

Lee, Mimi

From: Marlaud, Angela
Sent: Wednesday, November 25, 2009 8:30 AM
To: CommissionerJ2@gmail.com; Difuntorum, Randall; hbsondheim@verizon.net; ignazio.ruvolo@jud.ca.gov; jsapiro@sapirolaw.com; kemohr@charter.net; kevin_e_mohr@csi.com; kevinm@wsulaw.edu; kmelchior@nossaman.com; Lee, Mimi; linda.foy@jud.ca.gov; Marlaud, Angela; martinez@lbbslaw.com; McCurdy, Lauren; mtuft@cwclaw.com; pecklaw@prodigy.net; pwvapnek@townsend.com; rlkehr@kscllp.com; slamport@coxcastle.com; snyderlaw@charter.net
Subject: FW: Final RRC Agenda Submission - 3.3 [5-200] - III.D. - December 11-12, 2009 Agenda Materials
Attachments: RRC - 5-200 [3-3] - Dash, Intro, Rule, Red-MR, PubCom - COMBO - DFT2 (11-24-09) KEM.pdf

From: Kevin Mohr [mailto:kemohr@charter.net]
Sent: Tuesday, November 24, 2009 8:20 PM
To: Marlaud, Angela
Cc: Mark Tuft; Ellen Peck; Ignazio J. Ruvolo; Jerome Sapiro; Harry Sondheim; Difuntorum, Randall; McCurdy, Lauren; Lee, Mimi; Kevin Mohr G
Subject: Final RRC Agenda Submission - 3.3 [5-200] - III.D. - December 11-12, 2009 Agenda Materials

Greetings Angela:

I've attached a single, scaled PDF file that includes the following documents for this Rule (please use this e-mail as the cover memo for the Agenda item):

1. Dashboard, Draft 2 (11/24/09)KEM;
2. Introduction, Draft 3 (11/24/09)KEM - Cf. to DFT2.1 (the draft that was circulated for public comment);
3. Rule, Draft 9 (11/24/09), redline, compared to Pub Com Draft [#8.1] (4/12/09);
4. Rule, Draft 9 (11/24/09), redline, compared to MR 3.3 (2002);
5. Public Comment Chart, Draft 2.1 (11/24/09).

NOTES TO COMMISSION:

1. Dashboard. When we sent out this rule for public comment, we had not yet "invented" the Dashboard. It is new; I've numbered it "Draft 2" to distinguish it from the Draft 1 that Lauren circulated to the drafters on 11/10/09). Some issues:

a. Given the proposed post-public comment revisions to the Rule, I think we can fairly say that we have substantially adopted the Rule. I'm not so sure about the Comments.

- b. I've checked it as "moderately controversial," which I think is fair given the public comment received.
2. Introduction. A few minor edits (date, draft # in the footnote). Anticipating that the RRC will approve the proposed change to (a)(2), I've also changed the text of the Introduction to conform to that change.
3. Rule Draft 9, compared to Pub Com Draft.
- a. I've inserted footnotes where the Drafters have either proposed a change in response to public comment OR where the drafters disagree about the change and want a vote from the Commission. To fully appreciate the recommendations, please refer to item #5, the public comment chart, which summarizes the public comment and provides a road map for what the Drafters recommend.
- b. Note that staff will revise those parts of the public comment that are directed to the Commission, i.e., the recommendations. They will either be rewritten as a fait accompli or revised to state the Commission disagrees, etc.
4. Rule Draft 9, compared to MR 3.3. I've included this in lieu of the comparison chart, which can't be completed until the Commission resolves the issues identified in Item #3.
5. Public Comment Chart. Please review this in tandem w/ Item #3 to get the full picture on the proposed changes.

I'll circulate the underlying Word documents to the drafters and staff at a later date.

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

Kevin

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Proposed Rule 3.3 [5-200] “Candor Toward the Tribunal”

(Draft #9, 11/24/09)

Summary: Proposed Rule 3.3, which is based on Model Rule 3.3, sets forth specific duties of a lawyer in representing a client in a matter before a tribunal. The Rule replaces current Rule 5-200 (Trial Conduct), which is narrower in scope than Model Rule 3.3. The Rule imposes on lawyers the same duties as the Model Rule to avoid conduct that undermines the integrity of the adjudicative process, with several significant differences. See Introduction & Explanation of Changes.

Comparison with ABA Counterpart	
Rule	Comment
<input checked="" type="checkbox"/> ABA Model Rule substantially adopted <input type="checkbox"/> ABA Model Rule substantially rejected <input checked="" type="checkbox"/> Some material additions to ABA Model Rule <input checked="" type="checkbox"/> Some material deletions from ABA Model Rule <input type="checkbox"/> No ABA Model Rule counterpart	<input checked="" type="checkbox"/> ABA Model Rule substantially adopted <input type="checkbox"/> ABA Model Rule substantially rejected <input checked="" type="checkbox"/> Some material additions to ABA Model Rule <input checked="" type="checkbox"/> Some material deletions from ABA Model Rule <input type="checkbox"/> No ABA Model Rule counterpart

Primary Factors Considered

Existing California Law

Rules

RPC 5-200

Statute

Case law

State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(14 Members Total – votes recorded may be less than 14 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption

Vote (see tally below)

Favor Rule as Recommended for Adoption _____

Opposed Rule as Recommended for Adoption _____

Abstain _____

Approved on Consent Calendar

Approved by Consensus

Minority/Position Included on Model Rule Comparison Chart: Yes No

Stakeholders and Level of Controversy

No Known Stakeholders

The Following Stakeholders Are Known:

Very Controversial – Explanation:

Moderately Controversial – Explanation:

The Rule imports into the disciplinary rules several duties that are not expressed in current rule 5-200, but which are established in case law.

Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 3.3* Candor to the Tribunal

~~April-November~~ 2009

(Draft rule ~~prepared for circulation for~~following consideration of public comment)

INTRODUCTION:

Proposed Rule 3.3 sets forth specific duties of a lawyer in representing a client in a matter before a tribunal. The proposed rule replaces current Rule 5-200 (Trial Conduct), which is less precise and narrower in scope than Model Rule 3.3. The proposed rule sets forth substantially the same special duties of lawyers, as officers of the court to avoid conduct that undermines the integrity of the adjudicative process, as the Model Rule with several significant differences. The differences between proposed Rule 3.3 and the Model Rule relate primarily to California's policy of strictly limiting disclosures of confidential client information. See, e.g., Explanation of Changes for paragraphs (a)(3), (b) and (c). Other changes in the comments include a more detailed discussion of a lawyer's obligations to cite ~~controlling legal~~ authority in the controlling jurisdiction, (Comment [4]), a discussion of California authority governing a lawyer's conduct when representing a criminal defendant who chooses to testify (Comment [7]), and consideration of the more limited remedial measures available in light of California's confidentiality duty (Comments [9]-[11].)

* Proposed Rule 3.3, Draft 9 (11/24/09).

Rule 3.3 Candor Toward the Tribunal

- (a) A lawyer shall not knowingly:
- (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
 - (2)¹ fail to disclose to the tribunal ~~controlling~~ legal authority in the controlling jurisdiction² known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;
 - (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence, and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal, unless disclosure is prohibited by Business and Professions Code section 6068(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; or
 - (4) cite as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional, or fail to correct such a citation previously made to the tribunal by the lawyer.
- (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 Business and Professions Code section 6068(e).³
- (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding.⁴

¹ **Drafters' Recommendation:** Both Michael Judge, L.A. Public Defender, and the Cal. Public Defenders Association ("CPDA") recommend deletion of subparagraph (a)(2). The drafters disagree. See RRC Response to CPDA's objection to (a)(2) in the Public Comment Chart.

² **Drafters' Recommendation:** In light of the submissions of Michael Judge, the Cal. Pub. Def. Assn., LACBA, Fukai & Scofield, restore Model Rule 3.3(a)(2) and revise Comment [4], below.

³ **Drafters' Note:** LACBA proposed the addition of this language at the end of paragraph (b). The drafters do not agree it is necessary but request that the Commission vote on the proposal.

⁴ **Drafters' Note:** The drafters continue to disagree whether paragraph (c) should continue to track the Model Rule or be limited as recommended by COPRAC and the minority view and, therefore, recommend that the issue be decided by a vote of the RRC. COPRAC and the minority would prefer to see the duty in paragraph (c) end with the conclusion (termination) of the representation.

Points in favor of retaining current paragraph (c) include: (1) a lawyer who has been terminated or has withdrawn does not lack standing to correct the lawyer's false statement of material law or fact under

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- (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 will~~⁵ 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(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.

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 [1.2.1] not to counsel

paragraph (a); (2) the lawyer would not interfere with the relationship between the former client and the client’s new lawyer by advising the new lawyer of relevant facts including the existence of criminal or fraudulent conduct in the proceeding or urging that corrective action be taken (see Comment [10]); (3) the lawyer may only take remedial measures under paragraph (a)(3) and (b) to the extent permitted under Business and Professions Code §6068(e); (4) COPRAC’s proposal would allow lawyers to circumvent paragraphs (a) and (b) by simply withdrawing from the representation; and (5) no known state variation limits paragraph 3.3(c) as proposed.

⁵ **Drafters’ Recommendation:** In light of the submissions of COPRAC and SDCBA, restore Model Rule 3.3(d).

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a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule [1.2.1], 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 ~~controlling~~ legal authority in the controlling jurisdiction⁶ that is known to the lawyer and that has not been disclosed by the opposing party. ~~“Controlling legal authority” may include authority outside the jurisdiction in which the tribunal sits. 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.~~ 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 or otherwise permit the witness to present the testimony that the lawyer knows is false or base arguments to the trier of fact on evidence known to be false.⁷

⁶ See footnote 2 concerning changes made to Comment [4].

⁷ **Drafters’ Note:** OCBA agrees with the minority that the language “or otherwise permit the witness to present testimony the lawyer knows to be false,” is unclear, and should be deleted. The drafters disagree on whether to follow OCBA’s suggestion and request that the RRC vote on the issue.

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[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. If a criminal ~~defense client~~defendant⁸ 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 1.16.⁹ (Business and Professions Code section 6068(d); *People v. Guzman* (1988) 45 Cal.3d 915 [248 Cal.Rptr. 467]; *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].)¹⁰ 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.

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.¹¹ 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.

⁸ Drafters' Recommendation: In response to public comment (e.g., OCBA), change "criminal defense client" to "criminal defendant".

⁹ Drafters' Recommendation: In response to a public comment from the Cal. Public Defenders Association, we recommend the addition of this phrase.

¹⁰ Drafters' Note: The drafters do not object to including a citation to *People v. Bolton*, as requested by the CPDA. The drafters do not otherwise believe any further changes to Comments [7] and [8].

¹¹ Drafters' Recommendation: In light of the requests by COPRAC, OCBA and SDCBA that the Model Rule clause previously deleted be restored, the Drafters so recommend.

[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 1.2.1, 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 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. The conclusion of the proceeding is 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 client-lawyer 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] or 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.

Rule 3.3 Candor Toward The Tribunal

- (a) A lawyer shall not knowingly:
- (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
 - (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;~~or~~
 - (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence, and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal, unless disclosure is prohibited by 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;~~;~~ or
 - (4) cite as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional, or fail to correct such a citation previously made to the tribunal by the lawyer.
- (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,~~including, if necessary, disclosure~~ to the ~~tribunal~~extent permitted by Business and Professions Code section 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, 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. See Rule 1.0(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~~ 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 ~~allow the tribunal to be misled by~~ make false statements of law or fact or present evidence that the lawyer knows to be false.

