

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

(Draft #11.1, 2/20/10)

**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)

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## Rule Revision Commission Action/Vote to Recommend Rule Adoption

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

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

Vote (see tally below)

Favor Rule as Recommended for Adoption   7  

Opposed Rule as Recommended for Adoption   0  

Abstain   1  

Approved on Consent Calendar

Approved by Consensus

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## Commission Minority Position, Known Stakeholders and Level of Controversy

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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.

Not Controversial

# COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

## Proposed Rule 3.3\* Candor to the Tribunal

February 2010

(Draft rule following consideration of public comment)

### *INTRODUCTION:*

Proposed Rule 3.3 sets forth specific duties of a lawyer in representing a client in a matter before a tribunal. The proposed Rule, 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].)

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\* Proposed Rule 3.3, Draft 11.1 (2/20/10).

*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 align="center"><b><u>ABA Model Rule</u></b> <b>Rule 3.3 Candor Toward the Tribunal</b></p>	<p align="center"><b><u>Commission's Proposed Rule*</u></b> <b>Rule 3.3 Candor Toward the Tribunal</b></p>	<p align="center"><b><u>Explanation of Changes to the ABA Model Rule</u></b></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.4<sup>th</sup> 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 measures, including, if necessary,</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 measures, including, if necessary, disclosure to the</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 information.</p>

\* Proposed Rule 3.3, Draft 11.1 (2/20/10); Redline/strikeout showing changes to the ABA Model Rule

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<p>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>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>(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, <del>including, if necessary, disclosure</del> to the <del>tribunal</del> <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> <del>and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.</del></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 <u>of the proceeding</u>, 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 <del>material</del> facts known to the lawyer that <del>will</del><u>the lawyer knows, or reasonably should know, are needed to</u> enable the tribunal to make an informed decision, whether or not the facts are adverse.</p>	<p>Paragraph (d) follows the ABA counterpart, except it does not limit the lawyer's obligation to disclose all "material" facts and extends the duty to facts that the lawyer knows, or reasonably should know, are needed to enable the tribunal to make an informed decision.</p> <p><i>Minority.</i> A minority of the Commission believes there is insufficient reason for departing from the ABA standard, followed in most jurisdictions, and that the paragraph is unclear and would subject lawyers to being second-guessed on what facts were "needed" to enable a tribunal to make an informed decision in a particular matter.</p>

<p 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 <del>1.0</del><u>4-01.0.1</u>(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. <del>Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently</del> <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 <del>allow the tribunal to be misled by</del><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>

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	<p><a href="#">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.</a></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><b>Representations by a Lawyer</b></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><b>Representations by a Lawyer</b></p> <p>[3] <del>An advocate</del><a href="#">A lawyer</a> is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of <del>matters</del><a href="#">the facts</a> asserted therein, <del>for</del><a href="#">because</a> litigation documents ordinarily present assertions <a href="#">of fact</a> by the client, or <del>by someone on the client's behalf</del><a href="#">a witness</a>, and not <del>assertions</del> by the lawyer. Compare Rule 3.1. However, an assertion <a href="#">of fact</a> purporting to be <a href="#">based</a> on the lawyer's own knowledge, as in <a href="#">a declaration or</a> 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. <a href="#">Bryan v. Bank of America (2001) 86 Cal.App.4th 185 [103 Cal.Rptr.2d 148].</a> There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. <a href="#">Di Sabatino v. State Bar (1980) 27 Cal.3d 159 [162 Cal.Rptr. 458].</a> 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"><b><u>ABA Model Rule</u></b> <b>Rule 3.3 Candor Toward the Tribunal</b> <b>Comment</b></p>	<p align="center"><b><u>Commission's Proposed Rule</u></b> <b>Rule 3.3 Candor Toward the Tribunal</b> <b>Comment</b></p>	<p align="center"><b><u>Explanation of Changes to the ABA Model Rule</u></b></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><b>Legal Argument</b></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><b>Legal Argument</b></p> <p>[4] <del>Legal argument based on</del> <u>Although a knowingly false representation of law constitutes dishonesty toward the tribunal.</u> <del>A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities</del> <u>argument based on a knowing false representation of law constitutes dishonesty toward the tribunal.</u> <del>Furthermore, as stated in paragraph</del> <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> <del>an advocate has</del> <u>requires a duty</u> <del>lawyer</del> <u>to disclose directly adverse and legal authority in the controlling jurisdiction that is known to the lawyer and</u> <del>that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine</del> <u>Legal authority in the controlling jurisdiction may include legal premises properly applicable</u> <del>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</del></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>

