

COMMISSION PROVISIONAL REPORT AND RECOMMENDATION: RULE 3.1 [3-200]

Commission Drafting Team Information

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I. CURRENT CALIFORNIA RULE

Rule 3-200 Prohibited Objectives of Employment

A member shall not seek, accept, or continue employment if the member knows or should know that the objective of such employment is:

- (A) To bring an action, conduct a defense, assert a position in litigation, or take an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; or
- (B) To present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of such existing law.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: January 20 & 21, 2017

Action: Recommend Board Adoption of Proposed Rule 3.1

Vote: 14 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: March 10, 2017

Action: Board Adoption of Proposed Rule 3.1

Vote: X (yes) – X (no) – X (abstain)

III. PROPOSED RULE 3.1 (CLEAN)

Rule 3.1 Meritorious Claims and Contentions

- (a) A lawyer shall not:
 - (1) bring or continue an action, conduct a defense, assert a position in litigation, or take an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; or

- (2) present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of the existing law.
- (b) A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, or involuntary commitment or confinement, may nevertheless defend the proceeding by requiring that every element of the case be established.

IV. COMMISSION'S PROPOSED RULE 3.1 (REDLINE TO CURRENT CALIFORNIA RULE 3-200)

Rule 3.1 [3-200] ~~Prohibited Objectives of Employment~~ Meritorious Claims and Contentions

(a) A lawyer shall not:

~~A member shall not seek, accept, or continue employment if the member knows or should know that the objective of such employment is:~~

~~(A)~~(1) ~~To~~ bring or continue an action, conduct a defense, assert a position in litigation, or take an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; or

~~(B)~~(2) ~~To~~ present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of ~~such~~the existing law.

~~(B)~~(b) A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, or involuntary commitment or confinement, may nevertheless defend the proceeding by requiring that every element of the case be established.

V. RULE HISTORY

Current rule 3-200 originated with the first rules promulgated in 1928 as rule 13. The rule prohibited accepting employment when the motives are improper and specifically provided that:

A member of the State Bar shall not accept employment to prosecute or defend a case solely out of spite, or solely for the purpose of harassing or delaying another; nor shall he take or prosecute an appeal merely for delay, or for any other reason, except in good faith.

Operative January 1, 1975, rule 13 was revised and renumbered as new rule 2-110. In 1972, the State Bar's Special Committee to Study the ABA Code of Professional Responsibility developed two proposed rules addressing the substance of rule 13. A proposed rule was drafted to be identical to rule 13 but was ultimately not adopted. A

second rule, proposed rule 2-110, was modeled after ABA Code DR 2-109. The rule carried forward the substance of rule 13 using language adopted from the ABA Code and added a new provision prohibiting litigation claims or defenses not warranted under existing law.

Operative April 1, 1979, rule 2-110 was revised as part of a project to revise the rules governing lawyer advertising. The introductory paragraph of the rule was revised as follows:

A member of the State Bar shall not seek or accept employment to accomplish any of the following objectives, nor shall ~~he~~ the member do so if ~~he~~ the member knows or should know that the person ~~who employs him~~ solicited for or offering the employment wishes to accomplish any of the following purposes...

The revisions were made as conforming changes to the primary changes recommended for the main advertising and solicitation rules. (See, State Bar Special Committee on Lawyer Advertising and Solicitation, Final Report 1978).

The rule was last amended in 1989, when rule 2-110 was renumbered as rule 3-200 as part of a comprehensive revision and renumbering of the entire rules. The introductory paragraph was substantively amended, adding the language “or continue” to the phrase “shall not seek or accept employment” to clarify that withdrawal would be required whenever a lawyer knows or should know an action is being maintained for any of the prohibited reasons. Additionally, amendments to paragraph (A) added an objective probable cause standard, and incorporated the limitation on appeals formerly found in paragraph (C). In doing so, the language “solely for delay” was dropped. (See pages 31-32 of Bar Misc. No. 5626, “Request That The Supreme Court Of California Approve Amendments To The Rules Of Professional Conduct Of The State Bar Of California, And Memorandum And Supporting Documents In Explanation,” December 1987.)

VI. OCTC / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016**
(In response to 90-day public comment circulation):

1. OCTC supports the rule.

- **Gregory Dresser, Office of Chief Trial Counsel, 1/9/2017**
(In response to 45-day public comment circulation):

1. OCTC supports the rule.

OCTC submitted an identical comment in response to the 45-day public comment circulation.

- **State Bar Court:** No comments were received from State Bar Court.

VII. PUBLIC COMMENTS & PUBLIC HEARING TESTIMONY

One comment was received, from OCTC, which agreed. A public comment synopsis table, with the Commission's responses to each comment, is provided at the end of this report.

