

August 4, 2010 McCurdy E-mail to RRC:

To date, we have received 3 public comments for the rules currently circulating for public comment. Given the extremely short turn-around time between now and the next meeting, it is important that all members read all comments as they are received. I have attached copies of the following comments on the following rules, along with public commenter charts providing a synopsis of these comments:

Rule 1.0.1 – Peter Liederman
Rule 3.8 – Ventura DA – Michael Schwartz
Rule 5.4 – Thomas Quinn

The public comments will be sent out to the entire Commission as they are received, and will also be available at the Google site under the heading “COMMENTS BATCH Y”:
<http://Sites.google.com>

IMPORTANT: Please be advised that the assignments deadline is Thursday, August 26th at 9:00 am, due to the August 25th public comment deadline. This means that the usual opportunity for sending e-mail comments after receipt of the agenda materials will not be possible. Instead, all Commission members are asked to send e-mails responding to the public comment letters as they are distributed. Please send e-mail comments to the entire Commission to assure that leadership and the drafting teams can account for e-mail comments in preparing assignments.

Below is a list of the drafting teams assigned to each rule under consideration at the August meeting. Folders for each rule with the assignment background materials are available at the Google site under the heading “RULES BATCH Y.” As updated public commenter charts become available we will send them to you by e-mail and post them at the Google site.

III.A. Rule 1.0.1 - Terminology [1-100(B)] – KEHR, Julien, Sapiro
III.B. Rule 2.1 - Advisor [N/A] – LAMPORT, Vapnek
III.C. Rule 3.3 - Candor Toward the Tribunal [5-200] – TUFT, Peck, Ruvolo, Sapiro
III.D. Rule 3.8 - Special Responsibilities of a Prosecutor [5-110] (At the direction of the Board of Governors, public comment is being solicited only as to paragraph (d).) – FOY, Peck, Tuft
III.E. Rule 4.2 - Communications with a Represented Person [2-100] – MARTINEZ/TUFT
III.F. Rule 5.4 - Financial and Similar Arrangements with Nonlawyers [1-310, 1-320, 1-600] – MOHR, Martinez, Peck, Tuft
III.G. Rule 8.4 - Misconduct [1-120] – VAPNEK/PECK, Tuft

We're in the home stretch!

Attached:

RRC - 1-100 [1-0-1] - Public Comment Chart - By Commenter - YDFT1 (08-04-10).doc
RRC - 5-110 [3-8] - Public Comment Chart - By Commenter - YDFT1 (08-04-10).doc
RRC - 1-310X [5-4] - Public Comment Chart - By Commenter - YDFT1 (08-04-10).doc
RRC - [3-8] - Public Comment Complete - REV (08-04-10).pdf
RRC - [5-4] - Public Comment Complete - REV (08-04-10).pdf
RRC - [1-0-1] - Public Comment Complete - REV (08-04-10).pdf

August 5, 2010 Sondheim E-mail to McCurdy, cc Difuntorum & KEM:

The draft assignments/agenda looks fine, subject to the following 2 observations:

1. Mark said he can "participate by phone periodically if necessary." Since he is the lead drafter on 3.3 (III C), could you please ascertain from him if he wants to participate in the discussion of this rule.
2. If he does not, we need another lead drafter. I would suggest Jerry since we have not heard from Nace and Ellen is a co-drafter on 3 other rules whereas Jerry is a co-drafter on only 1 other.

August 5, 2010 McCurdy E-mail to Tuft, cc Difuntorum, Sondheim & KEM:

Harry has asked that I inquire as to whether you are still able to handle the Rule 3.3 assignment, and whether you can arrange to be available to discuss it with the Commission by phone at some point in the meeting.

If not, we will arrange for one of your co-drafters to take the lead.

August 5, 2010 McCurdy E-mail to Sondheim, cc Difuntorum & KEM:

Thanks, Harry. I sent Mark a message. If I haven't heard from him by tomorrow morning I'll give him a call. We'll send out the assignments once the Rule 3.3 assignment is sorted out, but no later than tomorrow afternoon.

August 5, 2010 Tuft E-mail to McCurdy, cc Difuntorum, Sondheim & KEM:

I would not be able to get to it any time soon, so if a co-drafter can do it, I would appreciate it. I should be able to call in to discuss it at an appointed time.

August 6, 2010 McCurdy E-mail to Ruvolo & Sapiro, cc Difuntorum, Tuft, Sondheim & KEM:

Mark is the lead drafter for Rule 3.3, along with you two and Ellen. He will be in NY for the August 27 & 28 meeting and can possibly join the meeting by phone for a short time, but isn't able to commit to taking on the lead for this assignment prior to the meeting. Please let me know if either of you are able to pick up the lead on this assignment for your codrafting team. Ellen is on three other drafting teams so she would be our last option for taking this on.

We need to send out the assignments today and want to firm this up.

August 6, 2010 Sapiro E-mail to McCurdy, cc Ruvolo, Difuntorum, Tuft, Sondheim & KEM:

I would love to work with them. I do not recall seeing any public comments on 3.3 so far. Have you received any?

August 6, 2010 McCurdy E-mail to Sapiro, cc Ruvolo, Difuntorum, Tuft, Sondheim & KEM:

Thanks, Jerry! You are correct, no comments have been received on Rule 3.3 so far.

August 24, 2010 McCurdy E-mail to RRC re LACBA Comment:

Please review the attached comment from LACBA on proposed Rule 3.3. LACBA has concerns about the relationship between the duty of confidentiality and some of the provisions of Rule 3.3. An updated public commenter chart adding a synopsis for LACBA's comment is being prepared and will be sent by a separate e-mail message.

All members are encouraged to lodge their e-mail comments concerning the attached public comment as soon as possible.

Attached:

RRC - [3-8] - Public Comment - LACBA (08-23-10).pdf

August 24, 2010 Tuft E-mail to RRC:

I oppose LACBA's proposed revisions to rule 3.3(a) (b) and (d) and to adding a new paragraph (e). The rule and Comment (10) are a clear expression of the standard for California lawyers and provides adequate guidance. California lawyers are required to deal with difficult issues in practicing law, including the time honored issue of satisfying the duty of candor to the tribunal and protecting client confidential information. Lawyers frequently face complex issues in bringing motions to withdraw, responding to disqualification motions, client perjury and other situations where these duties must be reconciled. I do not believe California case law is as absolute as LACBA would like to see in rule 3.3.

August 24, 2010 Martinez E-mail to RRC:

In looking at this Rule I noticed that we did not adopt ABA Comment [14] which explains the ex parte disclosure provision in paragraph (d). The Comparison chart gives no explanation for why it was not adopted. I suggest that we consider adopting ABA Comment [14]. I am not sure if this addresses COPRAC's concern, but it may help.

Also, in the absence of Comment [14], it is unclear what "ex parte proceeding" refers to. The term can mean a proceeding that is brought without the formalities of a noticed motion, or it can refer to a proceeding where the opposing party is not present because no notice was given or required. The latter instances involve emergency situations where notice is not feasible or would frustrate the relief sought. Under California parlance an ex parte application is simply a proceeding brought on less than full statutory notice. The CA Rules of Court require notice to the opposing side the day before. Rule 3.1203(a). However, certain types of ex parte proceedings do not require any notice such as harassment cases (CCP § 527.6) or TRO's where notification to the other side would lead to irreparable injury (CCP § 527(c)(2)(C)). Therefore, we need to explain, perhaps by the inclusion of Comment [14], that "ex parte proceeding" refers to a proceeding where the opposing party is not present, or has not submitted written opposition, rather than a proceeding that is the result of less than the formal noticed motion requirements.

Note also, in federal court all ex parte applications are done on paper--there is usually no appearance. Some Federal courts define ex parte to refer to a motion filed without notice to the opposing party (ND CA Rule 7-10), whereas other Federal courts define it to include a notice requirement (CD CA Rule L.R. 7-19.1).

ABA Comment [14] explains this distinction by stating that "in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates....The judge has an affirmative responsibility to accord the absent party just consideration." By not adopting Comment [14] we leave open the possibility that lawyers and judges will give "ex parte proceedings" an overly expansive interpretation by requiring a high degree of candor from the moving party even where the adverse party is present to oppose the application.

August 24, 2010 Difuntorum E-mail to Martinez, cc RRC:

An explanation was drafted. However, it was erroneously omitted in the version of the Rule 3.3 comparison chart that was posted. The explanation is below. You may or may not find it persuasive. (Note: At the June 25 – 26, 2010 meeting, there was motion to restore Comment [14] but it failed for lack of a second.)

<p>Ex Parte Proceedings</p> <p>[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.</p>	<p>Ex-Parte Proceedings</p> <p>[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.</p>	<p>Model Rule 3.3, Comment [14] is not included for two reasons. First, Comment [14] does not provide much guidance in applying the rule. Second, the Commission believes that although the language used may be descriptive of duties that are applicable in some ex parte proceedings, the language may not be accurate for every variation of an ex parte proceeding in California. In particular, the Commission notes that there are ex parte proceedings that may involve appearances by other parties notwithstanding the designation of the proceeding as "ex parte."</p>
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August 24, 2010 Martinez E-mail to RRC:

Thanks, Randy. I propose a comment explaining our use of the term as follows: "As used in this Rule, 'ex parte proceeding' refers to a proceeding where not all of the parties to the controversy are present."

August 24, 2010 McCurdy E-mail to RRC:

Over the past two days Randy and I have circulated the comments as we have received them. As promised, I've attached a copy of updated commenter charts including a synopsis of those comments received on the following rules:

- Rule 1.0.1
- Rule 3.3

Rule 3.8
Rule 4.2

Attached:

RRC - 1-100 [1-0-1] - Public Comment Chart - By Commenter - YDFT1.1 (08-24-10).doc
RRC - 2-100 [4-2] - Public Comment Chart - By Commenter - YDFT1.3 (08-24-10).doc
RRC - 5-200 [3-3] - Public Comment Chart - By Commenter - YDFT1.1 (08-24-10).doc
RRC - 5-110 [3-8] - Public Comment Chart - By Commenter - YDFT1.3 (08-24-10).doc

August 24, 2010 Sapiro E-mail to RRC:

Attached is a memo on Rule 3.3. I send it as an attachment because I am so inept with Word that I lost formatting and redlining when I copied and pasted it into this email.

Attached:

RRC - 5-200 [3-3] - 08-24-10 Sapiro Memo to RRC.doc

Because Mark and Nace are not able to take the lead on Rule 3.3 this time around, Lauren asked me to cover for them.

So far, I am only aware of two comments on Rule 3.3. One from COPRAC supports the rule as proposed. The Los Angeles county Bar Association Professional Responsibility and Ethics Committee ["PREC"] objects to the rule on, essentially, two grounds. The balance of this email will discuss the PREC objections.

1. First, PREC says that paragraphs (a)(3) and (b) do not adequately explain the exceptions for Rule 1.6 and Section 6068(e) and that paragraph (d) does not make such an exception at all.
2. In Rule 3.3(a)(3), if a client or witness called by the lawyer has offered false, material evidence, then the lawyer must take remedial measures: ". . . shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal, unless disclosure is prohibited by Rule 1.6 and Business and Professions Code section 6068(e)."
3. Similarly, in Rule 3.3(b), if the lawyer knows that a person has committed or will commit criminal or fraudulent conduct related to the proceeding, the lawyer ". . . shall take remedial measures to the extent permitted by Rule 1.6 and Business and Professions Code section 6068(e)."
4. PREC says that the rule should not merely direct the lawyer to 6068(e) and recommends that the last sentence of Comment [10] be added to the black letter rule, itself. That sentence is: "Remedial measures do not include disclosure of client confidential information, which the lawyer is required to maintain inviolate under Rule 1.6 and Business and Professions Code section 6068(e)."

