

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3.2

Lead Drafter: Ham
Co-Drafters: Eaton, Stout
Meeting Date: June 2nd & 3rd, 2016

I. CURRENT CALIFORNIA RULE

There is no California counterpart to ABA Model Rule 3.2.¹

II. DRAFTING TEAM'S RECOMMENDATION AND VOTE

There was a consensus among the drafting team members to recommend the proposed rule as set forth below in Section III. The vote was unanimous in favor of making the recommendation.

III. PROPOSED RULE 3.9 (CLEAN)

Rule 3.2 Delay of Litigation

In representing a client, a lawyer shall not use means that have no substantial purpose other than to delay or prolong the proceeding or to cause needless expense.

Comment

See Rule 1.3 with respect to a lawyer's duty to act with reasonable diligence and Rule 3.1(b) with respect to a lawyer's representation of a defendant in a criminal proceeding. See also Business and Professions Code § 6128(b).

IV. PROPOSED RULE (REDLINE TO MODEL RULE 3.2)

Rule 3.2 ~~Expediting~~ Delay of Litigation

~~A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.~~

In representing a client, a lawyer shall not use means that have no substantial purpose other than to delay or prolong the proceeding or to cause needless expense.

Comment

~~[1] Dilatory practices bring the administration of justice into disrepute. Although there will be occasions when a lawyer may properly seek a postponement for personal reasons, it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates. Nor will a failure to expedite be reasonable if done for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar~~

¹ The blackletter of Model Rule 3.2 provides:

Rule 3.2 Expediting Litigation

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

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~~conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.~~ See Rule 1.3 with respect to a lawyer's duty to act with reasonable diligence and Rule 3.1(b) with respect to a lawyer's representation of a defendant in a criminal proceeding. See also Business and Professions Code § 6128(b).

V. PUBLIC COMMENTS SUMMARY

None.

VI. OCTC / STATE BAR COURT COMMENTS

- **GREG DRESSER, OCTC, Date:**
[Insert OCTC Comments]
- **RUSSELL WEINER, OCTC, 6/15/2010:**
RRC1 did not recommend a version of ABA Model Rule 3.2 for public comment so OCTC did not provide comment in 2010.
- **MIKE NISPEROS, OCTC, 9/27/2001:**
OCTC did not comment on ABA Model Rule 3.2 in 2001.
- **State Bar Court:** No comments received from State Bar Court.

VII. COMPARISON OF PROPOSED RULE TO APPROACHES IN OTHER JURISDICTIONS (NATIONAL BACKDROP)

Other than California, all jurisdictions but three have adopted some version of ABA Model Rule 3.2.²

The ABA State Adoption Chart for ABA Model Rule 3.2 is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_2.authcheckdam.pdf
- Thirty-nine jurisdictions have adopted Model Rule 3.2 verbatim.³ Two jurisdictions have adopted a slightly modified version of Model Rule 3.2.⁴ Six jurisdictions have adopted a version of the rule that substantially diverges from Model Rule 3.2.⁵

² The three jurisdictions are: Ohio, Oregon and Virginia.

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VIII. CONCEPTS ACCEPTED/REJECTED; CHANGES IN DUTIES; NON-SUBSTANTIVE CHANGES; ALTERNATIVES CONSIDERED

A. Concepts Accepted (Pros and Cons):

1. General. Recommend adoption of a rule, not currently in the California Rules of Professional Conduct, that would prohibit lawyers from engaging in delay in litigation.

- o Pros: It has been widely recognized that delay tactics in litigation that greatly increase the cost of prosecuting a lawsuit threaten to limit access to the justice system except for the most affluent. This fact has recently been recognized by the Chief Justice of the United States, who wrote:

“As for the lawyers, most will readily agree—in the abstract—that they have an obligation to their clients, and to the justice system, to avoid antagonistic tactics, wasteful procedural maneuvers, and teetering brinksmanship. I cannot believe that many members of the bar went to law school because of a burning desire to spend their professional life wearing down opponents with creatively burdensome discovery requests or evading legitimate requests through dilatory tactics. The test for plaintiffs’ and defendants’ counsel alike is whether they will affirmatively search out cooperative solutions, chart a cost-effective course of litigation, and assume shared responsibility with opposing counsel to achieve just results.

