

**ANTHONIE M. VOOGD**

918 Palomar Lane, Ojai, California 93023, (805) 646-1512, email avoogd@ojai.net

**INTER-OFFICE MEMORANDUM**

TO: MEMBERS OF THE COMMISSION  
FROM: A.M. VOOGD  
RE: RULES 3.2  
DATE: 01-13-06

This rule has a long history. It was adopted in concept at the 7/2-23/05 meeting. A vote on adoption of the ABA version of the rule split 5-5, with one abstention, at the 10/28-29/05 meeting. Considering that this is my third memo on the subject, it is more of a personal pitch for adoption of the rule than a dispassionate review. I have asked that all past materials (including excerpts from past minutes) be included with the materials distributed for the 2/3/06 meeting.

Harry asked that I again consider the District of Columbia and Nebraska variants of the rule, namely

- D.C. (a) In representing a client, a lawyer shall not delay a proceeding when the lawyer knows or when it is obvious that such action would serve solely to harass or maliciously injure another.
- (b) A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.
  
- Neb. (b) In the lawyer's representation of a client, a lawyer shall not file a suit, assert a position, conduct a defense, delay litigation or take other action on behalf of the client when the lawyers

knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

In my opinion, D.C. (a) and Neb. (b) gut 3.2. Moreover, I don't think lawyers should do anything to harass or maliciously injure another person. It is remarkable that these variants expressly allow harassment or malicious injury if there is other motivation for the delay.

Rule 3.2 is a good rule for clients; it is a lousy rule for lawyers. Delay increases costs and destroys efficiency. Moreover, all of us are aware of circumstances where lawyers have prejudiced their clients' cases through missing discovery cut-off dates, filing last minute slovenly pleadings or through other acts of procrastination. On the other hand, lawyers wish schedule their work as they fancy, free of any risk of control or discipline.

It is suggested that lawyers are incorrigible in this regard and effort to change them will have no impact. I don't have that low a regard for the profession. Rule 3.2 isn't draconian; it is a step in the right direction. Moreover, how will we justify not having an expediting litigation rule when the ABA has such a rule? Isn't the absence of the rule an affirmation of the proposition that California lawyers may dawdle as their clients are injured?

Finally, consideration of the language of 3.2 and its comment shows that the rule does not preclude civility among lawyers. Where there is a request for an extension of time, a lawyer should grant the request where the court would grant the extension on motion. Where the court would not grant the extension and the extension would harm the lawyer's client, the extension should not be granted. The client's interests should trump any consideration of civility.

Our justice system is slow and expensive. I think any judge would affirm the proposition that the efficiency of the system would significantly improve if lawyers avoided dilatory practices.

Let us further the public interest and adopt 3.2

The rule and comment are again set out below:

**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

Rule 3.2  
10/28-29/05 Meeting  
Item III. G

**ANTHONIE M. VOOGD**

918 Palomar Lane, Ojai, California 93023, (805) 646-1512, email avoogd@ojai.net

**INTER-OFFICE MEMORANDUM**

TO: MEMBERS OF THE COMMISSION  
FROM: A.M. VOOGD  
RE: RULES 3.2  
DATE: 10-24-05

Please refer to the materials distributed for the 7/22-23/05 meeting. Model Rule 3.2 was adopted in concept at that meeting. Kevin's study of rule variants did not generate any suggested changes to the rule.

The issue for the meeting is thus whether we should adopt the rule and comments in ABA form. I favor proceeding in that manner with one exception. I would add the following to the comment: "A lawyer shall consult with his or her client before seeking or granting an extension of time where such extension may delay resolution of the matter or otherwise prejudice the client."

The rule and comment are set out below:

**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. [A lawyer shall consult with his or her client before seeking or granting an extension of time where such extension may delay resolution of the matter or otherwise prejudice the client.]