5. At first, I thought that the statements in the black letter rule should be sufficient, and I thought that the only thing that the last sentence of Comment [10] added was the phrase “which the lawyer is required to maintain inviolate,” which to me is self evident. I did not understand the reason for the PREC comment. I therefore called Robert Sall and asked for an explanation. He told me that they concluded that most lawyers are not ethics wonks and will not realize what the reference to 6068(e) means and that it is the limitation on “remedial measures” by “confidential information, which the lawyer is required to maintain inviolate” that is missing from the black letter rule.
6. PREC recommends that we add to the black letter rule a paragraph similar to the last sentence of Comment [10].
7. I still was not convinced that the paragraphs need rewording. However, on reflection, I think we could save toner and address the concerns of PREC. I think that, if PREC unanimously concludes that these paragraphs do need revision, we should consider a revision.
8. Further, on reflection, I think the wording of (a)(3) should be improved. As it is now worded, it requires that an exception to remediation satisfy both Rule 1.6 and Section 6068(e). In a future dispute, lawyers could quibble over whether that is what we intend and over whether a given fact was exempt from disclosure because it satisfied 6068(e) but not Rule 1.6. In (a)(3), we use the conjunctive “and,” while in (b) we use the disjunctive “or.” We should not invite lawyerlike quibbling on this issue. To me, if information is covered by either 1.6 or 6068(e), it should not be disclosed without the consent of the client.
9. I therefore offer for consideration

(a) A lawyer shall not knowingly:

* * * *

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer’s client, or a witness called by the lawyer, has offered material evidence, and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal, ~~unless disclosure is prohibited by Rule 1.6 and Business and Professions Code section 6068(e)~~. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take

reasonable remedial measures ~~to the extent permitted by Rule 1.6 and Business and Professions Code section 6068(e).~~

(c) As used in paragraphs (a)(3) and (b), the phrase “remedial measures” does not include disclosure of information that is confidential under Rule 1.6 or Business and Professions Code section 6068(e).

~~(ed)~~ The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding or the representation, whichever comes first.

~~(de)~~ 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.

10. These changes reduce the word count by a little. They would make the last sentence of Comment [10] redundant, but I think that sentence could be left in because it ties off the rest of that paragraph and reminds the reader about the problem.
11. Second, PREC also criticized paragraph (d) [relettered (e) above] because it “overstates the concept of disclosure . . . in an ex parte proceeding, and omits the necessary reference to avoid disclosure of client confidential information.” In our telephone conversation, Mr. Sall explained that PREC was offended by the fact that, in an ex parte application, the lawyer would be required to state the opponent’s potential arguments and rebut them. I think the concern is well taken. Many judges do not hear argument on ex parte applications and will not take the time to read lengthy moving papers on the subject or hear lengthy oral presentations, so the advocate will not be given time to present a balanced picture.
12. I also think PREC’s observation that there is no exception for confidential information is well taken. A lawyer presenting an application for a TRO should not have to disclose client confidences. But I would add that he or she also should not have to waive other privileges, such as the spousal privilege.
13. In addition, as to Rule 3.3(d), Raul recommends that we define what we mean by “ex parte” to delete from the scope of that paragraph the situation where an opponent actually appears. He points out that Model Rule Comment [14] makes clear that it does not apply to the situation where the opponent is present. In most ex parte applications, notice is required, and opponents appear. Raul recommends adding a Comment: "As used in this Rule, 'ex parte proceeding' refers to a proceeding where not all of the parties to the controversy are present."
14. I agree with the substance of the concerns expressed by PREC and by Raul. However, I lost that argument in prior meetings of RRC. If the Commission wants to reconsider this issue, I would change Raul’s suggested wording, and

I would want to accommodate PREC's concern about the implicit requirement that a lawyer would have to disclose privileged information. As to the latter, I would not limit the protection against disclosure to 6068(e). It seems to me that a lawyer should not be compelled by this rule to disclose any privileged information in an ex parte proceeding. Therefore, as an alternative to Raul's addition, I suggest that we reword the black letter paragraph:

(~~de~~) In an ~~ex parte~~ proceeding in which not all parties to the controversy are present, a lawyer shall inform the tribunal of all material, nonprivileged facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

August 24, 2010 Tuft E-mail to RRC:

I agree with Raul's recommendation that we include comment [14] and make clear that an ex parte proceeding under rule 3.3 means a proceeding where the other party are not present or have not submitted a written opposition.

I do not agree with Jerry's suggested revisions to rule 3.3.

August 24, 2010 Ruvolo E-mail to RRC:

I agree with Raul's suggestion also.

August 24, 2010 Martinez E-mail to Sapiro, cc RRC:

Jerry- Re paragraph (d), not all proceedings where all parties are not present are ex parte proceedings. Sometimes litigants choose not to attend a hearing after receiving proper notice. The enhanced duty of candor under paragraph (d) is not intended to address those situations. Therefore, the words "ex parte proceeding" are essential to the rule.

August 24, 2010 Peck E-mail to RRC:

I agree with Nace, Mark and Raul.

August 25, 2010 Snyder E-mail to RRC:

I agree as well.

August 25, 2010 Sapiro E-mail to Martinez, cc RRC:

I agree with you. Well put.

On the other hand, what about the LA PREC issues?

August 25, 2010 Martinez E-mail to Sapiro, cc RRC:

I'm not troubled by PREC's concerns. The Rule requires disclosure of material facts, and does not require, as Mr. Sall suggests, that the lawyer state the opposing party's arguments and then rebut them. As for making explicit what we mean by the reference to 6068(e) and 1.6, if we do it here we would have to amend many other rules that cross-reference 6068(e) and 1.6 accordingly. Unfortunately, our Rules have been written by "ethics wonks" and it's too late to try to "unwonk" them.

August 25, 2010 Peck E-mail to RRC:

I agree with Raul.

August 25, 2010 Ruvolo E-mail to RRC:

I agree with Raul also.

August 25, 2010 Difuntorum E-mail to RRC:

Please review the attached comment from CPDA on proposed Rule 3.3. While the commenter supports the proposed rule, the commenter recommends adding the following sentence to Comment [4].

"A criminal defense lawyer is not subject to discipline for not disclosing directly adverse authority in the controlling jurisdiction under paragraph (a)(2) if the lawyer reasonably believed that the lawyer was not required to do so by controlling constitutional principles, even if that belief is later shown to have been wrong."

An updated public commenter chart adding a synopsis for this comment is being prepared and will be sent by a separate e-mail message.

All members are encouraged to lodge their e-mail comments concerning the attached public comment as soon as possible.

Attached:

RRC - [3-3] - Public Comment - Y-2010-545b CPDA.pdf

August 25, 2010 Julien E-mail to RRC re CPDA proposal:

Seems like the utilization of more trees in Oregon, but I think it can't hurt.

August 25, 2010 Julien E-mail to RRC:

I am losing track of whom said what among us so I might be agreeing with my fellow commissioners. All that I know is that I do disagree with PREC despite the high profile nature of their membership. We do not need to add words or concepts to the rule. A lawyer may not violate 6068 e (with the known exceptions)--how many times do we need to say that and how many places do we need to put it before it becomes clear? It is the law without being in the rule. Also, no matter how many rules we write, a lawyer may not violate the constitution. Period.

August 25, 2010 Peck E-mail re CPDA proposal:

I agree with JoElla that it can't hurt-----but I think exceptions like this should not be in the rule but should develop through case law. I do not feel strongly, so if the majority is with JoElla to add, I will join.

August 25, 2010 Ruvolo E-mail to RRC re CPDA proposal:

I am opposed to adding it.

August 25, 2010 Martinez E-mail to RRC re CPDA proposal:

If we add a "reasonable belief" exception in this rule, where does it end? Why not sprinkle it into every rule... Maybe have a Comment for every rule that reads: "A lawyer is not subject to discipline for not _____ if the lawyer reasonably believed _____." A lawyer's "reasonable belief" then becomes a *defense* to discipline, instead of a factor in *mitigation*. We shouldn't go down that road. If the rule is mushy, let's fix the rule, instead of giving lawyers a safe harbor that becomes necessary only because the rule is vague.

August 25, 2010 Ruvolo E-mail to RRC re CPDA proposal:

I agree with Raul's reasoning.

August 25, 2010 Tuft E-mail to RRC re CPDA proposal:

I also oppose adding this comment.

If a criminal defense counsel honestly believes in a given case that he/she is excused from disclosing directly adverse authority in the controlling jurisdiction based on Constitutional principles (e.g., that the defendant will be denied the right to a fair trial under the 6th amendment), counsel should disclose that position to the court rather than simply harboring a belief.

If the court excuses counsel from having to disclose controlling law, that in itself could result in error in the case). If the court does not excuse counsel, the issue will have been preserved for appeal. However, I am not aware of legal authority in California or in the many jurisdictions that have this rule that supports this comment; nor am I aware of a reported case where a defendant

was denied due process or a fair trial because his lawyer disclosed controlling authority on an issue in the case. Although our current rule is different than the Model Rule, it does not provide for such an exception. We should not be the first to create an exception without having at least some existing legal authority. Finally, the comment would mean that the rule would be virtually unenforceable against criminal defense counsel.

August 25, 2010 Melchior E-mail to RRC:

I will be brief for reasons that follow.

I can only glance at this extensive material because I am getting ready for a major deposition in Vegas tomorrow. (Contrary to my earlier advice it now looks as if it will be 1 day only and I should probably be with you Friday, though completely unprepared, alas, for the reason just stated.) But if all agree that the commenters have identified both a rule and some comments as indecipherably "mushy," that tells me that Jerry and I were right in saying that these rules will just obscure and obfuscate the ethical and competent practice of law, and that as most of you are saying, minor fixes won't solve the problem. Ergo --- (you know my thinking)

August 25, 2010 Snyder E-mail to RRC re CPDA proposal:

Like Nace I oppose adding it and am fine with Raul's reasoning. The fact that someone "reasonably believed" does not trump a violation. I don't want someone to think that it's ok if they are ignorant of their responsibility to disclose directly adverse authority as long as they "reasonably believe" they didn't have to do it. Doesn't that give them a free pass? Why should this be limited to "criminal defense lawyer?" What is the rationale for this exception?

August 25, 2010 Difuntorum E-mail to RRC re OCBA Comment:

Commission Members:

Please review the attached comment from OCBA on proposed Rule 3.3. The commenter is concerned about the relationship between paragraphs (a)(3) and (b) and the duty of confidentiality. The commenter recommends moving the last sentence of Comment [10] into the rule text. An updated public commenter chart adding a synopsis for this comment is being prepared and will be sent by a separate e-mail message.

All members are encouraged to lodge their e-mail comments concerning the attached public comment as soon as possible.

Attached:

RRC - [3-3] - Public Comment - OCBA (08-18-10).pdf

August 25, 2010 Sapiro E-mail to RRC:

OK, folks. This is the second bar association to criticize the adequacy of the references to 1.6 and 6068(e) in paragraphs (a)(3) and (b) of Rule 3.3. I received nothing but rejection of my

suggested revisions to deal with this problem in response to LA PREC yesterday. Does the fact that two bar associations now perceive the same problem change anybody's mind?

I had trouble identifying the line to which Orange County refers in Comment [4]. I think they refer to the third sentence in that comment, which is not line 6 of that comment on my copy. If so, it is:

Paragraph (a)(2) requires a lawyer to disclose directly adverse and legal authority in the controlling jurisdiction that is known to the lawyer and that has not been disclosed by the opposing party.

If they and I are discussing the same sentence, then I agree with Orange County that the word "and" after "adverse" is not necessary. To me, it adds an element of ambiguity that would be avoided by deleting the word "and." Besides, deleting it would satisfy the JoElla Rule, reduce tonnage, and save toner.

August 25, 2010 Peck E-mail to RRC re CPDA proposal:

Thanks Raul and Nace. I agree that we should not add.

August 25, 2010 Kehr E-mail to RRC:

I support Jerry's recommendation that we respond affirmatively to the L.A. and O.C. concerns that some lawyers will not easily understand the interplay between Rule 3.3 and section 6068(e). As Jerry expressed in his 8/24 memo, proposed Rule 3.3 seems clear to me, but I also believe that it would be simple to revise the draft without any change in substance. However, instead of Jerry's recommendation that we define "remedial measure" by reference to paragraph (a)(3) and (b), I would add a sentence that applies to all disclosure obligations under the Rule. This would encompass paragraph (d) and would make clear that a lawyer's duty of disclosure in *ex parte* proceedings also is limited by section 6068(e). The L.A. letter asks why there is no 6068(e) reference in paragraph (d).

