

McCurdy, Lauren

RE: Rule 3.3
6/25&26/10 Commission Meeting
Open Session Agenda Item III.MM.

From: Ellen R. Peck [pecklaw@prodigy.net]
Sent: Wednesday, June 16, 2010 8:30 PM
To: Mark Tuft
Cc: Difuntorum, Randall; McCurdy, Lauren; ignazio.ruvolo@jud.ca.gov; Jerome Sapiro Jr.; Kevin Mohr; Kevin Mohr (Work) (E-mail); Kevin Mohr (Home#1) (E-mail)
Subject: Re: Revised Commenters' Chart to Rule 3.3

I do not agree with Mark and the 29 law professors. I think the rule should remain as drafted. Ellen

Mark Tuft wrote:

>
> <<636802_1.DOC>>
>
> I agree with the 29 California law professors' comment regarding
> paragraph (c) of Rule 3.3 and have revised the Commenters' Chart to
> reflect my recommendation that we track the Model Rule approach
> instead of the lawyer centric approach reflected in the current draft.
>

--

Ellen R. Peck, Lawyer
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McCurdy, Lauren

From: Ruvolo, Ignazio [Ignazio.Ruvolo@jud.ca.gov]
Sent: Thursday, June 17, 2010 6:14 PM
To: Mark Tuft
Cc: Difuntorum, Randall; McCurdy, Lauren; Jerome Sapiro Jr.; Kevin Mohr; Kevin Mohr (Work) (E-mail); Kevin Mohr (Home#1) (E-mail); pecklaw@prodigy.net
Subject: Re: Revised Commenters' Chart to Rule 3.3

I agree with Marks suggested alt comments & the 29 profs

On Jun 16, 2010, at 7:19 PM, "Mark Tuft" <MTuft@cwclaw.com> wrote:

<<636802_1.DOC>>

I agree with the 29 California law professors' comment regarding paragraph (c) of Rule 3.3 and have revised the Commenters' Chart to reflect my recommendation that we track the Model Rule approach instead of the lawyer centric approach reflected in the current draft.

<636802_1.DOC>

McCurdy, Lauren

From: Kevin Mohr [kemohr@charter.net]
Sent: Wednesday, June 16, 2010 10:10 PM
To: Mark Tuft
Cc: Difuntorum, Randall; McCurdy, Lauren; ignazio.ruvolo@jud.ca.gov; Jerome Sapiro Jr.; Kevin Mohr (Work) (E-mail); Kevin Mohr (Home#1) (E-mail); pecklaw@prodigy.net
Subject: Re: Revised Commenters' Chart to Rule 3.3
Attachments: RRC - 5-200 [3-3] - Public Comment Chart - By Commenter - XDFT2.2 (06-16-10)MLT-KEM.doc

Mark and all:

I've attached XDraft 2.2 (6/16/10)MLT-KEM to this E-mail. I've inserted the OCTC comments re this rule and, where possible w/o spending too much time, I've provided responses (mostly just our responses to OCTC's initial public comment submission). My additions are highlighted in yellow. However, there are three points that OCTC makes that require a response -- See paragraphs 3-5 on page 3-4 of the attached chart. The points are highlighted in turquoise.

As near as I can tell, the comments from OCTC and Zitrin et al are the only new comments on this Rule. Previously we received the resubmitted comments of SDCBA.

Please let me know if you have any questions. Thanks,

Kevin

Attached:
RRC - 5-200 [3-3] - Public Comment Chart - By Commenter - XDFT2.2 (06-16-10)MLT-KEM.doc

Mark Tuft wrote:

<<636802_1.DOC>>

I agree with the 29 California law professors' comment regarding paragraph (c) of Rule 3.3 and have revised the Commenters' Chart to reflect my recommendation that we track the Model Rule approach instead of the lawyer centric approach reflected in the current draft.

--
Kevin E. Mohr
Professor
Western State University College of Law
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Fullerton, CA 92831
714-459-1147
714-738-1000 x1147

**Rule 3.3 Candor Toward the Tribunal.
[Sorted by Commenter]**

TOTAL = __ Agree = __
Disagree = __
Modify = __
NI = __

No.	Commenter	Position	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
3	Office of Chief Trial Counsel ("OCTC")	M	Yes		<p>1. OCTC is concerned that this proposed rule requires knowingly. Rule 1.0 defines knowingly as "actual knowledge." However, this is contrary to established California law. An attorney's unqualified and unequivocal statements to judges under circumstances that should have caused him or her at least some uncertainty are at a minimum deceptive and support a finding of culpability. (In the <i>Matter of Chesnut</i> (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 173-174.) That is, California disciplines attorneys for dishonesty or moral turpitude based on gross negligence. (See sections 6068(d) and 6106; <i>Vaughn v. State Bar</i> (1972) 6 Cal.3d 847, 857 and 859; <i>In the Matter of Harney</i> (Review Dept. 1995) 3 Cal. State Bar 266, 2381-282; <i>In the Matter of Chesnut</i> (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 173-174; <i>In the Matter of Dale</i> (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 798 [gross negligence in representation to third party]; <i>In the Matter of Loftus</i> (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 80; <i>In the Matter of Casey</i> (Review Dept. 2008) 5 Cal. State Bar Ct.</p>	<p>1. The Commission disagrees. Both <i>Harney</i> and <i>Chesnut</i> were decided under Bus. & Prof. Code § 6068(d), and would not be affected by this Rule. Moreover, the definition of "know" in proposed Rule 1.0.1(f) (based on MR 1.0(f)) does not permit reckless disregard of the facts.</p>

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					<p>Rptr. 117. See also Comment 2B to proposed rule 8.4.) In fact, CCP section 128.7 requires that all statements in pleadings be made "after an inquiry reasonable under the circumstances." We should not be allowing lawyers to make false statements without proper inquiry and a good faith basis for the statement. Moreover, while good faith may be a defense to a charge of misrepresentation, this is because it is a statutory violation, not a rule violation. Good faith is generally not a defense to a violation of a Rule of Professional Conduct. (See <i>In the Matter of Broderick</i> (Review Dept. 1994) 3 Cal. State Bar Ct. Rpt. 138, 148; <i>Zitny v. State Bar, supra</i>, 64 Cal.2d at 793.) Further, this rule is inconsistent with proposed rules 8.2, 8.4, 4.2, and Comment 2B of proposed rule 8.4. While negligence is not a basis for discipline, gross negligence is. While we could still prosecute attorneys for gross negligence under sections 6068(d) and 6106 (and apparently 8.4) that creates inconsistent duties and could mislead attorneys into believing that actual knowledge is required for discipline when gross negligence can support discipline for this conduct.</p>	