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	<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><b>Offering Evidence</b></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><b>Offering Evidence</b></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. <del>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.</del> 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>

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<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 <del>or otherwise permit the witness to present</del> 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. <del>In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if</del> <u>criminal defendant insists on testifying, and the accused so desires, even if counsel</u> <del>lawyer</del> knows that the testimony <del>or statement</del> 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><a href="#">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.4<sup>th</sup> 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].</a> The <del>obligation</del>obligations of the <del>advocate</del> lawyer under <del>the</del>these Rules of Professional Conduct <del>is</del>and the State Bar Act are subordinate to <del>such requirements.</del> See <del>also Comment [9]</del><a href="#">applicable constitutional provisions.</a></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. <a href="#">See, e.g., <i>People v. Bolton</i> (2008) 166 Cal.App.4th 343, [82 Cal.Rptr.3d 671].</a> A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule <del>4-0</del><a href="#">1.0.1</a>(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><del>[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].</del></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><b>Remedial Measures</b></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><b>Remedial Measures</b></p> <p><del>[10]</del> 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. <del>In such situations, the advocate's</del> <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 <u>consequences of providing perjured testimony and of the</u> 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 <u>advocate</u> <u>lawyer</u> must take further remedial <u>action</u>. <del>If withdrawal from measures, see Comment [10], and may be required to seek permission to withdraw under Rule 1.16(b), depending on the representation is not permitted or will not undo the effect</del> <u>materiality</u> of the false evidence, <del>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.</del></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><del>[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</del></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><del>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.</del></p>	
	<p><a href="#">[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).</a></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><a href="#">[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</a></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>

<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><a href="#">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.</a></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><b>Preserving Integrity of Adjudicative Process</b></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><b>Preserving Integrity of Adjudicative Process</b></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 <a href="#">relating to the proceeding</a> or failing to disclose information to the tribunal when required by law to do so. <a href="#">See Rule 3.4.</a> Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, <del>including disclosure if necessary,</del> 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><b>Duration of Obligation</b></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><b>Duration of Obligation</b></p> <p>[13] <a href="#">A Paragraph (c) establishes a</a> practical time limit on the obligation to rectify false evidence or false statements of law and fact <del>has to be established.</del> <a href="#">The Either the</a> conclusion of the proceeding <del>is</del> <a href="#">or of the representation provides</a> 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 <del>obligation</del> <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><b>Ex Parte Proceedings</b></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><b>Ex Parte Proceedings</b></p> <p><del>[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.</del></p>	<p>Model Rule 3.3, Comment [14] is not included in the comments to proposed Rule 3.3.</p>

<p><b>Withdrawal</b></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><b>Withdrawal</b></p> <p>[15] <del>Normally, a</del> 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 <del>disclosure</del><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 <del>such an extreme</del> deterioration of the <del>client-lawyer-client</del> relationship <u>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</u>. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal’s permission to withdraw. <del>In connection</del> <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, <del>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.</del></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

(Comparison of the Current Proposed Rule to the initial 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 ~~controlling~~ 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; ~~or~~
  - (4) ~~cite as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional, or fail to correct such a citation previously made to the tribunal by the lawyer.~~
- (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures to the extent permitted by Rule 1.6 and Business and Professions Code section 6068(e).
- (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding or the representation, whichever comes first.
- (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all facts known to the lawyer that the lawyer knows, or reasonably should know, are needed to enable the tribunal to make an informed decision, whether or not the facts are adverse.

#### Comment

- [1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule ~~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.
- [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 ~~[1-2-4]~~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 ~~[1-2-4]~~1.2(d), see the ~~Comment~~comment to that Rule. See also the ~~Comment~~comment to Rule 8.4(b).

#### *Legal Argument*

- [4] Although a lawyer is not required to make a disinterested exposition of the law, legal argument based on a knowing false representation of law constitutes dishonesty toward the tribunal. A tribunal that is fully

informed on the applicable law is better able to make a fair and accurate determination of the matter before it. Paragraph (a)(2) requires a lawyer to disclose directly adverse and ~~controlling~~-legal authority in the controlling jurisdiction that is known to the lawyer and that has not been disclosed by the opposing party. ~~"Controlling legal~~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~~ [Comment](#) [7]. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit ~~or otherwise permit the witness to present~~ the testimony that the lawyer knows is false or base arguments to the trier of fact on evidence known to be false.

