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**INTER-OFFICE MEMORANDUM**

TO: MEMBERS OF THE COMMISSION  
FROM: A.M. VOOGD  
RE: RULE 3-200 (III.N)  
DATE: 8-1-04

**1. The 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 and 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.

There is no associated discussion.

**2. Related Provisions**

Business and Profession Code §6068(c) provides:

It is the duty of an attorney to do all of the following: To counsel or maintain those actions, proceedings, or defenses only as appear to him or her legal or just, except the defense of a person charged with a public offense.

ABA Model Rule 3.1 (2002):

### Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

### Comment

[1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position

ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

[3] The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule.

ABA Model Rule 3.4(d) (2002):

A lawyer shall not: in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent efforts to comply with a legally proper discovery request by an opposing party.

### **3. Mary Yen Comment**

I inquired of Mary Yen whether there was much prosecution under the Rule considering the wishy-washy language. She responded as follows:

I asked a couple of OCTC managers and supervisors about RPC 3-200 and heard back that OCTC uses RPC 3-200, and that 3-200(A) has some importance differences from BPC 6068(c) that they would like to see continued.

### **4. Mark Tuft Comments**

1. Rule 3-200 purports to address "prohibited objectives of employment" but, like Model 3.1, is a rule addressing the proper scope of advocacy for litigation attorneys. The conduct of lawyers in transactions with third parties is covered in Model Rules 4.1 and 4.4. Business and Professions Code section 6068(c), on which rule 3-200 is patterned, is arguably broader (i.e., "To counsel or maintain those actions. . . only as appear to him or her legal or just . . .") I favor having a rule or a set of rules that address prohibited objectives in all legal employment and not just litigation. If we stay with a separate rule on the proper scope of advocacy, it should be re-titled "Meritorious Claims and Contentions" or words of similar import.

2. Model Rule 3.1 prohibits asserting claims, defenses and contentions unless there is a basis "in law and in fact" for doing so that is not frivolous, which includes a good faith basis for seeking an extension, modification or reversal of existing law.

In contrast, Rule 3-200(A) has two requirements: the lawyer's actions must be supported by "probable cause" AND must not be brought or asserted "for the purpose of harassing or maliciously injuring any person." I favor the more straight forward ABA standard. I am sympathetic to the view that lawyers should not be subject to discipline simply based on a malicious prosecution judgment, but I am not aware that that risk has materialized under rule 3.1. The standard under rule 3.1 better promotes the stated purpose of the rules to promote respect and confidence in the judicial system.

3. Rule 3-200(B) is not necessary as a separate rule if we adopt this approach.

4. The rule should address the representation of criminal defendants under the Sixth Amendment as is the case both under Model Rule 3.1 and section 6068(c).

5. I would include the comments to rule 3.1 as revised in 2002.

I agree with Mark as to the superiority of Model Rule 3.1 as to scope, format and criminal law considerations. As appears from the following section of this memorandum I reject the standard used in the Model Rule as well as the non-criminal aspects of the associated comment.

#### **4. Discussion**

I start with the assumption that that the law is such that lawyers can predict with considerable accuracy how courts will rule with regard to proposed claims and defenses. Further, lawyers can reasonably predict whether or not a court will adopt proposed extensions, modifications, or reversals of existing law.

The pursuit of claims, defenses and positions likely to be rejected by courts causes enormous waste. Clients must to pay the associated legal fees. Courts waste time and effort disposing of these matters. Justice is delayed. Only lawyers benefit from the flogging of dead or dying horses; the public suffers.

Lawyers have a duty to further the fair administration of justice by refusing to maintain actions believed to lack merit. Kirsch v. Duryea , 21 Cal.3d 303, 308 (1978).

Yet violation of these fundamental ethical considerations is endemic. Alternative causes of action proliferate in complaints regardless of their merit. Ninety or more percent of all asserted affirmative defenses are dross. Lawyers frequently spend more money fighting about discovery than providing it.

Indeed, lawyers frequently stop to even consider the merits of positions asserted. For instance, lawyers in mesothelioma cases sue every employer of the plaintiff as a matter of course and without investigation bringing the profession into disrepute.

The torture memo issued by the Justice Department's Office of Legal Counsel indicates how far things have gotten out of hand. Lincoln Caplan's article, Lawyers' Standards in Free Fall, B-13, July 20, 2004 Los Angeles Times, makes the point clear:

Revisions to the lawyers' code of professional responsibility adopted by the American Bar Assn. and by most states have reduced the standard to this: Lawyers can't fake evidence, lie to judges, commit crimes or help clients plan, carry out or hide those crimes. And lawyers must follow rules of ethics that are clearly spelled out. Otherwise, as the legal scholar Robert Gordon puts it, 'they may, and if will serve their clients' interests must, exploit any gap, ambiguity, technicality or loop-hole, any not-obviously-and-totally-implausible interpretation of the law or facts.'

\* \* \*

The endorsement, for example, by the law firm of Vinson & Elkins of Enron's crooked accounting is a recent disgraceful instance, and it reflects the strain on professional morality caused by pressure from the marketplace."

The "not frivolous" standard of Model Rule 3.1 is precisely as described above. "Frivolous" means a zero percent chance of prevailing; "not frivolous" means a piece part of a one percent or higher chance of prevailing. Learned Hand said "I should dread a lawsuit beyond almost anything short of sickness and death." How would react to a claim that had

only a one percent chance of being found meritorious?

Rule 3-200(A) was in the disjunctive it might be meaningful. As written, it means you can pursue even frivolous claims as long as you are not a grouch. Rule 3-200(B) is so broad as to be meaningless; the sustaining of demurrer would be prima facie evidence of violation of this rule.

