

**Rule 3.10 Threatening Criminal, Administrative, or Disciplinary Charges  
(Proposed Rule Adopted by the Board on November 17, 2016)**

- (a) A lawyer shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute.
- (b) As used in paragraph (a) of this rule, the term “administrative charges” means the filing or lodging of a complaint with any governmental organization that 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.
- (c) As used in this rule, the term “civil dispute” means a controversy or potential controversy over the rights and duties of two or more persons\* 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.

**Comment**

[1] Paragraph (a) does not prohibit a statement by a lawyer that the lawyer will present criminal, administrative, or disciplinary charges, unless the statement is made to obtain an advantage in a civil dispute. For example, if a lawyer believes\* in good faith that the conduct of the opposing lawyer or party violates criminal or other laws, the lawyer may state that if the conduct continues the lawyer will report it to criminal or administrative authorities. On the other hand, a lawyer could not state or imply that a criminal or administrative action will be pursued unless the opposing party agrees to settle the civil dispute.

[2] This rule 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., *Crane v. State Bar* (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, does not by itself violate this rule.

[3] This rule does not apply to (i) a threat to initiate contempt proceedings 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 §§ 1377-78.

[4] This rule does not prohibit a government lawyer from offering a global settlement or release-dismissal agreement in connection with related criminal, civil or administrative matters. The government lawyer must have probable cause for initiating or continuing criminal charges. See rule 3.8.

[5] As used in paragraph (b), “governmental organizations” includes any federal, state, local, and foreign governmental organizations. Paragraph (b) exempts the threat of filing

an administrative charge that is a prerequisite to filing a civil complaint on the same transaction or occurrence.

**PROPOSED RULE OF PROFESSIONAL CONDUCT 3.10**  
**(Current Rule 5-100)**  
**Threatening Criminal, Administrative, or Disciplinary Charges**

**EXECUTIVE SUMMARY**

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) evaluated current rule 5-100 (Threatening Criminal, Administrative, or Disciplinary Charges)<sup>1</sup> in accordance with the Commission Charter. The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules. The result of the Commission’s evaluation is proposed Rule 3.10 (Threatening Criminal, Administrative, or Disciplinary Charges).

**Rule As Issued For 90-day Public Comment**

Proposed Rule 3.10 carries forward current rule 5-100. Only one substantive change is recommended in the black letter text of proposed Rule 3.10. In paragraph (b), the Commission is recommending that the definition of “administrative charges” be expanded to encompass the filing of a complaint with a foreign governmental organization. Under current rule 5-100(B), “administrative charges” is limited to complaints filed with a “federal, state or local government entity.” The Commission understands that the policy of the current rule is to prohibit lawyer misconduct that is tantamount to extortion and that this policy logically extends to threats of charges made to a foreign or international governmental organization, such as the equivalent of the State Bar of California in a foreign jurisdiction. The current rule’s use of restrictive terms unnecessarily limits the public protection afforded by the rule and is inconsistent with modern changes in the practice of law that include globalization and international multi-jurisdictional practice of law.

In addition to this one substantive change to the black letter of the rule, other proposed amendments include the following.

- In Comment [1], adding an explanation that the rule does not prohibit a statement by a lawyer that the lawyer will present criminal, administrative, or disciplinary charges, unless the statement is made to obtain an advantage in a civil dispute. For additional clarification, this comment states that if a lawyer believes in good faith that the conduct of the opposing lawyer or party violates criminal or other laws, the lawyer may state that if the conduct continues the lawyer will report it to criminal or administrative authorities. However, that same lawyer could not state or imply that a criminal or administrative action will be pursued unless the opposing party agrees to settle the civil dispute. This is

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<sup>1</sup> There is no corresponding American Bar Association (“ABA”) Model Rules. The predecessor to current California rule 5-100 is former rule 7-104 and that rule was derived from DR 7-105 of the ABA Model Code of Professional Responsibility. DR 7-105 of the Model Code differs from current California rule 5-100 in that DR 7-105 was limited only to threats of criminal prosecution. The DR 7-105 prohibition was not carried forward by the ABA when it adopted the Model Rules to replace the Model Code. Eleven jurisdictions, however, have carried forward the DR 7-105 prohibition as part of their current rules despite the omission of a counterpart in the current Model Rules. Additionally, eleven other jurisdictions have rules which more closely parallel rule 5-100 in that they prohibit not only threats of presenting criminal charges, but also threats of disciplinary or other administrative charges. Accordingly while there is not a corresponding Model Rule, California is not alone in having a rule prohibiting this misconduct.