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					<p>2. OCTC is concerned that the proposed rule omits the term "artifice" as provided in current rule 5-200(b). If the Commission is intending to further limit the rule, OCTC opposes that. OCTC believes the word should remain in the rule.</p>	<p>2. The Commission disagrees that removing "artifice" from the Rule will narrow OCTC's ability to charge lawyers. The word is found in Bus. & Prof. Code § 6068(d), so OCTC will not lose the ability to make such a charge. Moreover, the term "artifice" is from an statute enacted in 1872 and is not a term that is in common usage in modern lawyer regulation or is one that has received sufficient application or interpretation to provide lawyers with adequate advance guidance. The Commission believes that closely tracking the wording of the Model Rule will enhance compliance with the duty of candor and provide better public protection.</p>
					<p>3. OCTC is concerned that the proposed rule omits without Comment the following language in the current rule: (1) prohibiting an attorney from intentionally misquoting to a tribunal the language of a book, statute or decision; and (2) shall not knowing its invalidity cite as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional. (See current rule 5-200(c) and (d)). OCTC is aware that some of this language was removed by the Board of Governors because they believed that it was duplicative of proposed rule 3.3(a)(1).</p>	<p>3. The Commission disagrees that the proposed rule signals a change in the law regarding the proper citing of legal authority and believes that Comments [2] and [4] make it sufficiently clear that the prohibitions under current 5-200(c) come with the provisions of paragraph (a) and that no further comment is necessary.</p>

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					<p>and (2). However, some form of this language has existed in the rules since the original Rules of Professional Conduct. OCTC requests a comment to explain that this is not a change in the law but merely because it is already covered by proposed rule 3.3(a)(1) and (2).</p> <p>4. OCTC is concerned that the rule omits the language in current rule 5-200(E) that an attorney "shall not assert personal knowledge of the facts at issue, except when testifying as a witness." OCTC knows of no reason to omit that language and has seen attorneys violate this rule in an attempt to prejudice a party and deny them a fair trial. (See e.g. <i>In the Matter of Philip E. Kay</i>, Case No. 01-0-193.) The hearing department finding and recommendation in Kay's case is currently pending before the California Supreme Court. (Supreme Court Case No. S 180405.) OCTC suggests that this language be included in the rule.</p> <p>5. In a similar vein, OCTC is concerned that nowhere in the proposed rules do they provide for when an attorney 1) States or alludes at trial to evidence that the attorney knows or reasonably should know is not</p>	<p>4. <u>No change is necessary. The provision from current rule 5-200(E) is properly in proposed Rule 3.4(g) on advocacy and not in this rule.</u></p> <p>5.</p>

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					<p>relevant or admissible evidence, or has already been ruled inadmissible (see <i>Hawk v. Superior Court</i> (1974) 42 Cal App 3d 108, 118); 2) states the attorney's belief in the credibility of a witness (see <i>Hawk v. Superior Court supra</i> 42 Cal App 3d at 123); or 3) includes when an attorney violates discovery orders of a court. CFC recognizes that arguably they could be included in proposed rule 3.4, but they are not there either. They should be somewhere.</p> <p>6. There are too many Comments, many are too long, and they cover subjects and discussions best left to treatises, law review articles, and ethics opinions.</p> <p>7. Comment 3 is too long. If knowingly is stricken from the rule, this Comment should be also stricken. Further, this comment does not address CCP 128.7 or Rule 11 or that an attorney may have a duty to investigate even the client's claims in some situations. (See <i>Butler v. State Bar</i> (1986) 42 Cal.3d 323, 329 ["While an attorney may often rely upon statements made by the client without further</p>	<p>6. As the Commission has noted with respect to other Rules, the comments are an important part of the Rules modeled on the ABA Model Rules, providing clarification of the black letter and guidance to lawyers on how to be in compliance with their professional obligations.</p> <p>7. The Commission disagrees. As to length, see previous paragraph. As to the stated concerns re</p>

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					investigation, circumstances known to the attorney may require an investigation.")]	CCP 128.7, an inquiry is only required if reasonable under the circumstances. As Comment [8] recognizes, a "lawyer cannot ignore an obvious falsehood."
1	San Diego County Bar Association Legal Ethics Committee ("SDCBA")	M	Yes	Paragraph (d)	Agree with a Commission minority that there is "insufficient reason for departing from the ABA standard, followed in most jurisdictions, and that [paragraph subdivision (d)] is unclear and would subject lawyers to being second-guessed on what facts were 'needed' to enable a tribunal to make an informed decision in a particular matter."	The Commission disagreed with SDCBA.
				Comment [9]	The existing ABA Model Rule, making the lawyer take reasonable remedial measures when the lawyer learns of the falsity in response to cross-examination by the opposing lawyer best serves the concept of "Candor Toward the Tribunal," and should remain intact.	<u>Alternative response</u> (proposed by Mark Tuft): The Commission agrees with SDCBA. Paragraph (d) has been changed to track Model Rule paragraph (d) for better clarity and consistency in regulating lawyer conduct. No change is necessary. Comment [9] provides that the duty to take corrective measures applies when the lawyer learns of false testimony occurring on cross examination.
				Comment [6]	It should be noted that the "Explanation of Changes to ABA Model Rule" for Comment [6] notes that a Minority of the Commission believed the clause "or otherwise permit the witness to present testimony that the	The Commission agrees with SDCBA. The Commission believes the change will resolve the need to further explain the relationship between Comment [6] and Comment [9] <u>Alternative response</u> (proposed by Mark Tuft):: The last sentence in Comment [6] has been changed to

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					<p>lawyer knows to be false," in the last sentence of Comment [6], "lays a trap for the unwary lawyer who might call a friendly witness who unexpectedly testifies falsely. . . ." The Majority believed the reading of the subject clause in conjunction with Comment [5] (not a violation if offered to establish its falsity) and Comment [9] (concerning remedial measures available) "assuages the Minority's concerns." SDCBA thinks a clearer explanation of the relationship between Comment [6] and Comment [9] would be helpful to guide the lawyer in applying the proposed rule.</p>	<p>replace the phrase "or otherwise permit the witness to present testimony" with "may not elicit testimony."</p>
2	Zitrin, Richard (on behalf of law professors)	M	Yes	(c)	<p>In sharp contrast to the Model Rule, which requires candor until the matter is resolved, paragraph (c) requires that the duty of candor continues until the conclusion of the proceeding or representation, whichever occurs first. The effect of this provision permits lawyers to absolve themselves of their duty on candor while the adjudicative proceeding is pending. Also, because a lawyer need not have made an appearance in the matter to implicate the duty of candor, the proposed rule may also allow a lawyer to "withdraw" and thus from the duty without any imprimatur from the tribunal.</p>	<p><u>Mark Tuff's proposed response:</u> The Commission agrees with the commenters and has changed paragraph (c) to track the Model Rule. The Commission has also modified Comment [13] by eliminating the first two sentences.</p>

