

**Rule 3.3 [5-200] Candor Toward The Tribunal\***  
**(Commission's Proposed Rule Adopted on May 6 – 7, 2016 – Clean Version)**

- (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 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 Rule 1.6 and Business and Professions Code § 6068(e). 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 Rule 1.6 and Business and Professions Code § 6068(e).
- (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.

**Comment**

[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material misstatement of law includes citing as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional, or failing to correct such a citation previously made to the tribunal\* by the lawyer.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.\* See, e.g., Rules 1.2.1, 1.4(b)(4), 1.16(a), and 8.4; Business and Professions Code §§ 6068(d) and 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 Rule 1.6 and Business and Professions Code § 6068(e).

### *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. This Rule does not apply when a lawyer comes to know of a violation of paragraph (b) after the lawyer's representation has concluded. There may be obligations that go beyond this Rule. See, e.g., Rule 3.8(g) and (h).

### *Withdrawal*

[7] 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 Rule 1.6 and Business and Professions Code § 6068(e) with respect to a request to withdraw that is premised on a client's misconduct.

**PROPOSED RULE OF PROFESSIONAL CONDUCT 3.3**  
**(Current Rule 5-200)**  
**Candor Toward The Tribunal**

**EXECUTIVE SUMMARY**

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has evaluated current rule 5-200 (Trial Conduct) in accordance with the Commission Charter, with a focus on the function of the rule as a disciplinary standard, and with the understanding that the rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. In addition, the Commission considered the national standard of the American Bar Association (“ABA”) counterpart, Model Rule 3.3 (Candor Toward The Tribunal). The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules. The result of the Commission’s evaluation is proposed rule 3.3 (Candor Toward The Tribunal). This proposed rule has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

**Proposed Rule 3.3 in context within the Rules of Professional Conduct.** Proposed Rule 3.3 is one of nine rules in Chapter 3 of the proposed Rules of Professional Conduct. The content, framework and numbering scheme of this subset of the Rules is generally based on Chapter 3 of the ABA Model Rules, which is entitled “Advocate.” Model Rules Chapter 3 corresponds to Chapter 5 of the current California Rules, entitled “Advocacy and Representation.” The following table shows the Chapter 3 Model Rules and the corresponding California Rules:

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

The Commission is recommending the adoption of the Model Rule framework and numbering for this series of rules, but for many of the rules recommends retaining the language of the California Rules, which is more specific and precise, and accordingly more appropriate for a set of disciplinary rules. However, in the case of proposed Rule 3.3, the Commission determined that a rule patterned on Model Rule 3.3 would be more appropriate as a disciplinary rule.

**Recommendation that proposed Rule 3.3 be circulated for public comment.** Proposed Rule 3.3 is based on Model Rule 3.3, a version of which has been adopted in every jurisdiction in the country. (See National Backdrop – Adoption of Model Rule 3.3, below.) The drafting team believes that the Model Rule approach regarding a lawyer’s duty of candor is superior to the approach of current rule 5-200 (Trial Conduct) because it more clearly identifies the kind of conduct that the rule is intended to regulate, an attribute preferable in a disciplinary rule. For example, current rule 5-200(A) and (B) are nearly verbatim transcriptions of the two clauses of Bus. & Prof. Code § 6068(d), a provision that has remained virtually unchanged since the California Legislature adopted the Field Code in 1872.<sup>1</sup> Paragraph (A) cautions a lawyer to “employ, for the purpose of maintaining the causes confided to the lawyer, such means only as are consistent with the truth,” but provides no insight into what “such means” are consistent with the truth, and thus what “means” are not. Similarly, paragraph (B) prohibits a lawyer from “seeking to mislead the judge . . . by an artifice,” but does not clarify what a prohibited “artifice” might be.

