

AGENDA ITEM

JULY 136

Proposal for new “California Attorney Guidelines of Civility and Professionalism – Return from Public Comment

Date: July 20, 2007

TO: Members, Board Committee on Member Oversight
Members, Board of Governors

FROM: Attorney Civility Task Force

SUBJECT: Proposal for “California Attorney Guidelines of Civility and Professionalism” – Return From 30-Day Public Comment And Recommendation For Adoption

Executive Summary

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

At the May 2007 meeting, the task force reported to the Board Committee on Member Oversight (MOC) with a recommendation for a new voluntary set of guidelines called the “California Attorney Guidelines of Civility and Professionalism”. MOC authorized publication of the proposal for a 30-day public comment period.

This agenda item returns the proposal from public comment. In response to public comments, the task force further revised the Guidelines and now recommends their adoption, as set forth in Attachments 1 and 2.

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

This agenda item reflects the Attorney Civility Task Force’s recommendation for guidelines of civility and professionalism, following public comment. No additional public comment period is required because modifications were only made in response to comments and do not raise new topics. The recommended Guidelines are at Attachments 1 and 2.

BACKGROUND

In 1995, the Commission on the Future of the Legal Profession and the State Bar of California (“Futures Commission”) issued “The Future of the California Bar”. Among other things, this report made recommendations intended to promote professionalism¹.

¹ 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.)

Recommendation 58 stated that the California legal profession should consider adoption of an aspirational, statewide code of professionalism containing a broad list of aspirational goals and precatory duties, which would define the desired goals and aims of the legal profession and the desired qualities of proper professional practice. The 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. The Futures Commission viewed attorney civility as a central tenet of professionalism and that the absence of civility undermines the proper administration of justice. The commission believed that civility is especially important given our adversarial system of justice.²

In 1997, the State Bar and the American Bar Association (ABA) co-sponsored a “Conference on Professionalism for the 21st Century.” Chief Justice Ronald George of the California Supreme Court gave opening remarks. He emphasized that professionalism is a key component of public confidence in the justice system and encouraged further study of professionalism issues.³ Unfortunately, later in 1997 the State Bar’s dues bill was vetoed, which interrupted the Bar’s work on this subject.

Since the Futures Commission’s report was issued in 1995, various local, state and national bar organizations have adopted or updated civility guidelines. Currently, at least ten of the larger voluntary bar associations in California, and many of the mandatory integrated Bars of other states, have adopted civility guidelines⁴.

² Futures Commission final report, pp. 106, 108.

³ A report from the “Conference on Professionalism for the 21st Century” includes the Chief Justice’s opening remarks in which he said:

“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.”

⁴ California bar associations that have civility and professionalism guidelines 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; Sacramento County Bar Association; San Diego County Bar Association; Santa Clara County Bar Association; and Ventura County Bar Association.

Among the mandatory Bars that have adopted civility guidelines are: the Alabama State Bar; the State Bar of Arizona; The Florida Bar; the Hawaii State Bar; the Louisiana State Bar; the Mississippi State Bar; the Missouri Bar; the State Bar of Montana; the Nebraska State Bar; the Nevada State Bar; the State Bar of New Mexico; the Oregon State Bar; the Rhode Island Bar; the Virginia Bar; the Washington State Bar; and the West Virginia State Bar.

THE ATTORNEY CIVILITY TASK FORCE

The Attorney Civility Task Force⁵ was charged with considering whether it is more appropriate to recommend one set of voluntary, aspirational civility goals or to recommend an alternative, such as a sample selection of existing civility goals. Either version could be used by individual members or by local bars, especially those have not adopted civility guidelines. The thought was that the Board would adopt guidelines, then assume responsibility for publicizing them and encouraging attorneys to take a civility pledge.

