

**Rule 3.2 Delay of Litigation**  
**(Commission's Proposed Rule Adopted on June 2 – 3, 2016 – Clean Version)**

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).

**PROPOSED RULE OF PROFESSIONAL CONDUCT 3.2  
(No Current Rule)  
Delay of Litigation**

**EXECUTIVE SUMMARY**

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has evaluated American Bar Association (“ABA”) Model Rule 3.2 (Expediting Litigation) for which there is no California counterpart. The Commission also reviewed relevant California statutes, rules and case law relating to the issues addressed by the proposed rule. The evaluation was made with a focus on the function of the rules as disciplinary standards, and with the understanding that the rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. The result of the Commission’s evaluation is proposed rule 3.2 (Delay of Litigation). 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 3.2 in context within the Rules of Professional Conduct.**

Proposed rule 3.2 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:

| <b>Model Rule</b>                              | <b>California Rule</b>  |
|--|---|
| 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)<br>5-310 (Prohibited Contact with Witnesses)<br>5-200(E)                                  |
| 3.5 (Impartiality and Decorum of Tribunal)     | 5-300 (Contact with Officials)<br>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)<br>5-220 (Suppression of Evidence)<br>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.

Proposed rule 3.2 prohibits a lawyer from using means that have no substantial purpose other than to delay or prolong a proceeding, or to cause needless expense. The Commission recommends adoption of New York rule 3.2 (Delay of Litigation) instead of Model Rule 3.2 (Expediting Litigation),<sup>1</sup> which requires a lawyer to make reasonable efforts to “expedite” litigation, for several reasons. First, it has been widely recognized that delay tactics in litigation that greatly increase the cost for prosecuting a lawsuit threaten to limit access to the justice except for the most affluent. Second, 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. Third, 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.” Finally, the Model Rule imposes an affirmative duty on a lawyer to make reasonable efforts to “expedite” litigation, which is a rule structure more appropriate for an aspirational statement. The proposed rule prohibits delay, which is more appropriate for a disciplinary rule, as is required by the Commission’s Charter.

There is one comment to the rule. 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 rule 3.2, standing alone, would prohibit use of delaying tactics by a lawyer who represents a criminal defendant in a capital case. The reference to Business and Professions Code section 6128(b) informs the reader that attorneys are guilty of a misdemeanor who willfully delay their client’s suit with a view to the lawyer’s own gain.

### **National Background – Adoption of Model Rule 3.2**

As California does not presently have a direct counterpart to Model Rule 3.2, this section reports on the adoption of the Model Rule in United States’ jurisdictions.

Other than California, all jurisdictions but three have adopted some version of ABA Model Rule 3.2.<sup>2</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 states have adopted Model Rule 3.2 verbatim.<sup>3</sup> Two jurisdictions have adopted a slightly modified version of Model Rule 3.2.<sup>4</sup> Six jurisdictions have adopted a version of the rule that substantially diverges from Model Rule 3.2.<sup>5</sup>

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<sup>1</sup> ABA Model Rule 3.2 states:

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

<sup>2</sup> The three jurisdictions are: Ohio, Oregon, and Virginia.

<sup>3</sup> The thirty-nine jurisdictions are: Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland,

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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>4</sup> The two jurisdictions are: New Jersey and Tennessee.

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

**Rule 3.2 ~~Expediting~~Delay of Litigation**  
**(Redline Comparison of the Proposed Rule to ABA Model Rule)**

~~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**

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~~[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.~~