included by the Commission to address potential concerns that the concept of a prohibited threat is not sufficiently clear despite the fact that the rule is used for imposing discipline. (See, e.g., *In re Elkins* (Review Dept. 2009) 5 Cal. State Bar Ct. Rptr. 160 [respondent threatened to report individuals to the FBI, State Attorney General and others if they did not comply with his various demands regarding administration of his father's estate and his litigation with a mortgage company].)

- In Comment [2], clarifying that a mere statement that a lawyer will pursue “all available legal remedies” does not alone violate the rule and that finding a violation ordinarily requires consideration of the specific facts of a particular situation.
- In Comment [4], clarifying that the rule does not prohibit a government lawyer from engaging in a typical “release-dismissal” agreement in connection with related criminal, civil, or administrative matters.

### **Post-Public Comment Revisions**

After consideration of comments received in response to the initial 90-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

## COMMISSION REPORT AND RECOMMENDATION: RULE 3.10 [5-100]

### Commission Drafting Team Information

**Lead Drafter:** Dean Zipser

**Co-Drafters:** Jeffrey Bleich, Robert Kehr

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### I. CURRENT CALIFORNIA RULE

#### Rule 5-100 Threatening Criminal, Administrative, or Disciplinary Charges

- (A) A member shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute.
- (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.
- (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.

### Discussion

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.

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.

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.

### II. FINAL VOTES BY THE COMMISSION AND THE BOARD

#### Commission:

Date of Vote: October 21 & 22, 2016

Action: Recommend Board Adoption of Proposed Rule 3.10 [5-100]

Vote: 14 (yes) – 0 (no) – 0 (abstain)

## **Board:**

Date of Vote: November 17, 2016

Action: Board Adoption of Proposed Rule 3.10 [5-100]

Vote: 14 (yes) – 0 (no) – 0 (abstain)

### **III. COMMISSION'S PROPOSED RULE (CLEAN)**

#### **Rule 3.10 [5-100] Threatening Criminal, Administrative, or Disciplinary Charges**

- (a) A lawyer shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute.
- (b) As used in paragraph (a) of this rule, the term “administrative charges” means the filing or lodging of a complaint with any governmental organization that 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.
- (c) As used in this rule, the term “civil dispute” means a controversy or potential controversy over the rights and duties of two or more persons\* 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.

#### **Comment**

[1] Paragraph (a) does not prohibit a statement by a lawyer that the lawyer will present criminal, administrative, or disciplinary charges, unless the statement is made to obtain an advantage in a civil dispute. For example, if a lawyer believes\* in good faith that the conduct of the opposing lawyer or party violates criminal or other laws, the lawyer may state that if the conduct continues the lawyer will report it to criminal or administrative authorities. On the other hand, a lawyer could not state or imply that a criminal or administrative action will be pursued unless the opposing party agrees to settle the civil dispute.

[2] This rule 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., *Crane v. State Bar* (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, does not by itself violate this rule.

[3] This rule does not apply to (i) a threat to initiate contempt proceedings 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 §§ 1377-78.

[4] This rule does not prohibit a government lawyer from offering a global settlement or release-dismissal agreement in connection with related criminal, civil or administrative matters. The government lawyer must have probable cause for initiating or continuing criminal charges. See rule 3.8.

[5] As used in paragraph (b), “governmental organizations” includes any federal, state, local, and foreign governmental organizations. Paragraph (b) exempts the threat of filing an administrative charge that is a prerequisite to filing a civil complaint on the same transaction or occurrence.