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Rule 3.3 Candor Toward the Tribunal
(Commission's Proposed Rule – 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
 - (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 section 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 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 section 6068(e).
- (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding or the representation, whichever comes first.
- (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all facts known to the lawyer that the lawyer knows or reasonably should know, are needed to 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. See Rule 1.0.1(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. However, 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 make false statements of law or fact or present evidence that the lawyer knows to be false. For example, the prohibition in paragraph (a)(1) against making false statements of law or failing to correct a material misstatement of law includes a prohibition on a lawyer 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.

Representations by a Lawyer

- [3] A lawyer is responsible for pleadings and other documents prepared for litigation but is usually not required to have personal knowledge of the facts asserted therein because litigation documents ordinarily present assertions of fact by the client, or a witness, and not by the lawyer. Compare Rule 3.1. However, an assertion of fact purporting to be based on the lawyer's own knowledge, as in a declaration or 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. *Bryan v. Bank of America* (2001) 86 Cal.App.4th 185 [103 Cal.Rptr.2d 148]. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. *Di Sabatino v. State Bar* (1980) 27 Cal.3d 159 [162 Cal.Rptr. 458]. 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] Although a lawyer is not required to make a disinterested exposition of the law, legal argument based on a knowing false representation of law constitutes dishonesty toward the tribunal. A tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it. Paragraph (a)(2) requires a lawyer to disclose directly adverse and legal authority in the controlling jurisdiction that is known to the lawyer and that has not been disclosed by the opposing party. 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. Under this Rule, the lawyer must disclose authorities the court needs to be aware of in order to rule intelligently on the matter. Paragraph (a)(2) does not impose on lawyers a general duty to cite authority from outside the jurisdiction in which the tribunal is located. Whether a criminal defense lawyer is required to disclose directly adverse legal authority in the controlling jurisdiction involves constitutional principles that are beyond the scope of these Rules. In addition, a lawyer may not knowingly edit and submit to a tribunal language from a book, statute, rule, or decision in such a way as to mislead the court, or knowingly fail to correct an inadvertent material misquotation that the lawyer previously made to the tribunal.

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. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.
- [6] 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 must refuse to offer the false evidence. With respect to criminal defendants, see Comment [7]. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit the testimony that the lawyer knows is false or base arguments to the trier of fact on evidence known to be false.
- [7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. 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. (Business and Professions Code section 6068(d); *People v. Guzman* (1988) 45 Cal.3d 915 [248 Cal.Rptr. 467], disapproved on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069 fn.13 [108 Cal.Rptr.2d 409]; *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]; *People v. Brown* (1988) 203 Cal.App.3d 1335, 1340 [250 Cal.Rptr. 762].) The obligations of a lawyer under these Rules and the State Bar Act are subordinate to applicable constitutional provisions.

- [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. See, e.g., *People v. Bolton* (2008) 166 Cal.App.4th 343, [82 Cal.Rptr.3d 671]. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0.1(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.

Remedial Measures

- [9] 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. The lawyer's proper course is to remonstrate with the client confidentially, advise the client of the consequences of providing perjured testimony and 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 lawyer must take further remedial measures, see Comment [10], and may be required to seek permission to withdraw under Rule 1.16(b), depending on the materiality of the false evidence.

- [10] 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(d), 1.4, 1.16 and 8.4; Business and Professions Code sections 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 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 maintain inviolate under Rule 1.6 and Business and Professions Code section 6068(e).
- [11] A lawyer's duty to take reasonable remedial measures under paragraph (a)(3) is limited to the proceeding in which the lawyer has offered the evidence in question. A lawyer's duty to take remedial measures under paragraph (b) does not apply to another lawyer who is retained to represent a person in an investigation or proceeding concerning that person's conduct in the prior proceeding.

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 relating to the proceeding or failing to disclose information to the tribunal when required by law to do so. See Rule 3.4. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures 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

- [13] Paragraph (c) establishes a practical time limit on the obligation to rectify false evidence or false statements of law and fact. Either the conclusion of the proceeding or of the representation provides a reasonably definite point for the termination of the mandatory obligations under this Rule. 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. There may be obligations that go beyond this Rule. See, e.g., Rule 3.8.

Withdrawal

- [14] 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 taking reasonable remedial measures. 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 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. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. This Rule does not modify the lawyer's obligations under Rule 1.6 and Business and Professions Code section 6068(e) or the California Rules of Court with respect to any request to withdraw that is premised on a client's misconduct.

E-mails, e

June 9, 2010 McCurdy E-mail to Tuft, cc Chair, Vice-Chairs & Staff:

Mark,

Attached is a comprehensive assignment table that lists all of the rules for which you are the lead drafter, along with the names of your codrafters. This message addresses your assignments for the June 25 & 26, 2010 meeting. To minimize email traffic and potential confusion, this message will be copied to your codrafters only after all of the lead drafter assignment messages have been sent.

ASSIGNMENT SUBMISSION DEADLINE: The assignment submission deadline for all assignments is **5:00 pm on Wednesday, June, 16, 2010.**

As mentioned at the June 4 meeting, the agenda for the Commission's June 25 & 26 meeting will involve final action on all of the rules recommended for adoption as well as those not recommended for adoption. This means that there are 85 items that require action. To alleviate some of the burden on Commission members, rules that either receive no comments at all or only comments in support will be prepared by staff and will be acted upon en masse by the Commission through the use of a consent agenda. At present, there are about 45 items that fall into this category.

This message provides the assignment background materials for the assignments listed below for which you are the lead drafter, and which are not being handled by staff as anticipated consent agenda items. The materials attached to this message are a staff prepared draft Public Commenter Chart synopsising all comments/testimony received to date & the current clean draft of a rule as posted for public comment. Consistent with the consent agenda plan, we are only providing assignment materials for those rules that have received a comment in opposition, or a comment stating an "Agree if Modified" position. Your assignment is to review these comments and to prepare a Public Commenter Chart with recommended Commission responses. If the drafters conclude that any revisions to a rule are warranted based on comments received, then a revised draft rule should be prepared. (Note: Where a drafting team decides not to recommend any revisions to a rule, that drafting team recommendation will be included in a second category of consent agenda items for action at the June 25 & 26 meeting.)

