

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 5-200 [3.3]

**Lead Drafter:** Tuft  
**Co-Drafters:** Chou, Martinez  
**Meeting Date:** May 6 – 7, 2016

### I. INTRODUCTION

Proposed Rule 3.3 is based on Model Rule 3.3, a version of which has been adopted in every jurisdiction in the country. (See Section X, below.) The drafting team believes that the Model Rule approach regarding a lawyer's duty of candor is superior to the approach of current rule 5-200 (Trial Conduct) because it more clearly identifies the kind of conduct that is regulated under the rule, an attribute that is preferable in a disciplinary rule. For example, current rule 5-200(A) and (B) are nearly verbatim transcriptions of the two clauses of Bus. & Prof. Code § 6068(d), a provision that has remained virtually unchanged since California adopted the Field Code in 1872.<sup>1</sup> Paragraph (A) cautions a lawyer to "employ, for the purpose of maintaining the causes confided to the lawyer, such means only as are consistent with the truth," but provides no insight into what "such means" are. Similarly, paragraph (B) prohibits a lawyer from "seeking to mislead the judge ... by an artifice," but does not clarify what a prohibited "artifice" might be.

The proposed Rule's language, based on the Model Rule, in some respects provides a more clear statement of what conduct is required and prohibited under the rule. For example, paragraph (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." A lawyer is on notice that the lawyer may not knowingly make *any* false statement of fact or law or fail to correct a *material* false statement of fact or law. Similarly, paragraph (a)(2) [based on MR 3.3(a)(3)], states with precision what conduct is prohibited – offering false evidence – and then identifies steps the lawyer must take to remediate harm to the tribunal should the lawyer subsequently learn that of the evidence's falsity. Proposed paragraph (b), derived from MR 3.3(a)(2), clarifies the lawyer's duty to disclose to the tribunal adverse legal authority in the controlling jurisdiction, which is preferable to the narrowly defined duties in current rule 5-200(C) and (D). Proposed paragraph (c) confronts head-on a lawyer's duty when the lawyer knows that a person has engaged in criminal or fraudulent conduct related to a proceeding. Unlike Model Rule jurisdictions, however, the provision is limited by the lawyer's confidentiality duties under Rule 1.6 and Bus. & Prof. Code § 6068(e). Importantly, paragraph (d) of the proposed rule delimits the duration of the lawyer's duties under the preceding three paragraphs, and paragraph (e) proscribes appropriate conduct when a lawyer is appearing in an ex parte proceeding where the other side is not given notice or an opportunity to be heard.

Finally, there are seven comments that are limited to interpreting the rule or explaining how the rule is to be applied, appropriate functions of the comments.

<sup>1</sup> Bus. & Prof. Code § 6068(d) provides it is the duty of an attorney:

(d) To employ, for the purpose of maintaining the causes confided to him or her 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.

The only change since 1872 has been to render the provision gender neutral.

## **DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 5-200 [3.3]**

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### **II. CURRENT CALIFORNIA RULE 5-200**

#### **Rule 5-200 Trial Conduct**

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.

### **III. DRAFTING TEAM'S RECOMMENDATION AND VOTE**

There was consensus among the drafting team members to recommend a proposed amended rule as set forth below in Section IV. The vote was unanimous in favor of making the recommendation.

### **IV. PROPOSED RULE 3.3 (CLEAN)**

#### **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; or
  - (2) 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 § 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 shall not seek to mislead a tribunal by failing to disclose legal authority in the

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 5-200 [3.3]

**Lead Drafter:** Tuft  
**Co-Drafters:** Chou, Martinez  
**Meeting Date:** May 6 – 7, 2016

controlling jurisdiction known to the lawyer to be directly adverse to the position of the client.

- (c) 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 § 6068(e).
- (d) The duties stated in paragraphs (a), (b) and (c) continue to the conclusion of the proceeding.
- (e) In an ex parte proceeding where notice to the opposing party in the proceeding is not required or given and the opposing party is not present, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

### Comment

[1] This Rule governs the conduct of a lawyer in proceedings of a tribunal, including ancillary proceedings such as a deposition conducted pursuant to a tribunal's authority. See Rule 1.0.1(m) for the definition of "tribunal."

[2] The prohibition in paragraph (a)(1) against making false statements of law or failing to correct a material misstatement of law includes 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.

### *Legal Argument*

[3] Legal authority in the controlling jurisdiction may include legal authority outside the jurisdiction in which the tribunal sits, such as a federal statute or case that is determinative of an issue in a state court proceeding or a Supreme Court decision that is binding on a lower court.

[4] The duties stated in paragraphs (a), (b) and (c) apply to all lawyers, including defense counsel in criminal cases. If a lawyer knows that a 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 and, if unsuccessful, must refuse to offer the false evidence. 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. See, e.g., *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]. The obligations of a lawyer under these Rules and the State Bar Act are subordinate to applicable constitutional

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 5-200 [3.3]

**Lead Drafter:** Tuft  
**Co-Drafters:** Chou, Martinez  
**Meeting Date:** May 6 – 7, 2016

provisions.

### *Remedial Measures*

[5] Reasonable remedial measures under paragraphs (a)(2) and (c) refer to measures that are available under these Rules and the State Bar Act, and which a reasonable lawyer would consider appropriate under the circumstances to comply with the lawyer's duty of candor to the tribunal. See, e.g., Rules 1.2.1, 1.4(b)(4), 1.16(a), and 8.4; Business and Professions Code §§ 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 the 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 protect under Rule 1.6 and Business and Professions Code § 6068(e).

### *Duration of Obligation*

[6] 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. This Rule does not apply when a lawyer comes to know of a violation of paragraph (c) after the lawyer's representation has concluded. There may be obligations that go beyond this Rule. See, e.g., Rule 3.8(g) and (h).

### *Withdrawal*

[7] A lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation. 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 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. A lawyer must comply with Rule 1.6 and Business and Professions Code § 6068(e) with respect to a request to withdraw that is premised on a client's misconduct.

## V. PROPOSED RULE 3.3 (REDLINE TO CURRENT CALIFORNIA RULE 5-200)

### Rule ~~5-200~~ 3.3 ~~Trial Conduct~~ Candor Toward The Tribunal

~~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~~

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 5-200 [3.3]

Lead Drafter: Tuft  
Co-Drafters: Chou, Martinez  
Meeting Date: May 6 – 7, 2016

~~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.~~

(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; or

(2) 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 § 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 shall not seek to mislead a tribunal by failing to disclose legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client.

(c) 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 § 6068(e).

(d) The duties stated in paragraphs (a), (b) and (c) continue to the conclusion of the proceeding.

(e) In an ex parte proceeding where notice to the opposing party in the proceeding is not required or given and the opposing party is not present, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

### Comment

[1] This Rule governs the conduct of a lawyer in proceedings of a tribunal, including ancillary proceedings such as a deposition conducted pursuant to a tribunal's authority. See Rule 1.0.1(m)

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 5-200 [3.3]

**Lead Drafter:** Tuft  
**Co-Drafters:** Chou, Martinez  
**Meeting Date:** May 6 – 7, 2016

for the definition of “tribunal.”

[2] The prohibition in paragraph (a)(1) against making false statements of law or failing to correct a material misstatement of law includes 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.

### Legal Argument

[3] Legal authority in the controlling jurisdiction may include legal authority outside the jurisdiction in which the tribunal sits, such as a federal statute or case that is determinative of an issue in a state court proceeding or a Supreme Court decision that is binding on a lower court.

[4] The duties stated in paragraphs (a), (b) and (c) apply to all lawyers, including defense counsel in criminal cases. If a lawyer knows that a 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 and, if unsuccessful, must refuse to offer the false evidence. 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. See, e.g., *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]. The obligations of a lawyer under these Rules and the State Bar Act are subordinate to applicable constitutional provisions.

### Remedial Measures

[5] Reasonable remedial measures under paragraphs (a)(2) and (c) refer to measures that are available under these Rules and the State Bar Act, and which a reasonable lawyer would consider appropriate under the circumstances to comply with the lawyer’s duty of candor to the tribunal. See, e.g., Rules 1.2.1, 1.4(b)(4), 1.16(a), and 8.4; Business and Professions Code §§ 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 the 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 protect under Rule 1.6 and Business and Professions Code § 6068(e).

### Duration of Obligation

[6] 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. This Rule does not

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 5-200 [3.3]

Lead Drafter: Tuft  
Co-Drafters: Chou, Martinez  
Meeting Date: May 6 – 7, 2016

apply when a lawyer comes to know of a violation of paragraph (c) after the lawyer's representation has concluded. There may be obligations that go beyond this Rule. See, e.g., Rule 3.8(g) and (h).

### Withdrawal

[7] A lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation. 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 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. A lawyer must comply with Rule 1.6 and Business and Professions Code § 6068(e) with respect to a request to withdraw that is premised on a client's misconduct.

## VI. PROPOSED RULE 3.3 (REDLINE TO MODEL RULE 3.3)

### 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; or
  - ~~(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 § 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 shall not seek to mislead a tribunal by failing to disclose legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client.
- ~~(bc)~~ 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~~ to the extent permitted by Rule 1.6 and Business and Professions Code § 6068(e).



## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 5-200 [3.3]

**Lead Drafter:** Tuft  
**Co-Drafters:** Chou, Martinez  
**Meeting Date:** May 6 – 7, 2016

- (~~cd~~) The duties stated in paragraphs (a) ~~and~~, (b) and (c) continue to the conclusion of the proceeding, ~~and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.~~
- (~~de~~) In an ex parte proceeding where notice to the opposing party in the proceeding is not required or given and the opposing party is not present, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

### Comment

[1] This Rule governs the conduct of a lawyer ~~who is representing a client in the~~in proceedings of a tribunal, including ancillary proceedings such as a deposition conducted pursuant to a tribunal's authority. See Rule ~~1.01.0.1~~1.01.0.1(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. 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. The prohibition in paragraph (a)(1) against making false statements of law or failing to correct a material misstatement of law includes 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] ~~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~~



## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 5-200 [3.3]

**Lead Drafter:** Tuft  
**Co-Drafters:** Chou, Martinez  
**Meeting Date:** May 6 – 7, 2016

### ~~Rule 8.4(b).~~

#### *Legal Argument*

~~[43] 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.~~ 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.

#### *Offering Evidence*

~~[5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.~~

~~[64] The duties stated in paragraphs (a), (b) and (c) apply to all lawyers, including defense counsel in criminal cases.~~ 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 and, if unsuccessful, must refuse to offer the false evidence. If only a portion of a witness's a criminal defendant insists on testifying, and the lawyer knows that the 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. 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. See, e.g., *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]. The obligations of a lawyer under these Rules and the State Bar Act are subordinate to applicable constitutional provisions.

~~[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 also Comment [9].~~

~~[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~~

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 5-200 [3.3]

**Lead Drafter:** Tuft  
**Co-Drafters:** Chou, Martinez  
**Meeting Date:** May 6 – 7, 2016

~~inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.~~

~~[9] Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].~~

### *Remedial Measures*

~~[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 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 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.~~

[5] Reasonable remedial measures under paragraphs (a)(2) and (c) refer to measures that are available under these Rules and the State Bar Act, and which a reasonable lawyer would consider appropriate under the circumstances to comply with the lawyer's duty of candor to the tribunal. See, e.g., Rules 1.2.1, 1.4(b)(4), 1.16(a), and 8.4; Business and Professions Code §§ 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 the 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 protect under Rule 1.6 and Business and Professions Code § 6068(e).

~~[11] The disclosure of a client's false testimony can result in grave consequences to the client,~~

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 5-200 [3.3]

Lead Drafter: Tuft  
Co-Drafters: Chou, Martinez  
Meeting Date: May 6 – 7, 2016

~~including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.~~

### *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 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.~~

### *Duration of Obligation*

~~[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 meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed. This Rule does not apply when a lawyer comes to know of a violation of paragraph (c) after the lawyer's representation has concluded. There may be obligations that go beyond this Rule. See, e.g., Rule 3.8(g) and (h).

### *Ex Parte Proceedings*

~~[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.~~

### *Withdrawal*

~~[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~~

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 5-200 [3.3]

Lead Drafter: Tuft  
Co-Drafters: Chou, Martinez  
Meeting Date: May 6 – 7, 2016

~~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~~ Rule results in ~~such an extreme~~ a deterioration of the ~~client-lawyer~~ lawyer-client relationship ~~such~~ such that the lawyer can no longer competently ~~and diligently~~ and diligently 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, or where continued employment will result in a violation of these Rules. A lawyer must comply with Rule 1.6 and Business and Professions Code § 6068(e) with respect to~~ 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.~~

### VII. PROPOSED RULE 3.3 (REDLINE TO RRC1 PROPOSED RULE 3.3)

#### 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; or
  - ~~(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)~~ 2 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 shall not seek to mislead a tribunal by failing to disclose legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client.
- ~~(bc)~~ 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).
- ~~(ed)~~ The duties stated in paragraphs (a) ~~and~~ 1, (b) and (c) continue to the conclusion of the proceeding ~~or the representation, whichever comes first.~~

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 5-200 [3.3]

**Lead Drafter:** Tuft  
**Co-Drafters:** Chou, Martinez  
**Meeting Date:** May 6 – 7, 2016

- (de) In an ex parte proceeding where notice to the opposing party in the proceeding is not required or given and the opposing party is not present, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

### Comment

[1] This Rule governs the conduct of a lawyer ~~who is representing a client in the~~ proceedings of a tribunal, including ancillary proceedings such as a deposition conducted pursuant to a tribunal's authority. 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~~ The prohibition in paragraph (a)(1) against making false statements of law or failing to correct a material misstatement of law includes 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*

[43] ~~Although a lawyer is not required to make a disinterested exposition of the law, legal argument~~

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 5-200 [3.3]

Lead Drafter: Tuft  
Co-Drafters: Chou, Martinez  
Meeting Date: May 6 – 7, 2016

~~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) and (c) apply to all lawyers, including defense counsel in criminal cases. If a lawyer knows that a 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 and, if unsuccessful, must refuse to offer the false evidence. 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]; See, e.g., 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



## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 5-200 [3.3]

**Lead Drafter:** Tuft  
**Co-Drafters:** Chou, Martinez  
**Meeting Date:** May 6 – 7, 2016

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.~~

[405] Reasonable remedial measures under paragraphs (a)(32) and (bc) 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)1.2.1, 1.4(b)(4), 1.16(a), 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 the 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 maintaininviolateprotect 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.~~



## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 5-200 [3.3]

Lead Drafter: Tuft  
Co-Drafters: Chou, Martinez  
Meeting Date: May 6 – 7, 2016

### *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]~~ <sup>6</sup> 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. This Rule does not apply when a lawyer comes to know of a violation of paragraph (c) after the lawyer's representation has concluded. There may be obligations that go beyond this Rule. See, e.g., Rule 3.8(g) and (h).

### *Ex parte Proceedings*

~~[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in some ex parte proceedings, there is no balance of presentation by opposing advocates. When the judge has an affirmative responsibility to accord the absent party just consideration, the lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.~~

### *Withdrawal*

~~[15]~~ <sup>7</sup> 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~~ <sup>Rule</sup> 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~~ A lawyer must comply with Rule 1.6 and Business and Professions Code ~~section~~ <sup>§</sup> 6068(e) ~~or the California Rules of Court~~ with respect to

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 5-200 [3.3]

**Lead Drafter:** Tuft  
**Co-Drafters:** Chou, Martinez  
**Meeting Date:** May 6 – 7, 2016

anya request to withdraw that is premised on a client's misconduct.

### VIII. PUBLIC COMMENTS SUMMARY

- **Elliot Bien, 6/8/2015:**

Elliot Bien recommended adding add a provision to Rule 5-200 barring plagiarism in briefs or other submissions to a court.

### IX. OCTC / STATE BAR COURT COMMENTS

**A. Jayne Kim, OCTC, DATE:**

[Insert summary of comments.]

**B. Russell Weiner, OCTC, 6/15/2010:**

1. OCTC is concerned that this proposed rule requires knowingly. Rule 1.0 defines knowingly as “actual knowledge.” However, this is contrary to established California law. An attorney’s unqualified and unequivocal statements to judges under circumstances that should have caused him or her at least some uncertainty are at a minimum deceptive and support a finding of culpability. (*In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 173-174.) That is, California disciplines attorneys for dishonesty or moral turpitude based on gross negligence. (See sections 6068(d) and 6106; *Vaughn v. State Bar* (1972) 6 Cal.3d 847, 857 and 859; *In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar 266, 2381-282; *In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 173-174; *In the Matter of Dale* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 798 [gross negligence in representation to third party]; *In the Matter of Loftus* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 80; *In the Matter of Casey* (Review Dept. 2008) 5 Cal. State Bar Ct. Rptr. 117. See also Comment 2B to proposed rule 8.4.) In fact, CCP section 128.7 requires that all statements in pleadings be made “after an inquiry reasonable under the circumstances.” We should not be allowing lawyers to make false statements without proper inquiry and a good faith basis for the statement. Moreover, while good faith may be a defense to a charge of misrepresentation, this is because it is a statutory violation, not a rule violation. Good faith is generally not a defense to a violation of a Rule of Professional Conduct. (See *In the Matter of Broderick* (Review Dept. 1994) 3 Cal. State Bar Ct. Rpt. 138, 148; *Zitny v. State Bar*, *supra*, 64 Cal.2d at 793.) Further, this rule is inconsistent with proposed rules 8.2, 8.4, 4.2, and Comment 2B of proposed rule 8.4. While negligence is not a basis for discipline, gross negligence is. While we could still prosecute attorneys for gross negligence under sections 6068(d) and 6106 (and apparently 8.4) that creates inconsistent duties and could mislead attorneys into believing that actual knowledge is required for discipline when gross negligence can support discipline for this conduct.

