DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-200 [3.1]

Lead Drafter: Martinez
Co-Drafters: Kornberg, Harris
Meeting Date: January 22 – 23, 2016

I. CURRENT CALIFORNIA RULE

Rule 3-200 Prohibited Objectives of Employment

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.

II. DRAFTING TEAM'S RECOMMENDATION AND VOTE

There was consensus among the drafting team members to recommend a proposed amended rule as set forth below in Section III. The vote was unanimous in favor of making the recommendation.

III. PROPOSED RULE 3.1 (CLEAN)

Rule 3.1 Meritorious Claims and Contentions

(a) In a proceeding before a tribunal, a lawyer shall not:

(1) bring or continue 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

(2) 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 the 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.

IV. PROPOSED RULE 3.1 (REDLINE TO CURRENT CALIFORNIA RULE 3-200)

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

~~A member shall not seek, accept, or continue employment if the member knows or should know~~

~~that the objective of such employment is:~~

(a) In a proceeding before a tribunal, a lawyer shall not:

(~~A~~1) ~~To~~ bring or continue 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~~2) ~~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~~ the 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.

V. PUBLIC COMMENTS SUMMARY

- **Norman Sable, 05/20/15**

  The enforceability of this rule is problematic where other rules, such as zealous advocacy, encourage the behavior prohibited by the rule.

VI. OCTC / STATE BAR COURT COMMENTS

- ~~**JAYNE KIM, OCTC, DATE:**~~

  ~~[Insert summary of comments.]~~

- **RUSSELL WEINER, OCTC, 6/15/2010:**

  1. OCTC is concerned that proposed rule 3.1 has narrowed what is currently contained in rule 3-200(A). It removes the prohibition on bringing an action whose purpose is to harass or maliciously injure any person. We believe that still belongs in the rules.

  2. The Comments are too long and they cover subjects and discussions best left to treatises, law review articles, and ethics opinions. Further, while Comment 2 references Civil Procedure Code section 128.7 and Rule 11 of the Federal Rules of Civil Procedure, it, especially the first sentence, could be interpreted to be contrary to Civil Procedure Code section 128.7 and Rule 11 of the Federal Rules of Civil Procedure, which require an attorney to make an inquiry reasonable under the circumstances. The duty to make a reasonable inquiry should be stated in a clearer language. It should also be made clearer that attorneys may have a duty to even investigate their client's statements. (See Butler v. State Bar (1986) 42 Cal.3d 323, 329 ["While an attorney may often rely upon statements made by the client without further investigation, circumstances known to the attorney may require an investigation."])

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- **MIKE NISPEROS, OCTC, 9/27/2001:**

  OCTC recommends revising the rule to expand its application to prohibit acts done without probable cause, solely for delay, or with no basis in law or fact.

  Remove:

  ~~A member shall not seek, accept, or continue employment if the member knows or should know that the objective of such employment is:~~

  And replace and revise as follows:

  A member must not:

  (A) ~~To~~ ~~(b)~~*B*ring [*or improperly delay*] 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 solely for delay*.

  (B) ~~To~~ ~~(b)~~*P*resent 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.

  (C) Bring an action, conduct a defense, assert a position or fact in litigation, take an appeal, or present a claim or defense in litigation unless there is a basis in law and fact for it. However, a lawyer for a 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.

  OCTC COMMENTS:

  The proposed change makes it clear that even if the objective of the employment or represent action is an appropriate one, a lawyer must not bring an action, conduct a defense, assert a position or fact in litigation, take an appeal, or present a claim or defense in litigation unless there is some basis in law and fact for it. This reinforces existing law, which holds that an attorney has a duty to inquire into the facts and law before asserting any position or fact in litigation. This is consistent with Federal Rule 11 and California law. Attorneys, of course, should and must be given great deference to assert legitimate positions even if they are ultimately not successful, but they should be required to assert those positions after some investigation of the facts and examination of statutory and decisional authorities. In some situations, the client's statements will be sufficient investigation. In others, it will not. This is because "[w]hile an attorney may often rely upon statements made by the client without further investigation, circumstances known to the attorney may require investigation." (*Butler v. State Bar* (1986) 42 Cal.3d 323, 329.) An attorney should never be entitled to simply assert a position or state a fact without some investigation and a determination of the applicable law. This will often require legal research as well as factual investigations. The attorney can, of course, argue in good faith for an

extension, modification, or reversal of existing law. Furthermore, criminal defense attorneys, must be given leeway to defend their clients and to require that the prosecution meet its constitutional mandate to prove every element of a crime.

- **STATE BAR COURT:** No comments received from State Bar Court.

VII. COMPARISON OF PROPOSED RULE TO APPROACHES IN OTHER JURISDICTIONS (NATIONAL BACKDROP)

- **South Carolina Rule 3.1** is identical to Model Rule 3.1:

  South Carolina Rule 3.1 Meritorious Claims and Contentions

  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.