If revisions to a rule are recommended, then an updated Dashboard, Introduction, and Model Rule comparison chart also should be prepared to complete the rule package for Board submission. As soon as you or your drafting team determines that it will be recommending revisions to an assigned rule, please promptly inform staff and provide us with your revised Rule. We will create a new Model Rule redline version and middle column of the comparison chart, and provide you with the Word version of that document and any other necessary documents (Dashboard, etc . . .). Please contact us for this assistance once you or your team has determined that a revised rule will be recommended.

Because the comment period deadline of June 15th has not arrived, we may be updating your assignments. For example, a rule that presently has received no comments might receive an opposition comment prior to the June 15th comment deadline and, in that case, we would alert you with an email and provide you with the relevant background materials.

LIST OF ASSIGNED RULES (As explained above, these are rules that presently have received a comment in opposition or a comment stating an "Agree if Modified" position):

- 1.0** (Agenda Item III.A)
- 3.3** (Agenda Item III.MM)
- 4.3** (Agenda Item III.WW)
- 5.1** (Agenda Item III.ZZ)

Please note: The clean Word version of each rule is imbedded in the attached “Clean Version” PDF for each rule. You will see it and be able to open it when you open and view the PDF file.

Use the following link to the Proposed Rules page to find a copy of the Discussion Draft materials for all of the proposed rules as circulating for public comment:

www.calbar.org/proposedrules

Use the following link to review the [full text of public comment letters or transcripts of the public hearings](#):

<http://sites.google.com/site/commentsrrc/>

Please don't hesitate to contact us with any questions you have.

Attached:

RRC - PubCom - 06-25 & 06-26-10 Meeting Assignments - TUFT - DFT1 (06-09-10).pdf
RRC - 2-100 [4-3] - Public Comment Chart - By Commentator - XDFT1 (04-22-10).doc
RRC - 1-310X [5-1] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
RRC - 1-100 [1-0] - Public Comment Chart - By Commenter - XDFT1 (04-22-10)2.doc
RRC - 5-200 [3-3] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
RRC - 1-310X [5-1] - Rule - PCD [10] (09-13-09) - CLEAN-LAND.pdf
RRC - 1-310X [5-1] - Rule - PCD [10] (09-13-09) - CLEAN-LAND.doc
RRC - 1-100 [1-0] - Rule - PCD [8.1] (10-18-09) - CLEAN-LAND.pdf
RRC - 1-100 [1-0] - Rule - PCD [8.1] (10-18-09) - CLEAN-LAND.doc
RRC - 5-200 [3-3] - Rule - PCD [11.1] (02-20-10) - CLEAN-LAND.pdf
RRC - 5-200 [3-3] - Rule - PCD [11.1] (02-20-10) - CLEAN-LAND.doc
RRC - 2-100 [4-3] - Rule - PCD [6] (10-19-09) - CLEAN-LAND.pdf
RRC - 2-100 [4-3] - Rule - PCD [6] (10-19-09) - CLEAN-LAND.doc

June 156, 2010 Tuft E-mail to Drafters (Peck, Ruvolo & Sapiro), cc Staff:

I present you with a revised commenter's chart on Rule 3.3. To ensure that your interest in this exhilarating process does not wane, I have proposed two alternative responses to comments submitted by the San Diego Co. Bar Association; one dealing with whether to track paragraph (d) of the Model Rule with respect to a lawyer's obligations in ex parte proceedings and the other regarding the elegant wording of the last sentence in Comment [6]. Partake but don't over indulge.

Attached:

RRC - 5-200 [3-3] - Public Comment Chart - By Commenter - XDFT2 (06-15-10).doc

June 15, 2010 Peck E-mail to Tuft, cc Drafters & Staff:

I agree with your suggested changes.

June 15, 2010 Ruvolo E-mail to Tuft, cc Drafters & Staff:

I agree with the alternative comments and the proposed changes.

June 15, 2010 Sapiro E-mail to Tuft, cc Drafters & Staff:

Although I disagreed with the wording of Comments 9 and 6, I do agree with your rewording of the responses to San Diego regarding them.

I disagree with your proposed response regarding paragraph (d). My copy of proposed Rule 3.3(d) [dated May 17, 2010] does not include the word “material.” If that is correct, then, to me, that is a material [pardon the pun] deviation from the Model Rule and creates the risk about which San Diego complains. Instead of being obliged to disclose only the material facts, a lawyer in an ex parte proceeding will have to disclose “all facts” needed to enable the tribunal to make an informed decision. OCTC and opposing counsel will, by hindsight, contend that our rule requires disclosure of more than just the “material” facts because we deleted “material” from the Model Rule, and, if a lawyer has not disclosed “all facts” potentially relevant, contend that the lawyer should be disciplined. If my memory is correct, that is one of the reasons I dissented from this rule. I do not think we should suggest that our proposal is the same as the Model Rule, because it is not.

In looking at the draft rule, I perceive a nit we should pick. There is a comma after “or reasonably should know.” I think that we should either delete that comma or should insert a comma before that phrase. I prefer the latter.

June 16, 2010 Tuft E-mail to Sapiro, cc Drafters & Staff:

Jerry, my alternative response advocates that we do change paragraph (d) back to track the Model Rule paragraph and not retain such an overly broad, and in my view, unworkable, standard for lawyers in California. There has been no evidence presented justifying the need for such a unique departure from the generally accepted standard.

June 16, 2010 Peck E-mail to Drafters, cc Staff:

I AGREE WITH MARK'S PROPOSED CHANGE.

June 16, 2010 Ruvolo E-mail to Drafters, cc Staff:

Me too.

June 16, 2010 McCurdy E-mail to Tuft, cc Chair, Vice-Chairs & Staff:

Mark,

Additional comments in opposition or recommending modifications have been received for the following rules. The Google site is also up-to-date

<http://sites.google.com/site/commentstrrc/byrule> .

- 1.0 (Agenda Item III.A) - OCTC (sent with Randy's 6/15/10 e-mail)
- 1.4.1 (Agenda Item III.F) - OCTC (sent with Randy's 6/15/10 e-mail)
- 1.8.11 (Agenda Item III.V) - OCTC (sent with Randy's 6/15/10 e-mail)
- 1.10 (Agenda Item III.X) - OCTC (sent with Randy's 6/15/10 e-mail)
- 1.13 (Agenda Item III.AA) - OCTC (sent with Randy's 6/15/10 e-mail)
- 3.1 (Agenda Item III.KK)- OCTC (sent with Randy's 6/15/10 e-mail)
- 3.3 (Agenda Item III.MM) – 2 Comments: OCTC; and, Zitrin/Law Professors (sent with Randy's 6/15/10 e-mail)
- 4.3 (Agenda Item III.WW) - OCTC (sent with Randy's 6/15/10 e-mail)
- 4.4 (Agenda Item III.YY) – Co-Lead w/Martinez – 2 Comments: OCTC; and, Law Practice Management & Technology Section (sent with Randy's 6/15/10 e-mail)
- MR 4.4(a)** (Agenda Item III.XX – NRFA) – Co-Lead w/Martinez – 1 Comment: Zitrin/Law Professors (sent with Randy's 6/15/10 e-mail)
- 5.1 (Agenda Item III.ZZ) – 2 Comments: OCTC; and, Law Practice Management & Technology Section (sent with Randy's 6/15/10 e-mail)
- 5.2 (Agenda Item III.AAA) - OCTC (sent with Randy's 6/15/10 e-mail)
- 5.3 (Agenda Item III.BBB) - OCTC (sent with Randy's 6/15/10 e-mail)

NOTE: As previously mentioned, the most important information needed for the assignment deadline and for preparing the agenda is the codrafters' decision as to whether revisions to a rule are being recommended. We need to know this in order to determine which rules will be consent items and which rules will not be consent items.

In reviewing public comments, although drafting RRC responses are important and need to be completed prior to the meeting, the primary information that must be submitted for the agenda are any and all proposed language changes to the rules. Please keep this mind when reviewing the public comments and when preparing your assignment submissions.

This message may include assignments for rules for which staff has not yet provided a draft commenter chart. We hope to provide any such charts as soon as possible, by a separate message.

Please note that the assignment deadline for these rules remains the same as previously stated -- **5:00 pm on Wednesday, June, 16, 2010.**

June 16, 2010 Tuft E-mail to Drafters, cc Staff:

I agree with the 29 California law professors' comment regarding paragraph (c) of Rule 3.3 and have revised the Commenters' Chart to reflect my recommendation that we track the Model Rule approach instead of the lawyer centric approach reflected in the current draft.

Attached:

RRC - 5-200 [3-3] - Public Comment Chart - By Commenter - XDFT2.1 (06-16-10).doc

June 16, 2010 Peck E-mail to Drafters, cc Staff:

I do not agree with Mark and the 29 law professors. I think the rule should remain as drafted.

June 16, 2010 KEM E-mail to Drafters, cc Staff:

Mark and all:

I've attached XDraft 2.2 (6/16/10)MLT-KEM to this E-mail. I've inserted the OCTC comments re this rule and, where possible w/o spending too much time, I've provided responses (mostly just our responses to OCTC's initial public comment submission). My additions are highlighted in yellow. However, there are three points that OCTC makes that require a response -- See paragraphs 3-5 on page 3-4 of the attached chart. The points are highlighted in turquoise.

As near as I can tell, the comments from OCTC and Zitrin et al are the only new comments on this Rule. Previously we received the resubmitted comments of SDCBA.

Please let me know if you have any questions.

Attached:

RRC - 5-200 [3-3] - Public Comment Chart - By Commenter - XDFT2.2 (06-16-10)MLT-KEM.doc

June 17, 2010 Tuft E-mail to KEM, cc Drafters & Staff:

Kevin, my proposed responses to two of the three remaining comments submitted by OCTC are set out in bold type in the attached draft. I also added a further response to the comment about adding "artifice" to rule 3.3. However, I do not have a good response for the fifth comment as to why we are not including the prohibition against alluding to matters at trial that the lawyer does not reasonably believe are relevant or that will not be supported by admissible evidence other than to say those are matters properly for Rule 3.4 and not Rule 3.3. I am not able to come up with the justification for why our Rule 3.4(g) departs so significantly from Model Rule 3.4(c). I am confident I voted against deleting these provisions. I suggest we consider whether we want to revised Rule 3.4(g) in view of OCTC comment.

Attached:

RRC - 5-200 [3-3] - Public Comment Chart - By Commenter - XDFT2.3 (06-17-10)MLT-KEM.doc

June 17, 2010 Ruvolo E-mail to Drafters, cc Staff:

I agree with Mark's suggested alt comments & the 29 profs.

June 20, 2010 Kehr E-mail to RRC:

[Here are my thoughts on this one:](#)

1. I disagree with the proposed RRC Response to OCTC 2 regarding the absence of “artifice”. B/c that word is in rule 5-200 and remains in 6068(d), its absence from 3.3 likely will lead to questions about what we had in mind and whether we intended to provide for something narrower than the statute. If we don’t – and I don’t imagine that we do – I see no good reason to omit the word now. The Response says that the term has not received sufficient application or interpretation to provide lawyers with adequate advance guidance. I did a search in CA cases for (artifice w/s lawyer! or attorney!) and received 114 hits (some of which are non-published). I repeated the search within a paragraph and the number of hits went up to 142. Also, I disagree with the last sentence. I do not see how compliance will be fostered by copying the MR, a point likely to be lost on every reader who does not begin with a background in the rules of another jurisdiction.
2. I generally agree with the proposed Response to OCTC’s third point, but I wonder if we could say affirmatively that the Commission does not intend the wording changes noted by OCTC to alter a lawyer’s current duties to courts.
3. There is no proposed Response to the OCTC comment 5. I suggest: “Neither the current California Rules of Professional Conduct nor these proposals make any attempt to identify every situation in which a lawyer has been or might be sanctioned or disciplined. The sanctioning in *Hawk*, which was an order of contempt issued by a court and not professional discipline by the State Bar, would not have a different result under the proposed new rules as the rules cited there are found in the same or substantially the same form in the proposed new rules.
4. With respect to OCTC comment 7, I’m not certain that inferring knowledge from the circumstances means the same as the *Butler* quote that a lawyer might have an obligation to inquire. Getting this wrong would mislead lawyers about their duties under *Butler*. I ask that we discuss changing paragraph (a)(3) to: “knows or reasonably should know ...” If the commission were to do that, the word “knowingly” should be removed from the first portion of (a) and placed at the beginning of (a)(1) and (a)(2). I then would add a *Butler* cite to Comment [8], I think after what now is its final sentence, along the lines of: “In addition, there might be circumstances known to a lawyer that would require the lawyer to investigate the accuracy of statements made by a client.” (with a cite to *Butler*)
5. I continue to agree with the support for the current, narrower version of paragraph (c) expressed by COPRAC (see the 11/24/09 version of our commenter chart) and explained in the RRC Response in that version of the chart. I support Ellen’s 6/16/10 email on this.

