** Comments and Suggested Edits to Civility Task Force’s Proposed Revisions to Rules of Professional Conduct, Rules 1.0.1, 1.2, 1.3, 3.3, 3.4, 3.5, and 8.4.

**BACKGROUND**

The California Civility Task Force (CCTF), a joint project of the California Judges Association and the California Lawyers Association, proposed changes to the California Rules of Professional Conduct<sup>1</sup> along with other proposals to increase civility in the practice of law. At the March 24, 2022, Board of Trustees meeting, the Board agreed upon an action plan that included COPRAC’s review of CCTF’s recommendations to amend the rules to “address lawyer conduct that constitutes repeated incivility and to clarify that civility is not inconsistent with zealous representation of a client.” At the May 13, 2022, Committee on Professional Responsibility and Conduct (COPRAC) meeting, the committee began its review of CCTF’s recommendations. A working group was formed to analyze and propose revisions to CCTF’s proposed amendments for discussion at COPRAC’s June 3, July 29, September 9, and October 14, 2022, meetings. Following this evaluation, COPRAC recommends amendments to the comment section of rules 1.2 and 8.4. COPRAC believes these amendments would be more consistent with the purpose and function of the rules as disciplinary standards.

In the alternative and as described in more detail below, COPRAC recommends that the Board consider a standalone Rule of Professional Conduct to address civility, rather than incorporating various civility standards and guidance as part of disparate rules or comments.

Finally, as requested by the Board, COPRAC provides proposed revisions to CCTF’s proposed amendments to rules 1.0.1, 1.2, 1.3, 3.3, 3.4, 3.5 and 8.4. However, COPRAC does not recommend these revisions for the reasons set forth in the “COPRAC Comments” sections following each rule.

<sup>1</sup> All further references to rules are to the California Rules of Professional Conduct unless otherwise indicated.

## DISCUSSION

COPRAC is concerned that CCTF's proposed amendments would pose interpretation issues, be difficult to enforce as disciplinary standards, and chill a lawyer's protected activities. In addition, COPRAC does not believe that many of CCTF's proposed amendments fall within the scope and intended purpose of the rules. As such, COPRAC does not recommend that all of CCTF's proposed amendments be further considered or presented for public comment. Instead, COPRAC recommends that CCTF's proposed amendments to rules 1.0.1, 1.3, 3.3, 3.4, and 3.5 be incorporated conceptually into new rule 8.4, comment [6]. COPRAC also recommends that the Board adopt CCTF's proposed amendment to rule 1.2, comment [1], with modifications. COPRAC's proposed amendments to rules 1.2, comment [1], and 8.4, comment [6], as well as suggested edits to CCTF's proposed amendments to the other rules, which COPRAC does not recommend, are provided below.

If the Board believes that the text of the rules should be revised in addition to the comments, COPRAC suggests that the Board consider adopting a single standalone rule addressing civility, similar to rule 8.4.1 prohibiting discrimination, harassment, and retaliation in the legal profession. Many COPRAC members believe that a standalone rule would be more powerful and instructive in promoting civility in the legal profession and that incorporating multiple civility provisions into disparate rules tends to dilute their strength. As one member explained, trying to force civility rules into multiple rules addressing separate conduct is like trying to put a square peg in a round hole. In addition, the same conduct could lead to multiple rule violations. Given the limited time available to evaluate CCTF's proposed amendments and the limitation of our mandate to provide feedback on the proposed amendments, COPRAC has not prepared a proposed standalone rule for the Board's consideration.

If the Board intends to move forward with CCTF's recommendations, the following displays COPRAC's suggested edits to CCTF's proposed civility amendments. CCTF's recommended amendments to the current rules are displayed in redline below, with COPRAC's proposed additions in green highlighting and its deletions in strikethrough. At the end of each rule, COPRAC included a section labeled "COPRAC Comments" to explain the reasoning supporting COPRAC's proposed changes.

# 1 COPRAC Recommended Proposed Amendments

## 2 CHAPTER 1. 3 LAWYER-CLIENT RELATIONSHIP

### 4 Rule 1.2 Scope of Representation and Allocation of Authority

5 (a) Subject to rule 1.2.1, a lawyer shall abide by a client's decisions concerning the objectives of  
6 representation and, as required by rule 1.4, shall reasonably\* consult with the client as to the means by  
7 which they are to be pursued. Subject to Business and Professions Code section 6068, subdivision (e)(1)  
8 and rule 1.6, a lawyer may take such action on behalf of the client as is impliedly authorized to carry out  
9 the representation. A lawyer shall abide by a client's decision whether to settle a matter. Except as  
10 otherwise provided by law in a criminal case, the lawyer shall abide by the client's decision, after  
11 consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client  
12 will testify.

13 (b) A lawyer may limit the scope of the representation if the limitation is reasonable\* under the  
14 circumstances, is not otherwise prohibited by law, and the client gives informed consent.\*

### 15 Comment

#### 16 *Allocation of Authority between Client and Lawyer*

17 [1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served  
18 by legal representation, within the limits imposed by law and the lawyer's professional obligations. (See, e.g.,  
19 Cal. Const., art. I, § 16; Pen. Code, § 1018.) A lawyer retained to represent a client is authorized to act on  
20 behalf of the client, such as in procedural matters and in making certain tactical decisions. **Notwithstanding a**  
21 **client's direction, a** lawyer **retains the authority to agree** ~~does not violate this rule by acceding to~~  
22 **reasonable** requests of opposing counsel that do not prejudice the rights of the client, **be** being punctual in  
23 fulfilling all professional commitments, avoiding offensive tactics, and **treating with courtesy and**  
24 ~~consideration~~ all persons involved in the legal process **with dignity, courtesy, and integrity.** **However, a**  
25 lawyer is not authorized merely by virtue of the lawyer's retention to impair the client's substantive rights or  
26 the client's claim itself. (*Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 404 [212 Cal.Rptr. 151, 156].)

