Rule 3.3 Candor Toward The Tribunal*
(Proposed Rule Adopted by the Board on March 9, 2017)

(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 section 6068, subdivision (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 section 6068, subdivision (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material misstatement of law includes citing as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional, or failing to correct such a citation previously made to the tribunal* by the lawyer.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; Bus. & Prof. Code, §§ 6068, subd. (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 section 6068, subdivision (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. This rule does not apply when a lawyer comes to know* of a violation of paragraph (b) after the lawyer's representation has concluded. 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 section 6068, subdivision (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 sections 6068, subdivision (d) and 6106.

PROPOSED RULE OF PROFESSIONAL CONDUCT 3.3
(Current Rule 5-200)
Candor Toward The Tribunal

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct ("Commission") evaluated current rule 5-200 (Trial Conduct) in accordance with the Commission Charter. In addition, the Commission considered the national standard of ABA Model Rule 3.3 (Candor Toward The Tribunal). The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules. The result of the Commission's evaluation is proposed rule 3.3 (Candor Toward The Tribunal).

Rule As Issued For 90-day Public Comment

Proposed Rule 3.3 in context within the Rules of Professional Conduct. Proposed rule 3.3 is one of nine rules in Chapter 3 of the proposed Rules of Professional Conduct. The content, framework and numbering scheme of this subset of the rules is generally based on Chapter 3 of the ABA Model Rules, which is entitled "Advocate." Model Rules Chapter 3 corresponds to Chapter 5 of the current California rules, entitled "Advocacy and Representation." The following table shows the Chapter 3 Model Rules and the corresponding California rules:

Model Rule	California Rule
3.1 (Meritorious Claims & Contentions)	3-200 (Prohibited Objectives of Employment)
3.2 (Expediting Litigation)	No Cal. rule counterpart.
3.3 (Candor Toward The Tribunal)	5-200 (Trial Conduct)
3.4 (Fairness to Opposing Party & Counsel)	5-220 (Suppression of Evidence) 5-310 (Prohibited Contact with Witnesses) 5-200(E)
3.5 (Impartiality and Decorum of Tribunal)	5-300 (Contact with Officials) 5-320 (Contact with Jurors)
3.6 (Trial Publicity)	5-120 (Trial Publicity)
3.7 (Lawyer As Witness)	5-210 (Member As Witness)
3.8 (Special Responsibilities of a Prosecutor)	5-110 (Performing the Duty of Member in Government Service) 5-220 (Suppression of Evidence) 5-120 (Trial Publicity)
3.9 (Advocate In Non-adjudicative Proceedings)	No Cal. Rule counterpart.

The Commission is recommending the adoption of the Model Rule framework and numbering for this series of rules, but for many of the rules recommends retaining the language of the California rules, which is more specific and precise, and accordingly more appropriate for a set of disciplinary rules. However, in the case of proposed rule 3.3, the Commission determined that a rule patterned on Model Rule 3.3 would be more appropriate as a disciplinary rule.

Recommendation that proposed rule 3.3 be circulated for public comment. 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 National Backdrop – Adoption of Model Rule 3.3, 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 the rule is intended to regulate, an attribute 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 the California Legislature adopted the Field Code in 1872.[1] 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 consistent with the truth, and thus what "means" are not. 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.

In sum, the Model Rule approach, under which specific prohibited conduct is identified, is preferable in a disciplinary rule. 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. The need for increased detail in the rule is particularly evident regarding measures a lawyer is permitted to take to correct fraudulent or criminal conduct of another in relation to a proceeding before a tribunal. That is because, contrary to Model Rule jurisdictions under which duties under their versions of rule 3.3 trump a lawyer's duty of confidentiality, the text of proposed rule 3.3 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).

Text of Rule 3.3. The proposed rule's language, based on the Model Rule, provides a clearer statement of what conduct is required and prohibited under the rule.

Paragraph (a)'s introductory clause incorporates a "knowledge" standard. The requirement of known falsity is important from a practical as well as a policy standpoint. A rule that could be violated by gross negligence would have an improper chilling effect on advocacy and could render the lawyer a guarantor of the truth of the facts presented.

Subparagraph (a)(1) [based on Model Rule 3.3(a)(1)] provides that a lawyer shall not knowingly "make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." 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.

Subparagraph (a)(2) [derived from Model Rule 3.3(a)(2)], prohibits a lawyer from failing "to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse" to the client's position. It states 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). Nevertheless, to further clarify the provision's intent, the Commission recommends adding language from rule 5-200(C), which provides a lawyer shall not

[1] 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.

