

COMMISSION PROVISIONAL REPORT AND RECOMMENDATION: RULE 8.2 [1-700]

Commission Drafting Team Information

Lead Drafter: Judge Dean Stout

Co-Drafters: Danny Chou, Judge Karen Clopton

I. CURRENT CALIFORNIA RULE 1-700

Rule 1-700 Member as Candidate for Judicial Office

- (A) A member who is a candidate for judicial office in California shall comply with Canon 5 of the Code of Judicial Ethics.
- (B) For purposes of this rule, “candidate for judicial office” means a member seeking judicial office by election. The determination of when a member is a candidate for judicial office is defined in the terminology section of the California Code of Judicial Ethics. A member’s duty to comply with paragraph (A) shall end when the member announces withdrawal of the member’s candidacy or when the results of the election are final, whichever occurs first.

Discussion:

Nothing in rule 1-700 shall be deemed to limit the applicability of any other rule or law.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: October 21 & 22, 2016

Action: Recommend Board Adoption of Proposed Rule 8.2 [1-700]

Vote: 13 (yes) – 1 (no) – 1 (abstain)

Board:

Date of Vote: November 17, 2016

Action: Board Adoption of Proposed Rule 8.2 [1-700]

Vote: 14 (yes) – 0 (no) – 0 (abstain)

III. PROPOSED RULE 8.2 [1-700] (CLEAN)

Rule 8.2 [1-700] Judicial Officials

- (a) A lawyer shall not make a statement of fact that the lawyer knows* to be false or with reckless disregard as to its truth or falsity concerning the qualifications or

integrity of a judge or judicial officer, or of a candidate for election or appointment to judicial office.

- (b) A lawyer who is a candidate for judicial office in California shall comply with Canon 5 of the California Code of Judicial Ethics. For purposes of this Rule, “candidate for judicial office” means a lawyer seeking judicial office by election. The determination of when a lawyer is a candidate for judicial office by election is defined in the terminology section of the California Code of Judicial Ethics. A lawyer’s duty to comply with this Rule shall end when the lawyer announces withdrawal of the lawyer’s candidacy or when the results of the election are final, whichever occurs first.
- (c) A lawyer who seeks appointment to judicial office shall comply with Canon 5B(1) of the California Code of Judicial Ethics. A lawyer becomes an applicant seeking judicial office by appointment at the time of first submission of an application or personal data questionnaire to the appointing authority. A lawyer’s duty to comply with this Rule shall end when the lawyer advises the appointing authority of the withdrawal of the lawyer’s application.

Comment

To maintain the fair and independent administration of justice, lawyers should defend judges and courts unjustly criticized. Lawyers also are obligated to maintain the respect due to the courts of justice and judicial officers. See Business and Professions Code § 6068(b).

IV. COMMISSION’S PROPOSED RULE 8.2 [1-700] (REDLINE TO CURRENT CALIFORNIA RULE 1-700)

Rule 8.2 [1-700] ~~Member as Candidate for~~ Judicial ~~Office~~Officials

- (a) A lawyer shall not make a statement of fact that the lawyer knows* to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge or judicial officer, or of a candidate for election or appointment to judicial office.
- ~~(A)~~ A ~~member~~lawyer who is a candidate for judicial office in California shall comply with Canon 5 of the California Code of Judicial Ethics.
- ~~(B)~~ For purposes of this ~~rule~~Rule, “candidate for judicial office” means a ~~member~~lawyer seeking judicial office by election. The determination of when a ~~member~~lawyer is a candidate for judicial office by election is defined in the terminology section of the California Code of Judicial Ethics. A ~~member’s~~lawyer’s duty to comply with ~~paragraph (A)~~this Rule shall end when the ~~member~~lawyer announces withdrawal of the ~~member’s~~lawyer’s candidacy or when the results of the election are final, whichever occurs first.

- (c) A lawyer who seeks appointment to judicial office shall comply with Canon 5B(1) of the California Code of Judicial Ethics. A lawyer becomes an applicant seeking judicial office by appointment at the time of first submission of an application or personal data questionnaire to the appointing authority. A lawyer's duty to comply with this Rule shall end when the lawyer advises the appointing authority of the withdrawal of the lawyer's application.