#### IV. COMMISSION’S PROPOSED RULE (REDLINE TO CURRENT CALIFORNIA RULE 5-100)

##### Rule 3.10 [5-100] Threatening Criminal, Administrative, or Disciplinary Charges

- (Aa) A ~~member~~lawyer shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute.
- (Bb) As used in paragraph (Aa) of this rule, the term “administrative charges” means the filing or lodging of a complaint with ~~a federal, state, or local~~any governmental ~~entity which~~organization that 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.
- (Cc) 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~~persons\* 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.

#### ~~Discussion~~Comment

~~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.~~

[1] Paragraph (a) does not prohibit a statement by a lawyer that the lawyer will present criminal, administrative, or disciplinary charges, unless the statement is made to obtain an advantage in a civil dispute. For example, if a lawyer believes\* in good faith that the conduct of the opposing lawyer or party violates criminal or other laws, the lawyer may state that if the conduct continues the lawyer will report it to criminal or administrative authorities. On the other hand, a lawyer could not state or imply that a criminal or administrative action will be pursued unless the opposing party agrees to settle the civil dispute.

[2] This rule 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., *Crane v. State Bar* (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, does not by itself violate this rule.

[3] This rule does not apply to (i) a threat to initiate contempt proceedings 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 §§ 1377-78.

[4] This rule does not prohibit a government lawyer from offering a global settlement or release-dismissal agreement in connection with related criminal, civil or administrative matters. The government lawyer must have probable cause for initiating or continuing criminal charges. See rule 3.8.

[5] As used in paragraph (b), "governmental organizations" includes any federal, state, local, and foreign governmental organizations. Paragraph (B) ~~is intended to exempt~~ exempts the threat of filing an administrative charge ~~which~~that is a prerequisite to filing a civil complaint on the same transaction or occurrence.

~~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.~~

## **V. RULE HISTORY**

In 1972, in anticipation of comprehensive amendments to the original 1928 Rules of Professional Conduct, the California State Bar Special Committee to Study the ABA Code of Professional Responsibility recommended adoption of proposed rule 7-104, the predecessor to rule 5-100, as follows:

### **Rule 7-104. Threatening Criminal Prosecution.**

A member of the State Bar shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.

#### ***Comment:***

In California there is no Rule of Professional Conduct covering an attorney who threatens another with criminal prosecution. However, the Supreme Court has imposed discipline in the past for acts in the nature of extortion on the theory that such conduct involves moral turpitude (Business and Professions Code § 6106). See *Arden v. State Bar* (1959) 52 Cal.2d 310, 321. *Libarian v. State Bar* (1952) 38 Cal.2d 328; *Lindenbaum v. State Bar* (1945) 26 Cal.2d 565.

Rule 7-104 was adopted from ABA Code DR 7-105.

(California State Bar Special Committee to Study the ABA Code of Professional Responsibility, *Final Report* (1972) at p. 40.)

In 1975, Rule 7-104 as recommended by the Special Committee was amended and was approved by the California Supreme Court as follows:

**Rule 7-104. Threatening Criminal Prosecution.**

A member of the State Bar shall not threaten to present criminal, administrative or disciplinary charges to obtain an advantage in a civil action nor shall he present or participate in presenting criminal, administrative or disciplinary charges solely to obtain an advantage in a civil matter.

In 1989, the California Rules of Professional Conduct underwent another comprehensive revision that included a complete reorganization and renumbering of the rules. Rule 7-104 was amended and renumbered as rule 5-100. In its 1987 rule filing that preceded the adoption and approval of the comprehensive amendments, the then Rules Revision Commission summarized the changes as follows:

Proposed rule 5-100 is based loosely on current rule 7-104 which prohibits an attorney from threatening to file criminal, administrative, or disciplinary charges to obtain an advantage in a civil action or presenting such charges solely to obtain an advantage in a civil matter.

Paragraph (A) continues the prohibition on threatening to file criminal, administrative, or disciplinary charges but amends the context of the threat from “civil action” to “civil dispute” to avoid the ambiguity found in current rule 7-104.

The proposed deletion of the prohibition on filing such charges would permit an attorney to assist a client in presenting criminal, administrative or disciplinary charges with respect to matters arising out of the same transaction or occurrence as a civil dispute. In many cases, the client may need the assistance of the attorney in effectively presenting such charges.

