

Rule 3.3: Candor Toward the Tribunal

1. Current Kentucky Rule with Official Comments:

SCR 3.130(3.3) Candor toward the tribunal

(a) A lawyer shall not knowingly:

(1) Make a false statement of material fact or law to a tribunal;

(2) Fail to disclose a material fact to the tribunal when disclosure is necessary to avoid a fraud being perpetrated upon the tribunal;

(3) Offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

(e) The obligation of the advocate under these rules is subordinate to such constitutional requirements as may be announced by the courts.

Supreme Court Commentary

[1] The advocate's task is to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client is qualified by the advocate's duty of candor to the tribunal. However, an advocate does not vouch for the evidence submitted in a cause; the tribunal is responsible for assessing its probative value.

Representations by a Lawyer

[2] 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).(sic)

Misleading Legal Argument

[3] 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.

False Evidence

[4] When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes.

[5] When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures.

[6] Except in the defense of a criminal accused, the rule generally recognized is that, if necessary to rectify the situation, an advocate must disclose the existence of the client's deception to the court or to the other party. Such a disclosure 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.

Perjury by a Criminal Defendant

[7] Whether an advocate for a criminally accused has the same duty of disclosure has been intensely debated. While it is agreed that the lawyer should seek to persuade the client to refrain from perjurious testimony, there has been dispute concerning the lawyer's duty when that persuasion fails. If the confrontation with the client occurs before trial, the lawyer ordinarily can withdraw. Withdrawal before trial may not be possible, however, either because trial is imminent, or because the confrontation with the client does not take place until the trial itself, or because no other counsel is available.

[8] The most difficult situation, therefore, arises in a criminal case where the accused insists on testifying when the lawyer knows that the testimony is perjurious. The lawyer's effort to rectify the situation can increase the likelihood of the client's being convicted as well as opening the possibility of a prosecution for perjury. On the other hand, if the lawyer does not exercise control over the proof, the lawyer participates, although in a merely passive way, in deception of the court.

[9] Three resolutions of this dilemma have been proposed. One is to permit the accused to testify by a narrative without guidance through the lawyer's questioning. This compromises both contending principles; it exempts the lawyer from the duty to disclose false evidence but subjects the client to an implicit disclosure of information imparted to counsel. Another suggested resolution, of relatively recent origin, is that the advocate be entirely excused from the duty to reveal perjury if the perjury is that of the client. This is a coherent solution but makes the advocate a knowing instrument of perjury.

[10] The other resolution of the dilemma is that the lawyer must reveal the client's perjury if necessary to rectify the situation. A criminal accused has a right to the assistance of an advocate, a right to testify and a right of confidential communication with counsel. However, an accused should not have a right to assistance of counsel in committing perjury. Furthermore, an advocate has an obligation, not only in professional ethics but under the law as well, to avoid implication in the commission of perjury or other falsification of evidence. See Rule 1.2(d).

Remedial Measures

[11] If perjured testimony or false evidence has been offered, the advocate's proper course ordinarily is to remonstrate with the client confidentially. If that fails, the advocate should seek to withdraw if that will remedy the situation. If withdrawal will not remedy the situation or is impossible, the advocate should make disclosure to the court. It is for the court then to determine what should be done--making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing. If the false testimony was that of the client, the client may controvert the lawyer's version of their communication when the lawyer discloses the situation to the court. If there is an issue whether the client has committed perjury, the lawyer cannot represent the client in resolution of the issue,

and a mistrial may be unavoidable. An unscrupulous client might in this way attempt to produce a series of mistrials and thus escape prosecution. However, a second such encounter could be construed as a deliberate abuse of the right to counsel and as such a waiver of the right to further representation.

Constitutional Requirements

[12] The general rule--that an advocate must disclose the existence of perjury with respect to a material fact, even that of a client--applies to defense counsel in criminal cases, as well as in other instances. However, the definition of the lawyer's ethical duty in such a situation may be qualified by constitutional provisions for due process and the right to counsel in criminal cases. In some jurisdictions these provisions have been construed to require that counsel present an accused as a witness if the accused wishes to testify, even if counsel knows the testimony will be false. The obligation of the advocate under these Rules is subordinate to such a constitutional requirement.