- [7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. If a criminal ~~defense client~~ [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 ~~4-01.0.1~~ 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 ~~1-2-4~~ 1.2\(d\)](#), 1.4, 1.16 and 8.4; Business and Professions Code ~~Sections~~ [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. ~~The~~[Either the conclusion of the proceeding is 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 ~~client-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} or~~ [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 facts known to the lawyer that the lawyer knows or reasonably should know, are needed to enable the tribunal to make an informed decision, whether or not the facts are adverse.

### Comment

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0.1(m) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3)

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

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

#### Representations by a Lawyer

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

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

#### Legal Argument

- [4] Although a lawyer is not required to make a disinterested exposition of the law, legal argument based on a knowing false representation of law constitutes dishonesty toward the tribunal. A tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it. Paragraph (a)(2) requires a lawyer to disclose directly adverse 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 facts known to the lawyer that the lawyer knows or reasonably should know, are needed to enable the tribunal to make an informed decision, whether or not the facts are adverse.

**Comment**

- [1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0.1(m) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.
- [2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. However, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not make false statements of law or fact or present evidence that the lawyer knows to be false. For example, the prohibition in paragraph (a)(1) against making false statements of law or failing to correct a material misstatement of law includes a prohibition on a lawyer citing as authority a decision that has been overruled or a statute that has been repealed or declared

unconstitutional, or failing to correct such a citation previously made to the tribunal by the lawyer.

#### *Representations by a Lawyer*

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

#### *Legal Argument*

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

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

#### *Offering Evidence*

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

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

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

#### *Remedial Measures*

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

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

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

*Preserving Integrity of Adjudicative Process*

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

*Duration of Obligation*

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

*Withdrawal*

[14] A lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's taking reasonable remedial measures. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in a

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

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

**TOTAL = 9**    **Agree = 0**  
**Disagree = 1**  
**Modify = 8**  
**NI = 0**

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

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

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

**TOTAL = 9**    **Agree = 0**  
**Disagree = 1**  
**Modify = 8**  
**NI = 0**

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comment [4]	<p>germane to the case, because the prosecutor in a criminal case has “the responsibility of a minister of justice. . . .” (ABA Model Rule 3.8, Comment [1])</p> <p>We support Michael Judge and Janice Fukai’s reasoning and comments in opposition to this Rule as well.</p> <p>We have no objection to the first sentence of Comment [4] nor to the last sentence of Comment [4], but we do object to those sentences in between and feel they should be deleted.</p>	<p>be directly adverse to the position of the client and not disclosed by opposing counsel” ). The lawyer in that case had written the court a letter after being apprised of his failure to cite the case that he believed in good faith that the relevant statement in the case was dictum and that it did not serve to overrule the case he had relied upon. <u>Schaefer</u> is a 1945 case applying Business and Professions Code §6068(d) and decided many years before the Model Code from which the current rule derives. <u>Schaefer</u> does not support the notion that the rule does not apply to lawyers in California. Nevertheless, the Commission added the following sentence to Comment [4]:</p> <p>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.</p> <p>The Commission agreed and made appropriate revisions to both Comment [4] and paragraph (a)(2) (see RRC Response to LACBA, below).</p>

TOTAL = 9    Agree = 0  
 Disagree = 1  
 Modify = 8  
 NI = 0

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

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comment [7]	CPDA disagrees with the portion of Comment [7] which requires that the attorney seek permission from the court to withdraw when the attorney believes that the client will be committing perjury and asks that that portion of the Comment be deleted.	CPDA appropriately raises the question whether the Rule should require that a lawyer must make a motion to withdraw so as not to give implied consent to the perjurious testimony. The cases in California on the narrative approach are not entirely consistent on whether seeking to withdraw is a prerequisite to permitting the narrative approach. <u>People v. Brown</u> says it is. <u>People v. Johnson</u> and <u>People v. Gadson</u> say that mandatory withdraw would not solve the problem. See the discussion in the Rutter Group Practice Guide: Professional Responsibility at ¶8:187 – 8:187.1. As a solution, the Commission added the following at the end of second sentence in Comment [7] to clarify that the duty to seek to withdraw in this situation is covered under Rule 1.16: "as required under Rule 1.16".
				Comment [8]	CPDA agrees with the first two sentences of proposed Comment [8]. However, CPDA believes that proposed sentences three and four should be deleted, and sentence five should be changed.  Sentence five contains the phrase “. . . an obvious falsehood. . . .” This phrase should be changed: it does not specify to whom the falsehood must be obvious. The fifth sentence should read “a falsehood that is obvious to the lawyer,” or, better and	The Commission made no change to the third sentence in proposed Comment [8] which tracks the definition of "knows" in proposed Rule 1.0(f).  The Commission made no change to the last sentence in proposed Comment [8]. The sentence tracks Model Rule Comment [8] and is sufficiently clear in view of the reference to the definition of "knows" referenced in the preceding sentence. Comment [8] and paragraph (b) are consistent

