# Team 5

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

**The dilemma of the lying client vs. The ethical responsibility of the lawyer**

*“Remember when I said I was going to be honest with you, Jeff? That was a big, fat lie.”*

**Is the cornerstone of the American Legal System truly the expectation of truth and honesty?**

Is it ever OK to mislead your client, as to your aptitude, projected outcome, strength or weakness of their case etc.?

What is the attorney’s responsibility once he/she discovers a client misrepresentation?

What about the attorney who not only participates but encourages the client in an embellishment of their injuries to in the hopes of securing a higher recovery?

Is part of a lawyer’s role to be a moral compass for his or her client? Society in general?

**AUTHORITIES:**

Candor with client

When soliciting clients, and in any other communication, the attorney must not make any untrue statement or any false, deceptive or misleading statement.[1] This is true both in the affirmative and in the negative, meaning that the attorney may not "omit any necessary facts so as to make the statement misleading."[2] In addition, the attorney has a duty of candor which has been explained in case law to mean that no attorney may attempt to deceive another person, regardless of whether harm is done, and that this practice of deceit involves moral turpitude.[3]

The attorney also has a duty of competence to preclude the attorney from bringing a non-meritorious claim. Rule 3-200 provides that an attorney only seek, accept or continue employment that is supported by probable cause and that is not intended to harass or maliciously injure another. The attorney may not put forth claims or defenses not well-founded in law and fact without a good faith argument to support it. The attorney also has a duty not to assert facts she knows to be false.[4]

Diverging interests

An attorney has a fiduciary duty to his client, meaning that a relation "exist[s] between parties to a transaction wherein one of the parties is duty bound to act with the utmost good faith in the benefit of the other party. Such a relation ordinarily arises when a confidence is reposed by one person in the integrity of another, and in such a relation the party in whom the confidence is reposed, if he [or she] voluntarily accepts or assumes to accept the confidence, can take no advantage from his [or her] acts relating to the interest of the other party without the latter's knowledge or consent. . . . "[5]

An attorney may not seek, accept or continue employment where it is not substantiated by probable cause, thus an attorney may not prosecute any case that is not well-

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1 Cal. Rules Prof. Conduct, Rule 1-400.

2 *Id.*

3 McKinnery v. State Bar, 62 Cal.2d 194, 196 (1964); Culter v. State Bar of California, 71 Cal.2d 241, 249 (1969); *see also* Coulello v. State of California, 45 Cal.2d 57 (1955); Hallinan v. State Bar of California, 33 Cal.2d 246 (1948). Clearly, this duty applies not only with reference to the client but also with regard to the court, opposing counsel.

4 Cal. Rules Prof. Conduct, Rule 3-200; Cal. Bus. & Prof. Code § 6068(c). The ABA Model Rules of Professional Conduct, Rule 3.1 & 4.4, also impose a duty to the legal system which requires both that the attorney bring only meritorious claims and that they not use inappropriate means in the representation of their client that embarrass, burden, delay or violate legal rights.

5 Barbara A. v. John G., 145 Cal.App.3d 369 (1983) (citing Herbert v. Lankershim, 9 Cal.2d 409, 483 (1937); Bacon v. Soule, 19 Cal.App. 428, 434 (1912)).

founded in law and fact without a good faith argument.[6] The attorney also has a duty of candor to the court which may, at times, temper his or her "zealous representation" of the client.[7] For example, because the rules of professional conduct require that an attorney: (1) employ only those means that are "consistent with truth"; (2) may not attempt "to mislead the judge or jury" with false statement of fact or law; (3) cannot "intentionally misquote authority to a court"; and (4) may not "knowingly cite invalid authority."[8] Thus, even if it would benefit your client to do so, you are limited in the lengths you may go to in representing your client's interests.

Knowingly offering false witness testimony may even expose an attorney to criminal prosecution, in addition to discipline from the State Bar.[9] The Supreme Court has held, in *Nix v. Whiteside*, that 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.[10] The court indicated that the attorney has several options when presented with this kind of situation: (1) try to talk the client out of presenting perjured testimony; (2) disclosure to the court after the defendant has presented perjured testimony; and (3) withdrawal when a client threatens to offer perjured testimony.[11] In California, the court has held that the attorney's best ethical option when faced with a

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[6] *Id*. at Rule 3-200; *see also* Cal. Bus. & Prof. Code § 6068.Subsection (c) provides that an attorney must counsel only just actions or defenses except if the client is charged with a public offense. Subsection (d) embodies the duty of candor and provides that may only do such things that are consistent with the truth. A violation of these rules could subject the attorney to suspension or disbarment. Cal. Bus. & Prof. Code § 6103.