-----Original Message-----

From: Jerome Sapiro, Jr. [mailto:JSapiro@sapirolaw.com]

Sent: Tuesday, October 25, 2005 3:31 PM

To: Kehr, Robert; Sondheim, Harry B.; Tuft, Mark L.; Vapnek, Paul W.; Foy, Linda Quan; Julien, JoElla J.; Lamport, Stanley; Martinez, Raul; Melchior, Kurt W.; Peck, Ellen R.; Ruvolo, Hon. Ignazio J.; Voogd, Anthony; Mohr, Kevin E.; Difuntorum, Randall; McCurdy, Lauren; Hollins, Audrey; SeLegue, Sean  
Subject: Proposed Rule 3.2

Dear Friends:

I just noticed an error in the message I sent you a few minutes ago about proposed rule 3.2. In the first two lines of the text, the parenthetical remark should have been deleted. I apologize for any confusion I caused by my careless proofreading.

With best regards,

Jerry

CONFIDENTIAL E-MAIL from THE SAPIRO LAW FIRM

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-----Original Message-----

From: Jerome Sapiro, Jr. [mailto:JSapiro@sapirolaw.com]

Sent: Tuesday, October 25, 2005 2:59 PM

To: Kehr, Robert; Sondheim, Harry B.; Tuft, Mark L.; Vapnek, Paul W.; Foy, Linda Quan; Julien, JoElla J.; Lamport, Stanley; Martinez, Raul; Melchior, Kurt W.; Peck, Ellen R.; Ruvolo, Hon. Ignazio J.; Voogd, Anthony; Mohr, Kevin E.; Difuntorum, Randall; McCurdy, Lauren; Hollins, Audrey; SeLegue, Sean  
Subject: Proposed Rule 3.2

Dear Friends:

Although proposed Rule 3.2 copies Model Rule 3.2 (other than its Comment), this is a good example of a rule that should not be adopted if our rules are to be disciplinary rules. There are many reasons.

For example, disciplining someone because he or she does not “make reasonable efforts to expedite litigation” again makes the mistake of bringing a negligence standard into disciplinary rules. Disciplinary hearings will become swearing contests between expert witnesses.

The effect of this rule will be to substitute the judgment of attorneys in the Office of Chief Trial Counsel and of judges of the State Bar Court for that of the attorney handling the case to see whether the latter proceeded with reasonable diligence, not just in handling the litigation but in “expediting the litigation.” Frankly, they are not qualified to do so. How many of them have to pay rent for their offices, meet a payroll, or advance costs for litigation? How many of them represent clients whose injuries have not stabilized to the point where they can properly be evaluated by expert witnesses? I will not continue with the litany ad nauseum, but these examples illustrate the point.

Moreover, if we proceed with the adoption of this type of rule, we will destroy essential elements of codes of civility and professionalism that have been adopted by many local bar associations and courts. For example, the Standards of Professional Conduct adopted in San Francisco includes:

Consistent with existing law and court orders, an attorney should grant a reasonable request by opposing counsel for an extension of time within which to respond to a pleading, discovery, and other matters, when such an extension will not prejudice his or her client or unduly delay a proceeding.

A. An attorney shall advise his or her client that the strategy of not agreeing to reasonable requests for time extensions simply to appear “tough” is inappropriate.

B. An attorney should not condition an agreement to an extension on extraneous terms except to preserve rights that an extension might jeopardize or seeking reciprocal scheduling concessions.

The Association of Business Trial Lawyers in San Diego has adopted guidelines of ethics, civility, and professionalism. Paragraph 7 states:

A lawyer should consider opposing counsel's legitimate calendar conflicts when scheduling or postponing hearings, depositions, meetings or conferences, unless to do so would be contrary to the legitimate interests of his or her client. A lawyer should not arbitrarily or unreasonably refuse a reasonable request for extension of time. In considering a request for an extension of time, a lawyer may appropriately take into account the interests of his or her client, whether there have been prior requests for extensions, the time required for the task, the nature of the adversary's scheduling difficulty, and whether the adversary will grant reciprocal reasonable requests.

The State Bar Litigation Section has adopted a Code of Civility and Professionalism. Section 3 of that code includes the following paragraphs:

(d) A lawyer should not seek extensions or continuances for the purpose of harassment, or to improperly extend or delay litigation. When requesting an extension or continuance, a lawyer should explain to other counsel the specific reasons for the request. When requesting an extension or continuance of time, a lawyer should likewise grant a reciprocal extension or continuance of time to other counsel in connection with any deadlines that are impacted by the lawyer's request.