The task force met six times. It quickly reached consensus to recommend one set of civility guidelines that could be applicable statewide on a voluntary basis. The task force believed it appropriate to recommend two variations of essentially the same set of guidelines. One version contains the entire text of guidelines with detailed examples. The task force believed that a 2-page version, without the examples, is useful too. Therefore, this recommendation is for two versions as a package. The task force synthesized provisions from other codes into it an existing code of professionalism and drafted text for remaining subjects.⁶

The task force wanted its proposal to reflect a broad range of views. The schedule was adjusted to incorporate a period of informal vetting and feedback in February and March. Approximately 30 individuals and bar entities submitted written feedback. Six attorneys also spoke at two public hearings. The draft standards were vetted at bar association MCLE programs and law school classes where task force members participated. In response to the feedback, the task force incorporated suggestions into virtually every Section of the draft.

PROPOSED “GUIDELINES OF CIVILITY AND PROFESSIONALISM”

In light of the informal feedback period, MOC authorized a 30-day comment period at its May 2007 meeting. The proposed Guidelines were published in the *California Bar Journal*, online, and were sent by e-blast to all voluntary bar associations in California and to 200 individuals and organizations that had requested the earlier draft in February and March.

Recent activity in adopting or updating civility guidelines include: in 2006 the ABA's Family Law Section and the State Bar's Litigation Section each adopted civility codes; in 2005 the Pennsylvania Bar updated its civility code; in 2004 the Hawaii State Bar and Supreme Court amended their professionalism and civility guidelines; and in 2003 the Alameda County Bar Association amended its Statement of Professionalism and Civility.

⁵ The task force consists of: 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.

⁶ The task force is indebted to the Santa Clara Bar Association whose Code of Professionalism was relied upon as the starting point. The task force drew from approximately 20 civility and professionalism codes, including the American Academy of Matrimonial Lawyers, the American Board of Trial Advocates, and others.

The 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. This kind of statement is typically found in introductions to codes of professionalism and is considered important for these Guidelines. Because these will be Guidelines of a mandatory integrated state bar, 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.⁷

The Introduction is followed by 21 sections, as listed below. These address civility issues in client relations and responsibilities to the profession, public and administration of justice, in addition to attorney-attorney relationships. An optional Attorney Pledge appears at the end.

- * Section 1 [Responsibilities to the Justice System]
- * Section 2 [Responsibilities to the Public and the Profession]
- * Section 3 [Responsibilities to the Client and Client Representation]
- * Section 4 [Communications]
- * Section 5 [Punctuality]
- * Section 6 [Scheduling, Continuances and Extensions of Time]
- * Section 7 [Service of Papers]
- * Section 8 [Writings submitted to the Court, Counsel or Other Parties]
- * Section 9 [Discovery]
- * Section 10 [Motion Practice]
- * Section 11 [Dealing with Nonparty Witnesses]
- * Section 12 [Ex Parte Communication with the Court]
- * Section 13 [Settlement and Alternative Dispute Resolution]
- * Section 14 [Conduct in Court]
- * Section 15 [Default]
- * Section 16 [Social Relationships with Judicial Officers, Neutrals and Court Appointed Experts]
- * Section 17 [Privacy]
- * Section 18 [Negotiation of Written Agreements].
- * Section 19 [Additional provision for Family Law Practitioners]
- * Section 20 [Additional provision for Criminal Law Practitioners].
- * Section 21 [Court Proceedings]

Many of the guidelines are for civil litigation practice. Since the Guidelines are intended for all California attorneys, other areas of law are included too. Still other areas of law could be covered, but the task force did not want the Guidelines to become unwieldy. To the extent that guidelines could apply to other areas of practice, the spirit of the Guidelines would permit extending the guidelines as appropriate.

⁷ For this reason, and in response to feedback, the word “guidelines” was selected in order to avoid using “code”, “standards” or “rules”, which have a mandatory connotation.

PUBLIC COMMENT RECEIVED

The proposal received 31 written comments, as indicated briefly below. A longer summary of the comments is at Attachment 5. Actual comments will be available at your meeting.

Christine J. Kim, Deputy County Counsel, County of Tehama. The Guidelines are long overdue, comprehensive and clear. Offers a suggestion for Section 19.