Representations by a Lawyer

[3] ~~An advocate~~ A lawyer is responsible for pleadings and other documents prepared for litigation; but is usually not required to have personal knowledge of ~~matter~~ the facts asserted therein, ~~for because~~ litigation documents ordinarily present assertions of fact by the client, or ~~by someone on the client's behalf~~ a witness, and not ~~assertions~~ 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 ~~4.2(d)~~ [1.2.1] not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule ~~4.2(d)~~ [1.2.1], see the Comment to that Rule. See also the Comment to Rule 8.4(b).

Legal Argument

[4] ~~Legal argument based on~~ Although 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~~ argument based on a knowing false representation of law constitutes dishonesty toward the tribunal. ~~Furthermore, as stated in paragraph~~ 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), ~~an advocate has~~ requires a ~~duty~~ 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. ~~The underlying concept is that legal argument is a discussion seeking to determine~~ Legal authority in the controlling jurisdiction may include legal ~~premises properly applicable~~ 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. 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 case tribunal.

False 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.

[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 or otherwise permit the witness to present 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. ~~In some jurisdictions, however, courts have required counsel to present the accused as if a witness or to give a narrative statement if criminal defendant insists on testifying, and the accused so desires, even if counsel~~ knows that the testimony or statement will be false. The obligation of the advocate under lawyer may offer the Rules testimony in a narrative form if the lawyer made reasonable efforts to dissuade the client from the unlawful course of Professional Conduct is 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]; *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 ~~such requirements. See also Comment [9]~~ 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(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

[409] 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~~ 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 ~~advocate~~lawyer must take further remedial ~~action. If withdrawal from~~measures (see Comment [10]), and may be required to seek permission to withdraw under Rule 1.16(b), depending on the ~~representation is not permitted or will not undo the effect~~materiality 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 court 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.~~

[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 1.2.1, 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 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, ~~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

[13] A Paragraph (c) establishes 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~~ 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.

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

[1514] ~~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~~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 ~~such an extreme~~a deterioration of the client-lawyer 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. ~~In connection~~ This Rule does not modify the lawyer's obligations under [Rule 1.6] or Business and Professions Code section 6068(e) or the California Rules of Court with a respect to any 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.~~

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

TOTAL = __ Agree = __
Disagree = __
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No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
3	California Public Defenders Association	M		(a)(2)	<p>CPDA believes that Section a(2) should be deleted from Proposed Rule 3.3 As the Proposed Rule is currently written, it deprives a defendant of effective assistance of counsel in a criminal case. It would force counsel to abandon the duty of loyalty to the client in favor of disclosing harmful information to the court.</p> <p>The adversarial nature of the criminal justice process would be destroyed if the attorney for the accused cannot serve as an advocate for the accused and as an adversary of the prosecution.</p> <p>It is also clear that the proposed revision contradicts existing California law. In <i>Schaefer v State Bar</i>, the court held that the then-existing California Rules of Prof. Conduct did not support the discipline of an attorney who had failed to cite contrary authority to the court when opposing counsel was present at the hearing. CPDA believes that because a prosecutor will be present to urge the Government's position in court, the judge will be afforded access to whatever authority the prosecution believes is germane to the case, because the</p>	<p>The drafters do not agree with CPDA's or Michael Judge's objections (see below) to proposed paragraph (a)(2) as applied to criminal defense counsel and recommend that the paragraph not be deleted from the Rule. The distinction between disclosing harmful information to the court and having to advise the court of the controlling law is long standing and applies to all lawyers including defense counsel in criminal cases. There is no known authority, and none is cited, that requiring a criminal defense counsel in presenting a matter to a tribunal to advise the court of <u>known</u> controlling authority that is directly adverse to the client constitutes ineffective assistance of counsel under <u>Strickland v. Washington</u>. Aside from whether the term "controlling" should modify "jurisdiction" or "authority" (discussed below), paragraph (a)(2) has been part of lawyer codes for many years without proof that it undermines defense counsel's duties under the 6th Amendment. Nor does the Rule contradict California law. The Supreme Court in <u>Schaefer v. State Bar</u> found there was an absence of evidence that the lawyer in that case had intentionally attempted to mislead the court (i.e. that the lawyer had failed to disclose controlling legal authority "known to the lawyer to be directly adverse to the position of the client and</p>

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

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					<p>prosecutor in a criminal case has “the responsibility of a minister of justice. . . .” (ABA Model Rule 3.8, Comment [1])</p> <p>We support Michael Judge and Janice Fukai’s reasoning and comments in opposition to this Rule as well.</p>	<p>not disclosed by opposing counsel”). The lawyer in that case had written the court a letter after being apprised of his failure to cite the case that he believed in good faith that the relevant statement in the case was dictum and that it did not serve to overrule the case he had relied upon. <u>Schaefer</u> is a 1945 case applying Business and Professions Code §6068(d) and decided many years before the Model Code from which the current rule derives. <u>Schaefer</u> does not support the notion that the rule does not apply to lawyers in California.</p>
				Comment [4]	We have no objection to the first sentence of Comment [4] nor to the last sentence of Comment [4], but we do object to those sentences in between and feel they should be deleted.	The drafters agreed that Comment [4] and paragraph (a)(2) should be redrafted (see RRC Response to LACBA, below).
				Comment [7]	CPDA disagrees with the portion of Comment [7] which requires that the attorney seek permission from the court to withdraw when the attorney believes that the client will be committing perjury and asks that that portion of the Comment be deleted.	CPDA appropriately raises the question whether the Rule should require that a lawyer must make a motion to withdraw so as not to give implied consent to the perjurious testimony. The cases in California on the narrative approach are not entirely consistent on whether seeking to withdraw is a prerequisite to permitting the narrative

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				Comment [8]	<p>CPDA agrees with the first two sentences of proposed Comment [8]. However, CPDA believes that proposed sentences three and four should be deleted, and sentence five should be changed.</p> <p>Sentence five contains the phrase “. . . an obvious falsehood. . . .” This phrase should be changed: it does not specify to whom the falsehood must be obvious. The fifth sentence should read “a falsehood that is obvious to the lawyer,” or, better and simpler, “a falsehood that is known to the lawyer.”</p> <p><i>People v. Bolton</i> states the correct standard,</p>	<p>approach. <i>People v. Brown</i> says it is. <i>People v. Johnson</i> and <i>People v. Gadson</i> say that mandatory withdraw would not solve the problem. See the discussion in the Rutter Group Practice Guide: Professional Responsibility at ¶8:187 – 8:187.1. As a solution, the drafters recommend that the following be added at the end of second sentence in Comment [7] to clarify that the duty to seek to withdraw in this situation is covered under Rule 1.16: “as required under Rule 1.16”.</p> <p>The drafters recommend no change to the third sentence in proposed Comment [8] which tracks the definition of “knows” in proposed Rule 1.0(f).</p> <p>The drafters do not recommend that the last sentence in proposed Comment [8] be changed. The sentence tracks Model Rule Comment [8] and is sufficiently clear in view of the reference to the definition of “knows” referenced in the preceding sentence. Comment [8] and paragraph (b) are consistent with <i>People v. Bolton</i>, which deals with evidence the lawyer suspects but does not know is false.</p>

**Rule 3.3 Candor Toward the Tribunal.
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					and simultaneously states the reason for CPDA's position on Comment [8]. "Criminal defense attorneys sometimes have to present evidence that is incredible . . . [B]ut, as long as counsel has no . . . factual knowledge of its falsity, it does not raise an ethical problem." We believe that the <i>Bolton</i> case should be cited in either Comment [7] or [8], to provide additional guidance to attorneys.	The drafters have no objection to adding a citation to <i>People v. Bolton</i> .
1	COPRAC	M		3.3(c)	Regarding paragraph (c), we believe the minority position is the better one, regarding when a lawyer's obligations under paragraphs (a) and (c) should end. We are persuaded that a lawyer should not have a continuing obligation to oversee the course of a proceeding which the lawyer is no longer involved in, having been terminated or having withdrawn from representation. We believe a lawyer would lack standing to continue to be involved in proceedings regarding a former client and could potentially interfere with the relationship between the former client and his or her new lawyer. Accordingly, we believe the lawyer's duties should not continue to the conclusion of the proceeding, but to the conclusion of the representation, if such conclusion occurs earlier.	The drafters assume COPRAC refers to paragraphs (a) and (b). The drafters continue to disagree whether paragraph (c) should continue to track the Model Rule or be limited as recommended by COPRAC and the minority view and, therefore, recommend that the issue be decided by a vote of the RRC. Points in favor of retaining current paragraph (c) include: (1) a lawyer who has been terminated or has withdrawn does not lack standing to correct the lawyer's false statement of material law or fact under paragraph (a); (2) the lawyer would not interfere with the relationship between the former client and the client's new lawyer by advising the new lawyer of relevant facts including the existence of criminal or fraudulent conduct in the proceeding or urging that corrective action be taken (see Comment [10]); (3) the lawyer may only take remedial measures under paragraph (a)(3) and (b) to the extent permitted under Business and Professions Code

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No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				3.3(d)	In paragraph (d), regarding a lawyer's duty to inform the tribunal of necessary facts, we believe the language of the ABA Rule: "all material facts known to the lawyer that will enable the tribunal to make an informed decision," provides better guidance to practitioners than the Commission's proposed changes. We think it would be too difficult to opine on what facts a lawyer "reasonably should know are needed," as suggested by the Commission, particularly in retrospect, and the vagueness of this revised requirement could inure to the detriment of lawyers who are in good faith attempting to follow the Rule.	§6068(e); (4) COPRAC's proposal would allow lawyers to circumvent paragraphs (a) and (b) by simply withdrawing from the representation; and (5) no known state variation limits paragraph 3.3(c) as proposed. The drafters agree with COPRAC and SDCBA that current proposed paragraph (d) is unclear and will cause confusion and recommend that paragraph (d) be changed to track Model Rule paragraph (d)
				Comment [7]	In proposed Comment [7], we feel that using the term "criminal defendant" would make more sense than "criminal defense client." This is because there could be witnesses called by a lawyer that might be criminal defense clients in other cases, but the	The drafters agree with COPRAC's suggestion and recommend that "criminal defense client" be changed to "criminal defendant."