Paragraph (B) is new and is intended to make clear that the threat of filing an administrative charge which is a prerequisite to filing a civil complaint is not prohibited by the rule.

Paragraph (C) is new and is intended to define the term “civil dispute” as that term is used in paragraph (A).

[December 1987 gray bound rule filing at p. 47.]

Amendments Operative 1989 (Comparison of Proposed Rule 5-100 to Current Rule) 7-104

**Rule 5-100. ~~7-104.~~ Threatening Criminal, Administrative, or Disciplinary Charges. Prosecution.**

(A) ~~A member of the State Bar shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil action~~

~~dispute. nor shall he present or participate in presenting criminal, administrative or disciplinary charges solely to obtain an advantage in a civil matter.~~

(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.

(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.

**Discussion:**

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.

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.

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.

[December 1987 gray bound rule filing, enc. 2.]

No further changes have been made to Rule 5-100 since 1989.

**VI. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS**

• **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016  
(In response to 90-day public comment circulation):**

1. OCTC supports this rule.

Commission Response: No response required.

2. Comments [1] and [2] are unnecessary, as they merely repeat and restate the rule.

Commission Response: The Commission disagrees with the commenter’s assessment. Both comments clarify the how the Rule is applied, which is an

appropriate function of a comment. Neither repeats the Rule.

3. OCTC supports Comments [3] – [5].

Commission Response: No response required.

- **State Bar Court**: No comments were received from State Bar Court.

## **VII. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY**

During the 90-day public comment period, three public comments were received. Two comments agreed with the proposed Rule, and one comment disagreed. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

## **VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS**

### **A. Related California Law**

1. California law related to current rule 5-100.

- (a) Extortion

Prior to 5-100's adoption, attorneys were disciplined for conduct equivalent to extortion. (See *Arden v. State Bar* (1959) 52 Cal.2d 310 [341 P.2d 6]; *Libarian v. State Bar* (1952) 38 Cal.2d 328 [239 P.2d 865]; *Lindenbaum v. State Bar* (1945) 26 Cal.2d 565 [160 P.2d 9].)

Despite the adoption of Rule 5-100, there remains an unresolved overlap or even a conflict between the rule and the legal concept of extortion in the context of attorney conduct. (See *Flatley v. Mauro* (2006) 39 Cal.4th 299 [46 Cal.Rptr.3d 606] (*Flatley*) [“. . . a threat that constitutes criminal extortion is not cleansed of its illegality merely because it is laundered by transmission through the offices of an attorney."]; *Cohen v. Brown* (2009) 173 Cal.App.4th 302, 317-318 [93 Cal.Rptr.3d 24] (*Cohen*) [holding that assisting a client with the filing of a State Bar complaint under the circumstances of that case constituted extortion. "Here, [attorney] Brown went a step further than merely threatening to present administrative charges [as prohibited by Rule 5-100]. He actually did present an administrative charge to the State Bar, through [Brown's client] Zerah, and the communications he had with plaintiff and plaintiff's law partner demonstrate that the purpose of filing the State Bar complaint was to gain an advantage in the underlying action by pressuring plaintiff and his law partner into immediately signing off on the settlement check."]; *Mendoza v. Hamzeh* (2013) 215 Cal.App.4th 799, 806-807 [155 Cal.Rptr.3d 832] (*Mendoza*) [attorney's demand letter threatening to report plaintiff's alleged criminal conduct to enforcement agencies and to his customers and vendors, coupled with a demand for money, constituted criminal extortion as

a matter of law.], citation, internal quotation marks and emphasis omitted; but see *Malin v. Singer* (2013) 217 Cal.App.4th 1283, 1299 [159 Cal.Rptr.3d 292] [concluding that attorney Singer’s demand letter did not fall under the narrow exception [to protected activity under the Anti-SLAPP statute] articulated in *Flatley* because the letter was so extreme in its demands that it constituted criminal extortion as a matter of law. “We see a critical distinction between Singer’s demand letter, which made no overt threat to report Malin to prosecuting agencies or the Internal Revenue Service, and the letters in *Flatley* and *Mendoza*, which contained those express threats and others that had no reasonable connection to the underlying dispute.”].)

