

Rule 1-100
12/10 Meeting
Item III. A

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INTER-OFFICE MEMORANDUM

TO: MEMBERS OF THE COMMISSION
FROM: A.M. VOOGD
RE: RULE 1-100
DATE: 11-28-04

Suggested changes:

Change the title to read "Purpose and Scope [instead of Function] of the Rules of Professional Conduct" to accord with subpart (A) *Purpose* and subpart (B) *Scope*.

Change "A [willful] violation of these rules is grounds for discipline" to "Willful breach of these rules is grounds for discipline" to accord with Business and Professions Code section 6077.

Strike that portion of (B) stating: "Nothing in these rules or the comments to the rules is intended to enlarge or restrict existing law regarding the liability of lawyers to others." This subject is more appropriately dealt with in Comment [2] and striking the quoted language from (B) deletes redundant and surplus language. Moreover, the quoted language is inconsistent with (A)(1) and its inclusion in the rule might offend the Supreme Court since it can be construed as limiting the Court's broad authority to establish new tort causes of action.

In any event, strike the word "existing" as unnecessary and confusing.

Number the remaining subparagraphs of (B) in the same manner as subparagraphs are numbered in (A).

Change the concluding phrase of Comment [1] to “sections 6076, 6077 and 6100 [added]” to establish the jurisdictional basis of Comment [5].

Remove the brackets from Comment [4].

Strike the whole of Comment [4]. That comment provides “The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes stated in paragraph (A).”

The meaning of this comment is uncertain. I know of no clear definition of a rule of reason. There is a reference to such a rule in Standard Oil Co. of New Jersey v. U.S., 221 U.S. 1 (1910), namely “Thus not specifying, but indubitably contemplating and requiring a standard, it follows that it was intended that the standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute was intended to be the measure used for the purpose of determining whether, in a given case, a particular act had or had not brought about the wrong against which the statute provided.” I don’t find this helpful.

I suspect the intended meaning is that all rules and laws can be divided into two categories, i.e. those that are to be enforced whether reasonable or unreasonable and those that are enforced only if they are reasonable. Presumably, the standard of reasonableness is to be found in (A). For instance, it would appear that if a rule in terms has been violated but the conduct has not harmed the public then the rule should be interpreted as not violated.

We should write the rules as condemning only unreasonable conduct and avoid the uncertain affirmative defense overlay of the type created by this comment.