

McCurdy, Lauren

From: Difuntorum, Randall
Sent: Wednesday, September 30, 2009 9:23 AM
To: McCurdy, Lauren
Subject: FW: 3.10
Attachments: 491 Rule 3.10 Public Comment Chart - By Commenter - REV(RD).doc; 490 RRC - 5-100 [3-10] - Dashboard - ADOPT - Template (09-23-09)KEM.doc; 489 RRC 3.10 STATE VARIATIONS.doc; 488 RRC - 5-100 [3-10] - Compare - Rule & Comment Explanation - Template (09-23-09)RD-KEM.doc; 487 RRC - 3.10 [5-100] PubCom - Compare - Introduction - TEMPLATE (09-23-09).doc

From: Jerome Sapiro Jr. [mailto:jsapiro@sapirolaw.com]
Sent: Tuesday, September 29, 2009 5:30 PM
To: Difuntorum, Randall
Cc: 'Kurt Melchior (E-mail)'; 'Kevin Mohr'; 'Harry Sondheim'; snyderlaw@charter.net; 'Mark Tuft'
Subject: 3.10

Dear Randy:

Attached are the materials I have prepared for 3.10. The Intro includes a dissent drafted by Mark, in which Dom has joined.

Please let me know whether I owe you anything else on this rule.

With best regards,

Jerry

CONFIDENTIAL E-MAIL from THE SAPIRO LAW FIRM

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Proposed Rule 3.10 [5-100] “Threatening Criminal, Administrative, or Disciplinary Charges”

(Draft #4, 8/12/08)

Summary:

This Rule will repeat the substance of existing California Rule of Professional Conduct 5-100. There is no model rule counterpart. The Rule prohibits a lawyer from threatening to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute. It reflects California disciplinary decisions that preceded the adoption of the 1975 Rules of Professional Conduct. See, e.g., *Lindenbaum v. State Bar* (1945) 26 Cal. 2d 565; *Libarian v. State Bar* (1952) 3 Cal. 2d 328; and *Arden v. State Bar* (1959) 52 Cal. 2d 310. It has also been applied in civil cases. See, e.g., *Kinnamon v. Staitmen & Snyder* (1977) 66 Cal. App. 893.

Comparison with ABA Counterpart

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

Primary Factors Considered

Existing California Law

Rules	RPC 5-100
Statute	N/A
Case law	See, e.g., <i>Lindenbaum v. State Bar</i> (1945) 26 Cal. 2d 565; <i>Libarian v. State Bar</i> (1952) 3 Cal. 2d 328; and <i>Arden v. State Bar</i> (1959) 52 Cal. 2d 310; <i>Bluestein v. State Bar</i> (1974) 13 Cal. 3d 162; <i>Kinnamon v. Staitmen & Snyder</i> (1977) 66 Cal. App. 893; <i>Crane v. State Bar</i> (1981) 30 Cal. 3d 117; <i>In the Matter of Rodriguez</i> (Rev. Dept. 1993) 2 State Bar Ct. Rptr. 480.

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

CO, SC, VA, D.C., LA, and ME have similar proscriptions. HA, ID, CN, GA, NJ, and TN proscribe only threats of criminal charges.

X Other Primary Factor(s)

Threats to present criminal, administrative, or disciplinary complaints in order to gain an advantage in a civil dispute have long been prohibited by decisional law in this State. A Rule of Professional Conduct should memorialize the substance of those decisions so that lawyers have clear notice that such conduct is prohibited. Repealing the existing rule would incorrectly suggest that such conduct would be permissible in the future.

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 **X**

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: **X**Yes No See Introduction

Stakeholders and Level of Controversy

No Known Stakeholders

XThe Following Stakeholders Are Known:

Criminal offense bar, some of whom have commented. Comments criticizing a proposed comment were also received from the Los Angeles County Bar Association and the San Diego County Bar Association.

Very Controversial – Explanation:

Moderately Controversial – Explanation:

Not Controversial

Changes to Comment [2] made moot most of the criticisms received.

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 3.10: Threatening Criminal, Administrative, or Disciplinary Charges*

October 2009

(Draft rule following consideration of public comment.)