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				Comment [9]	<p>“narrative” approach is only available to the criminal defendant currently on trial.</p> <p>We disagree with proposed Comment [9] to the extent that it is intended to provide that a lawyer has no obligation to take remedial measures when opposing counsel elicits testimony the lawyer knows to be false from the lawyer’s client or a witness. We believe the better position is that a lawyer should have a duty to take remedial measures whenever the lawyer knows that the lawyer’s client or witness has testified falsely, regardless of which side elicited the false testimony. We believe that the following phrase found in ABA Comment [10] that was deleted from proposed Comment [9], “either during the lawyer’s direct examination or in response to cross examination by the opposing lawyer,” should be reinserted in Comment [9].</p> <p>We do not believe there is any legitimate rationale for the distinction established by the Comment [9], providing that a lawyer is obliged to take remedial measures if a client knowingly makes false statements during a deposition, but permitting a lawyer to forego such measures if a client makes false statements at trial.</p>	<p>COPRAC, OCBA and SDCBA recommend that Comment [9] restore the following language from Model Rule Comment [10] at the end of the second sentence: "either during the lawyer’s direct examination or in response to cross examination by the opposing lawyer" and, thus, impose the obligation to take remedial measures under paragraph (b) regardless of who adduces the false evidence.</p> <p>Since the recommendation to track the Model Rule in regard to the scope of paragraph (b) is made by COPRAC and two bar associations, the drafters agree Comment [9] should be changed to track Model Rule Comment [10] on this issue.</p>

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4	Judge, Michael P. Los Angeles County Public Defender	D		Comment [4]	<p>When counsel is faced with the dilemma of remaining silent or disclosing authority harmful to the client, a rule barring affirmative misstatements of law permits counsel to remain silent, thereby remaining loyal to the client.</p> <p>In contrast, the proposal would create a new rule which would require counsel to volunteer to the court authority contrary to the position of the client.</p> <p>A rule which requires counsel to affirmatively offer case law harmful to the client undermines two critical core values of our criminal justice system in California. The first being counsel's duty of loyalty to his or her client. The second core value of our criminal justice system is the adversarial system. The critical value of an adversarial system is undermined when counsel for the party who had diligently researched an issue is required to assist his or her opponent, who may have done nothing, by revealing the authority which requires the court to rule against that party.</p> <p>The proposed rule is very narrow, applicable only to "controlling authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." However, this narrow articulation</p>	<p>No change is recommended. See response to CPDA's similar comment.</p> <p>The drafters agree that proposed Comment [4] should be redrafted. See below.</p>

**Rule 3.3 Candor Toward the Tribunal.
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					of the rule is undermined by Comment [4], which states, "the lawyer must disclose the authorities the court needs to be aware of in order to rule intelligently on the matter." The Comment also refers to "a tribunal that is fully informed." The narrow duty to disclose controlling authority articulated in the proposed Rule itself is thus undermined by the Comments which appear to impose on counsel a duty to ensure that the judge is fully informed and has all the authorities necessary to rule intelligently.	
6	Los Angeles County Bar Association, Professional Responsibility and Ethics Committee	M		Subsection (b)	<p>We support deleting the language in (b) "including, if necessary, disclosures to tribunal" at the end of the sentence. We suggest adding the phrase "consistent with Business & Professions Code Section 6068(e)" at the end of the sentence, however, in place of the deleted language to make the rule clear as to how to understand "reasonable remedial."</p> <p>We agree that a lawyer should correct a previously improperly cited authority, but believe (with a minority of the RRC) that the duty should end when the lawyer ceases to represent the client.</p>	<p>The drafters do not agree that including a reference to §6068(e) is needed at the end of paragraph (b). However, if a reference is deemed necessary, the drafters recommend it read: "the extent permitted under Business and Professions Code §6068(e)."</p> <p>The drafters are divided on this issue. See discussion above.</p> <p>The drafters agree that Comment [4] and paragraph (a)(2) should be reconsidered by the RRC in light of the comments received from</p>
				Comment [4]	We are concerned that the language contained in Comment [4] ("Under this Rule, the lawyer must disclose authorities the	

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					<p>court needs to be aware of in order to rule intelligently on the matter.”) may be too general and broad a phrase in a disciplinary context, even though it is part of a Comment and not part of the Rule itself.</p>	<p>CPDA, Mr. Judge and Ms. Fukai, LACBA, and Mr. Scofield (whose thoughtful memorandum is not reported in this chart). The comments received reveal that the distinction we have tried to draw between controlling authority that is directly adverse and directly adverse authority in the controlling jurisdiction is not sufficiently clear and will likely cause confusion such that it does not warrant departing from the standard in the Model Rule, which is followed in most jurisdictions. In view of the comments received, the drafters recommend revising paragraph (a)(2) to track Model Rule paragraph (a)(2) and revise proposed Comment [4] as follows: (1) retain the first sentence in proposed Comment [4] in place of the first two sentences in the Model Rule Comment; (2) change the second sentence to read: "Paragraph (a)(2) requires a lawyer to disclose directly adverse legal authority in the controlling jurisdiction that is known to the lawyer and that has not been disclosed by an opposing party"; (3) add the following as a new sentence: "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) add the following anew fourth sentence: "Paragraph (a)(2) does not impose on lawyers a general duty to cite out of</p>

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						state cases.” (5) Include the last sentence in current proposed Comment [4]
9	Office of Chief Trial Counsel (“OCTC”), State Bar				<p>OCTC is concerned that the Model Rule language is narrower than current rule 5-200 in that it requires candor only to a tribunal, while rule 5-200 provides that a lawyer “shall employ, for the purpose of maintaining the causes confided to the member such means only as are consistent with truth.” OCTC believes that provision should be included in the Rule.</p> <p>OCTC is concerned that the Rule’s “knowingly” requirement would excuse gross negligence, contradicting <i>Matter of Harney</i> (Rev.Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 280, and <i>Matter of Chesnut</i> (Rev.Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 174.</p> <p>OCTC is concerned that the Rule omits the term “artifice” as is currently found in rule 5-200(B). OCTC contends the word should remain in the Rule so as to not narrow its reach.</p>	<p>The Commission disagrees. Proposed Rules 3.4 (Fairness to Opposing Party and Counsel) and 4.1 (Truthfulness in Statements to Others) cover the same ground with greater specificity.</p> <p>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> <p>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.</p>

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				Comment [3]	OCTC is concerned that Comment [3] is incomplete because the Fed. Rules of Civil Procedure and Code Civ. P. 128.7 require that statements be made “after an inquiry reasonable under the circumstances”.	The Commission disagrees. An inquiry is only required if reasonable under the circumstances. As Comment [8] recognizes, a “lawyer cannot ignore an obvious falsehood.”
5	Orange County Bar Association		M	Comment [6]	The OCBA agrees with the minority that the language “or otherwise permit the witness to present testimony the lawyer knows to be false,” is unclear, and should be deleted	The drafters are not in agreement and recommend the RRC vote on whether to accept OCBA's suggestion.
				Comments [6] and [7]	The OCBA recommends that the Commission use the phrase “criminal defendant” consistently, rather than the term “criminal defense client” used in Comment [7]	The drafters agree. See above.
				Comment [9]	The OCBA recommends that the phrase, “either during the lawyer’s direct examination or in response to cross-examination by the opposing lawyer” be included in this Comment, consistent with the ABA. We believe that the lawyer’s obligation to take remedial measures should apply to false testimony on cross-examination, just as the lawyer has an obligation to take remedial measures if false testimony is elicited in a deposition by the adverse party’s counsel – which is another form of cross-examination.	The drafters agree. See above.
2	San Diego County Bar Association Legal Ethics	M		Subparagraph (d)	Agree with a Commission minority that there is “insufficient reason for departing from the	The drafters agree with SDCBA (see RRC Response to COPRAC, above).

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	Committee			Comment [9]	<p>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."</p> <p>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.</p> <p>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 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."</p> <p>I think a clearer explanation of the</p>	<p>The drafters agree with SDCBA (see RRC Response to COPRAC, above). The drafters believe the change will resolve the need to further explain the relationship between Comment [6] and Comment [9].</p>

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					relationship between Comment [6] and Comment [9] would be helpful to guide the lawyer in applying the proposed rule.	
7	Santa Clara County Bar Association	M			<p>We agree with the rationale that California should rigorously protect attorney-client confidentiality even when it prevents the attorney from making disclosures to the tribunal regarding a client's or witness's untruthfulness or regarding evidence that may not be accurate.</p> <p>However, we think it should be noted that a small, but strong minority of the SCCBA Task Force support the ABA Model Rule version based on the rationale that this rule is meant to protect the integrity of the judicial process and judicial decision-making and that policy is of greater importance in this circumstance than allowing a client's wrongdoing to be protected by attorney-client confidentiality.</p> <p>The minority further suggests that the fact that the California Supreme Court has never approached such a mandatory rule is irrelevant; if the approach is the correct approach, it should be adopted and presented to the Court.</p>	No recommendation necessary.

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8	Scofield, Robert G.			Comment [4]	Mr. Scofield is concerned with the ambiguity of Comment [4] to the Rule, which can be interpreted to impose a duty on California lawyers to cite to authority from outside of the state, which would most penalize those lawyers who diligently research the law on their clients' behalf. He believes it would be easy to remove the ambiguity: by providing examples of the kinds of cases to which a lawyer must cite and those that would lie outside the duty.	The Commission agrees. See Response to L.A. County Bar Ass'n, above.

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File List - Public Comments – Batch 4 – Proposed Rule 3.3

D-2009-267 COPRAC [3.3]

D-2009-273 Robert Scofield [3.3]

D-2009-275d State Bar OCTC [3.3]

D-2009-276d Rick Hendlin SDCBA Legal Ethics Comm [3.3]

D-2009-277b California Public Defenders Association [3.3]

D-2009-279 Michael Judge LA Public Defender [3.3]

D-2009-283c Orange County Bar [3.3]

D-2009-286c James Ham LACBA [3.3]

D-2009-287d Santa Clara County Bar [3.3]



**THE STATE BAR
OF CALIFORNIA**

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September 10, 2009

Harry B. Sondheim, Chair
Commission for the Revision of the
Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

RE: Proposed Rule 3.3 – Candor to Tribunal

Dear Mr. Sondheim:

The State Bar of California's Committee on Professional Responsibility and Conduct (COPRAC) appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California, pursuant to the request of the Board Committee on Regulation, Admissions & Discipline Oversight (RAD) for public comment.

COPRAC has reviewed the provisions of proposed Rule 3.3 and offers the following comments.

We approve of the majority of the proposed Rule. We have comments, however, on four areas.

First, regarding paragraph (c), we believe the minority position is the better one, regarding when a lawyer's obligations under paragraphs (a) and (c) should end. We are persuaded that a lawyer should not have a continuing obligation to oversee the course of a proceeding which the lawyer is no longer involved in, having been terminated or having withdrawn from representation. We believe a lawyer would lack standing to continue to be involved in proceedings regarding a former client and could potentially interfere with the relationship between the former client and his or her new lawyer. Accordingly, we believe the lawyer's duties should not continue to the conclusion of the proceeding, but to the conclusion of the representation, if such conclusion occurs earlier.

Second, in paragraph (d) regarding a lawyer's duty to inform the tribunal of necessary facts, we believe the language of the ABA Rule: "all material facts known to the lawyer that will enable the tribunal to make an informed decision," provides better guidance to practitioners than the Commission's proposed changes. We think it would be too difficult to opine on what facts a lawyer "reasonably should know are needed," as suggested by the Commission, particularly in retrospect, and the vagueness of this revised requirement could inure to the detriment of lawyers who are in good faith attempting to follow the Rule.

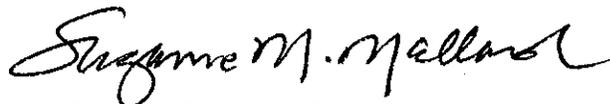
Third, in proposed Comment [7], we feel that using the term "criminal defendant" would make more sense than "criminal defense client." This is because there could be witnesses called by a lawyer that might be criminal defense clients in other cases, but the "narrative" approach is only available to the criminal defendant currently on trial.

