

Proposed Rule 3.1 “Meritorious Claims and Conditions”

(Draft 1)

Summary: Proposed Rule 3.1 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 | Comment |
|--|--|
| <input checked="" type="checkbox"/> ABA Model Rule substantially adopted <input type="checkbox"/> ABA Model Rule substantially rejected <input type="checkbox"/> Some material additions to ABA Model Rule <input type="checkbox"/> Some material deletions from ABA Model Rule <input type="checkbox"/> No ABA Model Rule counterpart | <input checked="" type="checkbox"/> ABA Model Rule substantially adopted <input type="checkbox"/> ABA Model Rule substantially rejected <input type="checkbox"/> Some material additions to ABA Model Rule <input type="checkbox"/> Some material deletions from ABA Model Rule <input type="checkbox"/> No ABA Model Rule counterpart |

Primary Factors Considered

Existing California Law

Rules

Statute

Case law

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 Public Comment Distribution

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

April 2009

(Draft rule revised following review of public comment)

INTRODUCTION:

Proposed Rule 3.1 is nearly identical to Model Rule 3.1 but makes minor wording changes to insure a broader coverage for the Rule and for clarity.

* Proposed Rule, Draft 4 (6/26/07).

| <p style="text-align: center;"><u>ABA Model Rule</u> Rule 3.1 Meritorious Claims and Contentions</p> | <p style="text-align: center;"><u>Commission's Proposed Rule*</u> Rule 3.1 Meritorious Claims and Contentions</p> | <p style="text-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><u>(a)</u> 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><u>(b)</u> 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>Approaches 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 4 (6/26/07). 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 Comment</p> | <p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center">Rule 3.1 Meritorious Claims and Contentions 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> |

* Proposed Rule, Draft 4 (6/26/07). 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 Comment</p> | <p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center">Rule 3.1 Meritorious Claims and Contentions Comment</p> | <p align="center"><u>Explanation of Changes to the ABA Model Rule</u></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 argument for an extension, modification or reversal of existing law.</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 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 section 6068, subdivisions (c) and (g), Code of Civil Procedure section 128.7, and Rule 11(b) of the Federal Rules of Civil Procedure.</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> |

| <p style="text-align: center;"><u>ABA Model Rule</u></p> <p style="text-align: center;">Rule 3.1 Meritorious Claims and Contentions</p> <p style="text-align: center;">Comment</p> | <p style="text-align: center;"><u>Commission's Proposed Rule*</u></p> <p style="text-align: center;">Rule 3.1 Meritorious Claims and Contentions</p> <p style="text-align: center;">Comment</p> | <p style="text-align: center;"><u>Explanation of Changes to the ABA Model Rule</u></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.
[Sorted by Commenter]**

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

| No. | Commentator | Position ¹ | Comment on Behalf of Group? | Rule Paragraph | Comment | RRC Response |
|-----|------------------------------------|-----------------------|-----------------------------|----------------|--|--------------------------------|
| 1 | COPRAC | agree | | | Support as drafted | No action needed |
| 2 | Peter H. Liederman | agree | | | 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 | agree | | | the proposed rule should be adopted in the interest of national uniformity | no action necessary |
| 4 | | | | | | |
| 5 | | | | | | |

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

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.

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August 27, 2009 McCurdy E-mail to Voogd, cc Chair, Vapnek, Tuft & Staff:

Given the recent measures taken to expedite the completion of the rule revision project, the purpose of this letter is to lay out the assignments for which you are a lead drafter that are scheduled to be discussed during the Commission's upcoming September, October and November meetings. A "rolling assignments agenda" is enclosed that covers all of the matters that must be completed at those meetings. This agenda format is being used due to the short turnaround time between these meetings and the interest of many Commission members in working on assignments for future meetings when they have an opportunity to do so. The assignments are considered "rolling" because, for example, any rule that is not completed at the September meeting should be treated as automatically re-assigned and carried forward to the October meeting. Accordingly, the Commission is facing a significant challenge to complete fully each assigned rule in order to avoid a domino effect of rules that are not finished.

Because the Commission has been given a mandate to meet a rigorous schedule of deliverables to the Board for action, it is very important that all assignments be submitted by the assignment due dates. As emphasized by the Chair, if a lead drafter anticipates a conflict, or a conflict unexpectedly arises, that interferes with the ability to complete an assignment, the lead drafter must take the initiative to make alternate arrangements with the codrafters so that the assignment can be submitted by the due date.

