

AGENDA ITEM

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Proposal for California Attorney Guidelines of Civility and Professionalism – request authorization for a 30-day public comment period

Date: April 20, 2007

TO: Members, Board Committee on Member Oversight

FROM: Attorney Civility Task Force

SUBJECT: Proposal for California Attorney Guidelines of Civility and Professionalism – request authorization for a 30-day public comment period

ATTACHMENT: Attachment1: Proposed California Attorney Guidelines of Civility and Professionalism (long version)
Attachment 2: Proposed California Attorney Guidelines of Civility and Professionalism (short version)

EXECUTIVE SUMMARY

The Attorney Civility Task Force was created to study and recommend to the Board one or more model sets of aspirational civility guidelines.

After study, which included obtaining informal feedback from members of the profession, judiciary, and public, the task force is reporting back with its recommendation for a new set of statewide guidelines called the California Attorney Guidelines of Civility and Professionalism. This agenda item requests authorization to publish the proposed Guidelines for a 30-day public comment period.

Any questions or comments may be directed to Mary Yen at mary.yen@calbar.ca.gov or at (415) 538-2369.

ISSUE

The Attorney Civility Task Force was appointed early this Board year to study and report back with a recommendation for one or more model sets of aspirational civility guidelines¹

¹ Different titles have been used by other bar organizations that have engaged in this type of activity. In some cases, bar organizations have adopted aspirational goals as the organization's guidelines for its members. In other cases, organizations have adopted guidelines in the form of a civility pledge that attorneys may take. The title for these forms of professionalism or civility guidelines vary, and include: code of civility or professionalism; creed of professionalism or civility;

that can be used to encourage attorneys in various parts of the state to make a commitment to civility. This memorandum sets forth the task force's recommendation for one statewide set of voluntary guidelines of civility and professionalism for members of the Bar, and requests authorization for a 30-day public comment period.

BACKGROUND

In 1995, the State Bar's Commission on the Future of the Legal Profession and the State Bar of California ("Futures Commission") issued its report, "The Future of the California Bar". This report, which noted that innumerable studies, surveys, reports, and articles had been conducted and written on the subject of professionalism in the legal profession,² made recommendations intended to promote professionalism in California. Recommendation 58 stated that the legal profession should consider adoption of a statewide code of professionalism containing a broad list of aspirational goals and precatory duties. In explanation of this recommendation, the final report stated that an aspirational, statewide code of professionalism would define for members the desired goals and aims of the legal profession and the desired qualities of proper professional practice. The final report noted there is some concern that an aspirational code would create confusion regarding its binding effect or precedential value and result in "grey letter" rules of conduct. However, the Commission believed that a code of professionalism would send an important message to the membership with a long-range salutary effect.³

The Futures Commission viewed attorney civility as a central tenet of professionalism and that the absence of civility undermines the proper administration of justice that is essential to achieving considered, just results. The commission stated that civility is especially important, though difficult, given our adversarial system of justice that produces antagonistic positions and, even hostility by opposing parties.⁴

At the time of the Future Commission's final report, many state and local bar associations had adopted, or were in the process of adopting, civility guidelines. That type of activity continued after the report issued. As a result, currently at least ten of the larger voluntary bar associations in California have adopted civility guidelines.⁵

civility pledge; pledge of professionalism; principles of professionalism; ideals and goals of professionalism; standards of civility; standards of professionalism and civility; guidelines for professional courtesy; guidelines for conduct. The task force suggests "guidelines of civility and professionalism" for this proposal.

² The Futures Commission viewed professionalism as encompassing ethical practice, competence, civility, service to the public, and self-regulation. (Futures Comm'n final report, pp. 101-102.)

³ Futures Comm'n final report, p. 108.

⁴ Futures Commission final report, p. 106.

⁵ Bar associations that have adopted civility and professionalism standards include: Alameda County Bar Association; Beverly Hills Bar Association; Contra Costa County Bar Association; Los Angeles County Bar Association; Marin County Bar Association; Orange County Bar Association;

On August 3, 1997, the State Bar and the American Bar Association co-sponsored a "Conference on Professionalism for the 21st Century." Chief Justice Ronald George of the California Supreme Court gave the opening remarks in which he emphasized the importance of professionalism as a key component of public confidence in the justice system and encouraged further study of professionalism issues.⁶ Unfortunately, later that year the State Bar's dues bill was vetoed, which interrupted the Bar's work on this subject.

