

## **DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 5-100 [3.10]**

**Lead Drafter:** Zipser  
**Co-Drafters:** Bleich, Kehr  
**Meeting Date:** May 6 – 7, 2016

### **I. CURRENT CALIFORNIA RULE 5-100**

#### **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. 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 3.10 (CLEAN)**

#### **Rule 3.10 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.

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- (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] 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.

[2] 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.

[3] 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. PROPOSED RULE 3.10 (REDLINE TO CURRENT CALIFORNIA RULE 5-100)

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

- (a) A ~~member~~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 a ~~federal, state, or local~~ 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.
- (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~~persons under civil

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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

[1] 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.

[2] ~~Rule 5-100 is not intended to~~ This Rule does not apply to ~~a member's threatening~~ (i) a 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 §§ 1377-78.

[3] 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. PUBLIC COMMENTS SUMMARY

### • Carol Engelhardt, 6/15/2015:

By way of example, expressed dissatisfaction with State Bar enforcement of prohibitions on threats and harassing conduct.

## VI. OCTC / STATE BAR COURT COMMENTS

### • JAYNE KIM, OCTC, DATE:

[Insert summary of comments.]

### • RUSSELL WEINER, OCTC, 6/15/2010:

#### **Rule 3.10. Threatening Criminal, Administrative, or Disciplinary Charges.**

1. OCTC supports this rule. Comment 1, however, could be shortened.

### • **State Bar Court:** No comments received from State Bar Court.

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

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

There is no corresponding ABA model rule. As discussed above, former California rule 7-104 was derived from DR 7-105 of the ABA Model Code of Professional Responsibility, which was limited to threats of criminal prosecution.<sup>1</sup> The 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 (11) jurisdictions have carried forward the DR 7-105 prohibition as part of their rules.<sup>2</sup> Additionally, eleven (11) 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>

### VIII. 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.
  - Pros: The rule is intended to prohibit lawyers from making threats to present charges to gain an advantage. Although there are criminal laws re 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

<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.

<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).

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

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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 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

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- 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 Comment [1] and Comment [2] clarify that the following conduct is not prohibited by the rule: (i) a threat to bring a civil action; (ii) actual presentation of charges (see San Diego County Bar Association Formal Op. [No. 2005-1](#)); (iii) general statements that “all available legal remedies;” and (iv) the offer of a civil compromise under Penal Code §§ 1377 – 1378.
- 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.

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

1. Add a new comment 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 California State Bar Formal Op. [No. 1989-106](#).)
- Pros: Adding a comment on this issue would promote lawyer compliance by calling



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attention to relevant case law and ethics opinions interpreting the rule.

- 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.

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

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

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served, or when negotiation of a business transaction has not yet commenced. (See Section VIII.A.3, above.)

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

1. The main alternative considered was whether to completely repeal the rule as many other jurisdictions no longer include this general prohibition. (See sections VII and VIII.A.1, above.)

## **IX. OPEN ISSUES/CONCEPTS FOR THE COMMISSION TO CONSIDER**

None.

## **X. COMMENTS FROM DRAFTING TEAM MEMBERS OR OTHER COMMISSION MEMBERS**

### **Zipser**

- [Date]: Email Comment
- [Date]: Email Comment

### **Bleich**

- [Date]: Email Comment
- [Date]: Email Comment

### **Kehr**

- [Date]: Email Comment
- [Date]: Email Comment

## **XI. RECOMMENDATION AND PROPOSED COMMISSION RESOLUTION**

### **Recommendation:**

That the Commission recommends that the Board of Trustees of the State Bar of California adopt proposed amended rule 3.10 [5-100] 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 3.10 [5-100] in the form attached to this Report and Recommendation.

## **XII. DISSENTING POSITION(S)**

None.