2. OCTC is concerned that the proposed rule omits the term “artifice” as provided in current

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 5-200 [3.3]

**Lead Drafter:** Tuft  
**Co-Drafters:** Chou, Martinez  
**Meeting Date:** May 6 – 7, 2016

rule 5-200(B). If the Commission is intending to further limit the rule, OCTC opposes that. OCTC believes the word should remain in the rule.

3. OCTC is concerned that the proposed rule omits without Comment the following language in the current rule: 1) prohibiting an attorney from intentionally misquoting to a tribunal the language of a book, statute or decision; and 2) shall not knowing its invalidity cite as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional. (See current rule 5-200(c) and (d).) OCTC is aware that some of this language was removed by the Board of Governors because they believed that it was duplicative of proposed rule 3.3(a)(1) and (2). However, some form of this language has existed in the rules since the original Rules of Professional Conduct. OCTC requests a comment to explain that this is not a change in the law, but merely because it is already covered by proposed rule 3.3(a)(1) and (2).
4. OCTC is concerned that the rule omits the language in current rule 5-200(E) that an attorney “[s]hall not assert personal knowledge of the facts at issue, except when testifying as a witness.” OCTC knows of no reason to omit that language and has seen attorneys violate this rule in an attempt to prejudice a party and deny them a fair trial. (See e.g. *In the Matter of Philip E. Kay*, Case No. 01-O-193. The hearing department finding and recommendation in Kay’s case is currently pending before the California Supreme Court, Supreme Court Case No. S180405.) OCTC suggests that this language be included in the rule.
5. In a similar vein, OCTC is concerned that nowhere in the proposed rules do they provide for when an attorney 1) states or alludes at trial to evidence that the attorney knows or reasonably should know is not relevant or admissible evidence or has already been ruled inadmissible (see *Hawk v. Superior Court* (1974) 42 Cal.App.3d 108, 118); 2) states the attorney’s belief in the credibility of a witness (see *Hawk v. Superior Court*, *supra*, 42 Cal.App.3d at 123); or 3) includes when an attorney violates discovery orders of a court. OCTC recognizes that arguably they could be included in proposed rule 3.4, but they are not there either. They should be somewhere.
6. There are too many Comments, many are too long, and they cover subjects and discussions best left to treatises, law review articles, and ethics opinions.
7. Comment 3 is too long. If knowingly is stricken from the rule, this Comment should be also stricken. Further, this comment does not address CCP 128.7 or Rule 11 or that an attorney may have a duty to investigate even the client’s claims in some situations. (See *Butler v. State Bar* (1986) 42 Cal.3d 323, 329 [“While an attorney may often rely upon statements made by the client without further investigation, circumstances known to the attorney may require an investigation.”])

### C. Mike Nisperos, OCTC, 9/27/2001:

OCTC’s recommends clarifying, codifying and making more specific existing law on the subject of trial conduct.

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 5-200 [3.3]

**Lead Drafter:** Tuft  
**Co-Drafters:** Chou, Martinez  
**Meeting Date:** May 6 – 7, 2016

Revise the rule as follows:

In presenting a matter to a tribunal, a member:

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

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

(C) Must correct a false statement of material fact or law previously made to the tribunal by the member, his law firm, or his client;

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

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

(G) Must 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;

(H) Must not offer evidence that the lawyer knows to be false. If the member, the member's firm, the member's client, or a witness called by the member has offered material evidence that the member comes to know is false, the member shall take reasonable remedial measures, including if necessary, disclosure to the tribunal. A member may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the member reasonably believes is false.

(I) Who represents a client in a proceeding and who knows that a person intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding must take reasonable remedial measures, including, if necessary, disclosure to the tribunal;

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

### OCTC COMMENTS:

OCTC has replaced the term “shall” with “must” and for clarity and instruction has listed specific conduct and the actions to be taken by a member in a given situation.

- **State Bar Court:** No comments received from State Bar Court.

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 5-200 [3.3]

**Lead Drafter:** Tuft  
**Co-Drafters:** Chou, Martinez  
**Meeting Date:** May 6 – 7, 2016

### X. COMPARISON OF PROPOSED RULE TO APPROACHES IN OTHER JURISDICTIONS (NATIONAL BACKDROP)

- **Colorado Rule 3.3** is identical to Model Rule 3.3:

#### **Rule 3.3 Candor Toward The Tribunal**

(a) A lawyer shall not knowingly:

- (1) make a false statement of material 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 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. 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, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

All jurisdictions have adopted some version of ABA Model Rule 3.3. The ABA State Adoption Chart, entitled "Variations of the ABA Model Rules of Professional Conduct, Rule 3.3: Candor To The Tribunal," revised May 7, 2015, is available at:

- [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_3\\_3.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_3.authcheckdam.pdf) [Last visited 4/16/2016]

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 5-200 [3.3]

**Lead Drafter:** Tuft  
**Co-Drafters:** Chou, Martinez  
**Meeting Date:** May 6 – 7, 2016

- Twenty-one jurisdictions have adopted Model Rule 3.3 verbatim.<sup>2</sup> Sixteen jurisdictions have adopted a slightly modified version of Model Rule 3.3.<sup>3</sup> Fourteen jurisdictions have adopted a version of the rule that is substantially different from Model Rule 3.3.<sup>4</sup>

### XI. CONCEPTS ACCEPTED/REJECTED; CHANGES IN DUTIES; NON-SUBSTANTIVE CHANGES; ALTERNATIVES CONSIDERED

#### A. Concepts Accepted (Pros and Cons):

1. General: Recommend adopting a rule patterned on Model Rule 3.3 rather than carry forward current rule 5-200.
  - Pros: See Section I, Introduction, above, for why the Model Rule approach is preferable in a disciplinary rule. In addition, the greater detail of the proposed rule should enhance compliance by lawyers in performing the duties they owe the court as officers of the legal system, as well as facilitate enforcement. This is particularly true regarding measures a lawyer is permitted to take to correct fraudulent or criminal conduct of another in relation to a proceeding. That is because the black letter, contrary to Model Rule jurisdictions, expressly states that the lawyer's duty to take reasonable remedial measures is subordinate to California's strict duty of confidentiality under Rule 1.6 and Bus. & Prof. Code § 6068(e).
  - Cons: As noted in the Introduction, the provisions in 5-200(A) and (B) have been in existence in California since 1872. A body of case law has grown around these provisions. There is no evidence that current rule 5-200 has been ineffective in regulating lawyers' duty of candor to tribunals.
2. Recommend adoption of a knowledge standard in paragraphs (a) and (c).
  - Pros: The requirement of known falsity is important from a policy as well as a practical standpoint. A rule that could be violated by gross negligence would have an improper chilling effect on advocacy and could make the lawyer a guarantor of the

<sup>2</sup> The twenty-one jurisdictions are: Arizona, Arkansas, Colorado, Delaware, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Minnesota, Montana, Nebraska, Nevada, New Hampshire (although the order of paragraphs (c) and (d) are reversed), Rhode Island, Utah, Vermont, West Virginia, and Wyoming.

<sup>3</sup> The sixteen jurisdictions are: Alaska, Connecticut, Georgia (Georgia retains a rule substantially similar to the former Model Rule from 1983), Hawaii (Hawaii retains a rule substantially similar to the former Model Rule from 1983), Maine, Mississippi (Mississippi retains the former Model Rule language from 1983), Missouri, New Jersey (New Jersey retains a rule substantially similar to the former Model Rule from 1983), New Mexico, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, and Wisconsin.

<sup>4</sup> The fourteen jurisdictions are: Alabama, California, District of Columbia, Florida, Maryland, Massachusetts, Michigan, New York, North Dakota, Oregon, Tennessee, Texas, Virginia, and Washington.



## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 5-200 [3.3]

**Lead Drafter:** Tuft  
**Co-Drafters:** Chou, Martinez  
**Meeting Date:** May 6 – 7, 2016

truth of the facts presented. The function of cross examination is to probe the validity of doubtful evidence. “Legitimate evidence is often of unknown reliability.” See Hazard & Hodes, THE LAW GOVERNING LAWYERS §32.05. Rest. § 120 provides further support for the scienter requirement. Further, the case law cited by OCTC in support of a gross negligence standard is mixed. Compare *In the Matter of Chesnut* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 173-174 (respondent knowingly made false statements to courts in Texas and California under proposed Rule 1.0.1(f), under which knowledge can be inferred from the circumstances: lawyer’s unqualified and unequivocal statements to judges under circumstances that should have caused him or her at least some uncertainty are at a minimum deceptive and support a finding of culpability), and *Vaughn v. State Bar* (1972) 6 Cal.3d 847, 855 (“It is inconceivable that such a practice could have become standard in petitioner’s office without his knowledge”) with *Matter of Harney* (Rev. Dept. 1995) 3 Cal. State Bar 266, 281-282 (violation of 5-200(B) even though nondisclosure occurred through gross neglect).

- Cons: Current rule 5-200(B) and Bus. & Prof. Code §§ 6068(d) and 6106 have been held to require only gross negligence to establish a violation. Incorporating a knowledge requirement into the rule would be an unnecessary change in the law. (See 2010 OCTC Comment, at Section IX.B.1, above.)