My suggestion is to remove the confidentiality references in (b)(3) and (c) as Jerry recommended, and then add a new paragraph (e) along these lines: "A lawyer's duty to take remedial action or to make disclosures under this Rule does not include the disclosure of client confidential information that the lawyer is obligated to maintain inviolate under Rule 1.6 and B&P C section 6068(e)."

I then would remove the last sentence of Comment [10] as now being redundant.

I agree about the surplus word in Comment [4].

August 25, 2010 McCurdy E-mail to RRC:

Lead Drafters:

Thanks to those of you who have found time to promptly send e-mails addressing the public comments that have been distributed.

As you know, we will also need completed public commenter charts for each of the rules on the agenda. An updated draft of each public commenter chart including a synopsis of all of the comments received by the end of the comment period is attached. You may already have the most recent version of those charts which did not require a recent update, however we are sending all of them with this e-mail for ease of reference.

For the RRC Response column, we encourage you to fill in a tentative response based on your own individual view or the views that you find in the Commission member e-mails that have been sent concerning the comments. This would be preferable to leaving the RRC Response column blank pending final resolution at the meeting.

We request that you submit your draft public commenter charts, and any other rule agenda materials you wish to provide **no later than tomorrow morning, Thursday, August 26th, at 9:00 am.**

Many thanks for your work on this. You're almost there!

Attached:

RRC - 1-100 [1-0-1] - Public Comment Chart - By Commenter - YDFT1.3 (08-25-10)LM.doc
RRC - [2-1] - Public Comment Chart - By Commenter - YDFT1 (08-25-10)LM.doc
RRC - 5-200 [3-3] - Public Comment Chart - By Commenter - YDFT1.2 (08-25-10)LM.doc
RRC - 5-110 [3-8] - Public Comment Chart - By Commenter - YDFT1.4 (08-25-10)LM.doc
RRC - 2-100 [4-2] - Public Comment Chart - By Commenter - YDFT1.4 (08-25-10)LM.doc
RRC - 1-310X [5-4] - Public Comment Chart - By Commenter - YDFT1 (08-25-10)LM.doc
RRC - 1-120X [8-4] - Public Comment Chart - By Commenter - YDFT1 (08-25-10)LM.doc

August 25, 2010 Sapiro E-mail to McCurdy, cc RRC:

Attached is my draft of the commenter chart on Rule 3.3. Call or email if you need clarification or correction of any of this.

Attached:

RRC - 5-200 [3-3] - Public Comment Chart - By Commenter - YDFT1.3 (08-25-10)LM-JS.doc

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

TOTAL = 5 Agree = 1
Disagree = _
Modify = 4
NI = _

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
3	California Public Defenders Association	M	Yes	Comment [4]	<p>CPDA requests an additional new sentence be added to Comment [4], using the term “reasonably believe[d]” as defined in Proposed Rule 1.0.1(i). The new sentence would read as follows:</p> <p>“A criminal defense lawyer is not subject to discipline for not disclosing directly adverse authority in the controlling jurisdiction under paragraph (a)(2) if the lawyer reasonably believed that the lawyer was not required to do so by controlling constitutional principles, even if that belief is later shown to have been wrong.”</p>	The Commission disagrees with the commenter. Whether the lawyer reasonably believed that he or she was not required to do so by controlling constitutional principles would be a fact in mitigation, not an exemption from the rule. If a criminal defense lawyer honestly believes in a given case that he/she is excused from disclosing directly adverse authority in the controlling jurisdiction based on Constitutional principles (e.g., that the defendant will be denied the right to a fair trial under the 6th Amendment), counsel should disclose that position to the court rather than simply harboring a belief. If the court excuses counsel from having to disclose controlling authority, that decision would exempt the lawyer from compliance with this rule. If the court does not excuse counsel, the lawyer will have to comply with this rule, but the issue will have been preserved for appeal.
1	COPRAC	A	Yes		COPRAC supports the adoption of proposed Rule 3.3 and the Comments to the Rule.	No response required.
2	Los Angeles County Bar Association Professional Responsibility and Ethics Committee	M	Yes	3.3(a)(3) & (b)	There are competing ethical concerns between California’s strict adherence to the duty of confidentiality and the Proposed Rule’s requirement that remedial measures be taken to inform the tribunal if	The commission disagrees with this comment. NOTE: Jerry dissents on this issue and would make the changes described in his August 24 th email.

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

TOTAL = 5 **Agree = 1**
Disagree = _
Modify = 4
NI = _

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				3.3(d)	<p>the lawyer comes to know that false evidence has been presented, or a person, potentially including a client, has engaged in or is about to engage in fraudulent or criminal conduct in the proceedings.</p> <p>We generally believe that the Proposed Rule could be improved by a more concise statement as to what the lawyer is not permitted to do, rather than merely directing the lawyer to Section 6068(e). The concept is well stated in the last sentence of Comment [10], which reads: "Remedial measures do not include disclosure of client confidential information, which the lawyer is required to maintain inviolate under Rule 1.6 and Business and Professions Coded Section 6068(e)."</p> <p>We support the view that the language of the last sentence of Comment [10] should be made a part of the body of the Rule itself, in place of the references to Section 6068(e) contained in Subsections (a)(3) and (b) of the Proposed Rule as presently drafted.</p>	<p>We also believe that Subsection (d) of the Proposed Rule overstates the concept of</p>

The commission agrees in part and has added the following sentence to the Comment: "As used in this

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

TOTAL = 5 **Agree = 1**
Disagree = _
Modify = 4
NI = _

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>disclosure to the tribunal in an ex parte proceeding, and omits the necessary reference to avoid disclosure of client confidential information. Thus a similar revision should be made to temper the overly broad statement as to required disclosure of material facts in an ex parte proceeding.</p> <p>Perhaps one way to implement these suggestions might be to add a subsection (e) to the Proposed Rule, which reads more or less as the last sentence of Comment [10].</p>	<p>Rule, 'ex parte proceeding' refers to a proceeding where not all of the parties to the controversy are present."</p> <p>NOTE: This is as Raul proposed it on August 24th. We should discuss where to place this sentence. Jerry recommends that it follow Comment [12] as a stand alone paragraph.</p> <p>NOTE: Jerry would add to paragraph (d) that the lawyer must disclose "all material nonprivileged facts" to respond to part of this comment. He has not added that to this draft because his suggestion to that effect on August 24th elicited no support.</p>
4	Orange County Bar Association	M	Yes	3.3(a)(3) & (b) Comment [10]	<p>If client confidentiality is to take precedence over the obligation to pursue remedial measures in correcting false information provided to the tribunal, the Proposed Rule needs to be more explicitly drafted. The bottom line is that if you don't have a client's permission, or some other exception to the duty of confidentiality, you can't take any remedial measures that involve disclosures of confidential information. This isn't plainly stated until the end of Comment [10], where it provides that remedial measures do not include the disclosure of client confidential information which the lawyer is required to maintain</p>	<p>The commission disagrees with this comment.</p> <p>NOTE: Jerry dissents on this issue and would make the changes described in his August 24th email.</p>

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

TOTAL = 5 **Agree = 1**
Disagree = _
Modify = 4
NI = _

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comment [4]	<p>inviolate.</p> <p>The clarity of the Proposed Rule would be enhanced if the last sentence of Comment [10] were actually moved into the body of the Rule, modifying the language of paragraphs (a)(3) and (b), to avoid the inconsistent or confusing treatment of these competing professional obligations.</p> <p>Line 6 of Comment [4] has an “and” between “directly adverse” and “legal authority.” The OCBA believes the “and” should be deleted, because the Comment pertains to directly adverse legal authority, and the conjunctive is unnecessary.</p>	<p>The commission agrees and has deleted the word “and” from the third sentence of Comment [4].</p>
5	Pansky, Ellen A.	M	No	3.3(a)(3) & (b)	<p>Subsections (a)(3) and (b) can be read to suggest that lawyers have a duty to reveal client confidences at an ex parte hearing, in order to correct a judge’s misunderstanding of facts. There is no known authority for this proposition, which seems to directly contradict the duty to maintain client secrets, set forth in B&P Code § 6068(e). It seems to me that the purpose of Model Rule 3.3 is to require a lawyer to make sure that no misrepresentations occur with respect to ex parte notice, so that ex parte relief is not</p>	<p>The commission disagrees with this comment.</p> <p>NOTE: Jerry dissents on this issue and would make the changes described in his August 24th email.</p>

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

TOTAL = 5 **Agree = 1**
Disagree = _
Modify = 4
NI = _

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					given on faulty procedural grounds. This point is not clear in Proposed Rule 3.3.	

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

(XDraft #12.1, 6/30/10)

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

Primary Factors Considered

Existing California Law

Rules

RPC 5-200

Statute

Case law

Batt v. City and County of San Francisco (2007) 155 Cal.App.4th 65, 82 n.9.

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

(13 Members Total – votes recorded may be less than 13 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 9

Opposed Rule as Recommended for Adoption 2

Abstain 0

Approved on Consent Calendar

Approved by Consensus

Commission Minority Position, Known Stakeholders and Level of Controversy

Minority Position Included on Model Rule Comparison Chart: Yes No

(See the introduction in the Model Rule comparison chart.)

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. In its public comment, OCTC objected to perceived changes in the standard set by current rule 5-200. Also, a comment from ethics law professors objected to the deviation from the Model Rule in paragraph (c).

Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 3.3* Candor to the Tribunal

June 2010

(Proposed rule following June 15, 2010 public comment deadline.)

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, which is based on Model Rule 3.3, 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 and legal system, to avoid conduct that undermines the integrity of the adjudicative process, as the Model Rule with several significant differences. Those 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 significant departures from the Model Rule include a change to paragraph (c), which sets forth the duration of the lawyer's duties under this Rule. The Model Rule extends the lawyer's duties through the conclusion of the proceeding. The Commission instead recommends that the duties "continue to the conclusion of the proceeding or the representation, whichever comes first." Other changes in the comments include a more detailed discussion of a lawyer's obligations to cite 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, XDraft 12.1 (6/30/10).

Minority. A minority of the Commission believes that, aside from the changes made to the Model Rule to conform the proposed Rule to California's policy of strictly limiting disclosures of confidential information and certain other clarifying changes, most of the revisions to the Model Rule that the Commission is recommending are unwarranted. In particular, the minority takes the position that the change the Commission has implemented to paragraph (c) concerning the duration of the duties under this Rule runs counter to prevailing authority in every other jurisdiction and threatens to undermine the integrity of the judicial process. See Minority Statement in Explanation of Changes for paragraph (c). See also Explanation of Changes for Comment [6].

A separate minority takes issue with subparagraph (a)(2). See Explanation of Changes for subparagraph (a)(2).

Variations in Other Jurisdictions. Every jurisdiction has adopted a version of Model Rule 3.3. See Selected State Variations excerpt, below.