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<b>XIII. FINAL COMMISSION VOTE/ACTION</b>
Date of Vote:  Action:  Vote: X (yes) – X (no) – X (abstain)



**CURRENT CALIFORNIA RULE 5-100**  
**“Threatening Criminal, Administrative, or Disciplinary Charges”**

***I. Text of Current Rule:***

- (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. Background/Purpose:***

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 pg. 47.]

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

**Rule 5-100. 7-404. 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.

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

#### **A. 2016 Comment**

In a [REDACTED], 2016 memorandum to the Commission, OCTC provided the following comment regarding rule 5-210:

(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 Office of Professional Competence, OCTC provided that while it supported the First Commission's Proposed Rule 3.10, OCTC stated that comment 1 "could be shortened."<sup>1</sup>

#### **C. 2001 Comment.**

In a September 27, 2001, memorandum to the First Commission, OCTC provided no comments regarding Rule 5-100.

### **IV. *Potential Deficiencies in the Current Rule:***

A. The rule is unnecessary. The ABA abandoned ABA Model Code, DR 7-105 when it adopted the Model Rules in 1983. A majority of jurisdictions have followed suit. (See Section VI, below.) The conduct prohibited in the rule is already adequately addressed by laws prohibiting extortion, whose application is fact-specific. (See Section V.A, below.)

B. The term "threaten" should be defined or explained. In an October 4, 2007, memorandum, Office of Professional Competence Ethics Hotline Staff suggested that the first Commission define "threaten" for purposes of rule 5-100. The staff had observed that some Hotline inquirers were construing the rule as limited to overt threats.

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<sup>1</sup> Comment [1] to RRC1 proposed Rue 3.10 provided:

[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., *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, by itself does not violate this Rule.



C. The rule should clarify that it does not prohibit **actually** “presenting” criminal, administrative, or disciplinary charges, even if to do so would create an advantage in a civil dispute. Ethics Hotline Staff likewise suggested that the First Commission clarify that Rule 5-100 does not prohibit filing a disciplinary complaint nor does it bar threatening a civil action.

D. The Rule should clarify whether the rule prohibits release-dismissal agreements. Citing the proposition that “[p]rosecutors commonly drop criminal charges if a defendant drops a civil complaint,” Ethics Hotline Staff’s memorandum stated that the current version of rule 5-100 fails to “[r]ecognize the validity of release-dismissal agreements in criminal matters . . .”<sup>2</sup> To this end, Ethics Hotline Staff proposed changes to both the body of the rule and to the discussion section that would account for a purported conflict between case authority, see *Town of Newton v. Rumery* (1987) 480 U.S. 386 [107 S. Ct. 1187, 94 L. Ed. 2d 405] (*Rumery*); *Hoines v. Barney’s Club, Inc.* (1980) 28 Cal.3d 603 [620 P.2d 628] (*Hoines*), and California State Bar Formal Op. No. 1989-106.

## V. **California Context:**

### A. California law related to current rule 5-100.

#### (1) 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 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

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<sup>2</sup> At least one legal commentator has raised the issue whether such agreements comport with principles of legal ethics despite their apparent legality. “With courts almost wholly ceding the field to prosecutors, however, professional ethics have become the only effective constraint on - and the only external guide for - prosecutorial discretion in this area. This state of affairs places a high burden on professional ethics regulators to get the issue right. Specifically, it creates the need for clear ethical guidance as to the use of release-dismissal agreements above and beyond the bare legal requirements imposed by courts.” (Coan, *The Legal Ethics of Release-Dismisal Agreements: Theory and Practice* (2005) 1 Stan. J.C.R. & C.L. 371, 388-389.)

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* for a letter 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."].)

## (2) Release-dismissal agreements

Case law related to release-dismissal agreements conflicts with State Bar Formal Ethics Opn. 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; *Rumery*, *supra*; *Hoines*, *supra*.)

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 (California State Bar Formal Op. No. 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.)