After 1997 and continuing to the present, national, state and local bar associations have persisted in creating or updating guidelines of civility and professionalism. For example, in 2006 the American Bar Association's Family Law Section adopted Civility Standards, and the State Bar's own Litigation Section adopted a Model Code of Civility and Professionalism; in 2005 the Pennsylvania Bar updated its Code of Civility; in 2004 the Hawaii State Bar and Supreme Court of Hawaii amended their Guidelines of Professional Courtesy and Civility for Hawaii Lawyers; and in 2003 the Alameda County Bar Association amended its Statement of Professionalism and Civility, and the Delaware State Bar and Delaware Supreme Court updated their jointly adopted Principles of Professionalism for Delaware Lawyers.

The Attorney Civility Task Force

State Bar President Sheldon Sloan's observation of a decline in civility in the legal profession prompted the appointment of the Attorney Civility Task Force. Since other bar associations have already adopted civility guidelines, the task force was charged with considering whether it is more appropriate to recommend a statewide set of aspirational civility goals or to recommend an alternative, such as to make available a collection of selected existing civility goals as samples for local bars that have not yet adopted civility guidelines for their members. The thought was that the task force would make a recommendation, and that thereafter Board members would assume responsibility for informing the membership and publicizing the civility guidelines in their respective legal communities. Attorneys who made a civility pledge would receive a copy of the civility guidelines.

Sacramento County Bar Association; San Diego County Bar Association; Santa Clara County Bar Association; Ventura County Bar Association.

⁶ A report from the "Conference on Professionalism for the 21st Century" includes the Chief Justice's opening remarks. Among the Chief Justice's comments were the following:

"The ability of the justice system to perform its role in our society rests in large part on the consent and confidence of those it serves. Whether the lack of faith that we see is grounded in actual flaws or in misguided perceptions, we must take seriously the public's views and work on many fronts to improve our relationship with those we serve. . . . ¶ Whether based on the cost of litigation, undue emphasis on the business end of practice, or unrestrained advocacy, many members of the public perceive lawyers as part of the problem, not part of the solution. And within the profession itself, many lawyers decry what they see as a decline in civility and collegiality, an increase in sharp practices, and the resulting low public opinion and loss of respect."

The task force⁷ has met four times. At the first meeting, the task force quickly reached consensus to recommend one set of civility guidelines that could apply to all members of the State Bar regardless of geographic location or area of law practice. The task force also reached consensus to recommend two versions of essentially the same set of guidelines. One version would contain the entire text of the guidelines with detailed examples. The task force thought that a second 2-page version without the examples would be useful too. Therefore, this recommendation offers two versions of the proposed Guidelines as a package. For drafting purposes, the task force began with an existing code of professionalism, synthesized provisions from other codes into it, and drafted text for a few remaining subjects.⁸

The task force wanted its recommendation for proposed guidelines to reflect a broad range of views, not just the views of its members. The time frame was adjusted to incorporate a period of informal feedback in February and March. With this adjustment and incorporation of the formal public comment period that is requested herein, the Board year became dedicated to producing civility and professionalism guidelines for the Bar's membership.

Draft guidelines that were made available during the informal feedback period generated a wide range of interest. More than 200 requests were received for the draft guidelines.⁹ Approximately 30 written comments were received from attorneys, judges, members of the public, and bar entities or their committees. Additionally, some individuals commented when they requested the draft, even though they did not provide specific feedback later. Of these individuals, most applauded the work of the task force, while a fewer number said that they do not believe in the concept of civility guidelines. The task force also held two public hearings where six attorneys spoke. Furthermore, the draft standards were vetted at continuing education seminars and programs, and at a couple of law school classes. Task

⁷ The following persons serve on the task force: Marguerite Downing (chair); Mary Alexander; Terry Bridges; Michael W. Case; Richard L. Crabtree; Dean Dennis; Hon. Richard L. Fruin, Jr.; Forentino R. Garza; Hon. Everett A. Hewlett, Jr.; Diane L. Karpman; Hon. Loren E. McMaster; Donald F. Miles (individually, not as a State Bar Court judge); Richard Rubin; Francis S. Ryu; Sherry M. Saffer; Cynthia Sands; Thomas G. Stolpman; Hon. Brian C. Walsh; Lei-Chala I. Wilson; and Alan S. Yochelson.