3. Recommend adoption of paragraph (a)(1), which is identical to MR 3.3(a)(1) and RRC1 Rule 3.3(a)(1).

- Pros: Proposed paragraph (a)(1) is a stronger and clearer statement of a lawyer’s duty than current rule 5-200(B). It identifies with precision the conduct that is proscribed and imposes an affirmative duty to correct a false statement of material fact previously made. Current rule 5-200(B) is vague; it is not certain what is meant by the term “artifice.”
- Cons: Rule 5-200(B), which is virtually identical to Bus. & Prof. Code § 6068(d), has been the law in California since 1872, with many cases decided under its standard. This would be a change in the law with possible unintended consequences. (See also 2010 OCTC Comment, at at Section IX.B.2, above.)

**NOTE:** The following recommendation is made by a majority of the drafting team. However, the drafting team agreed unanimously that the issue should be denominated as an “open issue” for consideration by the entire Commission: whether the concept in paragraph (b) – disclosure of legal authority in the controlling jurisdiction – should incorporate an intent to mislead standard (majority) or a knowledge (minority) standard. See Pros and Cons, below. See also Open Issue #1, in Section XII.1, below.

4. Recommend adoption of a specific intent standard – “seek to mislead” – in paragraph (b) [MR 3.3(a)(2)]. This is a recommendation to reject the knowledge standard that applies to Model Rule 3.3(a)(2).

- Pros: Proposed paragraph (b) more accurately reflects the current law in California



## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 5-200 [3.3]

**Lead Drafter:** Tuft  
**Co-Drafters:** Chou, Martinez  
**Meeting Date:** May 6 – 7, 2016

that requires a lawyer to intend to mislead the court by failing to disclose to the tribunal legal authority in the controlling jurisdiction the lawyer knows is directly adverse. See *Ainsworth v. State Bar of California*, 46 Cal.3d 1218, 1225 (1988) (finding violation of rule 7-107 because petitioner “committed acts with *intent to mislead* . . . the court by mispresenting the status of Jerald C.; and *sought to deceive* the court with a false statement of law,” emphasis added); *Schaefer v. State Bar of California*, 26 Cal.2d 738, 748 (“since it does not appear that petitioner *intentionally attempted to mislead the court*, we do not believe the incident warrants the imposition of disciplinary punishment,” emphasis added).

The requirement in Model Rule 3.3(a) that the lawyer disclose “directly adverse” authority is vague and would force attorneys to do their adversary’s work for them. Lawyers would be compelled to disclose authority which is not on “all fours” and is distinguishable. “Unclear rules risk blunting an advocate’s zealous representation of a client.” (*Snider v. Superior Court* (2003) 113 Cal.App.4th 1187, 1197-1198.) The intent to mislead requirement in proposed Paragraph (b) mitigates against the risk that a lawyer will be disciplined for engaging in protected conduct while acting as zealous advocates for their clients.

- Cons: The Commission should recommend retaining RRC1 paragraph (a)(2), which is derived from Model Rule 3.3(a)(2). Current California authority does not preclude the knowledge standard in a proposed paragraph (a)(2), which is required for important public policy and public protection reasons that are not provided in proposed paragraph (b). Courts such as in *Batt* correctly state that the duty to disclose adverse legal authority of the controlling jurisdiction known to the lawyer that is not disclosed by opposing court is because the court needs to be aware of that authority in order to intelligently rule on the matter. See *Batt v. City and County of San Francisco*, 155 Cal.App.4th 65, 82 n. 9 (2007). Requiring an intent to mislead would be more difficult to prove and would diminish the well-established purpose for the rule. See Rest. 3d. §111(2) On-point legal authority includes not only statutes and case law, but ordinances, regulations and administrative rulings. With the sharp increase in pro se litigants, over-crowded dockets and court calendars, the tribunal must rely on counsel to disclose direct adverse authority in the controlling jurisdiction known to the lawyer and not revealed by the other side. The few reported California cases are decided under §6068(d) which does not have a knowledge requirement. Proposed paragraph (b) overlaps with paragraph (a)(1) and fails to provide adequate public protection.

5. Recommend a departure from the Model Rule by the adoption of a rule that expressly provides Rule 1.6 and Bus. & Prof. Code § 6068(e) limit a lawyer’s duty to take reasonable remedial measures under paragraphs (a)(2) or (c). In a Model Rule jurisdiction, the duty of candor to the tribunal expressly trumps the duty of confidentiality as set forth in the jurisdiction’s counterpart to MR 1.6.

- Pros: Since 1872, a lawyer’s duty of confidentiality has been paramount in California, with only one express exception, effective in 2004, that permits a lawyer

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 5-200 [3.3]

**Lead Drafter:** Tuft  
**Co-Drafters:** Chou, Martinez  
**Meeting Date:** May 6 – 7, 2016

to disclose confidential information to prevent a life-threatening criminal act. (See Bus. & Prof. Code § 6068(e)(2) and current rule 3-100(B) [proposed Rule 1.6(b)].) It is beyond the purview of the Commission or the Court to create by rule an exception to the duty of confidentiality that resides in a statute, section 6068(e)(1). In any event, the policies underlying a strong duty of confidentiality, including the promotion of trust by the client in the client's representative in the adversarial legal system, warrants subordinating the duty of candor to confidentiality. Whether the duty of candor should be subordinated to the duty of confidentiality requires balancing the policies underlying the latter against the policy supporting the former. It is the drafting team's unanimous consensus that confidentiality policies outweigh the policies supporting candor to the tribunal.

- Cons: Every other jurisdiction in the country recognizes that the duty of confidentiality is subordinate to a lawyer's duty of candor with good reason. Avoiding fraud in the judicial process is critical to promoting respect for the administration of justice and the legal profession. If there is an exception to confidentiality that is justified, it is one that mandates that a lawyer take reasonable measures to prevent a fraud being perpetrated on the court.
6. In paragraph (c), include the phrase "intends to engage" in addition to "is engaging or has engaged".
- Pros: The reason for including "intends to engage" is to require a lawyer, who has actual knowledge and an opportunity to take reasonable remedial measures, to take steps to prevent crime or fraud by anyone from affecting the proceedings. There are many examples where this could arise. For example, another party, other counsel or a witness or a third party could intend to submit false evidence or to engage in bribery or perjury that threatens to affect the integrity of the proceeding. The objective is to prevent fraud on the tribunal when the lawyer is in a position to prevent it and not after the fact.
  - Cons: The trigger for imposing the lawyer's duty, another person "intends to engage" in criminal or fraudulent conduct, is too vague and ambiguous a standard for triggering a lawyer's duty. It will tend to chill legitimate advocacy.
7. Recommend adoption of paragraph (d), which delimits the duration of the lawyer's duties as provided in paragraphs (a) through (c), but depart from the Model Rule by limiting the paragraph's application by the duties owed under Rule 1.6 and Bus. & Prof. Code § 6068(e).
- Pros: Aside from the fact that a lawyer owes a general duty as an officer of the legal system to promote respect for and integrity of the legal process, there are a number of reasons to recommend adoption of MR 3.3(c) but to delete the model rule's statement that the duty of candor supersedes the duty of confidentiality: (1) a lawyer who has been discharged or has withdrawn has 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

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 5-200 [3.3]

**Lead Drafter:** Tuft  
**Co-Drafters:** Chou, Martinez  
**Meeting Date:** May 6 – 7, 2016

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;

(3) the lawyer may only take remedial measures under paragraph (a)(2), (b) and (c) to the extent permitted under Bus. & Prof. Code § 6068(e) and Rule 1.6;

(4) to limit the duties, as did RRC1, to the end of the proceeding *or termination of the lawyer-client relationship* would allow lawyers to circumvent paragraphs (a), (b) and (c) by simply withdrawing from the representation; and

(5) there is no known state variation that limits paragraph 3.3(c) as RRC1 had recommended.

- Cons: The duration of the duty should not extend beyond the end of the proceeding or termination of the lawyer-client relationship, whichever comes first.

(1) 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;

(2) the lawyer's involvement in such a controversy after termination risks interference with the relationship between client and successor counsel.

8. In paragraph (e), recommend adoption of the concept in MR 3.3(d) '[regarding ex parte proceedings] but modify the provision for clarity.

- Pros: The recommendation to adopt in paragraph (e) a departure from MR 3.3(d) is necessary to accommodate unique features of California ex parte proceedings. MR 3.3(d) contemplates "true" ex parte proceedings where the opposing party is not given notice or an opportunity to be heard. In California, 24 hour notice is required unless exigent circumstances exist. See Rule of Court 3.1203.<sup>5</sup> In federal court, ex parte applications are submitted on paper—no appearance by counsel is required. A lawyer should not be required to advise the tribunal of "all material facts" known to

<sup>5</sup> California Rule of Court 3.1203 provides:

### **Rule 3.1203. Time of notice to other parties**

#### **(a) Time of notice**

A party seeking an ex parte order must notify all parties no later than 10:00 a.m. the court day before the ex parte appearance, absent a showing of exceptional circumstances that justify a shorter time for notice.