(e) Upon request, a lawyer should extend professional courtesies and grant reasonable accommodations to other counsel and their respective clients, unless to do so would substantially prejudice the lawful objectives of the lawyer's own client.

(f) A lawyer should agree, as a matter of courtesy, to a first request for a reasonable extension of time, unless time is of the essence, or agreeing to such a request would clearly be inconsistent with the legitimate interests of the lawyer's client. A lawyer should not refuse to grant an extension of time to other counsel simply because the same counsel had previously refused to grant an extension of time to the lawyer. Rather, the lawyer should strive to act in a civil and professional manner at all times irrespective of the prior activities or attitudes of other counsel.

(g) After agreeing to a first request for an extension of time, a lawyer should consider any additional requests for extensions of time by balancing the need for a prompt resolution of the matter against considerations involving the professional and personal schedule of other counsel or his/her client, the willingness of other counsel to grant reciprocal extensions, the anticipated time needed for the task, and whether it would be likely that a Court would grant the extension of time, if requested to do so.

(h) A lawyer should not, as a condition to granting a reasonable request for an extension of time, seek to eliminate or cut off the rights of other counsel or an opposing party. For example, a lawyer should not condition his/her agreement to grant a reasonable request for an extension of time to respond to a complaint on the basis that the opposing party will not challenge the sufficiency of a complaint by filing a demurrer or motion to strike.

(i) A lawyer should agree to reasonable requests for extensions of time when new counsel is substituted in for prior counsel, unless the substitution of new counsel is being done solely for the purpose of improperly extending or delaying the litigation, and granting such a request for an extension of time would substantially prejudice the lawful objectives of the lawyer's own client.

(j) A lawyer should make a reasonable effort to schedule all meetings, hearings, and discovery matters by agreement or consensus of other counsel, and should consider the scheduling interests of any opposing counsel, parties, witnesses, and/or the Court, to the extent that such persons are involved in such meetings, hearings, or discovery matters. After an agreement has been reached concerning the scheduling of an event, a lawyer should send a notice to all counsel to avoid any future disputes or misunderstandings.

Even in the "red" states, codes of civility have become common. The United States District Court for the Northern District of Texas in 1988 convened en banc for the purpose of establishing standards of litigation conduct to be observed in civil actions in the district.

Adopting proposed Rule 3.2 will gut all such codes of civility and force lawyers to revert to the scorched earth approach to litigation that has properly been criticized by both the bench and the bar as improper. Adopting proposed Rule 3.2 would put our own disciplinary system out of step with the professional standards required of most lawyers and expected in California.

Indeed, the Comment to Model Rule 3.2 is substantively wrong. Often, delay will result in financial or other benefits for the client. Witnesses may be found, cases pending on appeal on related issues may be decided, and a host of other benefits to the client often result from delay. Yet our rule would characterize these as inherently improper.

We should reject Model Rule 3.2.

With best regards to all of you,

Jerry

CONFIDENTIAL E-MAIL from THE SAPIRO LAW FIRM

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Rule 3.2  
7/22-23/05 Meeting  
Item III. O  
Supplement

**ANTHONIE M. VOOGD**

918 Palomar Lane, Ojai, California 93023, (805) 646-1512, email avoogd@ojai.net

**INTER-OFFICE MEMORANDUM**

TO: MEMBERS OF THE COMMISSION  
FROM: A.M. VOOGD  
RE: RULES 3.2  
DATE: 7-7-05

Model Rule 3.2 was adopted in concept at the last meeting. My further task was to perform a rule study. I asked Kevin for assistance. His assistance consisted of completing my task in perfect form. See attachments below.

I am not particularly impressed by the variations of the Model Rule adopted or being considered by various states. However, I am sensitive to Jerry's plaint that the rule is hortatory and not sufficiently specific to be a disciplinary rule. Yet Rule 3.2, like Rule 3-600, provides guidance and is better than nothing.

Rule 3.2 implicates a fundamental conflict between the interests of clients and lawyers. Clients want work completed promptly. If an answer to a complaint can be completed and filed within a week without special efforts then it should be completed and filed within a week. The same considerations apply to discovery matters. In any event such tasks should not take longer than the 30-day or other period specified by law. Clients recognize that a series of small delays can in the aggregate result in a long delay and that delay increases costs and complexity.