⁸ The task force is indebted to the Santa Clara Bar Association whose Code of Professionalism was relied upon as the starting point for the proposed Guidelines. The task force reviewed and drew from approximately 20 civility and professionalism codes, including the American Academy of Matrimonial Lawyers, the American Board of Trial Advocates, and others.

⁹ This count does not include the number of persons who obtained the drafts directly from the Bar's web site. A broad cross-section of the membership requested the draft, including members who work in offices of district attorneys, public defenders, county counsel, U.S. Attorneys, corporate counsel, and private law firms of varying sizes. Several law school professors, and judges within California and in other states (Hawaii, New York, the Eleventh Circuit) requested the drafts. Several California bar associations, the American Bar Association's Professional Responsibility Center, The State Bar's Committee on Professional Responsibility and Conduct, another state's ethics counsel, a law student and members of the public also reviewed the draft.

force members participated in some of these sessions. All in all, the task force succeeded in generating interest in the guidelines at an early stage, which was one of the intentions.¹⁰

In light of feedback received, the task force revisited virtually every Section of the draft. Substantive changes made as a result of feedback included a change in the title from “standards” to “guidelines” of civility and professionalism; Section 2 is revised to retain a goal of contributing time to persons and organizations that cannot afford legal assistance without expressly mentioning pro bono service; Section 9 (Discovery) received substantial attention; Section 18 (Negotiating Business Transactions) has been expanded; and Section 21 (Courtroom Proceedings) has been substantially rewritten.

Proposed guidelines of civility and professionalism

An Introduction sets the context and states the intention that the Guidelines foster a level of civility and professionalism as the standard of civility in the practice of law in California. The Introduction states that the Guidelines are not mandatory rules of professional conduct, nor rules of practice or standards of care, and that the Guidelines are not to be used as the independent basis for disciplinary charges or claims of professional negligence. A statement of this type is typically found in introductions to voluntary codes of professionalism. It is considered important for these Guidelines. Because these will be Guidelines of a unified state bar with mandatory membership, it is important to distinguish between the mandatory rules of professional conduct that must be approved by the California Supreme Court for disciplinary purposes, and voluntary civility guidelines adopted by the Board of Governors without additional approval by the Supreme Court for disciplinary purposes.¹¹

The Introduction is followed by 21 sections of guidelines for specific subjects or practice settings. Sections 1 through 3 address responsibilities to the justice system, the public and the profession, and the client, respectively. Section 4 deals with communications. Section 5 addresses punctuality, and Section 6 gives civility guidelines for scheduling, continuances and extensions of time. Section 7 concerns civility issues that arise when serving papers. Writings submitted to the court, counsel or other parties is the subject of Section 8. Section 9 deals with discovery. Some of the informal feedback observed that civility guidelines for this section overlap with existing requirements for the practice of law. The task force carefully reviewed each provision in Section 9 to ensure that an issue of civility supports the need for the guideline. Any practice of law type of provision that did not have a related civility issue was deleted. Section 10 gives civility guidelines for motion practice. Section 11 deals with nonparty witnesses. Civility in ex parte communication with the court is the subject of Section 12. Section 13 deals with civility in settlement and alternative dispute resolution. Conduct in court is the subject of Section 14’s civility guidelines. Section 15 gives civility guidelines for defaults. Social relationships with judicial officers, neutrals and court-appointed experts are the subject of Section 16, and privacy is the subject of Section 17.

¹⁰ A copy of the written comments and transcripts of the public hearings will be available at the board committee meeting.

¹¹ For this reason, the title was selected so as to avoid using words with a mandatory connotation, like “code” or “rule”. Even then, some commenters viewed the initial title, “Standards of Civility and Professionalism”, as potentially causing confusion with standards of care. To address this concern, the word “standards” has been replaced with “guidelines”.