<p style="text-align: center;"><u>ABA Model Rule</u> Rule 3.3 Candor Toward the Tribunal</p>	<p style="text-align: center;"><u>Commission's Proposed Rule*</u> Rule 3.3 Candor Toward the Tribunal</p>	<p style="text-align: center;"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(a) A lawyer shall not knowingly:</p> <p>(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;</p>	<p>(a) A lawyer shall not knowingly:</p> <p>(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;</p>	<p>Subparagraph (a)(1) is identical to Model Rule (a)(1).</p>
<p>(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</p>	<p>(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</p>	<p>Subparagraph (a)(2) is identical to Model Rule (a)(2). The Commission determined that the Model Rule comports with California law. See, e.g., <i>Batt v. City and County of San Francisco</i>, 155 Cal.App.4th 65, 82n. 9 (2007). However, see Comment [4], which notes that this requirement might implicate constitutional concerns when a lawyer is engaged in the defense of a criminal defendant.</p> <p><i>Minority.</i> A minority view is that the requirement to disclose adverse authority that is not disclosed by opposing counsel where opposing counsel is present is contrary to California law, citing, <i>Schaefer v. State Bar</i>, 26 Cal.2d 739, 747-748 (1945).</p>
<p>(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</p>	<p>(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</p>	<p>Subparagraph (a)(3) is similar to Model Rule 3.3(a)(3) except that it does not require disclosure of the false evidence to the tribunal if the disclosure is prohibited by Business and Professions Code § 6068(e). The paragraph reflects the rule in California that a lawyer's duty of candor to a tribunal is circumscribed by the lawyer's duty under section 6068(e) to preserve client confidential</p>

* Proposed Rule 3.3, XDraft 12.1 (6/30/10); Redline/strikeout showing changes to the ABA Model Rule

<p align="center"><u>ABA Model Rule</u> Rule 3.3 Candor Toward the Tribunal</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 3.3 Candor Toward the Tribunal</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.</p>	<p>measures, including, if necessary, disclosure to the tribunal, <u>unless disclosure is prohibited by Business and Professions Code section 6068(e)</u>. 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.</p>	<p>information.</p>
<p>(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.</p>	<p>(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 <u>extent permitted by Business and Professions Code section 6068(e)</u>.</p>	<p>Paragraph (b) imposes a special obligation on lawyers to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process. See Comment [12]. Paragraph (b) follows Model Rule 3.3(b), except it substitutes the clause, "to the extent permitted by Business and Professions Code section 6068(e)" for the phrase "if necessary, disclosure to the Tribunal" at the end of the paragraph. See the Explanation of Changes to paragraph (a)(3).</p>
<p>(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.</p>	<p>(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding <u>or the representation, whichever comes first</u> and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.</p>	<p>Paragraph (c) is a significant departure from Model Rule 3.3(c) in two respects. First, unlike the Model Rule that imposes an obligation through the conclusion of the proceeding, paragraph (c) provides that the obligations set forth in paragraphs (a) and (b) should end either with the termination of the representation or the conclusion of the proceeding. The Commission determined that the lawyer lacks standing after termination of the lawyer's employment and that the lawyer should not have a duty to be involved in a time-consuming controversy after the lawyer has been discharged which could abrogate the lawyer's loyalty to a former client.</p>

<p align="center"><u>ABA Model Rule</u> Rule 3.3 Candor Toward the Tribunal</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 3.3 Candor Toward the Tribunal</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
		<p>Second, paragraph (c) deletes the clause “and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.” See the Explanation of Changes to paragraph (a)(3).</p> <p><i>Minority.</i> A minority of the Commission opposes the first departure from the Model Rule for a number of reasons: (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 §6068(e); (4) the 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.</p>
<p>(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.</p>	<p>(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.</p>	<p>In response to a comment letter from the San Diego Bar Association Legal Ethics Committee, the Commission revised paragraph (d) to be identical to the Model Rule counterpart provision for better clarity and consistency in regulating lawyer conduct. The language previously provided that a lawyer shall inform the tribunal of all facts "needed" to enable a tribunal to make an informed decision in a particular matter.</p>

<p align="center"><u>ABA Model Rule</u> Rule 3.3 Candor Toward the Tribunal Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 3.3 Candor Toward the Tribunal Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[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.</p>	<p>[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 4-01.0.1 1.0.1(m) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.</p>	<p>Comment [1] is identical to the Model Rule counterpart, except that the reference for the definition of tribunal is to Rule 1.0.1, which is the number assigned to the Terminology section in the Proposed Rules.</p>
<p>[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause;, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.</p>	<p>[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 <u>However</u>, 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 <u>make</u> false statements of law or fact or <u>present</u> evidence that the lawyer knows to be false. <u>For example, the prohibition in paragraph (a)(1) against making false statements of law or failing to correct a material</u></p>	<p>The first two sentences in Comment [2] are identical to the Model Rule counterpart.</p> <p>The third sentence in Model Rule Comment [2] is deleted because the lawyer's duty of confidentiality under Business and Professions Code § 6068(e) is not qualified by the lawyer's duty of candor to the tribunal.</p> <p>The next-to-last sentence is the same as the ABA counterpart, except for several grammatical changes and to clarify that the lawyer's obligation is to not make false statements of law or fact or present evidence the lawyer knows to be false rather than ensuring that the tribunal will not be misled.</p> <p>The last sentence has no counterpart in the Model Rule and is a revision of current California rule 5-200(D), which</p>

<p align="center"><u>ABA Model Rule</u> Rule 3.3 Candor Toward the Tribunal Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 3.3 Candor Toward the Tribunal Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>misstatement of law includes a prohibition on a lawyer citing as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional, or failing to correct such a citation previously made to the tribunal by the lawyer.</p>	<p>prohibits the citation to invalid authority. The Commission determined that adding the substance of current rule 5-200(D), which is more specific than proposed paragraph (a)(1), would provide guidance on the kinds of conduct that paragraph (a)(1) covers. As provided in paragraph (a)(1), the sentence also clarifies that a lawyer is also required to correct an invalid citation previously made to the tribunal.</p>
<p>Representations by a Lawyer</p> <p>[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).</p>	<p>Representations by a Lawyer</p> <p>[3] An advocateA lawyer is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of mattersthe facts asserted therein, forbecause litigation documents ordinarily present assertions of fact by the client, or by someone on the client's behalfa 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 1.2(d) not to counsel a client to commit or assist the client in committing a fraud</p>	<p>The first sentence in Comment [3] is similar to the ABA counterpart, except that "lawyer" is substituted for "advocate," since "advocate" is not the defined term in the rules. The sentence includes several grammatical changes to make the sentence more clear without changing its substance.</p> <p>The second, third, fourth and fifth sentences are similar to Model Rule Comment [3], except for several grammatical changes and the inclusion of a lawyer's declaration in addition to an affidavit. Citations to two applicable cases have been added.</p>

<p align="center"><u>ABA Model Rule</u> Rule 3.3 Candor Toward the Tribunal Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 3.3 Candor Toward the Tribunal Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).</p>	
<p>Legal Argument</p> <p>[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.</p>	<p>Legal Argument</p> <p>[4] Legal argument based on <u>Although</u> 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 <u>argument based on a knowing false representation of law constitutes dishonesty toward the tribunal.</u> Furthermore, as stated in paragraph <u>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),</u> an advocate has <u>requires</u> a duty <u>lawyer</u> 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 <u>Legal authority in the controlling jurisdiction may include legal</u> premises properly applicable <u>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</u></p>	<p>The first sentence of Comment [4] is derived from the first sentence in Comment [4] of the comments to the New York Rules of Professional Conduct. The sentence, in effect, reverses the first and second sentences in the Model Rule comment without changing the meaning.</p> <p>The second sentence is new and helps explain the reason for the obligation to disclose applicable law.</p> <p>The third sentence largely tracks its Model Rule counterpart, except that it substitutes “lawyer” for “advocate,” and adds the requirement that the legal authority be known to the lawyer.</p> <p>The fourth and fifth sentences provide guidance on what constitutes “legal authority in the controlling jurisdiction.”</p> <p>The sixth sentence is new and was added in response to public comments that raised concerns that imposing on a criminal defense lawyer the obligations of subparagraph (a)(2) might implicate constitutional principles of due process and effective assistance of counsel.</p> <p>The final sentence is new and provides guidance concerning the lawyer’s obligations under paragraph (a)(4) of the Rule, a provision that has no counterpart in the Model Rule.</p>

<p align="center"><u>ABA Model Rule</u> Rule 3.3 Candor Toward the Tribunal Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 3.3 Candor Toward the Tribunal Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p><u>lawyers a general duty to cite authority from outside the jurisdiction in which the tribunal is located. Whether a criminal defense lawyer is required to disclose directly adverse legal authority in the controlling jurisdiction involves constitutional principles that are beyond the scope of these Rules. In addition, a lawyer may not knowingly edit and submit to a tribunal language from a book, statute, rule, or decision in such a way as to mislead the court, or knowingly fail to correct an inadvertent material misquotation that the lawyer previously made to the case tribunal.</u></p>	
<p>Offering Evidence</p> <p>[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.</p>	<p>Offering Evidence</p> <p>[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.</p>	<p>The first sentence in Comment [5] is identical to the Model Rule counterpart.</p> <p>The second sentence in the Model Rule Comment has been deleted.</p> <p>The final sentence in Comment [5] is identical to the Model Rule counterpart.</p>
<p>[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</p>	<p>[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</p>	<p>The first and second sentences in Comment [6] are identical to the Model Rule counterpart.</p> <p>The third sentence has been added to point the reader to Comment [7], which provides relates to a lawyer's duties concerning testimony by a criminal defendant.</p>

<p align="center"><u>ABA Model Rule</u> Rule 3.3 Candor Toward the Tribunal Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 3.3 Candor Toward the Tribunal Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>the false evidence. 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.</p>	<p>the false evidence. <u>With respect to criminal defendants, see Comment [7].</u> 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 <u>or base arguments to the trier of fact on evidence known to be false.</u></p>	<p>The fourth sentence diverges from its Model Rule counterpart in two respects. First, it provides additional guidance that a lawyer may not base arguments to the trier of fact on the evidence known to be false. Second, the clause, "or otherwise permit the witness to present testimony that the lawyer knows to be false," has been stricken. The Commission believes that clause lays a trap for the unwary lawyer who might call a friendly witness who unexpectedly testifies falsely. Because the lawyer was not offering the evidence for the purpose of establishing its falsity, see Comment [5], or was in a position to "prevent" or not "otherwise permit" the evidence because of its unexpectedness, the lawyer could be subject to discipline merely by having called the witness.</p> <p><i>Minority.</i> A minority of the Commission disagrees. The minority takes the position that reading 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 concerns of the Commission and public commenters.</p>
<p>[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements. See</p>	<p>[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if <u>criminal defendant insists on testifying, and the accused so desires, even if counsel</u> lawyer knows that the testimony or statement will be false, <u>the lawyer may offer the testimony in a narrative form if the lawyer</u></p>	<p>The first sentence in Comment [7] is identical to the Model Rule counterpart.</p> <p>The second sentence in the Model Rule Comment has been replaced because California and Ninth Circuit law permits defense counsel to ask a criminal defendant client to testify in the "narrative" fashion as explained in the second sentence and in the cases cited in the proposed comment.</p>

<p align="center"><u>ABA Model Rule</u> Rule 3.3 Candor Toward the Tribunal Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 3.3 Candor Toward the Tribunal Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>also Comment [9].</p>	<p>made reasonable efforts to dissuade the client from the unlawful course of conduct and the lawyer has sought permission from the court to withdraw as required by Rule 1.16. Business and Professions Code section 6068(d); <i>People v. Guzman</i> (1988) 45 Cal.3d 915 [248 Cal.Rptr. 467], disapproved on other grounds in <i>Price v. Superior Court</i> (2001) 25 Cal.4th 1046, 1069 fn.13 [108 Cal.Rptr.2d 409]; <i>People v. Johnson</i> (1998) 62 Cal.App.4th 608 [72 Cal.Rptr.2d 805]; <i>People v. Jennings</i> (1999) 70 Cal. App. 4th 899 [83 Cal.Rptr.2d 33]; <i>People v. Brown</i> (1988) 203 Cal.App.3d 1335, 1340 [250 Cal.Rptr. 762]. The obligationobligations of the advocatelawyer under thethese Rules of Professional Conduct isand the State Bar Act are subordinate to such requirements. See also Comment [9]applicable constitutional provisions.</p>	<p>The third sentence adds a reference to the State Bar Act, which also regulates a lawyer's conduct before tribunals. The reference to Comment [9] has been deleted because the Commission recommends deletion of Model Rule 3.3, cmt. [9].</p>
<p>[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.</p>	<p>[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., <i>People v. Bolton</i> (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 4-01.0.1(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.</p>	<p>Comment [8] is identical to the Model Rule counterpart, except that a citation to an important California case on the concept discussed has been added and the cross-reference changed to "1.0(f)" changed to "1.0.1(f)," Proposed Rule 1.0.1 ("Terminology" is the counterpart to Model Rule 1.0.</p>

