

Rule 3.3 [5-200] Candor Toward The Tribunal*
(Commission's Proposed Rule Adopted on October 21–22, 2016 – Clean Version)

- (a) A lawyer shall not:
- (1) 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;
 - (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 knowingly 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 Business and Professions Code § 6068(e) and Rule 1.6. 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 Business and Professions Code § 6068(e) and Rule 1.6.
- (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 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 to the position of the client.

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material misstatement of law includes citing as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional, or failing to correct such a citation previously made to the tribunal* by the lawyer.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(a)(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 Business and Professions Code § 6068(e) and Rule 1.6.

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. However, there may be obligations that go beyond this Rule. See, e.g., Rule 3.8(g) and (h).

[7] Paragraph (d) does not apply to ex parte communications that are not otherwise prohibited by law or the tribunal.

Withdrawal

[8] 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 Business and Professions Code § 6068(e) and Rule 1.6 with respect to a request to withdraw that is premised on a client's misconduct.

[9] In addition to this Rule, lawyers remain bound by Business and Professions Code §§ 6068(d) and 6106.

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Offering Evidence

[5]¹ A lawyer does not violate paragraph (a)(3) if the lawyer offers the evidence for the purpose of establishing its falsity.

Remedial Measures

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¹ The consensus of the drafting team was to add language from ABA Model Rule 3.3, Comment [5], second sentence, to proposed Rule 3.3 as a new Comment [5] in response to DOJ's concerns expressed in their public comment letter dated January 6, 2017.

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[7] 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. However, there may be obligations that go beyond this Rule. See, e.g., Rule 3.8(g) and (h).

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

TOTAL = 3 **A = 0**
D = 0
M = 3
NI = 0

| No. | Commenter/Signatory | Comment on Behalf of Group? | A/D/M/NI ¹ | Rule Section or Cmt. | Comment | RRC Response |
|------------|---|-----------------------------|-----------------------|----------------------|---|---|
| Y-2016-21v | State Bar Office of Chief Trial Counsel (OCTC) (Dresser) (01-09-17) | Y | M | | <p>OCTC concerned with “knowingly” standard. Current rule can be violated by gross negligence, recklessness and willful blindness.</p> <p>Proposed rule far more limited than current rule in that it only prohibits a false statement of fact or law.</p> <p>Proposed rules do not address an attorney who alludes at trial to evidence that is not relevant or is not admissible.</p> <p>OCTC supports Comments except for the use of “knowingly” in Comment 4.</p> | <p>OCTC’s comment appears to disregard the application of the definition of “knowingly” in disciplinary cases. Many of the cases OCTC cites involved conduct that would satisfy the definition in Rule 1.0.1 (f) (e.g, conduct constituting “willful blindness” or “recklessness”). Proof of the cognitive standard under rules requiring knowledge is typically by circumstantial evidence. See, e.g., United States v. Benjamin, 328 F.2d 854 (2d Cir. 1964) – “the Government can meet its burden [of proving willfulness in a criminal prosecution for aiding others in mail and securities fraud] by showing that a defendant deliberately closed his eyes to facts that he had a duty to see.” That a lawyer’s knowledge “may be inferred from the circumstances” means that evidence of facts and circumstances that enables a disciplinary authority to infer that knowledge will satisfy the cognitive element of the rule. At the same time, the definition is important to</p> |

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

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|-----------|---|-----------------------------|-----------------------|----------------------|--|--|
| | | | | | | distinguish negligence conduct or conduct that is being judged in hindsight. The Commission is not aware of charging or proof problems in the many jurisdictions that have adopted this cognitive standard. |
| Y-2016-7p | State Bar Standing Committee on Professional Responsibility and Conduct (COPRAC) (Spencer) (01-06-17) | Y | M | (c) | Paragraph (c) should be amended to reflect the fact that an attorney who has been terminated but may still appear before the tribunal continues to be obligated to deal with the tribunal with the requisite candor. | The Commission agrees with the commenter's point regarding paragraph (c) but would not exclude paragraph (a)(3) and (b). The Commission believes that firing a lawyer or a lawyer's decision to withdraw in order to avoid having to take any steps to correct criminal or fraudulent conduct is against public policy. The Commission is not aware of any jurisdiction where that standard is the rule. |
| Y-2016-14 | U.S. Department of Justice (Ludwig) (01-06-17) | Y | M | Cmt. | Comment should address the concept that the rule is not violated if a lawyer offers evidence for the purpose of establishing its falsity. | The Commission has added A new Comment [5] stating that: "A lawyer does not violate paragraph (a)(3) if the lawyer offers the evidence for the purpose of establishing its falsity." |