Rule 3.10 Threatening Criminal, Administrative, or Disciplinary Charges
(Rule Approved by the Supreme Court, Effective November 1, 2018)

(a) A 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 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] Paragraph (a) does not prohibit a statement by a lawyer that the lawyer will present criminal, administrative, or disciplinary charges, unless the statement is made to obtain an advantage in a civil dispute. For example, if a lawyer believes* in good faith that the conduct of the opposing lawyer or party violates criminal or other laws, the lawyer may state that if the conduct continues the lawyer will report it to criminal or administrative authorities. On the other hand, a lawyer could not state or imply that a criminal or administrative action will be pursued unless the opposing party agrees to settle the civil dispute.

[2] 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.

[3] 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 sections 1377 and 1378.

[4] This rule does not prohibit a government lawyer from offering a global settlement or release-dismissal agreement in connection with related criminal, civil or administrative matters. The government lawyer must have probable cause for initiating or continuing criminal charges. (See rule 3.8(a).)

[5] 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.

NEW RULE OF PROFESSIONAL CONDUCT 3.10
(Former Rule 5-100)
Threatening Criminal, Administrative, or Disciplinary Charges

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct ("Commission") evaluated current rule 5-100 (Threatening Criminal, Administrative, or Disciplinary Charges)[1] in accordance with the Commission Charter. The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules. The result of the Commission's evaluation is proposed Rule 3.10 (Threatening Criminal, Administrative, or Disciplinary Charges).

Rule As Issued For 90-day Public Comment

Proposed Rule 3.10 carries forward current rule 5-100. Only one substantive change is recommended in the black letter text of proposed Rule 3.10. In paragraph (b), the Commission is recommending that the definition of "administrative charges" be expanded to encompass the filing of a complaint with a foreign governmental organization. Under current rule 5-100(B), "administrative charges" is limited to complaints filed with a "federal, state or local government entity." The Commission understands that the policy of the current rule is to prohibit lawyer misconduct that is tantamount to extortion and that this policy 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 public protection afforded by the rule and is inconsistent with modern changes in the practice of law that include globalization and international multi-jurisdictional practice of law.

In addition to this one substantive change to the black letter of the rule, other proposed amendments include the following.

- In Comment [1], adding an explanation that the rule does not prohibit a statement by a lawyer that the lawyer will present criminal, administrative, or disciplinary charges, unless the statement is made to obtain an advantage in a civil dispute. For additional clarification, this comment states that if a lawyer believes in good faith that the conduct of the opposing lawyer or party violates criminal or other laws, the lawyer may state that if the conduct continues the lawyer will report it to criminal or administrative authorities. However, that same lawyer could not state or imply that a criminal or administrative

[1] There is no corresponding rule in the American Bar Association ("ABA") Model Rules. The predecessor to current California rule 5-100 is former rule 7-104 and that rule was derived from DR 7-105 of the ABA Model Code of Professional Responsibility. DR 7-105 of the Model Code differs from current California rule 5-100 in that DR 7-105 was limited only to threats of criminal prosecution. The DR 7-105 prohibition was not carried forward by the ABA when it adopted the Model Rules to replace the Model Code. Eleven jurisdictions, however, have carried forward the DR 7-105 prohibition as part of their current rules despite the omission of a counterpart in the current Model Rules. Additionally, eleven 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. Accordingly while there is not a corresponding Model Rule, California is not alone in having a rule prohibiting this misconduct.

action will be pursued unless the opposing party agrees to settle the civil dispute. This is included by the Commission to address potential concerns that the concept of a prohibited threat is not sufficiently clear despite the fact that the rule is used for imposing discipline. (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].)

- In Comment [2], clarifying that a mere statement that a lawyer will pursue "all available legal remedies" does not alone violate the rule and that finding a violation ordinarily requires consideration of the specific facts of a particular situation.

- In Comment [4], clarifying that the rule does not prohibit a government lawyer from engaging in a typical "release-dismissal" agreement in connection with related criminal, civil, or administrative matters.

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

The Board adopted proposed rule 3.10 at its November 17, 2016 meeting.

Supreme Court Action (May 10, 2018)

The Supreme Court approved the rule as modified by the Court to be effective November 1, 2018. In Comment [3], citation style was revised to conform to the California Style Manual. In Comment [4], a pinpoint citation to rule 3.8(a) was added.

Rule ~~5-100~~3.10 Threatening Criminal, Administrative, or Disciplinary Charges (Redline Comparison to the California Rule Operative Until October 31, 2018)

(~~A~~a) A ~~member~~lawyer shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute.

(~~B~~b) As used in paragraph (~~A~~a) of this rule, the term "administrative charges" means the filing or lodging of a complaint with ~~a federal, state, or local~~any 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~~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 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

~~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.~~

[1] Paragraph (a) does not prohibit a statement by a lawyer that the lawyer will present criminal, administrative, or disciplinary charges, unless the statement is made to obtain an advantage in a civil dispute. For example, if a lawyer believes* in good faith that the conduct of the opposing lawyer or party violates criminal or other laws, the lawyer may state that if the conduct continues the lawyer will report it to criminal or administrative authorities. On the other hand, a lawyer could not state or imply that a criminal or administrative action will be pursued unless the opposing party agrees to settle the civil dispute.

[2] 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.

[3] 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 sections 1377 and 1378.

[4] This rule does not prohibit a government lawyer from offering a global settlement or release-dismissal agreement in connection with related criminal, civil or

administrative matters. The government lawyer must have probable cause for initiating or continuing criminal charges. (See rule 3.8(a).)

[5] As used in paragraph (b), "governmental organizations" includes any federal, state, local, and foreign governmental organizations. Paragraph (~~B) is intended to exempt~~b) 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.~~