

1 **Rule 3.3. Candor toward the Tribunal.**

2 *Effective: 5/1/2019*

3 (a) A lawyer ~~must~~shall not knowingly or recklessly:

4 ~~(a)~~(1) make a false statement of fact or law to a tribunal or fail to correct a false
5 statement of material fact or law previously made to the tribunal by the lawyer; or

6 ~~(a)~~(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction
7 directly adverse to the position of the client and not disclosed by opposing counsel.

8 (b) A lawyer ~~must~~shall not offer evidence that the lawyer knows to be false. If a lawyer,
9 the lawyer's client, or a witness called by the lawyer has offered material evidence and
10 the lawyer comes to know of its falsity, the lawyer ~~must~~shall take reasonable remedial
11 measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to
12 offer evidence, other than the testimony of a defendant in a criminal matter, that the
13 lawyer reasonably believes is false.

14 (c) A lawyer who represents a client in an adjudicative proceeding and who knows that
15 a person intends to engage, is engaging, or has engaged in criminal or fraudulent
16 conduct related to the proceeding ~~must~~shall take reasonable remedial measures,
17 including, if necessary, disclosure to the tribunal.

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

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

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25 **Comment**

26 [1] This Rule governs the conduct of a lawyer who is representing a client in the
27 proceedings of a tribunal. See Rule 1.0(q) for the definition of "tribunal." It also applies
28 when the lawyer is representing a client in an ancillary proceeding conducted pursuant
29 to the tribunal's adjudicative authority, such as a deposition. Thus, for example,
30 paragraph ~~(b)(a)(3)~~ requires a lawyer to take reasonable remedial measures if the
31 lawyer comes to know that a client who is testifying in a deposition has offered
32 evidence that is false or is reckless with respect to its truth.

33 [2] This Rule sets forth the special duties of lawyers as officers of the court to avoid
34 conduct that undermines the integrity of the adjudicative process. A lawyer acting as an
35 advocate in an adjudicative proceeding has an obligation to present the client's case
36 with persuasive force. Performance of that duty while maintaining confidences of the
37 client, however, is qualified by the advocate's duty of candor to the tribunal.
38 Consequently, although a lawyer in an adversary proceeding is not required to present
39 an impartial exposition of the law or to vouch for the evidence submitted in a cause, the
40 lawyer must not allow the tribunal to be misled by false statements of law or fact or
41 evidence that the lawyer knows to be false.

42 **Representations by a Lawyer**

43 [3] The Utah rule is different from the ABA Model Rule. In *In re Larsen*, 2016 UT 26, 379
44 P.3d 1209, the Utah Supreme Court held that the former rule's plain language required
45 finding actual knowledge before an attorney could be found to have violated the rule,
46 and that language in former Comment [3] permitted finding a violation on something
47 less than actual knowledge. The amendments to Rule 3.3(a), and to Comments [2], [4],
48 [5] and [9] permit finding a violation of the rule if an attorney recklessly, as defined in
49 Rule 1.0(n), makes a false statement of law or fact or fails to disclose controlling
50 authority.

51 **Legal Argument**

52 [4] Legal argument based on a knowingly or recklessly false representation of law
53 constitutes dishonesty toward the tribunal. A lawyer is not required to make a

54 disinterested exposition of the law, but must recognize the existence of pertinent legal
55 authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to
56 disclose directly adverse authority in the controlling jurisdiction that has not been
57 disclosed by the opposing party. The underlying concept is that legal argument is a
58 discussion seeking to determine the legal premises properly applicable to the case.

59 **Offering Evidence**

60 [5] Paragraph(b) requires that the lawyer refuse to offer evidence that the lawyer knows
61 to be false, regardless of the client's wishes. This duty is premised on the lawyer's
62 obligation as an officer of the court to prevent the trier of fact from being misled by false
63 evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the
64 purpose of establishing its falsity.

65 [6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to
66 introduce false evidence, the lawyer should seek to persuade the client that the evidence
67 should not be offered. If the persuasion is ineffective and the lawyer continues to
68 represent the client, the lawyer must refuse to offer the false evidence. If only a portion
69 of a witness's testimony will be false, the lawyer may call the witness to testify but may
70 not elicit or otherwise permit the witness to present the testimony that the lawyer
71 knows is false.

72 [7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense
73 counsel in criminal cases. In some jurisdictions, however, courts have required counsel
74 to present the accused as a witness or to give a narrative statement if the accused so
75 desires, even if counsel knows that the testimony or statement will be false. The
76 obligation of the advocate under the Rules of Professional Conduct is subordinate to
77 such requirements. See also Comment [9].

