

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

2 (a) A lawyer shall not knowingly or recklessly:

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

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

7 ~~(a)(3)(b)~~ (b) A lawyer shall not offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's
8 client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of
9 its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the
10 tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal
11 matter, that the lawyer reasonably believes is false.

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

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

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

19 Comment

20 [1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal.
21 See Rule 1.0(h) for the definition of "tribunal." It also applies when the lawyer is representing a client in
22 an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition.
23 Thus, for example, paragraph ~~(a)(3)(b)~~ requires a lawyer to take reasonable remedial measures if the
24 lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

25 [2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that
26 undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative
27 proceeding has an obligation to present the client's case with persuasive force. Performance of that duty
28 while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the
29 tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an
30 impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not
31 allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be
32 false or is reckless with respect to its truth.

33 Representations by a Lawyer

34 ~~[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not~~
35 ~~required to have personal knowledge of matters asserted therein, for litigation documents ordinarily~~
36 ~~present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer.~~
37 ~~Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an~~
38 ~~affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows~~
39 ~~the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are~~
40 ~~circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation.~~
41 ~~The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing~~
42 ~~a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See~~
43 ~~also the Comment to Rule 8.4(b).~~

44 [3] The Utah rule is different from the ABA Model Rule. In *In re Larsen*, 2016 UT 26, 379 P.3d 1209, the
45 Utah Supreme Court held that the former rule's plain language required finding actual knowledge before
46 an attorney could be found to have violated the rule, and that language in former Comment [3] permitted

47 | finding a violation on something less than actual knowledge. The amendments to Rule 3.3(a) and to
48 | Comments [2], [4], [5], and [9], permit finding a violation of the rule if an attorney recklessly, as defined in
49 | Rule 1.0(l), makes a false statement of law or fact or fails to disclose controlling authority. Comment [3] is
50 | stricken because the Utah Supreme Court disavowed it in *Larsen* and because it conflicts with the
51 | amendments to 3.3(a).

52 | Legal Argument

53 | [4] Legal argument based on a knowingly or recklessly false representation of law constitutes dishonesty
54 | toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must
55 | recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an
56 | advocate has a duty to 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 discussion seeking to
58 | determine the legal premises properly applicable to the case.

59 | Offering Evidence

60 | [5] Paragraph ~~(a)(3)~~(b) requires that the lawyer refuse to offer evidence that the lawyer knows to be false,
61 | regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court
62 | to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the
63 | lawyer offers the evidence for the purpose of establishing its falsity.

64 | [6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false
65 | evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the
66 | persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer
67 | the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness
68 | to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows
69 | is false.

70 | [7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal
71 | cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness
72 | or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or
73 | statement will be false. The obligation of the advocate under the Rules of Professional Conduct is
74 | subordinate to such requirements. See also Comment [9].

75 | [8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is
76 | false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of
77 | fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See
78 | Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other
79 | evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

80 | [9] Although paragraph ~~(a)(3)~~(b) only prohibits a lawyer from offering evidence the lawyer knows to be
81 | false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes
82 | is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of
83 | evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections
84 | historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer
85 | the testimony of such a client where the lawyer reasonably believes but does not know that the testimony
86 | will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's
87 | decision to testify. See also Comment [7].

88 | Remedial Measures

89 | [10] Having offered evidence in the belief that it was true, a lawyer may subsequently come to know that
90 | the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by
91 | the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or
92 | in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the
93 | falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial
94 | measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially,

95 advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with
96 respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must
97 take further remedial action. If withdrawal from the representation is not permitted or will not undo the
98 effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably
99 necessary to remedy the situation, even if doing so requires the lawyer to reveal information that
100 otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done—
101 making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

102 [11] The disclosure of a client's false testimony can result in grave consequences to the client, including
103 not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the
104 alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process
105 which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly
106 understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client
107 can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent.
108 Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

109 Preserving Integrity of Adjudicative Process

110 [12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that
111 undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully
112 communicating with a witness, juror, court official or other participant in the proceeding, unlawfully
113 destroying or concealing documents or other evidence or failing to disclose information to the tribunal
114 when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial
115 measures, including disclosure if necessary, whenever the lawyer knows that a person, including the
116 lawyer's client, intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related
117 to the proceeding.

118 Duration of Obligation

119 [13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has
120 to be established. The conclusion of the proceeding is a reasonably definite point for the termination of
121 the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the
122 proceeding has been affirmed on appeal or the time for review has passed.

123 Ex Parte Proceedings

124 [14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a
125 tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the
126 opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining
127 order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is
128 nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the
129 absent party just consideration. The lawyer for the represented party has the correlative duty to make
130 disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary
131 to an informed decision.

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