  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 good faith argument for an extension, modification or reversal of existing laws.

  [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.

- **Georgia Rule 3.1** is a rule that diverges from Model Rule 3.1 and more closely approximates current California rule 3-200 by including elements of malicious injury and harassment, and a knowledge standard similar to California's "know or should know"

standard. Georgia Rule 3.1 (Meritorious Claims and Contentions) provides:

In the representation of a client, a lawyer shall not:

a. 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;
b. knowingly advance a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification or reversal of existing law.

The maximum penalty for a violation of this Rule is a public reprimand.

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. 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 client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person, or, 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.

[3] It is not ethically improper for a lawyer to file a lawsuit before complete factual support for the claim has been established provided that the lawyer determines that a reasonable lawyer would conclude that there is a reasonable possibility that facts supporting the cause of action can be established after the filing of the claim; and provided further that the lawyer is not required by rules of procedure. or otherwise to represent that the cause of action has an adequate factual basis. If after filing it is discovered that the lawsuit has no merit, the lawyer will dismiss the lawsuit or in the alternative withdraw.

[4] The decision of a court that a claim is not meritorious is not necessarily conclusive of a violation of this Rule.

The ABA State Adoption Chart for the ABA Model Rule 3.1, which is the counterpart to current rule 3-200, is posted at:

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- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_1.authcheckdam.pdf

- Thirty jurisdictions have adopted Model Rule 3.1 verbatim,[1] and twelve have adopted a version of Model Rule 3.1 with slight variations.[2] Nine jurisdictions (including California) have a different rule or a materially modified version of Model Rule 3.1.[3] Of those nine jurisdictions, four have a rule that includes a malicious injury element similar to California,[4] six have a rule that includes a harassment element,[5] and seven have a rule that includes a knowledge element.[6]

VIII. CONCEPTS ACCEPTED/REJECTED; CHANGES IN DUTIES; NON-SUBSTANTIVE CHANGES; ALTERNATIVES CONSIDERED

A. **Concepts Accepted (Pros and Cons):**

1. In the introductory clause to proposed paragraph (a), add phrase "In a proceeding before a tribunal."
   - Pros: This change is in accordance with the Supreme Court's directive in its April 15, 2014 letter, which stated the rule should be limited "to attorney conduct in proceedings before a tribunal."
   - Cons: None identified. The term "tribunal" will be defined in proposed Rule 1.0.1.
2. In proposed subparagraph (a)(1), retain the current rule term "continue."
   - Pros: The prohibition against continuing an action once the lawyer discovers that it lacks probable cause is consistent with California case law. The question of whether a lawyer is liable for malicious prosecution for continuing an action after the lawyer discovers that it lacks merit was resolved by the California Supreme Court in *Zamos v. Stroud* (2004) 32 Cal.4th 958. Retaining the term "continue" as an express prohibition provides guidance to lawyers and serves as a clear disciplinary standard.

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[1] The thirty jurisdictions are: Arkansas; Colorado; Connecticut; Delaware; Florida; Hawaii; Idaho; Illinois; Indiana; Iowa; Kansas; Kentucky; Louisiana; Minnesota; Mississippi; Missouri; Nebraska; Nevada; New Hampshire; New Mexico, North Carolina; Oklahoma; Pennsylvania; Rhode Island; South Carolina; South Dakota; Utah; Vermont; Washington; and West Virginia.

[2] The twelve jurisdictions are: Alaska; Arizona; District of Columbia; Maine; Maryland; Massachusetts, Michigan; North Dakota; Ohio; Tennessee; Texas; and Virginia.

[3] The nine jurisdictions are: Alabama; California; Georgia; Montana; New Jersey; New York; Oregon; Wisconsin; and Wyoming.

[4] The four jurisdictions are: Alabama; Georgia; New York; Wisconsin.

[5] The six jurisdictions are: Alabama; Georgia; Montana; New York; Wisconsin; Wyoming.

[6] The seven jurisdictions are: Alabama; Georgia; New Jersey; New York; Oregon; Wisconsin; Wyoming.

- Cons: The term is arguably redundant as the concept already exists under California case law and is implicit in the rule. Removing this term tracks the language that OCTC recommended in its 2001 comments.

3. In proposed subparagraph (a)(1), retain current rule language "for the purpose of harassing or maliciously injuring any person."
   - Pros: Retaining this provision is in accordance with the California Supreme Court's express direction in its April 15, 2014 letter to the State Bar that the provision in current rule 3-200 should be retained: "[T]he proposed rule should retain the long-standing aspect of California law prohibiting attorneys from asserting claims, defenses, or contentions for an improper purpose or motive to harass or maliciously injure another as embodied in current rule 3-200, its predecessors, and Business and Profession Code section 6068, subdivision (g)."
   - Cons: None identified.
4. Add new proposed paragraph (b).
   - Pros: This provision would clarify that the rule does not constrain a lawyer for a criminal defendant from requiring that every element of the case be established. It effectively sanctions the appropriate advocacy of criminal defense lawyers. The same provision is taken from Model Rule 3.1 and was also proposed by the first Commission.
   - Cons: None identified.