#### (b) Release-dismissal agreements

Case law related to release-dismissal agreements conflicts with California State Bar Formal Op. No. 1989-106 (CAL 1989-106).

Case authority provides that prosecutors may agree to drop criminal charges in exchange for defendant’s agreement to not pursue a civil complaint against law enforcement officers or the municipality. (See Vapnek et al., Cal. Practice Guide: Professional Responsibility (The Rutter Group 2015) ¶ 8:982, p. 8-151; *Newton v. Rumery* (1987) 480 U.S. 386; *Hoines v. Barney’s Club, Inc.* (1980) 28 Cal.3d 603.)

However, the State Bar of California Standing Committee on Professional Responsibility and Conduct has opined that a prosecutor’s agreement to dismiss criminal charges conditioned on release from civil liability violates rule 5-100 (CAL 1989-106.) “Since a release-dismissal offer constitutes a veiled threat to continue the prosecution if the defendant rejects it (that is, if he or she refuses to waive the right to have a potential civil claim determined by due process), the practice cannot be countenanced under rule 5-100.” This conflicts with the California Practice Guide on Professional Responsibility which states that while a prosecutor may violate rule 5-100 by threatening criminal charges to gain advantage in a civil matter, if charges are already filed, the prosecutor does not violate the rule by negotiating an agreement in which the criminal charges are dropped in exchange for release of civil liability. (Vapnek et al., Cal. Practice Guide: Professional Responsibility (The Rutter Group 2015) ¶ 8:983, p. 8-152.)

## **B. ABA Model Rule Adoptions**

There is no corresponding ABA model rule. As discussed above, former California rule 7-104 was derived from Disciplinary Rule (DR) 7-105 of the ABA Model Code of Professional Responsibility, which was limited to threats of criminal prosecution.<sup>1</sup> The

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<sup>1</sup> DR 7-105, which prohibited threats of criminal prosecution in order to gain an advantage in a civil matter, stated:

A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.

DR 7-105 prohibition was not carried forward by the ABA when it adopted the Model Rules. (Geraghty, *Making threats* (American Bar Association 2008) at p. 1.)

However, eleven jurisdictions have carried forward the DR 7-105 prohibition as part of their rules.<sup>2</sup> Additionally, eleven other jurisdictions have rules which more closely parallel rule 5-100 in that they prohibit not only threats of presenting criminal charges, but also threats of disciplinary or other administrative charges.<sup>3</sup>

## **IX. CONCEPTS ACCEPTED/REJECTED; CHANGES IN DUTIES; NON-SUBSTANTIVE CHANGES; ALTERNATIVES CONSIDERED**

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

1. General: Carry forward the concept in current rule 5-100 that expressly prohibits threats to present criminal, administrative or disciplinary charges.
  - o Pros: The rule is intended to prohibit lawyers from making threats to present charges to gain an advantage. Although there are criminal laws regarding extortion that prohibit such conduct, it is important to have a disciplinary rule that prohibits the conduct and puts lawyers on notice that they are subject to discipline for making such threats. This is conduct in which lawyers should not engage and this rule is the most direct approach to preventing it. Moreover, the rule has been in existence in some form in California since 1975 and there is no evidence there has been a problem with it, and removing this long-standing rule might suggest to some readers that these threats now are to be permitted. Violations of this rule have been charged by OCTC and culpability has been found in the State Bar Court (see, e.g., *In re Elkins* (Review Dept. 2009) 5 Cal. State Bar Ct. Rptr. 160 [respondent threatened to report individuals to the FBI, State Attorney General and others if they did not comply with his various demands regarding administration of his father's estate and his litigation with a mortgage company]). Further, the targeted conduct should be expressly prohibited in the rules as a lawyer's threat would function to drive a wedge between the opposing lawyer and the lawyer's client, creating a conflict of interest. Finally, that a majority of jurisdictions

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<sup>2</sup> See Alabama Rule of Professional Conduct 3.10, Connecticut Rule of Professional Conduct 3.4(7), Georgia Rule of Professional Conduct 3.4(h), Hawaii Rule of Professional Conduct 3.4(i), Idaho Rule of Professional Conduct 4.4(a)(4), New Jersey Rule of Professional Conduct 3.4(g), New York Rule of Professional Conduct 3.4(e), Oregon Rule of Professional Conduct 3.4(g), South Carolina Rule of Professional Conduct 4.5, Tennessee Rule of Professional Conduct 4.4(a)(2), Vermont Rule of Professional Conduct 4.5.

