

**Rule 8.1.1 Compliance with Conditions of Discipline
and Agreements in Lieu of Discipline
(Proposed Rule Adopted by the Board on November 17, 2016)**

A lawyer shall comply with the terms and conditions attached to any public or private reproof or to other discipline administered by the State Bar pursuant to Business and Professions Code §§ 6077 and 6078 and California Rules of Court, rule 9.19 or any agreement in lieu of discipline.

Comment

Other provisions also require a lawyer to comply with agreements in lieu of discipline and conditions of discipline. See e.g., Business and Professions Code § 6068, (k) and (l).

PROPOSED RULE OF PROFESSIONAL CONDUCT 8.1.1
(Current Rule 1-110)
Compliance with Conditions of Discipline and Agreements in Lieu of Discipline

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) evaluated current rule 1-110 (Disciplinary Authority of the State Bar) in accordance with the Commission Charter. There is no corresponding ABA Model Rule to current rule 1-110. However, there is a comparable rule 10(B) in the ABA Model Rules for Lawyer Disciplinary Enforcement. The result of the Commission’s evaluation is proposed rule 8.1.1 (Compliance with Conditions of Discipline and Agreements in Lieu of Discipline).

Rule As Issued For 90-day Public Comment

Current rule 1-110 states: “A member shall comply with conditions attached to public or private reprovals or other discipline administered by the State Bar pursuant to Business and Professions Code sections 6077 and 6078 and rule 9.19 California Rules of Court.” Rule 10(B) of the ABA Model Rules for Lawyer Disciplinary Enforcement provides that “[w]ritten conditions may be attached to an admonition or a reprimand. Failure to comply with such conditions shall be grounds for reconsideration of the matter and prosecution of formal charges against the respondent.”

The Commission is recommending two clarifying revisions to the current rule. First, the Commission is recommending the addition of a reference to “an agreement in lieu of discipline.” An agreement in lieu of discipline is a disposition of a disciplinary matter that might include “conditions” with which a lawyer should be required to comply. Second, the Commission is recommending substituting the phrase “the terms and conditions” for “conditions” as the former is a more inclusive reference than the later. The Commission believes that both changes further the function of the rule as a charging vehicle that helps assure that lawyers can be held accountable if terms or conditions of a disciplinary disposition are violated.

The single comment recommended in proposed rule 8.1.1, recognizes that there are other provisions which also require a lawyer to comply with conditions of discipline. See e.g., Business and Professions Code § 6068 subdivisions (k) and (l).

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.

COMMISSION REPORT AND RECOMMENDATION: RULE 8.1.1 [1-110]

Commission Drafting Team Information

Lead Drafter: Dan Eaton

Co-Drafters: James Ham, Mark Tuft

I. CURRENT CALIFORNIA RULE

Rule 1-110 Disciplinary Authority of the State Bar

A member shall comply with conditions attached to public or private reprovls or other discipline administered by the State Bar pursuant to Business and Professions Code sections 6077 and 6078 and rule 9.19, California Rules of Court.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: October 21 & 22, 2016

Action: Recommend Board Adoption of Proposed Rule 8.1.1 [1-110]

Vote: 15 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: November 17, 2016

Action: Board Adoption of Proposed Rule 8.1.1 [1-110]

Vote: 12 (yes) – 0 (no) – 0 (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 8.1.1 [1-110] Compliance with Conditions of Discipline and Agreements in Lieu of Discipline

A lawyer shall comply with the terms and conditions attached to any agreement in lieu of discipline, any public or private reprovsl, or to other discipline administered by the State Bar pursuant to Business and Professions Code §§ 6077 and 6078 and California Rules of Court, rule 9.19.

Comment

Other provisions also require a lawyer to comply with agreements in lieu of discipline and conditions of discipline. See e.g., Business and Professions Code § 6068, (k) and (l).

IV. COMMISSION'S PROPOSED RULE (REDLINE TO CURRENT CALIFORNIA RULE 1-110)

Rule 8.1 [1-110] ~~Disciplinary Authority of the State Bar~~ Compliance with Conditions of Discipline and Agreements in Lieu of Discipline

A ~~member~~lawyer shall comply with the terms and conditions attached to any agreement in lieu of discipline, any public or private ~~reprovals or~~reproval, or to other discipline administered by the State Bar pursuant to Business and Professions Code ~~sections~~§§ 6077 and 6078 and ~~rule 9.19,~~ California Rules of Court, rule 9.19.

Comment

Other provisions also require a lawyer to comply with agreements in lieu of discipline and conditions of discipline. See e.g., Business and Professions Code § 6068, (k) and (l).

V. RULE HISTORY

The predecessor to current rule 1-110 was approved as rule 9-101 in 1983 at the same time the Supreme Court approved the predecessor to current rule 9.19 of the Rules of Court. Together, these rules provide the State Bar with the “authority to attach conditions to reprovals that would allow the bar to tailor the discipline more closely to the lawyer’s misconduct and provide more protection to the public.”

VI. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016**
(In response to 90-day public comment circulation):

1. OCTC supports this rule and its Comment.

Commission Response: No response required.

- **State Bar Court:** No comment was received from State Bar Court.

VII. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, three public comments were received. Two comments agreed with the proposed Rule and one comment agreed only if modified. A public comment synopsis table, with the Commission’s responses to each public comment, is provided at the end of this report.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

See Section V on the history of the current rule. In addition, the following authorities were among the statutes, cases and ethics opinions considered by the Commission in studying the current rule.