27 [2] At the outset of, or during a representation, the client may authorize the lawyer to take specific  
28 action on the client's behalf without further consultation. Absent a material change in circumstances and  
29 subject to rule 1.4, a lawyer may rely on such an advance authorization. The client may revoke such  
30 authority at any time.

#### 31 *Independence from Client's Views or Activities*

32 [3] A lawyer's representation of a client, including representation by appointment, does not  
33 constitute an endorsement of the client's political, economic, social or moral views or activities.

#### 34 *Agreements Limiting Scope of Representation*

35 [4] All agreements concerning a lawyer's representation of a client must accord with the Rules of  
36 Professional Conduct and other law. (See, e.g., rules 1.1, 1.8.1, 5.6; see also Cal. Rules of Court, rules 3.35-  
37 3.37 [limited scope rules applicable in civil matters generally], 5.425 [limited scope rule applicable in family  
38 law matters].)

### 39 **COPRAC Comments:**

40 COPRAC recommends moving CCTF’s proposed addition to rule 1.2 to a Comment because the rules set  
41 forth minimum standards for discipline. The proposed additional language does not set forth a minimum  
42 disciplinary standard but provides helpful guidance for lawyers. COPRAC suggests CCTF’s proposed  
43 addition be incorporated as part of comment [1] to provide an example of the lawyer's authority as to  
44 procedural matters and certain tactical decisions. For similar reasons, COPRAC revised CCTF’s proposed  
45 language “does not violate this rule by” to state that a lawyer "retains the authority to agree to reasonable  
46 requests of opposing counsel . . . ."

47 COPRAC also recommends adding “reasonable” before “requests of opposing counsel,” which tracks  
48 language of other states that have adopted similar language in their equivalent version of California’s rule  
49 1.2. *See, e.g., Massachusetts* (“A lawyer does not violate this Rule, however, by acceding to reasonable  
50 requests of opposing counsel which do not prejudice the rights of his or her client, by being punctual in  
51 fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and  
52 consideration all persons involved in the legal process.”); *Michigan* (“A lawyer does not violate this rule by  
53 acceding to reasonable requests of opposing counsel that do not prejudice the rights of the client, by being  
54 punctual in fulfilling all professional commitments, or by avoiding offensive tactics.”).

55 COPRAC further recommends incorporating parallel language from California Rules of Court, rule 9.7 –  
56 “dignity, courtesy, and integrity.”

57 **CHAPTER 8.**  
58 **MAINTAINING THE INTEGRITY OF THE PROFESSION**

59 **Rule 8.4 Misconduct**

60 It is professional misconduct for a lawyer to:

- 61 (a) violate these rules or the State Bar Act, knowingly\* assist, solicit, or induce another to do so, or do  
62 so through the acts of another;
- 63 (b) commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness, or fitness  
64 as a lawyer in other respects;
- 65 (c) engage in conduct involving dishonesty, fraud,\* deceit, or reckless or intentional  
66 misrepresentation;
- 67 (d) engage in conduct that is prejudicial to the administration of justice;
- 68 (e) state or imply an ability to influence improperly a government agency or official, or to achieve  
69 results by means that violate these rules, the State Bar Act, or other law; or
- 70 (f) knowingly\* assist, solicit, or induce a judge or judicial officer in conduct that is a violation of an  
71 applicable code of judicial ethics or code of judicial conduct, or other law. For purposes of this rule,  
72 “judge” and “judicial officer” have the same meaning as in rule 3.5(c).

73 **Comment**

74 [1] A violation of this rule can occur when a lawyer is acting in propria persona or when a lawyer is not  
75 practicing law or acting in a professional capacity.

76 [2] Paragraph (a) does not prohibit a lawyer from advising a client concerning action the client is  
77 legally entitled to take.

78 [3] A lawyer may be disciplined for criminal acts as set forth in Business and Professions Code sections  
79 6101 et seq., or if the criminal act constitutes “other misconduct warranting discipline” as defined by  
80 California Supreme Court case law. (See *In re Kelley* (1990) 52 Cal.3d 487 [276 Cal.Rptr. 375].)

81 [4] A lawyer may be disciplined under Business and Professions Code section 6106 for acts involving  
82 moral turpitude, dishonesty, or corruption, whether intentional, reckless, or grossly negligent.

83 [5] Paragraph (c) does not apply where a lawyer advises clients or others about, or supervises, lawful  
84 covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the  
85 lawyer’s conduct is otherwise in compliance with these rules and the State Bar Act.

86 [6] A lawyer violates violation of paragraph (d) by repeated incivility while engaged includes engaging  
87 in significantly unprofessional conduct that is abusive or harassing in the practice of law or related  
88 professional activities. A lawyer does not violate paragraph (d) by standing firm in the position of the  
89 client, protecting the record for subsequent review, or preserving professional integrity.