INTRODUCTION:

Existing California Rule of Professional Conduct 5-100 makes a lawyer subject to discipline and civil liability for threatening to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute. That rule is based on 1975 California Rule of Professional Conduct 7-104. That, in turn, was based on American Bar Association Disciplinary Rule 5-105(a). The current American Bar Association Model Rules contain no counterpart to this rule. The Commission decided to retain the substance of the existing California Rule and to expand the Comment to describe its scope.

The current California Rule applies regardless of whether there is a civil action pending. A threat made before a formal civil action has been commenced does come within the rule.

The Commission published for public comment a proposed expansion of Comment [2] that would have outlined the application of the rule to proposed release-dismissal agreements in which prosecutors might agree to drop criminal charges in exchange for a defendant's agreement not to pursue a civil complaint against arresting officers or a government entity. The comments and criticisms regarding that proposed expansion were to the effect that it would give too much authority to prosecutors. The Commission rescinded most of that proposal in light of the comments. The Commission's conclusion was that the applicability of the rule to that process should play out on a case by case basis in light of the facts. As a result of the deletion of most of the proposed language, the only expansion of proposed Comment [2] exempts from the rule an offer of a civil compromise in accordance with a statute such as Penal Code sections 1377-78, and the comments on this subject became moot.

*Rule Draft #4 (8/12/08)

INTRODUCTION (Continued):

Most states do not have a rule similar to existing California Rule 5-100. Colorado, South Carolina, Virginia, the District of Columbia, Louisiana, and Maine have similar rules. Hawaii, Idaho, Connecticut, Georgia, New Jersey, and Tennessee limit their rules to threats of criminal charges and do not include threats of criminal or disciplinary charges.

A minority of the Commission recommends against adoption of proposed Rule 3.10 for the reasons the ABA omitted the rule from the Model Rules in 1983. The drafters of the Model Rules viewed a similar prohibition in former ABA Model Code DR 7-105(A) (1969), on which California Rule 5-100 is based, as overly broad and unnecessary. Threats of criminal prosecution or administrative charges that amount to extortionate conduct under the law are adequately covered under proposed Rule 8.4(b) which expands on Model Rule 8.4(b). Proposed Rule 3.10 is considerable broader than the rule in the few states that retain the earlier ABA Model Code rule which is limited to threats of criminal prosecution. What constitutes a "threat" under the proposed rule is incapable of adequate definition to inform lawyers in advance what conduct is prohibited. As drafted, the rule would unreasonably impede legitimate negotiation tactics in criminal and civil matters. There is no showing of need to depart from the Model Rules by having a separate rule that prohibits extortionate conduct in addition to proposed rule 8.4.

<p align="center">California Rule 5-100 No Comparable ABA Model Rule</p>	<p align="center">Commission's Proposed Rule* Rule 3.10 Threatening Criminal, Administrative, or Disciplinary Charges</p>	<p align="center">Explanation of Changes to Current California Rule 5-100</p>
<p>(A) A member shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute.</p>	<p>(Aa) A memberlawyer shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute.</p>	<p>Because there is no Model Rule similar to existing California Rule of Professional Conduct 5-100, the comparisons in this table are to the existing California rule.</p> <p>The Commission changed "member" to "lawyer" because the proposed new rules will apply to both members of the State Bar and out of state lawyers practicing in this state.</p>
<p>(B) As used in paragraph (A) of this rule, the term "administrative charges" means the filing or lodging of a complaint with a federal, state, or local governmental entity which may order or recommend the loss or suspension of a license, or may impose or recommend the imposition of a fine, pecuniary sanction, or other sanction of a quasi-criminal nature but does not include filing charges with an administrative entity required by law as a condition precedent to maintaining a civil action.</p>	<p>(Bb) As used in paragraph (Aa) of this ruleRule, the term "administrative charges" means the filing or lodging of a complaint with a federal, state, or local governmental entity which may order or recommend the loss or suspension of a license, or may impose or recommend the imposition of a fine, pecuniary sanction, or other sanction of a quasi-criminal nature but does not include filing charges with an administrative entity required by law as a condition precedent to maintaining a civil action.</p>	<p>Proposed paragraph (b) is identical with existing Rule 5-100(B) except that the reference to paragraph (a) is now lower case, and the word "rule" has been capitalized.</p>

* Proposed Rule 3.10, Draft 4 (8/12/08). Redline/strikeout showing changes to the current California Rule (no ABA Model Rule counterpart)

