

Proposed Rule 3.1 [3-200] “Meritorious Claims and Contentions”

(Draft #5, 10/3/09)

Summary: Proposed Rule 3.1 imposes discipline on a lawyer for bringing or continuing frivolous claims, etc. It is nearly identical to Model Rule 3.1 but makes minor wording changes to insure a broader coverage for the Rule, and for clarity.

Comparison with ABA Counterpart

Rule

- ABA Model Rule substantially adopted
- ABA Model Rule substantially rejected
- Some material additions to ABA Model Rule
- Some material deletions from ABA Model Rule
- No ABA Model Rule counterpart

- ABA Model Rule substantially adopted
- ABA Model Rule substantially rejected
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Primary Factors Considered

- Existing California Law

Rules

RPC 3-200.

Statute

Case law

Zamos v. Stroud, (2004) 32 Cal.4th 958 [12 Cal.Rptr.3d 54].

- State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

- Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(14 Members Total– votes recorded may be less than 14 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption

Vote (see tally below)

Favor Rule as Recommended for Adoption _____

Opposed Rule as Recommended for Adoption _____

Abstain _____

Approved on Consent Calendar

Approved by Consensus

Minority/Position Included on Model Rule Comparison Chart: Yes No

Stakeholders and Level of Controversy

No Known Stakeholders

The Following Stakeholders Are Known:

Very Controversial – Explanation:

Moderately Controversial – Explanation:

Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 3.1* Meritorious Claims and Contentions

October 2009

(Draft rule following consideration of public comment.)

INTRODUCTION:

Proposed Rule 3.1 Proposed Rule 3.1 imposes discipline on a lawyer for bringing or continuing frivolous claims, etc. It is nearly identical to Model Rule 3.1 but makes minor wording changes to insure a broader coverage for the Rule and for clarity. See Explanation of Changes for the Rule.

Variation in Other Jurisdictions. See Explanation of Changes for the Rule.

* Proposed Rule, Draft 5 (10/3/09).

<p align="center"><u>ABA Model Rule</u> Rule 3.1 Meritorious Claims and Contentions</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 3.1 Meritorious Claims and Contentions</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>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.</p>	<p>(a) A lawyer shall not bring, <u>continue</u> 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.</p> <p>(b) A lawyer for the defendant in a criminal proceeding, or <u>for</u> 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.</p>	<p>Proposed Rule 3.1 is based on Model Rule 3.1, with only minor changes to broaden the rule's scope and to provide clarity. The addition of the word "continue" in paragraph (a) is intended to ensure broad coverage in the public interest. See also <i>Zamos v. Stroud</i> (2004) 32 Cal.4th 958 [12 Cal.Rptr.3d 54].</p> <p>The division of the Rule into two paragraphs and the addition of the word "for" in paragraph (b) is for clarity.</p> <p><u>Variation in other Jurisdictions:</u> Most states follow the Model Rule verbatim. A number of other jurisdictions have divided the Model Rule into two paragraphs as the Commission recommends. E.g., Montana, Wisconsin, and Wyoming. One state has taken the opposite tack and reduced the two sentences of the Model Rule to a single sentence. See Oregon Rule 3.1. Wyoming adds a third paragraph that parallels the substance of FRCP 11(b), concerning the legal effect of a lawyer's signing a pleading, motion or other court document. The Commission is not aware of any other jurisdiction that has added "continue" to its rule.</p> <p>New Jersey has not adopted the second sentence of MR 3.1. Several states elaborate on the word "incarceration," adding or substituting such phrases as "or commitment" (North Dakota), "involuntary institutionalization" (D.C.), or "deprivation of liberty" (Wisconsin).</p>

* Proposed Rule, Draft 5 (10/3/09). Redline/strikeout showing changes to the ABA Model Rule

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 3.1 Meritorious Claims and Contentions</p> <p align="center">Comment</p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center">Rule 3.1 Meritorious Claims and Contentions</p> <p align="center">Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[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.</p>	<p>[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.</p>	<p>Comment [1] is identical to Model Rule 3.1, cmt. [1].</p>
<p>[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</p>	<p>[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</p>	<p>Comment [2] is based on Model Rule 3.1, cmt. [3]. The added language clarifies that the Proposed Rule is consistent with the provisions of the State Bar Act and other law.</p>

* Proposed Rule, Draft 5 (10/3/09). Redline/strikeout showing changes to the ABA Model Rule.

<p align="center"><u>ABA Model Rule</u> Rule 3.1 Meritorious Claims and Contentions Comment</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 3.1 Meritorious Claims and Contentions Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>argument for an extension, modification or reversal of existing law.</p>	<p>argument for an extension, modification or reversal of existing law. This Rule also prohibits a lawyer from continuing an action after the lawyer knows that it has no basis in law or fact for doing so that is not frivolous. See Business and Professions Code sections 6068(c) and (g), Code of Civil Procedure section 128.7, and Rule 11(b) of the Federal Rules of Civil Procedure.</p>	
<p>[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.</p>	<p>[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.</p>	<p>Comment [3] is identical to Model Rule 3.1, cmt. [1].</p>
	<p>[4] This Rule is intended to apply to proceedings of all kinds, including appellate and writ proceedings.</p>	<p>Comment [4] has no counterpart in the Model Rule. It reinforces the intended broad scope of this Rule.</p>

Rule 3.1 Meritorious Claims and Contentions

(Comparison of the Current Proposed Rule to the initial Public Comment Draft)

- (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 for 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. This Rule also prohibits a lawyer from continuing an action after the lawyer knows that it has no basis in law ~~and~~or fact for doing so that is not frivolous. See, ~~e.g., *Zamos v. Stroud* (2004) 32 Cal.4th 958 [87 P.3d 802, 12 Cal.Rptr.3d 54.] See also~~ Business and Professions Code ~~section~~sections 6068, ~~subdivision~~(c) and (g), Civil Procedure Code ~~sections 128.5, 128.6 and~~section 128.7, and Rule 11(b) of the Federal Rules of Civil Procedure.