On the other hand, lawyers love to schedule their work to suit their personal convenience. Moreover, lawyers are procrastinators.

Our task is to protect the interests of the clients. Perhaps that can be done most effectively by adding the following sentence to Model Rule 1.3: “A lawyer shall not seek or grant an extension of time without the informed consent of the client.” Model Rule 1.3 would then subsume 3.2 in a specific and readily enforceable disciplinary rule.

**Model Rule 3.2: Expediting Litigation (2003)**

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.

**Model Rule 3.2: Expediting Litigation (Comparison of 2003 to 1983 version)**

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. ~~Delay should not be indulged merely for the convenience of the advocates, or~~ 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.

**D.C. Rule 3.2. Expediting Litigation (Current)**

(a) In representing a client, a lawyer shall not delay a proceeding when the lawyer knows or when it is obvious that such action would serve solely to harass or maliciously injure another.

(b) 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. Delay should not be indulged merely for the convenience of the advocates, or 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.

**Note:** D.C. Ethics 2000 Committee has recommended keeping current rule. Note also that comment is the same as pre-2000 Model Rule.

**Georgia Rule 3.2 Expediting Litigation**

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

The maximum penalty for a violation of this Rule is a public reprimand.

Comment

[1] Dilatory practices bring the administration of justice into disrepute.

[2] The reasonableness of a lawyer's effort to expedite litigation must be judged by all of the controlling factors. "Reasonable efforts" do not equate to "instant efforts" and are sufficient if reasonable under the relevant circumstances.

### Nebraska Rule 3.2 Expediting Litigation

In the lawyer's representation of a client, a lawyer shall not file a suit, assert a position, conduct a defense, delay litigation or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

#### 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.

**Note:** Nebraska kept its rule from the Code of Professional Responsibility, DR 7-102(A)(1). As explained by the Report to Nebraska's Ethics 2000 Committee:

"The Rule approved by the Subcommittee is taken from Nebraska Code DR 7-102(A)(1) with a few minor word changes. \* \* \* The Subcommittee believed that the Model Rule did not function well as a rule and that it was important to retain Nebraska's current DR 7-102(A)(1) concerning harassment. In keeping with the structure of the Model Rules, the Subcommittee retained the title of the Rule ("Expediting Litigation") and the Comment, but made the Rule more specific."

See <http://www.nebar.com/ethics/ModelRules/ModelRulesArticle3417E3.htm> Note also that the comment is identical to the Ethics 2000 Model Rule.

### Nevada Rule 171 [Rule 3.2]. Expediting litigation.

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

2. The duty stated in subsection 1 does not preclude a lawyer from granting a reasonable request from opposing counsel for an accommodation, such as an extension of time, or from disagreeing with a client's wishes on administrative and tactical matters, such as scheduling depositions, the number of depositions to be taken, and the frequency and use of written discovery requests.

**Note:** Nevada has not adopted comments to its rules.

### New Jersey Rule 3.2. Expediting Litigation

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client and shall treat with courtesy and consideration all persons involved in the legal process.

**Note:** New Jersey has not adopted comments to its rules.

### Ohio “Proposed” Rule 3.2: Expediting Litigation

Ohio Committee Reporter’s Note

The Task Force does not recommend adoption of ABA Model Rule 3.2, the text of which is set forth below. The substance of Model Rule 3.2 is addressed by other provisions of the Ohio Rules of Professional Conduct, including Rules 1.3 [Diligence], 3.1 [Meritorious Claims and Contentions], and 4.4(a) [Respect for Rights of Third Persons].

**Note:** In addition to Ohio’s proposed rejection of rule 3.2, both Oregon and Virginia have declined to adopt the rule.

### Tennessee Rule 3.2 Expediting Litigation

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

Comments

[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, such as illness or a conflict with an important family engagement, 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 litigation be reasonable if done for the primary 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 reasonable lawyer would regard the course of action as having some substantial purpose other than delay.

[2] Even if a lawyer is justified in seeking to delay a proceeding, the lawyer may not do so by means otherwise prohibited by these rules. See, e.g., RPCs 3.1 and 3.4.

-----Original Message-----

From: Antonie Voogd [mailto:avoogd@ojai.net]

Sent: Wednesday, June 08, 2005 6:10 PM

To: Jerome Sapiro, Jr.