<p align="center"><u>California Rule 5-100</u> No Comparable ABA Model Rule</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 3.10 Threatening Criminal, Administrative, or Disciplinary Charges</p>	<p align="center"><u>Explanation of Changes to Current California Rule 5-100</u></p>
<p>(C) As used in paragraph (A) of this rule, the term "civil dispute" means a controversy or potential controversy over the rights and duties of two or more parties under civil law, whether or not an action has been commenced, and includes an administrative proceeding of a quasi-civil nature pending before a federal, state, or local governmental entity.</p>	<p>(C) As used in paragraph (A) of this rule <u>Rule</u>, the term "civil dispute" means a controversy or potential controversy over the rights and duties of two or more parties under civil law, whether or not an action has been commenced, and includes an administrative proceeding of a quasi-civil nature pending before a federal, state, or local governmental entity.</p>	<p>Proposed paragraph (c) is substantially the same as existing California Rule 5-100(C). The definition of "civil dispute" will now apply to all parts of the proposed new Rule.</p>

<p align="center"><u>ABA Model Rule</u> No Comparable ABA Model Rule Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 3.10 Threatening Criminal, Administrative, or Disciplinary Charges Comment</p>	<p align="center"><u>Explanation of Changes to the California Rule 1-710</u></p>
	<p>[1] This Rule prohibits a lawyer from threatening to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute and does not apply to a threat to bring a civil action. It also does not prohibit actually presenting criminal, administrative, or disciplinary charges, even if doing so creates an advantage in a civil dispute. Whether a lawyer's statement violates this Rule depends on the specific facts. (See, e.g., <i>Crane v. State Bar</i> (1981) 30 Cal.3d 117 [177 Cal.Rptr 670].) A statement that the lawyer will pursue "all available legal remedies," or words of similar import, by itself does not violate this Rule.</p>	<p>Proposed Comment [1] is new and does not appear in existing California Rule 5-100. The Commission added this comment in order to describe the scope of the Rule and to make clear that whether a lawyer's statement violates the Rule depends on the facts and circumstances in which the statement is made. The limitations on the scope of the Rule stated in the proposed Comment are consistent with existing California law. For example, current California Rule 5-100 only prohibits threatening criminal or similar charges to gain an advantage in a civil dispute. Actually filing such charges is not prohibited, even if doing so is for the purpose of gaining an advantage in a civil dispute. See, e.g., Los Angeles County Bar Association Formal Opinion 469 (1993).</p>

<p align="center"><u>ABA Model Rule</u> No Comparable ABA Model Rule Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 3.10 Threatening Criminal, Administrative, or Disciplinary Charges Comment</p>	<p align="center"><u>Explanation of Changes to the California Rule 1-710</u></p>
<p>Rule 5-100 is not intended to apply to a member's threatening to initiate contempt proceedings against a party for a failure to comply with a court order.</p>	<p>[2] This Rule 5-100 is does not intended to apply to (i) a member's threatening threat to initiate contempt proceedings against a party for a failure to comply with a court order; or (ii) the offer of a civil compromise in accordance with a statute such as Penal Code sections 1377-78.</p>	<p>This comment has been reworded to make it active voice by stating that the rule "does not apply," instead of "is not intended to apply," to two circumstances. The first exception is substantially the same as the first paragraph of the Discussion in existing California Rule 5-100. The Commission reworded it for brevity. The second exception is to make clear that, if a person has been injured by an act constituting a misdemeanor, and that person has a remedy by a civil action, a prosecutor may offer to compromise the misdemeanor action in accordance with Penal Code sections 1377-78 without fear of violating this Rule.</p> <p>The version of this Rule circulated for public comment contained a more lengthy description of circumstances in which release-dismissal agreements in criminal cases might or might not violate this rule. However, the Commission deleted most of those sentences in light of adverse public comment.</p>
<p>Paragraph (B) is intended to exempt the threat of filing an administrative charge which is a prerequisite to filing a civil complaint on the same transaction or occurrence.</p>	<p>[3] Paragraph (B) is intended to exempt exempts the threat of filing an administrative charge which is a prerequisite to filing a civil complaint on the same transaction or occurrence.</p>	<p>Comment [3] is substantially the same as the second paragraph of the Discussion in existing California Rule 5-100. The only changes are that the reference to paragraph (b) is now lower case, and the Comment will affirmatively state the exemption instead of couching it in terms of the intent of the drafters.</p>
<p>For purposes of paragraph (C), the definition of "civil dispute" makes clear that the rule is applicable prior to the formal filing of a civil action.</p>	<p>For purposes of paragraph (C), the definition of "civil dispute" makes clear that the rule is applicable prior to the formal filing of a civil action.</p>	<p>The Commission recommends deleting the last paragraph of the Discussion of existing California Rule 5-100 because the majority of the Commission concluded that it is unnecessary. Proposed paragraph (c) of the Rule expressly refers to a "potential controversy," thereby referring to conduct prior to the filing of a complaint in a civil action.</p>