#### **(b) Time of notice in unlawful detainer proceedings**

A party seeking an ex parte order in an unlawful detainer proceeding may provide shorter notice than required under (a) provided that the notice given is reasonable.

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 5-200 [3.3]

**Lead Drafter:** Tuft  
**Co-Drafters:** Chou, Martinez  
**Meeting Date:** May 6 – 7, 2016

- the lawyer if it is anticipated that the opposing lawyer will be present.
- Cons: None identified.
9. Recommend moving the concept in rule 5-200(E) into proposed Rule 3.4 (Fairness to Opposing Party and Counsel).
- Pros: The concept of rule 5-200(E), that a lawyer should not assert personal knowledge of the facts at issue, is more appropriately placed in rule 3.4, as it is in Model Rule jurisdictions. Rule 3.4 addresses a lawyer's duties with respect to the preservation and suppression of evidence.
  - Cons: The placement of rule 5-200(E) in proposed Rule 3.3 is equally appropriate as the rule addresses statements made in court. (See, e.g., proposed Rule 3.3(a)(1), (2) and (c).)
10. Recommend adoption of Comment [1] re scope of the rule.
- Pros: Comment [1] describes the scope of the rule's application, i.e., that it also applies to ancillary proceedings such as depositions, a concept that might not be apparent in a rule addressing conduct before a "tribunal." The comment's inclusion is thus justified. The comment also provides a cross-reference to the definition of "tribunal" that further describes the scope of the rule's application.
  - Cons: Comment [1] states the obvious.
11. Recommend adoption of Comment [2], which incorporates current rule 5-200(D).
- Pros: Comment [2] has been included to address concerns OCTC expressed in its 2010 Comment about the deletion of the language in current rule 5-200(C) and (D). (See Section IX.B.3, above.) The comment incorporates nearly verbatim the language in current rule 5-200(D). The drafting team, however, does not believe it is necessary to include a similar comment concerning 5-200(C) ["Shall not intentionally misquote to a tribunal the language of a book, statute, or decision"] because it is obvious that such conduct comes within proposed paragraph (c).
  - Cons: None identified.
12. Recommend adoption of Comment [3] regarding the term "legal authority in the controlling jurisdiction" in paragraph (c).
- Pros: The comment provides critical interpretative guidance for the term, which can in some instances encompass legal authority outside of the jurisdiction in which a court is physically located. The comment is not strictly a definition but instead provides an example of how a strict interpretation of the term, i.e., to mean the politically-defined jurisdiction in which the court is located, would be inaccurate.
  - Cons: A definition should be in the black letter of the rule.
13. Recommend adoption of Comment [4], regarding preventive measures a lawyer should take to avoid another from engaging in fraudulent or criminal conduct related to a tribunal proceeding.
- Pros: The comment provides a suggested course of conduct for a lawyer to

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 5-200 [3.3]

**Lead Drafter:** Tuft  
**Co-Drafters:** Chou, Martinez  
**Meeting Date:** May 6 – 7, 2016

preserve the integrity of the legal process. A lawyer's persuasive skills constitute a critical resource in preventing such fraudulent or criminal conduct. The comment identifies this as a preventive measure the lawyer can take but also notes that under paragraphs (a) through (c), if the lawyer is unsuccessful in averting the conduct, the lawyer *must* refuse to offer the false evidence.

In addition, the comment identifies the narrative approach, a procedure sanctioned in California case law that is cited, when the person who intends to testify falsely, is the lawyer's criminal defendant client.

In sum, the comment provides interpretative guidance about the term "remedial measures."

- Cons: The "narrative approach" already exists in the case law, as does the concept that a lawyer should engage a client who intends to commit perjury in a dialog regarding the consequences of such conduct. The comment is unnecessary.

14. Recommend adoption of Comment [5], which addresses "reasonable remedial measures" under paragraphs (a)(2) and (c).

- Pros: The comment provides important guidance for a lawyer who seeks to perform the lawyer's duties to engage in reasonable remedial measures when a fraud has been perpetrated on the court. In particular, the comment provides cross-references to rules and statutes that provide further guidance.
- Cons: A lawyer is expected to be familiar with the duties described in the comment. It is not necessary.

15. Recommend adoption of Comment [6] regarding paragraph (d) and the duration of duties under the rule.

- Pros: The comment provides helpful guidance on when a proceeding is deemed to have concluded and the lawyer's duties under the rule terminated. It also recognizes that the duties under paragraph (c) do not apply when the lawyer learns of the fraudulent or criminal course of conduct only after the lawyer's representation has terminated.
- Cons: The provisions in the comment should be in the black letter.

16. Recommend adoption of Comment [7] regarding withdrawal from the representation.

- Pros: The comment provides important guidance that when a lawyer complies with the lawyer's duties under the rule, the lawyer does not necessarily need to withdraw. However, the comment also notes that withdrawal may be mandatory when, as a consequence of the lawyer's compliance, the lawyer-client relationship deteriorates to the extent the lawyer can no longer competently represent the client or continued representation will result in a violation of the Rules.<sup>6</sup>

<sup>6</sup> **Note:** If the Commission agrees with the recommendation of the 3-700 [1.16] drafting team to include the phrase "violation of these Rules *or of the State Bar Act*," then this comment should be modified to include the italicized language.

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 5-200 [3.3]

**Lead Drafter:** Tuft  
**Co-Drafters:** Chou, Martinez  
**Meeting Date:** May 6 – 7, 2016

- Cons: The comment neither interprets the black letter's meaning nor provides guidance on its application and should not be included.

### B. Concepts Rejected (Pros and Cons):

1. In paragraph (d), recommend adoption of the approach taken by RRC1, i.e., that the lawyer's duties under the Rule to take reasonable remedial measures ends with the conclusion of the proceeding or the conclusion of the representation, whichever comes first.
  - Pros: See "Cons," section XI.A.7, above.
  - Cons: See "Pros," section XI.A.7, above.
2. Recommend adoption of a provision that would expressly bar plagiarism in briefs or other submissions to a court. (See Section VIII, above.)
  - Pros: Plagiarism in brief or other submission to the court in effect is a false statement about the source of the document being submitted and violates a lawyer's duty of candor to the court. Specifically prohibiting plagiarism in a rule should increase confidence in the legal profession and improve the administration of justice, as well as help promote a useful national standard.
  - Cons: A specific prohibition on plagiarism is not necessary and not appropriate in a disciplinary rule. In any event, such conduct would be better addressed under proposed Rule 8.4(c) or Bus. & Prof. Code § 6106.<sup>7</sup> Moreover, there is no evidence that adopting such a provision would promote a national standard as the drafting team is unaware of any jurisdiction that has expressly addressed plagiarism in its Rules.

### C. Changes in Duties/Substantive Changes to the Current Rule:

1. Incorporating a "knowledge" standard in paragraph (a) is a substantive change in the law as current rule 5-200 does not include such a standard. (See Section XI.A.2, above.)
2. For the same reason, incorporating a specific intent requirement (seek to mislead) in paragraph (b) arguably is a substantive change, although a majority of the drafting team believes it simply reflects the standard applied in existing California Supreme Court case law. (See Section XI.A.4, above.)
3. Mandating that a lawyer take reasonable remedial measures to correct fraudulent or criminal conduct related to a proceeding of which the lawyer is aware is a substantive change *to the Rules*, although such a duty already exists in the lawyer's role as an officer of the legal system. (See Sections XI.A.5, 6, above.)
4. [Insert summary of Changes in Duties or Substantive Changes Here]

<sup>7</sup> Proposed Rule 8.4 (c) provides it is professional misconduct for a lawyer to:

- (c) engage in conduct involving moral turpitude, dishonesty, fraud, deceit or reckless or intentional misrepresentation



## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 5-200 [3.3]

**Lead Drafter:** Tuft  
**Co-Drafters:** Chou, Martinez  
**Meeting Date:** May 6 – 7, 2016

### D. Non-Substantive Changes to the Current Rule:

1. Substitute the term “lawyer” for “member”.
  - Pros: The current Rules’ use of “member” departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice pro hac vice or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)
  - Cons: Retaining “member” would carry forward a term that has been in use in the California Rules for decades.
2. Change the rule number to conform to the ABA Model Rules numbering and formatting (e.g., lower case letters).
  - Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized by various Rules of Court to practice in California to find the California rule corresponding to their jurisdiction’s rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the “Con” that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.
  - Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.
3. Except for the changes identified in Section C, above, the proposed rule provisions are non-substantive changes.

### E. Alternatives Considered:

None.



## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 5-200 [3.3]

**Lead Drafter:** Tuft  
**Co-Drafters:** Chou, Martinez  
**Meeting Date:** May 6 – 7, 2016

### XII. OPEN ISSUES/CONCEPTS FOR THE COMMISSION TO CONSIDER

1. Whether to adopt proposed paragraph (b), which imposes a specific intent requirement (seek to mislead) on a lawyer's duty to disclose legal authority in the controlling jurisdiction or whether to adopt Model Rule 3.3(a)(2) and RRC-1's version as follows:

(a) A lawyer shall not knowingly:

\* \* \*

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.<sup>8</sup>

- Pros: See "Pros" in Section XI.A.4, above.
- Cons: See "Cons" in Section XI.A.4, above.