Cc: SeLegue, Sean ; Hollins, Audrey; McCurdy, Lauren; Difuntorum, Randall; Mohr, Kevin E.; Ruvolo, Hon. Ignazio J.; Peck, Ellen R.; Melchior, Kurt W.; Martinez, Raul; Lamport, Stanley; Julien, JoElla J.; Foy, Linda Quan; Vapnek, Paul W.; Tuft, Mark L.; Sondheim, Harry B.; Kehr, Robert

Subject: Re: Proposed Rule 3.2 [3-200]

I respectfully disagree with Jerry. There is nothing uncivil about denying a continuance or a extension that would be granted by the court upon motion. Civility should not trump the client's interest in having the matter promptly resolved. We all know that justice delayed is justice denied. Yet it is common practice to seek or tolerate continuances and extensions required only because of the procrastination or sloth of counsel - and let the client pay the costs of the telephone conversations and confirming letters relating to those extensions. As to honeymoons, attorneys should schedule to avoid conflict. If the conflict arises notwithstanding reasonable scheduling, the clients interests should prevail unless he agrees to the extension. The rules are intended to protect the interests of clients, not the convenience of lawyers.

Tony

On Jun 8, 2005, at 2:03 PM, Jerome Sapiro, Jr. wrote:

Dear Friends:

I oppose adoption of Model Rule 3.2. It should not be a disciplinary rule at all. Adopting it merely for the sake of copying the American Bar Association Model Rules would be a serious mistake.

The rule is poorly drafted. It requires a lawyer to make reasonable efforts to expedite litigation consistent with the interests of the client. As an ethical consideration or aberrational rule, one could not quarrel with that concept. However, it is incomplete and only states part of the facts that ought to be considered by an ethical litigator.

A litigator is also expected to be civil. One of the concepts of civility is that a lawyer should respect the schedule, commitments, and concerns of opposing counsel, to the extent those matters are consistent with the protection of the interests of the client. If Model Rule 3.2 is interpreted literally, the only interests the lawyer should consider in expediting litigation are the interests of the lawyer's own client. If opposing counsel has been hospitalized, that should not be a matter of concern under Rule 3.2. Instead, if we follow the foolhardy approach of the American Bar Association, we would be required to expedite litigation consistent with the

interests of the client.

Business and Professions Code section 6128 makes it a misdemeanor for an attorney to willfully delay “. . . his client’s suit with a view to his own gain.” If our Rule of Professional Conduct copied that language, I would not object. However, the last sentence of the comment to Model Rule 3.2 goes farther than our statute. It suggests that it is improper for a lawyer to consider the client’s own financial or other benefit from a delay in litigation. Delaying a case from going to trial so our own client can work with expert witnesses to rebut the position of the opponent, so our client’s medical condition stabilizes and damages can properly be evaluated, so the client’s financial condition might improve to enable the client to afford to go to trial — all of these are not supposed to be legitimate interests of the client under the comment to Model Rule 3.2

The State Bar Act does not say that an attorney must not postpone a trial for the attorney’s own benefit. Suppose, for example, that the attorney wants to continue trials, depositions, or hearings because the attorney will be on honeymoon or for other personal reasons. That should not be a disciplinable offense. Yet the commentary to the rule dilutes the ability to seek a postponement for an attorney’s personal reasons (even if not for financial gain) by saying it would be improper for us to fail to expedite litigation solely for the convenience of the advocates.

Model Rule 3.2 is a good example of a rule that should be part of a hortatory concept but is inappropriate as a disciplinary rule. We properly rejected it in the 1980s. We should reject it again.

With best regards to all of you,

Jerry

CONFIDENTIAL E-MAIL from THE SAPIRO LAW FIRM

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RE: Rule 3-200 [ABA MR 3.1 and 3.2]  
6/10/05 Commission Meeting  
Open Session Item III.H.

Rules 3.1 [3-200], 3.2  
6/10/05 Meeting  
Item III. H

**ANTHONIE M. VOOGD**

918 Palomar Lane, Ojai, California 93023, (805) 646-1512, email avoogd@ojai.net

**INTER-OFFICE MEMORANDUM**

TO: MEMBERS OF THE COMMISSION  
FROM: A.M. VOOGD  
RE: RULES 3.1 [3-200]  
DATE: 5-11-05

Following the last meeting, the latest draft of the rule read as follows:

- (a) A lawyer shall not bring, continue 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.
  