[7] *Id.* at Rule 5-200. For a discussion of the duty of candor, and its application in questions about witnesses, client perjury, and citing authority, see Wendy Patrick Mazzarella, *Lawyer's Duty of Candor: Zealous representation can lead attorneys down a slippery slope right up to the ethical edge*, CALIFORNIA BAR JOURNAL (April 2007), available at http://calbar.ca.gov/state/calbar/calbar_cbj.jsp?sCategoryPath=/Home/Attorney%20Resources/California%20Bar%20Journal/April2007&MONTH=April&YEAR=2007&sCatHtmlTitle=MCLE%20Self-Study&sJournalCategory=YES.

[8] Cal. Rules Prof. Conduct, 5-200.

[9] People v. Davis, 48 Cal.2d 241, 257 (1957); In re Branch, 70 Cal.2d 200, 210-211 (1969); Cal. Penal Code § 127. "Every person who willfully procures another person to commit perjury is guilty of subornation of perjury. . . ." and may be punished as if he had perjured himself, which includes a prison term of two, three or four years. Cal. Penal Code §§ 126-27.

[10] 475 U.S. 157 (where defendant, in presenting claim of self-defense shortly before trial that he'd seen something metallic in the victim's hand and told his attorney that "[i]f I don't say I saw a gun, I'm dead", the defendant did not render ineffective assistance of counsel when he told his client he would tell the court and withdraw as his attorney if the client so perjured himself; the client did not present the perjured testimony as was convicted).

[11] *Nix, supra* 475 U.S. at 169-70.

client who intends to present perjured testimony is to permit the client to give unguided narrative testimony.[12]

Other interests that must be disclosed to the client include when the attorney has a financial or other interest that would be impacted by the client's litigation.[13]

**Shades of Grey…**

What ethical responsibility does a lawyer have to the tribunal in terms of oral and written representations, including accurately citing legal authority, to the tribunal?

Is carelessness one thing and covert actions to mislead another?

Should we assume the truth is not being told in mediation?

What is said in mediation stays in mediation…and if the truth be told it was not in mediation!

Under ABA Model Rules, a lawyer shall not knowingly "make a false statement of material fact . . . to a third person."[14] However, the Rules clarify that "[e]stimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim" are ordinarily not considered "statements of material fact."[15] As such, a lawyer is not required to disclose how much settlement authority he or she has. Moreover, arguably, the lawyer is also not doing anything unethical even if the lawyer flat out lies about how much authority he or she has.

Other statutes which relate to mediation and settlement complicate matters. For example, "[a]nything said, any admission made, or any writing that is inadmissible, protected from disclosure, and confidential under [the relevant chapter of the Evidence Code] before a mediation ends, shall remain inadmissible, protected from disclosure, and confidential to the same extent after the mediation ends."[16]

<u>Disclosing controlling authority</u>

Under the ABA Model Rules, a lawyer is not allowed to knowingly "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 client."[17] However, this implies that as long as the lawyer can distinguish the case, there is no obligation to

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12 People v. Johnson, 62 Cal.App.4th 608 (1998) (finding it error when attorney told court he had an "ethical conflict" calling him as a witness and the court prevented the defendant from testifying).

13 Cal. Rules Prof. Conduct 3-310(B)(4) provides that an attorney can't accept or continue representation of a client without providing written disclosure when has or has had legal, business, financial or professional interest in the subject matter of the representation.

14 ABA Model Rules 4.1(a) (2008).

15 ABA Model Rules 4.1 cmt. 2 (2008).

16 Cal. Evid. Code § 1126.

17 ABA Model Rules 3.3(a)(2) (2008).

disclose. The California Rules of Professional Conduct also serve to regulate the disclosure of controlling authority. Rule 5-200 provides that an attorney will present in front of the court using only those means that are consistent with the truth and shall not act to mislead the judge, judicial officer or jury through a false statement of the law or fact, nor shall the attorney intentionally misquote a source or knowingly cite invalid authority.[18]

**The following is an article taken from the California Lawyer April 2011 and was available for a 1 hour MCLE credit.**

It sets forth the legal framework and demonstrates the conflicting duties and responsibilities our ethical civil and criminal lawyer face.

