

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

Commission Drafting Team Information

Lead Drafter: Dan Eaton

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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 8.1.1 [1-110] (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 8.1.1 [1-110] (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. OCTC / 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.
- **State Bar Court:** No comment was received from State Bar Court.

VII. PUBLIC COMMENTS & PUBLIC HEARING TESTIMONY

Three comments, including the above comment from OCTC, were received. Two comments, including a comment from OCTC, agreed with the proposed rule. One comment, agreed only if modified. A public comment synopsis table, with the Commission’s responses to each comment, is provided at the end of this report.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

~~The following is taken verbatim from an analysis prepared by State Bar staff with the exception of an omitted, inapplicable parenthetical comment at the end of the analysis:~~

“Commission has been informed that ~~There 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. ~~Professional Competence staff believes that t~~The existence of these similar concepts achieves ~~a degree of appropriate~~ 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.¹⁵

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 “Member” to “Lawyer”
 - Pros: 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: None identified.
3. Change “conditions” to “terms and conditions”
 - Pros: Conforms to the proposed addition of agreements in lieu of discipline as those agreements have “terms” while reprimands typically have “conditions.”
 - Cons: None identified.
4. 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

¹ The following states 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.

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 section 6068, subdivision (I). 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 section 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 reproofs 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 section 6068, subdivision (l).

D. Non-Substantive Changes to the Current Rule:

1. 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. COMMISSION 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 adopt proposed Rule 8.1.1 [1-110] in the form attached to this Report and Recommendation