



ASIAN AMERICAN BAR ASSOCIATION  
*of the Greater Bay Area*

2021 AABA Mini-Marathon  
***Ethics in Virtual Court***

Live Stream via YouTube  
5:00pm-6:00pm, January 14, 2021

Speakers: Hon. Tracie L. Brown  
Hon. Edward M. Chen  
Hon. Russell L. Hom

Agenda:

- Introductions (5 min)
- The practical logistics of setting up a virtual courtroom/arbitration room (15 min)
  - Considerations for a criminal vs. civil proceeding
- The parties' testimony (5 min)
- Discovery in a virtual setting (5 min)
- True stories from the bench regarding virtual hearings (15 min)
  - Location of the parties
  - Participation from the parties
  - Civility and ethical conduct prehearing and at the hearing
  - Pro se litigants
- Lessons learned in virtual court (10 min)
  - Pros and cons
  - Post-pandemic
- Questions and Answers (5 min)

## Relevant CA [Rules of Professional Conduct](#):

### Chapter 1: RULES OF PROFESSIONAL CONDUCT

#### Rule 1.2.1 Advising or Assisting the Violation of Law

(a) A lawyer shall not counsel a client to engage, or assist a client in conduct that the lawyer knows\* is criminal, fraudulent,\* or a violation of any law, rule, or ruling of a tribunal.\*

(b) Notwithstanding paragraph (a), a lawyer may:

- (1) discuss the legal consequences of any proposed course of conduct with a client; and
- (2) counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of a law, rule, or ruling of a tribunal.\*

#### Comment

[1] There is a critical distinction under this rule between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud\* might be committed with impunity. The fact that a client uses a lawyer's advice in a course of action that is criminal or fraudulent\* does not of itself make a lawyer a party to the course of action.

[2] Paragraphs (a) and (b) apply whether or not the client's conduct has already begun and is continuing. In complying with this rule, a lawyer shall not violate the lawyer's duty under Business and Professions Code section 6068, subdivision (a) to uphold the Constitution and laws of the United States and California or the duty of confidentiality as provided in Business and Professions Code section 6068, subdivision (e)(1) and rule 1.6. In some cases, the lawyer's response is limited to the lawyer's right and, where appropriate, duty to resign or withdraw in accordance with rules 1.13 and 1.16.

[3] Paragraph (b) authorizes a lawyer to advise a client in good faith regarding the validity, scope, meaning or application of a law, rule, or ruling of a tribunal\* or of the meaning placed upon it by governmental authorities, and of potential consequences to disobedience of the law, rule, or ruling of a tribunal\* that the lawyer concludes in good faith to be invalid, as well as legal procedures that may be invoked to obtain a determination of invalidity.

[4] Paragraph (b) also authorizes a lawyer to advise a client on the consequences of violating a law, rule, or ruling of a tribunal\* that the client does not contend is unenforceable or unjust in itself, as a means of protesting a law or policy the client finds objectionable. For example, a lawyer may properly advise a client about the consequences of blocking the entrance to a

public building as a means of protesting a law or policy the client believes\* to be unjust or invalid.

[5] If a lawyer comes to know\* or reasonably should know\* that a client expects assistance not permitted by these rules or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must advise the client regarding the limitations on the lawyer's conduct. (See rule 1.4(a)(4).)

[6] Paragraph (b) permits a lawyer to advise a client regarding the validity, scope, and meaning of California laws that might conflict with federal or tribal law. In the event of such a conflict, the lawyer may assist a client in drafting or administering, or interpreting or complying with, California laws, including statutes, regulations, orders, and other state or local provisions, even if the client's actions might violate the conflicting federal or tribal law. If California law conflicts with federal or tribal law, the lawyer must inform the client about related federal or tribal law and policy and under certain circumstances may also be required to provide legal advice to the client regarding the conflict (see rules 1.1 and 1.4).

## **CHAPTER 3: ADVOCATE**

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

(a) A lawyer shall not:

(1) knowingly\* 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 knowingly\* misquote to a tribunal\* the language of a book, statute, decision or other authority; 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,\* unless disclosure is prohibited by Business and Professions Code section 6068, subdivision (e) and rule 1.6. 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.

(b) A lawyer who represents a client in a proceeding before a tribunal\* and 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 to the extent permitted by Business and Professions Code section 6068, subdivision (e) and rule 1.6.

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

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

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

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

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

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

[5] Reasonable\* remedial measures under paragraphs (a)(3) and (b) refer to measures that are available under these rules and the State Bar Act, and which a reasonable\* lawyer would consider appropriate under the circumstances to comply with the lawyer's duty of candor to the tribunal.\* e.g., rules 1.2.1, 1.4(a)(4), 1.16(a), 8.4; Bus. & Prof. Code, §§ 6068, subd. (d), 6128.) Remedial measures also include explaining to the client the lawyer's obligations under this rule and, where applicable, the reasons for the lawyer's decision to seek permission from the tribunal\* to withdraw, and remonstrating further with the client to take corrective action that would eliminate the need for the lawyer to withdraw. If the client is an organization, the lawyer should also consider the provisions of rule 1.13. Remedial measures do not include disclosure of client confidential information, which the lawyer is required to protect

under Business and Professions Code section 6068, subdivision (e) and rule 1.6. Duration of Obligation

[6] A proceeding has concluded within the meaning of this rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed. A prosecutor may have obligations that go beyond the scope of this rule. (See, e.g., rule 3.8(f) and (g).) Ex Parte Communications [7] Paragraph (d) does not apply to ex parte communications that are not otherwise prohibited by law or the tribunal.\* Withdrawal [8] A lawyer's compliance with the duty of candor imposed by this rule does not require that the lawyer withdraw from the representation. The lawyer may, however, be required by rule 1.16 to seek permission of the tribunal\* to withdraw if the lawyer's compliance with this rule results in a deterioration of the lawyer-client relationship such that the lawyer can no longer competently and diligently represent the client, or where continued employment will result in a violation of these rules. A lawyer must comply with Business and Professions Code section 6068, subdivision (e) and rule 1.6 with respect to a request to withdraw that is premised on a client's misconduct.[9] In addition to this rule, lawyers remain bound by Business and Professions Code sections 6068, subdivision (d) and 6106.

