



U.S. CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, DC 20207

Record of Commission Action
Commissioners Voting by Ballot*

Commissioners Voting: Chairman Ann Brown
Commissioner Mary Sheila Gall
Commissioner Thomas H. Moore

ITEM:

Proposed Standards of Conduct for Outside Attorneys

DECISION:

The Commission voted 2-1 to issue a Federal Register notice proposing for comment a new part to its regulations, 16 C.F.R. Part 1026, addressing the behavior of attorneys in matters before the Commission other than an adjudicatory proceeding. Chairman Brown and Commissioner Moore voted to issue the proposed rule. Commissioner Gall voted not to issue the proposed rule. Commissioner Moore and Commissioner Gall filed separate statements concerning their respective votes, copies of which are attached.

For the Commission:

A handwritten signature in cursive script that reads "Sadye E. Dunn".

Sadye E. Dunn
Secretary

* Ballot votes filed September 26 – October 18, 2000



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STATEMENT OF COMMISSIONER THOMAS H. MOORE ON THE
PROPOSED STANDARDS OF CONDUCT FOR OUTSIDE ATTORNEYS
Wednesday, October 18, 2000

I am voting to allow this ballot to go forward for the purpose of getting comment from the bar on this proposal. While I am far from convinced that there have been sufficient examples in the past to merit our agency putting this procedure in place, I do find the issue sufficiently important to seek input from outside interested parties. As presented, it appears that the most egregious examples given to me by staff could have been referred to and handled by the relevant state bar association, but even the step that was available to us was not taken. Attorneys do not take it lightly when a complaint is filed against them by a federal agency with their state bar association. I would think that in most cases this procedure would cure any pattern of unethical conduct.

However, since our staff has seen fit to send this to the Commission as a ballot, there are particular provisions of this document on which I would like to hear comment:

1. what conduct, that would be inimical to the pursuit of justice, but which would not be covered under most state bar association codes of professional responsibility, could constitute "bad faith"?
2. some other agencies specifically designate an associate general counsel to be the investigating officer and to make a recommendation to the General Counsel. Would such a specific delegation be appropriate? Would this serve to make the General Counsel less personally involved in the outcome and therefore give him more freedom to advise the Commissioners in a more neutral fashion?
3. under the current proposal the offending attorney has to make his oral presentation to the General Counsel, which is somewhat like pleading your case to the prosecuting attorney. Would the delegation mentioned above help to minimize that perception?
4. there does not appear to be an opportunity for the attorney to respond to the General Counsel's written sanction recommendation. Should there be?
5. there is no discretion about whether the attorney's state bar association is notified, it happens automatically whenever any type of sanction is imposed—I did not see a similar provision in any of the other agencies' regulations that staff provided my office. Should that notification be discretionary rather than mandatory and, if discretionary, on what basis should the discretion be exercised?

I note that the proposal does not set out any specific procedure by which the Commissioners could request additional information, nor does it indicate how a Commission decision would be effectuated. (Would it be by ballot? Would it be by a ruling at a hearing with the General Counsel and the offending attorney given an opportunity to present their sides?) The Commissioners may not, in every case, be satisfied in using the record as compiled by OGC as their sole source of information. While the Commissioners can always decide how they want to proceed in individual cases, if we are to

have this much detail in the regulation, perhaps it is also appropriate to spell out how the ultimate decision-making authority would be exercised.

As I have indicated, I feel that this issue merits significant input from outside interested parties. I, therefore, strongly encourage those who may be affected by this proposed rule to participate in this process. Comments received on the issues raised above will play an important role in formulating my final decision on this matter.



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**STATEMENT OF THE HONORABLE MARY SHEILA GALL
IN OPPOSITION TO ISSUANCE OF STANDARDS OF CONDUCT
FOR ATTORNEYS PRACTICING BEFORE THE COMMISSION**

September 28, 2000

I voted against issuance of a draft *Federal Register* notice proposing new Commission rules governing the conduct of attorneys who practice before the Commission outside the context of specific adjudicatory proceedings. I did so because I have never been presented with the justification for the need for such rules. Attorneys who practice before the Commission are, by definition, licensed by and subject to the disciplinary authority of the bar of a State, or of the District of Columbia. If the Commission believes that an attorney has violated the Code of Professional Responsibility in force in the jurisdiction in which that attorney practices, it may refer the complaint to the appropriate disciplinary authority. If the Commission found that such complaints were being ignored, or that the procedures used resulted in unjust determinations, developing the Commission's own system of disciplinary proceedings might make sense. In the absence of such a record, the system proposed in the *Federal Register* notice is unnecessary.

If this proposal is published, I hope that the Commission will hear from the relatively small number of attorneys who practice regularly before the Commission and who deal with its staff on a daily basis. I note that the proposed rules grant great authority to the Commission's General Counsel to open and close investigations. I note further that the definition of prohibited conduct includes not only conduct prohibited by the disciplinary rules of the bar of a State or of the District of Columbia, but also a very general idea of "bad faith." I note finally that the Commission's role appears to be limited to determining the appropriate sanction. Its review of the General Counsel's determination is on the record developed by the General Counsel, and there is no expectation that the Commission will itself hear witnesses or otherwise make evidentiary determinations. I anticipate that the attorneys who practice before the Commission will advise it about the need for, and the desirability of, the proposed disciplinary system.