<p align="center"><u>ABA Model Rule</u> Rule 3.3 Candor Toward the Tribunal Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 3.3 Candor Toward the Tribunal Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[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].</p>	<p>[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].</p>	<p>Model Rule Comment [9] has been deleted because it does not provide useful guidance and is not consistent with current California law.</p>
<p>Remedial Measures</p> <p>[10] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the</p>	<p>Remedial Measures</p> <p>[10] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's <u>The lawyer's</u> proper course is to</p>	<p>The first sentence in Comment [9] is identical to the first sentence in Model Rule Comment [10].</p> <p>The second sentence is identical to its Model Rule counterpart.</p> <p>The third sentence is identical to the third sentence in Model Rule Comment [10].</p> <p>The fourth sentence is derived from the fourth sentence in Model Rule Comment [10]. The proposed Comment replaces "advocate's" with "lawyer's", since advocate is not a defined</p>

<p align="center"><u>ABA Model Rule</u> Rule 3.3 Candor Toward the Tribunal Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 3.3 Candor Toward the Tribunal Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the 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.</p>	<p>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 advocatelawyer 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 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.</p>	<p>term in the rules and expands on the remedial measures to be taken to include advising the client of the consequences of providing perjured testimony.</p> <p>The fifth sentence combines the fourth and fifth sentences in Model Rule Comment [10]. It changes “advocate” to “lawyer” and clarifies that remedial measures may require seeking permission to withdraw depending on the materiality of the false evidence. The sentence departs from the ABA counterpart which obligates a lawyer to reveal information that would otherwise be protected by the lawyer's duty of confidentiality. Thus, the fifth and sixth sentences of the Model Rule Comment have been substantially revised.</p>
<p>[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</p>	<p>[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</p>	<p>Model Rule Comment [11] is not included because the State Bar Act and California case law obligate a lawyer to protect the client's confidential information, which duty is not superseded by the lawyer's obligation of candor toward a tribunal. See Business and Professions Code § 6068(e).</p>

<p align="center"><u>ABA Model Rule</u> Rule 3.3 Candor Toward the Tribunal Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 3.3 Candor Toward the Tribunal Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>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.</p>	<p>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.</p>	
	<p>[10] Reasonable remedial measures under paragraphs (a)(3) and (b) refer to measures that are available under these Rules and the State Bar Act, and which a reasonable lawyer would consider appropriate under the circumstances to comply with the lawyer's duty of candor to the tribunal. See e.g., Rules 1.2(d), 1.4, 1.16 and 8.4; Business and Professions Code sections 6068(d) and 6128. Remedial measures also include explaining to the client the lawyer's obligations under this Rule and, where applicable, the reasons for lawyer's decision to seek permission from the tribunal to withdraw, and remonstrating further with the client to take corrective action that would eliminate the need for the lawyer to withdraw. If the client is an organization, the lawyer should also consider the provisions of Rule 1.13. Remedial measures do not include disclosure of client confidential information, which the lawyer is required to maintain inviolate under Business and Professions Code section 6068(e).</p>	<p>Comment [10] has no Model Rule counterpart and is intended to provide guidance on what constitutes "reasonable remedial measures" under paragraphs (a)(3) and (b).</p>
	<p>[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</p>	<p>Comment [11] has no Model Rule counterpart and is intended to clarify that the obligation to take "reasonable remedial measures" under paragraph (a)(3) is limited to the proceeding in which the lawyer has offered the evidence in question and that the duty to take remedial measures under paragraph (b)</p>

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	<p>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.</p>	<p>does not apply to another lawyer who is retained to investigate or represent a person concerning that person's conduct in the prior proceeding.</p>
<p>Preserving Integrity of Adjudicative Process</p> <p>[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.</p>	<p>Preserving Integrity of Adjudicative Process</p> <p>[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.</p>	<p>Comment [12] is identical to its Model Rule counterpart, except that it clarifies that "other evidence" referred to in the comment is evidence relating to the proceeding. It adds a cross-reference to Rule 3.4. The Comment deletes the phrase "including disclosure if necessary" for the reasons explained in the changes to paragraphs (a)(3) and (b).</p>
<p>Duration of Obligation</p> <p>[13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the</p>	<p>Duration of Obligation</p> <p>[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 Either the conclusion of the proceeding is or of the representation provides a reasonably definite point for</p>	<p>The first sentence in Comment [13] derives from the Model Rule counterpart and no material change is intended.</p> <p>The second sentence conforms the Model Rule comment to the changes recommended for paragraph (c). It also departs</p>

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<p>meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.</p>	<p>the termination of the obligation <u>mandatory obligations under this Rule</u>. 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. <u>There may be obligations that go beyond this Rule. See, e.g., Rule 3.8.</u></p>	<p>from the Model Rule by referring to “mandatory” obligations under the rule.</p> <p>The third sentence is identical to the Model Rule.</p> <p>A fourth sentence has been added to clarify that there may be obligations that go beyond the rule, citing, for example, Rule 3.8 on duties of prosecutors.</p>
<p>Ex Parte Proceedings</p> <p>[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.</p>	<p>Ex Parte Proceedings</p> <p>[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.</p>	<p>Model Rule 3.3, Comment [14] is not included for two reasons. First, Comment [14] does not provide much guidance in applying the rule. Second, the Commission believes that although the language used may be descriptive of duties that are applicable in some ex parte proceedings, the language may not be accurate for every variation of an ex parte proceeding in California. In particular, the Commission notes that there are ex parte proceedings that may involve appearances by other parties notwithstanding the designation of the proceeding as “ex parte.”</p>

<p>Withdrawal</p> <p>[15] Normally, a lawyer’s compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer’s disclosure. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer’s compliance with this Rule’s duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal’s permission to withdraw. In connection with a request for permission to withdraw that is premised on a client’s misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.</p>	<p>Withdrawal</p> <p>[15] 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<u>taking reasonable remedial measures</u>. 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<u>a</u> deterioration of the client-lawyer-client<u>client-lawyer</u> relationship such<u>such that</u> the lawyer can no longer competently and diligently<u>and diligently</u> 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 <u>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 for permission</u> 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.</p>	<p>The first sentence in comment [14] is similar to the first sentence in Model Rule Comment [15], except “disclosure” is replaced with “taking reasonable remedial measures” to make the comment consistent with the wording of the proposed Rule.</p> <p>The second sentence is also similar to the Model Rule counterpart except that it provides clearer guidance on when the deterioration of the lawyer-client relationship may require the lawyer to seek the tribunal’s permission to withdraw.</p> <p>The third sentence duplicates the third sentence in the Model Rule Comment.</p> <p>The fourth sentence does not have a counterpart in Model Rule Comment [15] and has been added to clarify that the lawyer’s obligations under this Rule are not superseded by the lawyer’s obligations under the State Bar Act or the California Rules of Court in requesting permission to withdraw.</p> <p>The Comment departs from Model Rule [15] in that it does not permit the lawyer to reveal confidential client information to the extent reasonably necessary to comply with this rule or with Model Rule 1.6.</p>
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Rule 3.3 Candor Toward the Tribunal

(Redline Comparison of the Proposed Rule to the Public Comment Draft)

- (a) A lawyer shall not knowingly:
- (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
 - (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
 - (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence, and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal, unless disclosure is prohibited by Rule 1.6 and Business and Professions Code section 6068(e). A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.
- (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures to the extent permitted by Rule 1.6 and Business and Professions Code section 6068(e).
- (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding or the representation, whichever comes first.
- (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all ~~facts known to the lawyer that the lawyer knows or reasonably should know, are needed to enable the tribunal to make an informed decision, whether or not the facts are adverse.~~ 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 1.0.1(m) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.
- [2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. However, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not make false statements of law or fact or present evidence that the lawyer knows to be false. For example, the prohibition in paragraph (a)(1) against making false statements of law or failing to correct a material misstatement of law includes a prohibition on a lawyer citing as authority a decision that has

been overruled or a statute that has been repealed or declared unconstitutional, or failing to correct such a citation previously made to the tribunal by the lawyer.

Representations by a Lawyer

- [3] A lawyer is responsible for pleadings and other documents prepared for litigation but is usually not required to have personal knowledge of the facts asserted therein because litigation documents ordinarily present assertions of fact by the client, or a witness, and not by the lawyer. Compare Rule 3.1. However, an assertion of fact purporting to be based on the lawyer's own knowledge, as in a declaration or an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. *Bryan v. Bank of America* (2001) 86 Cal.App.4th 185 [103 Cal.Rptr.2d 148]. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. *Di Sabatino v. State Bar* (1980) 27 Cal.3d 159 [162 Cal.Rptr. 458]. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the comment to that Rule. See also the comment to Rule 8.4(b).

Legal Argument

- [4] Although a lawyer is not required to make a disinterested exposition of the law, legal argument based on a knowing false representation of law constitutes dishonesty toward the tribunal. A tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it. Paragraph (a)(2) requires a lawyer to disclose directly adverse and legal authority in the controlling jurisdiction that is known to the lawyer and that has not been disclosed by the opposing party. Legal authority in the controlling jurisdiction may

include legal authority outside the jurisdiction in which the tribunal sits, such as a federal statute or case that is determinative of an issue in a state court proceeding or a Supreme Court decision that is binding on a lower court. Under this Rule, the lawyer must disclose authorities the court needs to be aware of in order to rule intelligently on the matter. Paragraph (a)(2) does not impose on lawyers a general duty to cite authority from outside the jurisdiction in which the tribunal is located. Whether a criminal defense lawyer is required to disclose directly adverse legal authority in the controlling jurisdiction involves constitutional principles that are beyond the scope of these Rules. In addition, a lawyer may not knowingly edit and submit to a tribunal language from a book, statute, rule, or decision in such a way as to mislead the court, or knowingly fail to correct an inadvertent material misquotation that the lawyer previously made to the tribunal.

Offering Evidence

- [5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.
- [6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. With respect to criminal defendants, see Comment [7]. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit the testimony that the lawyer knows is false or base arguments to the trier of fact on evidence known to be false.

[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. If a criminal defendant insists on testifying, and the lawyer knows that the testimony will be false, the lawyer may offer the testimony in a narrative form if the lawyer made reasonable efforts to dissuade the client from the unlawful course of conduct and the lawyer has sought permission from the court to withdraw as required by Rule 1.16. (Business and Professions Code section 6068(d); *People v. Guzman* (1988) 45 Cal.3d 915 [248 Cal.Rptr. 467], disapproved on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069 fn.13 [108 Cal.Rptr.2d 409]; *People v. Johnson* (1998) 62 Cal.App.4th 608 [72 Cal.Rptr.2d 805]; *People v. Jennings* (1999) 70 Cal.App.4th 899 [83 Cal.Rptr.2d 33]; *People v. Brown* (1988) 203 Cal.App.3d 1335, 1340 [250 Cal.Rptr. 762].) The obligations of a lawyer under these Rules and the State Bar Act are subordinate to applicable constitutional provisions.

[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. See, e.g., *People v. Bolton* (2008) 166 Cal.App.4th 343, [82 Cal.Rptr.3d 671]. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0.1(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

Remedial Measures

[9] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by

the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. The lawyer's proper course is to remonstrate with the client confidentially, advise the client of the consequences of providing perjured testimony and of the lawyer's duty of candor to the tribunal, and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the lawyer must take further remedial measures, see Comment [10], and may be required to seek permission to withdraw under Rule 1.16(b), depending on the materiality of the false evidence.

[10] Reasonable remedial measures under paragraphs (a)(3) and (b) refer to measures that are available under these Rules and the State Bar Act, and which a reasonable lawyer would consider appropriate under the circumstances to comply with the lawyer's duty of candor to the tribunal. See e.g., Rules 1.2(d), 1.4, 1.16 and 8.4; Business and Professions Code sections 6068(d) and 6128. Remedial measures also include explaining to the client the lawyer's obligations under this Rule and, where applicable, the reasons for lawyer's decision to seek permission from the tribunal to withdraw, and remonstrating further with the client to take corrective action that would eliminate the need for the lawyer to withdraw. If the client is an organization, the lawyer should also consider the provisions of Rule 1.13. Remedial measures do not include disclosure of client confidential information, which the lawyer is required to maintain inviolate under Rule 1.6 and Business and Professions Code section 6068(e).