B. **Concepts Rejected (Pros and Cons):**

1. Retain the term "employment" as found in the title and black letter of the current rule (or alternatively, substitute the term "representation" for employment)
   - Pros: The term is used in the current rule and there is no evidence that it has limited the rule's application.
   - Cons: Retaining the term "employment" (or alternatively "representation") could lead to a limiting interpretation that the rule does not apply to lawyers appearing in propria persona, case law has applied the rule to lawyers acting in pro per. *Sorensen v. State Bar* (1991) 52 Cal.3d 1036. Further, the term "employment" is a vestige of the 1975 California Rules, which imported the term from the ABA Code of Professional Responsibility (1969). The ABA Model Rules eliminated the use of that term.
2. From current introductory paragraph, retain prohibition against *seeking* employment.
   - Pros: "Seek" was added to the rule in 1979 as a conforming change to changes recommended for the advertising and solicitation rules.
   - Cons: A prohibition against seeking employment could make an attempt to violate the rule a separate violation even where lawyer never files an action. The prohibition could subject a lawyer to discipline for targeted mailings, even though a lawyer would likely not be able to determine the merits of a suit before being retained.
3. From current introductory paragraph, retain "knows or should know."
   - Pros: Including "knows or should know" would ensure that the rule is not limited to the knowledge standard for malicious prosecution. Including this concept

reflects the duty to investigate a claim before filing or making an assertion. In its 2010 comments, OCTC suggested that the rule more clearly state this duty.
   - Cons: The phrase "knows or should know" imports a negligence standard, which is not relevant to the determination of probable cause. Such a standard would give lawyers an interest in creating a record of the adequacy of investigation to protect the lawyer, and would invite or require expert testimony on the adequacy of investigation. The Supreme Court directed that the rule retain a malicious injury element (see section VIII.A.4), which has a malice/intent standard. The "knows or should know" standard is inconsistent with the malice standard and would require standard of care testimony to prove a violation. Furthermore, including this standard focuses the inquiry on the lawyer's ability to discern motivation rather than on whether a matter has merit.

4. In proposed subparagraph (a)(1), add a prohibition "for an improper purpose."
   - Pros: This prohibition would conform the Rules to the current law. The concept of an improper purpose is found in both California Code of Civil Procedure section 128.7[7] and Federal Rule of Civil Procedure 11 [procedural rules requiring certification that actions are meritorious and not presented for an improper purpose].
   - Cons: There is no need to add an additional prohibition to a clause that the Supreme Court has accepted. See April 15, 2014 Supreme Court letter to State Bar. The current rule provision that is being carried forward adequately captures the concept of improper motive.
5. In proposed subparagraph (a)(1), add "sole" to modify the phrase "purpose of harassing or maliciously injuring any person."
   - Pros: This concept would limit application of the rule and is consistent with case law holding that actions should be held to be frivolous only when brought for an improper motive. *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.
   - Cons: The term "sole" is unnecessary since the rule also requires that an action (or filing) may not be brought without probable cause *and* for the purpose of harassing or maliciously injuring. A mixed motive is irrelevant; the rule requires both.
6. In proposed subparagraph (a)(1), add prohibition against actions "solely for delay."
   - Pros: This prohibition would conform the rule to the current law. The concept of delay is found in both California Code of Civil Procedure section 128.7 and Federal Rule of Civil Procedure 11 [procedural rules requiring certification that actions are meritorious and not presented for an improper purpose such as to cause unnecessary delay].
   - Cons: A prohibition against bringing an action solely for purposes of delay injects problems in proving a lawyer's state of mind and divining whether the

[7] CCP § 128.7(b)(1) provides that a condition for making a filing with a court is that "[i]t is not being presented primarily for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."

lawyer's purpose was also combined with legitimate objectives designed to advance the client's interests.

C. **Changes in Duties/Substantive Changes to the Current Rule:**

1. Deletion of "seek." Lawyers would not have an ethical duty cast in terms of seeking employment for a prohibited purpose. The prohibition in the proposed rule is against bringing or continuing an action that is meritless or for an improper purpose.
2. Deletion of "knows or should know." The "knows or should know" language in the current Rule refers to the "objective" of the lawyer's employment which is ambiguous as whether this refers to the intent of the lawyer or the client and injects unnecessary problems in proving a lawyer's subjective intent in pursuing litigation. The proposed rule would impose a duty on lawyers to not bring or continue an action without probable cause and for the purpose of harassing or maliciously injuring, regardless of whether the lawyer knows or should know that the objective is to bring such a claim. Lawyers would also have a duty to not bring a claim that is not warranted under existing law regardless of whether the lawyer knows or should know that the objective is to present such a claim.
3. Addition of "In a proceeding before a tribunal." Lawyer conduct prohibited by the proposed rule would be limited to conduct in proceedings before a tribunal.