TOTAL = 9 Agree = 0  
 Disagree = 1  
 Modify = 8  
 NI = 0

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

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>simpler, “a falsehood that is known to the lawyer.”</p> <p><i>People v. Bolton</i> states the correct standard, and simultaneously states the reason for CPDA’s position on Comment [8]. “Criminal defense attorneys sometimes have to present evidence that is incredible . . . [B]ut, as long as counsel has no . . . factual knowledge of its falsity, it does not raise an ethical problem.” We believe that the <i>Bolton</i> case should be cited in either Comment [7] or [8], to provide additional guidance to attorneys.</p>	<p>with <i>People v. Bolton</i>, which deals with evidence the lawyer suspects but does not know is false.</p> <p>The Commission added a citation to <i>People v. Bolton</i>.</p>
2	COPRAC	M		3.3(c)	<p>Regarding paragraph (c), we believe the minority position is the better one, regarding when a lawyer’s obligations under paragraphs (a) and (c) should end. We are persuaded that a lawyer should not have a continuing obligation to oversee the course of a proceeding which the lawyer is no longer involved in, having been terminated or having withdrawn from representation. We believe a lawyer would lack standing to continue to be involved in proceedings regarding a former client and could potentially interfere with the relationship between the former client and his or her new lawyer. Accordingly, we believe the lawyer’s duties should not continue to the conclusion</p>	<p>COPRAC refers to paragraphs (a) and (b). The Commission responded to COPRAC’s concerns by revising paragraph (c) as follows: “continue to the conclusion of the proceeding <u>or the representation, whichever comes first.</u>”</p>

TOTAL = 9  
 Agree = 0  
 Disagree = 1  
 Modify = 8  
 NI = 0

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				3.3(d)	of the proceeding, but to the conclusion of the representation, if such conclusion occurs earlier.  In paragraph (d), regarding a lawyer's duty to inform the tribunal of necessary facts, we believe the language of the ABA Rule: "all material facts known to the lawyer that will enable the tribunal to make an informed decision," provides better guidance to practitioners than the Commission's proposed changes. We think it would be too difficult to opine on what facts a lawyer "reasonably should know are needed," as suggested by the Commission, particularly in retrospect, and the vagueness of this revised requirement could inure to the detriment of lawyers who are in good faith attempting to follow the Rule.	The Commission disagrees and recommends retaining the "knows or reasonably should know" qualifier, which creates an objective standard and should facilitate enforcement.
				Comment [7]	In proposed Comment [7], we feel that using the term "criminal defendant" would make more sense than "criminal defense client." This is because there could be witnesses called by a lawyer that might be criminal defense clients in other cases, but the "narrative" approach is only available to the criminal defendant currently on trial.	The Commission agrees with COPRAC's suggestion and recommends that "criminal defense client" be changed to "criminal defendant."

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**TOTAL = 9**    **Agree = 0**  
**Disagree = 1**  
**Modify = 8**  
**NI = 0**

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comment [9]	<p>COPRAC disagrees with proposed Comment [9] to the extent that it is intended to provide that a lawyer has no obligation to take remedial measures when opposing counsel elicits testimony the lawyer knows to be false from the lawyer's client or a witness. We believe the better position is that a lawyer should have a duty to take remedial measures whenever the lawyer knows that the lawyer's client or witness has testified falsely, regardless of which side elicited the false testimony. We believe that the following phrase found in ABA Comment [10] that was deleted from proposed Comment [9], "either during the lawyer's direct examination or in response to cross examination by the opposing lawyer," should be reinserted in Comment [9].</p> <p>We do not believe there is any legitimate rationale for the distinction established by the Comment [9], providing that a lawyer is obliged to take remedial measures if a client knowingly makes false statements during a deposition, but permitting a lawyer to forego such measures if a client makes false statements at trial.</p>	<p>COPRAC, OCBA and SDCBA recommend that Comment [9] restore the following language from Model Rule Comment [10] at the end of the second sentence: "either during the lawyer's direct examination or in response to cross examination by the opposing lawyer" and, thus, impose the obligation to take remedial measures under paragraph (b) regardless of who adduces the false evidence.</p> <p>The Commission agreed that Comment [9] should be changed to track Model Rule Comment [10] on this issue.</p>