**Don't lie to me**

An attorney's duty of candor pervades every aspect of practicing law, in and outside the courtroom

By WENDY L. PATRICK

It's finally the day of trial and you are eager to get started. Wanting to make sure both sides are set to go before sending the case to a courtroom and calling up a jury panel, the judge looks at you and asks the loaded question, "Are you ready?" You assume the question has to do with both your preparation and the availability of your witnesses, none of whom are present in court. While you are fairly confident that they have all been subpoenaed and you think you probably have the proofs of service in your trial notebook somewhere, you of course have no idea whether or not they are physically present in the courthouse. And even if somehow, God forbid, they were not served, you are confident that your investigators can find them, particularly because your witnesses are cooperative. Although, you think on the spot, you really haven't taken the time to verify everyone's vacation schedules. How then, do you answer the judge's question?

Whether you are a civil or criminal practitioner, as an attorney, you are ethically bound by the duty of candor. This duty is codified by statute, reaffirmed in case law and mandated by the California Rules of Professional Conduct and the ABA Model Rules of Professional Conduct. The duty of candor covers everything from client perjury, false evidence, representations of procedural issues and citation of authority in court. This

[18] Cal. Rule of Prof. Conduct 5-200 provides that "[i]n presenting a matter to a tribunal, a member: (b) shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law." *See also* Mendez v. Superior Court, 162 Cal. App.4th 827 (2009) (observing that """ [c]ounsel should not forget that they are officers of the court, and while it is their duty to protect and defend the interests of their clients, the obligation is equally imperative to aid the court in avoiding error and in determining the cause in accordance with justice and the established rules of practice.""")

article will discuss some of the applicable rules found in statutes, rules of professional conduct and case law.

**California Rule of Professional Conduct 5-200,** Trial Conduct, states that 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.

Note that the California rule differentiates between using truthful means of representation and seeking to mislead the court. This is an important distinction to make, because as trial lawyers know, it is possible to present technically correct bits of evidence or information, but in a manner that is misleading in context. It is also possible to violate the duty of candor by omission. Looking to the ABA for an explicit example, ABA Model Rule 3.3 Comment [3] notes that there are circumstances where "failure to make a disclosure is the equivalent of an affirmative misrepresentation."

**California Business and Professions Code**

A lawyer's duty of candor is also laid out in the California Business and Professions Code. California Business and Professions Code Section 6068(d) states that it is the duty of an attorney to "employ, for the purpose of maintaining the causes confided to him or her, those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law." And lest anyone take a violation of an attorney's duties lightly, the California Business and Professions Code contains a section that spells out the potential punishment. California Business and Professions Code Section 6103 states that "a willful disobedience or violation of an order of the court requiring him to do or forbear an act connected with or in the course of his profession, which he ought in good faith to do or forbear, and any violation of the oath taken by him, or of his duties as such attorney, constitute causes for disbarment or suspension."

**California Business and Professions Code Section 6106** discusses actions unfit for an attorney that may result in discipline. The section states that "the commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony

or misdemeanor or not, constitutes a cause for disbarment or suspension. If the act constitutes a felony or misdemeanor, conviction thereof in a criminal proceeding is not a condition precedent to disbarment or suspension from practice therefor." And California Business and Professions Code Section 6067 requires a lawyer "faithfully to discharge the duties of any attorney at law to the best of his knowledge and ability."

**California Business and Professions Code Section 6128** actually imposes misdemeanor criminal liability on a lawyer who engages in or consents to any deceit or collusion "with intent to deceive the court or any party." (BP 6128(a)) Punishment for violating this section is up to a six-month jail sentence or a fine of up to $2,500 or both.

**Competing Duties**

In California, lawyers are often faced with the competing duties of candor to the court and the duty of confidentiality to one's client.

The conduct of California lawyers is governed by California Business and Professions Code Section 6068, which enumerates the duties of an attorney. BP 6068(e)(1) states that one of these duties is "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets of his or her client." This rule is cited within California Rule of Professional Conduct 3-100, Client Confidentiality. What result then, when a court orders an attorney to answer a question that would necessarily reveal confidential information of a client? Most attorneys would argue they must politely inform the court they are bound by their duty of confidentiality to their client. Some judges, on the other hand, would cite BP 6068(d) (candor), 6068 (b) (duty to respect the court) and CRPC 5-200. None of those sections, however, state that those ethical duties trump the duty of confidentiality to your client stated in BP 6068(e).