<sup>3</sup> See Colorado Rule of Professional Conduct 4.5(a), District of Columbia Rule of Professional Conduct 8.4(g), Florida Rule of Professional Conduct 3.4 (g), (h), Illinois Rule of Professional Conduct 8.4(g), Kentucky Rule of Professional Conduct 3.4(f), Louisiana Rule of Professional Conduct 8.4(g), Maine Rule of Professional Conduct 3.1(b), Massachusetts Rule of Professional Conduct 3.4(h), Ohio Rule of Professional Conduct 1.2(e), Texas Rule of Professional Conduct 4.04(b), and Virginia Rule of Professional Conduct 3.4(i).

have followed the ABA's lead in removing the language of DR 7-105 from their Rules of Professional Conduct has not created a national standard as a substantial minority of jurisdictions have retained the language.

- Cons: Criminal statutes prohibiting extortion adequately address the conduct targeted by the rule. The ABA (and a majority of jurisdictions) have dispensed with DR 7-105, the ABA Code of Professional Responsibility counterpart, when it adopted the Model Rules in 1983. ABA Formal Ethics Op. 92-363 (6/6/1992), explained:

"The deliberate omission of DR 7-105(A)'s language or any counterpart from the Model Rules rested on the drafters' position that "extortionate, fraudulent, or otherwise abusive threats were covered by other, more general prohibitions in the Model Rules and thus that there was no need to outlaw such threats specifically." (C.W. Wolfram, *Modern Legal Ethics* (1986) § 13.5.5, at 718, citing Model Rule 8.4 legal background note (Proposed Final Draft, May 30, 1981), (last paragraph). Model Rules that both provide an explanation of why the omitted provision DR 7-105(A) was deemed unnecessary and set the limits on legitimate use of threats of prosecution are Rules 8.4, 4.4, 4.1, and 3.1. (footnotes omitted).

In addition, current rule 5-100 arguably inhibits lawyers from engaging in appropriate corrective action. For example, a lawyer who observes unethical conduct by another lawyer can be deterred from pointing out that misconduct for fear that a mere statement that an opponent is engaging in unethical conduct could be construed as a veiled threat to report the adversary to the State Bar, thus constituting a reportable violation of the rule.

2. In paragraph (b)'s definition of "administrative charges," delete references to "federal, state, or local" as modifiers of a "governmental entity." The current rule uses "federal, state, or local" to modify the description a governmental agency that can order or recommend the loss of a license or impose quasi-criminal sanctions. Proposed paragraph (b) omits those restrictive modifiers to broaden the rule to prohibit threats of charges made to a foreign or international governmental organization.
  - Pros: The rule's prohibition against lawyer misconduct that is tantamount to extortion logically extends to threats of charges made to a foreign or international governmental organization, such as the equivalent of the State Bar of California in a foreign jurisdiction. The current rule's use of restrictive terms unnecessarily limits the public protection afforded by the rule and is inconsistent with modern changes in the practice of law that include globalization and international MJP.
  - Cons: None identified.