One speaker appeared at the public hearing whose testimony was in support of the proposed rule if modified. One speaker appeared at the public hearing whose testimony did not take a position on the proposed rule.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

The ABA State Adoption Chart for the ABA Model Rule 3.1, which is the counterpart to current rule 3-200, is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_1.authcheckdam.pdf
- Thirty jurisdictions have adopted Model Rule 3.1 verbatim,¹ and twelve have adopted a version of Model Rule 3.1 with slight variations.² Nine jurisdictions (including California) have a different rule or a materially modified version of Model Rule 3.1.³ Of those nine jurisdictions, four have a rule that includes a malicious injury element similar to California,⁴ six have a rule that includes a harassment element,⁵ and seven have a rule that includes a knowledge element.⁶

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

A. Concepts Accepted (Pros and Cons):

1. In proposed subparagraph (a)(1), retain the current rule term "continue."
 - Pros: The prohibition against continuing an action once the lawyer discovers

¹ The thirty jurisdictions are: Arkansas; Colorado; Connecticut; Delaware; Florida; Hawaii; Idaho; Illinois; Indiana; Iowa; Kansas; Kentucky; Louisiana; Minnesota; Mississippi; Missouri; Nebraska; Nevada; New Hampshire; New Mexico; North Carolina; Oklahoma; Pennsylvania; Rhode Island; South Carolina; South Dakota; Utah; Vermont; Washington; and West Virginia.

² The twelve jurisdictions are: Alaska; Arizona; District of Columbia; Maine; Maryland; Massachusetts; Michigan; North Dakota; Ohio; Tennessee; Texas; and Virginia.

³ The nine jurisdictions are: Alabama; California; Georgia; Montana; New Jersey; New York; Oregon; Wisconsin; and Wyoming.

⁴ The four jurisdictions are: Alabama; Georgia; New York; Wisconsin.

⁵ The six jurisdictions are: Alabama; Georgia; Montana; New York; Wisconsin; Wyoming.

⁶ The seven jurisdictions are: Alabama; Georgia; New Jersey; New York; Oregon; Wisconsin; Wyoming.

that it lacks probable cause is consistent with California case law. The question of whether a lawyer is liable for malicious prosecution for continuing an action after the lawyer discovers that it lacks merit was resolved by the California Supreme Court in *Zamos v. Stroud* (2004) 32 Cal.4th 958. Retaining the term “continue” as an express prohibition provides guidance to lawyers and serves as a clear disciplinary standard.

- Cons: The term is arguably redundant as the concept already exists under California case law and is implicit in the rule. Removing this term tracks the language that OCTC recommended in its 2001 comments.
2. In proposed subparagraph (a)(1), retain current rule language “for the purpose of harassing or maliciously injuring any person.”
- Pros: Retaining this provision is in accordance with the California Supreme Court’s express direction in its April 15, 2014 letter to the State Bar that the provision in current rule 3-200 should be retained: “[T]he proposed rule should retain the long-standing aspect of California law prohibiting attorneys from asserting claims, defenses, or contentions for an improper purpose or motive to harass or maliciously injure another as embodied in current rule 3-200, its predecessors, and Business and Profession Code section 6068, subdivision (g).”
 - Cons: None identified.
3. Add new proposed paragraph (b).
- Pros: This provision would clarify that the rule does not constrain a lawyer for a criminal defendant from requiring that every element of the case be established. It effectively sanctions the appropriate advocacy of criminal defense lawyers. The same provision is taken from Model Rule 3.1 and was also proposed by the first Commission.
 - Cons: None identified.

B. Concepts Rejected (Pros and Cons):

1. In the introductory clause to proposed paragraph (a), add phrase “In a proceeding before a tribunal.”
- Pros: This change is in accordance with the Supreme Court’s directive in its April 15, 2014 letter, which stated the rule should be limited “to attorney conduct in proceedings before a tribunal.”
 - Cons: None identified. The term “tribunal” is defined in proposed Rule 1.0.1(m).

2. Retain the term “employment” as found in the title and black letter of the current rule (or alternatively, substitute the term “representation” for employment)
 - Pros: The term is used in the current rule and there is no evidence that it has limited the rule’s application.
 - Cons: Retaining the term “employment” (or alternatively “representation”) could lead to a limiting interpretation that the rule does not apply to lawyers appearing in propria persona. Case law has applied the rule to lawyers acting in pro per. *Sorensen v. State Bar* (1991) 52 Cal.3d 1036. Further, the term “employment” is a vestige of the 1975 California Rules, which imported the term from the ABA Code of Professional Responsibility (1969). The ABA Model Rules eliminated the use of that term.
3. From current introductory paragraph, retain prohibition against *seeking* employment.
 - Pros: “Seek” was added to the rule in 1979 as a conforming change to changes recommended for the advertising and solicitation rules.
 - Cons: A prohibition against seeking employment could make an attempt to violate the rule a separate violation even where lawyer never files an action. The prohibition could subject a lawyer to discipline for targeted mailings, even though a lawyer would likely not be able to determine the merits of a suit before being retained.
4. From current introductory paragraph, retain “knows or should know.”
 - Pros: Including “knows or should know” would ensure that the rule is not limited to the knowledge standard for malicious prosecution. Including this concept reflects the duty to investigate a claim before filing or making an assertion. In its 2010 comments, OCTC suggested that the rule more clearly state this duty.
 - Cons: The phrase “knows or should know” imports a negligence standard, which is not relevant to the determination of probable cause. Such a standard would invite or require expert testimony on the adequacy of investigation. The Supreme Court directed that the rule retain a malicious injury element, which has a malice/intent standard. The “knows or should know” standard is inconsistent with the malice standard and would require standard of care testimony to prove a violation. Furthermore, including this standard focuses the inquiry on the lawyer’s ability to discern motivation rather than on whether a matter has merit.
5. In proposed subparagraph (a)(1), add a prohibition “for an improper purpose.”
 - Pros: This prohibition would conform the Rules to the current law. The concept of an improper purpose is found in both California Code of Civil