D. **Non-Substantive Changes to the Current Rule:**

1. Delete reference to "employment" in both the title and black letter of the Rule to avoid an interpretation that the rule does not apply to lawyers appearing in pro per. Case law has applied the rule to lawyers acting in pro per. *Sorensen v. State Bar* (1991) 52 Cal.3d 1036. (See paragraph B.1, above.)
2. Change title to reflect the rule's content, i.e., that it is not limited to a lawyer who has been retained (employed) by a client. The title is the same as that for Model Rule 3.1.
3. Substitute the term "lawyer" for "member".
    - Pros: The current Rules' use of "member" departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice pro hac vice or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)
    - Cons: Retaining "member" would carry forward a term that has been in use in the California Rules for decades.
4. Change the rule number to correspond to the ABA Model Rules numbering and formatting (e.g., lower case letters)
    - Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized to practice in California (see current rule 1-100(D)(1), which recognizes that reality, and rules such as the rule for *pro hac vice* admission, Rule of Court 9.40) to find the California rule corresponding to their jurisdiction's rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying

with duties, particularly when California does not have such authority interpreting the California rule. As to the "Con" that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.
    - Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.
5. Change the structure of the introductory clause to paragraph (a) to track language that OCTC suggested in its 2001 comment. Change numbering and beginning of subparagraphs to conform to the new structure.
6. In subparagraph (a)(2), substitute "the" for "such."

E. **Alternatives Considered:**
None.

IX. OPEN ISSUES/CONCEPTS FOR THE COMMISSION TO CONSIDER

There are no open issues.

X. COMMENTS FROM DRAFTING TEAM MEMBERS OR OTHER COMMISSION MEMBERS

Martinez
- 12/7/15: Attaching a draft revised rule.
- 12/16/15: Addressing issues Kevin Mohr identified in draft rule. The issues identified were: deleting reference to "bring or continue;" use of the term "representation" instead of "employment" as possibly excluding pro per attorneys from rule application; deleting the "knows or should know" standard; addition of concepts of bringing an action for an "improper purpose" and "solely for delay;" and adding "sole" to the phrase "for the purpose of harassing or maliciously injuring."
- 12/18/15: Agreeing to proposed title change to track Model Rule 3.1.

Kornberg
- 12/18/15: Agreeing to proposed title change to track Model Rule 3.1.

Harris
- 12/18/15: Agreeing to proposed title change to track Model Rule 3.1.

XI. RECOMMENDATION AND PROPOSED COMMISSION RESOLUTION

Recommendation:

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-200 [3.1]

Lead Drafter: Martinez
Co-Drafters: Kornberg, Harris
Meeting Date: January 22 – 23, 2016

That the Commission recommend that the Board of Trustees of the State Bar of California adopt proposed amended rule 3-200 [3.1] in the form attached to this report and recommendation.

Proposed Resolution:

RESOLVED: That the Commission for the Revision of the Rules of Professional Conduct recommends that the Board of Trustees adopt proposed amended rule 3-200 [3.1] in the form attached to this Report and Recommendation.

XII. DISSENTING POSITION(S)

None.

XIII. FINAL COMMISSION VOTE/ACTION

Date of Vote:

Action:

Vote: X (yes) – X (no) – X (abstain)

CURRENT CALIFORNIA RULE 3-200
"Prohibited Objectives of Employment"

I. Text of Current 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

(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.

II. Background/Purpose:

A. Rule History

Current rule 3-200 originated with the first rules promulgated in 1928 as rule 13. The rule prohibited accepting employment when the motives are improper and specifically provided that:

> A member of the State Bar shall not accept employment to prosecute or defend a case solely out of spite, or solely for the purpose of harassing or delaying another; nor shall he take or prosecute an appeal merely for delay, or for any other reason, except in good faith.

Operative January 1, 1975, rule 13 was revised and renumbered as new rule 2-110. In 1972, the State Bar's Special Committee to Study the ABA Code of Professional Responsibility developed two proposed rules addressing the substance of rule 13. A proposed rule was drafted to be identical to rule 13 but was ultimately not adopted. A second rule, proposed rule 2-110, was modeled after ABA Code DR 2-109. The rule carried forward the substance of rule 13 using language adopted from the ABA Code and added a new provision prohibiting litigation claims or defenses not warranted under existing law.

Operative April 1, 1979, rule 2-110 was revised as part of a project to revise the rules governing lawyer advertising. The introductory paragraph of the rule was revised as follows:

> A member of the State Bar shall not seek or accept employment to accomplish any of the following objectives, nor shall ~~he~~ the member do so if ~~he~~ the member knows or should know that the person ~~who employs him~~ solicited for or offering the employment wishes to accomplish any of the following purposes…

The revisions were made as conforming changes to the primary changes recommended for the main advertising and solicitation rules. (See, State Bar Special Committee on Lawyer Advertising and Solicitation, Final Report 1978).