Below is a list of your lead draft assignments for the next meeting, September 11, 2009, to be held at the San Diego State Bar Annual Meeting. Enclosed are materials for those assignments. Below that list is a list of assignments for the subsequent meetings in November and October. Materials for those assignments will be distributed soon. If you need any those materials immediately, then please send me an email with a copy to Randy and Kevin. Codrafter responsibilities are not listed. Please refer to the rolling agenda document which identifies the drafting team for each rule assignment. In addition staff will prepare an updated chart listing all rule assignments by Commission member.

Your continued hard work and dedication to this important project is appreciated, and don't forget that staff and the Commission Consultant are here to help so please feel free to contact us for assistance.

ASSIGNMENTS FOR SEPTEMBER MEETING

September 11, 2009 Meeting

Assignments Due: Wed., 9/2/09

1. **III.B. Rule 1.0.1 Definition of "Law Firm" [1-100(B)(1)]** (Post Public Comment Rule Draft dated 6/16/07) and a global terminology rule [MR 1.0, RPC 1-100(B)]

Codrafters: Julien, Kehr, Sapiro

Assignment: (1) a chart comparing a proposed California version of a global terminology rule to MR 1.0 (including a comparison of the Commission's Rule 1.0.1 definition of "Law Firm" to MR 1.0(c)); (2) a "dashboard" cover sheet; and (3) a chart summarizing the public comment received on the Commission's Rule 1.0.1 definition of "Law Firm" and the Commission's response.

2. **III.K. Rule 3.1 Meritorious Claims and Contentions [3-200]**
(April 2009 Comparison Chart - Post Public Comment Rule Draft #4 dated 6/26/07)

Codrafters: Ruvolo, Tuft

Assignment: (1) a chart comparing proposed Rule 3.1 to MR 3.1; (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.

3. **III.L. Rule 3.2 Expediting Litigation [N/A]** (Dec. 2008 Comparison Chart; a rule is not recommended for adoption)

Codrafters: None

Assignment: (1) a chart comparing proposed Rule 3.2 to MR 3.2; and (2) a “dashboard” cover sheet.

4. **III.P. Rule 5.3.1 Employment of Disbarred Member [1-311]** (Dec. 2008 Comparison Chart – Post Public Comment Rule Draft #4 dated 6/26/07)

Codrafters: Lampport

Assignment: (1) a chart comparing proposed Rule 5.3.1 to RPC 1-311; (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.

ASSIGNMENTS FOR OCTOBER MEETING

October 16 & 17, 2009 Meeting

Assignments Due: Wed., 9/30/09

1. **III.DD. Rule 1.8.5 Payment of Expenses for a Client [4-210]** (Post Public Comment Draft #7.3 dated 7/5/08)

Codrafters: Julien, Kehr

Assignment: (1) a chart comparing proposed Rule 1.8.5 to MR 1.8(e); (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.

(NOTE: This is in addition to any assigned rule not completed at the September meeting.)

ASSIGNMENTS FOR NOVEMBER MEETING

November 6 & 7, 2009 Meeting

Assignments Due: Wed., 11/28/09

1. **IV.K. Possible Rule re: Class Action (no counterpart rules)** (possible rule last considered at the September 2006 meeting; see also the comments to proposed Rule 1.7)

Codrafters: Martinez, Sapiro (w/Karpman)

Assignment: (1) a recommendation whether to adopt a new rule addressing this subject and if a new rule is recommended it should be accompanied by a chart with the first column blank, the clean version of the proposed new rule in the second column, and an explanation for each part of the proposed rule in the third column; and (2) a “dashboard” cover sheet.

2. **IV.L. Possible Rule re: Hourly Fee (Record Time)** (no counterpart rules) (possible rule last considered at the August 2004 meeting; see also email compilation dated 1/31/08)

Codrafters: Foy, Peck

Assignment: (1) a recommendation whether to adopt a new rule addressing this subject and if a new rule is recommended it should be accompanied by a chart

**RRC – Rule 3-200 [3.1 & 3.2]
E-mails, etc. – Revised (10/13/2009)**

with the first column blank, the clean version of the proposed new rule in the second column, and an explanation for each part of the proposed rule in the third column; and (2) a “dashboard” cover sheet.

