

RRC2 – Rule 1-100
E-mails, etc. – Revised (5/26/15)
Drafting Team: Martinez (Lead), Chou, Kornberg, Stout

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Intra-Commission Emails Following Agenda Mailing:

May 19, 2015 Kehr Email to Drafting Team, cc Difuntorum & Mohr:

I have the following comments on this draft rule ---

- 1) B/c I don't know how this Commission will operate, and b/c this is not identified as an open issue in Section IX, I request a vote on the removal of "professional" from paragraph (A). While it is correct that a lawyer's prohibited conduct might take place while not practicing law, such as by disclosing a client's confidential information at a cocktail party, the duty is imposed because of the lawyer's status as a lawyer and his conduct therefore is what is required by the profession. I think the first sentence of (A) would read more smoothly with "the professional conduct".
- 2) Paragraph (A) at line 4 uses "sections". The Style Guide for Rules of the State Bar at p. 28 recommends the use of the section symbol, as you did in paragraph (B).
- 3) Again b/c I don't know how the Commission will operate and b/c this is not identified as an open issue in Section IX, I request a vote on the removal to the reference to court opinions in paragraph (B)(2). However, b/c California now has unpublished opinions that are not citable and are dizzying in number, I think the phrase should be "published opinions".
- 4) The word "Comment" in paragraph (B)(3), line 2, should be "Comments".
- 5) Paragraph (C) is awkward ("comments contained in the Comment") and unnecessarily wordy. I suggest: "The comments contained in the Comments of the rules, while they do not add an independent are not a basis for imposing discipline, but are intended only to provide guidance for interpreting and practicing in compliance with the rules Rules and practicing in compliance with them.
- 6) As a minor drafting nit in Comment [3], I would remove "by members". Advisory ethics opinion might be helpful to anyone interested in the meaning of the Rules.
- 7) As a universal drafting issue, there should be a decision as to whether the term "rule" is to be capitalized when referring to one or all of the Rules of Professional Conduct. The MRs use the capitalized version, as did the first Commission and as I think is common in other jurisdictions.

May 22, 2015 Tuft Email to Drafting Team, cc Difuntorum, Mohr & A. Tuft:

I offer the following comments on the report and recommendation on Rule 1-100:

Paragraph (A), First Sentence:

1. Deleting "professional" as a modifier of "conduct" is a significant change that does not appear to be warranted by the explanation in Section VIII of the report. California's rules govern a lawyer's professional responsibilities regardless of whether the lawyer is acting in a professional capacity. This is evident from the comparison in Section VII of the proposed rule to approaches in other jurisdictions. Each of the rules cited in Section VII involve a lawyer's

professional obligations. Eliminating "professional" would create rather than eliminate unnecessary differences between California's rules and the rules of other jurisdictions and would not be consistent with the title or paragraph (D) that these are "rules of professional conduct."

2. Retaining the term "member" is too limiting and is no longer descriptive of the scope of the rules in the current legal environment. The State Bar Act employs the term "attorney," "lawyer" and "member" depending on the particular statute. (e.g. 6068 (Duties of Attorney). No jurisdiction currently uses the term "member." The current rules apply to lawyers authorized to practice in California and include a definition of "lawyer" that is broader than "member." The term "member" dates back to the original 1928 version of the rules before lawyer mobility and multijurisdictional practice.

More importantly, the Supreme Court's authority to regulate lawyers does not derive from Bus. & Prof. Code §§ 6076-6078. The Court has the inherent power to regulate the practice of law in California and has exercised its power to regulate out-of-state lawyers practicing in this state. Section 6076 simply authorizes the State Bar to formulate and enforce rules with the approval of the Supreme Court. Rules can also be formulated by the Court itself, or by the initiative process provided in Section 6076.5. Section 6077 provides that rules adopted by the Board and approved by the Supreme Court are binding on all members and the Board has the power to discipline members for a willful breach of the rules. Section 6078 empowers the State Bar to discipline and reinstate members of the bar. Nothing in these statutes limits the ultimate authority of the Supreme Court over the practice of law in California. See Bus. & Prof. C. § 6087; CRC 9.10(g) ("Nothing in these rules may be construed as affecting the power of the Supreme Court to exercise its inherent jurisdiction over the lawyer discipline and admissions system."). "In California, the power to regulate the practice of law, including the power to admit and to discipline attorneys, has long been recognized to be among the inherent powers of the (California Constitution) article VI courts." *Hustedt v. Worker's Comp. Appeals Bd.* (1981) 30 Cal.3d 329, 336; *Santa Clara County Attys. Ass'n v. Woodside* (1994) 7 Cal.4th 525, 542-543; *In re Attorney Discipline System* (1998) 19 Cal.4th 582, 592-593.