The rule was last amended in 1989, when rule 2-110 was renumbered as rule 3-200 as part of a comprehensive revision and renumbering of the entire rules. The introductory paragraph was substantively amended, adding the language "or continue" to the phrase "shall not seek or accept employment" to clarify that withdrawal would be required required whenever a lawyer knows or should know an action is being maintained for any of the prohibited reasons. Additionally, amendments to paragraph (A) added an objective probable cause standard, and incorporated the limitation on appeals formerly found in paragraph (C). In doing so, the language "soley for delay" was dropped. (See pages 31-32 of Bar Misc. No. 5626, "Request That The Supreme Court Of California Approve Amendments To The Rules Of Professional Conduct Of The State Bar Of California, And Memorandum And Supporting Documents In Explanation," December 1987.)

B. The First Commission's Proposed Rule

1. The First Commission's Rule.

The first Commission's proposed rule 3.1 was based on ABA Model Rule 3.1,[1] which governs the same type of misconduct as current rule 3-200 but with a different formulation. The first Commission recommended the model rule language as well as substantive changes to several aspects of rule 3-200, including:

- Removal of the prohibition against "seeking" employment. The first Commission recommended removing this component of the rule, which was added as part of the 1979 amendments to the advertising and solicitation rules. There was a lack of evidence that the addition of the term contributed to the protections against advertising misconduct, and in addition, changes in the advertising rules since 1979 likely diminished the need to retain this component of the rule.

- Removal of the knowledge standard ("knows or should know"). The first Commission recommended removal of this standard to focus the inquiry on the merit of the matter rather than the lawyer's ability to discern the client's motivation.
- Removal of the malicious purpose element, which parallels the change made to the ABA model rule in 1983. Instead of requiring the lawyer to discern a client's improper motivations, the proposed rule only required the lawyer to inquire as to whether the matter has merit.

[1] ABA Model Rule 3.1: "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."

Like Model Rule 3.1, the proposed rule also (1) substituted the phrase "basis in law and fact that is not frivolous" for the phrase "not warranted under existing law," and (2) added a paragraph specific to lawyers representing clients in a criminal proceeding or one that could result in incarceration to clarify that the rule is not intended to constrain the lawyer from defending the proceeding to ensure every element of the case is established. However, unlike Model Rule 3.1, the first Commission recommended retaining the rule 3-200 prohibitions against *continuing* in a proceeding in order to carry forward the broad scope of the rule consistent with California case law.[2]

2. The Supreme Court's Response to Proposed Rule 3.1.

The rule recommended by the first Commission and adopted the Board, proposed Rule 3.1, was submitted to the California Supreme Court (the rule filing is provided separately as additional background materials) and in a letter dated April 15, 2014, the Supreme Court referred proposed Rule 3.1 back to the State Bar for redrafting (the Supreme Court's letter also is separately provided). The Court stated that the rule should be modified to limit its scope to "attorney conduct in proceedings before a tribunal." The Court also stated that the rule should be modified to "retain the long-standing aspect of California law prohibiting attorneys from asserting claims, defenses, or contentions for an improper purpose or motive to harass or maliciously injure another as embodied in current rule 3-200." (See also "IX. Potential Issues, #IX.5.)

III. Input from the State Bar Office of the Chief Trial Counsel (OCTC):

A. 2015 Comment

In a _____, 2015 memorandum to the Commission, OCTC provided the following comment regarding rule 3-200:

> (Note: OCTC is expected to provide new comments on this rule. These comments will be distributed to the drafting team when they are received from OCTC.)

B. 2010 Comment

In a June 15, 2010 memorandum to the first Commission, OCTC provided the following comment on proposed rule 3.1:

> 1. OCTC is concerned that proposed rule 3.1 has narrowed what is currently contained in rule 3-200(A). It removes the prohibition on bringing an action whose purpose is to harass or maliciously injure any person. We believe that still belongs in the rules.
>
> 2. The Comments are too long and they cover subjects and discussions best left to treatises, law review articles, and ethics opinions. Further, while Comment 2

[2] See *Zamos v. Stroud* (2004) 32 Cal.4th 958, 970 [12 Cal.Rptr.3d 54] (attorney may be held liable for malicious prosecution when he commences a lawsuit properly but then continues to prosecute it after learning it is not supported by probable cause).

references Civil Procedure Code section 128.7 and Rule 11 of the Federal Rules of Civil Procedure, it, especially the first sentence, could be interpreted to be contrary to Civil Procedure Code section 128.7 and Rule 11 of the Federal Rules of Civil Procedure, which require an attorney to make an inquiry reasonable under the circumstances. The duty to make a reasonable inquiry should be stated in a clearer language. It should also be made clearer that attorneys may have a duty to even investigate their client's statements. (See *Butler v. State Bar* (1986) 42 Cal.3d 323, 329 ["While an attorney may often rely upon statements made by the client without further investigation, circumstances known to the attorney may require an investigation."])