**Rule 3.10 Threatening Criminal, Administrative, or Disciplinary Charges.
[Sorted by Commenter]**

TOTAL = __ Agree = 3
Disagree = 0
Modify = 4
NI = 0

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	COPRAC	A			None Supports adoption of the rule.	No response necessary.
2	Evan A. Jenness	D			Comment [2] exception for government lawyers should be removed because it endorses extortion and encourages the type of government misconduct that gives rise to civil claims against the government (e.g. permitting government lawyer to give criminal defendant a pass on criminal charges in exchange for releasing his civil rights claims arising from the arrest leading to the charges). <u>Special-interest carved-outs may endorse conduct prohibited by the Penal Code and foster government misconduct improper under Section 1983 of the Civil Rights Act. (42 U.S.C. § 1983.) See NACDL comments, <i>infra</i>.</u>	Commission did not make the requested revision, in part, because the concept is present. <u>The Commission recognizes that the rule can be abused by prosecutors. For example, if a wrongful arrest has been made, a prosecutor might agree not to pursue charges in exchange for a release from civil liability. In response to these comments, the majority of the Commission voted to delete all of the text that had been proposed for Comment [2] except the two sentences that remain. The substance of the remaining sentences is in the existing rule or are inherent in statutory law . The and the Commission is not aware of any authority citing the comment language as a justification for misconduct.</u>
3	Los Angeles County Bar Association (Toby J. Rothschild)	M			Replace the word “present” in paragraph (a) with “initiate” because most lawyers cannot actually file or present criminal, administrative or disciplinary charges. Amend Comment [1] to read: “By itself, a statement that the lawyer will pursue ‘all available legal remedies,’ or which contains words of similar import, does not violate this	Commission did not make the requested revision, in part, because the word “present” is the term used in the existing rule and changing that term might be misconstrued as a change in substance or policy. <u>The Commission concluded that the word “initiate” does not improve upon the word “present,” and the word “present” is not used in this Comment in a technical sense.</u>

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

**Rule 3.10 Threatening Criminal, Administrative, or Disciplinary Charges.
[Sorted by Commenter]**

TOTAL = __ Agree = 3
Disagree = 0
Modify = 4
NI = 0

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					Rule.” Delete “who represents a governmental agency” from Comment [2] so that the governmental and private attorneys are treated equally.	Commission revised the comment to address the commenter’s concern. Commission revised the comment <u>and deleted, <i>inter alia</i>, the phrase addressed by the commenter to address the commenter’s concern.</u>
4	National Association of Criminal Defense Lawyers (John Wesley Hall)	D			<u>Comment [2] exempts government lawyers from the rule prohibiting lawyers from threatening criminal proceedings in an effort to settle a civil dispute on favorable terms.</u> Comment [2] authorizes behavior by government lawyers that would amount to extortion <u>or compounding a crime.</u> Qualification that government lawyer’s actions be in good faith does help because an individual may be guilty of extortion even if he threatens to pursue well founded criminal charges.	Commission did not make the requested revision, in part, because the concept is present. <u>The Commission recognizes that the rule can be abused by government lawyers. For example, if a wrongful arrest has been made, a prosecutor might offer not to pursue charges in exchange for a release from civil liability. In response to these comments, the majority of the Commission voted to delete all of the text that had been proposed for Comment [2] except the two sentences that remain. The concept of the remaining sentences are in the existing rule or are inherent because of statute,</u> and the Commission is not aware of any authority citing the comment language as a justification for misconduct. See above response. Also, Commission deleted the language referring to “good faith.”
5	Orange County Bar Association (Trudy Levindofske)	A			None <u>Agreed with proposal.</u>	No response necessary.