Paragraph A, Second Sentence:

In stating the purpose of the rules, it would be more succinct and accurate to combine what the rules "protect" and what the rules "promote." For example, the second sentence could read:

"They have been adopted . . . to protect the public and the integrity of the legal system and to promote the administration of justice and confidence in the legal profession."

Paragraph A, Third Sentence:

I recommend, for the reasons stated above, that "binding upon all members" be changed to "binding on all members of the State Bar and all other lawyers practicing law in this state."

Paragraph B(2):

Deleting "and opinions of California courts" is another significant change without a compelling reason. The rules and the State Bar Act are not the sole basis of lawyer regulation in California. California case law that applies and interprets the rules is part of the applicable law lawyers practicing in California are bound to follow. The Supreme Court has expounded upon and, in some cases, expanded the duties of lawyers in case decisions. *Flatt v. Superior Court* 9

Cal. 4th 275 (1994) and *Rico v. Mitsubishi*, 42 Cal. 4th 807 (2007) come to mind. The concern that lawyers are subject to discipline for failing to abide by every court decision in civil matters has been shown not to be the case in my experience. Deleting the phrase “and opinions of California courts” from a rule of such long standing could be viewed as a reduction in public protection.

Comment [1]:

I recommend adding the following sentence at the beginning of Comment [1] to make it clear that, when approved, these are rules of the Supreme Court:

“The Rules of Professional Conduct are Rules of the Supreme Court of California regulating lawyer conduct in this State. See *In re Attorney Discipline System* (1998) 19 Cal. 4th 582, 593-597 [79 Cal. Rptr. 2d. 836]; *Howard v. Babcock* (1993) 6 Cal.4th 409, 418 [25 Cal. Rptr. 2d 80].

May 22, 2015 Martinez Email to Tuft, cc Drafting Team, Difuntorum, Mohr & A. Tuft:

Mark, regarding your last point, what if we more closely track the language in *Howard v. Babcock* which is that the Supreme Court “has the authority to prescribe rules of professional conduct for attorneys as part of its inherent power to regulate the practice of law”? Saying that the Rules “are Rules of the Supreme” may give the Court more “ownership” than it desires.

As for using the word “lawyer,” the main concern of the drafting team was in getting bogged down in the discussion at the first substantive meeting without knowing what the rules will look like and how they fit in vis a vis Rules of Court that regulate non-member lawyers and other areas where the court regulates lawyers. We wanted to defer the terminology section or rule for similar reasons.

I agree with deleting “professional” as a modifier. If the other drafting team members agree, perhaps we can take that issue off the table. Question for Randy: Can we tinker with a draft rule before the meeting or does the issue have to be presented to the full Commission?

May 22, 2015 Tuft Email to Martinez, cc Drafting Team, Difuntorum, Mohr & A. Tuft:

My view is that, once adopted, the rules are the rules of the Supreme Court (and not the State Bar for example) and become law as are the rules of court. I can’t imagine the Court would disagree, but I admit I have been surprised more than once by this process.

I think we should take up the “member” vs. “lawyer” issue early since so many rules on this agenda have raised the issue. It is particularly significant, for example, in regard to proposed rule 1-300. I don’t think it will bog us down to take it up at this next meeting.

May 22, 2015 Martinez Email to Tuft, cc Drafting Team, Difuntorum, Mohr & A. Tuft:

If we take up rule 1-300 first, that might moot the member/lawyer discussion on rule 1-100.