C. 2001 Comment

In a September 27, 2001 memorandum to the first Commission, OCTC provided the following comment on rule 3-200:

OCTC recommends revising the rule to expand its application to prohibit acts done without probable cause, solely for delay, or with no basis in law or fact.

Remove:

~~A member shall not seek, accept, or continue employment if the member knows or should know that the objective of such employment is:~~

And replace and revise as follows:

A member must not:

(A) ~~To~~ ~~(b)~~*B*ring [*or improperly delay*] 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 solely for delay*.

(B) ~~To~~ ~~(p)~~*P*resent 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.

(C) Bring an action, conduct a defense, assert a position or fact in litigation, take an appeal, or present a claim or defense in litigation unless there is a basis in law and fact for it. However, a lawyer for a 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.

OCTC COMMENTS:

The proposed change makes it clear that even if the objective of the employment or representation is an appropriate one, a lawyer must not bring an action, conduct a defense, assert a position or fact in litigation, take an appeal, or present a claim or defense in litigation unless there is some basis in law and fact

for it. This reinforces existing law, which holds that an attorney has a duty to inquire into the facts and law before asserting any position or fact in litigation. This is consistent with Federal Rule 11 and California law. Attorneys, of course, should and must be given great deference to assert legitimate positions even if they are ultimately not successful, but they should be required to assert those positions after some investigation of the facts and examination of statutory and decisional authorities. In some situations, the client's statements will be sufficient investigation. In others, it will not. This is because "[w]hile an attorney may often rely upon statements made by the client without further investigation, circumstances known to the attorney may require investigation." (*Butler v. State Bar* (1986) 42 Cal.3d 323, 329.) An attorney should never be entitled to simply assert a position or state a fact without some investigation and a determination of the applicable law. This will often require legal research as well as factual investigations. The attorney can, of course, argue in good faith for an extension, modification, or reversal of existing law. Furthermore, criminal defense attorneys, must be given leeway to defend their clients and to require that the prosecution meet its constitutional mandate to prove every element of a crime.

IV. Initial Public Comments Received:

At its April 24, 2015 meeting, the Board of Trustees Regulation and Discipline Committee authorized a 45-day public comment period to seek general input on possible amendments to the Rules of Professional Conduct that ought to be considered by the Commission. The Commission received one public comment specific to rule 3-200. An individual commented that the rule is problematic because other rules requiring zealous advocacy of clients appear to conflict with the prohibitions in rule 3-200. For further discussion, see section VI.B of this memorandum, below.

V. Potential Deficiencies in the Current Rule:

A. See above input from OCTC. As noted, in 2001, OCTC recommended three main revisions to rule 3-200:

1. The rule should add a provision prohibiting lawyers from bringing or defending actions or positions unless there is a "basis in fact and law" in order to reinforce a lawyer's existing duty to investigate the facts and law prior to litigation.[3] Professional Competence staff notes that the first Commission recommended using the same phrase (based on model rule 3.1) to replace the current rule phrase "not warranted under existing law," and described the change as non-substantive.

2. The rule should add a provision specific to lawyers representing clients in a criminal proceeding or one that could result in incarceration in order to

[3] As noted in OCTC comments, see *Butler v. State Bar* (1986) 42 Cal.3d 323, 329 [228 Cal.Rptr. 499], noting that "[w]hile an attorney may often rely upon statements made by the client without further investigation, circumstances known to the attorney may require investigation."

make clear that lawyers have leeway to defend such clients and to require that the prosecution prove every element of its case.

3. The rule should add a provision prohibiting lawyers from bringing or defending actions or positions soley for the purpose of delay. Professional Competence staff notes that the phrase "soley for delay" was part of former rule 2-110(C), and was not carried over with the 1989 amendments that incorporated the limitations formerly found in paragraph (C) into the probable cause standard added to paragraph (A). See section II.A of this memorandum, above.

B. The current rule refers specifically to "litigation," "appeal," "claim," and "defense" rather than applying broadly to all "proceedings."

C. The current rule includes elements that require proof of knowledge of the lawyer and a malicious purpose, rather than including a standard that would only require showing that the lawyer acted without a meritorious or nonfrivolous basis. OCTC noted in its 2010 comments on proposed rule 3.1 that it believed the malicious injury element still belongs in the rule.

VI. California Context:

A. California Law Related to Current Rule 3-200

1. Code of Civil Procedure

Code of Civil Procedure section 128.7 requires all papers presented to the court to be signed by an attorney certifying that it is not being presented for an improper purpose, that it is warranted by existing law, and that the allegations, denials and factual contentions have evidentiary support.