In sum, the Model Rule approach, under which specific prohibited conduct is identified, is preferable in a disciplinary rule. The greater detail of the proposed rule should enhance compliance by lawyers in performing the duties they owe the court as officers of the legal system, as well as facilitate enforcement. The need for increased detail in the rule is particularly evident regarding measures a lawyer is permitted to take to correct fraudulent or criminal conduct of another in relation to a proceeding before a tribunal. That is because, contrary to Model Rule jurisdictions under which duties under their versions of rule 3.3 trump a lawyer’s duty of confidentiality, the text of proposed Rule 3.3 expressly states that the lawyer’s duty to take reasonable remedial measures is subordinate to California’s strict duty of confidentiality under Rule 1.6 and Bus. & Prof. Code § 6068(e).

**Text of Rule 3.3.** The proposed Rule’s language, based on the Model Rule, provides a clearer statement of what conduct is required and prohibited under the rule.

**Paragraph (a)’s introductory clause** incorporates a “knowledge” standard. The requirement of known falsity is important from a practical as well as a policy standpoint. A rule that could be violated by gross negligence would have an improper chilling effect on advocacy and could render the lawyer a guarantor of the truth of the facts presented.

**Subparagraph (a)(1)** [based on Model Rule 3.3(a)(1)] provides that a lawyer shall not 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.” A lawyer is on notice that the lawyer may not knowingly make *any* false statement of fact or law or fail to correct a *material* false statement of fact or law.

**Subparagraph (a)(2)** [derived from Model Rule 3.3(a)(2)], prohibits a lawyer from failing “to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse” to the client’s position. It states the lawyer’s duty to disclose to the tribunal adverse legal authority in the controlling jurisdiction, which is preferable to the narrowly defined duties in current rule 5-200(C) and (D). Nevertheless, to further clarify the provision’s intent, the Commission recommends adding language from rule 5-200(C), which

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<sup>1</sup> Bus. & Prof. Code § 6068(d) provides it is the duty of an attorney:

(d) 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.

The only change since 1872 has been to render the provision gender neutral.

provides a lawyer shall not “misquote to a tribunal the language of a book, statute, decision or other authority.”<sup>2</sup> The Commission determined that a generalized statement of what is prohibited together with a specific example, is better than a narrowly-defined statement of prohibited conduct.

**Subparagraph (a)(3)** [based on Model Rule 3.3(a)(3)], states with precision what conduct is prohibited – offering false evidence – and then identifies steps the lawyer must take to remediate harm to the tribunal should the lawyer subsequently learn that of the evidence’s falsity.”

Paragraph (b) confronts head-on a lawyer’s duty when the lawyer knows that a person *has* engaged in criminal or fraudulent conduct related to a proceeding. Unlike Model Rule jurisdictions, however, the provision is limited by the lawyer’s confidentiality duties under Rule 1.6 and Bus. & Prof. Code § 6068(e).

Paragraph (c) importantly delimits the duration of the lawyer’s duties under the preceding three paragraphs. The lawyer’s duties continue to the end of the proceeding and do not terminate upon discharge by the client or the lawyer’s withdrawal.

Paragraph (d) proscribes appropriate conduct when a lawyer is appearing in an *ex parte* proceeding where the other side is not given notice or an opportunity to be heard.

There are seven comments to the proposed rule, each of which provides interpretative guidance or clarifies how the proposed rule, which is intended to govern a broad array of situations, should be applied.

Comment [1] describes the scope of the rule’s application, i.e., that it also applies to ancillary proceedings such as depositions, a concept that might not be apparent in a rule addressing conduct before a “tribunal.”

Comment [2], as noted (see footnote 2), has been included to address concerns OCTC expressed in its 2010 Comment about the deletion of the language in current rule 5-200(C) [now incorporated into subparagraph (a)(2)] and (D). The comment incorporates nearly verbatim the language in current rule 5-200(D).

Comment [3], regarding the term “legal authority in the controlling jurisdiction,” provides critical interpretative guidance for the term, which in some instances can encompass legal authority outside of the jurisdiction in which a court is physically located. The comment is not strictly a definition but instead explains how a strict interpretation of the term “controlling jurisdiction,” i.e., to mean the politically-defined jurisdiction in which the court is located, would be inaccurate.