90 For further guidance, a lawyer should consult the current California Attorney Guidelines of Civility and  
91 Professionalism and other applicable civility authorities.

92 [7] This rule does not prohibit those activities of a particular lawyer that are protected by the First  
93 Amendment to the United States Constitution or by Article I, section 2 of the California Constitution.

94 **COPRAC Comments:**

95 COPRAC has incorporated some of the provisions from CCTF’s proposed amendments to rules 3.3 through  
96 3.5 (as modified by COPRAC) into a comment to rule 8.4(d) to provide guidance on uncivil conduct that  
97 would result in a violation of rule 8.4(d). As noted in connection with our comments to CCTF’s proposed  
98 amendments to rule 3.3, COPRAC also suggests the Board consider prohibiting “severe” incivility in  
99 addition to “repeated” incivility.” The phrase “significantly unprofessional conduct that is abusive or  
100 harassing” is intended to encompass severe or repeated incivility. Additionally, the last sentence of  
101 comment [6] uses substantially similar language to rule 3.3, comment [10] to provide examples of conduct  
102 that would not violate rule 8.4(d).

103

104 **COPRAC Revisions to Other CCTF Proposed Amendments**

105 As described above, the following are COPRAC’s suggested edits to CCTF’s proposed amendments to rules  
106 1.0.1, 1.3, 3.3, 3.4, and 3.5. COPRAC does not recommend that these be adopted for the reasons  
107 previously stated.

108 **Rule 1.0.1 Terminology**

109 (a) “Belief” or “believes” means that the person\* involved actually supposes the fact in question to be  
110 true. A person’s\* belief may be inferred from circumstances.

111 (b) [Reserved]

112 (c) “Firm” or “law firm” means a law partnership; a professional law corporation; a lawyer acting as a  
113 sole proprietorship; an association authorized to practice law; or lawyers employed in a legal services  
114 organization or in the legal department, division or office of a corporation, of a government organization,  
115 or of another organization.

116 (d) “Fraud” or “fraudulent” means conduct that is fraudulent under the law of the applicable  
117 jurisdiction and has a purpose to deceive.

118 (\*) “Incivility” means **significantly unprofessional conduct that is** discourteous, abusive, **or** harassing,  
119 ~~or other significantly unprofessional conduct.~~

120 (e) “Informed consent” means a person’s\* agreement to a proposed course of conduct after the  
121 lawyer has communicated and explained (i) the relevant circumstances and (ii) the material risks, including  
122 any actual and reasonably\* foreseeable adverse consequences of the proposed course of conduct.

123 (e-1) “Informed written consent” means that the disclosures and the consent required by paragraph (e)  
124 must be in writing.\*

125 (f) “Knowingly,” “known,” or “knows” means actual knowledge of the fact in question. A person’s\*  
126 knowledge may be inferred from circumstances.

127 (g) “Partner” means a member of a partnership, a shareholder in a law firm\* organized as a  
128 professional corporation, or a member of an association authorized to practice law.

129 (g-1) “Person” has the meaning stated in Evidence Code section 175.

130 (h) “Reasonable” or “reasonably” when used in relation to conduct by a lawyer means the conduct of  
131 a reasonably prudent and competent lawyer.

132 (i) “Reasonable belief” or “reasonably believes” when used in reference to a lawyer means that the  
133 lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

134 (j) “Reasonably should know” when used in reference to a lawyer means that a lawyer of reasonable  
135 prudence and competence would ascertain the matter in question.

136 (k) “Screened” means the isolation of a lawyer from any participation in a matter, including the timely  
137 imposition of procedures within a law firm\* that are adequate under the circumstances (i) to protect  
138 information that the isolated lawyer is obligated to protect under these rules or other law; and (ii) to

139 protect against other law firm\* lawyers and nonlawyer personnel communicating with the lawyer with  
140 respect to the matter.

141 (l) “Substantial” when used in reference to degree or extent means a material matter of clear and  
142 weighty importance.

143 (m) “Tribunal” means: (i) a court, an arbitrator, an administrative law judge, or an administrative body  
144 acting in an adjudicative capacity and authorized to make a decision that can be binding on the parties  
145 involved; or (ii) a special master or other person\* to whom a court refers one or more issues and whose  
146 decision or recommendation can be binding on the parties if approved by the court.

147 (n) “Writing” or “written” has the meaning stated in Evidence Code section 250. A “signed” writing  
148 includes an electronic sound, symbol, or process attached to or logically associated with a writing and  
149 executed, inserted, or adopted by or at the direction of a person\* with the intent to sign the writing.

## 150 **Comment**

### 151 *Firm\* or Law Firm\**

152 [1] Practitioners who share office space and occasionally consult or assist each other ordinarily would  
153 not be regarded as constituting a law firm.\* However, if they present themselves to the public in a way  
154 that suggests that they are a law firm\* or conduct themselves as a law firm,\* they may be regarded as a  
155 law firm\* for purposes of these rules. The terms of any formal agreement between associated lawyers are  
156 relevant in determining whether they are a firm,\* as is the fact that they have mutual access to  
157 information concerning the clients they serve.

