

RE: Rule 3-200
10/8/04 Commission Meeting
Open Session Item III.F.

ANTHONIE M. VOOGD

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INTER-OFFICE MEMORANDUM

TO: MEMBERS OF THE COMMISSION
FROM: A.M. VOOGD
RE: RULE 3-200 (III.F)
DATE: 9-23-04

The purpose of this memorandum is to respond to Jerry Shapiro's scholarly email of August 26, 2004 and Diane Karpman's associated email of the same date. You will recall that the predicate of the argument in my memo of August 1, 2004, was "the assumption that the law is such that lawyers can predict with considerable accuracy how courts will rule with regard to proposed claims and defenses." Jerry challenged the assumption as incorrect, citing various memorable cases reflecting the positive development of the law.

To my mind, these cases are consistent with the assumption; they simply reflect the nature of the doctrine of stare decisis and the very limited number of circumstances allowing of judicial of the law. See generally, Witkin, California Law, Chapter XXVII, Stare Decisis, Volume 9, pages 953 et seq. Concepts fundamental to our democratic system control. Legislatures make the law; courts interpret the law. The public is entitled to be heard before the Legislation on proposed law changes. If the assumption were incorrect, the public would have no way or predicting the legal consequences of their actions. The rule of law would be a crapshoot.

A word on lawyer zeal. Consider an action on an unpaid promissory note. Justice requires that it be paid. Yet the zealous lawyer will try to find some way out for his client. Those efforts will only result in both parties paying

more in fees and a waste of scarce judicial resources. Competence trumps zeal. A competent lawyer would tell his client to pay the amounts due.

Notwithstanding, I have rewritten the proposed rule such it may have a better chance of Commission approbation.

Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, if the position lacks merit. Nevertheless:

(A) A lawyer may make a good faith argument for an extension, modification or reversal of existing law if there is a reasonable prospect of the position being adopted by the courts; and

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.

The standard accords with the law as specified by the Supreme Court in Kirsch and subsequent cases. And zealots would not be able to assert spurious proposed changes in the law; for instance, “and” means “or” in statute X even though the Supreme Court had previously rejected that precise argument.

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

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

Sent: Thursday, August 26, 2004 11:54 AM

To: Hollins, Audrey; McCurdy, Lauren; Difuntorum, Randall; Mohr, Kevin E.; Voogd, Anthony; Ruvolo, Hon. Ignazio J.; Peck, Ellen R.; Melchior, Kurt W.; Martinez, Raul; Lamport, Stanley; Julien, JoElla J.; George, Edward P.; Foy, Linda Quan; Betzner, Karen; Vapnek, Paul W.; Tuft, Mark L.; Sondheim, Harry B.

Subject: Rule 3-200

Dear Friends:

I promise this is the last email I will send before tomorrow's meeting, but I apologize for having to inundate you with so many comments on the eve of the meeting.

I respectfully disagree with the first sentence of the revision of Rule 3-200 recommended by Tony in his memorandum dated August 1, 2004, and with the reasons he expresses for deleting the current rule. The current rule should be retained, with the addition of the balance of Tony's recommended changes.

With all due respect to Tony, the assumption on which his recommendation is premised is incorrect. Lawyers cannot "predict with considerable accuracy" how courts will rule on proposed claims and defenses. Nor can lawyers reasonably predict whether or not a court will adopt proposed extensions, modifications, or reversals of existing laws. In many cases, a lawyer who tries to convince a client that that a particular result is certain is likely to be misleading his or her client. Three classic examples will illustrate the point.

First, in 1842, the United States Supreme Court decided *Swift v. Tyson*, 41 U.S. 1. It held that federal courts in diversity cases need not apply the substantive law of the forum state but may decide what the law should be. For almost a century, federal courts rigorously followed *Swift v. Tyson*. Legislation to overturn it did not pass. In the 1930s, a man was hit by a train while walking on railroad tracks in Pennsylvania. In the resulting litigation, the defendant railroad's attorneys argued that he was a trespasser under state law, so the railroad owed him no duty of care under state law. If Tony's assumption and analysis were correct, the lawyers would not ethically have made the argument. They would not ethically have argued that Pennsylvania law precluded recovery, would not ethically have appealed, and would not ethically have petitioned for a writ of certiorari. Unalterable precedent predicted certain defeat. However, after losing in the district and circuit courts because of the doctrine of *Swift v. Tyson*, the railroad was granted a hearing in the Supreme Court. In *Erie Railroad v. Tompkins*,

304 U.S. 64 (1938), the Supreme Court overruled *Swift v. Tyson* and held that the law of the forum state must be followed.