2. Business and Professions Code

Similar to rule 3-200, statutory provisions prescribing the duties of attorneys mandate that attorneys pursue only those matters that are legal or just and that they take no actions for an improper motive. Business and Professions Code, section 6068, subdivisions (c) and (g) provide it "is the duty of an attorney to do all of the following: …

(c) 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.

(g) Not to encourage either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest."

3. Disciplinary Cases.

The State Bar Court has applied both the statutory provisions above and rule 3-200 in disciplinary decisions. The following selected case law demonstrates application of

these provisions both to cases involving frivolous or unwarranted actions and those involving improper motives.

- *Matter of Thomson* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 966 – Respondent stipulated to violations of rule 3-200 where he commenced action adverse to real property despite a bankruptcy court injunction enjoining actions affecting the real property. The bankruptcy court imposed sanctions and found the attorney's "actions were in bad faith, frivolous and intended to cause unnecessary delay."

- *Matter of Lais* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 112 – Respondent was found culpable of violating Business and Professions Code, section 6068(c) where, in the underlying matter, respondent had filed an appeal that relitigated issues and challenged rulings of law from the client's earlier, related case. The Court of Appeal had sanctioned respondent, finding the appeal frivolous, devoid of merit, and prosecuted for an improper motive.

- *Sorensen v. State Bar* (1991) 52 Cal.3d 1036 – Respondent was suspended where, after being sued by a court reporting firm for an unpaid bill, he counter-claimed for fraud, turning the $94.05 court reporter bill into a $4,000 litigation. The court found that the attorney's fraud action was meritless and that the attorney was motivated by spite and vindictiveness.

B. California Law Related to the Duty of Zealous Advocacy

California case law provides that the "duty of a lawyer both to his client and to the legal system, is to represent his client zealously within the bounds of the law." *People v. Bolton* (2008) 166 Cal.App.4th 343, 357 [82 Cal.Rptr.3d 671] (citing *People v. McKenzie* (1983) 34 Cal.3d 616, 631 [194 Cal.Rptr. 462], disapproved on another ground). As noted above, one public commenter expressed concern that rule 3-200 interferes and conflicts with this duty. However, California case law also clarifies that a lawyer's duty of zealous advocacy must be exercised "within the bounds of the law," which include a lawyer's ethical duties and duties owed to the court.

In the disciplinary decision *Matter of Davis*, a bankruptcy court had previously found respondent's actions were frivolous. The Review Department stated that, while the court agreed that "attorneys have a duty to zealously represent their clients and assert unpopular positions in advancing their clients' legitimate objectives, … attorneys also have a duty to the judicial system to assert only legal claims or defenses that are warranted by the law or are supported by a good faith belief in their correctness." *Matter of Davis* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 576, 591. Based on the bankruptcy court's findings, the Review Department rejected respondent's assertion that his conduct was reasonable and therefore taken in good faith. *Id*.

In a civil matter, appellant appealed the trial court's denial of his motion to stop further payment under an existing child support order. The court found the appeal frivolous and, in addressing the appellant's lawyer, stated that "the high ethical and professional standards of a member of the bar and an officer of the court require the attorney to inform the client that the attorney's professional responsibility precludes him or her from

pursuing such an appeal, and to withdraw from the representation of the client." *In re Marriage of Gong and Kwong* (2008) 163 Cal.App.4th 510, 521 [77 Cal.Rptr.3d 540] (citing *Cosenza v. Kramer* (1984) 152 Cal.App.3d 1100, 1103 [200 Cal.Rptr. 18]).

VII. Approach In Other Jurisdictions (National Backdrop):

A. ABA Model Rule 3.1

ABA Model Rule 3.1 is the Model Rules counterpart to current rule 3-200, with several key differences. Like rule 3-200, Model Rule 3.1 governs the same type of misconduct and prohibits lawyers from bringing or defending meritless or unwarranted actions. Unlike rule 3-200, Model Rule 3.1: (1) does not expressly prohibit *seeking* or *continuing* in a matter that is meritless or unwarranted, (2) does not include a malicious injury element, and (3) does not include a knowledge element. Additonally, Model Rule 3.1 contains elements not found in current rule 3-200, including use of the broad term "proceeding" and provisions specific to criminal defense lawyers.