(NOTE: This is in addition to any assigned rule not completed at the September meeting.)

September 24, 2009 McCurdy E-mail to Voogd, cc Chair, Difuntorum & KEM:

I’m resending the assignment message I sent you for the September meeting, with all of the various materials for your upcoming assignments. In addition to a submission on Rule 1.8.5, (III.DD.) (assignment background materials sent to you by e-mail on Sept. 18th), we are also looking for materials for the following assignments that were carried over from the September meeting, to be submitted by September 30th for the October meeting:

Rule 3.1

Rule 3.2

Rule 5.3.1

I have also attached the most current Dashboard template for you to use. You can copy and paste any entries from the Dashboards sent out earlier into the revised Dashboard template provided (the last attachment to this message – named “Dashboard Template for Adoption V4 rev. 9-14-09.doc (43 KB).”

Attachments:

Rule 1.0.1

- Dashboard for Law Firm Definition (8/27/09)
- Introduction Template (8/27/09)
- Rule Chart Template (8/27/09)
- Comment Chart Template (8/27/09)
- Public Comment Chart, Draft 1 (8/27/09)
- State Variations (2009)
- Rule 1.0.1 [Law Firm], Post-PCD (6/16/07), Cf. to MR 1.0(c).
- Rule 1.0.1 [Law Firm], Post-PCD (6/16/07), Annotated
- Rule 1.0.1 [Law Firm], Post-PCD (6/16/07), Clean
- Rule 1.0.1 [Law Firm], Post-PCD (6/16/07), Cf. to PCD

Rule 3.1 [3-200]

- Dashboard (8/27/09)
- Introduction, Draft 2 (6/1/09)
- Rule Chart, Draft 2 (6/1/09)
- Comment Chart, Draft 2 (6/1/09)
- Public Comment Chart, Draft 1 (8/27/09)
- State Variations (2009)

Rule 3.2 [3-200]

- Dashboard (8/27/09)

- Introduction, Draft 3 (12/14/08)KEM
- Rule Chart, Draft 3 (12/14/08)KEM
- Comment Chart, Draft 3 (12/14/08)KEM
- Public Comment Chart, Draft 1 (8/27/09)
- State Variations (2009)

Rule 5.3.1 [1-311]

- Dashboard (8/27/09)
- Introduction, Draft 3.1 (12/17/08)KEM
- Rule Chart, Draft 3.1 (12/17/08)KEM
- Comment Chart, Draft 3.1 (12/17/08)KEM
- Public Comment Chart, Draft 1 (8/27/09)

September 30, 2009 Voogd E-mail to McCurdy:

I think the only thing you really need on 3.1 is the dashboard. Again I do not have the tally.

See attachments.

Attachments:

- Dashboard, Draft 1 (9/30/09)AV
- ~~Introduction, Draft 2 (6/1/09)~~
- ~~Rule Chart, Draft 2 (6/1/09)~~
- Comment Chart, Draft 2 (6/1/09)
- Public Comment Chart, Draft 1 (8/27/09)
- State Variations (2009)

October 3, 2009 KEM Note to File re 3.1:

I've updated the files Tony submitted. The new draft numbers, etc., are:

- Dashboard, Draft 2 (10/3/09)AV-KEM
- Introduction, Draft 3 (10/3/09)KEM
- Rule & Comment Chart, Draft 3 (10/3/09)KEM
- Public Comment Chart, Draft 2 (10/3/09)AV-KEM

October 11, 2009 Sondheim E-mail to RRC re 3.1:

The Dashboard does not indicate that there is no minority position.

October 11, 2009 Sondheim E-mail to RRC re 3.2:

The Dashboard indicates no minority position included, but it is included.

October 12, 2009 KEM Note to File re 3.2:

I've updated the files Tony submitted. The new draft numbers, etc., are:

- Dashboard, Draft 2 (10/12/09)AV-KEM
- Introduction, Draft 4 (10/12/09)KEM
- Rule Chart, Draft 3 (10/12/09)KEM
- Comment Chart, Draft 3.1 (10/12/09)KEM

October 12, 2009 Melchior E-mail to RRC List:

Rule 3.2, Intro, line 1: Why "tentative"?