Thomas J. Lincoln, Attorney, The Guidelines look good.

David Casselman, Attorney. Nice work. Offers a couple of suggestions.

Jonathan Weiss, Attorney. Observed two attorneys in court who demonstrated the sort of professionalism proposed in the Guidelines.

Linda A. Iannelli, Attorney. The Guidelines are fine. Would like a guideline for civility at voluntary bar association events.

Jim Flanagan, Attorney. The Guidelines are common sense. They can be implemented through law schools, continuing education and publication in general newspapers.

J. Daniel Holsenback and Christopher Healey, Attorneys. The Guidelines are well written and reflect careful consideration of the issues. Offers a suggestion for Section 9 and suggests language to encourage law firms to include professional and civil conduct in their training for new lawyers.

Corrine Bielejeski, law clerk to Hon. Edward Jellen, U.S. Bankruptcy Court. The Guidelines cover a variety of subjects and cover them well. Offers editorial suggestions.

Jonathan G. Stein, Attorney. The Guidelines need an enforcement mechanism.

Clarke Stone, President, Santa Clara County Bar Association (SCCBA). SCCBA supports the Guidelines. They should be promoted as a model set of Guidelines for voluntary bar associations to use and implement in a way that is effective for the local legal community and bench. Promoting the Guidelines as a model will reduce confusion that the Guidelines are mandatory and eliminate any impression that they are disciplinary rules, or will be used for disciplinary purposes, or are being promoted for use by the bench as a basis for sanctions. SCCBA offers suggestions for the Introduction and specific Sections. SCCBA also offers an alternative viewpoint that the Guidelines are overly general and broad, that they duplicate Rules of Professional Conduct, and that they will result in a potential disciplinary standard without procedural due process in implementation.

Jason Bezis, Attorney. The short version is concise and will facilitate practitioners' internalization of the goals. The Guidelines will not reign in uncivil attorneys. The Bar should discipline attorneys for uncivil conduct as well as adopt Guidelines.

Philip Andreen, Attorney. Suggests three specific guidelines for adoption.

William Hansult, Attorney. The Guidelines need teeth, like sanctions. Asks that a specific situation be covered.

Leonard J. Umina, Nonattorney. The Guidelines should be enforceable with penalties for violation.

John Amberg, Chair of COPRAC. The Guidelines are still too long, too detailed and too general. Some topics are covered by the Rules of Professional Conduct, the State Bar Act, and civility codes of voluntary bar associations and courts. The Guidelines appear to create duties that are inconsistent and confusing, and may lead to unintended consequences. Substantial bodies of rules and statutes already occupy this field. To the extent the Guidelines duplicate existing rules, they will be confusing. The Guidelines set standards that may be inconsistent with fiduciary duties to clients and the law. The Attorney Pledge is unnecessary. Assuming Guidelines will be adopted, COPRAC offers specific comments for the Introduction and specified Sections.

Gerald McNally, Attorney. Opposes the Guidelines in any form but Aspirational. These rules could be interpreted as a limit on an attorney's duty of zealous representation.

Patrick Byrne, Attorney. The long version is too long and detailed. Most of the guidelines are common sense to those who learned them from senior partners over the years. Suggests a few adages to add.

Scott Kays, President, California Judges Association. Commends the task force. If CJA's board has comments, they will be forwarded. (Note - none received)

Karen Fletcher, J.D. Revise California's Rules of Discovery to mirror the Federal Rules of Civil Procedure. Discovery in federal court require attorneys to be more civil.

Ronald S. Mintz, Attorney. Sends an example of uncivil conduct.

Martin Grayson, Attorney. Sends an article he wrote on civility.

Evan Jenness, Attorney. Opposes both versions. Even as advisory rules, these will increase the complexity of analyzing issues of professionalism and ethics, and promote confusion. Other rules, ethics opinions, court rules and judicial decisions already delineate the standard of conduct for lawyers. Many of the proposed standards of conduct are redundant, vague and amenable to conflicting interpretations. The guidelines will be further fodder for attorney misconduct claims. The standards could be inconsistent with attorneys' duties under certain circumstances. He questions the propriety of encouraging judges to become familiar with the Guidelines and promote them.