Fourth, we disagree with proposed Comment [9], entitled Remedial Measures, to the extent that it is intended to provide that a lawyer has no obligation to take remedial measures when opposing counsel elicits testimony the lawyer knows to be false from the lawyer's client or a witness. We believe the better position is that a lawyer should have a duty to take remedial measures whenever the lawyer knows that the lawyer's client or witness has testified falsely, regardless of which side elicited the false testimony. To this end, we believe that the following phrase found in ABA Comment [10] that was deleted from proposed Comment [9], "either during the lawyer's direct examination or in response to cross examination by the opposing lawyer," should be reinserted in Comment 9.

We do not believe there is any legitimate rationale for the distinction established by the Comment [9], providing that a lawyer is obliged to take remedial measures if a client knowingly makes false statements during a deposition, but permitting a lawyer to forego such measures if a client makes false statements at trial. Most likely, opposing counsel would elicit the false statements elicited under either scenario. The proffered rationale, to avoid interference with trial strategy, is not compelling and could lead to gamesmanship, inconsistent with the statutory obligation to employ only such means as are consistent with the truth. In our view, the obligation of candor should prevail over an attorney's trial strategy where the client testifies falsely, whether in a deposition or at trial.

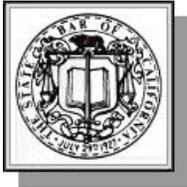
COPRAC thanks the Rules Revision Commission for its consideration of its comments.

Very truly yours,



Suzanne Mellard, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC



THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT

PUBLIC COMMENT FORM

INSTRUCTIONS: This form allows you to submit your comments by entering them into the text box below and/or by uploading files as attachments. We ask that you comment on **one** Rule per form submission and that you choose the proposed Rule from the drop-down box below.

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DEADLINE TO SUBMIT COMMENT IS: OCTOBER 23, 2009

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(You will receive a copy of your comment submission.)

The following proposed rules can be viewed by clicking on the links below:

[Rule 1.8.6 \[3-310\(F\)\]](#)

[Rule 3.3 \[5-200\]](#)

[Rule 6.3 \[n/a\]](#)

[Rule 1.8.7 \[3-310\(D\)\]](#)

[Rule 3.6 \[5-120\]](#)

[Rule 6.4 \[n/a\]](#)

[Rule 1.15 \[4-100\]](#)

[Rule 3.7 \[5-210\]](#)

[Batch 4 Discussion Draft \(All rules\)](#)

* Select the Proposed Rule that you would like to comment on from the drop down list.

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

AGREE with this proposed Rule

DISAGREE with this proposed Rule

AGREE ONLY IF MODIFIED

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Comment On Proposed Rule 3.3 Candor Toward The Tribunal

Robert G. Scofield

Introduction

I have a concern with one sentence in Comment [4] to the Commission's Proposed Rule 3.3 Candor Toward the Tribunal. The sentence of concern is: "Controlling legal authority' may include authority outside the jurisdiction in which the tribunal sits." My concern is that this will be interpreted to require a lawyer to cite out-of-state case law adverse to his or her client's position. In thinking about this issue, however, I have discovered that proposed Rule 3.3, as interpreted by Comment [4], is ambiguous.

In what follows I: (1) state my concern; (2) explain why an attorney should not be required to cite out-of-state authority adverse to his or her client's position; (3) discuss the ambiguities in the proposed California version of Rule 3.3; and (4), argue that the ambiguities should be resolved by giving some specific examples of what is required in the citation of adverse authority.

The Concern

Comment [4] to proposed Rule 3.3 states in part: "Controlling legal authority' may include authority *outside the jurisdiction in which the tribunal sits.*" (Emphasis added.) The italicized language could be interpreted to mean that an attorney is required to cite out-of-state authority adverse to his or her client's position.

The fact that Comment [4] could be interpreted to refer to out-of-state cases does not mean that it has to be interpreted that way, or that it is the intent of the Commission that it refer to out-of-state cases. In California the intermediate appellate courts are not bound by opinions from other intermediate appellate courts. (See *In re Marriage of Shaban* (2001) 88 Cal.App.4th 398, 409 [105 Cal.Rptr.2d 863].) So while the Sacramento County Superior Court might be bound by cases from the Fifth District Court

of Appeal in Fresno, the Third District Court of Appeal in Sacramento is not. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 [20 Cal.Rptr. 321, 369 P.2d 937].) Therefore the statement that controlling legal authority may include authority outside the jurisdiction in which the tribunal sits might be intended to cover situations like the one where an attorney appearing before either the California Supreme Court, or the Third District Court of Appeal in Sacramento, is aware of an adverse case from the Fifth District Court of Appeal in Fresno.

Why There Should Ordinarily Be No Ethical Duty To Cite Out-of-State Case Law

It is clear that out-of-state cases are sometimes relevant to California litigation. Appellate courts have on occasion implicitly criticized attorneys for not citing out-of-state case law when the court faces an issue of first impression. (See *People v. Rhoden* (1999) 75 Cal.App.4th 1346, 1352, fn. 4 [89 Cal.Rptr.2d 819].) Two courts have stated that, if there is no California authority on point, the attorney may have an affirmative duty to cite out-of-state case law. (See *People v. Taylor* (1974) 39 Cal.App.3d 495, 496 [114 Cal.Rptr. 169]; *Tate v. Conica* (1960) 180 Cal.App.2d 898, 900 [5 Cal.Rptr. 28].) And in rare cases it might be that out-of-state case law is determinative of the issue before a California court. An example is where the out-of-state case's interpretation of the elements of a crime will determine whether a person convicted of that crime will have his sentence enhanced as a result of a later California conviction. (See *People v. Riel* (2000) 22 Cal.4th 1153, 1203-1204 [96 Cal.Rptr.2d 1, 998 P.2d 969].)

While I would agree that an attorney would be ethically required to cite a Washington case adverse to his or her client's position in *People v. Riel*, lawyers should not have a general duty to cite of out-state-cases. I have a lot of experience researching out-of-state cases. In the vast majority of situations a lawyer will be able to find an out-of-state case that is contrary to the out-of-state case the lawyer wishes to cite to the court. Consider for example ALR annotations. To a great extent ALR annotations are just

compilations of conflicting out-of-state cases. A general duty to cite out-of-state cases will turn a lawyer's brief into a virtual ALR annotation. And that would go against Comment [4]'s countervailing policy: "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." (Emphasis added.)

There is a reason why out-of-state law is more contradictory than law from within any single jurisdiction. (And hence why one will most often find out-of-state cases adverse to his or her client's position.) As will be explained later, controlling legal authority (with regard to case law) usually means that a controlling precedent is synonymous with a binding precedent. Historically binding precedents could not arise until there was a hierarchy of courts. (See *Hart v. Massanani* (9th Cir.) 266 F.3d 1155, 1164-1165, 1175.) "Only towards the end of the nineteenth century, after England had reorganized its courts, was the position of the House of Lords at the head of its judicial hierarchy confirmed. Before that, there was no single high court that could definitively say what the law was." (*Id.* at pp. 1164-1165.) In California the hierarchy allows the California Supreme Court to maintain a coherent body of case law by putting an end to splits of authority among the intermediate appellate courts of the state. California Rules of Court, Rule 8.500 subdivision (b), provides that one ground upon which a litigant may petition for review of a case by the California Supreme Court is when it is "necessary to secure uniformity of decision." But there is no hierarchy of courts that resolves the web of conflicting opinions that one finds in out-of-state cases.

If Rule 3.3 is construed to require the citation of out-of-state cases, then it will penalize the most diligent legal researchers. The harder one works to find cases, the more one will be required to turn over adverse authority to one's opponent.

The best interpretation of Rule 3.3 is that it does not require an attorney to cite adverse out-of-state case law. This interpretation can be supported by a *reductio ad absurdum* argument leading to the conclusion that, if Rule 3.3 does require the citation of

out-of-state case law, then an attorney with a California Supreme Court case directly on point, and in his client's favor, will additionally be required to cite a contrary case from the Mississippi Court of Appeal. My concern is with how Rule 3.3 *might* be interpreted.

The Seventh Circuit Court of Appeals may disagree with me. In litigation in federal district court in the State of Illinois, one party failed to cite a case from the Illinois state appellate court, and failed to cite a case from the Seventh Circuit. In response to the party's objection that the Illinois state case did not have to be cited because it was not dispositive, but merely persuasive authority, the Court of Appeals replied that "this argument is an exercise in gall when presented by the same attorney who argued in briefs that the district court should rule in his client's favor based upon intermediate California and Washington state court decisions, as well as decisions of federal district courts from outside this Circuit." (*Mannheim Video, Inc. v. County of Cook* (7th Cir. 1989) 884 F.2d 1043, 1047.) But *Mannheim* did not consider the arguments that I have made above.

The Ambiguities of Proposed Rule 3.3

Both the ABA Model Rule 3.3 and the proposed California Rule 3.3 use the adjective "controlling." The difference, however, is that the adjective modifies different nouns in the respective rules. In the ABA model rule the adjective modifies "jurisdiction" in the relevant part of the rule:

(a) A lawyer shall not knowingly:

(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

(Emphasis added.)

In the proposed California rule the adjective modifies "legal authority" in the relevant part of the rule:

(a) A lawyer shall not knowingly:

(2) fail to disclose to the tribunal *controlling legal authority* known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;

(Emphasis added.)

I cannot find a definition of “controlling legal authority.” What one does find are cases giving examples of what controlling authority is. Controlling authority includes statutes. (*Texas American Oil Corp. v. U.S. Dept. of Energy* (D.C. Cir. 1995) 44 F.3d 1557, 1561.) It even includes temporary treasury regulations. (*Bankers Trust New York Corp. v. U.S.* (1996) 36 Ct.Cl. 30, 37.) Clearly, “controlling law” includes cases. (See *Schaeffer v. State Bar* (1945) 26 Cal.2d 739, 747-748 [160 P.2d 825].) Sometimes we see the term “controlling precedent.” (See *Matter of Riley* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 91, 109.)

The notion of controlling authority in the form of a case suggests reference to a proposition of law in a case that is binding; that is, a proposition that is part of a case’s holding, as opposed to mere dicta.

But there are also very important differences between controlling and persuasive authority. As noted, one of these is that, if a controlling precedent is determined to be on point, it must be followed. Another important distinction concerns the scope of controlling authority. Thus, an opinion of our court is binding within our circuit, not elsewhere in the country.

(*Hart v. Massanani*, *supra*, 266 F.3d at pp. 1172-1173.) And cases decided by the New York state courts are not “controlling authority” in federal district courts sitting in New York. (*JPMorgan Chase Bank v. Cook* (S.D.N.Y. 2004) 322 F.Supp.2d 353, 355.)

Thus without Comment [4] it might appear as though California has adopted the “narrow view,” which sees “controlling authority” as those cases “decisive of the pending case.” (See the discussion in *Tyler v. State* (Alaska App. 2001) 47 P.3d 1095, 1104-1107.) If so, then Comment [4] might change things by telling us that, if controlling authority may include cases from a jurisdiction other than that in which the tribunal sits,

then controlling legal authority in the Third District Court of Appeal includes cases from the Fifth District Court of Appeal. That is because, as controlling authority is usually understood, cases from the Fifth District Court of Appeal are not binding in other district courts of appeal (or in the California Supreme Court). In California appellate court opinions are persuasive authority for other appellate courts of equal authority in the judicial hierarchy. (See 9 Witkin, California Procedure (5th ed. 2008) Appeal §498, pp. 558-560.) So Comment [4] might have a purpose other than to require the citation of out-of-state cases.