**Rule 3.10 Threatening Criminal, Administrative, or Disciplinary Charges.
[Sorted by Commenter]**

TOTAL = __ Agree = 3
Disagree = 0
Modify = 4
NI = 0

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
6	San Diego County Bar Association (Heather L. Rosing)	M			Comment [2]: replace “good faith” standard with a “probable cause” standard.	Commission deleted <u>inter alia</u> , the language that was the basis of the commenter’s concern.
7	Santa Clara County Bar Association (Christine Burdick)	A			None <u>Supports the proposed rule and additional comments.</u>	No response necessary.

STATE VARIATIONS – CA RULE, NO ABA COUNTERPART

CA Rule 5-100 Threatening Criminal, Administrative, or Disciplinary Charges.

Jurisdictions with provisions similar to California:

Colorado

[Rule 4.5\(a\)](#) A lawyer shall not threaten criminal, administrative or disciplinary charges to obtain an advantage in a civil matter nor shall a lawyer present or participate in presenting criminal, administrative or disciplinary charges solely to obtain an advantage in a civil matter.

South Carolina

[Rule 4.5](#) A lawyer shall not present, participate in presenting, or threaten to present criminal or professional disciplinary charges solely to obtain an advantage in a civil matter.

Virginia

[Rule 3.4\(i\)](#) [A lawyer shall not] Present or threaten to present criminal or disciplinary charges solely to obtain an advantage in a civil matter.

District of Columbia

[Rule 8.4\(g\)](#) [It is professional misconduct for a lawyer to] Seek or threaten to seek criminal charges or disciplinary charges solely to obtain an advantage in a civil matter.

Louisiana

Rule of Professional Conduct 8.4(g) [It is professional misconduct for a lawyer to] Threaten to present criminal or disciplinary charges solely to obtain an advantage in a civil matter. (On pages 45-46 of the [pdf version](#) of the rules)

Maine*

Rule 3. Code of Professional Responsibility. 3.6 Conduct During Representation. (C) Threatening Prosecution. A lawyer shall not present, or threaten to present, criminal, administrative, or disciplinary charges solely to obtain an advantage in a civil matter.

*This rule is no longer effective. The Maine Rules of Professional Conduct (which follow the ABA numbering system and do not include a specific provision on threatening to present charges) became effective on 8/1/2009. Links to [current rules](#) and [old rules](#).

Jurisdictions with provisions relating only to threats of criminal charges:

Hawaii – [Rule 3.4\(i\)](#)

Idaho - [Rule 4.4\(a\)\(4\)](#)

Connecticut – [Rule 3.4\(7\)](#)

Georgia – [Rule 3.4\(h\)](#)

New Jersey – [Rule 3.4\(g\)](#)

Tennessee – [Rule 4.4\(b\)](#)

Other Resources:

ABA Article, [Making Threats](#), (October 2008), discussing history of prohibition against threats and state bar rules and ethics opinions on the subject. Note: some rule citations no longer effective and/or amended.

[ABA Formal Opinion 92-363](#) *Use of Threats of Prosecution in Connection with a Civil Matter* (1992).

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September 21, 2009 KEM E-mail to Staff:

Did we send out anything concerning proposed Rule 3.10 [5-100]? I don't recall seeing anything but I think it's on the October agenda.

September 23, 2009 Difuntorum E-mail to KEM, cc McCurdy & Lee:

Attached please find proposed assignment materials for Rule 3.10. Please take a look and let me know if they seem okay to send to the drafters. Thanks.

P.S. I think Rule 3.10 is the last agenda item for which materials are needed for the October assignments, but let me know if you think there is something that I've overlooked.

September 23, 2009 KEM E-mail to Difuntorum, cc McCurdy & Lee:

I've attached revised rule & comment chart (added footer and draft no.) and dashboard (added reference to RPC 5-100). Otherwise, they're ready to go.

September 23, 2009 McCurdy E-mail to Drafters (Sapiro, Melchior & Snyder):

Jerry (lead), and Kurt & Dominique (codrafters):

This message provides the assignment background materials for Rule 3.10 [5-100] on the October agenda. **The assignment deadline is Wednesday, September 30, 2009.**

As previously indicated, the materials provided are templates or drafts. Please don't hesitate to ask for further assistance or additional materials.