Under the ABA Model Rules, a lawyer's duty to the client is qualified by the duty of candor to the court (Rule 3.3 Comment [2]). In California, however, the duty of confidentiality is not qualified by the lawyer's duty of candor to the court. See California Business and Professions Code Section 6068(e) and California Rule of Professional Conduct 5-200. The proposed set of California rules will preserve this distinction. Therefore, when an attorney has received information, even if the information has been received from someone other than her client, she may not be at liberty to answer questions from the court if the answers would reveal confidential information. If, for example, a client's family member told the attorney the client was under the influence of drugs and would not be coming to court and the attorney was asked by the judge if she "had any idea why her client was not there," the attorney might make an argument that she was ethically unable to answer the question. See San Diego County Bar Association Ethics Opinion 2011-1. If she were to answer the court's question in the negative she would violate her duty of candor to the court per Rule 5-200 and BP 6068(d) because she does have an idea why her client wasn't there (as relayed by the client's family member). If the attorney answers in the affirmative, she might argue that she would violate her duty of confidentiality under Cal. Bus. and Prof. Code Section

6068(e) because that answer might cause a harmful inference to be drawn to the detriment of her client, thus violating her duty not to reveal client confidential information. Certainly if there were an exculpatory reason the attorney's client was not in court, the attorney would be free to reveal that information because it would not qualify as information "which the client has requested to be inviolate or the disclosure of which might be embarrassing or detrimental to the client" (Cal. State Bar Formal Op. 1993-133 [citing Cal. State Bar Formal Opn. Nos. 1980-52 and 1981-58]). A resolution to this question, however, cannot be arrived at in the abstract; it must be analyzed under the specific facts and inferences of each individual case.

**ABA Model Rules of Professional Conduct**

California has not yet adopted a version of the ABA Model Rules, but when the state does not have an ethical rule governing a specific issue, courts may look to the ABA for guidance, although they may not consider ABA Rules and Opinions as binding authority. Regarding ABA formal opinions, case law holds that while an ABA formal opinion "does not establish an obligatory standard of conduct imposed on California lawyers," the ABA Model Rules may be considered as a "collateral source" where there is no direct ethical authority in California. State Compensation Insurance Fund v. WPS Inc. (State Fund) (1999) 70 Cal.App.4th 644, 656.

**Model Rule 3.3 – Candor Toward The Tribunal**, states in subsection (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.

Rule 3.3 states in paragraph (b) that a lawyer representing a client "who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." Paragraph (c) qualifies the duties in paragraphs (a) and (b), stating in pertinent part that they apply "even if compliance requires disclosure of information otherwise protected by Rule 1.6. [Confidentiality]." (emphasis added)

It is important to note that the provisions of Rule 3.3 apply in a broader sense than simply in the courtroom. Comment [1] states that the duty of candor applies not only in front of a "tribunal," but also while representing a client in "an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition." Therefore, subdivision (1)(3) would require a lawyer who realizes his or her client testified falsely even in a deposition to take remedial measures.

In addition to Rule 3.3, which specifically covers candor in the courtroom, several other Model Rules discuss a lawyer's duty of candor generally. Model Rule 4.1 – Truthfulness in Statements to Others also covers the duty of candor.

This rule states that: 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 (emphasis added). Note the difference between the references to Rule 1.6 in Rule 3.3 versus Rule 4.1. *Rule 3.3 requires that candor to the court take precedence over the duty of confidentiality, while Rule 4.1, truthfulness in statements to others, recognizes the higher importance of the duty of confidentiality.*

Regarding the issue of affirmative misrepresentation versus passive failure to correct misinformation, Rule 4.1 Comment [1] states that while an attorney must be truthful in his or her dealings with others in representing a client, he or she "generally has no affirmative duty to inform an opposing party of relevant facts." The Comment goes on, however, to state that "[a] misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements."

Model Rule 8.4, Misconduct, also includes several provisions relating to a lawyer's duty of candor. Relevant provisions state that it is professional misconduct for a lawyer to (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, or (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

In conclusion, the duty of candor pervades every aspect of practicing law, in and out of the courtroom. A working knowledge of the applicable ethics rules will allow attorneys to practice law competently, honestly, professionally and ethically.

**This article does not constitute legal advice. Please shepardize all case law before using.*

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**SDCBA Legal Ethics Opinion 2011-1**

**Reconciling a Lawyer's Competing Duties of Candor to the Court v. Duty of Confidentiality**

## QUESTION PRESENTED

May Attorney, under the California Rules of Professional Conduct and the State Bar Act, answer a court's question asking if she has any idea why her client is not in court, when Attorney is aware of incriminating information that she suspects may explain her client's absence?

