

# When Your Witness Lies:

## Considering Rule of Professional Conduct 3.3 in Civil Litigation

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Being a zealous advocate, closely guarding a client's secrets and presenting a client's case in a truthful manner, are all essential obligations that go to the heart of a lawyer's ethical duties. Ideally these obligations operate in harmony—but what happens when a lawyer learns that the client, or one of the client's key witnesses, has lied? This article examines this conundrum in the context of civil litigation.<sup>1</sup>

A lying witness may create a situation where the lawyer's duties appear to conflict. Refusing to offer a witness' testimony, correcting perjured testimony, or even withdrawing from the representation, might severely damage the client's case, be contrary to the client's express instructions, or implicate a client confidence. And yet, California's Rule of Professional Conduct 3.3, like many other professional rules and statutes, forbids lawyers from engaging or assisting in dishonest conduct<sup>2</sup> and specifically requires that a lawyer who knows a witness has lied "take reasonable remedial measures, including, if necessary, disclosure to the tribunal . . . ."

Where the client and lawyer cannot agree on a strategy to correct the record, the lawyer's mandatory duty of candor to the tribunal presents the lawyer with difficult choices. Though there are few easy answers, this article provides a starting point for handling this sticky situation.

### What If a Lawyer Believes a Witness is Going to Lie?

Subsection 3.3(a)(3) specifically forbids "offer[ing] evidence the lawyer knows is false." This admonition is straightforward – under no circumstances may a lawyer offer evidence in civil litigation that lawyer *knows* is false.<sup>3</sup> It does not matter that the client wants the lawyer to do so, or that refusing to offer the evidence would damage the client's case.

But what if the lawyer only *suspects* that that evidence is false? That's a bit trickier. On one hand, rule 3.3(a)(3) allows lawyers to "refuse to offer evidence . . . that the lawyer reasonably believes is false."<sup>4</sup> This gives lawyers the discretion to prevent false testimony even if they cannot be absolutely sure the evidence is false. On the other hand, a lawyer may present evidence that the lawyer *suspects* is false, or even incredible, so long as the lawyer does not *know* the evidence is false.<sup>5</sup> Courts have explained that lawyers must be allowed to present even dubious evidence because a lawyer's duty to vigorously represent their clients entitles lawyers "to resolve all doubts about the credibility of evidence in their client's favor."<sup>6</sup> But keep in mind, "knowledge" may be inferred from the circumstance," so lawyers cannot simply turn a blind eye in the face of overwhelming evidence of perjury.<sup>7</sup>

When in doubt, the lawyer would be well served to investigate and discuss the issue with the client. If the evidence is critical to the client's case, and after

investigation the lawyer still does not know that it is false, the lawyer's duties of vigorous advocacy allow, and arguably require, that the lawyer present the evidence and allow the trier of fact to make the determination. On the other hand, if it turns out that, upon investigation, the evidence is false, the issue becomes an easy one: the evidence cannot be offered.

### What If a Lawyer Learns After The Fact that the Witness Lied?

Where a lawyer has unwittingly offered false testimony, rule 3.3(a)(3) requires that the lawyer take remedial measures "including, if necessary, disclosure to the tribunal."<sup>8</sup> The obligation to remediate continues through the end of trial and until "a final judgment in the proceeding has been affirmed on appeal or the time for review has passed."<sup>9</sup>

A lawyer who believes a witness has lied under oath must first ask: what do I actually *know*? The mandate to take remedial measures applies only if a lawyer has "actual knowledge" that the witness offered false testimony.<sup>10</sup> Where falsity is merely suspected, no corrective action is necessary. Conversely, if the lawyer knows that the testimony is perjured, rule 3.3 requires the lawyer to take corrective action.

Corrective action may take various forms, and no single method is mandated. So, for example, the lawyer may enter into a stipulation to correct the facts, stipulate to strike the testimony from the record, or recall the witness to the stand to correct the testimony.<sup>11</sup> In *Englebrick v. Worthington Industries*, a lawyer corrected his witness' false deposition testimony by ensuring that the witness testified truthfully at trial.<sup>12</sup> When obtaining client consent to correct the record, lawyers should remember that the rules of

professional conduct allow them to refer “to considerations other than the law,” including the moral and social benefits of truthfulness, when advising their clients.<sup>13</sup>

While rule 3.3 specifically requires the lawyer to take reasonable remedial measures that include, “if necessary, disclosure to the tribunal,” what if the lawyer’s knowledge is based on confidential client communications? Must lawyers disregard their duty to hold “inviolate” client confidences where disclosure is necessary to correct the record? Under the Model Rules, the answer is apparently yes. Model rule 3.3 makes the corrective action requirement an exception to the confidentiality requirement in rule 1.6, providing that lawyers must make such disclosures as are necessary to remedy “the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by rule 1.6.”<sup>14</sup> Critically, California takes the opposite approach.