Duration of Obligation

[13] A practical time limit on the obligation to rectify the presentation of false evidence has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation.

Refusing to Offer Proof Believed to be False

[14] Generally speaking, a lawyer has authority to refuse to offer testimony or other proof that the lawyer believes is untrustworthy. 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. In criminal cases, however, a lawyer may, in some jurisdictions, be denied this authority by constitutional requirements governing the right to counsel.

Ex Parte Proceedings

[15] 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 an 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.

2. Proposed Kentucky Rule with Official Comments:

SCR 3.130(3.3) Candor toward the tribunal

(a) A lawyer shall not knowingly:

(1) ~~Make~~ make a false statement of material 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 a material fact to the tribunal when disclosure is necessary to avoid a fraud being perpetrated upon the tribunal;~~

(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

~~(4)~~ (3) Offer 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. 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 proceeding 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.

~~(b)~~ (c) The duties stated in ~~paragraph~~ 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.

~~(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.~~

(d) In an ex parte proceeding, 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.

~~(e) The obligation of the advocate under these rules is subordinate to such constitutional requirements as may be announced by the courts.~~

Supreme Court Commentary Comment

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(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.

~~[1] [2] The advocate's task is~~ 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. However ~~Consequently, an advocate does~~ 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 is responsible for assessing its probative value to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

Representations by a Lawyer

[2] [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).

Misleading Legal Argument

~~[3]~~ [4] 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.

False Offering Evidence

~~[4]~~ When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes.

~~[5]~~ When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures.

[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] If a lawyer knows that the 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 must refuse to offer the false evidence. If only a portion of a witness's 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.

[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.

Refusing to Offer Proof Believed to Be False

[14] [9] Generally speaking, Although paragraph (a)(3) only prohibits a lawyer has authority 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 untrustworthy 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. In criminal cases, however, a lawyer may, in some jurisdictions, be denied this authority by constitutional requirements governing the right to counsel. 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].

~~Perjury by a Criminal Defendant~~

~~[7] Whether an advocate for a criminally accused has the same duty of disclosure has been intensely debated. While it is agreed that the lawyer should seek to persuade the client to refrain from perjurious testimony, there has been dispute concerning the lawyer's duty when that persuasion fails. If the confrontation with the client occurs before trial, the lawyer ordinarily can withdraw. Withdrawal before trial may not be possible, however, either because trial is imminent, or because the confrontation with the client does not take place until the trial itself, or because no other counsel is available.~~

~~[8] The most difficult situation, therefore, arises in a criminal case where the accused insists on testifying when the lawyer knows that the testimony is perjurious. The lawyer's effort to rectify the situation can increase the likelihood of the client's being convicted as well as opening the possibility of a prosecution for perjury. On the other hand, if the lawyer does not exercise control over the proof, the lawyer participates, although in a merely passive way, in deception of the court.~~

~~[9] Three resolutions of this dilemma have been proposed. One is to permit the accused to testify by a narrative without guidance through the lawyer's questioning. This compromises both contending principles; it exempts the lawyer from the duty to disclose false evidence but subjects the client to an implicit disclosure of information imparted to counsel. Another suggested resolution, of relatively recent origin, is that the advocate be entirely excused from the duty to reveal perjury if the perjury is that of the client. This is a coherent solution but makes the advocate a knowing instrument of perjury.~~

~~[10] The other resolution of the dilemma is that the lawyer must reveal the client's perjury if necessary to rectify the situation. A criminal accused has a right to the assistance of an advocate, a right to testify and a right of confidential communication with counsel. However, an accused should not have a right to assistance of counsel in committing perjury. Furthermore, an advocate has an obligation, not only in professional~~

~~ethics but under the law as well, to avoid implication in the commission of perjury or other falsification of evidence. See Rule 1.2(d).~~

Remedial Measures

~~[11] [10] If perjured testimony or false~~ Having offered material evidence has been offered 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 ordinarily 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 should seek to withdraw if that will remedy the situation must take further remedial action. If withdrawal from the representation is not permitted or will not remedy the situation or is impossible undo the effect of the false evidence, the advocate should must make such disclosure to the court 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 court 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. If the false testimony was that of the client, the client may controvert the lawyer's version of their communication when the lawyer discloses the situation to the court. If there is an issue whether the client has committed perjury, the lawyer cannot represent the client in resolution of the issue, and a mistrial may be unavoidable. An unscrupulous client might in this way attempt to produce a series of mistrials and thus escape prosecution. However, a second such encounter could be construed as a deliberate abuse of the right to counsel and as such a waiver of the right to further representation.