## **VI. Approach In Other Jurisdictions (National Backdrop):**

There is no corresponding ABA model rule. As discussed above, former California former rule 7-104 was derived from DR 7-105 of the ABA Model Code of Professional Responsibility, which was limited to threats of criminal prosecution.<sup>3</sup> The 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 (11) jurisdictions have carried forward the DR 7-105 prohibition as part of their rules.<sup>4</sup> Additionally, eleven (11) 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>5</sup>

## **VII. Public Comment Received by the First Commission:**

A. The clean text of proposed new rule 3.10 drafted by the first Commission and adopted by the Board to replace rule 5-100 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 5-100, 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 proposed rule showing changes to rule 5-100 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

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<sup>3</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.

<sup>4</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>5</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).

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.

***VIII. Possible Issues Identified by Professional Competence Staff Following Review of the 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 Commission should recommend that a rule similar to current rule 5-100 should be carried forward in the proposed Rules?

(2) If the concept of current rule 5-100 is carried forward, should it be carried forward as a standalone rule or should it be part of another rule, e.g., proposed Rule 3.4 (Fairness to Opposing Party and Counsel) or Rule 8.4 (Misconduct) as is done in other jurisdictions. (See notes 4 and 5, above.)

(3) Whether the rule should include a definition of “threaten” in either the black letter text or a comment. Case law holds that a threat need not be expressly stated but can be inferred from the circumstances. (See *Crane v. State Bar* (1981) 30 Cal. 3d 117, 123 [177 Cal. Rptr. 670] [discussing prior rule 7-104].) To this end, many Ethics Hotline callers inquire as to whether they are allowed to raise or discuss the alleged unethical conduct at issue with an opponent or if they are bound under this rule to simply present the alleged violation to the State Bar. (See California State Bar Formal Op. No. 1991-124 [opining that a “statement that ‘all available legal remedies will be pursued’ unless satisfactory settlement is promptly forthcoming is not, in itself, ethically improper.”]; but see California State Bar Formal Op. No. 1983-73 [opining that under prior rule 7-104 “there is a definite risk that a mere communication to an opponent stating that administrative or disciplinary charges will be brought by the client can be interpreted as an implied threat.”].)

(4) Whether the rule should clarify that actually presenting charges to gain an advantage in the underlying matter does not violate rule 5-100. (See *Cohen*, *supra* at pp. 317-318; but see California State Bar Formal Op. No. 1983-73 [opining that under prior rule 7-104 “[a]n attorney may not threaten to present administrative or disciplinary charges against an opposing party to obtain an advantage in a civil action but may assist the client in presenting such charges if there exists a legitimate reason for doing so.”]; San Diego County Bar Association Formal Op. No. 2005-1 [“If no threat is made, the actual filing of administrative or disciplinary charges during a civil dispute is also not a violation of Rule 5-100, even if doing so is for the purpose of gaining an advantage in a civil dispute.”] citing Los Angeles County Bar Association Formal Op. No. 469.)

(5) Whether the rule should clarify whether release-dismissal agreements violate rule 5-100. (See Section V.A, above.)

#### **IX. Research Resources:**

1. [\*Crane v. State Bar\*](#) (1981) 30 Cal.3d 117 [177 Cal.Rptr.670]
2. [\*Flatley v. Mauro\*](#) (2006) 39 Cal.4th 299 [46 Cal.Rptr.3d 606]
3. [\*Cohen v. Brown\*](#) (2009) 173 Cal.App.4th 302 [93 Cal.Rptr.3d 24]
4. [\*Mendoza v. Hamzeh\*](#) (2013) 215 Cal.App.4th 799 [155 Cal.Rptr.3d 832]
5. [\*Malin v. Singer\*](#) (2013) 217 Cal.App.4th 1283 [159 Cal.Rptr.3d 292]
6. [California State Bar Formal Op. No. 1989-106](#)
7. [California State Bar Formal Op. No. 1991-124](#)
8. [California State Bar Formal Op. No. 1983-73](#)
9. Coan, *The Legal Ethics of Release-Dismissal Agreements: Theory and Practice* (2005) 1 Stan. J.C.R. & C.L. 371

