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May 23, 2016 Marlaud Email to Drafting Team, cc Chair, Difuntorum, Mohr, McCurdy & Lee:

Please see attached OCTC memo with comments concerning ABA MR 3.2. Please consider these comments in preparation for the June meeting.

Attached:

RRC2 - [4-100][3-400][3-410][3-700][1.8.5A][6.1][1.10][1.18][2.3][3.9][4.1][4.4][5.7][8.3] - 05-19-16 OCTC Memo to RRC2.pdf

May 23, 2016 Marlaud Email to Drafting Team, cc Chair, Difuntorum, Mohr, McCurdy & Lee:

It's been brought to my attention that there is no comment on MR 3.2, so please disregard my original message.

May 25, 2016 Kehr Email to Difuntorum & Mohr:

The Commission's Charter includes the requirement that we "ensure that the proposed rules set forth a clear and enforceable articulation of disciplinary standards, as opposed to purely aspirational objectives [and the] Commission's work should facilitate compliance with and enforcement of the Rules by eliminating ambiguities and uncertainties." It is hard to see how this proposed Rule meets those standards. The proposal speaks of a lawyer's representation of a client having "no substantial purpose other than to delay or prolong the proceeding or to cause needless expense" but it provides no guidance on what purposes might prevent discipline for conduct that causes delay.

The Model Rule is not materially better. It states: "A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client." Neither version permits a predictable answer to the core question of whether a lawyer is subject to professional discipline for utilizing a client's superior financial condition by making motions or taking positions or extending depositions that are within otherwise applicable rule but might not be done by a lawyer representing a poorer client.

A lawyer who fails to represent a client competently or diligently already would be subject to Rules 1.1 and 1.3. Both of those Rule are directed to the quality of a lawyer's representation of a client and therefore protect client interests. Would Rule 3.2 add a duty to the legal system that would obligate a lawyer to meet the opponent half way and therefore would obligate a lawyer to modify conduct otherwise would be competent and diligent? Whether the answer to this is "yes" or "no", the Rule does not articulate an understandable standard for lawyer conduct and therefore needlessly would subject a lawyer to disciplinary and civil risks.