3	Judge, Michael P. Los Angeles County Public Defender	D		Comment [4]	<p>When counsel is faced with the dilemma of remaining silent or disclosing authority harmful to the client, a rule barring affirmative misstatements of law permits counsel to remain silent, thereby remaining loyal to the client.</p> <p>In contrast, the proposal would create a new rule which would require counsel to volunteer to the court authority contrary to the position of the client.</p> <p>A rule which requires counsel to affirmatively offer case law harmful to the client undermines two critical core values of our criminal justice system in California. The first being counsel's duty of loyalty to his or her client. The second core value of our criminal justice system is the adversarial system. The critical value of an adversarial system is undermined when counsel for the party who had diligently researched an issue is required to assist his or her opponent, who may have done nothing, by revealing the authority which requires the court to rule against that party.</p> <p>The proposed rule is very narrow, applicable only to "controlling authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." However, this narrow articulation of the rule is undermined by Comment [4], which states, "the lawyer must disclose the authorities the court needs to be aware of in order to rule intelligently on the matter." The Comment also refers to "a tribunal that is</p>	<p>No change is recommended. See response to CPDA's similar comment.</p> <p>The Commission agreed that proposed Comment [4] should be redrafted and made the appropriate changes. See below.</p>
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					fully informed.” The narrow duty to disclose controlling authority articulated in the proposed Rule itself is thus undermined by the Comments which appear to impose on counsel a duty to ensure that the judge is fully informed and has all the authorities necessary to rule intelligently.	
4	Los Angeles County Bar Association, Professional Responsibility and Ethics Committee	M		Subsection (b)	<p>We support deleting the language in (b) “including, if necessary, disclosures to tribunal” at the end of the sentence. We suggest adding the phrase “consistent with Business &amp; Professions Code Section 6068(e)” at the end of the sentence, however, in place of the deleted language to make the rule clear as to how to understand “reasonable remedial.”</p> <p>We agree that a lawyer should correct a previously improperly cited authority, but believe (with a minority of the RRC) that the duty should end when the lawyer ceases to represent the client.</p>	<p>The Commission agreed and added the following to paragraph (b): “to the extent permitted under Business and Professions Code §6068(e).”</p> <p>The Commission changed paragraph (c) to provide that the lawyer’s obligations end with either “the conclusion of the proceeding or the representation, whichever comes first.”</p>
				Comment [4]	<p>We are concerned that the language contained in Comment [4] (“Under this Rule, the lawyer must disclose authorities the court needs to be aware of in order to rule intelligently on the matter.”) may be too general and broad a phrase in a disciplinary context, even though it is part of a Comment and not part of the Rule itself.</p>	<p>The Commission agreed that Comment [4] and paragraph (a)(2) should be reconsidered by the RRC in light of the comments received from CPDA, Mr. Judge and Ms. Fukai, LACBA, and Mr. Scofield (whose thoughtful memorandum is not reported in this chart). The comments received reveal that the distinction we have tried to draw between controlling authority that is directly adverse and directly adverse authority in the controlling jurisdiction is not sufficiently clear and will likely cause confusion such that it does not warrant departing from the standard in the Model Rule, which is followed in most jurisdictions. In view of the comments received, the Commission revised paragraph (a)(2) to track Model Rule</p>