- California Rules of Court, rule 9.19

B. ABA Model Rule Adoptions

The Commission has been informed that there is no corresponding ABA Model Rule of Professional Conduct, nor has any jurisdiction adopted a rule of professional conduct similar to rule 1-110. However, there is a comparable rule 10(B) in the ABA Model Rules of Disciplinary Enforcement¹ that provides: “Written conditions may be attached to an admonition or a reprimand. Failure to comply with such conditions shall be grounds for reconsideration of the matter and prosecution of formal charges against the respondent.” Current rule 1-110 is similar in concept to the ABA disciplinary enforcement rule but it is tailored to California’s lawyer disciplinary system. The existence of these similar concepts achieves a degree of uniformity and promotes a national standard. This is because the subject matter of this particular professional conduct rule is one which is tied to a jurisdiction’s specific system of discipline.

IX. CONCEPTS ACCEPTED/REJECTED; CHANGES IN DUTIES; NON-SUBSTANTIVE CHANGES; ALTERNATIVES CONSIDERED

A. Concepts Accepted (Pros and Cons):

1. Changing Title of the Current Rule

- Pros: Conforms the title to the substance of the rule.
- Cons: None identified.

2. Change “conditions” to “terms and conditions”

- Pros: Conforms to the proposed addition of agreements in lieu of discipline as those agreements have “terms” while reprovls typically have “conditions.”
- Cons: None identified.

¹ The following jurisdictions appear to have discipline enforcement rules based, in whole or in part, on the ABA Model Rules of Disciplinary Enforcement: Alabama, Alaska, Delaware, Florida, Idaho, Louisiana, Michigan, Mississippi, Montana, Nevada, North Dakota, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Vermont, and West Virginia. In addition, Maine recently proposed a similar rule.

3. Include in the rule an express reference to “any agreement in lieu of discipline.”
 - Pros: As noted in the comment submitted by OCTC, including an “agreement in lieu of discipline” removes ambiguity concerning a member’s duties under disciplinary orders and such agreements and emphasizes the importance of strict compliance with such orders and agreements.
 - Cons: Violations of agreements in lieu of discipline already constitute a violation of Business and Professions Code § 6068, subdivision (l). There is no need for a rule that also addresses violations of agreements in lieu of discipline...

B. Concepts Rejected (Pros and Cons):

1. Including in the rule an express reference to “disciplinary probation.” If the foregoing reference had been included, the rule would have provided: “A lawyer shall comply with the terms and conditions attached to public or private reprovls, *disciplinary probation*, and any agreement in lieu of discipline administered by the State Bar pursuant to Business and Professions Code §§ 6077 and 6078 and rule 9.19, California Rules of Court.” (Emphasis added).
 - Pros: Adding the term “disciplinary probation” is consistent with the duty of an attorney under Business and Professions Code § 6068(k) providing that an attorney must “comply with all conditions attached to any disciplinary probation, including a probation imposed with the concurrence of the attorney.” Including “disciplinary probation” in an amended rule 1-110 should improve public protection by increasing awareness of this duty and by promoting compliance through deterrence because any condition imposed as part of probation would likely include a warning to the lawyer that failure to comply with the condition would subject the lawyer to a rule 1-110 violation. (See *In the Matter of Respondent Y* (Rev. Dept. 1998) 3 Cal State Bar Ct. Rptr. 862 [1998 WL 240126] for an example of the rule 1-110 admonishment given to a respondent in a State Bar Court order imposing conditions attached to a reproof.) Notwithstanding the current rule’s reference to “other discipline,” the current rule arguably is deficient to the extent that the significance of conditions arising in the context of “probation” is not specifically identified.
 - Cons: Including “disciplinary probation” in an amended Rule 1-110 could result in unnecessary and inefficient double charging of the same misconduct (i.e., a count for violation of Rule 1-110 and a count for violation § 6068(k)) without having any effect on the outcome of the matter or the degree of discipline imposed. Unnecessary duplicative charging needlessly increases the cost of the discipline system with no corresponding measurable benefit. “Disciplinary probation” is neither a category nor type of discipline. Adding that term risks possible confusion in a rule that has been historically non-controversial. Public protection and increased awareness of the rules is not

enhanced by unnecessary repetition or by the inclusion of terms that do not correctly describe the discipline process and its terms and conditions. Probation is regularly required as a condition of formal discipline, such as a public reproof or actual suspension. Probation can also be a condition of an agreement in lieu of discipline. As recommended, the proposed rule would cover both reprovals and agreements in lieu of discipline. The addition of “disciplinary probation” is unnecessary, imports confusing terminology that is not used in State Bar court proceedings, and would not as a practical matter increase public protection.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission’s reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

C. Changes in Duties/Substantive Changes to the Current Rule:

1. Including in the rule an express reference to "any agreement in lieu of discipline" is a substantive change to current rule 1-110. However, it is not a change in the underlying duties of an attorney because this is found in Business and Professions Code § 6068, subdivision (l).

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D. Non-Substantive Changes to the Current Rule:

1. Substituting the term “lawyer” for “member”.
 - Pros: The current rules’ use of “member” departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice *pro hac vice* or as military counsel. (See, e.g., rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)

The Rules of Professional Conduct apply to all lawyers authorized to practice in California, including out-of-state lawyers admitted *pro hac vice*. The application of the rules is not limited to members of the California State Bar.
 - Cons: Retaining “member” would carry forward a term that has been in use in the California Rules for decades.
2. All three concepts accepted for inclusion in the rule (title change, changing “member” to “lawyer,” and substituting “terms and conditions” for “conditions”) are intended as non-substantive, clarifying changes.

E. Alternatives Considered:

None.

X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 8.1.1 [1-110] in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 8.1.1 [1-110] in the form attached to this Report and Recommendation