- (b) 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.

Moreover, ABA Model Rule (2002) comments [1], [2] and [3] were approved as well as the concept of a cross reference comment.

Open issues:

(1) The language of the cross-reference comment. "See also Business & Professions Code § 6068(c), California Civil Code §§

128.5, 128.6 and 128.7, and Rule 11(b) of the Federal Rules of Civil Procedure” is suggested.

- (2) Items suggested by Robert Kehr in his May 7, 2005 memo, a copy of which is attached, and, in particular, the language suggested in paragraphs 2, 3.a. and 3.b. of that memo.

## MEMO

To: Tony Voogd  
Mark Tuft  
Nace Ruvolo

From: Robert L. Kehr

Date: May 7, 2005

Re: Rule 3.1/3-200  
June 10, 2005 Meeting  
Agenda Item III.H

### 1. Introduction.

At our April 1 and 2, 2005, meeting, I offered to write a new Comment that would address the appellate implications of this rule. It was suggested at the meeting that one of those implications arises from the so-called "*Wende*" brief filed in the appeal following an adjudication of criminal guilt. See *People v. Wende*, 25 Cal.3d 436 (1979) and *Anders v. California*, 386 U.S. 738 (1967).

Cribbing liberally from 6 Witkin, California Criminal Law §39 (3<sup>rd</sup> Ed. 2000): In *Wende*, the lawyer representing a criminal appellant filed a brief that merely set forth a summary of the proceedings and facts with citations to the transcript, raised no specific issues, and asked the court to make a thorough review of the entire record to determine for itself whether there were any arguable issues. The appellate lawyer also filed a declaration in which he stated that he had advised the appellant of the nature of the brief, that he would send the appellant a copy, and that he had informed the appellant that the court would permit him to file a brief on

his own behalf. The appellate lawyer also stated that he was not asking to withdraw but would advise the appellant of his right to move to have counsel relieved. He further stated that the principal issue at trial was one of credibility of witnesses and that he would cooperate with trial counsel in investigating and seeking writ review of possible new evidence on that issue.

A *Wende* brief, therefore, is a brief filed by a criminal appellant's lawyer stating, among other things, that the lawyer can find no legitimate appellate issue. This seems to me to be consistent with Rule 3.1/3-200 and raises no questions I can see under it: the lawyer has made no unmeritorious claims. I recommend we do nothing to address the *Wende* situation.

## 2. Proposal.

I nevertheless continue to believe that the rule should make clear that the word "proceeding is not subject to a restrictive interpretation. I therefore suggest adding a new Comment, as follows:

"[4] Subject to Comment [3], Rule 3.1(a) addresses the duties of lawyers when bringing or defending proceedings of all kinds, including appellate and writ proceedings."

## 3. Other Comments.

- a. M.R. Rule 3.1 does not refer to M.R. 3.8 (Special Responsibilities of a Prosecutor). It might be helpful to add a cross-reference, which could be done by beginning my proposed Comment [4] with: "Subject to Comment [3] and to Rule 3.8, ...."
- b. Kevin's April 1 and 2, 2005, meeting notes point out that the Commission hasn't voted on the title for Rule 3.1, and he asks if we should adopt the 3.1, the 3-200, or some other title. I have a suggestion that falls into the some other category. Several months ago Mark argued in a memo that the topic of 3.1 really is the proper scope of advocacy. I think he is right but would suggest two changes. First,

because these are disciplinary rules, and to avoid the ABA's inclination for hortatory expressions, I would change "proper" to "permitted". Second, because Rule 3.8 handles a special application of the concerns that are the basis for 3.1, I would imitate the title of Rule 1.10, as follows: "Permitted Scope of Advocacy: General Rule."