Comment~~Discussion~~

To maintain the fair and independent administration of justice, lawyers should defend judges and courts unjustly criticized. Lawyers also are obligated to maintain the respect due to the courts of justice and judicial officers. See Business and Professions Code § 6068(b).

~~Nothing in rule 1-700 shall be deemed to limit the applicability of any other rule or law.~~

V. RULE HISTORY

On January 3, 1996, the Supreme Court of California sent a letter to the State Bar requesting consideration of a proposed new rule of professional conduct to regulate an attorney's conduct as a temporary judicial officer and as a candidate for judicial office. The Court's request was intended to fill a regulatory gap. The Code of Judicial Ethics sets the standards for regulating temporary judicial officers and candidates for judicial office. However, the jurisdiction of the Commission on Judicial Performance extends only to sitting judges and does not extend to attorneys who are serving as temporary judicial officers or who are candidates for judicial office. The Court's request was intended to incorporate the relevant portions of the California Code of Judicial Ethics into the California Rules of Professional Conduct in order to allow the State Bar to discipline attorneys who violate the Code of Judicial Ethics while serving as temporary judicial officers or as candidates for judicial office.

The State Bar studied the Supreme Court's request and published two rules for public comment. Following public comment, the State Bar Board of Trustees unanimously adopted two proposed new rules of professional conduct for submission to the Court. Rule 1-700 (Member as Candidate for Judicial Office) became operative by order of the Court on November 21, 1997. Rule 1-710 (Member as Temporary Law Judge, Referee, or Court-Appointed Arbitrator) became operative by order of the Court on March 18, 1999.

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 is concerned that this proposed rule would only prohibit a false statement of fact, not other misleading statements. (See *In the Matter of Parish* (Review Dept. 2015) 5 Cal. State Bar Ct. Rptr. 370, 376 [interpreting Canon 5 of the Judicial Code of Ethics to apply only to factual misrepresentations, but not to

statements that may be misleading or true statements that might imply or suggest through innuendo false conclusions. The Review Department concluded that on its face the language of Canon 5 only reached factual misrepresentations.].)¹ California has long held that an attorney is required to refrain from misleading and deceptive acts without qualification. (*Rodgers v. State Bar* (1989) 48 Cal.3d 300, 315.) No distinction is made among concealment, half-truths, and false statements of fact. (*In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 174.) Further, express and implied representations, as well as material omissions, support finding a statement misleading. (See e.g. *In re Naney* (1990) 51 Cal.3d 186 [“Both express and implied representations of ability to practice are prohibited”]; *In the Matter of Kirwin* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 630, 636-637]; *Franklin v. State Bar* (1986) 41 Cal.3d 700, 709.)

2. Comments 1 and 2 are unnecessary and merely a philosophical discussion of the reasons for the rule, which are evident.

- **State Bar Court:** No comments were received from State Bar Court.

VII. PUBLIC COMMENTS & PUBLIC HEARING TESTIMONY

Three comments, including the above comment from OCTC, were received. One agreed with the proposed rule, and two 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

ABA Model Rule 8.2 is a counterpart to the current rule but with several key differences. Like rule 1-700, Model Rule 8.2 requires compliance with the applicable provision of the Code Of Judicial Ethics (Cf. MR 8.2(b) with 1-700(B).) However, unlike rule 1-700, Model Rule 8.2 prohibits lawyers from making false statements of fact concerning the qualifications or integrity of a judge, legal officer or candidate for election or appointment to judicial or legal office. Also unlike the current rule, the model rule does not include provisions defining “candidate for judicial office” or describing when such candidacy starts and ends.

The ABA State Adoption Chart for the ABA Model Rule 8.2 is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_8_2.authcheckdam.pdf

¹ Canon 5B(1)(b) prohibits a judge or candidate for judicial office from making “knowing misrepresentations, including false or misleading statements, during an election campaign because doing so would violate Canons 1 and 2A, and may violate other canons.” There is a proposal to amend this Canon to include not only false statements of fact, but misleading statements as well.