Attached:

- Dashboard, Template (9/23/09)KEM
- Introduction, Template (9/23/09)
- Rule & Comment Chart, Template (9/23/09)RD-KEM
- Public Comment Chart, Template (9/23/09)-RD)
- State Variations, Staff (2009)

September 25, 2009 Sapiro E-mail to Drafters (Melchior, Snyder & Tuft):

Attached are the templates, dashboard, and other materials I have drafted regarding Rule 3.10. The public comment spreadsheet is redlined to show my changes from what I received from Lauren. The state variations pages are as I received them from Lauren.

Please promptly give me the benefit of our comments, questions, suggestions, and criticisms. Unfortunately, we have to submit these by September 30th.

September 28, 2009 Tuft E-mail to Drafters, cc Difuntorum & KEM:

Jerry, I voted to not adopt proposed rule 3.10 and would like the following minority report included in the Introduction:

A minority of the Commission recommends against adoption of proposed Rule 3.10 for the reasons the ABA omitted the rule from the Model Rules in 1983. The drafters of the Model Rules viewed a similar prohibition in former ABA Model Code DR 7-105(A) (1969), on which California Rule 5-100 is based, as overly broad and unnecessary. Threats of criminal prosecution or administrative charges that amount to extortionate conduct under the law are adequately covered under proposed Rule 8.4(b) which expands on Model Rule 8.4(b). Proposed Rule 3.10 is considerably broader than the rule in the few states that retain the earlier ABA Model Code rule which is limited to threats of criminal prosecution. What constitutes a "threat" under the proposed rule is incapable of adequate definition to inform lawyers in advance what conduct is prohibited. As drafted, the rule would unreasonably impede legitimate negotiation tactics in criminal and civil matters. There is no showing of need to depart from the Model Rules by having a separate rule that prohibits extortionate conduct in addition to proposed rule 8.4.

September 28, 2009 Snyder E-mail to Drafters, cc Difuntorum & KEM:

I agree with Mark. I greatly appreciate all the hard work that you put into drafting this, however, this rule has always troubled me. I, too, want to allow lawyers some latitude in pursuing litigation. Extortion attempts should be prohibited, but such conduct would appear to be covered adequately under Rule 8.4.

September 29, 2009 Sapiro E-mail to Difuntorum, cc Drafters, Chair & KEM:

Attached are the materials I have prepared for 3.10. The Intro includes a dissent drafted by Mark, in which Dom has joined.

Please let me know whether I owe you anything else on this rule.

Attachments:

- Dashboard, DFT1 (9/29/09)JS
- Introduction, DFT1 (9/29/09)JS
- Rule & Comment Chart, DFT1 (9/29/09)JS
- Public Comment Chart, DFT1 (9/29/09)RD-JS
- State Variations (2009)

October 2, 2009 KEM E-mail to McCurdy:

I just saw this e-mail from Jerry on which you were not copied. Is this one of the e-mails Randy forwarded to you? If not, please let me know if I can help whip it into shape for inclusion in the agenda package.

October 2, 2009 McCurdy E-mail to KEM:

Yes, Randy did forward this to me and I've already included all of the pieces.

October 3, 2009 KEM Note to File:

I've revised the drafts Jerry circulated to the Drafters & Staff on 9/29/09. The affected documents and new draft numbers, etc., are:

- Dashboard, DFT2 (10/3/09)JS-KEM
- Introduction, DFT2 (10/3/09)JS-KEM
- Rule & Comment Chart, DFT2 (10/3/09)JS-KEM
- Public Comment Chart, DFT2 (10/3/09)JS-KEM

October 9, 2009 Sondheim E-mail to RRC:

In the Dashboard, under Stakeholders, first line, "offense" should be changed to defense.

In the Introduction, p.398, eighth line, "considerable" should be considerably.

October 9, 2009 Kehr E-mail to RRC:

Here are my comments on these materials:

1. I think the paragraph (a) explanation, second paragraph, is not correct. Both the current and proposed Rules can apply to lawyers who are not members of the State Bar, so I think that the change from "member" to "lawyer" is only to track the MRs.
2. There is a possible compromise between the majority and minority positions on this Rule, which is to move it into Rule 8.4 as was done in D.C. and Louisiana.

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

Rule 3.10, p. 398, 4 lines from bottom, nit: "considerably"

And this is a good example of my general complaint that we are defensive about "client protection": in my opinion, this rule offers a good balance which deals fairly with clients and provides clarity; and we should say that.