Second, in the 1800s, Homer Plessy was 1/8th Black and 7/8th Caucasian. He was arrested in Louisiana when he refused to ride in the "colored" coach of a railroad train as required by Louisiana law. He sued Judge Ferguson to prohibit the judge from hearing the trial. He lost. In *Plessy v. Ferguson*, 163 U.S. 537 (1896), the Supreme Court affirmed. It held that the purpose of the 14th Amendment was to secure the absolute equality of the two races before the law but was not intended to abolish distinctions based on race or to enforce social equality or commingling of the races on terms unsatisfactory to either. "Separate but equal" became the law of the land. Three years later, in *Cummings v. Board of Education*, 175 U.S. 528 (1899), the Supreme Court denied relief from segregation of the schools of Richmond County, Georgia. In *Gong Lum v. Rice*, 275 U.S. 78 (1927), a Chinese resident of Mississippi contested a school board order requiring her to attend the school maintained for Blacks. Since there were no separate schools for Chinese, she contended that she was entitled to attend the Caucasian schools. The Supreme Court accepted the finding of the Mississippi courts that, for the purposes of the segregation laws, all who were not White belonged to the "colored race." Other cases upheld the "separate but equal" concept in education.

In 1951, Oliver Brown and twelve other parents sued on behalf of their children in the United States District Court for the District of Kansas to enjoin enforcement of a Kansas statute that permitted, but did not require, cities of more than 15,000 population to maintain separate school facilities for Black and White students. If their attorneys had adhered to the principles advocated by Tony, Mr. Brown and the other plaintiffs would never have been able to find an attorney to contest their children's right to attend desegregated schools. Decades of decisions and legislation made it predictable with a reasonable certainty that such a suit would be defeated. However, *Brown v. Board of Education*, 347 U.S. 483 (1954), decided 55 years after *Plessy*, overturned clear precedents, contrary to most reasonable predictions.

Third, in England, Mr. Winterbottom was seriously injured when a mail coach he was driving collapsed because of defective construction. Its manufacturer had sold the mail coach to the Postmaster General. The Postmaster General, in turn, contracted with a company to supply horses to pull the coach. That company hired Mr. Winterbottom to drive the coach. Mr. Winterbottom sued the manufacturer. His case was dismissed based on the general rule that a seller of a product cannot be sued, even for proven negligence, by someone with whom he has not contracted. In other

words, Mr. Winterbottom was not "in privity" with the manufacturer. *Winterbottom v. Wright*, 152 Eng. Rep. 402 (1842). In language akin to Tony's argument here, one Lord was outraged that anyone would try to sue:

If we were to hold that [Winterbottom] could sue in such a case, there is no point at which such actions would stop. The only safe rule is to confine the right to recover to those who enter into the contract: if we go one step beyond that, there is no reason why we should not go fifty. The only real argument in favor of the action is, that this is a case of hardship; but that might have been obviated, if the plaintiff had made himself a party to the contract.

Another Lord added, in language akin to Tony's:

We ought not to permit a doubt to rest upon this subject, for our doing so might be the means of letting in upon us an infinity of actions. . . . Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue.

This effectively prevented injured persons from suing for defective products. For almost a century, *Winterbottom v. Wright*, *supra*, precluded such actions in common law countries. Since the plaintiff and the manufacturer were not in privity of contract, the injured party had no right of action. See, e.g., *Hanson v. Blackwell Motor Co.*, 143 Wash. 547 (1927).

However, in New York, a man by the name of MacPherson bought a Buick automobile that had a defective wheel. He was injured. If his lawyer had adhered to the principle argued by Tony, Mr. MacPherson could not have retained an ethical attorney to represent him in suing the manufacturer. Defying decades of precedent in New York and elsewhere, however, an attorney did represent Mr. MacPherson. *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916), reversed long-established law and imposed liability on the manufacturer. If a lawyer could be disciplined for bringing an action or asserting an issue when there was no "reasonable prospect of the position being meritorious under applicable law," to use Tony's recommended phrase, Mr. MacPherson could not have found an ethical lawyer who would represent him. After all, the lawyer would be challenging almost a century of unvarying precedent that had recently been upheld in New York.

The point is that lawyers challenge statutes, precedents, and injustice all the time. The mere fact that a lawyer will challenge the dominant majority of our populace or will contest clear laws and precedents does not mean that the lawyer is acting unethically. To the contrary, a healthy legal system demands that lawyers challenge as unlawful, incorrect, or unconstitutional acts by legislatures, by the executive branch, or by the judiciary that abuse people or entities or that deprive them of defenses.

When we drafted Rule 3-200, we followed prior Rule 2-110 and paid attention to these concepts. We consciously decided not to discourage lawyers from challenging precedent or from seeking to make new law on behalf of their clients. Under our rules, before a lawyer can be disciplined for attempting to advocate a losing cause, the State Bar Court would have to find that the lawyer asserted the position in litigation or took the appeal for the purpose of harassing and maliciously injuring someone. Before a lawyer could be so disciplined, the State Bar Court would have to find that the lawyer's position in the litigation could not be supported by a good faith argument for extension, modification, or reversal of existing law.