"misquote to a tribunal the language of a book, statute, decision or other authority."[2] The Commission determined that a generalized statement of what is prohibited together with a specific example, is better than a narrowly-defined statement of prohibited conduct.

Subparagraph (a)(3) [based on Model Rule 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."

Paragraph (b) 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).

Paragraph (c) importantly delimits the duration of the lawyer's duties under the preceding three paragraphs. The lawyer's duties continue to the end of the proceeding and do not terminate upon discharge by the client or the lawyer's withdrawal.

Paragraph (d) 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.

There are seven comments to the proposed rule, each of which provides interpretative guidance or clarifies how the proposed rule, which is intended to govern a broad array of situations, should be applied.

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."

Comment [2], as noted (see footnote 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) [now incorporated into subparagraph (a)(2)] and (D). The comment incorporates nearly verbatim the language in current rule 5-200(D).

Comment [3], regarding the term "legal authority in the controlling jurisdiction," provides critical interpretative guidance for the term, which in some instances can encompass legal authority outside of the jurisdiction in which a court is physically located. The comment is not strictly a definition but instead explains how a strict interpretation of the term "controlling jurisdiction," i.e., to mean the politically-defined jurisdiction in which the court is located, would be inaccurate.

Comment [4] provides a suggested course of conduct for a lawyer to preserve the integrity of the legal process by identifying preventive measures a lawyer might take to prevent another from engaging in fraudulent or criminal conduct related to a tribunal proceeding. It also notes that under paragraphs (a) and (b), 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.

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[2] In response to a request by OCTC, the Commission is also recommending that the substance of 5-200(D) (a lawyer "shall not, knowing its invalidity, cite as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional") be retained in a comment to clarify the application of paragraph (a)(1). (See Comment [2].)

Comment [5] provides important guidance for a lawyer who seeks to perform the lawyer's duties to engage in "reasonable remedial measures" as required under paragraph (b) when a fraud has been perpetrated on the court. In particular, the comment provides cross-references to rules and statutes that provide further guidance.

Comment [6] provides interpretative guidance on when a proceeding is deemed to have concluded and the lawyer's duties under the rule are terminated. In particular, it recognizes that the duties under paragraph (b) to rectify fraudulent conduct before a tribunal do not apply when the lawyer learns of the fraudulent or criminal course of conduct only after the lawyer's representation has terminated.

Comment [7], regarding a lawyer's withdrawal from representation occasioned by events contemplated by the rule's provisions, 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.

In addition to the recommended provisions, the Commission declined to recommend a provision suggested in public comment that would expressly bar plagiarism in briefs or other submissions to a court. The Commission determined 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.[3] Moreover, there is no evidence that adopting such a provision would promote a national standard as the Commission is unaware of any jurisdiction that has expressly addressed plagiarism in its rules.

National Background – Adoption of Model Rule 3.3

Every jurisdiction except California has adopted some version of Model Rule 3.3. Twenty-one jurisdictions have adopted Model Rule 3.3 verbatim. Sixteen jurisdictions have adopted a slightly modified version of Model Rule 3.3. Thirteen jurisdictions have adopted a version of the rule that is substantially different from Model Rule 3.3.

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission revised paragraphs (a), (c), and (d) for clarity. Comment [3] was added to make clear that in addition to this rule, lawyers are remain bound by their statutory obligations to never mislead a judge or judicial officer, nor commit an act of moral turpitude, dishonesty or corruption. Comment [4] was added to clarify that paragraph (d) does not apply to ex parte communications otherwise not prohibited by law or by the tribunal.

With these changes, the Board authorized an additional 45-day public comment period on the revised proposed rule.

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[3] 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

Final Modifications to the Proposed Rule

After consideration of comments received in response to the additional 45-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

COMMISSION REPORT AND RECOMMENDATION: RULE 3.3 [5-200]

Commission Drafting Team Information

Lead Drafter: Mark Tuft
Co-Drafters: Danny Chou, Raul Martinez

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. The Commission 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 Business and Professions Code section 6068(d), a provision that has remained virtually unchanged since California adopted the Field Code in 1872.[1] 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 clearer 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 Model Rule 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). Paragraph (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) 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 Business and Professions Code section 6068(e). Importantly, paragraph (c) of the proposed rule delimits the duration of the lawyer's duties under the

[1] 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.

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 nine Comments that are limited to interpreting the rule or explaining how the rule is to be applied, appropriate functions of the Comments.

II. CURRENT CALIFORNIA RULE

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. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: January 20, 2017
Action: Recommend Board Adoption of Proposed Rule 3.3 [5-200]
Vote: 13 (yes) – 1 (no) – 1 (abstain)

Board:

Date of Vote: March 9, 2017
Action: Board Adoption of Proposed Rule 3.3 [5-200]
Vote: 11 (yes) – 0 (no) – 0 (abstain)

IV. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 3.3 [5-200] Candor Toward The Tribunal*

(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.

V. COMMISSION'S PROPOSED RULE (REDLINE TO CURRENT CALIFORNIA RULE 5-200)

Rule 3.3 [5-200] ~~Trial Conduct~~ Candor Toward The Tribunal*

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~~(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~~

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(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."

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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.

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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.

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[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.

VI. COMMISSION'S PROPOSED RULE (REDLINE TO ABA MODEL RULE 3.3)

Rule 3.3 [5-200] Candor Toward ~~the~~The Tribunal*

(a) A lawyer shall not ~~knowingly~~:

(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 ~~an adjudicative~~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~~, including, if necessary, disclosure to the tribunal~~ 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~~, and apply even if compliance requires disclosure of information otherwise protected by rule 1.6~~ 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 ~~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 ~~1.0~~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. 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 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 ~~knows to be false~~.

~~*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 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.~~

[~~6~~4] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. If a lawyer knows* that ~~the~~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~~. 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 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

[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.

~~[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.~~

~~[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false 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~~6] 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. 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.

~~*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

[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.

~~[15] Normally, a lawyer's compliance with the duty of candor imposed by this rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this rule or as otherwise permitted by rule 1.6.~~

VII. RULE HISTORY

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 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.

Former rule 7-105 was amended in 1989 as part of a comprehensive study and revision of the Rules of Professional Conduct. 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 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.

VIII. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016**
  (In response to 90-day public comment circulation):

1. "Knowing" standard is contrary to established standards of conduct; contrary to the State Bar Act, the current rules and case law interpreting those authorities; misleading to attorneys as to their professional obligations and; creates confusion in disciplinary law making enforcement more difficult.

   Commission Response: The Commission disagrees. The definition of "knowingly" in Rule 1.0.1(f) makes clear that knowledge can be inferred from the circumstances. With this definition, the Commission believes that the "knowingly" standard is appropriately used in this Rule, which addresses a lawyers statements and the submission or presentation of evidence to a court.

2. OCTC is concerned that the proposed rule is far more limited than current rule 5-200, which prohibits an attorney from seeking to mislead a judge, judicial officer, or jury by an artifice or false statement of factor law. The proposed rule would only prohibit a false statement of fact or law. (See *In the Matter of Parish* (Review Dept.) 5 Cal. State Bar Ct. Rptr. 370, 376 [interpreting Canon 5 of the Judicial Code of Ethics to apply only to factual misrepresentations, but not to statements that may be misleading or true statements that might imply or suggest, through innuendo, false conclusions; Review Department concluded that on its face the language of Canon 5 only reached factual

misrepresentations].)[2] California has long held that an attorney is required to refrain from misleading and deceptive acts without qualification. (*Rodgers v. State Bar (*1989) 48 Cal.3d 300, 315.) No distinction is made among concealment, half-truth, and false statement of fact. (*In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 174.) Further, express and implied representations, as well as material omissions, support finding a statement misleading. (See e.g. *In re Naney* (1990) 51 Cal.3d 186 ["Both express and implied representations of ability to practice are prohibited"]; *In the Matter of Kirwin* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 630, 636-637; *Franklin v. State Bar* (1986) 41 Cal.3d 700, 709.)

Commission Response: The Commission disagrees with the commenter's assessment of current rule 5-200, which is simply a restatement of Bus. & Prof. C. § 6068(d). As stated in the Commission's Report and Recommendation on proposed Rule 3.3, it 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." The more specific approach should provide greater public protection and promote respect for the administration of justice.

3. OCTC is concerned that the proposed rules do not 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 p. 123); or (3) violates discovery orders of a court. OCTC recognizes that arguably they could be included in proposed Rule 3.4, but they are not specifically there, either. They should be included somewhere.

   Commission Response: The Commission believes that (1) is covered by this Rule; (2) is addressed in proposed Rule 3.4(g); and (3) is addressed in Rule 3.4(f).

4. OCTC supports the Comments to this rule.

   Commission Response: No response required.

[2] Canon 5B(1)(b) prohibits a judge or candidate for judicial office from making "knowing misrepresentations, including false or misleading statements, during an election campaign because doing so would violate Canons 1 and 2A, and may violate other canons." There is a proposal to amend this Canon to include not only false statements of fact, but misleading statements as well.

- **Gregory Dresser, Office of Chief Trial Counsel, 1/9/2017 (In response to 45-day public comment circulation):**

  For the 45-day public comment version of the rule, OCTC re-submitted substantially the same comments as on the 90-day public comment version of the rule and the Commission's responses to OCTC remained the same.

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

IX. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, fourteen public comments were received. Four comments agreed with the proposed Rule, five comments disagreed, and five comments agreed only if modified. During the 45-day public comment period, five public comments were received. Two comments disagreed with the proposed Rule and three comments agreed only if modified. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

One speaker appeared at the public hearing whose testimony was not in support of the proposed rule. That testimony and the Commission's response is also in the public comment synopsis table.

X. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

1. 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 §§ 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.

2. 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 3-100(A) provides, "A member shall not reveal information protected from disclosure by Business and Professions Code § 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]).[3] 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

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[3] 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."

court's question in the negative, she would violate her duty of candor to the court, per rule 5-200 and § 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 § 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 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. Johnso*n (1998) 62 Cal.App.4th 608 [same]. Compare Model Rule 3.3, Cmt. [7].)

3. 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.4th 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 §§ 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.)

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

In *Datig v. Dove Books, Inc*. (1999) 73 Cal.App.4th 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 §§ 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 field, 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.)

B. ABA Model Rule Adoptions

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 December 1, 2016, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_3.authcheckdam.pdf [Last visited 2/7/2017]

- Twenty-one jurisdictions have adopted Model Rule 3.3 verbatim.[4] Sixteen jurisdictions have adopted a slightly modified version of Model Rule 3.3.[5] Fourteen

[4] 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.

jurisdictions have adopted a version of the rule that is substantially different from Model Rule 3.3.[6]

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 (b)

   - 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 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

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[5] 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.

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

negligence standard is mixed. (Compare *In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 173-174 [respondent knowingly made false statements to courts in Texas and California 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 *In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 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.

3. Recommend adoption of paragraph (a)(1), which is identical to MR 3.3(a)(1) and the first Commission's 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.

4. Recommend a departure from the Model Rule by adopting 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 Model Rule 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 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, § 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 Commission'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.

5. In paragraph (b), 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.

6. Recommend adoption of paragraph (c), which delimits the duration of the lawyer's duties as provided in paragraphs (a) and (b) to the conclusion of the proceeding or representation, whichever comes first.

   - Pros: The duration of the duty should extend to the conclusion of the proceeding *only if* the lawyer-client relationship continues to that point. Otherwise, the duty should end upon termination of the relationship for the following reasons:

     (1) the lawyer lacks standing after termination of the lawyer's employment. 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; and

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

- Cons: 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 Model Rule 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 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), (a)(3) and (b) to the extent permitted under Bus. & Prof. Code § 6068(e) and Rule 1.6;

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

  (5) there is no known state variation that limits Model Rule 3.3(c) as recommended by the Commission.

7. In paragraph (d), recommend adoption of the concept in Model Rule 3.3(d) but modify the provision for clarity.

   - Pros: The recommendation to adopt in paragraph (e), a departure from Model Rule 3.3(d), is necessary to accommodate unique features of California ex parte proceedings. Model Rule 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.[7]) In federal court, ex parte

[7] California Rules of Court, rule 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.

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 the lawyer if it is anticipated that the opposing lawyer will be present.

- Cons: None identified.

8. Recommend moving the concept in rule 5-200(E) into proposed Rule 3.4

   - 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).)

9. Recommend adoption of Comment [1] regarding the 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.

10. Recommend adoption of Comment [2], which incorporates current rule 5-200(D)

    - Pros: Comment [2] has been included to address concerns expressed to the first Commission about the deletion of the language in current rule 5-200(C) and (D). The Comment incorporates nearly verbatim the language in current rule 5-200(D). The Commission has recommended that the language of 5-200(C) be added to proposed paragraph (a)(2). See paragraph 4, above.

    - Cons: None identified.

11. 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.

12. 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 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.

13. Recommend adoption of Comment [5], which addresses "reasonable remedial measures" under paragraphs (a)(3) and (b)

    - 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.

14. Recommend adoption of Comment [6] regarding paragraph (c) 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.

    - Cons: The provisions in the Comment should be in the black letter.

15. Recommend adoption of Comment [7] that notes paragraph (d) does not prohibit ex parte communications not otherwise prohibited by law or the tribunal

    - Pros: The Comment provides interpretative guidance regarding the general prohibition on ex parte communications with a tribunal.

    - Cons: If this Comment is intended to except certain conduct from the Rule, it should be in the black letter.

16. Recommend adoption of Comment [8] 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.

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

17. Recommend adoption of Comment [9], which cites to other authority under which lawyers may be disciplined for conduct that violates the proposed Rule

    - Pros: The Comment provides cross-references to Business and Professions Code §§ 6068(d) and 6106. These are broad statutes under which lawyers are commonly charged in the discipline system for conduct that would also violate this Rule. Alerting lawyers to these statutes should help promote compliance with the Rule.

    - Cons: The statutory sections exist and all lawyers are assumed to be aware of them. This Comment is superfluous.

B. Concepts Rejected (Pros and Cons):

1. Recommend adoption of a specific intent standard – "seek to mislead" – in paragraph (a)(2). This would have rejected the knowledge standard that applies to Model Rule 3.3(a)(2).

    - Pros: Such a proposed provision would more accurately reflect the current law in California 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* (1988) 46 Cal.3d 1218, 1225 [finding violation of rule 7-107 because petitioner "committed acts with *intent to mislead* . . . the court by misrepresenting 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* (1945) 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)(2) 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 A "seek to mislead" standard would mitigate against the risk that a lawyer will be disciplined for engaging in protected conduct while acting as zealous advocates for the lawyer's clients.

- Cons: 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 would not be provided by the proposed provision. Some courts correctly describe that the duty to disclose adverse legal authority of the controlling jurisdiction known to the lawyer that is not disclosed by opposing court exists 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* (2007) 155 Cal.App.4th 65, 82 fn. 9.) Requiring an "intent to mislead" standard 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 on the subject were decided under §6068(d), which does not have a knowledge requirement. The proposed provision would overlap with paragraph (a)(1) and fails to provide adequate public protection.

2. Recommend adoption of a provision that would expressly bar plagiarism in briefs or other submissions to a court

   - 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 Business and Professions Code §

6106.[8] Moreover, there is no evidence that adopting such a provision would promote a national standard as the Commission is unaware of any jurisdiction that has expressly addressed plagiarism in its Rules.

This section identifies concepts the Commission considered before the Rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the Rule, can be found in the Public Comment Synopsis Tables.

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.

2. 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.

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

[8] 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

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.

XII. DISSENT/MINORITY STATEMENTS SUBMITTED BY COMMISSION MEMBERS

Mr. Cardona, Mr. Chou, and Judge Stout submitted a written dissent. See attached for the full text of the dissent and the Commission's response to the dissent.

XIII. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of Rule 3.3 [5-200] in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 3.3 [5-200] in the form attached to this Report and Recommendation.

Commission Member Dissent, Submitted by Mark Tuft, on the Recommended Adoption of Proposed Rule 3.3

Limiting the duties stated in paragraphs (a) and (b) of the conclusion to the proceeding or the representation "whichever occurs first" is a significant departure from the rule in every other jurisdiction (with the possible exception of Texas) and if adopted would undermine the purpose of the rule and the goal of public protection. A lawyer who has knowingly made a false statement to the tribunal or who knows that the client or another person has committed a fraud on the court can simply withdraw or be discharged by the client to avoid having to take any remedial measures that may be reasonable available. A lawyer who has been terminated or has withdrawn does not lack standing to correct the lawyer's false statement of material law or fact under paragraph (a); nor would the lawyer interfere with the relationship between the former client and the client's new lawyer by advising the new lawyer of the relevant circumstances including the existence of criminal or fraudulent conduct in the proceeding and urging that corrective action be taken. Paragraph (c) adopted in other jurisdictions does not required a discharged or withdrawn lawyer to monitor the case until its conclusion. The Commission's proposed rule requires that the lawyer take reasonable remedial measures if the lawyer "knows" of the fraud on the tribunal and then only to the extent permitted under Business and Professions Code §6068(e) and Rule 1.6. There are no state variations limiting paragraph 3.3(c) as proposed and, if adopted, paragraph (c) would uniquely allow lawyers and their clients a means of circumventing the provisions of paragraphs (a) and (b).