78 [8] The prohibition against offering false evidence only applies if the lawyer knows that
79 the evidence is false. A lawyer's reasonable belief that evidence is false does not
80 preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false,

81 however, can be inferred from the circumstances. See Rule 1.0(g). Thus, although a
82 lawyer should resolve doubts about the veracity of testimony or other evidence in favor
83 of the client, the lawyer cannot ignore an obvious falsehood.

84 [9] Although paragraph (b) only prohibits a lawyer from offering evidence the lawyer
85 knows to be false, it permits the lawyer to refuse to offer testimony or other proof that
86 the lawyer reasonably believes is false. Offering such proof may reflect adversely on the
87 lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's
88 effectiveness as an advocate. Because of the special protections historically provided
89 criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the
90 testimony of such a client where the lawyer reasonably believes but does not know that
91 the testimony will be false. Unless the lawyer knows the testimony will be false, the
92 lawyer must honor the client's decision to testify. See also Comment [7].

93 **Remedial Measures**

94 [10] Having offered evidence in the belief that it was true, a lawyer may subsequently
95 come to know that the evidence is false. Or, a lawyer may be surprised when the
96 lawyer's client, or another witness called by the lawyer, offers testimony the lawyer
97 knows to be false, either during the lawyer's direct examination or in response to cross-
98 examination by the opposing lawyer. In such situations or if the lawyer knows of the
99 falsity of testimony elicited from the client during a deposition, the lawyer must take
100 reasonable remedial measures. In such situations, the advocate's proper course is to
101 remonstrate with the client confidentially, advise the client of the lawyer's duty of
102 candor to the tribunal and seek the client's cooperation with respect to the withdrawal
103 or correction of the false statements or evidence. If that fails, the advocate must take
104 further remedial action. If withdrawal from the representation is not permitted or will
105 not undo the effect of the false evidence, the advocate must make such disclosure to the
106 tribunal as is reasonably necessary to remedy the situation, even if doing so requires the
107 lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the

108 tribunal then to determine what should be done-making a statement about the matter to
109 the trier of fact, ordering a mistrial or perhaps nothing.

110 [11] The disclosure of a client's false testimony can result in grave consequences to the
111 client, including not only a sense of betrayal but also loss of the case and perhaps a
112 prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the
113 court, thereby subverting the truth-finding process which the adversary system is
114 designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood
115 that the lawyer will act upon the duty to disclose the existence of false evidence, the
116 client can simply reject the lawyer's advice to reveal the false evidence and insist that
117 the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a
118 party to fraud on the court.

119 **Preserving Integrity of Adjudicative Process**

120 [12] Lawyers have a special obligation to protect a tribunal against criminal or
121 fraudulent conduct that undermines the integrity of the adjudicative process, such as
122 bribing, intimidating or otherwise unlawfully communicating with a witness, juror,
123 court official or other participant in the proceeding, unlawfully destroying or
124 concealing documents or other evidence or failing to disclose information to the
125 tribunal when required by law to do so. Thus, paragraph (c)(~~b~~) requires a lawyer to take
126 reasonable remedial measures, including disclosure if necessary, whenever the lawyer
127 knows that a person, including the lawyer's client, intends to engage, is engaging or has
128 engaged in criminal or fraudulent conduct related to the proceeding.

129 **Duration of Obligation**

130 [13] A practical time limit on the obligation to rectify false evidence or false statements
131 of law and fact has to be established. The conclusion of the proceeding is a reasonably
132 definite point for the termination of the obligation. A proceeding has concluded within
133 the meaning of this Rule when a final judgment in the proceeding has been affirmed on
134 appeal or the time for review has passed.

135 Ex Parte Proceedings

136 [14] Ordinarily, an advocate has the limited responsibility of presenting one side of the
137 matters that a tribunal should consider in reaching a decision; the conflicting position is
138 expected to be presented by the opposing party. However, in any ex parte proceeding,
139 such as an application for a temporary restraining order, there is no balance of
140 presentation by opposing advocates. The object of an ex parte proceeding is
141 nevertheless to yield a substantially just result. The judge has an affirmative
142 responsibility to accord the absent party just consideration. The lawyer for the
143 represented party has the correlative duty to make disclosures of material facts known
144 to the lawyer and that the lawyer reasonably believes are necessary to an informed
145 decision.

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