~~[6] [11] Except in the defense of a criminal accused, the rule generally recognized is that, if necessary to rectify the situation, an advocate must disclose the~~

~~existence of the client's deception to the court or to the other party. Such a~~ 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.

Constitutional Requirements

~~[12] The general rule that an advocate must reveal the existence of perjury with respect to a material fact, even that of a client -- applies to defense counsel in criminal cases, as well as in other instances. However, the definition of the lawyer's ethical duty in such a situation may be qualified by constitutional provisions for due process and the right to counsel in criminal cases. In some jurisdictions these provisions have been construed to require that counsel present an accused as a witness if the accused wishes to testify, even if counsel knows the testimony will be false. The obligation of the advocate under these Rules is subordinate to such a constitutional requirement.~~

Duration of Obligation

[13] A practical time limit on the obligation to rectify ~~the presentation of~~ 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.

Ex Parte Proceedings

~~[15]~~ [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

[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.

3. Discussion and Explanation of Recommendation:

a. Comparison of proposed Kentucky Rule with its counterpart ABA Model Rule.

(1) The proposed KRPC 3.3 Candor toward the tribunal adopts all MR 3.3 changes. In so doing the Committee's recommendation results in three major changes to the current KRPC 3.3:

(a) It deletes current paragraph (a)(2). This subject is now covered in new paragraph (b) "A lawyer who represents a client in an adjudicative proceeding 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." See the ABA Reporter's Explanation of Changes below for the reasons for this change.

(b) It adds a new paragraph (a)(2) that imposes the requirement for lawyers 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. This requirement was recommended to the Supreme Court for adoption in 1990, but was not approved by the Court. The Committee believes this requirement sets the appropriate standard for ethical practice before Kentucky tribunals. It is consistent with the rule in the great majority of other jurisdictions and will place Kentucky's Rule within the mainstream of modern professional responsibility policy.

(c) It deletes paragraph (e) of the Rule that provides: "The obligation of the advocate under these Rules is subordinate to such constitutional requirements as may be announced by the courts." This paragraph is considered unnecessary because the Rules of Professional Conduct are always subordinate to substantive law. There is no need to stress this in a particular Rule. See Scope.

(2) The ABA Reporter's Explanation of Changes to Rule 3.3 expresses the Committee's view. It is adopted by the Committee for purposes of explaining recommended changes and is quoted below.

- ABA Reporter's Explanation of Changes -- Model Rule 3.3

The Commission has revised and reorganized this Rule to clarify a lawyer's obligation of

candor to the tribunal with respect to testimony given and actions taken by the client and other witnesses. The Commentary was reorganized and expanded to address some recurring situations not directly addressed in the Rule. In some particulars, the lawyer's obligations to the tribunal have been strengthened. For example, the Rule now makes clear that the lawyer must not allow the introduction of false evidence and must take remedial steps where the lawyer comes to know that material evidence offered by the client or a witness called by the lawyer is false – regardless of the client's wishes. As under the existing Rule, the lawyer's obligations to the tribunal may require the lawyer to reveal information otherwise protected by Rule 1.6. The lawyer's obligation in the existing Rule to avoid assisting client crime or fraud is replaced by a broader obligation to ensure the integrity of the adjudicative process. The lawyer must take remedial measures whenever the lawyer comes to know that any person is engaging or has engaged in criminal or fraudulent conduct related to the proceeding, such as jury tampering or document destruction.

In one special case, however, the lawyer's obligation to the client has been reaffirmed and strengthened, and that is where the lawyer represents the defendant in a criminal proceeding. For the first time the Rule text will address the special obligations of a criminal defense lawyer, providing that such a lawyer does not have the same discretion as other lawyers regarding the client's own testimony. While a criminal defense lawyer is subject to the general Rule prohibiting the offering of testimony the lawyer knows to be false, the lawyer may not refuse to allow a defendant to testify in the defendant's defense if the lawyer only reasonably believes the testimony will be false. The Commentary also provides that where a court insists that a criminal defendant be permitted to testify in the defendant's defense, the lawyer commits no ethical violation in allowing the client to do so even if the lawyer knows the client intends to lie.