158 [2] The term “of counsel” implies that the lawyer so designated has a relationship with the law firm,\*  
159 other than as a partner\* or associate, or officer or shareholder, that is close, personal, continuous, and  
160 regular. Whether a lawyer who is denominated as “of counsel” or by a similar term should be deemed a  
161 member of a law firm\* for purposes of these rules will also depend on the specific facts. (Compare *People*  
162 *ex rel. Department of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135 [86  
163 Cal.Rptr.2d 816] with *Chambers v. Kay* (2002) 29 Cal.4th 142 [126 Cal.Rptr.2d 536].)

### 164 *Fraud\**

165 [3] When the terms “fraud”\* or “fraudulent”\* are used in these rules, it is not necessary that anyone  
166 has suffered damages or relied on the misrepresentation or failure to inform because requiring the proof  
167 of those elements of fraud\* would impede the purpose of certain rules to prevent fraud\* or avoid a lawyer  
168 assisting in the perpetration of a fraud,\* or otherwise frustrate the imposition of discipline on lawyers who  
169 engage in fraudulent\* conduct. The term “fraud”\* or “fraudulent”\* when used in these rules does not  
170 include merely negligent misrepresentation or negligent failure to apprise another of relevant information.

### 171 *Incivility*

172 [4] This definition does not apply to conduct protected by the First Amendment to the United States  
173 Constitution or by Article I, section 2 of the California Constitution. This definition includes conduct that  
174 violates an attorney’s duties under Business and Professions Code section 6068, subdivisions (b) and (f).  
175 (See California Code of Judicial Ethics, Canon 3B, advisory commentary: Canon 3B(2) regarding/for a  
176 judge’s responsibility to require lawyers under the judge’s direction and control to be patient, dignified,  
177 and courteous to litigants, jurors, witnesses, lawyers, and others.)

### 178 *Informed Consent\* and Informed Written Consent\**



179 [5] The communication necessary to obtain informed consent\* or informed written consent\* will vary  
180 according to the rule involved and the circumstances giving rise to the need to obtain consent.

181 *Screened\**

182 [6] The purpose of screening\* is to assure the affected client, former client, or prospective client that  
183 confidential information known\* by the personally prohibited lawyer is neither disclosed to other law  
184 firm\* lawyers or nonlawyer personnel nor used to the detriment of the person\* to whom the duty of  
185 confidentiality is owed. The personally prohibited lawyer shall acknowledge the obligation not to  
186 communicate with any of the other lawyers and nonlawyer personnel in the law firm\* with respect to the  
187 matter. Similarly, other lawyers and nonlawyer personnel in the law firm\* who are working on the matter  
188 promptly shall be informed that the screening\* is in place and that they may not communicate with the  
189 personally prohibited lawyer with respect to the matter. Additional screening\* measures that are  
190 appropriate for the particular matter will depend on the circumstances. To implement, reinforce and  
191 remind all affected law firm\* personnel of the presence of the screening,\* it may be appropriate for the  
192 law firm\* to undertake such procedures as a written\* undertaking by the personally prohibited lawyer to  
193 avoid any communication with other law firm\* personnel and any contact with any law firm\* files or other  
194 materials relating to the matter, written\* notice and instructions to all other law firm\* personnel  
195 forbidding any communication with the personally prohibited lawyer relating to the matter, denial of  
196 access by that lawyer to law firm\* files or other materials relating to the matter, and periodic reminders of  
197 the screen\* to the personally prohibited lawyer and all other law firm\* personnel.

198 [7] In order to be effective, screening\* measures must be implemented as soon as practical after a  
199 lawyer or law firm\* knows\* or reasonably should know\* that there is a need for screening.\*

200 **COPRAC Comments:**

201 COPRAC proposes to strike “discourteous” and “other significantly unprofessional conduct” from the  
202 definition of incivility because this word and phrase are too vague, subjective, and overbroad for a  
203 disciplinary standard. We are concerned about potential First Amendment implications. We believe that  
204 the proposed clarification that incivility means “significantly unprofessional conduct that is abusive or  
205 harassing” provides clearer guidance to lawyers.

206 COPRAC proposes to add comment [4] to help ensure the incivility rule amendments are not applied to  
207 protected First Amendment activities. The first sentence of this comment tracks comment [4] to rule  
208 8.4.1.

209 **CHAPTER 1.**  
210 **LAWYER-CLIENT RELATIONSHIP**

211 **Rule 1.3 Diligence**

212 (a) A lawyer shall not intentionally, repeatedly, recklessly or with gross negligence fail to act with  
213 reasonable diligence in representing a client.

214 (b) For purposes of this rule, “reasonable diligence” shall mean that a lawyer acts with commitment  
215 and dedication to the interests of the client and does not neglect or disregard, or unduly delay a legal  
216 matter entrusted to the lawyer.

217 **Comment**

218 [1] This rule addresses only a lawyer’s responsibility for his or her own professional diligence. See  
219 rules 5.1 and 5.3 with respect to a lawyer’s disciplinary responsibility for supervising subordinate lawyers  
220 and nonlawyers.

221 [2] See rule 1.1 with respect to a lawyer’s duty to perform legal services with competence.

222 ~~[3] A lawyer’s duty to act with reasonable diligence does not eliminate a lawyer’s other professional~~  
223 ~~obligations and lawyers should strive to~~ treat all persons involved in the legal process with dignity, courtesy,  
224 and integrity respect.