The public deserves a proper standard consistent with §6068(c) and the views of the Supreme Court expressed in Kirsch.

## **5. Proposed Rule**

### Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue, unless there is a reasonable prospect of the position being meritorious under applicable law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

### Discussion

The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule.

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**NOTE:** Refer to comment no. 2002-29 (William Wells) included in the clear public comment binder.

## **RULE AMENDMENT HISTORY (2004)**

### **Rule 3-200. Prohibited Objectives of Employment**

#### **Current 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.

#### **Amendments Operative 1992**

N/A

#### **Amendments Operative 1989 (Comparison of Current Rule to Former Rule)**

##### **Rule ~~3-200~~. ~~2-210~~. ~~Acceptance~~ Prohibited Objectives of Employment**

A member of the State Bar shall not seek, or accept, or continue employment if the member knows or should know that the objective of such employment is: ~~to accomplish any of the following objectives, nor shall the member do so if he knows or should know that the person solicited for or offering the employment wishes to accomplish any of the following objectives:~~

(A) ~~B~~ To bring an legal action, conduct a defense, or assert a position in litigation, or otherwise take steps an appeal, without probable cause and , solely for the purpose of harassing or maliciously injuring any person; or ~~or to prosecute or defend a case solely out of spite.~~

(B) ~~P~~ 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.

(C) ~~Take or prosecute an appeal solely for delay, or for any other reason not in good faith.~~

[December, 1987 grey bound rule filing, Enc. 2]

## **RULE AMENDMENT HISTORY (2004)**

### **Summary of 1989 Amendments**

Proposed rule 3-200 continues the prohibition found in current rule 2-110 on the attorney seeking or accepting employment when the motives of the attorney or the client in conducting the litigation are improper.

The addition of “or continue” to the precatory language is intended to make clear that withdrawal is required whenever the attorney knows or should know an action is being maintained for any of the prohibited reasons.

The proposed amendments to paragraph (A) are intended to add the objective probable cause standard to the subjective standard (purpose of the act) in the current rule.

No substantive changes are proposed to paragraph (B), which prohibits presenting a claim or defense that is not warranted under existing law.

The limitation on appeals found in current paragraph (C) is now in proposed paragraph (A).

[December, 1987 grey bound rule filing at pgs. 31-32.]

[Note: The concept of this rule was not covered in the 1972 study.]

## Excerpt from September 27, 2001 Memorandum

DATE: **September 27, 2001**  
TO: **The Commission for the Revision of the Rules of Professional Conduct**  
FROM: **Mike Nisperos, Jr., Chief Trial Counsel**  
SUBJECT: **Recommendations for Changes to the Rules of Professional Conduct**

### 16. Rule 3-200. Prohibited Objectives of Employment

OCTC recommends revising the rule to expand its application to prohibit acts done without probable cause, solely for delay, or with no basis in law or fact.

Remove:

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

And replace and revise as follows:

*A member must not:*

(A) ~~⊖~~ ~~(b)~~ Bring [or improperly delay] 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 solely for delay.*

(B) ~~⊖~~ ~~(p)~~ 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.

*(C) Bring an action, conduct a defense, assert a position or fact in litigation, take an appeal, or present a claim or defense in litigation unless there is a basis in law and fact for it. However, a lawyer for a defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.*

OCTC COMMENTS:

The proposed change makes it clear that even if the objective of the employment or represent action is an appropriate one, a lawyer must not bring an action, conduct a defense, assert a position or fact in litigation, take an appeal, or present a claim or defense in litigation unless there is some basis in law and fact for it. This reinforces existing law, which holds that an attorney has a duty to inquire into the facts and law before asserting any position or fact in litigation. This is consistent with Federal Rule 11 and California law. Attorneys, of course, should and must be given great deference to assert legitimate positions even if they are ultimately not successful, but they should be required to assert those positions after some investigation of the facts and examination of statutory and decisional authorities. In some situations, the client's statements will be sufficient investigation. In others, it will not. This is because "[w]hile an attorney may often rely upon statements made by the client without further investigation, circumstances known to the attorney may require investigation." (*Butler v. State Bar* (1986) 42 Cal.3d 323, 329.) An attorney should never be entitled to simply assert a position or state a fact without some investigation and a determination of the applicable law. This will often require legal research as well as factual investigations. The attorney can, of course, argue in good faith for an extension, modification, or reversal of existing law. Furthermore, criminal defense attorneys, must be given leeway to defend their clients and to require that the prosecution meet its constitutional mandate to prove every element of a crime.

CA Rule 3-200 Prohibited Objectives of Employment	ABA Model Rule 3.1 – Meritorious Claims and Contentions	Comments
A member shall not seek, accept, or continue employment if the member knows or should know that the objective of such employment is:	“A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein,”	The ABA rule has a discussion section while the CA rule does not. Although not part of either CR 3-200 or MR 3.1, Mark Tuft observed in a 7/14/2004 e-mail that CR 3-200 is closest in concept to MR 1.2(d) (“(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.”) Cal. does not at present include that concept in its rules and Mark would like to explore it in relation to this rule or as a separate rule.
(A) To bring an action, conduct a defense, assert a position in the litigation, or take an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; or		No ABA equivalent.
(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.	[MR 3.1, con’t] “unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.” [2] The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.	The ABA describes a similar rule in both the body of their rule and in the discussion.
CA does not have a similar concept as the last sentence of MR 3.1.	[MR 3.1, con’t] “A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.”	