There are some problems with this view, however. The Third District Court of Appeal is not bound by its own decisions. The California Supreme Court is not bound by its own decisions. (See 9 Witkin, California Procedure (5th ed. 2008) Appeal §492, p. 553.) And the California Supreme Court is not bound by the decisions of the courts of appeal. But there is no analogous comment to the proposed Rule 3.3 defining “controlling legal authority” as persuasive authority from the very tribunal before which the attorney is arguing. In other words (under the interpretation I have just put forth) the attorney is specifically told he or she must cite Fifth District Court of Appeal cases in the Third District Court of Appeal, but not specifically told that he or she has to cite adverse Third District Court of Appeal cases in the Third District Court of Appeal. The attorney is not specifically told that he or she is required to cite to the California Supreme Court adverse decisions from the courts of appeal. And the attorney is not specifically told that he or she has to cite to the California Supreme Court adverse decisions from the California Supreme Court.

A second problem is reflected in *Shaeffer v. State Bar, supra*, which weakens the notion of controlling authority in a way that suggests that California might not follow “the narrow view” after all. In that case an attorney was accused of misleading a trial court by failing to cite an applicable case. The attorney’s defense was that the case in question was not controlling because the relevant statement was “dictum.” While the

California Supreme Court failed to discipline the attorney, as to this particular charge, because there was no evidence the attorney intentionally misled the court, the Supreme Court stated that the attorney should have cited the case, and then argued to the court that it was not controlling. (26 Cal.2d at p. 748.) This appears to be the same result as would be reached under the ABA Model Rule 3.3. Thus in *Tyler v. State, supra*, the court cited *Schaeffer* in support of its conclusion that an attorney has a duty to cite “adverse” legal authority under ABA Model Rule 3.3 even though the attorney reasonably believes that the court will conclude that the precedent does not control the present case because it is distinguishable, or for some other reason. (See 47 P.3d at pp. 1105-1106.) Under *Schaeffer* the attorney’s duty is to cite cases that *might be* controlling. Whether a precedent is adverse under the ABA model rule, or controlling under the proposed California rule, is up to the court to decide; not the attorney.

There are some problems with *Schaeffer*. One is that it did not spend a lot of time analyzing the issue of the failure to cite controlling case law. A second problem is that *Schaeffer* fails to make the distinction between judicial dicta and obiter dicta. Obiter dicta are “by the way” statements. (Cross & Harris, *Precedent in English Law* (4th ed. 1991) 41.) Thus they are not entitled to serious consideration and can be safely ignored. (Scofield, *Judicial Dicta Versus Obiter Dicta: An Examination of the Dicta That Has Great Authority*, 25 Los Angeles Lawyer (Oct. 2002) 17.) But judicial dicta is entitled to greater weight since these are legal propositions resulting from a court’s comprehensive discussion of the issues. (*Ibid.*) Judicial dicta “should be followed in the absence of some cogent reason for departing therefrom.” (*State v. Fahringer* (Ariz. 1983) 666 P.2d 514, 515.) One reason this distinction is important for our purposes is that an ethical rule requiring the citation of adverse obiter dicta will lead to the courts becoming highly irritated. Judges do not want briefs lengthened by unsupported legal propositions. But the situation with regard to judicial dicta is different. Courts hold that judicial dicta from the California Supreme Court should be followed. (See, e.g. *Hubbard v. Superior Court*

(1997) 66 Cal.App.4th 1163, 1169 [78 Cal.Rptr.2d 819].) The spirit of the proposed Rule 3.3 would require attorneys to cite adverse judicial dicta from the courts of appeal and the California Supreme Court.

But if *Schaeffer* represents the California view of controlling legal authority, there doesn't seem to be much difference between the proposed California version of Rule 3.3 and the ABA version of Rule 3.3, notwithstanding the difference between where the adjective "controlling" is placed. In *Mannheim Video, Inc. v. County of Cook, supra*, the court made the following statement with regard to attorneys failing to cite a Seventh Circuit case in a district court governed by the Seventh Circuit:

... *Hill* and *Bonds* made clear that an attorney should not ignore potentially dispositive authorities; the word "potentially" deliberately included those cases arguably dispositive. Counsel is certainly under obligation to cite adverse cases which are ostensibly controlling and then may argue their merits or inapplicability.

(884 F.2d at p. 1047.) Under *Shaeffer* an attorney has to cite cases he or she may not believe are controlling authority because it is up to the court to make the determination of what constitutes controlling authority. And the cases seem to suggest that, as a practical matter, whether a case is adverse is very similar to whether a case is controlling. Thus a lawyer may argue under the ABA Rule 3.3 that a precedent is not adverse to his client's position because the case is distinguishable. And the lawyer can argue under the proposed California Rule 3.3 that the precedent is not controlling legal authority because it is distinguishable.

In summary, proposed Rule 3.3 is both over and under inclusive. It is over inclusive in that it could require the routine citation of adverse out-of-state cases. (I admit that it is only over inclusive if I am right that the citation of out-of-state case law is not part of the purpose of the proposed rule as interpreted by Comment [4].) It is under inclusive to the extent that it might be construed to require the citation of court of appeal cases from other district court of appeals, but not require the citation of court of appeal

cases to either the court of appeal issuing the case or the California Supreme Court. *The bottom line is that it is just not clear what Comment [4] means when it says that controlling legal authority may include authority outside the jurisdiction in which the tribunal sits.*

In addition to the problem of over and under inclusiveness, there is the problem of the ambiguity of “controlling legal authority” with regard to case law. Does it include judicial dicta? That is, does it include well articulated arguments presented by the court that were not necessary to the decision reached in the case?

I do not think that the ethical obligation can be expressed with general statements or principles. I think the rule, or the comment to the rule, should present examples. With all of these thoughts in mind I present a suggested revision below.

Proposed Revision of Comment [4]

My proposed revisions are in italics.

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 controlling legal authority that is known to the lawyer and that has not been disclosed by the opposing party. “Controlling legal authority” may include authority outside the jurisdiction in which the tribunal sits. *This does not ordinarily require an attorney to cite out-of-state case law, though it would require the citation of such law where it would be determinative of the issue before the court as in People v. Riel (2000) 22 Cal.4th 1153, 1203-1204.* Under this Rule, the lawyer must

disclose authorities the court needs to be aware of in order to rule intelligently on the matter. *This would include case law that is not strictly binding on the tribunal before which the attorney is appearing. For example an attorney would be required to cite adverse cases that were issued by one panel of the Court of Appeal to another panel of the Court of Appeal. The attorney would also be required to cite an adverse case from the Court of Appeal to the California Supreme Court. And an attorney would be required to cite adverse precedent from the California Supreme Court to the California Supreme.* 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.

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**THE STATE BAR OF
CALIFORNIA**

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October 20, 2009

Randall Difuntorum, Director
Office of Professional Competence & Planning
State Bar of California
180 Howard Street
San Francisco, California 94105

Re: Comments of the Office of the Chief Trial Counsel to Proposed
Amendments to the Rules of Professional Conduct

Dear Mr. Difuntorum:

Thank you for the opportunity to submit the comments of the Office of the Chief Trial Counsel to the proposed amendments to the Rules of Professional Conduct that were released for public comment by the Board of Governors in July 2009. Here are our comments:

~~Rule 1.8.6 Payments Not from Client.~~

- ~~1. The Office of the Chief Trial Counsel (OCTC) supports this rule. However, OCTC believes that a comment should be added suggesting to the lawyers that they advise in writing both the client and the paying non-client that the lawyer's duty only requires him or her to communicate with the client and that, unless the client designates the non-client to receive communications for the client, the lawyer cannot communicate about the case to the non-client and even with such a designation the lawyer must preserve the client's confidences and secrets. OCTC finds that often the paying non-client complains to us because they do not understand that the lawyer cannot communicate with them.~~

~~Rule 1.8.7 Aggregate Settlements.~~

- ~~1. OCTC supports the proposal to use the term "informed written consent" as that term is used in other California rules. However, OCTC finds the rule as written and the Commission's Comments confusing. For example, OCTC finds Comment 4, which is not in the Model Rules, very confusing and problematic. If the Commission is seeking to allow clients to agree that a neutral third party may determine the allocation of the aggregate settlement, then that should be in the rule itself, not in a Comment. OCTC also finds unclear and confusing what the Commission means by aggregate package deals in criminal cases. That might need some clarification.~~

~~Rule 1.15 Handling Funds and Property of Clients and Other Persons.~~

- ~~1. While OCTC supports some of the Commission's additions or changes to the Model Rules, such as the Commission's exclusion of trust accounts maintained in other jurisdictions, and there is merit to its explanation that costs are covered by the rule, OCTC finds most of the changes from the Model Rules confusing and potentially inconsistent. For example, OCTC supports the Model Rules provision requiring that advanced fees be placed in the Client Trust Account (CTA). This will prevent confusion and lack of consistency. Either every lawyer should be placing advanced fees in the CTA or no lawyer should be placing the advanced fees in the CTA. A rule requiring that advanced fees be deposited into the CTA will also protect clients. OCTC has many cases where the attorney does not return unearned fees and claims not to have the funds to do so. If this proposal is adopted, it may require a change to Comment 10.~~
- ~~2. OCTC finds very confusing and inconsistent the proposed rule as to when disputed funds need to be placed in the client trust account. (See proposed rules 1.15(d), (g), (h) and (i).) OCTC suggests deletion of the deviation from the Model Rules regarding these issues. This may require changes to Comments 12 – 14.~~
- ~~3. OCTC suggests that the term "inviolable" in proposed rule 1.15(e) be deleted as it is confusing and unnecessary in light of the rest of the sentence. All client funds should be maintained in a trust account until the time it is permitted to withdraw them.~~
- ~~4. OCTC finds confusing and inconsistent proposed rule 1.15(f). OCTC sees no compelling reason here to deviate from the Model Rules and, therefore, OCTC suggests that the first sentence of rule 1.15(a) of the Model Rules be reinstated. OCTC is particularly concerned that there are too many exceptions to the prohibition on the commingling of client funds and this will undermine the rule prohibiting commingling of client funds with the lawyer's own funds or allow such commingling if the attorney has the funds somewhere.~~
- ~~5. OCTC supports proposed rule 1.15(k) even though it is not in the Model Rules because it is essentially current rule 4-100(B). However, OCTC is concerned that subparagraph (6) is too limited as it does not provide for the Supreme Court or other court to issue an order for an audit. The rules should not determine jurisdiction or send a message that attorneys can violate a court's order. The Supreme Court has always provided that it has the right to involve itself at any stage of the disciplinary proceedings and investigation. (See *Brotsky v. State Bar* (1962) 57 Cal.2d 287, 301; *In re Rose* (2000) 22 Cal.4th 430, 439; *Obrien v. Jones* (2000) 23 Cal.4th 40, 48. See also *In re Accusation of Walker* (1948) 32 Cal.2d 488, 490.) OCTC also believes that subparagraph (7) should add the word "authorized" to other person to make clear that only authorized persons can request undisputed funds.~~
- ~~6. OCTC is concerned that the language of rule 1.15(l) is too broad and, as written, no part of the rule applies to those attorneys and firms discussed in the subparagraphs. This seems counter to the purpose of the rule and public protection. OCTC is also concerned that subparagraphs (2) and (3) do not state, as subparagraph (1) does, that, if the rule does not apply in those situations, the firms and lawyers handle the funds in accordance with the law of the controlling jurisdiction. OCTC is further concerned how it would be able~~

~~to obtain copies of those out of state records and believes that the lawyers in those situations should have a disciplinable obligation to provide those to us or ensure that the financial institutions provide those records to us. Further, OCTC is concerned how this paragraph is impacted by the proposed Choice of Law rule in the September batch of proposed rules. (See proposed rule 8.5.)~~

Rule 3.3 Candor Toward the Tribunal.