225 **COPRAC Comments:**

226 As an initial matter, COPRAC believes that this comment does not necessarily fit within the scope and  
227 intended purpose of rule 1.3, which is focused on diligence in representing a client. As noted in the first  
228 two introductory paragraphs to this section, the Board should consider moving this provision to a  
229 comment to rule 8.4 or incorporating it as part of a standalone rule.

230  
231 In the event the Board elects to consider CCTF’s proposed amendments to rule 1.3, COPRAC suggests the  
232 edits shown above. COPRAC recommends that “strive” be removed from the proposed Comment language  
233 because this word is too vague and subjective. Additionally, COPRAC believes the proposed language — “A  
234 lawyer’s duty to act with reasonable diligence does not eliminate a lawyer’s other professional obligations”  
235 — is too vague for purposes of a disciplinary standard, particularly where “other professional obligations”  
236 is not defined. While COPRAC recommends this language be stricken, if it remains, COPRAC recommends  
237 that “eliminate” be changed to “diminish.”

238  
239 COPRAC also proposes incorporating parallel language from California Rules of Court, rule 9.7 — “dignity,  
240 courtesy, and integrity.”

241  
242  
243

**CHAPTER 3. ADVOCATE**

244 **Rule 3.3 Candor Toward the Tribunal\***

245 (a) A lawyer shall not:

246 (1) knowingly\* make a false statement of fact or law to a tribunal\* or fail to correct a false  
247 statement of material fact or law previously made to the tribunal\* by the lawyer;

248 (2) fail to disclose to the tribunal\* legal authority in the controlling jurisdiction known\* to the  
249 lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel, or  
250 knowingly\* misquote to a tribunal\* the language of a book, statute, decision or other authority; or

251 (3) offer evidence that the lawyer knows\* to be false. If a lawyer, the lawyer’s client, or a witness  
252 called by the lawyer, has offered material evidence, and the lawyer comes to know\* of its falsity,  
253 the lawyer shall take reasonable\* remedial measures, including, if necessary, disclosure to the  
254 tribunal,\* unless disclosure is prohibited by Business and Professions Code section 6068,  
255 subdivision (e) and rule 1.6. A lawyer may refuse to offer evidence, other than the testimony of a  
256 defendant in a criminal matter, that the lawyer reasonably believes\* is false.

257 (b) A lawyer who represents a client in a proceeding before a tribunal\* and who knows\* that a  
258 person\* intends to engage, is engaging or has engaged in criminal or fraudulent\* conduct related to the

259 proceeding shall take reasonable\* remedial measures to the extent permitted by Business and  
260 Professions Code section 6068, subdivision (e) and rule 1.6.

261 (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding.

262 (d) In an ex parte proceeding where notice to the opposing party in the proceeding is not required  
263 or given and the opposing party is not present, a lawyer shall inform the tribunal\* of all material facts  
264 known\* to the lawyer that will enable the tribunal\* to make an informed decision, whether or not the  
265 facts are adverse to the position of the client.

266 (e) In appearing as a lawyer before a tribunal,\* a lawyer shall not:

267 ~~(1) engage in a pattern of incivility;~~

268 ~~(2) intentionally or habitually violate any established rule of procedure or of evidence; or~~

269 ~~(3) engage in conduct solely~~ intended to disrupt the tribunal.\*

## 270 **Comment**

271 [1] This rule governs the conduct of a lawyer in proceedings of a tribunal,\* including ancillary  
272 proceedings such as a deposition conducted pursuant to a tribunal's\* authority. See rule 1.0.1(m) for  
273 the definition of "tribunal."

274 [2] The prohibition in paragraph (a)(1) against making false statements of law or failing to correct a  
275 material misstatement of law includes citing as authority a decision that has been overruled or a statute  
276 that has been repealed or declared unconstitutional, or failing to correct such a citation previously made  
277 to the tribunal\* by the lawyer.

## 278 *Legal Argument*

279 [3] Legal authority in the controlling jurisdiction may include legal authority outside the jurisdiction  
280 in which the tribunal\* sits, such as a federal statute or case that is determinative of an issue in a state  
281 court proceeding or a Supreme Court decision that is binding on a lower court.

282 [4] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in  
283 criminal cases. If a lawyer knows\* that a client intends to testify falsely or wants the lawyer to introduce  
284 false evidence, the lawyer should seek to persuade the client that the evidence should not be offered  
285 and, if unsuccessful, must refuse to offer the false evidence. If a criminal defendant insists on testifying,  
286 and the lawyer knows\* that the testimony will be false, the lawyer may offer the testimony in a  
287 narrative form if the lawyer made reasonable\* efforts to dissuade the client from the unlawful course of  
288 conduct and the lawyer has sought permission from the court to withdraw as required by rule 1.16.  
289 (See, e.g., *People v. Johnson* (1998) 62 Cal.App.4th 608 [72 Cal.Rptr.2d 805]; *People v. Jennings* (1999) 70  
290 Cal.App.4th 899 [83 Cal.Rptr.2d 33].) The obligations of a lawyer under these rules and the State Bar Act  
291 are subordinate to applicable constitutional provisions.