TEXT:

1. Paragraph (a)(1): Amplify lawyer's duty not to make false statements to tribunal and add obligation to correct false statements previously made

The Commission recommends deletion of the term "material" that presently qualifies the lawyer's duty not to knowingly make false statements of fact or law to a tribunal, bringing

this duty into conformity with the duty not to offer false evidence set forth in paragraph (a)(3). A new phrase addresses the lawyer's duty to correct a false statement of material fact or law previously made to the tribunal, also paralleling the duty to take remedial measures in paragraph (a)(3).

2. Paragraph (a)(2): Delete existing provision on lawyer's duty to disclose client crime or fraud

The Commission is deleting current paragraph (a)(2), which provides that a lawyer shall not knowingly fail to disclose to the tribunal material facts when necessary to avoid assisting client crime or fraud. The lawyer's duty to disclose crime or fraud in connection with a proceeding before a tribunal is now addressed more comprehensively in paragraph (b). The lawyer also has disclosure obligations under paragraphs (a)(1) and (a)(3), where the lawyer comes to know of the falsity of statements previously made to the tribunal or evidence previously offered. A lawyer's general duty to avoid assisting client crime or fraud is addressed in Rules 1.2(d) and 4.1. *(Ed. Note: The current KRPC (a)(2) differs from the former MR in that it is expressed only in terms of fraud and does not specifically include assisting a criminal act.)*

3. Paragraph (a)(3): Amplify duty to take remedial measures in connection with material evidence lawyer comes to know is false and include discretion to refuse to offer evidence lawyer reasonably believes is false

The Commission is amending current paragraph (a)(4) to extend its remedial obligations to situations where the lawyer's client or a witness called by the lawyer has offered material evidence that the lawyer subsequently comes to know is false. Required remedial measures may, if necessary, include disclosure to the tribunal.

The Commission has also transferred to this paragraph the substance of current paragraph (c), which permits a lawyer to refuse to offer evidence that the lawyer reasonably believes (but does not know) is false. This grant of discretion, however, has been limited so it will not apply to the testimony of a client who is exercising the constitutional right to testify in a criminal case.

4. Paragraph (b): Duty to preserve integrity of adjudicative process

The Commission recommends adoption of a new provision (b) addressing the lawyer's obligation to take reasonable remedial measures, including disclosure if necessary, where the lawyer comes to know that a person is engaging or has engaged in any sort of criminal or fraudulent conduct related to the proceeding. This new provision incorporates the substance of current paragraph (a)(2), as well as ABA Model Code of Professional Responsibility DR 7 102(B)(2) ("A lawyer who receives information clearly establishing that a person other than the client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal") and DR 7 108(G) ("A lawyer shall reveal promptly to the court improper conduct by a venireperson or juror, or by another toward a venireperson or juror or a member of the venireperson's or juror's family, of which the lawyer has knowledge").

5. Paragraph (c): Duration of duties in paragraphs (a) and (b)

The Commission is not changing the scope and duration of the lawyer's duty of candor to the tribunal but extending it to paragraph (b).

COMMENT:

[1] This new Comment explains that the duties contained in Rule 3.3 apply in all proceedings before a "tribunal" as defined in Rule 1.0(m). It explains that they also apply in ancillary proceedings conducted pursuant to a tribunal's adjudicative authority, such as a deposition.

[2] The revisions to current Comment [1] clarify that a lawyer has a duty to avoid conduct that undermines the integrity of the adjudicative process and in this regard must not allow the tribunal to be misled by false statements of law or fact.

Caption: The caption "Legal Argument" more accurately describes the subjects addressed in Comment [4].

[4] The change reflects paragraph renumbering in the Rule text. No change in substance is intended.

Caption: The caption "Offering Evidence" more accurately describes the subjects addressed in Comments [5] through [9].

[4] This Comment has been replaced by Comment [5].

[5] This Comment has been replaced and supplemented by Comment [9].

