



The State Bar *of California*

Attorney Civility: Proposed Amendments to Rule of Court 9.7 and the Rules of Professional Conduct

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Presentation Overview

1. Provide an overview of the California Civility Task Force Recommendations
2. Discuss proposed revisions to California Rules of Court, rule 9.7 to be issued for public comment
3. Discuss proposed options for revisions to the California Rules of Professional Conduct to be issued for public comment
4. Review resolutions for Board approval



Report & Recommendations



The California Civility Task Force Report

- The California Civility Task Force (CCTF) is a joint project of the California Judges Association and the California Lawyers Association
- CCTF reported that:
 - Incivility increases:
 - stress and job dissatisfaction among lawyers and judges; and
 - costs and delays in litigation and legal transactions, thereby increasing costs for the public.
 - Incivility can be a manifestation of bias.



Three Recommendations Affecting Attorneys

1. Require one hour of MCLE for civility training;
2. Revise the Rules of Professional Conduct to address incivility; and
3. Require all lawyers to take the civility pledge.



Proposed Amendments to Rule of Court 9.7



Current Attorney Oath

- **California Rules of Court, rule 9.7**

- Since June 2014, has required all attorneys to take the attorney oath with civility language:

I, (licensee name) solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution of the State of California, and that I will faithfully discharge the duties of any attorney and counselor at law to the best of my knowledge and ability. **As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity.**

- **Total licensees:**

- **Approx. 237,000 licensees (150,000 active) who took the oath without civility language**
- **Approx. 48,000 licensees who took the oath with the civility language**



Three Options Presented at the September 2022 meeting

	Option 1	Option 2	Option 3
Initial oath requirement	If no past oath with civility language		
Initial declaration requirement		If no past oath with civility language	
Initial affirmation requirement			✓
Annual affirmation requirement	✓	✓	✓



Option Two proposed amendments selected by the Board

- By February 1, 2024, licensees who did not take the oath with the civility language and specially admitted attorneys must submit a declaration with the civility pledge language.
- Annual requirement to take the civility pledge when paying licensing fees or registration.



Proposed Amendments to the Rules of Professional Conduct



CCTF Recommendations

- CCTF recommended changes to seven Rules of Professional Conduct:
 - Rule 1.0.1 (Terminology);
 - Rule 1.2 (Scope of Representation and Allocation of Authority);
 - Rule 1.3 (Diligence);
 - Rule 3.3 (Candor Toward the Tribunal);
 - Rule 3.4 (Fairness to Opposing Party and Counsel);
 - Rule 3.5 (Contact with Judges, Officials, Employees, and Jurors); and
 - Rule 8.4 (Misconduct).
- Intent: clarify that civility is consistent with zealous advocacy and “the mere existence of a disciplinary rule prohibiting incivility will spur civility.”



COPRAC's Analysis:

- Board directed COPRAC to review CCTF's proposed amendments to Rules of Professional Conduct
- COPRAC concerns with CCTF's proposed amendments:
 - May pose interpretation issues;
 - May be difficult to enforce as disciplinary standards;
 - May chill a lawyer's protected activities under the First Amendment of the United States Constitution; and
 - May not fall within the scope and purpose of the rules in which they are proposed.



COPRAC's & Staff's Recommendations

- COPRAC:
 - Recommends amendments to Rules 1.2 Comment [1] and 8.4 Comment [6]; and
 - In the alternative, a new standalone rule.
- Staff:
 - Recommends two alternatives be released for public comment: (1) COPRAC's proposed amendments Rules 1.2 Comment [1] and 8.4 Comment [6] and a new standalone rule, rule 8.4.2.



Proposed Amendments to Rule 1.2 Comment [1]

Rule 1.2 addresses the allocation of authority within a lawyer-client relationship.

“ . . . Notwithstanding a client’s direction, a lawyer retains the authority to agree to reasonable requests of opposing counsel that do not prejudice the rights of the client, be punctual in fulfilling all professional commitments, avoid offensive tactics, and treat all persons involved in the legal process with dignity, courtesy, and integrity. . . .”



Proposed Amendments to Rule 8.4 Comment [6]

Rule 8.4(d): It is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice.

“[6] A violation of paragraph (d) includes engaging in significantly unprofessional conduct that is abusive or harassing in the practice of law or related professional activities. A lawyer does not violate paragraph (d) by standing firm in the position of the client, protecting the record for subsequent review, or preserving professional integrity.

For further guidance, a lawyer should consult the current California Attorney Guidelines of Civility and Professionalism and other applicable civility authorities.”



Proposed New Rule of Professional Conduct 8.4.2

Rule 8.4.2 Prohibited Incivility

- (a) In representing a client, a lawyer shall not engage in incivility in the practice of law or related professional activities.
- (b) In appearing as a lawyer before a tribunal,* a lawyer shall not engage in incivility by conduct solely intended to:
 - (1) disrupt the tribunal;* or
 - (2) degrade a witness or other person.
- (c) For purposes of this rule, “incivility” means significantly unprofessional conduct that is abusive or harassing and shall be determined on the basis of all the facts and circumstances surrounding the conduct.



Proposed New Rule of Professional Conduct 8.4.2

Staff proposed new Rule of Professional Conduct, rule 8.4.2 (Prohibited Incivility)

- Defines “incivility” as significantly unprofessional conduct that is abusive or harassing and is determined based on surrounding facts and circumstances
- Rule would prohibit:
 - Engaging in incivility in the practice of law or related professional activities; and
 - Before a tribunal, engaging in incivility by conduct solely intended to disrupt the tribunal or degrade a witness or other person.



Proposed New Rule of Professional Conduct 8.4.2

Staff proposed new Rule of Professional Conduct, rule 8.4.2 (Prohibited Incivility)

- Comment:
 - Directs lawyers to consult the current California Attorney Guidelines of Civility and Professionalism and other applicable civility authorities;
 - Describes conduct that would not violate the rule;
 - Indicates that a violation of rule 8.4.2 may also violate rule 8.4(d) (Misconduct) and/or the State Bar Act; and
 - Clarifies that the rule does not apply to conduct protected by the First Amendment.



Proposed New Rule of Professional Conduct 8.4.2

Staff proposed new Rule of Professional Conduct, rule 8.4.2 (Prohibited Incivility)

- Attempts to strike a balance between:
 - CCTF's belief that there needs to be rule language that addresses civility, instead of only changes to comments to the rules, and
 - Concerns related to First Amendment issues, interpretation, and enforcement.
- Staff also proposes a cross-reference to rule 8.4.2 within rule 8.4 Comment [4], if 8.4.2 is ultimately adopted



Resolutions



Authorization of Public Comment – Rule of Court 9.7 (Attorney Oath)

RESOLVED, that the Board of Trustees authorizes staff to make available for public comment, for a period of 60 days, proposed amendments to rule 9.7 of the California Rules of Court as set forth in Attachment A; and it is

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



Authorization of Public Comment – Rules of Professional Conduct

RESOLVED, that the Board of Trustees authorizes staff to make available for public comment, for a period of 60 days, proposed amended rules 1.2 and 8.4 of the California Rules of Professional Conduct as set forth in Attachment D and proposed new rule 8.4.2 and amended rule 8.4 Comment [4], as alternative proposals, as set forth in Attachment F; and it is

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