[11] A lawyer's duty to take reasonable remedial measures under paragraph (a)(3) is limited to the proceeding in which the lawyer has offered the evidence in question. A lawyer's duty to take remedial measures under paragraph (b) does not apply to another lawyer who is retained to

represent a person in an investigation or proceeding concerning that person's conduct in the prior proceeding.

Preserving Integrity of Adjudicative Process

[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence relating to the proceeding or failing to disclose information to the tribunal when required by law to do so. See Rule 3.4. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

Duration of Obligation

[13] Paragraph (c) establishes a practical time limit on the obligation to rectify false evidence or false statements of law and fact. Either the conclusion of the proceeding or of the representation provides a reasonably definite point for the termination of the mandatory obligations under this Rule. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed. There may be obligations that go beyond this Rule. See, e.g., Rule 3.8.

Withdrawal

[14] A lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's

taking reasonable remedial measures. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in a deterioration of the lawyer-client relationship such that the lawyer can no longer competently and diligently represent the client, or where continued employment will result in a violation of these Rules. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. This Rule does not modify the lawyer's obligations under Rule 1.6 and Business and Professions Code section 6068(e) or the California Rules of Court with respect to any request to withdraw that is premised on a client's misconduct.

Rule ~~5-200~~ Trial Conduct 3.3 Candor Toward the Tribunal

(Comparison of the Current Proposed Rule to Current California Rule)

~~In presenting a matter to a tribunal, a member:~~

~~(a) A lawyer shall not knowingly:~~

~~(A) Shall employ, for the purpose of maintaining the causes confided to the member such means only as are consistent with truth;~~

~~(B) Shall not seek to mislead the judge, judicial officer, or jury by an artifice or *false statement of fact or law*;~~

~~(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;~~

~~(C) Shall not intentionally misquote to a tribunal the language of a book, statute, or decision;~~

~~(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~~

~~(D) Shall *not, knowing its invalidity, cite as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional*; and~~

~~(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence, and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal, unless disclosure is~~

prohibited by Rule 1.6 and Business and Professions Code section 6068(e). A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

~~(E) Shall not assert personal knowledge of the facts at issue, except when testifying as a witness~~

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures to the extent permitted by Rule 1.6 and Business and Professions Code section 6068(e).

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding or the representation, whichever comes first.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all 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 1.0.1(m) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3)

requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

- [2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. However, although a lawyer in an adversary proceeding is *not* required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not make false statements of law or fact or present evidence that the lawyer knows to be false. For example, the prohibition in paragraph (a)(1) against making false statements of law or failing to correct a material misstatement of law includes a prohibition on a lawyer citing *as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional*, or failing to correct such a citation previously made to the tribunal by the lawyer.

Representations by a Lawyer

- [3] A lawyer is responsible for pleadings and other documents prepared for litigation but is usually not required to have personal knowledge of the facts asserted therein because litigation documents ordinarily present assertions of fact by the client, or a witness, and not by the lawyer. Compare Rule 3.1. However, an assertion of fact purporting to be based on the lawyer's own knowledge, as in a declaration or an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. *Bryan v. Bank of America* (2001) 86 Cal.App.4th 185 [103 Cal.Rptr.2d 148]. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. *Di Sabatino v. State Bar* (1980) 27

Cal.3d 159 [162 Cal.Rptr. 458]. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the comment to that Rule. See also the comment to Rule 8.4(b).

Legal Argument

- [4] Although a lawyer is not required to make a disinterested exposition of the law, legal argument based on a knowing false representation of law constitutes dishonesty toward the tribunal. A tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it. Paragraph (a)(2) requires a lawyer to disclose directly adverse legal authority in the controlling jurisdiction that is known to the lawyer and that has not been disclosed by the opposing party. Legal authority in the controlling jurisdiction may include legal authority outside the jurisdiction in which the tribunal sits, such as a federal statute or case that is determinative of an issue in a state court proceeding or a Supreme Court decision that is binding on a lower court. Under this Rule, the lawyer must disclose authorities the court needs to be aware of in order to rule intelligently on the matter. Paragraph (a)(2) does not impose on lawyers a general duty to cite authority from outside the jurisdiction in which the tribunal is located. Whether a criminal defense lawyer is required to disclose directly adverse legal authority in the controlling jurisdiction involves constitutional principles that are beyond the scope of these Rules. In addition, a lawyer may not knowingly edit and submit to a tribunal language from a book, statute, rule, or decision in such a way as to mislead the court, or knowingly fail to correct an inadvertent material misquotation that the lawyer previously made to the tribunal.

Offering Evidence

- [5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.
- [6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. With respect to criminal defendants, see Comment [7]. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit the testimony that the lawyer knows is false or base arguments to the trier of fact on evidence known to be false.
- [7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. If a criminal defendant insists on testifying, and the lawyer knows that the testimony will be false, the lawyer may offer the testimony in a narrative form if the lawyer made reasonable efforts to dissuade the client from the unlawful course of conduct and the lawyer has sought permission from the court to withdraw as required by Rule 1.16. (Business and Professions Code section 6068(d); *People v. Guzman* (1988) 45 Cal.3d 915 [248 Cal.Rptr. 467], disapproved on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069 fn.13 [108 Cal.Rptr.2d 409]; *People v. Johnson* (1998) 62 Cal.App.4th 608 [72 Cal.Rptr.2d 805]; *People v. Jennings* (1999) 70 Cal.App.4th 899 [83 Cal.Rptr.2d 33]; *People v. Brown* (1988) 203 Cal.App.3d 1335, 1340 [250 Cal.Rptr. 762].) The obligations of a lawyer under these Rules and the State Bar Act are subordinate to applicable constitutional provisions.

- [8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. See, e.g., *People v. Bolton* (2008) 166 Cal.App.4th 343, [82 Cal.Rptr.3d 671]. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0.1(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

Remedial Measures

- [9] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. The lawyer's proper course is to remonstrate with the client confidentially, advise the client of the consequences of providing perjured testimony and of the lawyer's duty of candor to the tribunal, and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the lawyer must take further remedial measures, see Comment [10], and may be required to seek permission to withdraw under Rule 1.16(b), depending on the materiality of the false evidence.
- [10] Reasonable remedial measures under paragraphs (a)(3) and (b) refer to measures that are available under these Rules and the State Bar Act, and which a reasonable lawyer would consider appropriate under the circumstances to comply with the lawyer's duty of candor to the

tribunal. See e.g., Rules 1.2(d), 1.4, 1.16 and 8.4; Business and Professions Code sections 6068(d) and 6128. Remedial measures also include explaining to the client the lawyer's obligations under this Rule and, where applicable, the reasons for lawyer's decision to seek permission from the tribunal to withdraw, and remonstrating further with the client to take corrective action that would eliminate the need for the lawyer to withdraw. If the client is an organization, the lawyer should also consider the provisions of Rule 1.13. Remedial measures do not include disclosure of client confidential information, which the lawyer is required to maintain inviolate under Rule 1.6 and Business and Professions Code section 6068(e).

- [11] A lawyer's duty to take reasonable remedial measures under paragraph (a)(3) is limited to the proceeding in which the lawyer has offered the evidence in question. A lawyer's duty to take remedial measures under paragraph (b) does not apply to another lawyer who is retained to represent a person in an investigation or proceeding concerning that person's conduct in the prior proceeding.

Preserving Integrity of Adjudicative Process

- [12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence relating to the proceeding or failing to disclose information to the tribunal when required by law to do so. See Rule 3.4. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

Duration of Obligation

- [13] Paragraph (c) establishes a practical time limit on the obligation to rectify false evidence or false statements of law and fact. Either the conclusion of the proceeding or of the representation provides a reasonably definite point for the termination of the mandatory obligations under this Rule. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed. There may be obligations that go beyond this Rule. See, e.g., Rule 3.8.

Withdrawal

- [14] A lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's taking reasonable remedial measures. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in a deterioration of the lawyer-client relationship such that the lawyer can no longer competently and diligently represent the client, or where continued employment will result in a violation of these Rules. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. This Rule does not modify the lawyer's obligations under Rule 1.6 and Business and Professions Code section 6068(e) or the California Rules of Court with respect to any request to withdraw that is premised on a client's misconduct.

Rule 3.3 Candor Toward the Tribunal
(Commission's Proposed Rule – Clean Version)

- (a) A lawyer shall not knowingly:
- (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
 - (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
 - (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence, and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal, unless disclosure is prohibited by Rule 1.6 and Business and Professions Code section 6068(e). A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.
- (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures to the extent permitted by Rule 1.6 and Business and Professions Code section 6068(e).
- (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding or the representation, whichever comes first.
- (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all 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 1.0.1(m) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.
- [2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. However, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not make false statements of law or fact or present evidence that the lawyer knows to be false. For example, the prohibition in paragraph (a)(1) against making false statements of law or failing to correct a material misstatement of law includes a prohibition on a lawyer citing as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional, or failing to correct such a citation previously made to the tribunal by the lawyer.

Representations by a Lawyer

- [3] A lawyer is responsible for pleadings and other documents prepared for litigation but is usually not required to have personal knowledge of the facts asserted therein because litigation documents ordinarily present assertions of fact by the client, or a witness, and not by the lawyer. Compare Rule 3.1. However, an assertion of fact purporting to be based on the lawyer's own knowledge, as in a declaration or an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. *Bryan v. Bank of America* (2001) 86 Cal.App.4th 185 [103 Cal.Rptr.2d 148]. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. *Di Sabatino v. State Bar* (1980) 27 Cal.3d 159 [162 Cal.Rptr. 458]. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the comment to that Rule. See also the comment to Rule 8.4(b).

Legal Argument

- [4] Although a lawyer is not required to make a disinterested exposition of the law, legal argument based on a knowing false representation of law constitutes dishonesty toward the tribunal. A tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it. Paragraph (a)(2) requires a lawyer to disclose directly adverse and legal authority in the controlling jurisdiction that is known to the lawyer and that has not been disclosed by the opposing party. Legal authority in the controlling jurisdiction may include legal authority outside the jurisdiction in which the tribunal sits, such as a federal statute or case that is determinative of an issue in a state court proceeding or a Supreme Court decision that is binding on a

lower court. Under this Rule, the lawyer must disclose authorities the court needs to be aware of in order to rule intelligently on the matter. Paragraph (a)(2) does not impose on lawyers a general duty to cite authority from outside the jurisdiction in which the tribunal is located. Whether a criminal defense lawyer is required to disclose directly adverse legal authority in the controlling jurisdiction involves constitutional principles that are beyond the scope of these Rules. In addition, a lawyer may not knowingly edit and submit to a tribunal language from a book, statute, rule, or decision in such a way as to mislead the court, or knowingly fail to correct an inadvertent material misquotation that the lawyer previously made to the tribunal.

Offering Evidence

- [5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.
- [6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. With respect to criminal defendants, see Comment [7]. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit the testimony that the lawyer knows is false or base arguments to the trier of fact on evidence known to be false.
- [7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. If a criminal defendant insists on testifying, and the lawyer knows that the testimony will be false, the lawyer may offer the testimony in a narrative form if the lawyer made

reasonable efforts to dissuade the client from the unlawful course of conduct and the lawyer has sought permission from the court to withdraw as required by Rule 1.16. Business and Professions Code section 6068(d); *People v. Guzman* (1988) 45 Cal.3d 915 [248 Cal.Rptr. 467], disapproved on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069 fn.13 [108 Cal.Rptr.2d 409]; *People v. Johnson* (1998) 62 Cal.App.4th 608 [72 Cal.Rptr.2d 805]; *People v. Jennings* (1999) 70 Cal.App.4th 899 [83 Cal.Rptr.2d 33]; *People v. Brown* (1988) 203 Cal.App.3d 1335, 1340 [250 Cal.Rptr. 762]. The obligations of a lawyer under these Rules and the State Bar Act are subordinate to applicable constitutional provisions.