## 292 *Remedial Measures*

293 [5] Reasonable\* remedial measures under paragraphs (a)(3) and (b) refer to measures that are  
294 available under these rules and the State Bar Act, and which a reasonable\* lawyer would consider  
295 appropriate under the circumstances to comply with the lawyer's duty of candor to the tribunal.\* (See,  
296 e.g., rules 1.2.1, 1.4(a)(4), 1.16(a), 8.4; Bus. & Prof. Code, §§ 6068, subd. (d), 6128.) Remedial measures  
297 also include explaining to the client the lawyer's obligations under this rule and, where applicable, the  
298 reasons for the lawyer's decision to seek permission from the tribunal\* to withdraw, and remonstrating

299 further with the client to take corrective action that would eliminate the need for the lawyer to  
300 withdraw. If the client is an organization, the lawyer should also consider the provisions of rule 1.13.  
301 Remedial measures do not include disclosure of client confidential information, which the lawyer is  
302 required to protect under Business and Professions Code section 6068, subdivision (e) and rule 1.6.

303 *Duration of Obligation*

304 [6] A proceeding has concluded within the meaning of this rule when a final judgment in the  
305 proceeding has been affirmed on appeal or the time for review has passed. A prosecutor may have  
306 obligations that go beyond the scope of this rule. (See, e.g., rule 3.8(f) and (g).)

307 *Ex Parte Communications*

308 [7] Paragraph (d) does not apply to ex parte communications that are not otherwise prohibited by  
309 law or the tribunal.\*

310 *Withdrawal*

311 [8] A lawyer's compliance with the duty of candor imposed by this rule does not require that the  
312 lawyer withdraw from the representation. The lawyer may, however, be required by rule 1.16 to seek  
313 permission of the tribunal\* to withdraw if the lawyer's compliance with this rule results in a  
314 deterioration of the lawyer-client relationship such that the lawyer can no longer competently and  
315 diligently represent the client, or where continued employment will result in a violation of these rules. A  
316 lawyer must comply with Business and Professions Code section 6068, subdivision (e) and rule 1.6 with  
317 respect to a request to withdraw that is premised on a client's misconduct.

318 [9] In addition to this rule, lawyers remain bound by Business and Professions Code sections 6068,  
319 subdivision (d) and 6106.

320 [10] A lawyer does not violate paragraph (e) by standing firm in the position of the client, protecting  
321 the record for subsequent review, or preserving professional integrity. A lawyer's violation of paragraph (e)  
322 may also constitute a violation of rule 8.4(d).

323 **COPRAC Comments:**

324 As explained further in the introductory paragraphs to this section, COPRAC recommends that certain  
325 aspects of CCTF's proposed amendments to rules 3.3 through 3.5 be incorporated into rule 8.4. As an  
326 alternative, COPRAC suggests that certain aspects be incorporated into a standalone rule addressing  
327 civility.

328 In the event the Board decides to consider CCTF's proposed amendments to Rule 3.3, COPRAC suggests  
329 the above edits. COPRAC recommends that the majority of CCTF's proposed new paragraph (e) be  
330 deleted. COPRAC suggests that CCTF's proposed new paragraph (e) be limited to prohibiting "conduct  
331 solely intended to disrupt the tribunal," which is more palatable as a disciplinary rule. Adding "solely"  
332 before "intended to disrupt the tribunal" clarifies that conduct consistent with an attorney's duty to  
333 zealously advocate on behalf of a client will not violate the rule.

334 If the Board chooses to retain more of the CCTF proposed amendment as a comment or in the text of  
335 the rule, COPRAC proposes other clarifying revisions that it believes are more consistent with the  
336 purpose and function of the rules as disciplinary standards and will help avoid interfering with a lawyer's  
337 zealous advocacy on behalf of a client. COPRAC recommends removing the phrase "pattern of incivility"  
338 because this phrase is problematic when construed as a disciplinary rule as "pattern" is not defined.  
339 COPRAC suggests replacing "pattern of incivility" with "repeatedly" engaging in incivility. COPRAC also

340 considered the term "habitually" used in CCTF's proposed amendments. However, concerns were raised  
341 about "habitually" being misconstrued given the precise meaning of this term in the criminal context.  
342 We believe the term "repeatedly" is clearer. "Repeatedly" is also used in rules 1.1 and 1.3 regarding the  
343 lawyer's duties of competence and diligence. COPRAC suggests that the Board also consider prohibiting  
344 incivility that is "severe" even if it is not "repeated" as an isolated incident of incivility may be  
345 sufficiently severe to warrant discipline. By analogy, California employment law standards prohibit  
346 "severe or pervasive" harassment and COPRAC believes these established standards are also  
347 appropriate in evaluating uncivil conduct that is sufficiently severe or pervasive to warrant discipline.

348 COPRAC does not believe that CCTF's proposed prohibition on "intentionally or habitually violat[ing] any  
349 established rule or procedure or evidence" is necessary as the parties and assigned judge to a  
350 proceeding already have other available tools and remedies to address this type of conduct. If the Board  
351 further considers this prohibition, COPRAC suggests removing "habitually" from the prohibition on  
352 violating established rules of procedure or evidence for the reasons explained above. In addition, if the  
353 Board further considers this prohibition, COPRAC believes the prohibition should be limited to  
354 intentionally violating established rules of procedure or evidence, so discipline is not imposed for a  
355 lawyer's inadvertent or unknowing violation of a rule of procedure or evidence. The use of the term  
356 "intentionally" may need to be defined in the context of this rule and to distinguish this term from the  
357 definition of "willful" in rule 1.0, which does not require a lawyer's bad faith or actual knowledge of the  
358 rule provision which is violated. However, COPRAC notes that the term "intentionally" is already used in  
359 rules 1.1 and 1.3. As an alternative, rule 8.4 uses the term "knowingly" in subsections (a) and (f) which  
360 should also be considered in place of "intentionally."