May 22, 2015 Mohr Email to Tuft & Martinez, cc Drafting Team, Difuntorum & A. Tuft:

I defer to Randy on whether a drafting team can take an issue identified in its Report & Recommendation “off the table” before a meeting but I recommend that the deletion of

"professional" as a modifier of "conduct" be retained as an issue for the Commission. I understand Mark's distinction, which I believe is that professional conduct is expected of lawyers even when not acting in their capacity as a lawyer, so it would appear accurate to state that the rules are aimed at regulating "professional conduct." My concern is that Mark's distinction is too fine for the average lawyer. Both current and proposed rule 1-100 provide general guidance on how the rules are interpreted and applied. Lawyers should be made to understand in rule 1-100 that they are subject to the rules (read discipline) for conduct in which they engage in a non-lawyer capacity.

Notwithstanding the Commission's charge to use comments sparingly, I recommend (if the term "professional conduct" is retained) that a comment be inserted similar to the following from the Model Rules' Preamble, paragraph [4], which provides in part:

In addition, there are Rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. See Rule 8.4.

The foregoing language would have to be modified to tie it to the term "professional conduct," but I think a comment along the lines of the foregoing would help clarify that term. Such a comment would be in conformance with the charge that "Official commentary to the proposed rules should not conflict with the language of the rules, and should be used sparingly to elucidate, and not to expand upon, the rules themselves." I'm willing to take a shot at tailoring the language to the proposed rule.

May 22, 2015 Chou Email to Drafting Team, cc Tuft, Difuntorum, Mohr & A. Tuft:

I agree with Kevin that such a comment would be useful if the commission decides to retain the word "professional."

May 22, 2015 Stout Email to Drafting Team, cc Tuft, Difuntorum, Mohr & A. Tuft:

I concur that the comment would be useful if "professional" is retained.

May 22, 2015 Kornberg Email to Drafting Team, cc Tuft, Difuntorum, Mohr & A. Tuft:

Thank you Kevin for your offer. I would like to see your proposed language for the comment. I think Mark's comments are to be considered before our meeting.

May 22, 2015 Mohr Email to Drafting Team, cc Tuft, Difuntorum & A. Tuft:

I've attached for discussion purposes a redline of proposed draft 5, which includes "Comment [1A]." Comment [1A] has language similar to ABA Model Rule Preamble ¶. [4]. I've also reinserted "professional" as a modifier of "conduct" in the two places from which it was deleted in draft 4.1 (paragraph (A) and Comment [3].)

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Here is proposed Comment [1A], to be read in conjunction w/ paragraph (A):

[1A] Although the Rules are intended to regulate professional conduct, certain rules also apply to members who are not active in the practice of law or to active members even when they are acting in a nonprofessional capacity. For example, a member who reveals confidential client information to a third person in a social gathering is subject to discipline for violating the member's duty of confidentiality. See Rule 3-100; Business & Professions Code § 6068(e)(1).

The concept could be added to Comment [1] but if it were included, I think it better that it have its own comment.

Attached:

RRC2 - [1-100] - Rule - DFT5 (05-22-15) - Cf. to DFT4.1 (05-13-15).docx

May 23, 2015 Kornberg Email to Drafting Team, cc Difuntorum, Mohr & A. Tuft:

This sounds like a good compromise language, that clears up this issue.

May 25, 2015 Chou Email to Drafting Team, cc Difuntorum, Mohr & A. Tuft:

I agree. Thanks, Kevin.

May 26, 2015 Difuntorum Email to Martinez, cc Drafting Team, Mohr, Lee & A. Tuft:

[Response to 5/22/15 Martinez Email] Drafting team tinkering with a proposed rule after the team's report and recommendation has been posted as part of the agenda is okay. The March 2017 deadline almost makes it a necessity that drafting teams confer and work on a draft rule in the time between the agenda posting and the actual meeting. However, the consequence is that there will likely be a new "consensus" draft at the time of the meeting and this means altering the presentation and the motion made since you won't be able to move the draft that is in the written report. As long as Mimi receives an email with latest draft it can be projected at the meeting and this will facilitate the oral presentation.