

## ADVOCATE

### 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.—Amended June 17, 2009, eff. Sept. 1, 2009.

#### Comment

[1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

[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.

#### Reporter's Notes — 2009 Amendment

V.R.P.C. 3.1 is amended to conform to the changes in Model Rule 3.1. The ABA Reporter's Explanation is as follows:

#### TEXT:

Add reference to "law and fact"

This change makes explicit the requirement that a claim must have a nonfrivolous basis in both law and fact. See also Comment [2]. No change in substance is intended.

#### COMMENT:

[2] A new sentence has been added to remind lawyers that they must act reasonably to inform themselves about the facts and law pertinent to a claim they will make on behalf of a client. The reference to a client's purpose to harass has been dropped because the client's purpose is not relevant to the objective merits of the client's claim.

[3] This new Comment acknowledges the primacy of constitutional law that might require a lawyer to take action on behalf of a criminal defendant that otherwise would violate this Rule.

#### Reporter's Notes

This rule departs from the Vermont Code by prohibiting the assertion of frivolous claims or contentions without regard to whether the lawyer knows or it is obvious that they are frivolous. DR 7-102. This change from a subjective to an objective standard is consistent with Vermont Rule of Civil Procedure 11. Rule 3.1 merges in "frivolous" the concepts of active bad faith in the sense of harassing or malicious action and lack of good faith as in the advancement of an unsupportable argument. Lawyers should be clear that the standard of Rule 11, and that of the present rule, require that the position advanced be both

nonfrivolous and in good faith. The rule also adds a provision to the effect that in criminal cases and cases resulting in incarceration, the defense lawyer may put the prosecution to its proof even if there is no nonfrivolous basis for the defense.