I am hardly the first to urge that we must engineer a change in our legal culture that places a premium on the public’s interest in speedy, fair, and efficient justice.” See 2015 YEAR-END REPORT ON THE FEDERAL JUDICIARY, at page 11 (12/21/15), available at: <http://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf>

- o Cons: The concept in the Rule, avoiding delay, is already covered in other

³ The thirty-nine jurisdictions are: Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, New Hampshire, New Mexico (but uses a different rule number), North Carolina, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.

⁴ The two jurisdictions are: New Jersey and Tennessee.

⁵ The six jurisdictions are: District of Columbia, Georgia, Nebraska, Nevada, New York and Texas.

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proposed Rules, Rule 1.3 (Diligence) and 3.1 (Meritorious Claims and Contentions) and by statute in Bus. and Prof. Code § 6128(b).⁶

2. Recommend adoption of title to New York rule 3.2.

- Pros: The New York rule title (Delay of Litigation) is more appropriate than the ABA title (Expediting Litigation). The Model Rule imposes an affirmative duty on a lawyer to make reasonable efforts to “expedite” litigation. The proposed rule being recommended prohibits delay.
- Cons: None identified.

3. Recommend adoption of New York Rule 3.2.

- Pros: Prohibiting undue delay and needless expense are significant concerns in the litigation process that will help protect the administration of justice and the public. Such tactics are rightfully prohibited when they are used to frustrate an opposing party’s ability or attempt to obtain a rightful remedy or redress. Establishing such prohibitory conduct as a minimum standard of professional responsibility is consistent with the first principle of the Commission’s Charter: “The Commission’s work should promote confidence in the legal profession and the administration of justice, and ensure adequate protection of the public.” In addition, the Model Rule imposes an affirmative duty on a lawyer to make reasonable efforts to “expedite” litigation, a rule structure more appropriate for an aspirational statement. The proposed rule being recommended prohibits delay, which is more appropriate for a disciplinary rule, as is required by the Commission’s Charter.
- Cons: The proposed rule diverges from the Model Rule language which has been adopted verbatim or nearly verbatim in a substantial majority of jurisdictions.

4. Recommend adoption of a single Comment.

- Pros: The Comment provides cross-reference to other rules addressing unnecessary delay. The reference to proposed Rule 1.3 informs the reader that attorneys are required to act with reasonable diligence and the reference to proposed Rule 3.1(b) is intended to address concerns that that Rule 3.2, standing alone, would prohibit delaying tactics by a lawyer who represents a criminal defendant in a capital case.
- Cons: None identified.

B. Concepts Rejected (Pros and Cons):

1. Recommend adoption of the Comment to Model Rule 3.2.

- Pros: The Model Rule comment explains the policy underlying the rule.
- Cons: No comment is needed to explicate this rule. Moreover, the comment to

⁶ 6128(b) states every attorney is guilty of a misdemeanor who either: “(b) Willfully delays his client’s suit with a view to his own gain.”

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Model Rule 3.2 is inapposite to the proposed rule.

C. Changes in Duties/Substantive Changes to the Current Rule:

This would be new rule of professional conduct in California and is a substantive change in that violation of the rule would subject a lawyer to discipline.

D. Alternatives Considered:

None.

IX. OPEN ISSUES/CONCEPTS FOR THE COMMISSION TO CONSIDER

There are no open issues.

X. COMMENTS FROM DRAFTING TEAM MEMBERS OR OTHER COMMISSION MEMBERS

Ham

- [Date]: Email Comment
- [Date]: Email Comment

Eaton

- [Date]: Email Comment
- [Date]: Email Comment

Stout

- [Date]: Email Comment
- [Date]: Email Comment

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XI. RECOMMENDATION AND PROPOSED COMMISSION RESOLUTION

Recommendation:

That the Commission recommends that the Board of Trustees of the State Bar of California adopt proposed rule 3.2 in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Commission adopts proposed rule 3.2 in the form attached to this Report and Recommendation.

XII. DISSENTING POSITION(S)

None.

XIII. FINAL COMMISSION VOTE/ACTION

[Date of Vote]

[Action: Proposed amended rule adopted or not adopted]

[Record of Roll Call Vote]