Joseph Chairez, President, Orange County Bar Association. Local civility guidelines are more appropriate. Teaching civility should be left to law schools, local bar associations, and MCLE programs. With the State Bar's imprimatur, the Guidelines are likely to be cited in an adversary context, and may be subverted into standards of conduct from which a standard of care arises. The Guidelines duplicate existing rules or statutes and may be inconsistent with them. Many of the guideline areas are best left to local standards

and to an extant body of law. The guidelines are vague. If guidelines are necessary to reign in uncivil behavior, forward the Guidelines to the Rules Revision Commission for consideration. That will lead to conformity and less confusion. Comments on specific Sections are offered.

Louisa Lau, Chair, Los Angeles County Bar Association's Professional Responsibility and Ethics Committee (LACBA's PRE Committee). The committee unanimously recommends against adoption. They are concerned the Guidelines will be used in discipline and civil litigation to establish a standard of care. "Should" and "should not" suggests obligations, not mere recommendations. The Guidelines impose on all attorneys standards that may be irrelevant to them. Local bar associations can better formulate civility standards. Professional conduct standards should be left to an existing extensive body of law. Civility is best taught in law schools, voluntary bar organizations, or MCLE. Forward the guidelines to the Rules Revision Commission to consider whether any of the proposals should be incorporated into ethics rules. If the State Bar elects to proceed, offers several comments, including that the long version is too long, detailed and repetitive; the Guidelines should be revised to be consistent with standards of conduct; many guidelines are vague and amenable to conflicting interpretations. Also offers suggestions for specific guidelines.

Patricia Daehnke, Chair, LACBA's Litigation Section. The Executive Committee unanimously recommends against adoption. They agree with the comments of LACBA's PRE Committee. The guidelines do little to advance civility and would create confusion as lawyers bounce from one standard to another. The Attorney Pledge resembles a loyalty oath and should be eliminated.

Robin Yeager, Chair, LACBA's Individual Rights Section. The Guidelines are not necessary. The Introduction states the Guidelines are not to be used for discipline or professional negligence, however, they may be used as a standard when a statute is being prosecuted. The Guidelines clash with lawyer's First Amendment rights to speak.

Janet Levine, President, Los Angeles chapter of the Federal Bar Association. Opposes adoption. The chapter is not convinced the Guidelines would further the cause of justice. The chapter adopts the comments of LACBA's PRE Committee, and joins the Orange County Bar Association and LACBA's Litigation Section in opposing adoption.

Stephanie Patterson, Investigator, Dep't of Consumer Affairs, Los Angeles County. Disagrees with the proposal.

Tim Jensen, Attorney. The proposal is ridiculous. You will never effectively change the behavior of attorneys.

G. Kirk Ellis, Attorney. This is a bad joke and will add to the cost of legal representation.

Tim Kelleher, Attorney. This will not change human behavior. It will create another layer of regulation for the unwary.

TASK FORCE'S RESPONSE TO COMMENTS

The task force considered all written comments. Major responsive revisions are listed below. No additional public comment period is required because the modifications were only made in response to comments and do not raise new topics. Revisions are shown in legislative style at Attachments 3 and 4.