California’s rule 3.3 is substantively the same as Model rule 3.3, with the important caveat that California adds a unique clause, 3.3(a)(3). That clause *prohibits* the lawyer, absent client consent, from disclosing information that is protected by section 6068(e) or rule 1.6, even if disclosure would otherwise appear required by rule 3.3.<sup>15</sup> In short, the lawyer’s duty to “maintain inviolate the [client’s] confidence and at every peril to himself or herself, to preserve the secrets of his or her client” is paramount in this equation.<sup>16</sup> Thus, a lawyer cannot expose a client confidence without the client’s permission, even where such exposure would be necessary to correct the record.

Not surprisingly, the most difficult problems arise when the client insists that the false testimony go uncorrected. A lawyer who fails to correct false testimony risks violating rule 3.3 and possibly even misdemeanor liability under Business and Professions Code section 6128, but the lawyer’s options are limited, particularly where disclosure would reveal client confidences. In such a situation, the lawyer must remonstrate with the

client. They should explain their duty of candor, and warn that if the client continues to insist on offering or relying on the false evidence, the lawyer may be forced to withdraw, which could hurt the client’s case in various ways, such as damaging the client’s credibility, delaying the case, or increasing litigation costs.<sup>17</sup>

If remonstration is unsuccessful, some options remain. An attorney, as the “captain of the ship,” generally has the authority to make a tactical decision to refuse to call a particular witness or even to strike false testimony over the objections of the client, but this may not be true where the evidence is vital to the client’s case.<sup>18</sup> The more critical the testimony is, the more likely that striking it (or refusing to introduce it) would “impair the client’s substantial rights or the cause of action itself,” which the attorney may not do without the client’s consent.<sup>19</sup>

At a minimum, a lawyer who has inadvertently offered perjured testimony must refrain from referring to or relying upon the false testimony during the rest of the litigation.<sup>20</sup> This strategy may be sufficient to cure the problems presented by the false testimony, but not always. For example, if the perjured testimony is the only grounds for seeking a verdict for the client, the lawyer would necessarily be implicitly relying on that evidence by seeking a verdict for the client.

### When Is Withdrawal Permitted or Required?

A lawyer faced with a client who is resistant to correcting false testimony is not necessarily required to withdraw from the representation<sup>21</sup> – indeed, withdrawal may make matters worse since new counsel might not know of the perjured testimony and therefore would not be in a position to advocate for remedial action.<sup>22</sup> Instead, as discussed above, lawyers in this situation must remonstrate with their clients while also looking for ways to correct the record without exposing their clients’ confidential infor-

mation. Thus, for example, in *Englebrick*, the court concluded that the lawyer’s strategy of having the witness correct his deposition testimony at the time of trial was superior to withdrawal and that the lawyer was not required to break confidentiality by notifying the other party that the deposition testimony was false.<sup>23</sup>

However, faced with an intransigent client and potentially critical false evidence, the lawyer must at least consider whether withdrawal is appropriate or required. Rule 1.16 provides that a lawyer *may* withdraw (i.e., permissive withdrawal) if continuing the representation is “likely” to result in a rule violation. Thus, where a rules violation is not certain (even though likely), withdrawal is not mandatory. On the other hand, withdrawal is mandatory if continuing the representation “will” result in a rule violation.<sup>24</sup> In considering whether a rules violation *will* occur, the lawyer must consider all of the rules of conduct, including the lawyer’s affirmative duty of competence. Where a conflict between the lawyer and client causes a “deterioration of the lawyer-client relationship such that the lawyer can no longer competently and diligently represent[] the client”<sup>25</sup> in violation of rule 1.1, withdrawal is mandatory. If withdrawal is necessary, the lawyer must be mindful that, to preserve client confidences, the specific reasons for the withdrawal cannot be disclosed.<sup>26</sup>

### Conclusion

California’s Rules of Professional Conduct prohibit a lawyer from knowingly offering false testimony, and require that a lawyer who becomes aware of prior false testimony take measures to remediate the situation; unfortunately the rules provide no easy or “one fit” solution for fixing false testimony. What remediation measures are appropriate, and whether withdrawal may be required, must be determined on a case-by-case basis, consistent with the lawyer’s other ethical obligations. Certain separate rules and norms that apply the criminal context are not discussed in this article.

# References

<sup>1</sup> Certain separate rules and norms that apply the criminal context are not discussed in this article.

<sup>2</sup> See, e.g., Cal. Bus. & Prof. Code § 6128 (making it a misdemeanor for attorneys to engage in or consent to “deceit or collusion, with intent to deceive the court or any party”); Cal. Rules of Prof. Conduct, R.8.4(c) (Professional misconduct includes conduct “involving dishonesty, fraud, deceit, or reckless or intentional misrepresentation”); Cal. Bus. & Prof. Code § 6106 (“The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension.”)

<sup>3</sup> See, e.g., *In re Jones*, 5 Cal. 3d 390, 400 (1971); *Nahhas v. Pac. Greyhound Lines*, 192 Cal. App. 2d 145, 146 (1961).

<sup>4</sup> This does not apply to “the testimony of a defendant in a criminal matter.” Cal. Rules of Prof. Conduct R.3.3(a)(3). Rule 3.3, comment 4 provides instructions for criminal defense lawyers whose clients insist on testifying falsely.

<sup>5</sup> *People v. Bolton*, 166 Cal. App. 4th 343, 357 (2008).

