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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 4.1. 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 19, 2016 OCTC Memo [Dresser] to RRC2:**

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**K. ABA Model Rule 4.1 [Truthfulness in Statements to Others]**

Acts of dishonesty, whether intentional or the result of gross negligence, are addressed by Business and Professions Code section 6106 and the decisional law interpreting that section.

**May 25, 2016 Kehr Email to Difuntorum & Mohr:**

I have the following thoughts and suggestions about this proposed Rule ---

1) Paragraph (a), in requiring that the lawyer's misstatement of fact or law was made "knowingly", is intended in the MR and proposed versions to avoid negligence as a disciplinary standard. Unfortunately, the Rule has been applied where the lawyer did not have actual knowledge but would have had that knowledge if the lawyer had been more diligent. See Idaho State Bar v. Eliassen, 128 Idaho 393 (1996). This involved a collection lawyer who, due to ignorance, incorrectly stated that the judgment debtor's driver's license could be suspended if the debtor failed to pay the judgment. The debtor responded with a letter saying that he had been told by Legal Aid that it had called the DMV and learned that the license could not be suspended. A diligent lawyer would have done more research, or perhaps have called Legal Aid for the citation, but this one didn't and instead repeated the incorrect claim in a second demand letter. The Court found that the lawyer had "knowledge": "The lawyer should have done more research before he wrote the second letter to the [judgment debtor] reasserting his earlier misstatement of the law. The lawyer's knowledge can be inferred from this circumstance and thus fits the definition of knowingly. There is clear and convincing evidence to support the hearing committee's finding that the lawyer knowingly made a misstatement of law." Id. at 397. It is my view that this lawyer's conduct might be categorized as many things other than knowledge, which under the Idaho and MR definition is: "... actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." A lawyer does not have actual knowledge b/c an opponent asserts a particular fact or legal rule. If the Commission is inclined to adopt paragraph (a), it should add a Comment to try to prevent the incremental expansion of the Rule's scope. The correct standard is stated in In re Tocco, 194 Ariz. 453, 457 (1999) ("While actual knowledge can be proven by circumstantial evidence, a mere showing that the attorney reasonably should have known her conduct was in violation of the rules, without more, is insufficient. As stated above, the Commission adopted the hearing committee's finding that Tocco was, at worst, negligent. Thus, there could be no determination that she violated Ethical Rules 1.2, 3.3, and 4.1."

2) Does the "knowingly" standard in proposed paragraph (b) apply to whether the fact already was known to the other person, whether the fact is material, or whether the client's act is "criminal or fraudulent".

3) This proposal omits covert investigations from the Rule, and this was a topic that at the first Commission was the subject of considerable public comment and Commission discussion. Instead, proposed Comment [4] refers to Rule 8.4, Comment [5], which would attempt to have the effect of a Comment modifying a Rule. That cannot be done. Here is the first Commission's version, slightly edited:

(b) This Rule does not apply where a lawyer advises about, or supervises, lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct otherwise complies with these Rules. "Covert activity," as used in this Rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. Covert activity can be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place, or will take place in the foreseeable future.

**May 26, 2016 Cardona Email to Drafting Team, cc Difuntorum & Mohr:**

I do not believe we need to do anything to address the OCTC comment. I think it is already covered by the pros and cons identified in connection with our report and recommendation.

**May 26, 2016 Langford Email to Drafting Team, cc Difuntorum & Mohr:**

Agreed.

**May 26, 2016 Rothschild Email to Difuntorum, Mohr, A. Tuft, McCurdy:**

I have no problem with the content of 4.1, but I find Comment [1] a bit confusing. I think the sentence that was added, "However, in drafting an agreement on behalf of a client, a lawyer does not necessarily affirm or vouch for the truthfulness of representations made by the client in the agreement." Is in the wrong place. It detracts from the continuity of the comment. I think it should either be at the end of the comment or, heaven forbid, a separate comment.