## ANSWER

No. Under the California Rules of Professional Conduct and State Bar Act, Attorney may not answer the court's question in any fashion; she must respectfully decline to answer, citing her ethical duty of confidentiality. This is true even though in jurisdictions that follow some version of the ABA Model Rules, the result may be different.

## FACTS

Attorney, a member of the California State Bar, represents Client on a drug charge. The night before she is scheduled to appear in court with her client, who is out of custody on bond, she receives a call from Client's mother stating "don't expect to see Client in court tomorrow morning; he just left the house high as a kite." Sure enough, Client doesn't appear in court. The judge asks Attorney on the record: "Do you have any idea why your client isn't here?" Ethically, what if anything can Attorney say?

## APPLICABLE LAW AND ETHICAL RULES

This issue can be analyzed through a combination of California Rules of Professional Conduct, the California Evidence Code, the California Business and Professions Code, California Ethics Opinions, and the ABA Model Rules of Professional Conduct.

## CONFIDENTIAL COMMUNICATION V. THE DUTY OF CONFIDENTIALITY

Of paramount importance to this opinion is the distinction between confidential communication and the duty of confidentiality. "Confidential communication between client and lawyer" is defined in Section 952 as "information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and

includes a legal opinion formed and the advice given by the lawyer in the course of that relationship."

Regarding the duty of confidentiality, the conduct of California lawyers is governed by California Business and Professions Code Section 6068 which enumerates the duties of an attorney. Section 6068(e)(1) states that one of these duties is "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."

Regarding the scope of Section 6068(e)(1), several California Ethics Opinions provide useful guidance. California Rule of Professional Conduct 1-100 states that while they are not binding authority, California ethics committee opinions should be consulted by California lawyers "for guidance on proper professional conduct."[1] Cal. State Bar Formal Opinion No. 2003-161 notes that the attorney's ethical duty of confidentiality under Business and Professions Code section 6068, subdivision (e) is broader than the attorney-client privilege and extends to cover all of the information gained within the scope of the professional relationship that the client has requested be kept secret, or the disclosure of which would likely be harmful or embarrassing to the client. (citing Cal. State Bar Formal Opns. No. 1993-133, 1986-87, 1981-58, and 1976-37; Los Angeles County Bar Association Formal Opns. Nos. 456, 436, and 386. See also *In re Jordan* (1972) 7 Cal.3d 930, 940-41 [103 Cal.Rptr. 849].)

In this case, the information about the Client revealed by his mother to Attorney, while not covered by the attorney-client privilege, would fall within the scope of confidential information.

## DUTY OF LOYALTY TO THE CLIENT V. CANDOR TO THE COURT

Under the ABA Model Rules, a lawyer's duty to the client is qualified by the duty of candor to the court (Rule 3.3 Comment [2]). In California, however, the duty of confidentiality is not qualified by the lawyer's duty of candor to the court.[2] The proposed set of California rules, if adopted, will preserve this distinction.[3] While this debate continues, judges and lawyers should be familiar with the distinction, and all of the rules involved.

California Rule of Professional Conduct 5-200, Trial Conduct, states in pertinent part that: 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."

Note that the California Rule differentiates between using truthful means of representation, and seeking to mislead the court. This is an important distinction to make, because as trial lawyers know, it is possible to present technically correct bits of evidence or information, but in a manner that is misleading in context. It is also possible

to violate the duty of candor by omission. Indeed, ABA Model Rule 3.3 Comment [3] notes that there are circumstances where "failure to make a disclosure is the equivalent of an affirmative misrepresentation."

California Business and Professions Code Section 6068(d) states that it is the duty of an attorney to "employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law." California Business and Professions Code Section 6106, which discusses actions of moral turpitude which may result in discipline, states that: "The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension."

## ABA MODEL RULES

While California has not yet adopted a version of the ABA Model Rules, when California does not have an ethical rule governing a specific issue, courts may look to the ABA for guidance, although they may not consider ABA Rules and Opinions as binding authority.[4] Regarding ABA formal opinions, case law holds that while an ABA formal opinion "does not establish an obligatory standard of conduct imposed on California lawyers," the ABA Model Rules may be considered as a "collateral source" where there is no direct ethical authority in California.[5]

ABA Model Rule 3.3 – Candor Toward the Tribunal, states in pertinent part that "A lawyer shall not knowingly make a false statement of fact or law to a tribunal" (Rule 3.3 (a)(1)). The Rule states in paragraph (b) that a lawyer representing a client "who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." Paragraph (c) qualifies the duties in paragraphs (a) and (b), stating in pertinent part that they apply "even if compliance requires disclosure of information otherwise protected by Rule 1.6. [Confidentiality]."