#### 361 **Rule 3.4 Fairness to Opposing Party and Counsel**

362 A lawyer shall not:

363 (a) unlawfully obstruct another party's access to evidence, including a witness, or unlawfully alter,  
364 destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not  
365 counsel or assist another person\* to do any such act;

366 (b) suppress any evidence that the lawyer or the lawyer's client has a legal obligation to reveal or to  
367 produce;

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

370 (d) directly or indirectly pay, offer to pay, or acquiesce in the payment of compensation to a witness  
371 contingent upon the content of the witness's testimony or the outcome of the case. Except where  
372 prohibited by law, a lawyer may advance, guarantee, or acquiesce in the payment of:

373 (1) expenses reasonably\* incurred by a witness in attending or testifying;

374 (2) reasonable\* compensation to a witness for loss of time in attending or testifying; or

375 (3) a reasonable\* fee for the professional services of an expert witness;

376 (e) advise or directly or indirectly cause a person\* to secrete himself or herself or to leave the  
377 jurisdiction of a tribunal\* for the purpose of making that person\* unavailable as a witness therein;

378 (f) A lawyer shall not ask any question **engage in conduct solely** intended to degrade a witness or  
379 other person ~~except where the lawyer reasonably\* believes that the question will lead to relevant and~~  
380 ~~admissible evidence;~~

381 (g) knowingly\* disobey an obligation under the rules of a tribunal\* except for an open refusal based  
382 on an assertion that no valid obligation exists; or

383 (h) in trial, assert personal knowledge of facts in issue except when testifying as a witness, or state a  
384 personal opinion as to the guilt or innocence of an accused.

385 **Comment**

386 [1] Paragraph (a) applies to evidentiary material generally, including computerized information. It is a  
387 criminal offense to destroy material for purpose of impairing its availability in a pending proceeding or one  
388 whose commencement can be foreseen. (See, e.g., Pen. Code, § 135; 18 U.S.C. §§ 1501-1520.) Falsifying  
389 evidence is also generally a criminal offense. (See, e.g., Pen. Code, § 132; 18 U.S.C. § 1519.) Applicable law  
390 may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of  
391 conducting a limited examination that will not alter or destroy material characteristics of the evidence.  
392 Applicable law may require a lawyer to turn evidence over to the police or other prosecuting authorities,  
393 depending on the circumstances. (See *People v. Lee* (1970) 3 Cal.App.3d 514, 526 [83 Cal.Rptr. 715]; *People*  
394 *v. Meredith* (1981) 29 Cal.3d 682 [175 Cal.Rptr. 612].)

395 [2] A violation of a civil or criminal discovery rule or statute does not by itself establish a violation of  
396 this rule. See rule 3.8 for special disclosure responsibilities of a prosecutor.

397 [3] Paragraph (f) does not apply to impeaching a witness or developing theories intended to impeach  
398 a witness, or where the question seeks relevant information that is reasonably calculated to lead to  
399 relevant and admissible evidence. The language in paragraph (f) is purposefully narrow to avoid  
400 interference with an attorney's duties of zealous advocacy. A lawyer's violation of paragraph (f) may also  
401 constitute a violation of rule 8.4(d).

402 **COPRAC Comments:**

403 As stated in COPRAC's comments to rule 3.3, COPRAC recommends that certain aspects of CCTF's  
404 proposed amendments to rules 3.3 through 3.5 be incorporated into rule 8.4. As an alternative, COPRAC  
405 suggests that certain aspects be incorporated into a standalone rule addressing civility.

406 In the event the Board decides to consider CCTF's proposed amendments to rule 3.4, COPRAC suggests  
407 the above edits. Consistent with CORPAC's recommended edits to rule 3.3, we recommend "solely" be  
408 added to CCTF's proposed new subsection (f) to help ensure that the rule is not interpreted to apply to  
409 conduct consistent with a lawyer's duty of zealous advocacy. For similar reasons, COPRAC recommends  
410 adding comment [3]. COPRAC's proposed new comment includes language about the scope of relevant  
411 discovery derived from California Code of Civil Procedure section 2017.010 in addition to impeachment.  
412 The remaining suggested language is intended to avoid chilling an advocate's legitimate strategies.

413 As COPRAC noted in connection with its proposed revisions to CCTF's proposed amendments to rule 3.3,  
414 COPRAC also believes the Board should consider "knowingly" in place of "intended." Similar to our  
415 comments above, COPRAC also believes that this aspect of the rule will be difficult to enforce as a  
416 disciplinary standard, and the assigned judge already has established tools and remedies for curbing an  
417 attorney's uncivil conduct in questioning a witness.

418 **Rule 3.5 Contact with Judges, Officials, Employees, and Jurors**

419 (a) Except as permitted by statute, an applicable code of judicial ethics or code of judicial conduct, or  
420 standards governing employees of a tribunal,\* a lawyer shall not directly or indirectly give or lend anything  
421 of value to a judge, official, or employee of a tribunal.\* This rule does not prohibit a lawyer from

422 contributing to the campaign fund of a judge or judicial officer running for election or confirmation  
423 pursuant to applicable law pertaining to such contributions.