Commission Members Dissent, Submitted by Danny Chou, George Cardona & Judge Dean Stout, on the Recommended Adoption of Proposed Rule 3.3

We believe that some of the duties stated in paragraphs (a) and (b) should continue until the conclusion of the proceeding even if the representation has been terminated before then. For example, a lawyer should not be able to shirk his/her duty to take reasonable remedial measure to correct a false statement made to the tribunal by withdrawing from the representation. But ABA Model Rule 3.3(c) – which extends *all* of the duties stated in paragraphs (a) and (b) until the conclusion of the proceeding and has been adopted by other jurisdictions – may, in some circumstances, place an undue burden on lawyers who no longer represent a party to the proceeding. A more nuanced approach that specifies which particular duties stated in paragraphs (a) and (b) – such as the duty stated in paragraph (a)(1) – continue until the conclusion of the proceeding should be adopted.

Commission's Response to Dissents Submitted by Mark Tuft and Danny Chou, George Cardona & Judge Dean Stout on the Recommended Adoption of Proposed Rule 3.3(c)

The Commission does not believe that the duties under paragraphs (a) and (b) should be extended to the conclusion of the proceeding. From the former client's standpoint,

doing so might interfere with the relationship with replacement counsel and with remedial measures (or planned remedial measures) unknown to the client's former lawyer. From the former lawyer's standpoint, it would impose an unfair and potentially burdensome obligation to monitor the proceedings after the representation of the client has ended. The variety of circumstances in which paragraphs (a) and (b) could come into play does not warrant imposing a continuous obligation on a lawyer to take corrective action in a proceeding in which a lawyer no longer is involved and about which, due to the privilege that applies to communications between the former client and replacement counsel, the former lawyer can have only imperfect and potentially misleading information. Moreover, a lawyer would be compelled to correct a false statement of fact or law or adverse legal authority previously cited to the court even if such a "mea culpa" would have no significance to the parties or to the court. The lawyer's actions may also be ill-advised and contrary to the advice given by the client's current lawyer. The Commission further believes that limiting the obligation to take corrective action to the conclusion of the proceeding or the representation, whichever occurs first, is a practical and workable time limit and consistent with the Commission's Charter to promulgate rules that are clear and enforceable.

The Commission disagrees with Mr. Tuft's interpretation of ABA Model Rule 3.3. That dissent suggests that the ABA Rule extends the remedial obligations of the Rule to the conclusion of the proceedings even in situations where the lawyer no longer represents the client. ABA Rule 3.3 merely states that the duties continue until the conclusion of the proceeding, but it is silent on whether these duties apply even after the lawyer has withdrawn or been terminated. ABA Rule 3.3 is therefore ambiguous on the issue, and no doubt this uncertainty over time will lead to different interpretations in the jurisdictions that have adopted ABA Rule 3.3(c).[1] Fairly read, ABA Rule 3.3 is premised on situations where the lawyer still represents the client and the lawyer has not withdrawn or been terminated. Therefore, the Commission's approach to draw the line at the conclusion of the representation is not inconsistent with the ABA Rule and in fact eliminates the ambiguity in the ABA approach.

The dissent from Mr. Chou, et al. recommends a more nuanced approach, which would specify what specific duties under paragraphs (a) and (b) continue to the conclusion of the proceeding. The problem with this approach is that identifying which paragraph (a) and (b) duties should continue after the lawyer's termination or withdrawal is necessarily fact-specific, depends on the particular circumstances of breach of candor, and the current status of the proceeding. The Commission believes that a more nuanced approach would defeat the objective of having a bright-line Rule. The Chou dissent also does not explain how such a Rule would read or offer an alternative. It does not explain

[1] However, there is textual support for the conclusion that the ABA Rule applies only while the lawyer-client relationship continues because it refers to ABA Rule 1.6, which states the duty of confidentiality to current clients, but not to Rule 1.9 which expresses a lawyer's duties to former clients. Had the ABA Rule drafters intended that ABA Rule 3.3 would apply after the lawyer-client relationship ends, Rule 3.3(c) would have referred to Rule 1.9 as well. That is, the last clause of Rule 3.3(c) would been drafted to say, for example: "… even if compliance requires disclosure of information otherwise protected by Rule 1.6 ***or Rule 1.9***, as applicable."

what aspects of paragraphs (b) and (c) should apply after termination and to the conclusion of the proceeding.

A Rule that attempts to encompass every ill sets an aspirational goal. The results necessarily will be indefinite, subject to varying interpretations, and deficient in providing guidance to lawyers in practice and to those who enforce the Rules.