

January 11, 2017 Kehr Email re 5.1 to Drafting Team, cc Chair, Difuntorum, Mohr, McCurdy Marlaud & Lee:

Here is a revised public comment synopsis chart. The OCTC comments also relate in part to Rules 5.2 and 5.3, but I don't have the time to deal with them. In any event, I think we need to complete the 5.1 chart before moving on to the others.

OCTC has a universal objection to the use of "knowingly", so it might be good to coordinate the response here with the same topic in other synopsis charts. Please be sure to notice my bracketed response to OCTC's final comment.

Attached:

RRC2 - [5.1][3-110] - Public Comment Synopsis Table Y (01-11-17)RLK.doc

January 11, 2017 Mohr Email re 5.1 to Drafting Team, cc Chair, Difuntorum, Mohr, McCurdy Marlaud & Lee:

Professor Bundy had a fairly lengthy policy argument against comment [6] and I'm not sure your response does it justice. I've revised the attached Synopsis Table to more accurately reflect his argument. I think in the rush to get these materials out to the drafting team his comment was given short shrift in the table. I've also attached his comment for your convenience.

Also, I've added responses to OCTC 2 and 3.

Finally, I don't have any notes on OCTC #6, though I'm not sure I'd characterize it as a conflict. Would the following revision to Comment [9] work:

[9] Paragraphs (a), (b), and (c) create independent bases for discipline. This Rule does not impose vicarious responsibility on a lawyer for the acts of another lawyer who is in or outside the law firm.* Apart from paragraph (c) of this Rule, ~~and~~ Rule 8.4(a) and Rule 8.4.1(b)(1), a lawyer does not have disciplinary liability for the conduct of a partner,* associate, or subordinate lawyer. The question of whether a lawyer can be liable civilly or criminally for another lawyer's conduct is beyond the scope of these Rules.

Attached:

RRC2 - [5.1][3-110] - Public Comment Synopsis Table Y (01-11-17)RLK-KEM.doc

RRC2 - [5.1][3-110] - PubCom - Bundy Stephen Y-2016-16-[5.1]-FS.pdf

January 11, 2017 Kehr Email re 5.1 to Mohr, cc Drafting Team, Difuntorum, Mohr, McCurdy & Lee:

Regarding the Bundy comment: I'm afraid that time limits led me to rely on the draft synopsis without reading the entire comment, and now that I see it I agree with him regarding the need to place this in the Rule. However, I am persuaded by his policy argument and turn to the other members of the drafting team for their thoughts on this. My recommendation is to remove Comment [6]. My thinking on this is that the ratifying supervisory is not in the same situation as the obedient subordinate. The latter might be constrained to defer but the former should be obligated to monitor, and a supervisor who ratifies "with knowledge of the relevant facts and of

the specific conduct” should be responsible for that ratification. What do others have to say about this?

Regarding Comment [9], I don’t think that change would be accurate. First, Rule 8.4.1, Comment [1], third sentence requires a lawyer to advocate firm action but does not make a lawyer responsible for Rule 8.4.1 violations by other firm lawyers. Second, I read that sentence as applying to 8.4.1(a) as well as 8.4.1(b). I think the correct edit would be simply to add a reference to Rule 8.4.1, Comment [1]. Let me add that the Commission narrowed Rules 5.1 and 5.3 to limit them to managing partners and direct supervisors, so an individual firm lawyer is subject to discipline for failing to advocate action to correct known discriminatory conduct but not known sexual crimes or predation, dishonesty with courts, misappropriation of client funds, understaffing likely to cause wide-spread malpractice, conflicts of interest, and so on.