- [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.
- [4] ~~Subject to Comment [3] and~~This Rule ~~[3.8, paragraph (a)] addresses the duties of lawyers when bringing or defending~~applies to proceedings of all kinds, including appellate and writ proceedings.

Rule 3-200 Prohibited Objectives of Employment 3.1 Meritorious Claims and Contentions

(Comparison of the Current Proposed Rule to Current California Rule)

~~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~~

~~(a) (B) To present a claim~~ A lawyer shall not bring, continue or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in ~~litigation~~ law and fact for doing so that is not warranted under existing law ~~frivolous, unless it can be supported by~~ which includes a good faith argument for an extension, modification, or reversal of ~~such~~ existing law.

~~(b) A lawyer for the defendant in a criminal proceeding, or for 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. This Rule also prohibits a lawyer from continuing an action after the lawyer knows that it has no basis in law or fact for doing so that is not frivolous. See Business and Professions Code sections 6068(c) and (g), Civil Procedure Code section 128.7, and Rule 11(b) of the Federal Rules of Civil Procedure.

[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.

[4] This Rule applies to proceedings of all kinds, including appellate and writ proceedings.

Rule 3.1 Meritorious Claims and Contentions
(Commission's Proposed Rule – Clean Version)

- (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 for 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. This Rule also prohibits a lawyer from continuing an action after the lawyer knows that it has no basis in law or fact for doing so that is not frivolous. See Business and Professions Code sections 6068(c) and (g), Civil Procedure Code section 128.7, and Rule 11(b) of the Federal Rules of Civil Procedure.

- [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.
- [4] This Rule applies to proceedings of all kinds, including appellate and writ proceedings.

Rule 3.1 Meritorious Claims and Contentions

STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: Statutes and Standards (2009 Ed.)
by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

Arizona generally tracks ABA Model Rule 3.1, but the “unless” clause in the first sentence applies if there is a “good faith” basis in law and fact, which “may include” a good faith “and nonfrivolous” argument for an extension, modification, or reversal of existing law.

California: Rule 3-200 provides:

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.

Also, California Business & Professions Code §6068(c) states that an attorney has a duty 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.” In addition, California Civil

Code §§ 128.5, 128.6, and 128.7 provide sanctions for bad faith lawsuits and for frivolous litigation tactics.

Colorado: Rule 1.2(c) permits a lawyer to “provide limited representation to pro se parties...,” but Rule 11(b) of the Colorado Rules of Civil Procedure provides as follows:

Limited Representation

... Pleadings or papers filed by the pro se party that were prepared with the drafting assistance of the attorney shall include the attorney's name, address, telephone number and registration number.... The attorney in providing such drafting assistance may rely on the pro se party's representation of facts, unless the attorney has reason to believe that such representations are false or materially insufficient, in which instance the attorney shall make an independent reasonable inquiry into the facts....

Merely “helping to draft the pleading or paper filed by the pro se party” constitutes a certification by the attorney that the pro se client's document is “(1) well-grounded in fact based upon a reasonable inquiry of the pro se party by the attorney... and (3) is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.”

District of Columbia: The second sentence of Rule 3.1 provides that a lawyer for the defendant in a criminal proceeding, or for the respondent in a proceeding that could result in “involuntary institutionalization, shall, if the client elects to go to trial or to a contested factfinding hearing, nevertheless so defend the proceeding as to require that the government carry its burden of proof.”

Georgia rejects ABA Model Rule 3.1 and instead retains the language of DR 7-102(A)(1) and (A)(2) from the ABA Model Code of Professional Responsibility.

Montana: Rule 3.1 forbids a lawyer from asserting a claim or defense unless the lawyer has first determined “through diligent investigation that there is a bona fide basis in law and fact for the position to be advocated.” Also, a lawyer may not make a claim or defense “for the purpose of harassment, advancement of a non-meritorious claim, or solely to gain leverage.”

New Jersey adds “the lawyer knows or reasonably believes” after “unless” in the first sentence and adds “or the establishment of new law” at the end of the first sentence.

New York: DR 7-102(A) provides that in representing a client, a lawyer shall not:

(1) File a suit, assert a position, conduct a defense, delay a trial, 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.

(2) Knowingly advance a claim or defense that is unwarranted under existing law, except... if it can be supported by good faith argument for an extension, modification, or reversal of existing law.

North Dakota: The second sentence of Rule 3.1 applies to a proceeding that could result in incarceration “or commitment.”

Texas: Rule 3.01 ends after the word “frivolous” in the first sentence.

Wyoming divides ABA Model Rule 3.1 into paragraphs (a) and (b), and adds the following new paragraph (c):

The signature of an attorney constitutes a certificate by him that he has read the pleading, motion, or other court document; that to the best of his knowledge, information, and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose such as to harass or to cause unnecessary delay or needless increase, in the cost of litigation.

**Rule 3.1 Meritorious Claims and Contentions.
[Sorted by Commenter]**

TOTAL = 3 **Agree = 3**
Disagree = __
Modify = __
NI = __

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	COPRAC	A			Support as drafted.	No action required.
2	Liederman, Peter H.	A			In Comment [2] the discussion of actions that are frivolous may need to be clarified.	Commission revised Comment [2].
3	Los Angeles County Bar Association	A			The proposed rule should be adopted in the interest of national uniformity.	No action required.

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED