

**From:** [Kevin Mohr](#)  
**To:** [Mark Tuft](#); [Ellen Peck](#); [Ignazio J. Ruvolo](#); [Jerome Sapiro](#)  
**Cc:** [Harry Sondheim](#); [Difuntorum, Randal](#); [McCurdy, Lauren](#); [Kevin Mohr G](#)  
**Subject:** RRC - 3.3 [5-200] - Rule - Draft 11 (Post-1/7/09 RAC Meeting)  
**Date:** Friday, January 08, 2010 1:22:09 PM  
**Attachments:** [RRC - 5-200 \[3-3\] - KEM Meeting Notes - CUMUL \(06-18-09\)5-6.pdf](#)  
[RRC - 5-200 \[3-3\] - Rule - DFT 11 \(01-08-10\) - Cf. to DFT10.doc](#)

---

Greetings 3.3 Drafters:

Rule 3.3 was the only rule that RAC sent back to us during yesterday's meeting -- on a very limited issue. They observed that paragraph (a)(4) is already covered by (a)(1). At least 3 RAC members suggested placing the language of (a)(4) in the Comment. In fact, that is precisely the discussion that took place before the RRC voted early on to include (a)(4) by a 7-5 vote. See my attached notes.

Moreover, when the vote took place, we started w/ Rule 5-200 as the template and Nace suggested that we might want to move (a)(4) [at that time, it was numbered "(a)(3)"] into the comment. I didn't catch this when we went with the Model Rule format and structure a few drafts later.

At any rate, I've attached new draft 11. I've moved the language of (a)(4) into Comment [2]. Please let me know if that works for you. Another alternative is simply to delete (a)(4) and not include it in a comment.

Again, this is the only issue for which the rule was sent back. We'd like to put this before the Commission at our January meeting and return it to RAC/BOG in March.

As usual, please let me know if you have any questions. Thanks,

Kevin

P.S. In my notes, both Linda and Bob raised issues that are moot as we have deleted the language concerning "misquotes". In addition, their comments were concerned with the structure of that draft of the rule. We've discarded that draft's structure and followed the Model Rule's.

--  
Kevin E. Mohr  
Professor  
Western State University College of Law  
1111 N. State College Blvd.  
Fullerton, CA 92831  
714-459-1147  
714-738-1000 x1147  
714-525-2786 (FAX)

[kevin\\_e\\_mohr@compuserve.com](mailto:kevin_e_mohr@compuserve.com)  
[kevinm@wsulaw.edu](mailto:kevinm@wsulaw.edu)

### Rule 3.3 Candor Toward the Tribunal

- (a) A lawyer shall not knowingly:
- (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
  - (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;
  - (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence, and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal, unless disclosure is prohibited by Business and Professions Code section 6068(e). A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false; or
  - ~~(4) cite as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional, or fail to correct such a citation previously made to the tribunal by the lawyer.<sup>1</sup>~~
- (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures to the extent permitted by Business and Professions Code section 6068(e).
- (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

---

<sup>1</sup> Consultant's Note/Recommendation: At the 1/7/10 RAC Meeting, the Committee voted 6-1-0 not to adopt Rule 3.3 and to send it back to the Commission for reconsideration of the Commission's recommendation to carry forward current rule 5-200(D) as subparagraph (a)(4).

I researched this provision in my notes. At the 11/2-3/07 RRC meeting, the RRC voted 7-5-0 to include (a)(4) (then numbered (a)(3)). See 11/2-3/07 KEM Meeting Notes, III.K., at ¶. 9. The Commission had the identical discussion that RAC had, i.e., that (a)(4) was already covered by (a)(1), and that if 5-200(D) were to be carried forward, it should be included in a comment. See, e.g., Id., at ¶¶. 9.a. & d. In fact, the lead drafter suggesting revisiting this very issue after we had completed consideration of the Rule, (id. at ¶. 9.e.), but we never did.

Recommendation: Place the language of (a)(4) [current 5-200(D)] in Comment [2].