### XIII. COMMENTS FROM DRAFTING TEAM MEMBERS OR OTHER COMMISSION MEMBERS

**Tuft**

- [Date]: Email Comment

**Chou**

- [Date]: Email Comment

**Martinez**

- [Date]: Email Comment

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<sup>8</sup> In addition to proposed paragraph (b) [majority] and MR 3.3(a)(2) [minority], the drafting team also considered, but ultimately did not accept, provisions from the District of Columbia and Virginia.

D.C. Rule 3.3(a)(3) provides a lawyer shall not:

(3) Fail to disclose to the tribunal legal authority in the controlling jurisdiction not disclosed by opposing counsel and known to the lawyer to be dispositive of a question at issue and directly adverse to the position of the client;

Virginia Rule 3.3(a)(3) provides a law shall not:

(3) fail to disclose to the tribunal controlling legal authority in the subject jurisdiction known to the lawyer to be adverse to the position of the client and not disclosed by opposing counsel;

## **DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 5-200 [3.3]**

**Lead Drafter:** Tuft  
**Co-Drafters:** Chou, Martinez  
**Meeting Date:** May 6 – 7, 2016

### **XIV. RECOMMENDATION AND PROPOSED COMMISSION RESOLUTION**

**Recommendation:**

That the Commission recommends that the Board of Trustees of the State Bar of California adopt proposed amended Rule 3.3 [5-200] in the form attached to this report and recommendation.

**Proposed Resolution:**

RESOLVED: That the Commission for the Revision of the Rules of Professional Conduct recommends that the Board of Trustees adopt proposed amended Rule 3.3 [5-200] in the form attached to this Report and Recommendation.

### **XV. DISSENTING POSITION(S)**

None.

### **XVI. FINAL COMMISSION VOTE/ACTION**

Date of Vote:

Action:

Vote: X (yes) – X (no) – X (abstain)



**CURRENT CALIFORNIA RULE 5-200**  
**“Trial Conduct”**

***I. Text of Current Rule:***

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.

***II. Background/Purpose:***

Current rule 5-200 originated in 1928 as former rule 17, operative on July 24, 1928. (See, *The State Bar Journal* (July 1928) Vol. III, No.1, p. 17.) Rule 17 originally provided:

“A member of the State Bar shall not intentionally misquote to a judge, judicial officer or jury the testimony of a witness, the argument of opposing counsel or the contents of a document; nor shall he intentionally misquote to a judge or judicial officer the language of a book, statute or decision; nor shall he, with knowledge of its invalidity and without disclosing such knowledge, cite as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional.”

In 1972, former rule 14 was renumbered as rule 7-105, “Trial Conduct,” which provided:

**Rule 7-105 Trial Conduct**

In presenting a matter to a tribunal, a member of the State Bar shall:

- (1) Employ, for the purpose of maintaining the causes confided to him such means only as are consistent with truth, and shall not seek to mislead the judge, judicial officer or jury by an artifice or false statement of fact or law. A member of the State Bar shall not intentionally misquote to a judge or judicial officer the language of a book, statute or decision; nor shall he, with knowledge of its invalidity and without disclosing such knowledge, cite as

authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional. A member of the State Bar shall refrain from asserting his personal knowledge of the facts at issue, except when testifying as a witness.

(2) Disclose, unless privileged or irrelevant, the identities of the clients he represents.

The added first sentence of former Rule 7-105 incorporated nearly verbatim the language of Bus. & Prof. Code § 6068(d).

Former Rule 7-105 was amended in 1989. The amendments included renumbering the rule 5-200 and dividing the rule into five paragraphs to make it easier to follow. New paragraph (C) continued the prohibition on intentionally misquoting authorities but changed “judge or judicial officer” to “tribunal” to indicate that an attorney’s duty of candor is equally applicable when the lawyer is appearing before an administrative tribunal as when appearing before a judge or judicial officer. Paragraph (2) of Rule 7-105 which required an attorney to disclose, unless privileged or irrelevant, the identity of the client was deleted as unnecessary. Rule 5-200, as approved by the Supreme Court, provided:

### **Rule 5-200 Trial Conduct**

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 of 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.

Rule 5-200 has not been amended since 1989.

### ***III. Input from the State Bar Office of the Chief Trial Counsel (OCTC):***

A. 2015 Comments. In a \_\_\_\_, 2015 memorandum from OCTC, OCTC provided the following comment on rule 5-200:

(Note: OCTC is expected to provide new comments on this rule. These comments will be distributed to the drafting team when they are received from OCTC.)

B. 2010 Comments. In a June 15, 2010 memorandum from OCTC, OCTC provided the following comment on proposed rule 3.3 (current rule 5-200):<sup>1</sup>

1. OCTC is concerned that this proposed rule requires knowingly. Rule 1.0 defines knowingly as “actual knowledge.” However, this is contrary to established California law. An attorney’s unqualified and unequivocal statements to judges under circumstances that should have caused him or her at least some uncertainty are at a minimum deceptive and support a finding of culpability. (*In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 173-174.) That is, California disciplines attorneys for dishonesty or moral turpitude based on gross negligence. (See sections

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<sup>1</sup> The black letter text of RRC1 proposed Rule 3.3 provided:

- (a) A lawyer shall not knowingly:
  - (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
  - (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
  - (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence, and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal, unless disclosure is prohibited by Rule 1.6 and Business and Professions Code section 6068(e). A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.
- (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures to the extent permitted by Rule 1.6 and Business and Professions Code section 6068(e).
- (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding or the representation, whichever comes first.
- (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

6068(d) and 6106; *Vaughn v. State Bar* (1972) 6 Cal.3d 847, 857 and 859; *In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar 266, 2381-282; *In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 173-174; *In the Matter of Dale* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 798 [gross negligence in representation to third party]; *In the Matter of Loftus* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 80; *In the Matter of Casey* (Review Dept. 2008) 5 Cal. State Bar Ct. Rptr. 117. See also Comment 2B to proposed rule 8.4.) In fact, CCP section 128.7 requires that all statements in pleadings be made “after an inquiry reasonable under the circumstances.” We should not be allowing lawyers to make false statements without proper inquiry and a good faith basis for the statement. Moreover, while good faith may be a defense to a charge of misrepresentation, this is because it is a statutory violation, not a rule violation. Good faith is generally not a defense to a violation of a Rule of Professional Conduct. (See *In the Matter of Broderick* (Review Dept. 1994) 3 Cal. State Bar Ct. Rpt. 138, 148; *Zitny v. State Bar*, *supra*, 64 Cal.2d at 793.) Further, this rule is inconsistent with proposed rules 8.2, 8.4, 4.2, and Comment 2B of proposed rule 8.4. While negligence is not a basis for discipline, gross negligence is. While we could still prosecute attorneys for gross negligence under sections 6068(d) and 6106 (and apparently 8.4) that creates inconsistent duties and could mislead attorneys into believing that actual knowledge is required for discipline when gross negligence can support discipline for this conduct.

2. OCTC is concerned that the proposed rule omits the term “artifice” as provided in current rule 5-200(b). If the Commission is intending to further limit the rule, OCTC opposes that. OCTC believes the word should remain in the rule.
3. OCTC is concerned that the proposed rule omits without Comment the following language in the current rule: 1) prohibiting an attorney from intentionally misquoting to a tribunal the language of a book, statute or decision; and 2) shall not knowing its invalidity cite as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional. (See current rule 5-200(c) and (d).) OCTC is aware that some of this language was removed by the Board of Governors because they believed that it was duplicative of proposed rule 3.3(a)(1) and (2). However, some form of this language has existed in the rules since the original Rules of Professional Conduct. OCTC requests a comment to explain that this is not a change in the law, but merely because it is already covered by proposed rule 3.3(a)(1) and (2).
4. OCTC is concerned that the rule omits the language in current rule 5-200(E) that an attorney “[s]hall not assert personal knowledge of the facts at issue, except when testifying as a witness.” OCTC knows of no reason to omit that language and has seen attorneys violate this rule in an attempt to prejudice a party and deny them a fair trial. (See e.g. *In the Matter of Philip E. Kay*, Case No. 01-O-193. The hearing department finding and recommendation in Kay’s case is currently pending before the California Supreme Court, Supreme



Court Case No. S180405.) OCTC suggests that this language be included in the rule.

5. In a similar vein, OCTC is concerned that nowhere in the proposed rules do they provide for when an attorney 1) states or alludes at trial to evidence that the attorney knows or reasonably should know is not relevant or admissible evidence or has already been ruled inadmissible (see *Hawk v. Superior Court* (1974) 42 Cal.App.3d 108, 118); 2) states the attorney's belief in the credibility of a witness (see *Hawk v. Superior Court, supra*, 42 Cal.App.3d at 123); or 3) includes when an attorney violates discovery orders of a court. OCTC recognizes that arguably they could be included in proposed rule 3.4, but they are not there either. They should be somewhere.
6. There are too many Comments, many are too long, and they cover subjects and discussions best left to treatises, law review articles, and ethics opinions.
7. Comment 3 is too long. If knowingly is stricken from the rule, this Comment should be also stricken. Further, this comment does not address CCP 128.7 or Rule 11 or that an attorney may have a duty to investigate even the client's claims in some situations. (See *Butler v. State Bar* (1986) 42 Cal.3d 323, 329 ["While an attorney may often rely upon statements made by the client without further investigation, circumstances known to the attorney may require an investigation."])