- [8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. See, e.g., *People v. Bolton* (2008) 166 Cal.App.4th 343, [82 Cal.Rptr.3d 671]. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0.1(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

Remedial Measures

- [9] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. The lawyer's proper course is to remonstrate with the client confidentially, advise the client

of the consequences of providing perjured testimony and of the lawyer's duty of candor to the tribunal, and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the lawyer must take further remedial measures, see Comment [10], and may be required to seek permission to withdraw under Rule 1.16(b), depending on the materiality of the false evidence.

- [10] Reasonable remedial measures under paragraphs (a)(3) and (b) refer to measures that are available under these Rules and the State Bar Act, and which a reasonable lawyer would consider appropriate under the circumstances to comply with the lawyer's duty of candor to the tribunal. See e.g., Rules 1.2(d), 1.4, 1.16 and 8.4; Business and Professions Code sections 6068(d) and 6128. Remedial measures also include explaining to the client the lawyer's obligations under this Rule and, where applicable, the reasons for lawyer's decision to seek permission from the tribunal to withdraw, and remonstrating further with the client to take corrective action that would eliminate the need for the lawyer to withdraw. If the client is an organization, the lawyer should also consider the provisions of Rule 1.13. Remedial measures do not include disclosure of client confidential information, which the lawyer is required to maintain inviolate under Rule 1.6 and Business and Professions Code section 6068(e).
- [11] A lawyer's duty to take reasonable remedial measures under paragraph (a)(3) is limited to the proceeding in which the lawyer has offered the evidence in question. A lawyer's duty to take remedial measures under paragraph (b) does not apply to another lawyer who is retained to represent a person in an investigation or proceeding concerning that person's conduct in the prior proceeding.

Preserving Integrity of Adjudicative Process

[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence relating to the proceeding or failing to disclose information to the tribunal when required by law to do so. See Rule 3.4. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

Duration of Obligation

[13] Paragraph (c) establishes a practical time limit on the obligation to rectify false evidence or false statements of law and fact. Either the conclusion of the proceeding or of the representation provides a reasonably definite point for the termination of the mandatory obligations under this Rule. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed. There may be obligations that go beyond this Rule. See, e.g., Rule 3.8.

Withdrawal

[14] A lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's taking reasonable remedial measures. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in a deterioration of the lawyer-client relationship such that the lawyer can no longer competently and diligently represent the client, or where

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

Rule 3.3: Candor Toward the Tribunal

STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: Statutes and Standards (2010 Ed.)
by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

California: Rule 5-200 provides as follows:

In presenting a matter to a tribunal, a member:

(A) Shall employ, for the purpose of maintaining the causes confided to the member such means only as are consistent with truth;

(B) Shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law;

(C) Shall not intentionally misquote to a tribunal the language of a book, statute, or decision;

(D) Shall not, knowing its invalidity, cite as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional; and

(E) Shall not assert personal knowledge of the facts at issue, except when testifying as a witness.

In addition, California Business & Professions Code §6068(d) provides that it is the duty of an attorney to employ “those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.” And §6128(a) makes an attorney guilty of a misdemeanor if the attorney engages in “any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party.”

District of Columbia: Rule 3.3(a)(1) provides that a lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer, “unless correction would require disclosure of information that is prohibited by Rule 1.6.” Rule 3.3(a)(2) is nearly identical to ABA Model Rule 1.2(d). D.C.’s equivalent to ABA Model Rule 3.3(a)(2) applies to undisclosed, directly adverse legal authority in the controlling jurisdiction not disclosed by opposing counsel and known to be “dispositive of a question at issue.”

D.C. Rule 3.3(a)(4) provides that a lawyer shall not knowingly offer evidence that the lawyer knows to be false, “except as provided in paragraph (b).” D.C. Rule 3.3(b)

adopts the so-called “narrative method” for presenting false testimony by providing as follows:

When the witness who intends to give evidence that the lawyer knows to be false is the lawyer’s client and is the accused in a criminal case, the lawyer shall first make a good-faith effort to dissuade the client from presenting the false evidence; if the lawyer is unable to dissuade the client, the lawyer shall seek leave of the tribunal to withdraw. If the lawyer is unable to dissuade the client or to withdraw without seriously harming the client, the lawyer may put the client on the stand to testify in a narrative fashion, but the lawyer shall not examine the client in such manner as to elicit testimony which the lawyer knows to be false, and shall not argue the probative value of the client’s testimony in closing argument.

Rule 3.3(c) provides simply: “The duties stated in paragraph (a) continue to the conclusion of the proceeding.” D.C. omits both the second sentence of ABA Model Rule 3.3(a)(3) (“If a lawyer . . . has offered material evidence and the lawyer comes to know of its falsity . . .”), and all of ABA Model Rule 3.3(b) (“A lawyer . . . who knows that a person . . . has engaged in criminal or fraudulent conduct relating to the proceeding . . .”) but covers both situations by adding Rule 3.3(d), which provides as follows: “(d) A lawyer who receives information clearly establishing that a fraud has been perpetrated upon the tribunal shall promptly take reasonable remedial measures, including disclosure to the tribunal to the extent disclosure is permitted by Rule 1.6(d).” (The relevant

part of D.C. Rule 1.6(d)(2) provides that when a client has used or is using a lawyer’s services to further a crime or fraud, the lawyer may reveal client confidences and secrets to the extent reasonably necessary to “prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of the crime or fraud.”) Finally, D.C. omits ABA Model Rule 3.3(d) (regarding ex parte proceedings).

Florida: Rule 3.3 provides that a lawyer shall not

(a)(4) Permit any witness, including a criminal defendant, to offer testimony or other evidence that the lawyer knows to be false. A lawyer may not offer testimony that the lawyer knows to be false in the form of a narrative unless so ordered by the tribunal. If a lawyer has offered material evidence and thereafter comes to know of its falsity, the lawyer shall take reasonable remedial measures.

Florida Rule 3.3(b) provides that “the duties stated in Rule 3.3(a) continue beyond the conclusion of the proceeding.” Florida has not adopted any equivalent to ABA Model Rule 3.3(b). Florida Rule 3.3(c) provides only that a lawyer “may refuse to offer evidence that the lawyer reasonably believes is false.”

Maryland adds the following Rule 3.3(e): “[A] lawyer for an accused in a criminal case need not disclose that the accused intends to testify falsely or has testified falsely if the lawyer reasonably believes that the disclosure would jeopardize any constitutional right of the accused.”

Massachusetts: Rule 3.3(b) states that the conclusion of the proceedings includes “all appeals.” Rule 3.3(e) permits a lawyer representing a criminal defendant to elicit false testimony in narrative fashion if withdrawal is not otherwise possible without prejudicing the defendant. However, “the lawyer shall not argue the probative value of the false testimony in closing argument or in any other proceedings, including appeals.” A lawyer who is unable to withdraw when he or she knows that a criminal defendant will testify falsely “may not prevent the client from testifying” but must not “examine the client in such a manner as to elicit any testimony from the client the lawyer knows to be false.”

New Jersey adheres closely to the pre-2002 version of ABA Model Rule 3.3 but adds, in a new Rule 3.3(a)(5), that a lawyer shall not fail to disclose to the tribunal a material fact “knowing that the omission is reasonably certain to mislead the tribunal.” Also, New Jersey Rule 1.6(b)(2) requires a lawyer to reveal confidences to prevent a client from committing “a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to perpetrate a fraud upon a tribunal.”

New Mexico specifies in Rule 16-303(E) that a lawyer must disclose to a tribunal whether the lawyer is representing the client in a “limited manner.”

New York: In the rules effective April 1, 2009, Rule 3.3(c) omits the phrase “continue to the conclusion of the proceeding” (and thus has no express time limit). New York also adds Rule 3.3(e), which is substantially similar to 7-106(B)(2) of the old Model Code. Rule 3.3(f), which also has no Model Rule equivalent, is substantially similar to 7-106(C)(5)-(7) of the old Model Code, but it also prohibits

“conduct intended to disrupt the tribunal.” New York adds Comment 6A, which addresses the rule’s application to prosecutors, and omits Comment 13 concerning the duration of the Rule 3.3 obligation.

North Dakota: Rule 3.3(a)(3) provides that 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, then:

the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal unless the evidence was contained in testimony of the lawyer’s client. If the evidence was contained in testimony of the lawyer’s client, the lawyer shall make reasonable efforts to convince the client to consent to disclosure. If the client refuses to consent to disclosure, the lawyer shall seek to withdraw from the representation without disclosure. If withdrawal is not permitted, the lawyer may continue the representation and such continuation alone is not a violation of these rules. The lawyer may not use or argue the client’s false testimony.

Ohio: Rule 3.3(c) provides that the duties stated in Rules 3.3(a) and (b) continue “until the issue to which the duty relates is determined by the highest tribunal that may consider the issue, or the time has expired for such determination. . . .”

Oregon provides that the duties in Rule 3.3(a) and (b) are suspended if “compliance requires disclosure of information otherwise protected by Rule 1.6.”

Pennsylvania adds that it applies if a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence "before a tribunal or in an ancillary proceeding conducted pursuant to a tribunal's adjudicative authority, such as a deposition. . . ."

Texas: Rule 3.03(b) and (c) provides:

(b) If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall make a good faith effort to persuade the client to authorize the lawyer to correct or withdraw the false evidence. If such efforts are unsuccessful, the lawyer shall take reasonable remedial measures, including disclosure of the true facts.

(c) The duties stated in paragraphs (a) and (b) continue until remedial legal measures are no longer reasonably possible.

Virginia: Rule 3.3(a)(2) provides that a lawyer shall not knowingly "fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client, subject to Rule 1.6." Virginia Rule 3.3(a)(3) requires disclosure only of "controlling" legal authority and omits the word "directly" before "adverse." (The Comment explains that "directly" was deleted because "the limiting effect of that term could seriously dilute the paragraph's meaning.") Virginia Rule 3.3(a)(4) and Rule 3.3(b) are identical to the pre-2002 version of ABA Model Rule 3.3(a)(4) and Rule 3.3(c). Virginia omits ABA Model Rules 3.3(b) and (c) and adds a new paragraph taken verbatim from DR 7-102(B)(2) of the ABA Model Code of

Professional Responsibility that provides: "A lawyer who receives information clearly establishing that a person other than a client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal."

Rule 3.3 – Public Comment – File List

Y-2010-534b COPRAC [3.3]

Y-2010-538 LACBA [3.3]

Y-2010-545b CPDA [3.3]

Y-2010-548a OCBA [3.3]

Y-2010-551 Ellen Pansky [3.3]



**THE STATE BAR
OF CALIFORNIA**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

**COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT**

TELEPHONE: (415) 538-2161

August 9, 2010

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

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 – Candor Towards Tribunal. COPRAC supports the adoption of proposed Rule 3.3 and the Comments to the Rule.

Thank you for your consideration of our comments.

Very truly yours,

A handwritten signature in black ink that reads "Carole J. Buckner".

Carole Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC



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August 23, 2010

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

Re: Public Comment on Proposed Rule 3.3 from The Professional
Responsibility and Ethics Committee of the Los Angeles County
Bar Association

Dear Ms. Hollins:

The Professional Responsibility and Ethics Committee (PREC) of the Los Angeles County Bar Association (LACBA) offers the following comments on proposed Rule 3.3 of the Proposed Rules of Professional Conduct.

PREC is one of the oldest and most experienced legal ethics committees in the United States. It has a long history of publishing ethics opinions. Its membership is highly diverse, representing many different areas of legal practice. Many PREC members have been active on the committee for decades. PREC committee members include three members of the Rules Revision Commission, present and former members and officers of the Los Angeles County Bar Association's Board of Trustees, numerous present and former members (and former chairs) of COPRAC, two past presidents of the Association of Professional Responsibility Lawyers, present and former members of the Editorial Board of the ABA/BNA Manual of Professional Responsibility and a member of the American Law Institute.

The Committee is concerned regarding potential confusion that will arise among members of the bar by the statements in Subsection (a)(3) and (b), that the lawyer is required to take remedial steps to make various disclosures to the tribunal, except as limited by Business and Professions Code Section 6068(e).

