

Proposed Rule 3.2 [N/A] “Expediting Litigation”

(Draft 1)

Summary: The Commission does not recommend adoption of this rule

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
- Some material additions to ABA Model Rule
- Some material deletions from ABA Model Rule
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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:

A Commission minority favored enactment of the Rule. The minority explains that the principal reason for having the rule is that lawyers' dilatory tactics impede the administration of justice and are a burden upon opposing parties and a waste of public resources. Engaging in tactics that have no purpose other than delay leads to frustration with the courts and eventually disrespect for the law.

Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Recommendation to Not Adopt ABA Model Rule 3.2 Expediting Litigation

December 2008

INTRODUCTION:

Following consideration of this ABA Model Rule, the Commission made a tentative decision to not recommend adoption of any California counterpart.

The Commission rejected the rule for the following reasons: (1) the Rule is not intended to protect the client (who is protected by the lawyer's duty of competence, Rule 1.1), but rather to protect the interests of the justice system and of adverse parties. Any complaint under this Rule would be made by someone other than the client, and the lawyer's defense likely would require the lawyer to disclose confidential client information; (2) the rule lacks the specificity necessary for a rule that may result in a lawyer being disciplined. In effect, the Rule's "reasonable efforts" standard is a negligence standard that would require the State Bar Court to retroactively determine how a case might have been better handled. The Commission believes that professional discipline not based on a judgment call as to how a representation might have been done better; and (3) the concept of rule is adequately covered by proposed Rule 3.1.

A minority of the Commission favored enactment of the Rule. The minority explains that the principal reason for having the rule is that lawyers' dilatory tactics impede the administration of justice and are a burden upon opposing parties and a waste of public resources. Engaging in tactics that have no purpose other than delay leads to frustration with the courts and eventually disrespect for the law.

| <u>ABA Model Rule</u> | <u>Commission's Proposed Rule</u> (Redline/strikeout showing changes to the ABA Model Rule) | <u>Explanation of Changes to the ABA Model Rule</u> |
|---|--|--|
| <p data-bbox="184 472 537 500">Rule 3.2 Expediting Litigation</p> <p data-bbox="71 623 648 675">A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.</p> | <p data-bbox="810 472 1131 524">NO RULE RECOMMENDED BY THE COMMISSION</p> <p data-bbox="667 623 1272 675">A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.</p> | <p data-bbox="1293 623 1476 646">See Introduction</p> |

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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

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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"?