						paragraph (a)(2) and revised proposed Comment [4], including the following sentence: “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.”
5	Office of Chief Trial Counsel (“OCTC”), State Bar	M		Comment [3]	<p>OCTC is concerned that the Model Rule language is narrower than current rule 5-200 in that it requires candor only to a tribunal, while rule 5-200 provides that a lawyer “shall employ, for the purpose of maintaining the causes confided to the member such means only as are consistent with truth.” OCTC believes that provision should be included in the Rule.</p> <p>OCTC is concerned that the Rule’s “knowingly” requirement would excuse gross negligence, contradicting <i>Matter of Harney</i> (Rev.Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 280, and <i>Matter of Chesnut</i> (Rev.Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 174.</p> <p>OCTC is concerned that the Rule omits the term “artifice” as is currently found in rule 5-200(B). OCTC contends the word should remain in the Rule so as to not narrow its reach.</p> <p>OCTC is concerned that Comment [3] is incomplete because the Fed. Rules of Civil Procedure and Code Civ. P. 128.7 require that statements be made “after an inquiry reasonable under the circumstances”.</p>	<p>The Commission disagrees. Proposed Rules 3.4 (Fairness to Opposing Party and Counsel) and 4.1 (Truthfulness in Statements to Others) cover the same ground with greater specificity.</p> <p>The Commission disagrees. Both <i>Harney</i> and <i>Chesnut</i> were decided under Bus. &amp; Prof. Code § 6068(d), and would not be affected by this Rule. Moreover, the definition of “know” in proposed Rule 1.0.1(f) (based on MR 1.0(f)) does not permit reckless disregard of the facts.</p> <p>The Commission disagrees that removing “artifice” from the Rule will narrow OCTC’s ability to charge lawyers. The word is found in Bus. &amp; Prof. Code § 6068(d), so OCTC will not lose the ability to make such a charge.</p> <p>The Commission disagrees. An inquiry is only required if reasonable under the circumstances. As Comment [8] recognizes, a “lawyer cannot ignore an obvious falsehood.”</p>
6	Orange County Bar Association	M		Comment [6]	The OCBA agrees with the minority that the language “or otherwise permit the witness to present testimony the lawyer knows to be	The Commission agreed and deleted that clause.

				<p>Comments [6] and [7] false," is unclear, and should be deleted</p> <p>The OCBA recommends that the Commission use the phrase "criminal defendant" consistently, rather than the term "criminal defense client" used in Comment [7]</p> <p>Comment [9] The OCBA recommends that the phrase, "either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer" be included in this Comment, consistent with the ABA. We believe that the lawyer's obligation to take remedial measures should apply to false testimony on cross-examination, just as the lawyer has an obligation to take remedial measures if false testimony is elicited in a deposition by the adverse party's counsel – which is another form of cross-examination.</p>	<p>The Commission agreed. See above.</p> <p>The Commission agreed. See above.</p>
7	San Diego County Bar Association Legal Ethics Committee	M		<p>Subparagraph (d) Agree with a Commission minority that there is "insufficient reason for departing from the ABA standard, followed in most jurisdictions, and that [paragraph subdivision (d)] is unclear and would subject lawyers to being second-guessed on what facts were 'needed' to enable a tribunal to make an informed decision in a particular matter."</p> <p>Comment [9] The existing ABA Model Rule, making the lawyer take reasonable remedial measures when the lawyer learns of the falsity in response to cross-examination by the opposing lawyer best serves the concept of "Candor Toward the Tribunal," and should remain intact.</p>	<p>The Commission disagreed with SDCBA (see RRC Response to COPRAC, above).</p> <p>The Commission agrees with SDCBA (see RRC Response to COPRAC, above). The Commission believes the change will resolve the need to further explain the relationship between Comment [6] and Comment [9].</p>

				<p>It should be noted that the “Explanation of Changes to ABA Model Rule” for Comment [6] notes that a Minority of the Commission believed the clause “or otherwise permit the witness to present testimony that the lawyer knows to be false,” in the last sentence of Comment [6], “lays a trap for the unwary lawyer who might call a friendly witness who unexpectedly testifies falsely. . . .” The Majority believed the reading of the subject clause in conjunction with Comment [5] (not a violation if offered to establish its falsity) and Comment [9] (concerning remedial measures available) “assuages the Minority’s concerns.”</p> <p>SDCBA thinks a clearer explanation of the relationship between Comment [6] and Comment [9] would be helpful to guide the lawyer in applying the proposed rule.</p>	
8	Santa Clara County Bar Association	M		<p>We agree with the rationale that California should rigorously protect attorney-client confidentiality even when it prevents the attorney from making disclosures to the tribunal regarding a client’s or witness’s untruthfulness or regarding evidence that may not be accurate.</p> <p>However, we think it should be noted that a small, but strong minority of the SCCBA Task Force support the ABA Model Rule version based on the rationale that this rule is meant to protect the integrity of the judicial process and judicial decision-making and that policy is of greater importance in this circumstance than allowing a client’s wrongdoing to be protected by attorney-client confidentiality.</p>	No recommendation necessary.