There are competing ethical concerns between California's strict adherence to the duty of confidentiality and the proposed rule's requirement that remedial measures be taken to inform the tribunal if the lawyer comes to know that false evidence has been presented, or a person, potentially including a client, has engaged in or is about to engage in fraudulent or criminal conduct in the proceedings.

Audrey Hollins
Office of Professional Competence, Planning & Development
State Bar of California
August 23, 2010
Page 2

These are difficult concepts for most lawyers to wrestle with, and we generally believe that the rule could be improved by a more concise statement as to what the lawyer is not permitted to do, rather than merely directing the lawyer to Section 6068(e). The concept is well stated in the last sentence to Comment 10, which reads: "Remedial measures do not include disclosure of client confidential information, which the lawyer is required to maintain inviolate under Rule 1.6 and Business and Professions Code Section 6068(e)."

By a unanimous vote with two abstentions, PREC supports the view that the language of the last sentence of Comment 10 should be made a part of the body of the rule itself, in place of the references to Section 6068(e) contained in Subsections (a)(3) and (b) of the rule as presently drafted.

PREC is also of the view that Subsection (d) of the proposed rule overstates the concept of disclosure to the tribunal in an ex parte proceeding, and omits the necessary reference to avoid disclosure of client confidential information. Thus a similar revision should be made to temper the overly broad statement as to required disclosure of material facts in an ex parte proceeding.

Perhaps one way to implement these suggestions might be to add a subsection (e) to the rule, which reads more or less as the last sentence of Comment 10.

We thank you for the opportunity to comment on the draft rule.

LOS ANGELES COUNTY BAR ASSOCIATION
PROFESSIONAL RESPONSIBILITY AND ETHICS
COMMITTEE



Robert K. Sall, Vice Chair

Cc: Alan K. Steinbrecher, Esq., President
Evan Jenness, Esq., Committee Chair
Grace Danziger, LACBA Staff



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: AUGUST 25, 2010

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 1.0.1 \[1-100\(B\)\]](#)

[Rule 2.1 \[n/a\]](#)

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

[Rule 3.8 \[5-110\]](#)

[Rule 4.2 \[2-100\]](#)

[Rule 5.4 \[1-310, 1-320, 1-600\]](#)

[Rule 8.4 \[1-120\]](#)

[Discussion Draft \[All Rules\]](#)

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

3.3 Candor Toward the Tribunal [5-200]

*

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 California Public Defenders Association (CPDA) is the largest organization of criminal defense lawyers in California. It has approximately 4,000 members, composed of public defenders, appointed indigent defense counsel, privately retained lawyers, and others. (Address and other contact information is at the bottom of this Public Comment)

The author of this comment, Garrick Byers, is a member of CPDA's Board of Directors, and Chairperson of CPDA's Ethics Committee, and is authorized to make this public comment on behalf of CPDA. (Address and other contact information is at the bottom of this Public Comment.)

CPDA is grateful to the Commission for having added the following sentence in Comment [4]:

"Whether a criminal defense lawyer is required to disclose directly adverse legal

ENTER COMMENTS HERE.

The California Public Defenders Association (CPDA) is the largest organization of criminal defense lawyers in California. It has approximately 4,000 members, composed of public defenders, appointed indigent defense counsel, privately retained lawyers, and others. (Address and other contact information is at the bottom of this Public Comment)

The author of this comment, Garrick Byers, is a member of CPDA's Board of Directors, and Chairperson of CPDA's Ethics Committee, and is authorized to make this public comment on behalf of CPDA. (Address and other contact information is at the bottom of this Public Comment.)

CPDA is grateful to the Commission for having added the following sentence in Comment [4]:

"Whether a criminal defense lawyer is required to disclose directly adverse legal authority in the controlling jurisdiction involves constitutional principles that are beyond the scope of these Rules."

CPDA remains concerned, however, that this does not always provide a bright line, and, in effect, may sometimes require the criminal defense lawyer to "violate" the rule to find out whether it applies in that case.

A teaching of the Court of Appeal concerning current Rule 2-100 [contact with a represented party] applies equally to this Proposed Rule 3.3: "... [A] bright line test is essential.... [A]n attorney must be able to determine beforehand whether particular conduct is permissible; otherwise, an attorney would be uncertain whether the rules had been violated until ... he or she is disqualified. Unclear rules risk blunting an advocate's zealous representation of a client." Snider v. Superior Court (2003) 113 Cal.App.4th 1187, 1197-1198, quoting Nalian Truck Lines, Inc. v. Nakano Warehouse & International Corp. (1992) 6 Cal.App.4th 1256, 1264.

Because the added sentence in Comment [4] of Proposed Rule 3.3 does not always provide a bright line, CPDA believes that one more sentence should also be added. The additional sentence should be similar to the first sentence of Comment [4] to Proposed Rule 1.16 [Declining or Terminating Representation]. That first sentence reads "A lawyer is not subject to discipline for withdrawing under paragraph (a)(1) or (2) if the lawyer has acted reasonably under the facts and circumstances known to the lawyer, even if that belief later is shown to have been wrong."

The sentence that CPDA requests be added to Comment [4] of this Proposed Rule 3.3, uses the term "reasonably believe[d]" as defined in Proposed Rule 1.0.1(i). The new sentence would read as follows:

"A criminal defense lawyer is not subject to discipline for not disclosing directly adverse authority in the controlling jurisdiction under paragraph (a)(2) if the lawyer reasonably believed that the lawyer was not required to do so by controlling constitutional principles, even if that belief is later shown to have been wrong."

Thank you for your consideration,

California Public Defenders Association by
Garrick Byers, Member, Board of Directors, Chair, Ethics Committee

Address information:
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MEMORANDUM

Date: August 18, 2010

To: 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 Tribunal

Founded over 100 years ago, the Orange County Bar Association has over 7,000 members, making it one of the 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 comments concerning the latest public comment draft of the subject proposed Rule:

Improving the Language of Paragraphs (a) and (b)

The OCBA is concerned about the lack of guidance in paragraphs (a)(3) and (b) of the draft rule, which impose an obligation to take remedial measures, but then refer to the limitations of Rule 1.6 and Business and Professions Code Section 6068(e). These are conflicting obligations. The average lawyer will have difficulty interpreting how he or she is supposed to take remedial measures, as indicated in the Rule, when limited by the mere reference to Section 6068(e).

If client confidentiality is to take precedence over the obligation to pursue remedial measures in correcting false information provided to the tribunal, the Rule needs to be more explicitly drafted. The bottom line is that if you don't have the client's permission, or some other exception to the duty of confidentiality, you can't take any remedial measures that involve disclosure of confidential information. This isn't plainly stated until the end of Comment [10], where it provides that remedial measures do not include the disclosure of client confidential information which the lawyer is required to maintain inviolate.

The clarity of the Rule would be enhanced if the last sentence of Comment [10] were actually moved into the body of the Rule, modifying the language of

paragraphs (a)(3) and (b), to avoid the inconsistent or confusing treatment of these competing professional obligations.

This change would make it clearer to practitioners (without having to wade through all the Comments) that they are not to reveal confidential client information without the client's consent, or some other exception to the duty of confidentiality. The Rule should explicitly say so.

Excess Verbiage in Comment [4]

Line 6 of Comment [4] has an "and" between "directly adverse" and "legal authority." The OCBA believes the "and" should be deleted, because the Comment pertains to directly adverse legal authority, and the conjunctive is unnecessary.

August 25, 2010

VIA E-MAIL TO: audrey.hollins@calbar.ca.gov
AND U.S. FIRST CLASS MAIL

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

Re: Public Comment on Proposed Rules of Professional Conduct

Dear Ms. Hollins:

Please accept this as my public comment regarding the proposed Rules of Professional Conduct which are currently being considered by the California State Bar Board of Governors.

As a preliminary matter, I wish to reiterate some of the observations that were recently made in the Daily Journal by attorneys Kurt Melchior and Jerome Sapiro, Jr. As Messrs. Melchior and Sapiro commented in the four part series published during the last few weeks, there are many flaws in the proposed rules as currently drafted. Although the Herculean effort made by the Rules Revision Commission is commendable and is to be lauded, the final product is fraught with problems. Most notably, I sincerely recommend that the Comments to the Rules be separated from the rules themselves, and published separately as a California Restatement of The Law Governing Lawyers. The Comments are convoluted, confusing, sometimes contradictory, and difficult to interpret in some instances. Without criticizing particular comments, it would be far more useful to simply publish them in a separate guidebook, to provide aspirational guidance, rather than using them to create disciplinary sanctions.

In addition, although the charge provided to the Rules Revision Commission was to harmonize California's Rules of Professional Conduct with the ABA Model Rules unless there was a compelling reason to deviate from the Model Rules, the Rules as currently proposed are a unique hybrid, in many instances constituting a new standard not previously seen either in the California Rules of Professional Conduct or in the ABA Model Rules. By way of one example, California cases interpreting current rule 2-200 permit lawyers to comply with the rule governing division of attorneys fees, so long as the writing is provided to the client and executed by the client before the division of fees actually occurs. (See, *Cohen v. Brown* (2009) 173 Cal. App. 4th 302 and *Mink v. Maccabee* (2004) 121 Cal. App. 4th 835.) As currently proposed, Rule 1.5.1 (a) (2) would make it a disciplinary offense to fail to obtain the client's consent to a division of fees agreement at the time the attorneys first agree to divide the fee. Not only does the new rule contradict current case law, it is illogical, since the lawyers will not know their relative contributions to the client's matter until representation is complete.

Audrey Hollins
Office of Professional Competence, Planning & Development
State Bar of California
August 25, 2010
Page 2

Similarly, proposed Rule 1.5 (e)(2) purports to create a disciplinary offense where a lawyer collects a flat fee to which the client has agreed, which by definition is not based on a calculation of the number of hours times an hourly rate. Flat fees have always been recognized as alternatives to the billable hour arrangement and provides great certainty to both the lawyer and the client, since the total amount of fees will be capped. The concept that a portion of a flat fee may be required to be retroactively refunded, even if all of the services have been completed, is an entirely novel disciplinary rule.

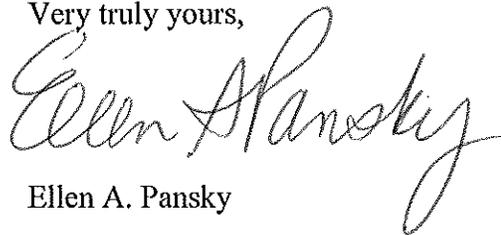
As a member of the Los Angeles County Bar Association Professional Responsibility and Ethics committee for approximately 18 years, I am personally aware that concerns about inconsistencies between existing law and the proposed new rules were brought to the attention of the RRC over the past 9 years. Regrettably, some of these genuine concerns were apparently given short shrift by the RRC. Although I appreciate the extreme expenditure of resources this process has already consumed, some of the rules simply require additional consideration.

Regarding the rules currently out for public comment, Proposed Rule 3.3 subsections (a)(3) and (b) can be read to suggest that lawyers have a duty to reveal client confidences at an ex parte hearing, in order to correct a judge's misunderstanding of facts. There is no known authority for this proposition, which seems to directly contradict the duty to maintain client secrets, set forth in Business & Professions Code § 6068(e). It seems to me that the purpose of Model Rule 3.3 is to require a lawyer to make sure that no misrepresentations occur with respect to ex parte notice, so that ex parte relief is not given on faulty procedural grounds. This point is not clear in proposed California Rule 3.3.

I wish to reiterate my sincere appreciation for the nine years of dedicated work conducted by the RRC members, as well as the hundreds, if not thousands of hours contributed by numerous Bar Association ethics committees and individual lawyers throughout California. All of the State Bar stakeholders in this process have an identical goal: the adoption of a workable, fair and clear set of Rules of Professional Conduct. I urge the Board of Governors to carefully consider whether the current proposed rules, as currently organized and in light of the manner in which the Comments have been structured, will serve the legal community and the public better than a set of rules which more closely follow the format of the ABA Model Rules.

Thank you for the opportunity to comment on this rule.

Very truly yours,

A handwritten signature in cursive script that reads "Ellen A. Pansky". The signature is written in black ink and is positioned to the right of the typed name.

Ellen A. Pansky

EAP/rk