

Rule 3.1 [3-200] Meritorious Claims and Contentions
(Commission's Proposed Rule Adopted on February 19 – 20, 2016 – Clean Version)

- (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, may nevertheless defend the proceeding by requiring that every element of the case be established.

**PROPOSED RULE OF PROFESSIONAL CONDUCT 3.1
(Current Rule 3-200)
Meritorious Claims and Contentions**

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has evaluated current rule 3-200 (Prohibited Objectives of Employment) in accordance with the Commission Charter, with a focus on the function of the rule as a disciplinary standard, and with the understanding that rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. In addition, the Commission considered the national standard of the American Bar Association (“ABA”) counterpart, Model Rule 3.1 (Meritorious Claims and Contentions). The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules. This proposed rule has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

Proposed rule 3.1 in context within the Rules of Professional Conduct.

Proposed rule 3.1 is one of nine rules in Chapter 3 of the proposed Rules of Professional Conduct. The general content, framework and numbering scheme of this subset of the Rules is based on Chapter 3 of the ABA Model Rules, which is entitled “Advocate”. Model Rules Chapter 3 corresponds to Chapter 5 of the current California Rules, entitled “Advocacy and Representation.” The following table shows the Chapter 3 Model Rules and the corresponding California Rules:

Model Rule	California Rule
3.1 (Meritorious Claims & Contentions)	3-200 (Prohibited Objectives of Employment)
3.2 (Expediting Litigation)	No Cal. Rule counterpart.
3.3 (Candor Toward The Tribunal)	5-200 (Trial Conduct)
3.4 (Fairness to Opposing Party & Counsel)	5-220 (Suppression of Evidence) 5-310 (Prohibited Contact with Witnesses) 5-200(E)
3.5 (Impartiality and Decorum of Tribunal)	5-300 (Contact with Officials) 5-320 (Contact with Jurors)
3.6 (Trial Publicity)	5-120 (Trial Publicity)
3.7 (Lawyer As Witness)	5-210 (Member As Witness)
3.8 (Special Responsibilities of a Prosecutor)	5-110 (Performing the Duty of Member in Government Service) 5-220 (Suppression of Evidence) 5-120 (Trial Publicity)
3.9 (Advocate In Non-adjudicative Proceedings)	No Cal. Rule counterpart.

The Commission is recommending the adoption of the Model Rule framework and numbering for this series of rules.

In general, proposed rule 3.1 carries forward the substance of current rule 3-200. Proposed paragraph (a) simplifies the language of the current rule by stating that: A lawyer shall not. . . .” The current rule uses language that refers to the acts of seeking, accepting or continuing prohibited conduct, but the Commission believes that all of these elements are captured in the unambiguous statement that a “lawyer shall not.” In addition, the specific concept of restricting a lawyer from continuing prohibited conduct is included in paragraph (a)(1) that refers to “continuing an action. . . .”

Proposed paragraph (a) also deletes the current phrase “knows or should know.” In the context of this particular rule, the current phrase could imply a negligence standard which is not relevant to the determination of probable cause. In addition, the “knows or should know” standard is inconsistent with the malice standard in California law and might require standard of care testimony to prove a violation. It would also be a confusing deviation from the knowledge standards defined in proposed rule 1.0.1. Furthermore, including the “knows or should know” standard needlessly focuses the inquiry on a lawyer’s ability to discern motivation rather than on the most important issue of whether a matter has merit.

Paragraph (b) is derived from Model Rule 3.1 and was added to clarify that the proposed rule does not constrain a lawyer for a criminal defendant from requiring that every element of the case be established.

There is no Discussion section in the current rule and the Commission is not recommending the addition of any Comments.

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

(Redline Comparison of the Proposed Rule to Current California Rule)

(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, may nevertheless defend the proceeding by requiring that every element of the case be established.