**EXCERPT**

**STATE BAR OF CALIFORNIA**  
**COMMISSION FOR THE REVISION OF THE RULES**  
**OF PROFESSIONAL CONDUCT**

**\*DRAFT\***

**MEETING SUMMARY - OPEN SESSION**

**Friday, October 28, 2005**

(9:15 am - 5:00 pm)

**Saturday, October 29, 2005**

(9:00 am - 5:00 pm)

LOCATION ON FRIDAY, OCTOBER 28, 2005:

SF—State Bar Office  
180 Howard Street, 4th Floor  
San Francisco, CA 94105

LOCATION ON SATURDAY, OCTOBER 29, 2005:

Nossaman Guthner Knox et al  
50 California Street, 34th Floor  
San Francisco, CA 94111

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**G. Consideration of ABA MR 3.2. Expediting Litigation**

The Commission considered an October 24, 2005 draft of proposed rule 3.2 presented by Mr. Voogd. Mr. Voogd summarized the status of the draft indicating the recommendation that the substance of MR 3.2 be adopted. Mr. Voogd commented that given the Commission's action to pursue a California version of MR 1.2 (Communication), he withdraws his suggestion to add a new comment to rule 3.2 stating: "A lawyer shall consult with his or her client before seeking or granting an extension of time where such extension may delay resolution of the matter or otherwise prejudice the client." Mr. Voogd also called attention to an October 25, 2005 message from Mr. Sapiro stating reasons why the Commission should not adopt MR 3.2. The Chair called for discussion of the codrafters' recommendation to adopt the substance of MR 3.2. Among the points raised during the discussion were the following.

(1) MR 3.2 is a hortatory rule that does not work as an actual disciplinary rule. It contains a "reasonable care" standard that is not an appropriate test for a disciplinary rule.

(2) MR 3.2 will be used as an excuse for lawyers to reject reasonable requests for a continuance and will foster uncivil behavior among lawyers on the pretext of a professional responsibility to "expedite litigation."

(3) The controlling factor in MR 3.2 is the express condition that the lawyer's efforts to expedite litigation be "consistent with the interests of the client." This means that the rule will not undermine a lawyer's discretion to grant a reasonable request for a continuance. Often, a lawyer will agree to an opposing counsel's request for a continuance with the expectation that it will garner reciprocal courtesies that will benefit the client. This rule has not led to uncivil behavior in the states that have adopted it.

(4) It is not clear how the concept of "the interests of the client" applies to a situation where objectively the

client should abide with their lawyer's desire to expedite litigation but subjectively the client instructs the lawyer to prolong or delay the litigation.

(5) This rule should be read together with MR 1.2 (re allocation of authority among client and lawyer) and 1.3 (diligence) in order to appreciate fully the dynamics of the lawyer-client relationship in any situation that triggers a lawyer's concern about expediting litigation.

(6) As evidenced by the cases found in the annotated MR's, the focus of MR 3.2 is exceptional dilatory practices that harm the administration of justice. It should not be read to invade the normal course of litigation.

(7) The hortatory language undermines any exclusive focus on dilatory practices. If adopted, the rule should be re-written to be a precisely stated disciplinary rule.

(8) If adopted, the rule could become an arrow in a judges quiver used to control counsel through the threat of a Bar referral of a perceived violation.

(9) Realistically, if this rule is used in the Bar discipline system, then it would be in egregious circumstances such as the all too common scenario where a lawyer signs-up a client and then does nothing until the day before the statute runs.

(10) This rule may be problematic because conceptually it creates parity between the interests of a client and the interests in the administration of justice. If a judge or an opposing counsel claims a violation of the rule, then should a lawyer be allowed refute that claim by using confidential information concerning the client's demands to delay the litigation. This rule could place lawyers at odds with their own clients.

(11) Consideration should be given to the D.C. and Nebraska variations of MR 3.2. The D.C. variation provides that: "(a) In representing a client, a lawyer shall not delay a proceeding when the lawyer knows or when it is obvious that such action would serve solely to harass or maliciously injure another....(b) A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client." The Nebraska variation employs a different approach stating that: "In the lawyer's representation of a client, a lawyer shall not file a suit, assert a position, conduct a defense, delay litigation or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another."

Following discussion, the Chair called for a vote on the codrafters recommendation to adopt proposed rule 3.2. The vote was tied: 5 yes, 5 no (including the Chair), and 1 abstain. As the rule was not adopted, the codrafters were asked to attempt a redraft that accounts for the concerns expressed by the members, in particular the suggestion to consider the D.C. and Nebraska variations.