Comment [4] provides a suggested course of conduct for a lawyer to preserve the integrity of the legal process by identifying preventive measures a lawyer might take to prevent another from engaging in fraudulent or criminal conduct related to a tribunal proceeding. It also notes that under paragraphs (a) and (b), if the lawyer is unsuccessful in averting the conduct, the lawyer must refuse to offer the false evidence. In addition, the comment identifies the narrative approach, a procedure sanctioned in California case law that is cited, when the person who intends to testify falsely is the lawyer’s criminal defendant client.

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<sup>2</sup> In response to a request by OCTC, the Commission is also recommending that the substance of 5-200(D) (a lawyer “shall not, knowing its invalidity, cite as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional”) be retained in a comment to clarify the application of paragraph (a)(1). (See Comment [2].)

Comment [5] provides important guidance for a lawyer who seeks to perform the lawyer's duties to engage in "reasonable remedial measures" as required under paragraph (b) when a fraud has been perpetrated on the court. In particular, the comment provides cross-references to rules and statutes that provide further guidance.

Comment [6] provides interpretative guidance on when a proceeding is deemed to have concluded and the lawyer's duties under the rule are terminated. In particular, it recognizes that the duties under paragraph (b) to rectify fraudulent conduct before a tribunal do not apply when the lawyer learns of the fraudulent or criminal course of conduct only after the lawyer's representation has terminated.

Comment [7], regarding a lawyer's withdrawal from representation occasioned by events contemplated by the rule's provisions, provides important guidance that when a lawyer complies with the lawyer's duties under the rule, the lawyer does not necessarily need to withdraw. However, the comment also notes that withdrawal may be mandatory when, as a consequence of the lawyer's compliance, the lawyer-client relationship deteriorates to the extent the lawyer can no longer competently represent the client or continued representation will result in a violation of the Rules.

In addition to the recommended provisions, the Commission declined to recommend a provision suggested in public comment that would expressly bar plagiarism in briefs or other submissions to a court. The Commission determined a specific prohibition on plagiarism is not necessary and not appropriate in a disciplinary rule. In any event, such conduct would be better addressed under proposed rule 8.4(c) or Bus. & Prof. Code § 6106.<sup>3</sup> Moreover, there is no evidence that adopting such a provision would promote a national standard as the Commission is unaware of any jurisdiction that has expressly addressed plagiarism in its Rules.

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<sup>3</sup> Proposed rule 8.4 (c) provides it is professional misconduct for a lawyer to:

- (c) engage in conduct involving moral turpitude, dishonesty, fraud, deceit or reckless or intentional misrepresentation

### **National Background – Adoption of Model Rule 3.3**

Every jurisdiction except California has adopted some version of Model Rule 3.3. Twenty-one jurisdictions have adopted Model Rule 3.3 verbatim.<sup>4</sup> Sixteen jurisdictions have adopted a slightly modified version of Model Rule 3.3.<sup>5</sup> Thirteen jurisdictions have adopted a version of the rule that is substantially different from Model Rule 3.3.<sup>6</sup>

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<sup>4</sup> The twenty-one jurisdictions are: Arizona, Arkansas, Colorado, Delaware, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Minnesota, Montana, Nebraska, Nevada, New Hampshire (although the order of paragraphs (c) and (d) are reversed), Rhode Island, Utah, Vermont, West Virginia, and Wyoming.

<sup>5</sup> The sixteen jurisdictions are: Alaska, Connecticut, Georgia (Georgia retains a rule substantially similar to the former Model Rule from 1983), Hawaii (Hawaii retains a rule substantially similar to the former Model Rule from 1983), Maine, Mississippi (Mississippi retains the former Model Rule language from 1983), Missouri, New Jersey (New Jersey retains a rule substantially similar to the former Model Rule from 1983), New Mexico, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, and Wisconsin.