## **CHAPTER 4: TRANSACTIONS WITH PERSONS\* OTHER THAN CLIENTS**

### **Rule 4.4 Duties Concerning Inadvertently Transmitted Writings\***

Where it is reasonably\* apparent to a lawyer who receives a writing\* relating to a lawyer's representation of a client that the writing\* was inadvertently sent or produced, and the lawyer knows\* or reasonably should know\* that the writing\* is privileged or subject to the work product doctrine, the lawyer shall:

- (a) refrain from examining the writing\* any more than is necessary to determine that it is privileged or subject to the work product doctrine, and
- (b) promptly notify the sender.

#### Comment

[1] If a lawyer determines this rule applies to a transmitted writing,\* the lawyer should return the writing\* to the sender, seek to reach agreement with the sender regarding the disposition of the writing,\* or seek guidance from a tribunal.\* (See *Rico v. Mitsubishi* (2007) 42 Cal.4th 807, 817 [68 Cal.Rptr.3d 758].) In providing notice required by this rule, the lawyer shall comply with rule 4.2.

[2] This rule does not address the legal duties of a lawyer who receives a writing\* that the lawyer knows\* or reasonably should know\* may have been inappropriately disclosed by the sending person.\* (See *Clark v. Superior Court* (2011) 196 Cal.App.4th 37 [125 Cal.Rptr.3d 361].)

## CHAPTER 8. MAINTAINING THE INTEGRITY OF THE PROFESSION

### 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.

[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] 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.

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### Speaker Biographies



Justice Tracie L. Brown was appointed to the First District Court of Appeal by Governor Edmund G. Brown, Jr., in November 2018. She serves as an Associate Justice in Division Four.

Before her appointment, Justice Brown served for five years on the San Francisco Superior Court, where she presided over a wide variety of criminal cases, including the Domestic Violence Court. She was also twice elected to the Superior Court's Executive Committee.

Justice Brown graduated Phi Beta Kappa and magna cum laude from Harvard University in 1992. After spending a year working in Japan, she received a J.D. from the University of California, Berkeley School of Law in 1996, where she received numerous academic awards. After law school, Justice Brown clerked for Judge M. Margaret McKeown on the United States Court of Appeals for the Ninth Circuit. She also worked as an associate for Morrison & Foerster LLP and Cooley LLP. In 2002, she joined the U.S. Attorney's Office for the Northern District of California. As an Assistant U.S. Attorney, Justice Brown tried numerous civil and criminal cases to verdict and argued several cases before the Ninth Circuit.

In 2002, Justice Brown received the California State Bar's Jack Berman Award for Distinguished Service to the Profession and the Public, based on her extensive work on a pro bono case representing San Francisco's Japanese American community. In 2003, she also received the Asian American Bar Association's Joe Morozumi Award for Exceptional Legal Advocacy. In 2013, Judge Brown was honored with a United States Department of Justice Director's Award for her work on a successful trial involving a massive online "pill mill," through which three defendants unlawfully distributed millions of doses of controlled substances. In addition, Justice Brown has taught trial advocacy at the University of California, Berkeley School of Law since 2013.



Hon. Edward M. Chen sits on the U.D. District Court for the Northern District Court of California, and was formerly a magistrate judge of the same court. Born and raised in Oakland, California, Chen earned an Artium Baccalaureus degree in 1975 from the University of California, Berkeley and a Juris Doctor from Boalt Hall School of Law in 1979. After graduating law school, Chen served judicial clerkships for United States District Judge Charles Byron Renfrew from June 1979 until April 1980 and United States Circuit Judge James R. Browning from June 1981 until June 1982. From 1982 until 1985, Chen served as an associate at the San Francisco law firm of Coblenz, Cahen, McCabe & Breyer. In September 1985, Chen became a staff attorney for the American Civil Liberties Union, specializing in language discrimination cases. He held that post until April 2001, when the judges on the United States District Court for the Northern District of California named Chen to an eight-year term as a United States Magistrate Judge. Since being confirmed as a District Judge, Chen has been a prolific writer, authoring a number of major opinions.



Hon. Russell L. Hom is the Presiding Judge for the Sacramento Superior Court. Judge Hom served as President to the Asian Pacific Bar Association of Sacramento in 2001. He also served as a Commissioner for the Human Rights/Fair Housing Commission for the City and County of Sacramento and served as a board member to the Sacramento Asian/Pacific Chamber of Commerce, and the Judicial Council. Judge Hom also served as a member of the National Asian Pacific American Bar Association Judicial Council.

Prior to his appointment to the bench, Judge Hom was a Deputy District Attorney for the Sacramento District Attorney's Office and prior to that was in solo practice and private practice serving as a partner with local defense firms Edson and Hom and Cohen and Hom. Judge Hom received his Juris Doctorate from UC Hastings College of Law in 1981.