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) 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.<sup>2</sup>

## 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

---

<sup>2</sup> [See footnote 1, above.](#)

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



**RRC – Rule 3.3 [5-200] – CUMULATIVE  
November 2-3, 2007 KEM Meeting Notes**

- (1) There should be no discipline; it's OK for practice pointer, but not for discipline.
- g. Bob: There is contrary authority in the controlling jurisdiction and the lawyer knows it and fails to cite to that authority.
  - (1) It is a dishonest argument. We should have it.
- h. Nace: It's rare that we find citations to authority directly adverse to one party where it is raised in anticipation of what the other side is about to do or the court will find it.
  - (1) We should have it.
  - (2) Supreme Court growing impatient with lawyers' sharp practices in front of courts.
- i. Mark: This is an extremely narrow rule. Double scienter requirement.
  - (1) It is a fraud on the court.
  - (2) This will be very hard to explain.
- j. Raul: Would prefer to see this as "controlling authority" vs. "directly adverse."
- k. JoElla: Now believes we should have it.
- l. Ellen: There is an issue in the Second District concerning duty re third party lien.
  - (1) There is directly adverse authority, but there is also authority that supports the position. This is not dishonesty.
- m. Harry: Has been convinced by the discussion here. It will probably never be used by the State Bar but, if we don't include it, we will look very foolish to the rest of the country.
  - (1) If this is candor to the tribunal and you have a split in authority, then the judge has a right to know about the split in authority.
- n. Paul: Also very foolish not to cite to the authority.
- o. Randy: If you back up and look at this from a macro viewpoint: duty to client and duty to court.
  - (1) Arguably, MR's tip balance to the courts vs. the client.
  - (2) Here, looking at the balance, although candor to the court is important, we usually err on the side of protecting the client.
  - (3) Randy: There are cases in federal courts in California that state this is critical to the operation of the courts. Westlaw case.

**8. Issue #3. Paragraph (a)(3).**

**"Cite as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional."**

9. **MOTION:** Include paragraph (a)(3) in the rule.

YES: 7      NO: 5      ABSTAIN: 0

a. **Mark:** It is completely covered by (a)(1).

b. Linda: So long as we have the “misquote” language, why don’t we also include this, and break it into its subparts, i.e., put (a)(1) through (a)(3) together under the same introductory clause as all relating to quotation or citation of authority?

(1) Harry: That is a drafting issue.

d. **Harry:** There is no reason to include it; better to put it in a comment.

e. **Nace:** We can put it in for now and revisit if it seems that we have tracked MR 3.3 and we decide to put it in the comment.

f. Bob: By putting into the rule the statement re “misquote,” there is a lack of parallel of structure with (a)(1), but should we also put in a correction requirement as in (a)(1).

(1) Harry: Drafters can consider Bob’s point.

10. **Issue #4. Paragraph (a)(4) [MR 3.4(e)]:**

“Allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.”

a. KEM: We have not yet covered MR 3.4.

b. Mark: Let’s look at the conduct first before we decide where it goes.

(1) Do we want to address the conduct now, and decide whether we want to regulate it?

(2) We should address each part of paragraph (a)(4) in turn.

**RRC – Rule 3.3 [5-200]  
E-mails, etc. – Revised (1/19/2010)**

<i>April 27, 2009 Snyder E-mail to RRC:</i> .....	67
April 29, 2009 Sondheim E-mail to RRC:.....	67
May 7, 2009 Sondheim E-mail to RRC: .....	67
November 10, 2009 McCurdy E-mail to Drafters (Tuft, Peck, Ruvolo, Sapiro), cc Chair, Vice-Chairs & Staff:.....	68
November 23, 2009 Tuft E-mail to Drafters, cc Staff: .....	69
November 24, 2009 Ruvolo E-mail to Drafters, cc Staff: .....	69
November 24, 2009 KEM E-mail to Marlaud, cc Drafters, Chair & Staff: .....	69
November 25, 2009 Marlaud E-mail to RRC: .....	70
November 29, 2009 Sapiro E-mail to RRC List: .....	71
December 1, 2009 KEM E-mail to Drafters, cc Chair & Staff: .....	73
December 4, 2009 Kehr E-mail to RRC:.....	73
December 8, 2009 Sondheim E-mail to RRC: .....	74
December 15, 2009 KEM E-mail to Tuft, cc Difuntorum, McCurdy, Lee, Yen & Andrew Tuft:.....	75
December 15, 2009 Tuft E-mail to KEM, cc Difuntorum, McCurdy, Lee, Yen & Andrew Tuft:.....	75
January 8, 2010 KEM E-mail to Drafters, cc Chair & Staff: .....	76
January 8, 2010 Peck E-mail to Drafters, cc Chair & Staff: .....	76
January 17, 2010 Vapnek E-mail to RRC: .....	76
January 18, 2010 Sondheim E-mail to RRC:.....	76
January 18, 2010 KEM E-mail to Governors Chairez, Liberty & Streeter, cc Chair & Staff: .....	77
January 18, 2010 Chairez E-mail to KEM, cc Govs. Liberty & Streeter, Chair & Staff:.....	77
January 18, 2010 Tuft E-mail to RRC List: .....	77
January 19, 2010 Liberty E-mail to KEM, cc Govs. Chairez & Streeter, Chair & Staff:.....	77