- Thirty-two jurisdictions have adopted Model Rule 8.2 verbatim.² Fourteen jurisdictions have adopted a slightly modified version of Model Rule 8.2.³ Four jurisdictions either have no comparable rule, or have adopted a version of the rule that is substantially different from Model Rule 8.2.⁴

**IX. CONCEPTS ACCEPTED/REJECTED; CHANGES IN DUTIES;
NON-SUBSTANTIVE CHANGES; ALTERNATIVES CONSIDERED**

A. Concepts Accepted (Pros and Cons):

1. Recommend that the provisions of the current rule be continued.
 - Pros: There are no known issues with the application of the current rule as a disciplinary standard. OCTC does not recommend any changes to the current rule. The origin of the current rule is a recommendation of the judicial committee that drafted revisions to the Code of Judicial Ethics.
 - Cons: None identified
2. Recommend a new paragraph (a) that prohibits a lawyer from making a false or reckless statement concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.
 - Pros: Although new, this concept has precedent generally in a lawyer's duty of respect to the courts and judicial officers (Bus. & Prof. Code sec. 6068(b)) and specifically in disciplinary case law (*In the Matter of Parish* (Review Dept. 2015) 5 Cal. State Bar Ct. Rptr. 370. [During a lawyer's campaign for judicial election, the lawyer made false statements regarding his opponent's involvement in fraudulent activities.].) Adding this provision protects public confidence in the legal profession.
 - Cons: Adding this provision is unnecessary as it largely overlaps with the existing requirement of Canon 5B(1)(b) of the Code of Judicial Ethics.
3. Recommend a new paragraph (c) that governs the conduct of a lawyer who seeks appointment to judicial office and requires the candidate's compliance with Canon 5B(1) of the California Code of Judicial Ethics.

² The thirty-two jurisdictions are: Arizona, Arkansas, Connecticut, Delaware, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Vermont, West Virginia, Wisconsin, and Wyoming.

³ The fourteen jurisdictions are: Alabama, Alaska, Colorado, Florida, Maryland, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Tennessee, Texas, and Washington.

⁴ The four jurisdictions are: District of Columbia, Georgia, Massachusetts, and Virginia.

- Pros: This is a conforming change that implements revisions to the Code of Judicial Ethics that became operative after the current rule was adopted. Similar to the policy and intended function of the current rule, new paragraph (c) would serve as a State Bar disciplinary charging vehicle for violations of the applicable provision of the Code of Judicial Ethics.
 - Cons: None identified.
4. Recommend the addition of a new Comment. The first sentence of the Comment is derived from counterpart Comment [3] to Model Rule 8.2. As referenced in the Comment, the second sentence is derived from Business and Professions Code section 6068(b).
- Pros: In part, the Comment clarifies that false statements by lawyers about candidates for judicial office harm confidence in the legal profession. The Comment also recognizes the cross-over regulation with the duty of an attorney, in general, to maintain the respect due to courts and judges. The Comment promotes lawyer compliance with obligations imposed by the Rule, and states important policies underlying the Rule, both of which provide helpful guidance in interpreting and applying the Rule.
 - Cons: This Comment might be criticized as unnecessary for the application of the rule.
5. Delete the current Discussion paragraph to existing rule 1-700 that states the rule does not limit the applicability of other law
- Pros: This Discussion paragraph arguably does not qualify as a necessary Comment under the Commission's charter.
 - Cons: We are not aware of any problems caused by the existing Discussion paragraph.

B. Concepts Rejected (Pros and Cons):

None.

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. The recommended new paragraph (c) which governs the conduct of a lawyer who seeks appointment to judicial office and requires compliance with Canon 5B(1) of the California Code of Judicial Ethics is a substantive change to the extent that it adds an explicit State Bar charging vehicle in the Rules of

Professional Conduct. However, duties under Canon 5B(1) are already imposed on a lawyer applicant for judicial office. If a lawyer is appointed to judicial office but subsequently is found to have violated Canon 5B(1) during the application process, that lawyer would be subject to the discipline by the Commission on Judicial Performance regardless of the terms of Rule 1-700.

D. Non-Substantive Changes to the Current Rule:

1. Substitute the term “lawyer” for “member”.
 - Pros: The current Rules’ use of “member” departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice pro hac vice or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)
 - Cons: Retaining “member” would carry forward a term that has been in use in the California Rules for decades.

E. Alternatives Considered:

- There were no alternative regulatory approaches considered.

X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 8.2 [1-700] in the form attached to this report and recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopt proposed Rule 8.2 [1-700] in the form attached to this Report and Recommendation.