424 (b) Unless permitted to do so by law, an applicable code of judicial ethics or code of judicial conduct, a  
425 rule or ruling of a tribunal,\* or a court order, a lawyer shall not directly or indirectly communicate with or  
426 argue to a judge or judicial officer upon the merits of a contested matter pending before the judge or  
427 judicial officer, except:

428 (1) in open court;

429 (2) with the consent of all other counsel and any unrepresented parties in the matter;

430 (3) in the presence of all other counsel and any unrepresented parties in the matter;

431 (4) in writing\* with a copy thereof furnished to all other counsel and any unrepresented parties in the  
432 matter; or

433 (5) in ex parte matters.

434 ~~(c) A lawyer shall not engage in a pattern of incivility that is degrading to a tribunal.\*~~

435 (d) As used in this rule, “judge” and “judicial officer” shall also include: (i) administrative law judges;  
436 (ii) neutral arbitrators; (iii) State Bar Court judges; (iv) members of an administrative body acting in an  
437 adjudicative capacity; and (v) law clerks, research attorneys, or other court personnel who participate in  
438 the decision-making process, including referees, special masters, or other persons\* to whom a court refers  
439 one or more issues and whose decision or recommendation can be binding on the parties if approved by  
440 the court.

441 (e) A lawyer connected with a case shall not communicate directly or indirectly with anyone the  
442 lawyer knows\* to be a member of the venire from which the jury will be selected for trial of that case.

443 (f) During trial, a lawyer connected with the case shall not communicate directly or indirectly with  
444 any juror.

445 (g) During trial, a lawyer who is not connected with the case shall not communicate directly or  
446 indirectly concerning the case with anyone the lawyer knows\* is a juror in the case.

447 (h) After discharge of the jury from further consideration of a case a lawyer shall not communicate  
448 directly or indirectly with a juror if:

449 (1) the communication is prohibited by law or court order;

450 (2) the juror has made known\* to the lawyer a desire not to communicate; or

451 (3) the communication involves misrepresentation, coercion, or duress, or is intended to harass or  
452 embarrass the juror or to influence the juror’s actions in future jury service.

453 (i) A lawyer shall not directly or indirectly conduct an out of court investigation of a person\* who is  
454 either a member of a venire or a juror in a manner likely to influence the state of mind of such person\* in  
455 connection with present or future jury service.

456 (j) All restrictions imposed by this rule also apply to communications with, or investigations of,  
457 members of the family of a person\* who is either a member of a venire or a juror.

458 (k) A lawyer shall reveal promptly to the court improper conduct by a person\* who is either a  
459 member of a venire or a juror, or by another toward a person\* who is either a member of a venire or a  
460 juror or a member of his or her family, of which the lawyer has knowledge.

461 (l) This rule does not prohibit a lawyer from communicating with persons\* who are members of a  
462 venire or jurors as a part of the official proceedings.

463 (m) For purposes of this rule, “juror” means any empaneled, discharged, or excused juror.

464 **Comment**

465 [1] An applicable code of judicial ethics or code of judicial conduct under this rule includes the  
466 California Code of Judicial Ethics and the Code of Conduct for United States Judges. Regarding employees of  
467 a tribunal\* not subject to judicial ethics or conduct codes, applicable standards include the Code of Ethics  
468 for the Court Employees of California and 5 United States Code section 7353 (Gifts to Federal employees).  
469 The statutes applicable to adjudicatory proceedings of state agencies generally are contained in the  
470 Administrative Procedure Act (Gov. Code, § 11340 et seq.; see Gov. Code, § 11370 [listing statutes with the  
471 act].) State and local agencies also may adopt their own regulations and rules governing communications  
472 with members or employees of a tribunal.\*

473 [2] For guidance on permissible communications with a juror in a criminal action after discharge of  
474 the jury, see Code of Civil Procedure section 206.

475 [3] It is improper for a lawyer to communicate with a juror who has been removed, discharged, or  
476 excused from an empaneled jury, regardless of whether notice is given to other counsel, until such time as  
477 the entire jury has been discharged from further service or unless the communication is part of the official  
478 proceedings of the case.

479 ~~[4] — The advocate’s function is to present evidence and argument so that the cause may be decided  
480 according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate’s right to  
481 speak on behalf of litigants. In the event that any judicial officer is impatient, undignified, or discourteous,  
482 the lawyer may continue to advocate on behalf of the client and stand firm in the position of the client, but  
483 this shall not provide justification for the lawyer engaging in any violations of this rule.~~

484 ~~[5] — The duty to refrain from incivility applies to any proceeding of a tribunal,\* including a deposition.~~

485 **COPRAC Comments:**

486 As stated in COPRAC’s comments to rules 3.3 and 3.4, COPRAC recommends that certain aspects of  
487 CCTF’s proposed amendments to rules 3.3 through 3.5 be incorporated into rule 8.4. As an alternative,  
488 COPRAC suggests that certain aspects be incorporated into a standalone rule addressing civility.

489 COPRAC does not recommend adoption of CCTF’s proposed new subsection (c) or proposed comments [4]  
490 and [5]. This rule generally addresses *ex parte* communications and related procedural issues relating to  
491 the manner of communicating with judicial officers. The proposed addition does not belong in this rule. In  
492 addition, “pattern of incivility” is undefined. As a disciplinary rule, this rule will likely have a chilling effect  
493 on zealous advocacy.

494