3. In paragraph (c), substitute “persons” for “parties,” as provided in current rule 5-100(B).
  - Pros: The use of the word “parties” is too restrictive. The term “parties” suggests that the rule would not apply unless there is a contract, an ongoing lawsuit, or a dispute that ultimately matures into a lawsuit. The rule should apply to the use of threats to gain an advantage in any civil dispute. Further, if adopted as proposed, “persons” will also include any non-party witnesses in a matter.
  - Cons: First, there is no evidence that the use of “parties” has proven confusing or restrictive. The clause following “parties” in current rule 5-100(C), “whether or not an action has been commenced,” obviates the concern that lawyers might be misled into believing the rule only applies to parties in formal proceedings or contracts. Second, some public commenters could erroneously perceive that the Commission is intending a controversial substantive change simply because of the history concerning rule 2-100 (Communication with a Represented Party) and the change from “party” to “person” proposed in that rule. In response to this concern, staff observed that a different approach for removing the restrictive impact of the term “parties” in paragraph (C) might be to remove the entire phrase so that the clause simply states: “. . . the term “civil dispute” means a controversy or potential controversy over rights and duties under civil law. . . .”
4. Include new Comments identifying conduct that is not prohibited by the rule. Unlike the current rule, proposed Comments [1] and [2] would clarify that the following conduct is not prohibited by the rule: (i) a statement in good faith that seeks cessation of unlawful conduct but does not constitute a veiled threat to obtain an improper advantage (e.g., settlement on favorable terms); (ii) threat to bring a civil action; (iii) actual presentation of charges (see San Diego County Bar Association Formal Op. No. 2005-1); (iv) general statements that “all available legal remedies;” and (v) the offer of a civil compromise under Penal Code §§ 1377-1378. Similarly, Comment [3] provides that the rule does not apply to threats to initiate civil contempt proceedings.
  - Pros: Misconstruing the rule to be an overbroad prohibition can chill a lawyer’s advocacy. The new comment helps lawyers understand the rule’s limited scope.
  - Cons: The guidance provided by the comment can be determined through normal legal research of applicable case law and ethics opinions.
5. Add new Comment [4] on negotiation of release-dismissal agreements with criminal prosecutors. A prosecutor may agree to drop criminal charges in exchange for a defendant’s agreement to not pursue a civil complaint against law enforcement officers or the municipality (see *Town of Newton v. Rumery* (1987) 480 U.S. 386 [107 S. Ct. 1187].) However, the State Bar of California

Standing Committee on Professional Responsibility and Conduct has opined that a prosecutor's agreement to dismiss criminal charges conditioned on release from civil liability violates the current rule (see CAL 1989-106).

- Pros: This comment clarifies that the rule is not intended to apply to criminal settlement practices that have been found to be lawful.
  - Cons: Whether the negotiation of a release-dismissal agreement violates the rule is a case-by-case fact dependent inquiry that accounts for the all of the surrounding circumstances. A comment would be either: misleading in suggesting a one-size-fits-all application; or too vague and equivocal to offer any real guidance.
6. Add new Comment [5] that defines "governmental organizations" as used in paragraph (b). This comment clarifies that such organizations include any federal, state, local or foreign governmental organizations.
- Pros: This clarifies a possible ambiguity that the current rule is limited to state governmental organizations
  - Cons: This comment is unnecessary because there is no restrictive language in paragraph (b) concerning types of governmental organizations.

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

1. The main concept rejected was the policy decision to completely repeal the rule as many other jurisdictions no longer include this general prohibition. (See Section IX.A.1, above.)

This section identifies concepts the Commission considered before the Rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the Rule, can be found in the Public Comment Synopsis Tables.

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

1. The changes to paragraph (b) are substantive. (See Section IX.A.2, above.)
2. All other changes are non-substantive clarifications of the current rule. (See Section IX.D below.)

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

1. 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.
2. Change the rule number to conform 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 by various Rules of Court to practice in California 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.
3. In paragraph (b), the word “organization” is substituted for “entity” to be consistent with the use of the term “organization” throughout the proposed rules and also under rule 3-600 (proposed rule 1.13).
4. In paragraph (c), the word “persons” is substituted for “parties” to clarify that the prohibition can apply, for example, when an anticipated claim has not been filed or served, or when negotiation of a business transaction has not yet commenced. (See Section IX.A.3, above.)

#### **E. Alternatives Considered:**

1. See Section IX.B.1, above.

#### **X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION**

##### **Recommendation:**

The Commission recommends adoption of proposed Rule 3.10 [5-100] in the form attached to this Report and Recommendation.

**Proposed Resolution:**

RESOLVED: That the Board of Trustees adopts proposed Rule 3.10 [5-100] in the form attached to this Report and Recommendation.