

October 18, 2016 Mohr Email re 1.1 & 1.3 to Drafting Teams, cc Difuntorum, A. Tuft, McCurdy & Lee:

I gave a presentation on some of the proposed Rules to my Inn of Court last Thursday. Two of the rules were 1.1 and 1.3 and I made special mention of the addition of the term "gross negligence". I've pasted an email comment I received from an Inn member, Michael Sall, about our language in 1.1 and 1.3. I think the point is well-taken and ask the drafting teams consider his suggestion. Thanks,

Thank you for the presentation on Thursday night, it was interesting and discussed some proposed rules I hadn't previously focused on. * * *

I think it is a plausible reading of proposed rules 1.1 and 1.3 that "with gross negligence" modifies "recklessly" rather than creates a new possible ground for discipline. This is not necessarily the **best** reading of the rule, but there is some ambiguity. This ambiguity results, in part, because of the use of the serial comma. Because of the comma after "with gross negligence," it could be a dependent clause within the list, rather than one of the listed items.

This interpretation is bolstered because the "with gross negligence" language fails to use the parallel structure of the other items in the list—all of which are adverbs ending in -ly: intentionally, recklessly, and repeatedly. This is both jarring to the ear and grammatically incorrect **if** "with gross negligence" is intended to be an item in the list rather than a dependent clause modifying recklessly.

Resolving this ambiguity would seem to have a special importance given, as you explained, the inclusion of "with gross negligence" is intended to give notice to attorneys of the actual standards being currently used by bar prosecutors.

Off the top of my head, I think the best option is to move "with gross negligence" to the end of the list, so that it reads: "intentionally, recklessly, repeatedly, or with gross negligence fail to perform . . ." While this phrasing is still grammatically problematic in that it fails to maintain parallel structure, there is no possibility of interpreting it as a dependent clause because "with gross negligence" directly follows "or." For whatever it is worth, I think this is what most style guides recommend for resolving these times of ambiguities in lists.

Alternatively, "with gross negligence" could be changed to "grossly negligently." This would maintain parallel structure and, although it is a clumsy phrasing, it doesn't give rise to the same ambiguity I've been discussing. But, insofar as "with gross negligence" is a term of art, it shouldn't be changed.

If this rule comes up for a second round of public comment, I'll be sure to formally submit this.

October 18, 2016 Langford Email re 1.1 & 1.3 to Drafting Teams, cc Difuntorum, Mohr, A. Tuft, McCurdy & Lee:

I agree with this comment.

October 18, 2016 Cardona Email re 1.1 & 1.3 & 3.3/3.5 to Mohr:

I am fine with the movement to the end of the list (although I disagree about it being non-parallel given that “with gross negligence” is an adverbial phrase parallel to the others).

October 18, 2016 Kehr Email re 1.1 & 1.3 to Drafting Teams, cc Difuntorum, Mohr, A. Tuft, McCurdy & Lee:

I don't see any possibility of the misreading suggested by the message Kevin received b/c there are four items in the series and each is set off by a comma. I am agnostic as to whether we keep the public comment version, change it as suggested, or change it to: “... intentionally, recklessly or with gross negligence, or repeatedly” The third alternative is b/c recklessness and gross negligence can be seen as alternative ways of describing conduct so far from the norm as to imply intent.

October 18, 2016 Clopton Email re 1.1 & 1.3 to Drafting Teams, cc Difuntorum, Mohr, A. Tuft, McCurdy & Lee:

Thanks Kevin and Bob, I concur with Kevin's recommendation.

October 18, 2016 Kornberg Email re 1.1 & 1.3 to Drafting Teams, cc Difuntorum, Mohr, A. Tuft, McCurdy & Lee:

I agree with Bob on this issue. Language is clear. If there is a concern the language "or with gross negligence can be put on the end of the sentence.

October 18, 2016 Rothschild Email re 1.1 & 1.3 to Drafting Teams, cc Difuntorum, Mohr, A. Tuft, McCurdy & Lee:

The question is whether gross negligence is a variant of reckless or if it is a separate category. My recollection is that we did not intend to add to the categories for which discipline could be administered, but rather to clarify that gross negligence is included in the current interpretation of recklessness by OCTC. If that is correct, then I think Bob's third option is the best, making clear that we are not expanding the bases for discipline but rather clarifying them.

October 18, 2016 Croker Email re 1.1 & 1.3 to Drafting Teams, cc Difuntorum, Mohr, A. Tuft, McCurdy & Lee:

I agree with this [i.e., Rothschild's email]

October 18, 2016 Kehr Email re 1.1 & 1.3 to Drafting Teams, cc Difuntorum, Mohr, A. Tuft, McCurdy & Lee:

Toby has captured what I had in mind. We'll need to touch on this at the meeting.