C. 2001 Comment. In a September 27, 2001 Memo to the first Commission, OCTC provided the following comment on rule 5-200:

OCTC's recommends clarifying, codifying and making more specific existing law on the subject of trial conduct.

Revise the rule as follows:

In presenting a matter to a tribunal, a member:

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

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

(C) Must correct a false statement of material fact or law previously made to the tribunal by the member, his law firm, or his client;

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

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

(G) Must 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;

(H) Must not offer evidence that the lawyer knows to be false. If the member, the member's firm, the member's client, or a witness called by the member has offered material evidence that the member comes to know is false, the member shall take reasonable remedial measures, including if necessary, disclosure to the tribunal. A member may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the member reasonably believes is false.

(I) Who represents a client in a proceeding and who knows that a person intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding must take reasonable remedial measures, including, if necessary, disclosure to the tribunal;

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

#### OCTC COMMENTS:

OCTC has replaced the term “shall” with “ must” and for clarity and instruction has listed specific conduct and the actions to be taken by a member in a given situation.

#### **IV. Potential Deficiencies in the Current Rule:**

A. See above input from OCTC.

B. Rule 5-200 does not set forth the duration of the lawyer's duties under the rule.<sup>2</sup>

C. Rule 5-200 does not expressly state the current law in California that a lawyer's duty of candor to a tribunal is circumscribed by the lawyer's duty under B&P Code section 6068(e) to preserve client confidential information. (See, e.g., *People v. Jennings* (1999) 70 Cal.App.4th 899 (approving the narrative approach to testimony when a lawyer reasonably believes the client intends to commit perjury); *People v. Johnson* (1998) 62 Cal.App.4th 608 (same)).

D. Rule 5-200 does not include a requirement that a lawyer shall take reasonable remedial measures to inform the tribunal if the lawyer comes to know that false evidence *has been* presented, or a person, including a client, has

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<sup>2</sup> ABA Model Rule 3.3(c) states the duties in paragraphs (a) and (b) of that rule “continue to the conclusion of the proceeding.” RRC1's proposed rule 3.3(c) stated the duties in paragraphs (a) and (b) “continue to the conclusion of the proceeding or the representation, whichever comes first.”

engaged in or is about to engage in fraudulent or criminal conduct in the proceedings.

## **V. *California Context:***

### **A. Business and Professions Code §§ 6068(b), (c), (d) and 6128(a)**

In addition to California Rule of Professional Conduct 5-200, an attorney's duty to judges, judicial officers, and tribunals is governed by Business and Professions Code sections 6068(b), (c), and (d).

Business and Professions Code section 6068(b) states it is the duty of an attorney to "maintain the respect due to the courts of justice and judicial officers." Section 6068(c) states it is the duty of an attorney to "counsel or maintain those actions, proceedings, or defenses only as appear to him or her legal or just, except the defense of a person charged with a public offense." Section 6068(d) contains the same language as Rule 5-200(A) and (B). Section 6068(d) states it is the duty of an attorney to "employ, for the purpose of maintaining the causes confided to him or her 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."

Also, Business and Professions Code section 6128(a) provides that a lawyer is guilty of a misdemeanor if the lawyer either: (a) is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party.

### **B. Duty of Confidentiality vs. Duty of Candor to the Court**

In California, lawyers are often faced with the competing duties of candor to the court and the duty of confidentiality to one's client. Business and Professions Code section 60068(e)(1) requires an attorney "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." Current Rule of Professional Conduct 3-100(A) provides, "A member shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) without the informed written consent of the client . . ." except, pursuant to subdivision 6068(e)(2), the lawyer reasonably believes disclosure is necessary to prevent a life-threatening criminal act. There is no similar exception in statute or rule to the duty of confidentiality to prevent or rectify a client's fraudulent conduct before a tribunal.

Thus, a lawyer's duty to maintain inviolate the client's secrets may conflict with the lawyer's duty of candor to the court such as when a court orders an attorney to answer a question that would require the lawyer to reveal confidential information of a client. While the duty of confidentiality does not allow an attorney to abandon his or her duty of candor to courts and administrative tribunals, none of the Business and Professions Code sections cited above state

that those obligations owed the court supersede or preempt the duty of confidentiality.

Under the ABA Model Rules, a lawyer's duty to the client is qualified by the duty of candor to the court. (See Model Rule 3.3(c) and Comment [2]).<sup>3</sup> In California, however, the duty of confidentiality is not qualified by the lawyer's duty of candor to the court. Therefore, when an attorney has received information concerning a client, the attorney may not be at liberty to answer questions from the court if the answers would reveal that client's confidential information. If, for example, a client's family member told the attorney the client was under the influence of drugs and would not be coming to court and the attorney was asked by the judge if she "had any idea why her client was not there," the attorney would be prohibited from answering the question. (See, [San Diego County Bar Association Ethics Opinion 2011-1](#)). If the lawyer were to answer the court's question in the negative, she would violate her duty of candor to the court, per Rule 5-200 and section 6068(d), because she would have an idea why her client was not there (as relayed by the client's family member). If the lawyer were to answer in the affirmative, even without disclosing the reason why the client was not present, she could violate her duty of confidentiality under section 6068(e) because that answer might cause a harmful inference to be drawn to the detriment of her client, thus violating her duty not to reveal client confidential information to the client's detriment. (See, Cal. State Bar Formal Opns. 1993-133; 1981-58; 1980-52 – defining confidential information as information which the client has requested to be held inviolate or the disclosure of which would be embarrassing or detrimental to the client.) The San Diego County Bar's ethics opinion concludes that, under these facts, the attorney's "only ethical option is to inform the court respectfully that due to applicable ethics rules she is not at liberty to answer the question."

In the criminal context, California Courts of Appeal have approved the use of the "narrative" form of testimony, which avoids a lawyer assisting the lawyer's client

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<sup>3</sup> Model Rule 3.3(c) provides:

- (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.* (Emphasis added).

ABA Model Rule 3.3, Comment [2], provides:

"This Rules 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."

in committing perjury. (See, e.g., *People v. Jennings* (1999) 70 Cal.App.4th 899 (approving the narrative approach to testimony when a lawyer reasonably believes the client intends to commit perjury); *People v. Johnson* (1998) 62 Cal.App.4th 608 (same). Compare Model Rule 3.3, cmt. [7].)

C. Duty of Confidentiality v. Duty to Refrain from Not Engaging In or Furthering Deception

While the duty of confidentiality prevents a lawyer from disclosing a client's fraudulent conduct, a lawyer may not participate in or further such conduct. When a client is engaging in an ongoing fraud the lawyer must be careful to avoid furthering, or assisting, the fraud in any way. See, [CAL 1996-146](#).

In *Nix v. Whiteside* (1986) 475 U.S. 157, a criminal defendant petitioned for habeas corpus relief from his conviction by arguing ineffective assistance of counsel because his lawyer advised him the lawyer would seek to withdraw from representation if the defendant insisted on committing perjury. While preparing for his state-court criminal trial on murder charges, the defendant "consistently told his attorney that although he had not actually seen a gun in the victim's hand when he stabbed the victim, he was convinced that the victim had a gun." *Id.* The witnesses who were present when the stabbing occurred told the attorney that they had not seen a gun and no gun was found. The defendant was convicted for murder and alleged that he had been denied effective assistance of counsel due to his attorney's refusal to allow him to testify as he had proposed.

The United States Supreme Court held that the Sixth Amendment right of a criminal defendant to assistance of counsel is not violated when an attorney refuses to cooperate with the defendant in presenting perjured testimony at his trial. The Court stated that an attorney must attempt to dissuade the client from committing perjury: "(A)t minimum the attorney's first duty when confronted with a proposal for perjurious testimony is to attempt to dissuade the client from the unlawful course of conduct." *Id.* at 169. See also, [CAL 1983-74](#).

In *Bryan v. Bank of America* (2001) 86 Cal.App.4<sup>th</sup> 185, the attorney's client became delusional and disappeared. The attorney filed for a continuance in the court of appeal to preserve the client's case. The attorney believed the duty of confidentiality prevented him from disclosing his client's situation. As a result, the attorney felt he was justified in representing that he had obtained the client's permission to obtain an extension of time to file an appeal when in reality he was unable to locate the client. The appellate court stated these representations constituted dishonest and inexcusably inaccurate factual misrepresentations that were not only ethically objectionable but interfered with the judicial responsibility to insure that appellate court matters are conducted expeditiously and that public confidence in efficient administration of justice at the appellate level is maintained. *Id.* at 194. As a result of the attorney's actions, the court imposed sanctions in the form of attorney fees.