In addition to Rule 3.3, which specifically covers candor in the courtroom, several other Model Rules discuss a lawyer's duty of candor generally. Model Rule 4.1 – Truthfulness in Statements to Others also covers the duty of candor. Rule 4.1 states that: 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*." (emphasis added). Note the difference between the references to Rule 1.6 in these respective rules. Rule 3.3 requires candor to the court take precedence over the duty of confidentiality, while Rule 4.1, truthfulness in statements to others, recognizes the higher importance of the duty of confidentiality.

Regarding criminal or fraudulent behavior by the client, Rule 4.1 Comment [3] reminds lawyers that "[u]nder Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, *unless the disclosure is prohibited by Rule 1.6*." (emphasis added).

Model Rule 8.4, Misconduct, also includes several provisions relating to a lawyer's duty of candor. Relevant provisions state that it is professional misconduct for a lawyer to (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, or (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

**ANALYSIS**

Analyzing all of these rules and ethics opinions, we conclude that in California, Attorney is not able to answer the judge's question either way. She is not able to be dishonest with the court due to her duty of candor, and she is not at liberty to disclose the information imparted to her by Client's mother the night before, because even though that information was not relayed to her by her client and therefore is not protected by the attorney-client privilege, it nonetheless constitutes confidential information.

The more difficult issue is whether Attorney is permitted to say anything at all in response to the court's question regarding whether she "had any idea why her client was not there." If Attorney answers in the negative, she is in violation of her duty of candor to the court per Rule 5-200 and Bus. and Prof. code section 6068(d) because she does have an idea, as relayed by Client's mother the night before. If, however, Attorney answers "yes," she arguably violates her duty of confidentiality under Cal. Bus. and Prof. code section 6068(e) because that answer would cause a harmful inference to be drawn to the detriment of her client, thus violating Attorney's duty not to reveal client confidential information. Certainly if there were an exculpatory and unexceptional [see parenthetical note] reason Attorney's client was not in court, Attorney would be free to reveal that information, because it would not qualify as information "which the client has requested to be inviolate or the disclosure of which might be embarrassing or detrimental to the client" (Cal. State Bar Formal Op. 1993-133 [citing Cal. State Bar Formal Opn. Nos. 1980-52 and 1981-58]).

Under our facts, Attorney's only ethical option is to inform the court respectfully that due to applicable ethical rules she is not at liberty to answer the question.[6]

This opinion is issued by the San Diego County Bar Association Legal Ethics Committee. It is advisory only, and not binding upon the courts, the State Bar of California, tribunals charged with regulatory responsibilities, or any member of the State Bar.

[1] The Rule also states that "Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered."

[2] See California Business and Professions Code Section 6068(e) and California Rule of Professional Conduct 5-200.

[3] http://ethics.calbar.ca.gov/Committees/RulesCommission/ProposedRulesofProfessionalConduct.aspx

[4] See e.g., *U.S. v. Sierra Pacific Industries* (E.D. Cal. 2010) 2010 WL 4778051, *7.

[5] *State Compensation Insurance Fund v. WPS Inc.* (*State Fund*) (1999) 70 Cal.App.4th 644, 656.

[6] Cf. *In the matter of a Member of the State Bar of Arizona Robert E. Fee* (1995) 182 Ariz. 597, 607 (1995) (Censuring plaintiff's personal injury attorneys who did not disclose to settlement judge separate agreement requiring client to pay attorney's fees beyond those specified in settlement agreement. The plaintiff's attorneys "should have either disclosed the complete [fee] arrangement [with their client] or politely declined any discussion of fees." )

**As to the issue of whether it is appropriate to suggest reporting a prospective witness or party to immigration once their status is divulged…California Business and Professions Code Section 6103.7 is very clear.**

§ 6103.7. Report of suspected immigration status cause for discipline

It is cause for suspension, disbarment, or other discipline for any member of the State Bar to report suspected immigration status or threaten to report suspected immigration status of a witness or party to a civil or administrative action or his or her family member to a federal, state, or local agency because the witness or party exercises or has exercised a right related to his or her employment, broadly interpreted. As used in this section, "family member" means a spouse, parent, sibling, child, uncle, aunt, niece, nephew, cousin, grandparent, or grandchild related by blood, adoption, marriage, or domestic partnership.