

Table of Contents

May 19, 2015 Kehr Email to Drafting Team, cc Difuntorum & Mohr:.....	1
May 19, 2015 Eaton Email to Drafting Team, cc Difuntorum & Mohr:.....	1
May 19, 2015 Difuntorum Email to Drafting Team, cc Mohr, McCurdy & Lee:.....	1
May 19, 2015 Eaton Email to Difuntorum, cc Drafting Team, Mohr, McCurdy & Lee:	1
May 21, 2015 Martinez Email to Drafting Team (forwarded by Eaton to Difuntorum & Mohr):	1
May 21, 2015 Eaton Email to Martinez, cc Drafting Team, Difuntorum & Mohr:	1
May 21, 2015 Eaton Email to Ham, cc Drafting Team, Difuntorum & Mohr:	2
May 21, 2015 Ham Email to Martinez, cc Drafting Team, Difuntorum & Mohr:.....	2
May 21, 2015 Martinez Email to Ham, cc Drafting Team, Difuntorum & Mohr:.....	2
May 21, 2015 Ham Email to Martinez, cc Drafting Team, Difuntorum & Mohr:.....	2
May 21, 2015 Difuntorum Email to Martinez, cc Drafting Team & Mohr:	3
May 21, 2015 Martinez Email to Difuntorum, cc Drafting Team & Mohr:	4
May 21, 2015 Difuntorum Email to Martinez, cc Drafting Team & Mohr:	4
May 21, 2015 Martinez Email to Difuntorum, cc Drafting Team & Mohr:	4
May 21, 2015 Ham Email to Difuntorum, cc Drafting Team & Mohr:.....	4
May 21, 2015 Eaton Email to Drafting Team, cc Difuntorum & Mohr:.....	4
May 26, 2014 Difuntorum Email to Blumenthal, cc Mohr & McCurdy:.....	5

Intra-Commission Emails Following Agenda Mailing:

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

My only suggestions on your drafting of this proposed rule are:

- 1) The word "lieu" should be capitalized in the title.
- 2) The Style Guide for Rules of the State Bar at p. 28 recommends the use of the section symbol rather than the word "section".

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

Please let me know whether you accept Robert's stylistic changes.

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

Please see the attached for a redline/strikeout draft showing Robert's recommended stylistic changes to the Rule 1-110 team's proposed rule.

Attached:

RRC2 - [1-110] - Rule - DFT3 (05-19-15)RLK-RD - Cf. to DFT2 (05-07-15).pdf

May 19, 2015 Eaton Email to Difuntorum, cc Drafting Team, Mohr, McCurdy & Lee:

Please go ahead and make these changes part of our official submission

May 21, 2015 Martinez Email to Drafting Team (forwarded by Eaton to Difuntorum & Mohr):

I would suggest leaving the language "or other discipline" in the rule. First, any deviations from the present rule must be explained to the Court and I don't understand the rationale for deleting it. Why is a failure to comply with a condition of probation or a condition for staying an actual suspension not subject to discipline?

Second, if this proposed language change relates to the disagreement over the reference to "disciplinary probation," then I don't see the problem in leaving "or other discipline" in. If the concern is "double charging," then isn't that a problem inherent in the rule itself? That is, the rule itself seems designed to allow stacking of charges.

May 21, 2015 Eaton Email to Martinez, cc Drafting Team, Difuntorum & Mohr:

Thank you for your comment, Raul. We'll get back to you with a response.

May 21, 2015 Eaton Email to Ham, cc Drafting Team, Difuntorum & Mohr:

I think this was an issue on which you were focused. Would you like to respond to Raul on behalf of the working group?

May 21, 2015 Ham Email to Martinez, cc Drafting Team, Difuntorum & Mohr:

As I understand it, Rule 1-110 pertains only to those cases where discipline is not imposed by the Supreme Court. Randy can correct me if I am incorrect. Thus, it is a unique rule. The only discipline that is not imposed by the Supreme Court is the private and public reproof. So, this rule presents stand alone authority to discipline a lawyer for violating the terms and conditions of that discipline, together with any violation of an agreement *in lieu* of discipline.