					The minority further suggests that the fact that the California Supreme Court has never approached such a mandatory rule is irrelevant; if the approach is the correct approach, it should be adopted and presented to the Court.	
9	Scofield, Robert G.	M		Comment [4]	Mr. Scofield is concerned with the ambiguity of Comment [4] to the Rule, which can be interpreted to impose a duty on California lawyers to cite to authority from outside of the state, which would most penalize those lawyers who diligently research the law on their clients' behalf. He believes it would be easy to remove the ambiguity by providing examples of the kinds of cases to which a lawyer must cite and those that would lie outside the duty.	The Commission agrees. See Response to Los Angeles County Bar Association, above.

## Rule 3.3: Candor Toward the Tribunal

### STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: Statutes and Standards (2008 Ed.) by Steven Gillers and Roy D. Simon. The text relevant to proposed Rule 1.8 is highlighted)

**California.** 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."

**Illinois:** Rule 3.3(a)(1) provides that a lawyer shall not make a statement of material fact or law to a tribunal which the lawyer knows "or reasonably should know" is false. The Illinois version of Rule 3.3(a) adds that a lawyer shall not:

(5) participate in the creation or preservation of evidence when the lawyer knows or reasonably should know the evidence is false; ...

(8) fail to disclose the identities of the clients represented and of the persons who employed the lawyer unless such information is privileged or irrelevant; ...

(12) fail to use reasonable efforts to restrain and to prevent clients from doing those things that the lawyer ought not to do; [or]

(13) suppress any evidence that the lawyer or client has a legal obligation to reveal or produce; ...

In addition, Illinois Rules 1.2(g)-(h) are similar to ABA Model Rules 3.3(a)(3) and (b).

**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 York:** Regarding false statements or testimony, DR 7-102(A) provides that a lawyer representing a client shall not

(3) Conceal or knowingly fail to disclose that which the lawyer is required by law to reveal.

(4) Knowingly use perjured testimony or false evidence.

(5) Knowingly make a false statement of law or fact...

In addition, DR 4-101(C)(3) permits a lawyer to reveal the "intention of a client to commit a crime and the information necessary to prevent the crime." Regarding adverse authority, DR 7-106(B) provides that a lawyer presenting a matter to a tribunal shall disclose "[c]ontrol1ing legal authority" known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel. Regarding remedial measures, DR 7-102(B) provides:

(B) A lawyer who receives information clearly establishing that:

(1) The client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon the client to rectify the same, and if the client refuses or is unable to do so, the lawyer shall reveal the fraud to the affected person or tribunal, except when the information is protected as a confidence or secret.

(2) A person other than the client has perpetrated a fraud upon a tribunal shall reveal the fraud to the tribunal.

New York's Disciplinary Rules have no counterpart to Rule 3.3(d).

**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.B(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 ...."

**South Carolina:** Rule 3.3(c) states that the duties stated in Rule 3.3(a) and (b) apply when the lawyer is representing a client before a tribunal "as well as in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition."

**Texas:** Rule 3.03(b) and (e) 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)

**Washington:** omits ABA Model Rule 3.3(b)f but adds a new Rule 3.3(a)(2), which provides that a lawyer shall not knowingly "fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client unless such disclosure is prohibited by Rule 1.6." Washington breaks up ABA Model Rule 3.3(a)(3) into several paragraphs, starting with Washington Rule 3.3(a)(4), which provides only that a lawyer shall not "offer evidence that the lawyer knows to be false:" Rules 3.3(c) through (e) elaborate by providing:

(c) If the lawyer has offered material evidence and comes to know of its falsity, the lawyer shall promptly disclose this fact to the tribunal unless such disclosure is prohibited by Rule 1.6.

(d) If the lawyer has offered material evidence and comes to know of its falsity, and disclosure of this fact

is prohibited by Rule 1.6, the lawyer shall promptly make reasonable efforts to convince the client to consent to disclosure. If the client refuses to consent to disclosure, the lawyer may seek to withdraw from the representation in accordance with Rule 1.16.

(e) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

Amendments in 2006 deleted former Washington Rule 3.3(g), which had provided that “[c]onstitutional law defining the right to assistance of counsel in criminal cases may supersede the obligations stated in this rule.”

**Wisconsin:** Rule 3.3(c) deletes the phrase "the conclusion of the proceeding."