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## **EXCERPT**

### **STATE BAR OF CALIFORNIA COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT**

#### **MEETING SUMMARY - OPEN SESSION**

**Friday, July 22, 2005**  
(9:10 am - 5:00 pm)

**Saturday, July 23, 2005**  
(9:15 am - 5:00 pm)

**SF–State Bar Office  
180 Howard Street, 4th Floor  
San Francisco, CA 94105**

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#### **O. Consideration of ABA MR 3.2. Expediting Litigation**

The Commission considered a July 7, 2005 memorandum presented by Mr. Voogd setting forth a recommendation accounting for both MR 3.2 and MR 1.3 (re diligence). Mr. Voogd summarized the memorandum indicating that, as an alternative to the adoption of MR 3.2, MR 1.3 could be amended to prohibit a lawyer from seeking or granting an extension of time without a client's informed written consent. The Chair called for a discussion of the concept of MR 3.2, noting that consideration of MR 1.3 would be agendized for future consideration.

- (1) The generality of the MR 3.2 standard is not an effective disciplinary rule.
- (2) The structure of the ABA MR's must be appreciated and the Commission should not consider the merits of MR 3.2 in isolation.
- (3) The broad policy underlying MR 3.2 appears to be a lawyer civility and administration of justice concern.
- (4) MR 3.2 is a major departure from California's approach to issues of lawyer neglect as the current law focuses on discrete enforceable areas: delay for a lawyer's benefit; delay to cause injury; and habitual neglect that impacts the efficiency of the court system.
- (5) MR 3.2 is the wrong rule to address lawyer civility.
- (6) MR 3.2 is founded on a "reasonableness" standard that may be okay for civil issues concerning a lawyer's standard of care but is not right for a disciplinary rule.

Following discussion, the Chair took a vote to ascertain Commission consensus on the policy of MR 3.2. The Commission adopted the concept of MR 3.2 by a vote of 7 yes, 5 no, 1 abstain. The Chair assigned the codrafters to prepare a first draft rule and all members were invited to send drafting suggestions to the codrafters.

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## **EXCERPT**

### **STATE BAR OF CALIFORNIA COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT**

#### **MEETING SUMMARY - OPEN SESSION**

**Friday June 10, 2005**  
(9:15 am - 5:00 pm)

#### **VIDEO-CONFERENCE MEETING**

**SF-State Bar Office**  
**180 Howard Street, Room 8-B**  
**San Francisco, CA 94105**

**LA-State Bar Office**  
**1149 So. Hill Street, Room 723**  
**Los Angeles, CA 90015**

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#### **H. Consideration of Rule 3-200 [ABA MR 3.1 and 3.2]. Prohibited Objectives of Employment**

Mr. Voogd presented a May 11, 2005 memorandum with a revised draft rule 3.1. Mr. Voogd reported that input from Mr. Kehr had been considered in developing the current draft. In response to Mr. Voogd's report, the following drafting decisions were made.

(1) The Commission agreed with Mr. Kehr's recommendation that the draft rule not specifically address Wende brief situations but instead include a new Cmt. [4] clarifying that the term "proceeding" includes appellate and writ proceedings (8 yes, 0 no, 2 abstain).

(2) The Commission agreed with Mr. Kehr's recommendation to reserve a place, possibly at the start of Cmt. [4], for a cross reference to MR 3.8 (re special duties of prosecutors), subject to the Commission's future action on MR 3.8 (8 yes, 0 no, 2 abstain).

(3) The Commission determined to use the ABA rule title: "Meritorious Claims and Contentions" (8 yes, 0 no, 2 abstain).

(4) The Commission agreed with the codrafters' recommended modification to Cmt. [1] identifying certain codified provisions as a cross reference (5 yes, 3 no, 0 abstain).

With these changes, the Commission tentatively approved proposed rule 3.1 (6 yes, 3 no, 0 abstain). The codrafters were asked to finalize the draft for submission to staff. The codrafters were also assigned to prepare a report on MR 1.3 re diligence, including consideration of the D.C. version of that rule. It was understood that the web posting of proposed rule 3.1 should go forward without awaiting the Commission's work on rules 3.2 and 1.3. Ms. Peck noted her objection to the Commission's tentative approval of rule 3.1.

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