There is no “other discipline” that is, or can be, imposed under this rule. When a public or private reproof or an agreement in lieu of discipline is issued, those dispositions, together with the terms and conditions contained therein, govern. The “other discipline” language refers to nothing that I can identify, although if someone can think of something, we can consider this point further.

I don't see the proposed language change as relating to the unnecessary and wasteful double charging of the same misconduct. That problem is occasioned, in the first instance, by unnecessary duplication of prohibitions in the Rules of Professional Conduct and statutes prohibiting the same conduct.

May 21, 2015 Martinez Email to Ham, cc Drafting Team, Difuntorum & Mohr:

The present Rule applies to discipline “administered” by the State Bar, which would include the supervision of conditions of discipline imposed by the Supreme Court. So I don't read it as limited to private and public reproofs.

As I understand it, this “other discipline” language was added in the 1987 Rules. However, this language was not in the 1975 Rules (then Rule 9-101). So we would be reverting back to the 1975 Rules and would have to explain to the Supreme Court the reason for the change.

May 21, 2015 Ham Email to Martinez, cc Drafting Team, Difuntorum & Mohr:

Thanks for those thoughts.

As mentioned, my view is that the words “other discipline” are meaningless and refer to nothing. The language made no sense when it was added, and makes no sense now. Others may have different thoughts.

If we need to add an explanation indicating that the words “other discipline” do not refer to anything not already covered by the rule, and are therefore surplus and confusing because they refer to something that does not exist, we could do that, I suppose.

There is no “other discipline.” There are public and private reproofs, and the terms and conditions contained therein, and there is an agreement in lieu of discipline, and the terms and conditions contained therein.

Also, the State Bar doesn't actually administer discipline. The Supreme Court imposes discipline. The Office of Probation, an arm of the State Bar Court, administers probation. The Office of Chief Trial Counsel prosecutes alleged violations. The only thing the State Bar may "administer" are the ALD's and reprovais.

May 21, 2015 Difuntorum Email to Martinez, cc Drafting Team & Mohr:

Here is the excerpt from the Rule 1-110 assignment document. It describes the somewhat technical nature of this rule that derives from the statutory distinction between the finality of discipline meted out by the State Bar and discipline recommended by the State Bar but imposed by an order of the Supreme Court. I am not aware of any published disciplinary case that has applied or interpreted the "other discipline" language in Rule 1-110. Also, while the team is recommending deletion of this language, it is also recommending adding agreements in lieu of discipline which is something requested by OCTC and is analogous to the Bar's authority to act on reprovais independent of a Supreme Court order. –Randy D.

B. The scope of the rule might be too narrow. By its terms, rule 1-110 applies to conditions attached to "reprovais" or "other discipline administered by the State Bar." The laws governing the State Bar Court's authority to impose discipline draw a distinction between conditions attached to reprovais and conditions attached to other discipline that requires an order of the Supreme Court. Business and Professions Code section 6077, in part, provides: "For a willful breach of these rules [of professional conduct], the Board has the power to discipline members of the State Bar by reprovail, public or private, or to recommend to the Supreme Court the suspension from practice. . ." (See also: California Rules of Court, rule 9.19; Rules of Procedure of the State Bar of California, rules 5.127 and 5.128.) The State Bar Court in *In the Matter of Posthuma* (Rev. Dept. 1998) 3 Cal. State Bar Ct. Rptr. 813, 818 explains this distinction in addressing a condition requiring a disciplined lawyer to successfully complete the California Professional Responsibility Examination (CPRE):

[R]ule 951(b) [currently Rule 9.10] applies only to CPRE conditions imposed by Supreme Court Order.

With respect to private or public reprovais, the State Bar Court's authority to extend CPRE conditions is derived from rule 956 [currently Rule 9.19] of the California Rules of Court, which authorizes the State Bar Court to attach conditions to reprovais. The State Bar Court's exercise of that authority was formerly governed by rule 618 of the former Transitional Rules of Procedure and is currently governed by rules 550 through 554 of the Rules of Procedure of the State Bar, title II, State Bar Court Proceedings. (Rules Proc. of State Bar, title II, State Bar Court Proceedings, rule 271.)