1. OCTC is concerned that proposed rule 3.3 addresses only candor toward a tribunal. However, California law, unlike paragraph 3.3(a)(1), currently provides that an “attorney shall employ for purposes of maintaining causes confided to the member such means only as consistent with truth.” Thus, the current rule covers, not just tribunals, but statements to others, including opposing counsel, parties, etc. Thus, unless this is covered in some other rule, OCTC believes that California’s current rule should be incorporated into this rule or proposed rule 3.4. OCTC recognizes that proposed rule 3.4 is titled Fairness to Opposing Party and Counsel, but that proposed rule does not include this requirement of truth and candor either and that rule also is only designed to cover opposing parties and counsels.
2. OCTC is concerned that this proposed rule requires knowingly. It is unclear what that means, but if that requires intentional and not misstatements or concealment based on gross negligence, OCTC opposes it since that as is not consistent with California law. (See e.g. *In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 280.) In fact, while good faith in the statement may be a defense to a charge of misrepresentation, an attorney’s unqualified and unequivocal statements to judges under circumstances that should have caused him at least some uncertainty are at minimum deceptive and support a finding of culpability. (*In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 174.) Moreover, some of the proposed rules already permit violations for “knew or reasonably should have known.” (See proposed rule 3.6.) For the same reasons, OCTC has concerns and disagrees with Comment 4. OCTC also wants to make clear that it believes the term material does not require that the attorney successfully misled court. Such an interpretation
3. 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 that word should remain in the rule. The proposed rule also omits the current rule that an attorney shall not intentionally misquote to a tribunal the language of a book, statute, or decision. OCTC is unsure if the Commission is intending to remove that, but OCTC believes that this language should remain and be added to the proposed rule. Likewise, the proposed rule omits the language 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 suggests that it be included in the proposed rule. In a similar vein, OCTC is concerned that nowhere in the proposed rules do they provide for 1) when an attorney states or alludes at trial to evidence that the attorney knows or reasonable believes is not relevant or admissible evidence or has already been ruled by the court inadmissible; 2) states the attorney’s belief in the credibility of a witness; and 3) includes when an attorney violates discovery orders of a court. OCTC believes these belong in rule 3.3. OCTC recognizes that these are in rule 3.4 of Model

Rule, but believe that they belong here, although what is most important is that they remain in the rules. They or some of them appear to be at least implicitly currently in rule 5-200.

4. OCTC is concerned that Comment 3 is incomplete as written because FRCP and CCP 128.7 requires that statements in pleadings be made "after an inquiry reasonable under the circumstances." Likewise, the California Supreme court has written that "while an attorney may often rely upon statements made by a client without further investigation, circumstances known to the attorney may require an investigation." (*Butler v. State Bar* (1986) 42 Cal.3d 323, 329.)

~~Rule 6.4 Law Reform Activities Affecting Client Interests.~~

- ~~1. OCTC is concerned that, while this rule requires the lawyer to inform an organization in which he or she serves as a director, officer, or member when the reform may affect the interests of the client, nothing in the rule requires the lawyer to inform the client. Perhaps that is already required by the conflict rules, but it should be made clear here.~~

Again, thank you for the opportunity to comment on these rules.

Very truly yours,



Russell G. Weiner
Interim Chief Trial Counsel

SDCBA Legal Ethics Committee
Comments to Revisions to Rules of Professional Conduct (RPC)
BATCH #4, Comment Deadline October 23, 2009
SDCBA Legal Ethics Committee Deadline September 22, 2009
Subcommittee Deadline August 31, 2009

LEC Rule Volunteer Name(s): **Rick Hendlin**

Old Rule No./Title: **Rule 5-200 (Trial Conduct)**

Proposed New Rule No./ Title: **3.3. Candor Toward the Tribunal**

QUESTIONS (please use separate sheets of paper as necessary):

(1) Is the **policy** behind the new rule correct? If “yes,” please proceed to the next question. If “no,” please elaborate, and proceed to Question #4.

Yes [X] No []

(2) Is the new rule **practical** for attorneys to follow? If “yes,” please proceed to the next question. If “no,” please elaborate, and then proceed to the Conclusions section.

Yes [] No [X]

A. Proposed Subparagraph (d) reads:

“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.”

Although reasonable minds could disagree, I tend to 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.”**

B. I disagree with the Commission’s proposed Comment [9] insofar as it deletes from the Model Rule counterpart [Model Rule Comment [10]] the following: **“either during the lawyer’s direct examination or in response to cross-examination by the opposing lawyer”** in the second sentence which reads **“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 [stricken through: either during the lawyer’s direct examination or in response to cross-examination by the opposing lawyer.]”**

The Commission's "Explanation of Changes to the ABA Model Rule" states, in part:

"The reason for the change is that the lawyer has not 'offered' the evidence in that situation (See, e.g. Ev.Code §776). Imposing the requirement to take remedial measures to correct false testimony that the lawyer was careful not to elicit from the witness on direct examination but which was adduced by opposing counsel in cross-examining the witness unreasonably interferes with a lawyer's legitimate trial strategy."

My view is that 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 underlying concept of "Candor toward the Tribunal," and should remain intact.

The Commission's proposed change to the ABA Model Rule would allow a lawyer (or client) to anticipate that the client or other witness called by the lawyer will give false testimony on cross-examination, and thereby relieving the lawyer to the duty to take remedial measures. Or, even after a lawyer has sought to persuade the client that false evidence should not be offered, it would provide a loophole allowing the client to simply lie on cross-examination, and allow the lawyer to sit silently while knowingly false testimony is given.

Query whether under such circumstances this would allow the lawyer to then **"base arguments to the trier of fact on evidence known to be false,"** which is expressly forbidden in the last sentence to **Comment [6]** which states:

"If only a portion of a witness's 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 or base arguments to the trier of fact on evidence known to be false."

If should be noted that the "Explanation of Changes to the 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]**, above, "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."

I think a clearer explanation of the relationship between **Comment 6** and **Comment 9** would be helpful to guide the lawyer in applying the proposed rule.

(3) Is the new rule **worded correctly and clearly**? If “yes, please proceed to the Conclusions section. If “no,” please elaborate, and then proceed to the Conclusions section.
Yes No

See comments to (2) above.

(4) Is the policy behind the existing rule correct? If “yes,” please proceed to the Conclusions section. If “no,” please elaborate, and then proceed to the Conclusions section.
Yes No

(5) Do you have any other comments about the proposed rule? If so, please elaborate here:

NOTE: The Commission’s explanation to Comment [1] notes, “the Commission has not yet determined the definition of “tribunal.” I am unclear whether this has since been defined, but it clearly would be relevant to consideration of this Rule’s scope.

CONCLUSIONS (pick one):

We approve the new rule in its entirety.

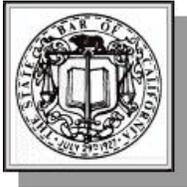
We approve the new rule with modifications.*

We disapprove the new rule and support keeping the old rule.

We disapprove the new rule and recommend a rule entirely different from either the old or new rule.*

We abstain from voting on the new rule but submit comments for your consideration.*

* If you select one of the * options, please make sure your concerns are included in your comments above in response to Questions 1-5, or set the forth on a separate sheet of paper.



THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT

PUBLIC COMMENT FORM

INSTRUCTIONS: This form allows you to submit your comments by entering them into the text box below and/or by uploading files as attachments. We ask that you comment on **one** Rule per form submission and that you choose the proposed Rule from the drop-down box below.

All information submitted is regarded as public record.

DEADLINE TO SUBMIT COMMENT IS: OCTOBER 23, 2009

Your Information

Professional Affiliation

Commenting on behalf of an organization

Yes

No

* Name

* City

* State

* Email address
(You will receive a copy of your comment submission.)

The following proposed rules can be viewed by clicking on the links below:

[Rule 1.8.6 \[3-310\(F\)\]](#)

[Rule 3.3 \[5-200\]](#)

[Rule 6.3 \[n/a\]](#)

[Rule 1.8.7 \[3-310\(D\)\]](#)

[Rule 3.6 \[5-120\]](#)

[Rule 6.4 \[n/a\]](#)

[Rule 1.15 \[4-100\]](#)

[Rule 3.7 \[5-210\]](#)

[Batch 4 Discussion Draft \(All rules\)](#)

* Select the Proposed Rule that you would like to comment on from the drop down list.

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

AGREE with this proposed Rule

DISAGREE with this proposed Rule

AGREE ONLY IF MODIFIED

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

Please see attached letter.

Attachments

You may upload up to **three** attachments commenting on the rule you selected from the drop down box in the previous section. We accept the following file types: text (.txt), Microsoft Word (.doc), WordPerfect (.wpd), Rich Text Format (.rtf) and Adobe Acrobat PDF (.pdf). We **do not** accept any other file types. **Files must be less than 1 megabyte (1,000,000 bytes) in size.** For help with uploading file attachments, click the  next to **Attachment**.

Attachment 

file: [3.3 final.pdf \(284k\)](#)

Attachment 

Attachment 

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To receive e-mail notifications regarding the rules revision project, check the box indicating that you would like to be added to the Commission's e-mail list and enter your email address below. Email addresses will be used only to deliver the requested information. We will not use it for any other purpose or share it with others.



CPDA

California Public Defenders Association
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Kathleen Cannon, 2007-2008
Leslie McMillan, 2008-2009

October 23, 2009

Audrey Hollins
Office of Professional Competence, Planning and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639
Re: Proposed Rule 3.3

Dear Ms. Hollins:

The California Public Defenders Association remains committed to the principle that attorneys should be honest in their dealings with the court, because this practice promotes public confidence in our system of justice. We believe, however, that portions of Rule 3.3 of the proposed amendments to the Rules of Professional Conduct undermine the Constitutional right to effective assistance of counsel, are contrary to existing law, and would not serve the ends of justice.

The California Public Defenders Association (CPDA) is the largest public defender organization in the nation with a membership of over 4,000 public defenders and private defense counsel. CPDA attorney members act as legal counsel for over 95 percent of the indigents accused of criminal conduct in California. The association, established in 1969, is the state-designated continuing legal education provider for all local public defender offices in the state of California, and also represents the interests of CPDA's criminal defense attorney members in legislative sessions and on significant issues in the appellate courts.

OBJECTIONS TO PROPOSED RULE 3.3

CPDA believes that Section a(2) should be deleted from Proposed Rule 3.3. As the Proposed Rule is currently written, it deprives a defendant of effective assistance of counsel in a criminal case.