June 21, 2010 McCurdy E-mail to Tuft, cc Chair, Vice-Chairs & Staff:

Mark,

This message provides a public commenter chart for every rule you are assigned as a lead or co-lead drafter. We have reconciled all of the comments received against each commenter chart and there should now be a synopsis for every comment received. However, there are a

**RRC – Rule 3.3 [5-200]
E-mails, etc. – Revised (6/21/2010)**

number of comments for which an RRC Response is needed. Please take a look at each table and fill in any missing RRC Responses.

Our goal is to send out a supplemental mailing providing a copy of all of the final or near-final commenter charts on Tuesday or Wednesday, for receipt prior to the meeting this week.

If possible, please provide us with any revised charts no later than 5:00 pm, Tuesday, June 22nd.

Attached:

RRC - [4-4] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc
RRC - [4-4(a)] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc
RRC - 1-310X [5-1] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc
RRC - 1-310X [5-2] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc
RRC - 1-310X [5-3] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc
RRC - 3-310 [1-10] - Public Comment Chart - By Commenter - XDFT2.1 (06-21-10).doc
RRC - 3-320 [1-8-11] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc
RRC - 3-600 [1-13] - Public Comment Chart - By Commenter - XDFT2.2 (06-21-10)MLT-KEM.doc
RRC - 3-200 [3-1] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc
RRC - 1-100 [1-0] - Public Comment Chart - By Commenter - XDFT3.1 (06-12-10)KEM.doc
RRC - 3-410 [1-4-1] - Public Comment Chart - By Commenter - XDFT2.2 (06-19-10).doc
RRC - 5-200 [3-3] - Public Comment Chart - By Commenter - XDFT2.3 (06-17-10)MLT-KEM.doc
RRC - [4-1] - Public Comment Chart - By Commenter - XDFT2 (06-15-10).doc
RRC - 2-100 [4-3] - Public Comment Chart - By Commentator - XDFT2.4 (06-19-10)MLT-RM-RD-KEM.doc

June 21, 2010 Sapiro E-mail to RRC List:

1. One of the reasons that I dissented from Rule 3.3 is the wording of paragraph (d). Unlike the Model Rule, a proposal does not include the word “material.” To me, that is a material [pardon the pun] deviation from the Model Rule and creates the risks about which the San Diego County Bar Association complains. Instead of being obliged to disclose only the material facts, under our proposal a lawyer in an ex parte proceeding will have to disclose “all facts” needed to enable the tribunal to make an informed decision. OCTC and opposing counsel will, by hindsight, contend that our rule requires disclosure of more than just the “material” facts because we deleted “material” from the Model Rule. If a lawyer has not disclosed “all facts” that are potentially relevant, OCTC and opposing counsel will contend that the lawyer should be disciplined.
2. Having said that, I would not support adopting all of the Model Rule.
3. In reviewing the draft rule, there is a nit in paragraph (d) we should pick. There is a comma after the phrase “or reasonably should know.” I think that we should either delete that comma, or insert a comma before that phrase. I prefer inserting a comma before that phrase.
4. I respectfully disagree with Bob’s recommendation in his paragraph 4. Part of the OCTC comment is that the standard should be gross negligence. Adding “or reasonably should know” would reduce the standard to simple negligence.

June 22, 2010 Tuft E-mail to RRC (Response to Kehr E-mail):

1. Greater uniformity in the rules improves lawyer understanding and compliance and results in less discipline. Adding "artifice" to rule 3.3 would create the same quandary for lawyers as current rule 5-200 which simply mirrors 6068(d). I can attest that students do not understand what "artifice" means as applied to legitimate advocacy and clever argument and I doubt lawyers do either. Artifice comes from the 19th Century "Field" Code and is not a term used in modern lawyer codes. It fails to provide advance notice to lawyers in modern practice of circumstances where legitimate cleverness, inventiveness and finesse crosses the line and becomes an "artifice" in violation of 6068(d). If OCTC wants to prosecute lawyers for an artifice that does not constitute a false statement of fact or law, they can do so under 6068(d).
2. Ok with me.
3. My response to OCTC's comment 4 was intended to apply to OCTC's comment 5. Rule 3.4 and not 3.3 applies. Bob's proposed response can also be added.
4. I oppose changing paragraph (a)(3) to a "knows or reasonably should know" standard and I do not think the quote from *Butler* requires that we do so.
5. I think the law professors are correct and our unique version of paragraph (c) will be seen as lawyer centric and not as public protection.

**Rule 3.3 Candor Toward the Tribunal.
[Sorted by Commenter]**

TOTAL = 3 Agree =
 Disagree =
 Modify = 3
 NI =

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
3	Office of Chief Trial Counsel ("OCTC")	M	Yes		1. OCTC is concerned that this proposed rule requires knowingly. Rule 1.0 defines knowingly as "actual knowledge." However, this is contrary to established California law. An attorney's unqualified and unequivocal statements to judges under circumstances that should have caused him or her at least some uncertainty are at a minimum deceptive and support a finding of culpability. (In the <i>Matter of Chesnut</i> (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 173-174.) That is, California disciplines attorneys for dishonesty or moral turpitude based on gross negligence. (See sections 6068(d) and 6106; <i>Vaughn v. State Bar</i> (1972) 6 Cal.3d 847, 857 and 859; <i>In the Matter of Harney</i> (Review Dept. 1995) 3 Cal. State Bar 266, 2381-282; <i>In the Matter of Chesnut</i> (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 173-174; <i>In the Matter of Dale</i> (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 798 [gross negligence in representation to third party]; <i>In the Matter of Loftus</i> (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 80; <i>In the Matter of Casey</i> (Review Dept. 2008) 5 Cal. State Bar Ct.	1. The Commission disagrees. Both <i>Harney</i> and <i>Chesnut</i> were decided under Bus. & Prof. Code § 6068(d), and would not be affected by this Rule. Moreover, the definition of "know" in proposed Rule 1.0.1(f) (based on MR 1.0(f)) does not permit reckless disregard of the facts.