Procedure section 128.7⁷ and Federal Rule of Civil Procedure 11 [procedural rules requiring certification that actions are meritorious and not presented for an improper purpose].

- Cons: There is no need to add an additional prohibition to a clause that the Supreme Court has accepted. See April 15, 2014 Supreme Court letter to State Bar. The current rule provision that is being carried forward adequately captures the concept of improper motive.
6. In proposed subparagraph (a)(1), add “sole” to modify the phrase “purpose of harassing or maliciously injuring any person.”
- Pros: This concept would limit application of the rule and is consistent with case law holding that actions should be held to be frivolous only when brought for an improper motive or when it indisputably has no merit. *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.
 - Cons: The term “sole” is unnecessary since the rule also requires that an action (or filing) may not be brought without probable cause *and* for the purpose of harassing or maliciously injuring. A mixed motive is irrelevant; the rule requires both.
7. In proposed subparagraph (a)(1), add prohibition against actions “solely for delay.”
- Pros: This prohibition would conform the rule to the current law. The concept of delay is found in both California Code of Civil Procedure section 128.7 and Federal Rule of Civil Procedure 11 [procedural rules requiring certification that actions are meritorious and not presented for an improper purpose such as to cause unnecessary delay].
 - Cons: A prohibition against bringing an action solely for purposes of delay injects problems in proving a lawyer’s state of mind and divining whether the lawyer’s purpose was also combined with legitimate objectives designed to advance the client’s interests.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission’s reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

⁷ CCP § 128.7(b)(1) provides that a condition for making a filing with a court is that “[i]t is not being presented primarily for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.”

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

1. Deletion of “seek.” Lawyers would not have an ethical duty cast in terms of seeking employment for a prohibited purpose. The prohibition in the proposed rule is against bringing or continuing an action that is meritless or for an improper purpose.
2. Deletion of “knows or should know.” The “knows or should know” language in the current Rule refers to the “objective” of the lawyer’s employment which is ambiguous as whether this refers to the intent of the lawyer or the client and injects unnecessary problems in proving a lawyer’s subjective intent in pursuing litigation. The proposed rule would impose a duty on lawyers to not bring or continue an action without probable cause and for the purpose of harassing or maliciously injuring, regardless of whether the lawyer knows or should know that the objective is to bring such a claim. Lawyers would also have a duty to not bring a claim that is not warranted under existing law regardless of whether the lawyer knows or should know that the objective is to present such a claim.
3. Addition of “In a proceeding before a tribunal.” Lawyer conduct prohibited by the proposed rule would be limited to conduct in proceedings before a tribunal.

D. Non-Substantive Changes to the Current Rule:

1. Deleting reference to “employment” in both the title and black letter of the Rule to avoid an interpretation that the rule does not apply to lawyers appearing in pro per. Case law has applied the rule to lawyers acting in pro per. *Sorensen v. State Bar* (1991) 52 Cal.3d 1036. (See paragraph B.1, above.)
2. Changing the title to reflect the rule’s content, i.e., that it is not limited to a lawyer who has been retained (employed) by a client. The title is the same as that for Model Rule 3.1.
3. Substituting the term “lawyer” for “member”.
 - Pros: The current Rules’ use of “member” departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice pro hac vice or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)
 - Cons: Retaining “member” would carry forward a term that has been in use in the California Rules for decades.
4. Changing the rule number to correspond to the ABA Model Rules numbering and formatting (e.g., lower case letters)
 - Pros: It will facilitate the ability of lawyers from other jurisdictions who are

authorized to practice in California under *pro hac vice* admission (see current rule 1-100(D)(1)) to find the California rule corresponding to their jurisdiction's rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the "Con" that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.

- Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.

5. Changing the structure of the introductory clause to paragraph (a) to track language that OCTC suggested in its 2001 comment. Change numbering and beginning of subparagraphs to conform to the new structure.

6. In subparagraph (a)(2), substituting "the" for "such."

E. Alternatives Considered:

None.

X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

That the Board of Trustees of the State Bar of California adopt proposed Rule 3.1 [3-200] in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 3.1 [3-200] in the form attached to this Report and Recommendation.