Our rule has not been the same as ABA DR 7-102(A)(2), nor has it been the same as ABA Model Rule 3.1, for good cause. In the words of DR 7-102(A)(2), a lawyer could be disciplined for knowingly advancing "a claim or defense that is unwarranted under existing law." If that were the standard, interracial marriage would still be prohibited in California, and the state could bar non-Whites from owning real estate. *Perez v. Sharp*, 32 Cal. 2d 711 (1948). *Cumings v. Hokr*, 31 Cal. 2d 844 (1948).

The American Bar Association's Disciplinary Rules began the erosion of a duty that, for centuries, has required an attorney to be a zealous advocate of his or her client's cause. In 1792, Thomas Erskine defended Thomas Paine on a charge of seditious libel. During the trial he said:

I will for ever at all hazards assert the dignity, independence and integrity of the English Bar without which impartial justice, the most valuable part of the English constitution can have no existence. From the moment that any advocate can be permitted to say that he *will* or will *not* stand between the Crown and the subject arraigned in the court where he daily sits to practice, from that moment the liberties of England are at an end.

22 State Trials, 358, 411 (1792) [italics in original].

On October 3, 1820, Henry Brougham argued to the House of Lords in defense of Queen Caroline. George IV, in a reprise of Henry VIII, had caused a bill to be prosecuted in the House

of Lords to deprive the queen of her title, prerogatives, rights, privileges, and pretensions and to dissolve her marriage to the king on the ground of adultery. In his argument, Henry Brougham gave a classic statement of a lawyer's duty of zealous advocacy, even if it caused the collapse of an empire:

I once before took leave to remind Your Lordships — which was unnecessary, but there are many whom it may be needful to remind — that an advocate by the sacred duty which he owes his client knows, in the discharge of that office, but one person in the world, *that client and none other*. To save that client by all expedient means, to protect that client at all hazards and costs to all others, and among others to himself, is the highest and most unquestioned of his duties. And he must not regard the alarm, the suffering, the torment, the destruction which he may bring upon any other. Nay, separating the duties of a patriot from those of an advocate, and casting them if need be to the wind, he must go on reckless of the consequences, if his part it should unhappily be to involve his country in confusion for his client's protection.

Quoted in Lloyd Paul Stryker, *For the Defense* (1947), in *THE LAW AS LITERATURE* 176, 210 (1960). These remarks set the stage for the defense's intent to attack the king's own title to the crown.

The American Bar Association Canons of Professional Ethics, Canon 15 (1908), clearly stated that it is the duty of an attorney to give “. . . entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability.” Even the prime mover of the Model Rules characterized zealousness as being “. . . the fundamental principle of the law of lawyering . . .” and the “. . . dominant standard of lawyerly excellence.” G. Hazard & W. Hodes, *The Law of Lawyering* 17 [emphasis in original].

This duty of zealous representation is not limited to litigation. When a lawyer negotiates a contract for a client, for example, he or she has the same duty, for that contract may later be interpreted by adversaries in litigation. Not being a zealous advocate in the negotiation of the contract may weaken the client's position in that litigation. The duty of zealous representation also affects the drafting of a will. The lawyer who drafts the will must carry out the intentions of the testator, even if those intentions disappoint the expectations of potential beneficiaries. In the corporate context, a lawyer for a corporation must warn directors of the corporation, even if misconduct by the president of the corporation is thereby disclosed. Utter devotion to our clients is the hallmark of our profession.

Tony's recommendation and analysis extends the erosion of the duty of zealous representation that was part of the adoption of

the Model Rules. In the Model Rules, no rule requires a lawyer to be zealous in the representation of clients. As far as I am aware, zeal is only mentioned in the preamble and in the comment to Model Rule 1.3. Although the comment now says that a lawyer "must act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf," that comment is watered down by other statements in the same comment and by the absence of a correlative duty in any of the text of any of the rules.

Instead of acquiescing in the approach of the Model Rules and extending it, we should resist it at all costs. I therefore oppose the first sentence of Tony's proposed new rule. The reasons for it are wrong and ignore what our ethical standards should be.

Instead, I recommend that we retain existing Rule 3-200(A) and (B). However, I would add to the rule a new paragraph that would adopt the substance of the second sentence of Tony's recommendation at page 164 of the agenda materials, and I would add to the rule the substance of the Discussion recommended by Tony at that same page.

With best regards to all of you, but continued embarrassment that this reaches you so late and the wish that I could be present in person tomorrow and Saturday in Los Angeles,

Sincerely,

Jerry

CONFIDENTIAL E-MAIL from THE SAPIRO LAW FIRM

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