The Constitution guarantees an accused the right to the effective assistance of counsel. *Powell v. Alabama* (1932) 287 U.S. 45; *Strickland v. Washington* (1984) 466 U.S. 668; *People v. Pope* (1979) 23 Cal.3d 412. This would be a hollow guarantee if the accused's attorney were to work against his or her client. This would destroy the duty of loyalty that a defense attorney owes to the client. "Representation of a criminal defendant entails certain

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Re: Proposed Rule 3.3
Page Two

basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest." (*People v. Doolin* (2009) 45 Cal.4th 390, 411; citing *Strickland v. Washington* (1984) 466 U.S. 668, 688) Yet that is exactly what this proposed subsection would require, for it would force counsel to abandon the duty of loyalty to the client in favor of disclosing harmful information to the court. Instead of permitting an attorney to stand silent, the Proposed Rule would require a defendant's attorney, on pain of discipline, to voluntarily make a legal argument against his or her client. Additionally, Comment [4] to the Rule would require a defendant's attorney to go so far in this voluntary argument to cite cases from other jurisdictions.

The proposed rule would also undercut the adversarial nature of the criminal justice process. In *United States v. Cronin* (1984) 466 U.S. 648, 656-657, the Supreme Court said that "[t]he right to the effective assistance of counsel is . . . the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." The adversarial nature of the criminal justice process would be destroyed if the attorney for the accused cannot serve as an advocate for the accused and as an adversary of the prosecution. Again, the accused would be deprived of the effective assistance of counsel.

Section a(1) of the Proposed Rule continues the present prohibition against making false statements of fact or law to the court, and CPDA agrees that this is proper. This section would preclude an attorney from misleading the court by citing legal authority that the attorney knows is inapposite, based on other controlling legal authority. The inclusion of section a(1) protects the court from being misled by an attorney without forcing an attorney to become, in essence, an advocate against the client.

It is also clear that the proposed revision contradicts existing California law. In *Schaefer v. State Bar*, (1945) 26 Cal.2d 739, 747-

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748, the court held that the then-existing California Rules of Professional Conduct did not support the discipline of a attorney who had failed to cite contrary authority to the court when opposing counsel was present at the hearing. CPDA believes that because a prosecutor will be present to urge the Government's position in court, the judge will be afforded access to whatever authority the prosecution believes is germane to the case, because the prosecutor in a criminal case has "the responsibility of a minister of justice...." (ABA Model Rule 3.8, Comment 1)

Lastly, CPDA is aware of the comments that Michael Judge, the Public Defender of Los Angeles County, and Janice Fukai, the Alternate Public Defender of Los Angeles County, have submitted in opposition to section a(2) of Proposed Rule 3.3 in his letter of October 20, 2009. We join in his reasoning and his comments.

OBJECTIONS TO THE COMMENTS TO PROPOSED RULE 3.3

Proposed comment [4]

In light of CPDA's opposition to section a(2) of the Proposed Rule, we believe that much of comment 4 should be deleted.

We have no objection to the first sentence of the comment nor to the last sentence of the comment. We do object to those sentences in between, based on our earlier comments in opposition to section a(2). With the middle portion deleted, we believe the comment should read:

"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. 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."

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State Bar of California
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Page Four

Proposed comment [7]

CPDA disagrees with the portion of the comment which requires that the attorney seek permission from the court to withdraw when the attorney believes that the client will be committing perjury and asks that that portion of the comment be deleted.

Of the authorities cited, only *People v. Brown* (1988) 203 Cal.App.3d 1335, 1340 suggests this should be the case. None of the other cases require the attorney to attempt to withdraw from further representation. Nor does the seminal case of *Nix v. Whiteside*, (1986) 457 U.S. 157, 166, which is discussed in all of the authorities cited in the comment.

Even when the attorney suspects that the client intends to commit perjury, there is no requirement to declare a conflict of interest or to withdraw from representation of the client. (*People v. Bolton* (2008) 166 Cal.App.4th 343, 357.) As recognized by the California Supreme Court, “Although attorneys may not present evidence they know to be false or assist in perpetrating known frauds on the court, they may ethically present evidence that they suspect, but do not personally know, is false. Criminal defense attorneys sometimes have to present evidence that is incredible and that, not being naive, they might personally disbelieve. Presenting incredible evidence may raise difficult tactical decisions if counsel finds evidence incredible, the fact finder may also but, as long as counsel has no specific undisclosed factual knowledge of its falsity, it does not raise an ethical problem.” (*People v. Riel* (2000) 22 Cal.4th 1153, 1217.)

CPDA believes that such a procedure is, as stated in *People v. Johnson* (1998) 62 Cal. App. 4th 608, 623, is “an ‘ostrich-like approach’ which does little to resolve the problem.” For this reason, we suggest that the comment be modified to delete the requirement that the attorney seek to withdraw from representation before presenting such testimony.

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Page Five

Proposed Comment [8]

CPDA agrees with the first two sentences of proposed Comment [8]. However, CPDA believes that proposed sentences three and four should be deleted, and sentence five should be changed.

Our objection to sentence four is precautionary. Sentence four reads “See Rule 1.0(f).” Since the Committee has not yet proposed a Rule 1.0(f), that cross-reference is premature.

Proposed sentence three detracts from, and obscures, rather than adds to and clarifies, the first two sentences. The first two sentences highlight the lawyer’s own belief, which, of course, must be “reasonable.” This is the right blend of subjective and objective standards.

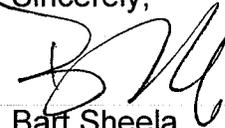
Sentence three tilts too far toward an objective-only standard and will unduly chill “[d]efense counsel’s obligation ... ‘to serve as the accused’s counselor and advocate with courage and devotion and to render effective, quality representation.’ ” *People v. Bolton* (2008) 166 Cal.App.4th 343, 357 (quoting ABA Standards for Criminal Justice: Prosecution and Defense Function (1993) ABA Defense Function Standards, Standard 4-1.2, p. 120.) And it creates the possibility that an attorney would be subject to discipline because a “Monday-morning quarterback” draws the conclusion that the attorney knew of the falsity by inferring knowledge “from the circumstances.”

This concern is amplified by the phrase in the fifth and final sentence of proposed Comment [8], “... an obvious falsehood...” This phrase should be changed: it does not specify to whom the falsehood must be obvious. The fifth sentence should read “a falsehood that is obvious to the lawyer,” or, better and simpler, “a falsehood that is known to the lawyer.”

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Again, *People v. Bolton, supra*, 166 Cal.App.4th at 357 states the correct standard, and, simultaneously, states the reason for CPDA's position on Comment [8]. "Criminal defense attorneys sometimes have to present evidence that is incredible.... [B]ut, as long as counsel has no ... factual knowledge of its falsity, it does not raise an ethical problem." We believe that the *Bolton* case should be cited in either comment [7] or [8], to provide additional guidance to attorneys.

Sincerely,

A handwritten signature in black ink, appearing to read 'B Sheela', written over a horizontal dotted line.

Bart Sheela
President,
California Public Defenders Association

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* Date

10/23/2009 

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MICHAEL P. JUDGE
PUBLIC DEFENDER

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LOS ANGELES COUNTY PUBLIC DEFENDER

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EXECUTIVE OFFICE

October 20, 2009

Audrey Hollins
Office of Professional Competence, Planning and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

Re: Proposed Rule 3.3, Candor Toward the Tribunal

Dear Ms. Hollins,

I write to express my strong opposition to the proposed Rule 3.3, Candor Toward the Tribunal.

Although the ABA has provided for many years that a lawyer must not fail to disclose to the court legal authority known to be directly adverse to the position of the client, this rule has never been adopted in California. Instead, current Rule 5-200 provides that counsel may not make a "false statement of fact or law" to the court. (Rule 5-200, subd. (b).)

The proposed Rule 3.3 provides that a lawyer shall not knowingly "fail to disclose to the tribunal controlling authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." (Proposed Rule 3.3, subd. (a)(2).)

The existing rule bars counsel from making a false statement to the court. I have no quarrel with a rule barring counsel from making affirmative misstatements of law to a court. When counsel is faced with the dilemma of remaining silent or disclosing authority harmful to the client, a rule barring affirmative misstatements of law permits counsel to remain silent, thereby remaining loyal to the client. In contrast the proposal would create a new rule which would require counsel to volunteer to the court authority contrary to the position of the client. A rule which requires counsel to affirmatively offer case law harmful to the client undermines two critical core values of our criminal justice system in California.

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State Bar of California
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The first core value of our system is counsel's duty of loyalty to his or her client. The duty of counsel to be a zealous advocate for his or her client is a central value of our justice system. (See, e.g., *People v. Pangelina* (1984) 153 Cal.App.3d 1, 6; *People v. Pope* (1979) 23 Cal.3d 412, 424-425; *People v. Fosselman* (1983) 33 Cal.3d 572.) The Court of Appeal, citing a California Supreme Court decision, has explained:

Once an attorney has been assigned to represent a client, he is bound to do so to the best of his abilities under the circumstances despite the not uncommon difficulty of that task, particularly in the context of criminal trials. (See rule 6-101(2), Rules Prof. Conduct of State Bar.) This duty is not affected by the fact that a client may be uncooperative or that, as in this case, a trial court's ruling on a substantive motion appears to be arbitrary or incorrect. The existence of these admittedly adverse conditions does not relieve counsel of the duty to act as a vigorous advocate and to provide the client with whatever defense he can muster. Any other course would be contrary to the attorney's obligation faithfully to discharge the duties of an attorney at law to the best of his knowledge and ability. (Bus. & Prof. Code § 6067.)

(*People v. Shelley* (1984) 156 Cal.App.3d 521, 528-529, internal quotation marks omitted; citing *People v. McKenzie* (1983) 34 Cal.3d 616, 631.)

Counsel's duty of loyalty to his or her client has been recognized by both the California and United States Supreme Courts: "Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest." (*People v. Doolin* (2009) 45 Cal.4th 390, 411; citing *Strickland v. Washington* (1984) 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674.)

The Court of Appeal has explained counsel's duty of loyalty to the client, characterizing that duty as an "overarching duty to advocate the defendant's cause." (*King v. Superior Court* (2003) 107 Cal.App.4th 929, 949.) Thus, a core value of our system is counsel's duty to his or her client. There can be no ambiguity here: the proposed rule would require counsel to harm the client, perhaps devastating the client's position, and perhaps leading to a sentence of death or life in prison, by volunteering to the court authority which hurts the client's position.

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Since the rules of professional conduct apply only to lawyers, this means that a defendant would be far better off representing himself or herself. A pro per defendant has no duty to disclose contrary authority, while a lawyer would be ethically compelled to disclose that contrary authority. It should be a fundamental premise of the Rules of Professional Conduct that clients should not have a strong incentive to represent themselves instead of having counsel.

The second core value of our system of criminal justice is the adversarial system. As the dissenting justice in *In re Visciotti* explained:

The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free. *Herring v. New York*, 422 U.S. 853, 862 [45 L.Ed.2d 593, 600, 95 S.Ct. 2550] (1975). It is that very premise that underlies and gives meaning to the Sixth Amendment. It is meant to assure fairness in the adversary criminal process. *United States v. Morrison*, 449 U.S. 361, 364 [66 L.Ed.2d 564, 567-568, 101 S.Ct. 665] (1981). Unless the accused receives the effective assistance of counsel, a serious risk of injustice infects the trial itself. *Cuyler v. Sullivan*, 446 U.S. [335,] 343 [(1980) (64 L.Ed.2d 333, 343, 100 S.Ct. 1708)]. [¶] Thus, the adversarial process protected by the Sixth Amendment requires that the accused have counsel acting in the role of an advocate. *Anders v. California*, 386 U.S. 738, 743 [18 L.Ed.2d 493, 497-498, 87 S.Ct. 1396] (1967).