Because civility issues frequently arise in civil litigation practice, this is the setting for many of the guidelines up to this point.

As noted, these Guidelines are intended to apply to all members, regardless of area of practice. Therefore, the task force proposes guidelines that extend beyond the civil litigation setting. Specific provisions are included for negotiating business transactions (Section 18), family law practitioners (Section 19), and criminal law practice (Section 20). Although other areas of law could have been included, the task force is mindful of keeping the Guidelines from becoming unwieldy. The last guideline is in Section 21, which encourages the judiciary to become familiar with the Guidelines and to support and promote them where appropriate in court proceedings.

The proposed creation of civility guidelines raises a question about enforcement through civil sanctions. The task force discussed this subject on its own. The subject was also raised in the informal feedback. Interest in the possibility of sanctions for uncivil conduct appears to trace back to the case of *U.S. v. Wunsch* (9th Cir.1996), 84 F.3d 1110. The court in *Wunsch* held that part of provision (f) of California's Business and Professions Code section 6068 was unconstitutionally vague. Section 6068 contains statutory duties of attorneys. At the time, provision (f) stated, in relevant part, that it is the duty of an attorney to abstain from an "offensive personality". The *Wunsch* court reasoned that it would be impossible to know when "offensive personality" behavior is offensive enough to invoke the statute, and that it is likely to have a chilling effect on some constitutionally protected speech, for fear of violating the statute. (*Wunsch, supra, at p. 1119.*) After the *Wunsch* decision issued, in California it became difficult to find a basis in discipline for individual conduct that had previously been deemed offensive under section 6068(f). A proposed rule of professional conduct with a provision to address uncivil conduct appears to be proceeding on a separate path.¹²

The task force does not recommend that the Guidelines be subject to sanctions. The Guidelines are not mandatory. It includes a voluntary pledge that attorneys can take. Members would likely be hesitant to take the pledge if they knew they would be subject to sanctions.

Finally, it may be noted that some local judiciary have endorsed local codes of professionalism in California.¹³ It is possible that, after the Board adopts civility guidelines, in

¹² The State Bar's Commission on the Revision of the Rules of Professional Conduct has drafted a proposed new rule of professional conduct, rule 8.4, with a provision that states: "It is professional misconduct for a lawyer to: ... (d) engage in conduct in connection with the practice of law that is prejudicial to the administration of justice."

These Guidelines propose civility standards for "conduct unbecoming a member of the bar and an officer of the court" (Sections 3,4, and 9). "Conduct unbecoming a member of the bar" has been upheld as a prohibition because the phrase refers to the legal profession's code of behavior and "lore, of which attorneys are charged with knowledge. (*United States v. Hearst* (9th Cir. 1980) 638 F.2d 1190, 1197, *cert. denied*, 451 U.S. 938 [101 S. Ct. 2018] (1981); cited with approval in *Wunsch, supra, at p. 1120.*)

¹³ For example, the superior courts of Marin County, Santa Clara County, Contra Costa County, and Los Angeles County have endorsed local codes of civility and professionalism.

some geographic areas the local judiciary may wish to endorse the Guidelines to serve as a guide to the judges of the court in their individual discretion when considering disputes among attorneys.

PUBLIC COMMENT RECOMMENDATION

The proposed Guidelines are recommended for a 30-day public comment period. The proposed Guidelines reflect revisions that were made as a result of informal feedback generated in February and March. Accordingly, a 90-day formal public comment period does not appear necessary. The 30-day comment period will allow the task force to review comments received and bring its final recommendation back to the board committee and entire Board at the July meeting.

FISCAL IMPACT

None known.

BOARD BOOK IMPACT

There is no impact on the Board Book.

RECOMMENDED RESOLUTIONS

Should the Board Committee on Member Oversight concur with the request of the Attorney Civility Task Force, it would be appropriate to adopt the following resolutions:

RESOLVED that the Board Committee on Member Oversight authorizes staff to make available for public comment for a period of 30 days, the proposed California Attorney Guidelines of Civility and Professionalism, in the form attached; and it is

FURTHER RESOLVED that this authorization for release for public comment is not and shall not be construed as a statement or recommendation of approval of the proposed item.