**Rule 3.3 Candor Toward the Tribunal.
[Sorted by Commenter]**

TOTAL = 3 Agree =
 Disagree =
 Modify = 3
 NI =

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>Rptr. 117. See also Comment 2B to proposed rule 8.4.) In fact, CCP section 128.7 requires that all statements in pleadings be made "after an inquiry reasonable under the circumstances." We should not be allowing lawyers to make false statements without proper inquiry and a good faith basis for the statement. Moreover, while good faith may be a defense to a charge of misrepresentation, this is because it is a statutory violation, not a rule violation. Good faith is generally not a defense to a violation of a Rule of Professional Conduct. (See <i>In the Matter of Broderick</i> (Review Dept. 1994) 3 Cal. State Bar Ct. Rpt. 138, 148; <i>Zitny v. State Bar, supra</i>, 64 Cal.2d at 793.) Further, this rule is inconsistent with proposed rules 8.2, 8.4, 4.2, and Comment 2B of proposed rule 8.4. While negligence is not a basis for discipline, gross negligence is. While we could still prosecute attorneys for gross negligence under sections 6068(d) and 6106 (and apparently 8.4) that creates inconsistent duties and could mislead attorneys into believing that actual knowledge is required for discipline when gross negligence can support discipline for this conduct.</p>	

**Rule 3.3 Candor Toward the Tribunal.
[Sorted by Commenter]**

TOTAL = 3 Agree =
Disagree =
Modify = 3
NI =

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>2. OCTC is concerned that the proposed rule omits the term "artifice" as provided in current rule 5-200(b). If the Commission is intending to further limit the rule, OCTC opposes that. OCTC believes the word should remain in the rule.</p>	<p>2. The Commission disagrees that removing "artifice" from the Rule will narrow OCTC's ability to charge lawyers. The word is found in Bus. & Prof. Code § 6068(d), so OCTC will not lose the ability to make such a charge. Moreover, the term "artifice" is from an statute enacted in 1872 and is not a term that is in common usage in modern lawyer regulation or is one that has received sufficient application or interpretation to provide lawyers with adequate advance guidance. The Commission believes that closely tracking the wording of the Model Rule will enhance compliance with the duty of candor and provide better public protection.</p>
					<p>3. OCTC is concerned that the proposed rule omits without Comment the following language in the current rule: 1) prohibiting an attorney from intentionally misquoting to a tribunal the language of a book, statute or decision; and 2) shall not knowing its invalidity cite as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional. (See current rule 5-200(c) and (d).) OCTC is aware that some of this language was removed by the Board of Governors because they believed that it was duplicative of proposed rule 3.3(a)(1)</p>	<p>3. The Commission disagrees that the proposed rule signals a change in the law regarding the proper citing of legal authority and believes that Comments [2] and [4] make it sufficiently clear that the prohibitions under current 5-200(c) come with the provisions of paragraph (a) and that no further comment is necessary.</p>

**Rule 3.3 Candor Toward the Tribunal.
[Sorted by Commenter]**

TOTAL = 3 Agree =
 Disagree =
 Modify = 3
 NI =

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>and (2). However, some form of this language has existed in the rules since the original Rules of Professional Conduct. OCTC requests a comment to explain that this is not a change in the law, but merely because it is already covered by proposed rule 3.3(a)(1) and (2).</p> <p>4. OCTC is concerned that the rule omits the language in current rule 5-200(E) that an attorney "[s]hall not assert personal knowledge of the facts at issue, except when testifying as a witness." OCTC knows of no reason to omit that language and has seen attorneys violate this rule in an attempt to prejudice a party and deny them a fair trial. (See e.g. <i>In the Matter of Philip E. Kay</i>, Case No. 01-0-193. The hearing department finding and recommendation in Kay's case is currently pending before the California Supreme Court, Supreme Court Case No. S 180405.) OCTC suggests that this language be included in the rule.</p> <p>5. In a similar vein, OCTC is concerned that nowhere in the proposed rules do they provide for when an attorney 1) states or alludes at trial to evidence that the attorney knows or reasonably should know is not</p>	<p><u>4. No change is necessary. The provision from current rule 5-200(E) is properly in proposed Rule 3.4(g) on advocacy and not in this rule.</u></p> <p>5.</p>

**Rule 3.3 Candor Toward the Tribunal.
[Sorted by Commenter]**

TOTAL = 3 Agree =
 Disagree =
 Modify = 3
 NI =

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>relevant or admissible evidence or has already been ruled inadmissible (see <i>Hawk v. Superior Court</i> (1974) 42 Cal.App.3d 108, 118); 2) states the attorney's belief in the credibility of a witness (see <i>Hawk v. Superior Court, supra</i>, 42 Cal.App.3d at 123); or 3) includes when an attorney violates discovery orders of a court. OCTC recognizes that arguably they could be included in proposed rule 3.4, but they are not there either. They should be somewhere.</p> <p>6. There are too many Comments, many are too long, and they cover subjects and discussions best left to treatises, law review articles, and ethics opinions.</p> <p>7. Comment 3 is too long. If knowingly is stricken from the rule, this Comment should be also stricken. Further, this comment does not address CCP 128.7 or Rule 11 or that an attorney may have a duty to investigate even the client's claims in some situations. (See <i>Butler v. State Bar</i> (1986) 42 Cal.3d 323, 329 ["While an attorney may often rely upon statements made by the client without further</p>	<p>6. As the Commission has noted with respect to other Rules, the comments are an important part of the Rules modeled on the ABA Model Rules, providing clarification of the black letter and guidance to lawyers on how to be in compliance with their professional obligations.</p> <p>7. The Commission disagrees. As to length, see previous paragraph. As to the stated concerns re CCP 128.7, an inquiry is only required if reasonable under the circumstances. As Comment [8] recognizes, a "lawyer cannot ignore an obvious falsehood."</p>

**Rule 3.3 Candor Toward the Tribunal.
[Sorted by Commenter]**

TOTAL = 3 Agree =
Disagree =
Modify = 3
NI =

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					investigation, circumstances known to the attorney may require an investigation."])	
1	San Diego County Bar Association Legal Ethics Committee ("SDCBA")	M	Yes	Paragraph (d)	Agree with a Commission minority that there is "insufficient reason for departing from the ABA standard, followed in most jurisdictions, and that [paragraph subdivision (d)] is unclear and would subject lawyers to being second-guessed on what facts were 'needed' to enable a tribunal to make an informed decision in a particular matter."	The Commission disagreed with SDCBA. <u>Alternative response</u> (proposed by Mark Tuft): The Commission agrees with SDCBA. Paragraph (d) has been changed to track Model Rule paragraph (d) for better clarity and consistency in regulating lawyer conduct.
				Comment [9]	The existing ABA Model Rule, making the lawyer take reasonable remedial measures when the lawyer learns of the falsity in response to cross-examination by the opposing lawyer best serves the concept of "Candor Toward the Tribunal," and should remain intact.	No change is necessary. Comment [9] provides that the duty to take corrective measures applies when the lawyer learns of false testimony occurring on cross examination.
				Comment [6]	It should be noted that the "Explanation of Changes to ABA Model Rule" for Comment [6] notes that a Minority of the Commission believed the clause "or otherwise permit the witness to present testimony that the lawyer knows to be false," in the last sentence of Comment [6], "lays a trap for the unwary lawyer who might call a friendly witness who unexpectedly testifies falsely. . . ." The Majority believed the reading of	The Commission agrees with SDCBA. The Commission believes the change will resolve the need to further explain the relationship between Comment [6] and Comment [9] <u>Alternative response</u> (proposed by Mark Tuft):: The last sentence in Comment [6] has been changed to replace the phrase "or otherwise permit the witness to present testimony" with "may not elicit testimony."