<sup>6</sup> Cal. State Bar, Formal Opn. 2019-200 [hereinafter *Opn. 2019-200*] (citing *People v. McKenzie*, 34 Cal. 3d 616, 631 (1983), on the issue of waiver of the right to counsel abrogated by *People v. Crayton*, 28 Cal. 4th 346 (2002)).

<sup>7</sup> “Knowingly,” “known” or “knows” is defined as “actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.” Cal Rules of Prof. Conduct R.1.01(f).

<sup>8</sup> The definition of “tribunal” includes courts, as well as other adjudicators such as arbitrators, administrators, and special masters. Cal Rules of Prof. Conduct R.1.01(m).

<sup>9</sup> Cal. Rules of Prof. Conduct R.3.3, cmt. 6. A prosecutor’s obligation to correct false testimony may last even longer under Rule 3.8.

<sup>10</sup> Cal. Rules of Prof. Conduct R.1.01(f).

<sup>11</sup> *Opn. 2019-200*, *supra* at 7-8.

<sup>12</sup> *Englebrick v. Worthington Indus.*, No. SACV 08-01296-CJC(MLGx), 2016 U.S. Dist. LEXIS 184453, at \*31 (C.D. Cal. Aug. 12, 2016), *aff’d*, *Englebrick v. Hodes Milman Liebeck, LLP*, 716 F. App’x 715 (9th Cir. 2018) (however, note that in this case the lawyer’s obligation to maintain client confidences prevented more timely or fulsome remedial action).

<sup>13</sup> Cal. Rules of Prof. Conduct R.2.1, cmt. 2. If remonstrance with a third party witness is required, lawyers must take care not to provide legal advice to non-clients, particularly in the face of potential criminal exposure.

<sup>14</sup> Model Rules of Prof. Conduct, R. 3.3, cmt. 10 (“[t]he 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.”). Many states including New York and Alabama follow this approach. See, e.g., Association of the Bar of the City of New York Committee on Profession and Judicial Ethics, Formal Opinion 2013-2, at 2 (describing Rule 3.3’s disclosure requirement as “the only mandatory exception to in New York to the obligation of confidentiality contained in Rule 1.6”), [https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/formal-opinion-2013-2-lawyers-obligation-to-take-action-if-after-the-conclusion-of-a-proceeding-the-lawyer-comes-to-know-that-material-evidence-offered-by-the-lawyer-the-lawyers-client-or-a-witness-called-by-the-lawyer-during-the-proceeding-was-false#\\_ftnref3](https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/formal-opinion-2013-2-lawyers-obligation-to-take-action-if-after-the-conclusion-of-a-proceeding-the-lawyer-comes-to-know-that-material-evidence-offered-by-the-lawyer-the-lawyers-client-or-a-witness-called-by-the-lawyer-during-the-proceeding-was-false#_ftnref3); Alabama State Bar, Ethics Opinion RO-2009-01, Ethical Obligations of a Lawyer When His Client Has Committed or Intends to Commit Perjury (“If withdrawal will not remedy the situation or is impossible, that advocate should make disclosure to the court”), <https://www.alabar.org/office-of-general-counsel/formal-opinions/2009-01/>.

<sup>15</sup> The unique clause is italicized here: “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.*” Cal. Rules of Prof. Conduct R.3.3(a)(3) (emphasis added).

<sup>16</sup> Cal. Bus. & Prof. § 6068(e); Cal. Rules of Prof. Conduct R.3.3, cmt. 5 (Remedial measures do not include disclosure of client confidential information, which the lawyer is required to protect under [Bus. & Prof. § 6068(e)] and Rule 1.6).

<sup>17</sup> *Opn. 2019-200*, *supra* note at 10; Cal. Rules of Prof. Conduct R.1.16, cmt. 4.

<sup>18</sup> See *Opn. 2019-200*, *supra* note at 8.

<sup>19</sup> *Blanton v. Womancare, Inc.*, 38 Cal. 3d 396, 404 (1985) (quoting *Linsk v. Linsk*, 70 Cal. 2d 272, 276 (1969))

<sup>20</sup> Cal. State Bar, Formal Opn. 1983-74.

<sup>21</sup> *Opn. 2019-200*, *supra* note at 8; Cal. Rules of Prof. Conduct R.3.3 cmt. 8.

<sup>22</sup> In *People v. Johnson* (1998) 62 Cal.App.4th 608, 623, in the context of a criminal action, the court explained that “permitting defense counsel to withdraw does not necessarily resolve the problem” because it may create a cycle of attorneys forced to withdraw, “the accused may be less candid with his new attorney,” or the client may find a less scrupulous attorney. Thus, the court concluded, that withdrawal “could create even more problems.”

<sup>23</sup> *Englebrick v. Worthington Indus.*, 2016 U.S. Dist. LEXIS 184453, at \*32, \*37.

<sup>24</sup> *Opn. 2019-200*, *supra* note, at 10.

<sup>25</sup> Cal. Rule of Prof. Conduct R.3.3, cmt. 8.

<sup>26</sup> Cal. Rule of Prof. Conduct R.1.16, cmt 4.