[5] This new Comment replaces current Comments [4] and [5] and explains that paragraph (a)(3) prohibits a lawyer from offering testimony or other evidence the lawyer knows is false, regardless of the client's wishes. Unlike the current Rule, paragraph (a)(3) extends to evidence provided by the client. The Comment explains that a lawyer does not violate the Rule if the lawyer knowingly elicits false testimony for the purpose of subsequently establishing its falsity.

[6] This new Comment explains the lawyer's duty where the lawyer's client intends to testify falsely or wants the lawyer to introduce false testimony. The lawyer must seek to dissuade the client and, if this is unsuccessful, must refuse to offer the false evidence.

[7] This new Comment explains that the duties in paragraphs (a) and (b) apply to defense counsel in criminal cases. Where a court requires a lawyer to permit a criminal defendant to give testimony that the lawyer knows is false, however, the obligation of the advocate under these Rules is subordinate to such a requirement.

[8] This new Comment explains that while the prohibition against offering false testimony in paragraph (a) applies only where the lawyer knows that the evidence is false, such knowledge may be inferred from the circumstances.

Caption: The caption "Refusing to Offer Proof Reasonably Believed to Be False" has been deleted because the Comment to which it referred is now subsumed under "Offering Evidence."

[9] This Comment, which revises current Comment [14], explains that while paragraph (a)(3) prohibits a lawyer from offering evidence that the lawyer knows is false, a lawyer may refuse to offer evidence that the lawyer only reasonably believes is false, including evidence offered by the client – except where the client is a defendant in a criminal case. Because of the special protections historically provided criminal defendants, criminal defense counsel do not have the same latitude to refuse to offer client testimony they reasonably believe (but do not know) is false. (See also Comment [7] supra.)

Caption: The caption "Perjury by a Criminal Defendant" has been deleted because of the deletion of current Comments [7] through [10].

[7] through [10] These Comments have been deleted as no longer helpful to the analysis of questions arising under this Rule. No change in substance is intended.

[10] This Comment revises and expands upon current Comment [11] to describe the remedial steps a lawyer must take if the lawyer is surprised by a witness's false testimony or where the lawyer subsequently comes to know that evidence the lawyer has offered is false. These steps include remonstrating with the client, consulting with the client about the lawyer's duty of candor to the tribunal and withdrawing from the representation. If necessary to remedy the situation, the lawyer may make disclosure to the tribunal even if doing so would require the lawyer to reveal information otherwise protected by Rule 1.6.

[11] The revisions to current Comment [6] are editorial in nature. No change in substance is intended.

Caption: A new caption, "Preserving Integrity of Adjudicative Process," was added to highlight the Comment [12] discussion of paragraph (b).

[12] This new Comment explains the obligations imposed by paragraph (b), where the lawyer knows that any person intends to engage, is engaging or has engaged in criminal or fraudulent conduct that undermines the integrity of the adjudicative process. Examples of such conduct are 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. This could include lies or misrepresentations by the opposing party or witnesses called by the opposing party, which are not covered by paragraph (a)(3). The obligations imposed by this paragraph will ordinarily subsume those imposed by current paragraph (a)(2), which has been deleted.

Caption: The caption "Constitutional Requirements" has been deleted because the discussion of constitutional requirements in current Comment [12] has been incorporated into Comments [7] and [9].

[12] This Comment has been deleted because the issues it addressed are now addressed in Comments [7] and [9].

[13] Revisions to this Comment explain that the obligation of candor to the tribunal

continues until a final judgment has been affirmed on appeal or the time for review has passed.

Caption: The new caption "Withdrawal" sets off the discussion in new Comment [15].

[15] This new Comment explains the relationship between a lawyer's compliance with the duty of candor to the tribunal and the lawyer's obligation to withdraw from the representation under Rule 1.16. While a lawyer's compliance with the Rule does not normally require withdrawal, the lawyer may be obliged to seek the tribunal's permission to withdraw if there results "such an extreme deterioration of the client lawyer relationship that the lawyer can no longer competently represent the client." The Comment also addresses the issue of disclosure in circumstances where withdrawal is permitted but not required.

b. Detailed discussion of reason for variance from ABA Model Rule (if any).

There is no variance in the proposed KRPC 3.3 from MR 3.3.

Committee proposal adopted without change. Order 2009-05, eff 7-15-09.