In *In re Young* (1989) 49 Cal.3d 257, the California Supreme Court affirmed the imposition of discipline against an attorney who provided a false name to a bail bondsman to secure the client's release from jail in order to protect the client's identity and secrets. In rejecting the attorney's arguments against discipline the court stated:

[P]etitioner violated his oath and duties as an attorney under sections 6068 and 6103 when he arranged bail for his client under a false name. An attorney's duty to maintain his client's confidences does not extend to affirmative acts which further a client's unlawful conduct. While petitioner admittedly had not duty to disclose that his client gave the arresting officer a false name, he had a duty not to further his client's unlawful conduct by arranging bail for him under a false name. Petitioner's actions misled the bail bondsman and the officers of the court responsible for bail and allowed a fugitive wanted for a violent felony to evade prosecution. We conclude that there is sufficient evidence that petitioner acted dishonestly, and that his misconduct constituted a fraud on the court.

*Id.* at 265.

D. Duty to Inform the Court of Misrepresentations and Aid the Court in Avoiding Error

In *Datig v. Dove Books, Inc.* (1999) 73 Cal.App.4<sup>th</sup> 964, a defense attorney obtained an ex parte dismissal of the plaintiff's action based upon plaintiff's failure to timely file a second amended complaint. Prior to filing the ex parte motion, the defense attorney did not verify whether the complaint had in fact been filed or give notice of or serve a copy of the motion on the plaintiff. Several days after entry of the dismissal, plaintiff's counsel provided the defense attorney with a file-stamped copy of the second amended complaint showing it was timely filed. Plaintiff's counsel asked defense attorney to stipulate to vacate the dismissal order. Defense attorney refused.

Citing Business and Professions Code sections 6068(b), (c), and (d), as well as, Rule of Professional Conduct 5-200(B), the appellate court said that the defense attorney violated his duty as an officer of the court. This was evident due to (1) defense attorney's failure, once he had direct evidence that the second amended complaint had been timely filed, to stipulate to the vacation of the judgment which had been obtained on the sole ground that it had *not* been timely; (2) his subsequent reliance on what he then knew to be a judgment obtained on the basis of a misrepresentation to the court, to (a) seek additional relief against the plaintiff (in the form of attorney's fees and costs), and (b) file and maintain an action for malicious prosecution against the plaintiff and her attorney; and (3) his opposition to plaintiff's motion to vacate the judgment, at a time when he was fully aware that a factual misrepresentation to the judge was the sole basis for

entry of that judgment. Following the defense attorney's presentation during oral argument, the court stated the following in its published decision:

At oral argument, it was apparent that [defense attorney] did not feel that he had done anything wrong. We therefore find it necessary to state, explicitly, that although a misrepresentation to the court may have been made negligently, not intentionally, it is still a misrepresentation, and once the attorney realizes that he or she has misled the court, even innocently, he or she has an affirmative duty to immediately inform the court and to request that it set aside any orders based upon such misrepresentation; also, counsel should not attempt to benefit from such improvidently entered orders. As the court stated in *Furlong v. White*, an attorney has a duty not only to tell the truth in the first place, but a duty to "*aid the court in avoiding error and in determining the cause in accordance with justice and the established rules of practice.*" (51 Cal.App. 265, 271, italics added.) Observance of this duty, we might add, prevents the waste of judicial resources, and the opposing party's time and money.

*Id.* at 980-981.

## **VI. Approach In Other Jurisdictions (National Backdrop):**

A. Model Rule 3.3 Variations. All jurisdictions except California have adopted some version of ABA Model Rule 3.3. The ABA State Adoption Chart, entitled "Variations of the ABA Model Rules of Professional Conduct, Rule 3.3: Candor Toward the Tribunal," revised May 7, 2015, is available at:

[http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_3.3.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3.3.authcheckdam.pdf) [Last visited 3/16/16]

Twenty-one jurisdictions have adopted Model Rule 3.3 verbatim.<sup>4</sup> Sixteen jurisdictions have adopted a slightly modified version of Model Rule 3.3.<sup>5</sup>

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<sup>4</sup> The twenty-one jurisdictions are: Arizona, Arkansas, Colorado, Delaware, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Minnesota, Montana, Nebraska, Nevada, New Hampshire (although the order of paragraphs (c) and (d) are reversed), Rhode Island, Utah, Vermont, West Virginia, and Wyoming.

<sup>5</sup> The sixteen jurisdictions are: Alaska, Connecticut, Georgia (Georgia retains a rule substantially similar to the former Model Rule from 1983), Hawaii (Hawaii retains a rule substantially similar to the former Model Rule from 1983), Maine, Mississippi (Mississippi retains the former Model Rule language from 1983), Missouri, New Jersey (New Jersey retains a rule substantially similar to the former Model Rule from 1983), New Mexico, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, and Wisconsin.



Fourteen jurisdictions have adopted a version of the rule that is substantially different from Model Rule 3.3.<sup>6</sup>

***VII. Public Comment Received by the First Commission:***

A. The clean text of proposed new rule 3.3 drafted by the first Commission and adopted by the Board to replace rule 5-200 is enclosed with this assignment, together with the synopsis of public comments received on those proposed rules and the full text of those comments. Although the proposed rule differs from current rule 5-200, the drafting team might consider to what extent, if any, the public comments received on the proposed rule provide helpful information in analyzing the current rule.

To facilitate the review and to appreciate the relevance of these public comments, a redline comparison of the proposed rule showing changes to rule 5-200 is also enclosed with the public comments received. However, given the Board's charge to engage in a comprehensive review of the current rules and to retain the historical nature of the California Rules as "a clear and enforceable articulation of disciplinary standards," a drafting team that considers amendments developed by the first Commission should not presume that the approach taken by the first Commission was appropriate to achieve those objectives.

***VIII. Potential Issues Identified by Professional Competence Staff Following Review of the Proposed Rule Developed by the First Commission and Adopted by the Board:***

Bearing in mind the Commission's Charter to engage in a comprehensive review of the current rules and to retain the historical nature of the California Rules as "a clear and enforceable articulation of disciplinary standards," Professional Competence staff identified the following rule amendment issues (in no particular order) that the drafting team might consider. The drafting team need not address any of the issues. For example, if after critically evaluating an issue addressed by a revision made by the first Commission, the drafting team determines that the revision does not address an actual (as opposed to theoretical) public protection deficiency in the current rule, then the drafting team should hesitate to recommend a change to the current rule despite the prior decision by the first Commission and the Board to address the issue. (Note: For the sake of completeness and ease of reference, some of the issues listed below may have already been mentioned in connection with other information provided above, such as in connection with the approaches taken in other jurisdictions or prior public comment. Multiple mentions of an issue do not necessarily warrant the drafting team taking action on an issue.)

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<sup>6</sup> The fourteen jurisdictions are: Alabama, California, District of Columbia, Florida, Maryland, Massachusetts, Michigan, New York, North Dakota, Oregon, Tennessee, Texas, Virginia, and Washington.

(1) Whether the rule should be amended to expressly provide 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.

(a) Conversely, whether the rule should be amended to provide that the duty of candor to the tribunal supersedes the lawyer's duty of confidentiality.

(2) Whether the rule should be amended to state the duration of the lawyer's duties under the rule.

(3) Whether the rule should be amended to require the lawyer 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 the opposing counsel.

(4) Whether the rule should be amended to require 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, to take reasonable remedial measures.

(a) If so, should a clause be added to indicate the lawyer's duty of candor to the tribunal in this instance is circumscribed by the lawyer's duty of confidentiality?

(5) Whether the rule should be amended to include a requirement that the lawyer take remedial measures to inform the tribunal if the lawyer comes to know that false evidence *has been* presented.

(6) An alternative to (5), above, should the Commission recommend that the rule follow North Dakota's<sup>7</sup> approach, which has added additional language to their Rule 3.3(a)(3) to distinguish the lawyer's obligation with respect to evidence contained in testimony of the lawyer's client.

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<sup>7</sup> North Dakota Rule 3.3(a)(3) provides:

"(a) A lawyer shall not knowingly: (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal unless 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."

**IX. Research Resources:**

- [CAL 1983-74](#) (Whether There is a Duty to Advise Court of Client Perjury)
- [CAL 1996-146](#) (Client Using Attorney Services to Further a Fraud)
- People v. Jennings (1999) 70 Cal.App.4th 899 [83 Cal.Rptr.2d 33]
- [SDCBA 2011-1](#) (Duty to Preserve Client Secrets vs. Duty of Candor to Court)
- Datig v. Dove Books, Inc. (1999) 73 Cal.App.4<sup>th</sup> 964 [87 Cal.Rptr.2d 719]
- Furlong v. White (1921) 51 Cal.App. 265, 271
- People v. Jennings (1999) 70 Cal.App.4th 899 [83 Cal.Rptr.2d 33]
- People v. Johnson (1998) 62 Cal.App.4th 608 [72 Cal.Rptr.2d 805] (same)
- Nix v. Whiteside (1986) 475 U.S. 157
- Bryan v. Bank of America (2001) 86 Cal.App.4th 185 [103 Cal.Rptr.2d 148]
- In re Young (1989) 49 Cal.3d 257