If an attorney fails to comply with a CPRE condition imposed on him by a Supreme Court suspension order, the attorney "will automatically be placed on actual suspension until he does pass the examination" (*Segretti v. State Bar* (1976) 15 Cal.3d 878, 891, fn. 8, 126 Cal.Rptr. 793, 544 P.2d 929.) However, when an attorney fails to comply with a CPRE condition imposed on him by the State Bar Court as a reprovail condition, he or she is not subject to automatic actual suspension, but his or her failure is grounds for additional discipline. (Cal. Rules of Court, rule 956(b) [currently Rule 9.19]; rule 1-110.)

Given this distinction, the drafting team might consider whether rule 1-110 should be amended to apply to conditions attached to any agreement made in lieu of discipline as

those conditions appear to be similar to the authority allocated to the State Bar to impose a reproof. The statutory duties of an attorney refer to compliance with conditions of disciplinary probation (Business and Professions Code section 6068(k)) and compliance with all agreements made in lieu of disciplinary prosecution (Business and Professions Code section 6068(l)) but the standard in rule 1-110 does not refer to these conditions.

May 21, 2015 Martinez Email to Difuntorum, cc Drafting Team & Mohr:

Notwithstanding that the State Bar may only recommend suspension, doesn't the State Bar become involved in "administering" cases --after discipline has been imposed on lawyers by the Supreme Court--who are then subject to conditions of discipline that arguably should be subject to this rule? Jim's email refers to the Office of Probation as an arm of the State Bar Court that administers probation. So are there any potential violations of conditions of discipline that might fall through the cracks if the language is deleted?

May 21, 2015 Difuntorum Email to Martinez, cc Drafting Team & Mohr:

I can see that plain meaning interpretation and I would say the Commission could decide to keep the language on that basis, albeit speculative as to what it encompasses, but in doing so the Commission might look to the OCTC liaison and the Supreme Court liaison for their input at the upcoming meeting, especially given the drafting team's proposed explicit addition of agreements in lieu of discipline.

However even if the current language is retained, as a practical matter, if a lawyer fails to comply with conditions attached to a Supreme Court disciplinary order and that lawyer is not presently on actual suspension because it has been stayed in expectation of the lawyer's full compliance with the probationary conditions set forth in the Court's order, then the Bar's likely action is not to charge a Rule 1-110 violation, it is to terminate the probation and have that lawyer placed into actual suspension – a very direct response and a far greater deterrent than bringing a Rule 1-110 charge.

May 21, 2015 Martinez Email to Difuntorum, cc Drafting Team & Mohr:

Agreed. I would defer to their views. Should we give them a heads up on this?

May 21, 2015 Ham Email to Difuntorum, cc Drafting Team & Mohr:

Great idea. I would like to know anyone at OCTC or elsewhere can explain what the language was intended to cover that is not already fully covered. The thought that we might include speculative phrases that no one can really explain or link to a real issue makes my head explode.

May 21, 2015 Eaton Email to Drafting Team, cc Difuntorum & Mohr:

Thanks for your input, all. Let's proceed accordingly.

May 26, 2014 Difuntorum Email to Blumenthal, cc Mohr & McCurdy:

The Rule Revision Commission’s Rule 1-110 drafting team has a question regarding the text highlighted below.

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.

The drafting team is wondering if OCTC knows what this phrase refers to in terms of “other discipline.” The drafting team believes that Rule 1-110 is typically applied only to conditions attached to reprovls. Are you aware of any published decision applying the Rule 1-110 “other discipline” language to, for example, a respondent’s violation of conditions attached to a Supreme Court suspension order? I didn’t find a case stating that the Rule 1-110 “other discipline” language applies to a suspension order. The cases I found all involve reprovls. The drafting team is recommending deletion of the “other discipline” language because they are unsure of its meaning and actual use, if any. However, the drafting team is recommending adding “agreements in lieu of discipline” per the April 20th OCTC memo. Here’s a link to the drafting team’s [full report and recommendation](#). Thanks for any insights you can offer on the “other discipline” language.