

**RRC2 – Rule 5-100 [No MR Counterpart]
E-mails, etc. – Revised (May 3, 2016)
Drafting Team: Zipser (Lead), Bleich, Kehr**

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April 29, 2016 McCurdy Email to Drafting Team, cc Difuntorum, Mohr, A. Tuft, Marlaud & Lee:

OCTC's additional comments on Rule 5-100 are attached and also pasted below for ease of reference. Please consider these comments in preparation for the May meeting.

Attached:

RRC2 - [5-110 & 5-220][1-400][3-210][3-500][3-310][3-300][3-400][3-410][3-700][4-100][5-210] - 03-25-16 OCTC Memo to RRC2.pdf

April 28, 2016 OCTC Memo to RRC2:

C. Rule 5-100 [Threatening Criminal, Administrative, or Disciplinary Charges]

OCTC recommends that rule 5-100 be retained as currently written. The rule protects the public, the courts, and the legal profession by prohibiting attorneys from threatening and intimidating others. Moreover, the purpose and language of the rule have been discussed and defined in disciplinary decisional law.^{1/}

^{1/} See Crane v. State Bar (1981) 30 Cal.3d 117; Arden v. State Bar (1959) 52 Cal.2d 310; In the Matter of Elkins (Review Dept. 2009) 5 Cal. State Bar Ct. Rptr. 160; and In the Matter of Malek-Yonan (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 627.

April 29, 2016 Kehr Email to Drafting Team, cc Difuntorum, Mohr, McCurdy & Marlaud:

I've looked back at the proposed draft that is part of the materials for our next meeting and don't see that we propose any substantive change to current rule 5-100. Nothing need be said as a result of the OCTC letter.

April 29, 2016 Zipser Email to Drafting Team, cc Difuntorum, Mohr, McCurdy & Marlaud:

I think that's correct. We did discuss whether we needed to retain the rule at all, and rejected that option.

April 29, 2016 Tuft Email to Drafting Team, cc Difuntorum, Mohr & A. Tuft:

This rule has become redundant as a result of the adoption of Rule 8.4 and is overly broad as a disciplinary rule. The line between lawyer speech that constitutes a "threat" for purposes discipline as opposed to permissible speech should depend on whether the conduct is extortionate under the law. See ABA Formal Opinion 94-383. Rule 8.4(b) and (c) provide adequate public protection for "threatening" criminal, administrative or disciplinary charges for the purpose of gaining an advantage in a civil dispute. As the draft shows, the rule is shot full of exceptions. The rule also suffers from a lack of a definition of what constitutes a "threat."

The current rule has been improperly used to curtail legitimate communications, such as asking opposing counsel to cease engaging in conduct that violates the rules, sending legitimate demand letters that include an explanation for the relief requested and communications regarding a decision the client has made. More often than not, whether the rule is violated depends on the particular wording of the communication rather than the author's intent.

April 29, 2016 Bleich Email to Tuft, cc Drafting Team, Drafting team majority:

You won't have to work too hard to convince me to dump the rule. I've recommended keeping it only because it remains the rule in virtually all states, it is part of the ABA model rules, and to omit it now might suggest that extortionate threats are okay. Given the Court's directive to be restrained in our changes, I did not feel it was worth trying to eliminate the rule. But I continue to have concerns that it is a trap for the unwary and that it prevents attorneys from informally correcting misconduct where possible. So feel free to make these arguments next week.

May 3, 2016 Cardona Email to Drafting Team, cc Difuntorum & Mohr:

Sorry for the late comment, but I have some concerns about the decision not to add a new comment addressing the negotiation of release-dismissal agreements or other forms of joint civil-criminal settlements.

This is an issue that comes up frequently in my practice. As examples, it is not uncommon for: (1) a doctor and the hospital for which she works to be the subject of a criminal investigation for submitting inflated or false billings to Medicare, while also facing an administrative action seeking exclusion from Medicare and potential civil liability (including possible treble damages under the FCA) based on the same conduct; or (2) a defense contractor and certain of its employees to be the subject of a criminal investigation for lying about tests done on aircraft parts, while also facing an administrative action seeking debarment and potential civil liability (including possible treble damages under the FCA) based on the same conduct. In these situations, it may be advantageous to both the government and the individuals/entities under investigation for the government to be able to approach the individuals/entities under investigation to raise the possibility of trying to craft a global settlement. In certain instances, it may be only the government who can initiate such global discussions because one or more of the potential actions may not be public. For example, criminal grand jury investigations are conducted under the secrecy requirements of Fed. R. Crim. P. 6(e), and a qui tam civil action seeking treble damages under the FCA may remain under seal pending a government intervention decision. Initiating such global settlement discussions does not appear to me as something that should be or is intended to be precluded by Rule 3.10.

In many instances, however, such global settlements may end up involving an agreement by the government not to pursue some criminal charges (for example, a doctor may be required to plead to only one fraud charge, instead of many) or in some instances a disposition that foregoes criminal prosecution (for example, a publicly-traded defense contractor might convince the government to forego criminal charges against it entirely based on factors such as its compliance efforts, willingness to pay restitution and take other remedial steps, and collateral effects of criminal charges on its employees and shareholders, see USAM 9-28.000 – Principles of Federal Prosecution of Business Organizations).

In this sense, an argument could be made that such settlements are variants on a release-dismissal agreement, in that the government is dismissing some or all criminal charges in conjunction with a resolution (that in many instances may involve mutual releases of claims) of administrative and civil matters. This raises the issue of CA Eth. Op. 1989-106, which opines that the current California rule imposes a per se bar on release-dismissal agreements. While decided in a different context, the ethics opinion uses broad language: "We believe, however, that any threat to use the criminal justice system to gain leverage in a civil dispute subverts the integrity of the judicial process and should be prohibited. 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.” In taking this broad position, the ethics opinion appears at odds with both United States and Supreme Court cases that rejected a per se ban on release-dismissal agreements, instead holding that their validity depended on the particular facts. See *Town of Newton v. Rumery*, 430 U.S. 386, 393-94, 399 (1987) (plurality); *Hoines v. Barney’s Club, Inc.*, 28 Cal. 3d 603, 611-14 (1980). (I note that it is also at odds with the ABA Model Rules, which omit the prior analogue to the California rule, DR 7-105, and with ABA Ethics Opinion 92-363, which similarly recognizes that, dependent on the particular facts, release-dismissal and other global criminal/civil settlements are permitted.)

Because the California ethics opinion postdates these cases and distinguishes them as not explicitly addressing the current California ethics rule, I fear that adopting the proposed rule (whose language in substantial part mirrors the current California rule) will, in the absence of a comment making clear that this is not the intent, be viewed as endorsing the California ethics opinion’s per se bar on release-dismissal agreements, and its broad language that might be read as calling into question global settlements in other contexts (as discussed above) that couple dismissals of criminal charges with mutual releases of civil claims. From the report and recommendation, I do not believe this is the intent of the drafting team.

I urge the inclusion of a comment making this clear, and would suggest something along the lines of the following:

“This Rule does not impose a per se ban on an offer of an otherwise lawful global settlement or release-dismissal agreement by a government lawyer in connection with related criminal and civil matters. See *Town of Newton v. Rumery*, 430 U.S. 386, 393-94, 399 (1987) (plurality); *Hoines v. Barney’s Club, Inc.*, 28 Cal. 3d 603, 611-14 (1980).”