<sup>6</sup> The thirteen jurisdictions are: Alabama, District of Columbia, Florida, Maryland, Massachusetts, Michigan, New York, North Dakota, Oregon, Tennessee, Texas, Virginia, and Washington.

**Rule 3.3 [5-200] Trial Conduct**  
**(Redline Comparison of the Proposed Rule to Current California Rule)**

~~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~~

(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 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 Rule 1.6 and Business and Professions Code § 6068(e). 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 Rule 1.6 and Business and Professions Code § 6068(e).

(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.

### **Comment**

[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.\* See, e.g., Rules 1.2.1, 1.4(b)(4), 1.16(a), and 8.4; Business and Professions Code §§ 6068(d) and 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 Rule 1.6 and Business and Professions Code § 6068(e).

#### *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. This Rule does not apply when a lawyer comes to know of a violation of paragraph (b) after the lawyer's representation has concluded. There may be obligations that go beyond this Rule. See, e.g., Rule 3.8(g) and (h).

#### *Withdrawal*

[7] 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 Rule 1.6 and Business and Professions Code § 6068(e) with respect to a request to withdraw that is premised on a client's misconduct.

**Rule 3.3 [5-200] Candor Toward ~~the~~The Tribunal\***  
**(Redline Comparison of the Proposed Rule to ABA Model Rule)**

- (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 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 Rule 1.6 and Business and Professions Code § 6068(e). 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 ~~an adjudicative~~ 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, ~~including, if necessary, disclosure to the tribunal~~ to the extent permitted by Rule 1.6 and Business and Professions Code § 6068(e).
- (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, ~~and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.~~
- (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.

**Comment**

[1] This Rule governs the conduct of a lawyer ~~who is representing a client in the~~ proceedings of a tribunal, including ancillary proceedings such as a deposition conducted pursuant to a tribunal's authority. See Rule ~~1.01.0.1~~(m) for the definition of "tribunal." ~~It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.~~

~~[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that~~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~~knows to be false.~~

### *Representations by a Lawyer*

~~[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).~~

### *Legal Argument*

~~[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.~~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.

### *Offering Evidence*

~~[5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled~~

~~by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.~~

~~[64] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. If a lawyer knows\* that ~~the~~ 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. ~~If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer~~ and, if unsuccessful, must refuse to offer the false evidence. If ~~only a portion of a witness's~~ a criminal defendant insists on testifying, and the lawyer knows\* that the testimony will be false, the lawyer may ~~call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.~~ 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.~~

~~[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements. See also Comment [9].~~

~~[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.~~

~~[9] Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].~~

### *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.\* See, e.g., Rules 1.2.1, 1.4(b)(4), 1.16(a), and 8.4; Business and Professions Code §§ 6068(d) and 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 Rule 1.6 and Business and Professions Code § 6068(e).

~~[10] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done — making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.~~

~~[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.~~

### *Preserving Integrity of Adjudicative Process*

~~[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that~~

~~a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.~~

### *Duration of Obligation*

~~[136] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. 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. This Rule does not apply when a lawyer comes to know of a violation of paragraph (b) after the lawyer's representation has concluded. There may be obligations that go beyond this Rule. See, e.g., Rule 3.8(g) and (h).~~

### *Ex Parte Proceedings*

~~[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.~~

### *Withdrawal*

~~[157] Normally, a lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation ~~of a client whose interests will be or have been adversely affected by the lawyer's disclosure~~. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal\* to withdraw if the lawyer's compliance with this ~~Rule's duty of candor~~Rule results in ~~such an~~ extreme deterioration of the ~~client-lawyer~~lawyer-client relationship such that the lawyer can no longer competently and diligently represent the client. ~~Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with, or where continued employment will result in a violation of these Rules. A lawyer must comply with Rule 1.6 and Business and Professions Code § 6068(e) with respect to~~ a request ~~for permission~~ to withdraw that is premised on a client's misconduct, ~~a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.~~~~