(*In re Visciotti* (1996) 14 Cal.4th 325, 363 -364, dis. opn., J., internal quotation marks omitted.)

The critical value of an adversarial system is undermined when counsel for the party who has diligently researched an issue is required to assist his or her opponent, who may have done nothing, by revealing the authority which requires the court to rule against that party.

The California Supreme Court has stressed that the law should not place defense counsel in criminal cases in the position of “honoring counsel’s commitment to the court” while simultaneously attempting to honor his or her duty to the client: “Nor should the law place a defense attorney in the untenable position of having to choose between honoring

Audrey Hollins
State Bar of California
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counsel's commitment to the court (that jury trial on the prior conviction allegation would be waived) and counsel's duty to his or her client (to offer all available defenses to the charges and allegations contained in the accusatory pleading)." (*People v. Saunders* (1993) 5 Cal.4th 580, 591.) Yet the proposed rule does precisely this. Whenever counsel is in the position of being aware of authority contrary to the client's position, counsel would be placed exactly in that "untenable position" either of assisting the court or protecting the client. That is a quintessential ethical conflict of interest.

The current statute recognizes the special rule applicable to criminal defense lawyers. The Business and Professions Code bars attorneys from maintaining actions or defenses unless those actions and defenses appear legal or just, "except the defense of a person charged with a public offense." (Bus. & Prof. Code § 6068, subd. (c).) The special role of criminal defense lawyers frequently requires us to challenge the prosecution, or to remain silent, when in any other context a concession or voluntary admission would be ethically required. Application of the proposed rule to criminal defense attorneys would force us to volunteer adverse case authority to the court, with the inevitable result of damaging the client and undermining the adversarial system.

Criminal defense attorneys may be aware of facts that tend to inculcate a client, which they are not permitted to disclose, but which under the proposed rule would generate a duty to disclose adverse authority, from which the prosecution and court could readily deduce the theretofore undisclosed facts.

For these reasons, I oppose adoption of the proposed Rule 3.3. I also note that there is no indication that the problem which proposed Rule 3.3 is intended to address is widespread or common. There are no reported cases where counsel failed to disclose contrary authority. Frequently, such disclosure is tactically advantageous to counsel and enhances counsel's credibility. However, I am unaware of instances where nondisclosure actually resulted in erroneous judicial rulings.

I must also note that the proposed rule is very narrow, applicable only to "controlling authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." (Proposed Rule 3.3, subd. (a)(2).) However, this narrow articulation of the rule is wholly undermined by the comment section 4, which states, "the lawyer must disclose the authorities the court needs to be aware of in order to rule intelligently on the matter." The comment also refers to "a tribunal that is fully informed."

Audrey Hollins
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The narrow duty to disclose controlling authority articulated in the proposed Rule itself is thus undermined by comments which appear to impose on counsel a duty to ensure that the judge is fully informed and has all the authorities necessary to rule intelligently. That duty is much broader than the narrow duty imposed by the rule. Although I oppose adoption of the proposed rule in its entirety, if it is adopted, the comment should be rewritten to reinforce the narrowness of the rule.

Finally, with respect to the Proposed Rule 3.6, Trial Publicity, the proposed Rule seems fair and allows the defense leeway under Rule 3.6, subdivision (c), to make statements when necessary to protect a client from the prejudicial effect of recent adverse publicity; moreover comment (6) explains that a response can be made to publicity initiated by third persons (police bloggers, etc.) when necessary to avoid prejudice to the client's rights.

The commission, however, does not include ABA comment (5) which sets forth some examples of subjects more likely than not to prejudice a proceeding. These subjects are also the statements most likely to occur, such as (1) criminal record of a party; (2) statements by defendant or refusal to make a statement; (3) refusal of a person to submit to a test; (4) opinion of guilt or innocence; and (5) information that would most likely be inadmissible as evidence in a trial. I believe comment (5) should be restored.

Sincerely,


JANICE FUKAI
Alternate Public Defender


MICHAEL P. JUDGE
Public Defender

LOS ANGELES COUNTY, CALIFORNIA

Hollins, Audrey

From: Trudy Levindofske [trudy@ocba.net]
Sent: Friday, October 23, 2009 2:46 PM
To: Hollins, Audrey
Cc: 'Shawn M Harpen'; 'Garner, Scott'; 'Bagosy, Jennifer'; 'Yoder, Mike'
Subject: Orange County Bar Comments Re Rule Revisions
Attachments: OCBA Comments on Rules Due Oct 23 2009.pdf

Dear Ms. Collins:

Please find attached the comments from the Orange County Bar Association regarding the following proposed amended rules. We appreciate the opportunity to offer our comments to the Bar's Special Commission for the Revision of the Rules of Professional Conduct. Please note that we will not be submitting comments on Rule 1.8.6.

Please let me know if you have any questions. I would also appreciate your acknowledgement of receipt of these comments.

Rule 1.8.7

Aggregate Settlements [3-310(D)]

Rule 1.15

Safekeeping Property: Handling Funds and Property of Clients and Other Persons [4-100]

Rule 3.3

Candor Toward the Tribunal [5-200]

Rule 3.6

Trial Publicity [5-120]

Rule 3.7

Lawyer as Witness [5-210]

Rule 6.3

Membership in Legal Services Organization [n/a]

Rule 6.4

Law Reform Activities Affecting Client Interests [n/a]

Trudy C. Levindofske, CAE

Executive Director

Orange County Bar Association

Orange County Bar Association Charitable Fund

(949)440-6700, ext. 213

MEMORANDUM

Date: September 4, 2009

To: Special Commission for the Revision of the Rules of Professional Conduct of the State Bar of California

From: Orange County Bar Association (“OCBA”)

Re: **Proposed Rule 3.3 – Candor to the Tribunal**

Founded over 100 years ago, the Orange County Bar Association has over 7,000 members, making it one of largest voluntary bar associations in California. The OCBA Board of Directors, made up of practitioners from large and small firms, with varied civil and criminal practices, and of differing ethnic backgrounds and political leanings, has approved this comment prepared by the Professionalism & Ethics Committee.

The OCBA respectfully submits the following concerning the subject Proposed Rule:

The OCBA supports the adoption of the Proposed Rule, which will clarify the lawyer’s obligation of candor to a tribunal, and which represents a significant improvement over the existing California Rule.

The OCBA has several proposed revisions to the comments, as follows:

As to Comment [6], the OCBA agrees with the minority that the language “*or otherwise permit* the witness to present testimony the lawyer knows to be false,” is unclear, and should be deleted.

As to Comments [6] and [7], the OCBA recommends that the Commission use the phrase “criminal defendant” consistently, rather than the term “criminal defense client” used in Comment [7].

As to Comment [9], the OCBA recommends that the phrase, “either during the lawyer’s direct examination or in response to cross-examination by the opposing lawyer” be included in the Comment, consistent with the ABA. To do otherwise could lead to gamesmanship, with the lawyer coaching the client that the lawyer cannot elicit false testimony on direct examination, but that the lawyer has no ethical obligations if such testimony is elicited on cross-examination. We also believe that the lawyer’s obligation to take remedial measures should apply to false testimony on cross-examination, just as the lawyer has an obligation to take remedial measures if false testimony is elicited in a deposition by the adverse party’s counsel – which is another form of cross-examination.



LACBA

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October 21, 2009

Audrey Hollins
Office of Professional Competence, Planning & Development
State Bar of California
180 Howard Street
San Francisco, CA 94105

RE: Rule 3.3 – Candor Toward the Tribunal

Dear Ms. Hollins:

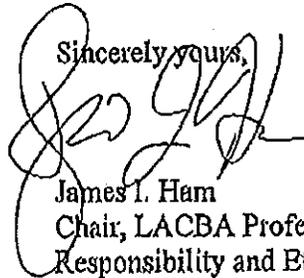
The Professional Responsibility and Ethics Committee (PREC) of the Los Angeles County Bar Association (LACBA) supports Proposed Rule 3.3 with the various changes to the proposed rule and comments suggested by a majority of the Rules Revision Commission with the following comments and suggestions:

1. PREC supports deleting the language in (b) "including, if necessary, disclosure to tribunal" at the end of the sentence. We suggest adding the phrase "consistent with Business & Professions Code Section 6068(a)" at the end of the sentence, however, in place of the deleted language to make the rule clear as to how to understand "reasonable remedial."
2. PREC agrees that a lawyer should correct a previously improperly cited authority, but believes (with a minority of the RRC) that the duty should end when the lawyer ceases to represent the client.
3. PREC notes the sentence in proposed comment #4 which reads "Under this Rule, the lawyer must disclose authorities the court needs to be aware of in order to rule intelligently on the matter." We are concerned that this may be too general and broad a phrase in a disciplinary context, even though it is as part of a comment and not part of the Rule itself.

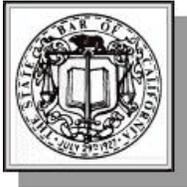
Audrey Hollins
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We appreciate the opportunity to comment on the proposed new and amended Rules of Professional Conduct.

Sincerely yours,



James I. Ham
Chair, LACBA Professional
Responsibility and Ethics Committee



THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT

PUBLIC COMMENT FORM

INSTRUCTIONS: This form allows you to submit your comments by entering them into the text box below and/or by uploading files as attachments. We ask that you comment on **one** Rule per form submission and that you choose the proposed Rule from the drop-down box below.

All information submitted is regarded as public record.

DEADLINE TO SUBMIT COMMENT IS: OCTOBER 23, 2009

Your Information

Professional Affiliation

Commenting on behalf of an organization

- Yes
 No

* Name

* City

* State

* Email address
(You will receive a copy of your comment submission.)

The following proposed rules can be viewed by clicking on the links below:

- | | | |
|---------------------------------------|----------------------------------|--|
| Rule 1.8.6 [3-310(F)] | Rule 3.3 [5-200] | Rule 6.3 [n/a] |
| Rule 1.8.7 [3-310(D)] | Rule 3.6 [5-120] | Rule 6.4 [n/a] |
| Rule 1.15 [4-100] | Rule 3.7 [5-210] | Batch 4 Discussion Draft (All rules) |

* Select the Proposed Rule that you would like to comment on from the drop down list.

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

- AGREE with this proposed Rule
 DISAGREE with this proposed Rule
 AGREE ONLY IF MODIFIED

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

The Santa Clara County Bar Association (SCCBA) Task Force that reviewed this rule had a The substantial majority who agree with Rule 3.3 as proposed by the Rule Review Commission. Consequently, the SCCBA adopts that views. We agree with the rationale that California should rigorously protect attorney-client confidentiality even when it prevents the attorney from making disclosures to the tribunal regarding a client's or witness's untruthfulness or regarding evidence that may not be accurate. However, we think it should be noted that a small, but strong minority of the SCCBA Task Force support the ABA Model Rule version based on the rationale that this rule is meant to protect the integrity of the judicial process and judicial decision-making and that policy is of greater importance in this circumstance than allowing a client's wrongdoing to be protected by attorney-client confidentiality. The minority further suggests that the fact that the California Supreme Court has never approved such a mandatory rule is irrelevant; if the approach is the correct approach, it should be adopted and presented to the Court.

OFFICE USE ONLY.

* Date

10/30/2009 

Period

PC

File :

D-2009-287d Santa Clara County Bar [3.3].pdf

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