

## **COMMISSION PROVISIONAL REPORT AND RECOMMENDATION: RULE 3.2**

### **Commission Drafting Team Information**

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### **I. CURRENT CALIFORNIA RULE**

There is no California Rule that corresponds to the concepts in Model Rule 3.2. ABA Model Rule 3.2 provides:

#### **ABA Model Rule 3.2 Expediting Litigation**

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

#### **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 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.

#### **New York Rule 3.2**

As described below, the Commission is recommending adoption of New York Rule 3.2. The Model Rule imposes an affirmative duty on a lawyer to make reasonable efforts to "expedite" litigation. The proposed rule being recommended prohibits delay. The New York rule title (Delay of Litigation) is more appropriate than the ABA title (Expediting Litigation).

### **II. FINAL VOTES BY THE COMMISSION AND THE BOARD**

#### **Commission:**

Date of Vote: October 20 & 21, 2017

Action: Recommend Board Adoption of Proposed Rule 3.2

Vote: 15 (yes) – 0 (no) – 0 (abstain)

#### **Board:**

Date of Vote: November 17, 2016  
Action: Board Adoption of Proposed Rule 3.2  
Vote: 14 (yes) – 0 (no) – 0 (abstain)

### **III. COMMISSION'S PROPOSED RULE 3.2 (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. COMMISSION'S 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**

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).

~~[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 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.~~

### **V. RULE HISTORY**

Although the origin and history of Model Rule 3.2 was not the primary factor in the Commission's consideration of proposed Rule 3.2, that information is published in "A Legislative History, The Development of the ABA Model Rules of Professional Conduct,

1982 – 2013,” Art Garwin, Editor, 2013 American Bar Association, at pages \_\_\_\_ - \_\_\_\_, ISBN: 978-1-62722-385-0. (A copy of this excerpt is on file with the State Bar.)

Information on the adoption of New York Rule 3.2 is published online at the New York Legal Ethics Reporter website: <http://www.newyorklegalethics.com/simon-on-new-rules-rule-2-1-through-3-3a1/> [last checked January 31, 2017]. This article “Simon on New Rules: Rule 2.1 Through 3.3(a)(1),” by Professor Roy Simon was originally published in NYPRR September 2009 issue.

An excerpt is provided below:

Rule 3.2 (“Delay of Litigation”) is a new rule that had no equivalent in the Disciplinary Rules of the Code of Professional Responsibility. Rule 3.2 provides:

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.

The key to understanding Rule 3.2 is the phrase “no substantial purpose.” What does this mean? In a breach of contract suit, may the defendant’s lawyer make a hopeless but time-consuming motion for summary judgment so that the defendant can continue to earn interest on his money before offering a settlement? In a foreclosure action, may a lawyer seek a continuance to give his client more time to raise money to avoid foreclosure? May a plaintiff’s lawyer ratchet up discovery demands, or refuse to stipulate to indisputable facts, to wear down the defendant financially? The answer to all of these questions will be “no” under Rule 3.2 unless the lawyer has some legitimate and reasonably important justification beyond those given in my examples.

What might those additional justifications be? The Comment to Rule 3.2 — the shortest Comment in the new rules, consisting of a single paragraph — is of minimal help. It says that “[d]ilatory practices” — even if they are “often tolerated by the bench and bar” — are prohibited “if their only substantial purpose is to frustrate an opposing party’s attempt to obtain rightful redress or repose.” Is the test subjective or objective? Is good faith enough?

Yes, good faith is enough. The Comment says: “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 or needless expense.” But that brings us back to square one, trying to define a “substantial” purpose. The Comment offers only negative advice: “Seeking or realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.” With so little guidance and so many incentives to delay litigation or use tactics that impose significant costs on opposing parties, courts and ethics committees will need to be very discerning to determine whether a proffered justification for suspicious conduct rises to the level of a “substantial purpose.”

## **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 this rule and its Comments.
- **State Bar Court:** No comments were received from State Bar Court.

## **VII. PUBLIC COMMENTS & PUBLIC HEARING TESTIMONY**

Four comments, including the above comment from OCTC were received. Two agreed with the proposed rule. Two comments agreed only if modified. A public comment synopsis table, with the Commission's responses to each comment is provided at the end of this report.

## **VIII. 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.<sup>1</sup>

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](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.<sup>2</sup> Two jurisdictions have adopted a slightly modified version of Model Rule 3.2.<sup>3</sup> Six jurisdictions have adopted a version of the rule that substantially diverges from Model Rule 3.2.<sup>4</sup>

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<sup>1</sup> The three jurisdictions are: Ohio, Oregon, and Virginia.

<sup>2</sup> 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.

<sup>3</sup> The two jurisdictions are: New Jersey and Tennessee.

<sup>4</sup> The six jurisdictions are: District of Columbia, Georgia, Nebraska, Nevada, New York and Texas.

**IX. 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.

- 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>

- Cons: The concept in the Rule, avoiding delay, is already covered in other proposed Rules, Rule 1.3 (Diligence) and 3.1 (Meritorious Claims and Contentions) and by statute in Bus. and Prof. Code § 6128(b).<sup>5</sup>

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.

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<sup>5</sup> Section 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.”

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 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.

**X.     RECOMMENDATION AND PROPOSED BOARD RESOLUTION**

**Recommendation:**

That the Commission recommends adoption of proposed Rule 3.2 in the form attached to this Report and Recommendation.

**Proposed Resolution:**

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