

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

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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 (3rd 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."