

Rule 3.3 [5-200] Candor Toward The Tribunal*
(Commission's Proposed Rule Adopted on May 6 – 7, 2016 – Clean Version)

- (a) A lawyer shall not knowingly:
- (1) make a false statement of fact or law to a tribunal* or fail to correct a false statement of material fact or law previously made to the tribunal* by the lawyer;
 - (2) fail to disclose to the tribunal* legal authority in the controlling jurisdiction known* to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel, or misquote to a tribunal* the language of a book, statute, decision or other authority; 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 who represents a client in a proceeding before a tribunal* 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).
- (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding.
- (d) 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material misstatement of law includes citing as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional, or failing to correct such a citation previously made to the tribunal* by the lawyer.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) and (b) 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)(3) and (b) refer to measures that are available under these Rules and the State Bar Act, and which a reasonable* lawyer would consider appropriate under the circumstances to comply with the lawyer's duty of candor to the tribunal.* See, e.g., Rules 1.2.1, 1.4(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 (b) 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 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.

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**Proposed Rule 3.3 [5-200(A)] Candor Toward the Tribunal
Synopsis of Public Comments**

TOTAL = XX **A = X**
D = X
M = X
NI = X

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
2016-32h	Law Professors (Zitrin) (07-25-16)	Yes	A	3.3(c)	<p>The first ethics professors' letter recommended that the duty of candor must continue until the conclusion of the proceeding. Allowing candor to conclude upon termination of the representation was a recipe for disaster.</p> <p>The commission has now removed the offending language. The commenters congratulate the commission for this decision.</p>	No response required.
2016-43x	COPRAC (Baldwin) (8-12-16)	Yes	M	3.3(d)	<p>Add to the end of paragraph (d) the words "to the position of the client" to clarify the adversity.</p> <p>In Comment [5], the reference to "Rule 1.4(b)(4)" should be to "Rule 1.4(a)(4)".</p>	<p>The Commission has made the requested change.</p> <p>The Commission agrees and has made the change.</p>
2016-47	Elliot Bien (8-17-16)	No	M	3.3	<p>The commenter's position is that the rule should be modified to specifically address plagiarism. Such modification would address the recent increase in judicial attention paid to plagiarism. The existing language of the rule is too uncertain to be helpful on the subject of plagiarism. Such modification will bolster public confidence in the legal profession.</p> <p>The commenter further asserts</p>	<p>The Commission considered the commenter's proposal and rejected it. In the original Report & Recommendation submitted by the Rule 3.3 drafting team, it was identified as a "Concept Considered But Rejected." The Report stated:</p> <p>A specific prohibition on plagiarism is not necessary and not appropriate in a disciplinary rule. In any event, such conduct would</p>

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

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					that the Commission failed to address the concern he raised re plagiarism because “it did not vote against [his] proposal,” and “[no]” vote was even called. The Commission silently accepted its drafting committee’s recommendation to remain silent on this subject.”	<p>be better addressed under proposed Rule 8.4(c) or Bus. & Prof. Code § 6106.² 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.</p> <p>The Commission’s position has not changed.</p> <p>The commenter was also afforded an opportunity to present his position at a regularly scheduled Commission meeting. That no Commission member made a motion to vote on the commenter’s proposal does not mean that the Commission “failed to address” or consider it.</p>
2016-52p	Law Professors (Zitrin) (08-24-16)	Yes	A	3.3(c)	The first ethics professors’ letter recommended that the duty of candor must continue until the conclusion of the proceeding. Allowing candor to conclude upon	No response required.

² 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.

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					<p>termination of the representation was a recipe for disaster.</p> <p>The commission has now removed the offending language. The commenters congratulate the commission for this decision.</p>	
Public Hearing	Menaster, Albert (Provided oral public hearing testimony on July 26, 2016. See pages 34-38 of the public hearing transcript.)	No	D	(a)(2); cmt. 4	<p>Defense lawyer's duty to disclose adverse authority to court amounts to violations of fifth and sixth amendments.</p> <p>Fifth amendment issue: a person charged with a crime shouldn't have a duty to assist the government with his or her conviction.</p> <p>Sixth amendment issue: a defense lawyer has a duty of loyalty to client to not volunteer information harmful to client.</p> <p>Recounts example where defendant is convicted because attorney was required to provide case authority saying that what he has done is in violation of the law.</p> <p>In response to an inquiry from the hearing panel, the commenter noted that the counterpart ABA rule does not appear to be enforced against defense lawyers</p>	No change to paragraph (a) or Comment [4] is required. The first clause in paragraph (a)(2) is verbatim from Model Rule 3.3(a)(2), which has been the rule for many years in the vast majority of jurisdictions and, as noted by the commenter, has not resulted in Fifth or Sixth Amendment problems for criminal defense lawyers. The Commission is not aware of authority supporting the commenter's position that a criminal defense lawyer's failure of candor to a court about the applicable law is always protected by constitutional principles. In the event a constitutional issue were to arise, the last sentence in comment [4] provides that the obligations of a lawyer under these Rules and the State Bar Act are subordinate to applicable constitutional provisions. In summary, the Commission

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					as his office's research has not revealed any cases on this issue.	does not recommend a provision under which a criminal defense lawyer's failure of candor to a court about the applicable law is always protected by constitutional principles and that such conduct can never be disciplined. Such a determination is for the court.