

Team 5

“If the truth be told it probably isn’t”

Rule 1-400 Advertising and Solicitation

- (D) A communication or a solicitation (as defined herein) shall not:
- (1) Contain any untrue statement; or
 - (2) Contain any matter, or present or arrange any matter in a manner or format which is false, deceptive, or which tends to confuse, deceive, or mislead the public; or
 - (3) Omit to state any fact necessary to make the statements made, in the light of circumstances under which they are made, not misleading to the public; or
 - (4) Fail to indicate clearly, expressly, or by context, that it is a communication or solicitation, as the case may be.

Rule 3-200 Prohibited Objectives of Employment

A member shall not seek, accept, or continue employment if the member knows or should know that the objective of such employment is:

- (A) To bring an action, conduct a defense, assert a position in litigation, or take an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; or
- (B) To present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of such existing law.

Rule 5-200 Trial Conduct

In presenting a matter to a tribunal, a member:

- (A) Shall employ, for the purpose of maintaining the causes confided to the member such means only as are consistent with truth;
- (B) Shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law;
- (C) Shall not intentionally misquote to a tribunal the language of a book, statute, or decision;
- (D) Shall not, knowing its invalidity, cite as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional; and
- (E) Shall not assert personal knowledge of the facts at issue, except when testifying as a witness.

Nix v. Whiteside (1986) 475 U.S. 157: refusing to offer perjured testimony, either from a client or another to benefit your client, does not open up the attorney to a claim of ineffective assistance of counsel.

ABA Rule 4.1 Truthfulness In Statements To Others

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

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

Rule 3.3 Candor Toward The Tribunal

(a) A lawyer shall not knowingly:

- (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
- (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

Standard 4- 4.4 Relations With Expert Witnesses

(a) Defense counsel who engages an expert for an opinion should respect the independence of the expert and should not seek to dictate the formation of the expert's opinion on the subject. To the extent necessary, defense counsel should explain to the expert his or her role in the trial as an impartial witness called to aid the fact finders and the manner in which the examination of witnesses is conducted.

(b) Defense counsel should not pay an excessive fee for the purpose of influencing an expert's testimony or fix the amount of the fee contingent upon the testimony an expert will give or the result in the case.

Rule 5-210 Member as Witness

A member shall not act as an advocate before a jury which will hear testimony from the member unless:

- (A) The testimony relates to an uncontested matter; or
- (B) The testimony relates to the nature and value of legal services rendered in the case; or
- (C) The member has the informed, written consent of the client. If the member represents the People or a governmental entity, the consent shall be obtained from the head of the office or a designee of the head of the office by which the member is employed and shall be consistent with principles of recusal.

California Rule of Professional Conduct 5-310 Prohibited Contact With Witnesses

This Rule states in pertinent part that a member shall not: "(B) Directly or indirectly pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the case." The Rule goes on to state that "Except where prohibited by law, a member may advance, guarantee, or acquiesce in the payment of:

- (1) Expenses reasonably incurred by a witness in attending or testifying.
- (2) Reasonable compensation to a witness for loss of time in attending or testifying.
- (3) A reasonable fee for the professional services of an expert witness."

In re Silica Products Liability Litigation (S.D. Tex. 2005) 398 F. Supp. 2d 563: an attorney cannot rely on an expert report that they know, or should have reason to know, is false.

Roland v. Superior Court (2004) 124 Cal.App.4th 154: The court held that even oral witness statements must be disclosed pursuant to Penal Code § 1054.3.

United States v. Kovel (2d Cir. 1961) 296 F.2d 918: The court found that the attorney-client privilege is not waived when the expert is necessary or highly useful for an attorney to understand the communication.

Susan S. v. Israels (1997) 55 Cal.App.4th 1290: The court held that the victim had a claim for invasion of privacy against a criminal defense attorney when the attorney accidentally received a sexual battery victim's mental health records and knowing their confidential nature, read them, gave them to a psychiatrist used by the defense and used them in cross-examining the victim who thereby suffered severe emotional distress.