**January 8, 2010 KEM E-mail to Drafters, cc Chair & Staff:**

Rule 3.3 was the only rule that RAC sent back to us during yesterday's meeting -- on a very limited issue. They observed that paragraph (a)(4) is already covered by (a)(1). At least 3 RAC members suggested placing the language of (a)(4) in the Comment. In fact, that is precisely the discussion that took place before the RRC voted early on to include (a)(4) by a 7-5 vote. See my attached notes.

Moreover, when the vote took place, we started w/ Rule 5-200 as the template and Nace suggested that we might want to move (a)(4) [at that time, it was numbered "(a)(3)"] into the comment. I didn't catch this when we went with the Model Rule format and structure a few drafts later.

At any rate, I've attached new draft 11. I've moved the language of (a)(4) into Comment [2]. Please let me know if that works for you. Another alternative is simply to delete (a)(4) and not include it in a comment.

Again, this is the only issue for which the rule was sent back. We'd like to put this before the Commission at our January meeting and return it to RAC/BOG in March.

As usual, please let me know if you have any questions. Thanks,

Kevin

P.S. In my notes, both Linda and Bob raised issues that are moot as we have deleted the language concerning "misquotes". In addition, their comments were concerned with the structure of that draft of the rule. We've discarded that draft's structure and followed the Model Rule's.

**January 8, 2010 Peck E-mail to Drafters, cc Chair & Staff:**

I approve the draft Kevin has sent and the approach to resolve this limited issue. I look forward to hearing your views so that we can give Kevin further direction.

**January 17, 2010 Vapnek E-mail to RRC:**

I believe that the addition of the language of former (a) (4) to Comment [2] as it appears on page 774 solves the problem that resulted in the Rule being sent back to us by RAC

**January 18, 2010 Sondheim E-mail to RRC:**

We will vote on Kevin's redraft after a discussion (hopefully brief).

**January 18, 2010 KEM E-mail to Governors Chairez, Liberty & Streeter, cc Chair & Staff:**

I've attached for your review new draft 11 (1/8/10) of proposed Rule 3.3 [5-200], redline, compared to Draft 10 (12/14/09), the draft you considered at the 1/7/10 RAC meeting. This is the proposed Rule you returned to the Commission from Batch 4 for the limited issue of considering whether paragraph (a)(4) was necessary or whether it was covered by paragraph (a)(1). I've reviewed the Commission's meeting notes and have determined that it is not necessary and have recommended that the Commission delete paragraph (a)(4) but insert its language in Comment [2] of the Rule. I've suggested placing the (a)(4) language in Comment [2] because the language is nearly identical to current rule 5-200(D). A representative from OCTC made the same observation during the RAC meeting. The attached redline draft shows the proposed changes. The Commission will consider the proposed revised draft at its meeting this coming Friday & Saturday.

Please let us know if the proposed revisions address the concerns you raised at the meeting.

***Attached:***

RRC - 5-200 [3-3] - Rule - DFT 11 (01-08-10) - Cf. to DFT10.pdf

**January 18, 2010 Chairez E-mail to KEM, cc Govs. Liberty & Streeter, Chair & Staff:**

Thank you.

**January 18, 2010 Tuft E-mail to RRC List:**

As a co-drafter of this rule, I agree with Kevin's recommendation to move proposed paragraph (a)(4) to Comment [2].

**January 19, 2010 Liberty E-mail to KEM, cc Govs. Chairez & Streeter, Chair & Staff:**

Thank you.