1. Introduction:
 - * replace “standards” with “best practices” of civility⁸
 - * replace “minimal” with “minimum” Rules of Professional Conduct
 - * replace the last sentence of the Introduction
 - * insert the Introduction into the 2-page version of the Guidelines to clarify their context
2. Section 4:
 - * delete unnecessary language in example (g)
 - * simplify the language in example (i)
3. Section 9⁹:
 - * add the words “parties, or witnesses” to the guideline.
 - * delete former example (5) as redundant
4. Section 12:
 - * clarify that the guideline applies in social settings as well as in court
5. Section 15:
 - * reformat the example
6. Section 18:
 - * consistent with the examples, apply the section to litigation as well as transactional practice and reorganize the examples accordingly
7. Section 19:
 - * consistent with the title, change the guideline text to apply to family law practice generally rather than to specific areas of family law practice
 - * reduce redundancy and delete former example (b)
8. Section 20:
 - * consistent with the guidelines being best practices and not duties, replace “special duties” with “unique responsibilities”
 - * delete former examples (a) and (b), which duplicate other guidelines

⁸ Some public comments equate the guidelines with duties, rules or standards. This modification further distinguishes the guidelines as best practices, not standards.

⁹ Section 9 has been criticized as being too detailed and as overlapping with existing requirements for the practice of law. Each example has been reviewed multiple times to assure that an issue of civility justifies it.

The task force offers these comments on three suggestions that were not accepted:

First, the task force retains the word “should” in order to conform to the State Bar’s use of “should” in other contexts, such as in the project to rewrite State Bar rules into a simpler, unified set of rules. The State Bar follows the Judicial Council’s use of “should”. The Introductory Statement to the California Rules of Court states that the Judicial Council’s rules and standards use “should” to indicate a nonbinding recommendation, that “should” indicates nonmandatory conduct.

Second, several reviewers thought that Section 16 diverges from existing law, which places a burden of disclosure on the judicial officer. The task is aware of existing law and recommends the guideline in order to provide opposing counsel with an early opportunity to bring a motion to disqualify. This is a matter of courtesy, avoids wasting court resources, and does not diverge from existing law.

Third, the task force recommends against enforcement through sanctions. The task force holds the view that sanctions would lead to a less collegial relationship among counsel and would tend to undermine civility efforts. In addition, if members thought they would be subject to sanctions for taking the pledge, they would likely be hesitant to take it.¹⁰

Finally, there is on-going interest in the educational value of the Guidelines as a model of best practices of civility in the practice of law in California. The task force continues to receive requests for speakers at bar association and law school educational programs, some of which will take place into the next Board year.¹¹

FISCAL IMPACT

None known.

BOARD BOOK IMPACT

There is no impact on the Board Book.

¹⁰ Interest in sanctions for uncivil conduct traces back to *U.S. v. Wunsch* (9th Cir.1996), 84 F.3d 1110, which held that a provision in Bus. and Prof. Code §6068 (f) was unconstitutionally vague. That provision used to state, in relevant part, that it is the duty of an attorney to abstain from an “offensive personality”. After *Wunsch*, it became difficult to find a basis in discipline for conduct that had been deemed offensive under section 6068(f). The State Bar’s Commission on the Revision of the Rules of Professional Conduct is proposing to address uncivil conduct through a new rule 8.4, which would state: “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.”

¹¹ Santa Barbara Women Lawyers, Orange County Bar Association, the Federal Bar Association, and Western State School of Law, have asked for speakers at MCLE programs to be given between August and November.

RECOMMENDED RESOLUTIONS

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

RESOLVED that, following consideration of public comment, the Board Committee on Member Oversight recommends that the Board of Governors adopt the proposed California Attorney Guidelines of Civility and Professionalism, in the form attached at Attachments 1 and 2.

Should the Board of Governors concur with the recommendation of the Board Committee on Member Oversight, it would be appropriate to adopt the following resolution:

RESOLVED that, following consideration of public comment and upon recommendation of the Board Committee on Member Oversight, the Board of Governors hereby adopts the California Attorney Guidelines of Civility and Professionalism, in the form attached at Attachments 1 and 2.

- Attachments:
- 1) California Attorney Guidelines of Civility and Professionalism (14-page version, clean)
 - 2) California Attorney Guidelines of Civility and Professionalism (2-page version, clean)
 - 3) California Attorney Guidelines of Civility and Professionalism (14-page version, with legislative style edits)
 - 4) California Attorney Guidelines of Civility and Professionalism (2-page version, with legislative style edits)
 - 5) Chart of public comment received