**Rule 3.3 Candor Toward the Tribunal.
[Sorted by Commenter]**

TOTAL = 3 Agree =
Disagree =
Modify = 3
NI =

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					the subject clause in conjunction with Comment [5] (not a violation if offered to establish its falsity) and Comment [9] (concerning remedial measures available) "assuages the Minority's concerns." SDCBA thinks a clearer explanation of the relationship between Comment [6] and Comment [9] would be helpful to guide the lawyer in applying the proposed rule.	
2	Zitrin, Richard (on behalf of law professors)	M	Yes	(c)	In sharp contrast to the Model Rule, which requires candor until the matter is resolved, paragraph (c) requires that the duty of candor continues until the conclusion of the proceeding or representation, whichever occurs first. The effect of this provision permits lawyers to absolve themselves of their duty on candor while the adjudicative proceeding is pending. Also, because a lawyer need not have made an appearance in the matter to implicate the duty of candor, the proposed rule may also allow a lawyer to "withdraw" and thus from the duty without any imprimatur from the tribunal.	<u>Mark Tuff's proposed response:</u> The Commission agrees with the commenters and has changed paragraph (c) to track the Model Rule. The Commission has also modified Comment [13] by eliminating the first two sentences.

Rule 3.3 Candor Toward the Tribunal
(Commission's Proposed Rule – 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
 - (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 section 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 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 section 6068(e).
- (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding or the representation, whichever comes first.
- (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all facts known to the lawyer that the lawyer knows or reasonably should know, are needed to 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. See Rule 1.0.1(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. However, 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 make false statements of law or fact or present evidence that the lawyer knows to be false. For example, the prohibition in paragraph (a)(1) against making false statements of law or failing to correct a material misstatement of law includes a prohibition on a lawyer 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.

Representations by a Lawyer

- [3] A lawyer is responsible for pleadings and other documents prepared for litigation but is usually not required to have personal knowledge of the facts asserted therein because litigation documents ordinarily present assertions of fact by the client, or a witness, and not by the lawyer. Compare Rule 3.1. However, an assertion of fact purporting to be based on the lawyer's own knowledge, as in a declaration or 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. *Bryan v. Bank of America* (2001) 86 Cal.App.4th 185 [103 Cal.Rptr.2d 148]. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. *Di Sabatino v. State Bar* (1980) 27 Cal.3d 159 [162 Cal.Rptr. 458]. 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] Although a lawyer is not required to make a disinterested exposition of the law, legal argument based on a knowing false representation of law constitutes dishonesty toward the tribunal. A tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it. Paragraph (a)(2) requires a lawyer to disclose directly adverse and legal authority in the controlling jurisdiction that is known to the lawyer and that has not been disclosed by the opposing party. 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. Under this Rule, the lawyer must disclose authorities the court needs to be aware of in order to rule intelligently on the matter. Paragraph (a)(2) does not impose on lawyers a general duty to cite authority from outside the jurisdiction in which the tribunal is located. Whether a criminal defense lawyer is required to disclose directly adverse legal authority in the controlling jurisdiction involves constitutional principles that are beyond the scope of these Rules. In addition, a lawyer may not knowingly edit and submit to a tribunal language from a book, statute, rule, or decision in such a way as to mislead the court, or knowingly fail to correct an inadvertent material misquotation that the lawyer previously made to the tribunal.

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. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.
- [6] 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 must refuse to offer the false evidence. With respect to criminal defendants, see Comment [7]. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit the testimony that the lawyer knows is false or base arguments to the trier of fact on evidence known to be false.
- [7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. 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. (Business and Professions Code section 6068(d); *People v. Guzman* (1988) 45 Cal.3d 915 [248 Cal.Rptr. 467], disapproved on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069 fn.13 [108 Cal.Rptr.2d 409]; *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]; *People v. Brown* (1988) 203 Cal.App.3d 1335, 1340 [250 Cal.Rptr. 762].) The obligations of a lawyer under these Rules and the State Bar Act are subordinate to applicable constitutional provisions.

- [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. See, e.g., *People v. Bolton* (2008) 166 Cal.App.4th 343, [82 Cal.Rptr.3d 671]. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0.1(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.

Remedial Measures

- [9] 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. The lawyer's proper course is to remonstrate with the client confidentially, advise the client of the consequences of providing perjured testimony and 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 lawyer must take further remedial measures, see Comment [10], and may be required to seek permission to withdraw under Rule 1.16(b), depending on the materiality of the false evidence.

- [10] 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(d), 1.4, 1.16 and 8.4; Business and Professions Code sections 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 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 maintain inviolate under Rule 1.6 and Business and Professions Code section 6068(e).
- [11] A lawyer's duty to take reasonable remedial measures under paragraph (a)(3) is limited to the proceeding in which the lawyer has offered the evidence in question. A lawyer's duty to take remedial measures under paragraph (b) does not apply to another lawyer who is retained to represent a person in an investigation or proceeding concerning that person's conduct in the prior proceeding.

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 relating to the proceeding or failing to disclose information to the tribunal when required by law to do so. See Rule 3.4. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures 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

[13] Paragraph (c) establishes a practical time limit on the obligation to rectify false evidence or false statements of law and fact. Either the conclusion of the proceeding or of the representation provides a reasonably definite point for the termination of the mandatory obligations under this Rule. 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. There may be obligations that go beyond this Rule. See, e.g., Rule 3.8.

Withdrawal

[14] 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 taking reasonable remedial measures. 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 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. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. This Rule does not modify the lawyer's obligations under Rule 1.6 and Business and Professions Code section 6068(e) or the California Rules of Court with respect to any request to withdraw that is premised on a client's misconduct.