B. The ABA State Adoption Chart

The ABA State Adoption Chart, entitled "Variations of the ABA Model Rules of Professional Conduct, Rule 3.1: Meritorious Claims and Contentions," revised May 7, 2015, is available at:

http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_1.authcheckdam.pdf

Thirty jurisdictions have adopted Model Rule 3.1 verbatim,[4] and twelve have adopted of Model Rule 3.1 with slight variations.[5] Nine jurisdictions (including California) have a different rule or a materially modified version of Model Rule 3.1.[6] Of those nine jurisdictions, four have a rule that includes a malicious injury element similar to California,[7] six have a rule that includes a harassment element,[8] and seven have a rule that includes a knowledge element.[9]

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[4] The thirty jurisdictions are: Arkansas; Colorado; Connecticut; Delaware; Florida; Hawaii; Idaho; Illinois; Indiana; Iowa; Kansas; Kentucky; Louisiana; Minnesota; Mississippi; Missouri; Nebraska; Nevada; New Hampshire; New Mexico, North Carolina; Oklahoma; Pennsylvania; Rhode Island; South Carolina; South Dakota; Utah; Vermont; Washington; and West Virginia.

[5] The twelve jurisdictions are: Alaska; Arizona; District of Columbia; Maine; Maryland; Massachusetts, Michigan; North Dakota; Ohio; Tennessee; Texas; and Virginia.

[6] The nine jurisdictions are: Alabama; California; Georgia; Montana; New Jersey; New York; Oregon; Wisconsin; and Wyoming.

[7] The four jurisdictions are: Alabama; Georgia; New York; Wisconsin.

[8] The six jurisdictions are: Alabama; Georgia; Montana; New York; Wisconsin; Wyoming.

[9] The seven jurisdictions are: Alabama; Georgia; New Jersey; New York; Oregon; Wisconsin; Wyoming.

VIII. Public Comment Received by the First Commission:

The clean text of proposed rule 3.1 drafted by the first Commission and adopted by the Board to replace rule 3-200 is enclosed with this assignment, together with the synopsis of public comments received on that proposed rule and the full text of those comments. Although the proposed rule differs from current rule 3-200, the drafting team might consider to what extent, if any, the public comments received on the proposed rule provide helpful information in analyzing the current rule.

To facilitate the review and to appreciate the relevance of these public comments, a redline comparison of the first Commission's proposed rule showing changes to rule 3-200 is also enclosed with the public comments received. However, given the Board's charge to engage in a comprehensive review of the current rules and to retain the historical nature of the California Rules as "a clear and enforceable articulation of disciplinary standards," a drafting team that considers amendments developed by the first Commission should not presume that the approach taken by the first Commission was appropriate to achieve those objectives.

IX. Potential Issues Identified by Professional Competence Staff Following Review of the Proposed Rule Developed by the First Commission and Adopted by the Board:

Bearing in mind the Commission's Charter to engage in a comprehensive review of the current rules and to retain the historical nature of the California Rules as "a clear and enforceable articulation of disciplinary standards," Professional Competence staff identified the following rule amendment issues (in no particular order) that the drafting team might consider. The drafting team need not address any of the issues. For example, if after critically evaluating an issue addressed by a revision made by the first Commission, the drafting team determines that the revision does not address an actual (as opposed to theoretical) public protection deficiency in the current rule, then the drafting team should hesitate to recommend a change to the current rule despite the prior decision by the first Commission and the Board to address the issue. (Note: For the sake of completeness and ease of reference, some of the issues listed below may have already been mentioned in connection with other information provided above, such as in connection with the approaches taken in other jurisdictions or prior public comment. Multiple mentions of an issue do not necessarily warrant the drafting team taking action on an issue.)

1. Whether the rule's prohibition against "seeking" employment should be removed as an unnecessary or ineffective addition to the protections against advertising misconduct added with the 1979 amendments.

2. Whether the rule's introductory paragraph should retain the knowledge standard ("knows or should know"), which requires proof of the lawyer's knowledge and may require the lawyer to be able to discern the client's motivation.

3. Whether the rule should retain the malicious purpose element, which would require proof of both lack of probable cause and an improper purpose, and may require the lawyer to be able to discern the client's motivation.

4. Whether the rule should add a provision specific to lawyers representing clients in a criminal proceeding or one that could result in incarceration to make clear that the rule is not intended to constrain the lawyer from defending the proceeding to ensure every element of the case is established.

5. As noted above in Section II.B.2 of this memo, the first Commission's proposed Rule 3.1 was submitted to the California Supreme Court and, in a letter dated April 15, 2014, the Supreme Court referred the rule back to the State Bar for redrafting. The Court stated that the rule should be modified to limit its scope to "attorney conduct in proceedings before a tribunal." The Court also stated that the rule should be modified to "retain the long-standing aspect of California law prohibiting attorneys from asserting claims, defenses, or contentions for an improper purpose or motive to harass or maliciously injure another as embodied in current rule 3-200." If the drafting team considers utilizing the first Commission's language, then the Court's views should be considered.

X. Research Resources:

- Business and Professions Code, section 6068, subdivisions (c) and (g)
- Code of Civil Procedure, section 128.7
- *Matter of Davis* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 576
- *Sorensen v. State Bar* (1991) 52 Cal.3d 1036 [277 Cal.Rptr. 858]
- *Zamos v. Stround* (2004) 32 Cal.4th 958 [12 Cal.Rptr.3d 54]