Rule 8.1 False Statement Regarding Application for Admission to Practice Law
(Proposed Rule Adopted by the Board on March 9, 2017)

(a) An applicant for admission to practice law shall not, in connection with that person's own application for admission, make a statement of material fact that the lawyer knows* to be false, or make such a statement with reckless disregard as to its truth or falsity.

(b) A lawyer shall not, in connection with another person's application for admission to practice law, make a statement of material fact that the lawyer knows* to be false.

(c) An applicant for admission to practice law, or a lawyer in connection with an application for admission, shall not fail to disclose a fact necessary to correct a statement known by the applicant or the lawyer to have created a material misapprehension in the matter, except that this rule does not authorize disclosure of information protected by Business and Professions Code § 6068(e) and rule 1.6.

(d) As used in this Rule, "admission to practice law" includes admission or readmission to membership in the State Bar; reinstatement to active membership in the State Bar; and any similar process relating to admission or certification to practice law in California or elsewhere.

Comment

[1] A person* who makes a false statement in connection with that person's own application for admission to practice law may be subject to discipline under this rule after that person* has been admitted. See, e.g., *In re Gossage* (2000) 23 Cal.4th 1080 [99 Cal.Rptr.2d 130].

[2] A lawyer's duties with respect to a *pro hac vice* application or other application to a court for admission to practice law are governed by rule 3.3.

[3] A lawyer representing an applicant for admission to practice law is governed by the rules applicable to the lawyer-client relationship, including Business and Professions Code § 6068(e)(1) and rule 1.6. A lawyer representing a lawyer who is the subject of a disciplinary proceeding is not governed by this rule but is subject to the requirements of rule 3.3.

PROPOSED RULE OF PROFESSIONAL CONDUCT 8.1
(Current Rule 1-200)
False Statement Regarding Application for Admission, Readmission, Certification or Registration

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct ("Commission") evaluated current rule 1-200 (False Statement Regarding Admission to the State Bar) and in accordance with the Commission Charter. In addition, the Commission considered the national standard of ABA Model Rule 8.1 (Bar Admission and Disciplinary Matters). The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules. The result of the Commission's evaluation is proposed rule 8.1 (False Statement Regarding Application for Admission, Readmission, Certification or Registration).

Rule As Issued For 90-day Public Comment

Proposed Rule 8.1 retains the substance of current rule 1-200 while expanding the public policy protections of the current rule. Current rule 2-100 prohibits members (on behalf of another person) from making false statements or omitting material facts in connection with an application for admission to the State Bar. Proposed rule 8.1 would expand the current rule to petitions for reinstatement after disbarment or resignation, applications for certified legal specialization and applications for special or temporary admission.

Paragraph (a) defines with specificity the applications covered under the expanded scope of proposed rule 8.1. The objective of paragraph (a) is to make clear that the rule applies to applications for admission, readmission, certification and registration.[1]

Paragraph (b) is new and recognizes the need to expand the public protection policy objectives of proposed rule 8.1 to cover conduct related to applications from both members of the California State Bar as well as non-California lawyer applicants (e.g. non-California lawyer seeking authorization to practice as a registered in-house counsel under the Multijurisdictional Program (MJP)).

Paragraph (c) makes clear that the proscriptions against making false statements, omissions or failure to correct a statement know to be false, equally apply to lawyers who are supporting or opposing the application of another person.

Paragraph (d) is derived from current rule 1-200(C) and clarifies that the rule does not apply to a lawyer representing a client/applicant in proceedings relating to admission, readmission, certification or registration.

Proposed rule 8.1 contains two Comments that clarify the rule's application. Comment [1] clarifies that a person making false statements in connection with that person's own application can be subject to discipline or cancellation of that person's admission or other authorization.

[1] One member of the Commission submitted a written dissent expressing concerns that proposed rule 8.1 might overlap with duties imposed by other rules, resulting in a risk of confusion on the part of lawyers seeking to comply and a potential for double-charging in disciplinary matters. The full text of the dissent is attached to this summary.

Comment [2] relates to paragraph (d) and makes clear that a lawyer who represents a client/applicant is subject to other applicable rules and the State Bar Act.

Non-substantive changes in proposed rule 8.1 include: changing the title to accurately reflect the expanded scope of the rule, reordering the rule to place key definitions in the first paragraph and stylistic changes to track the ABA Model Rule numbering system, format and style conventions. These changes include substitution of the word "lawyer" for "member."

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission made several changes to the text and comment of proposed rule 8.1. These changes follow the Commission's recommendation that proposed rule 3.3 (Candor Toward The Tribunal) be adopted. The Commission believes rule 3.3 is the appropriate source of regulation for statements made to a tribunal. Specifically, rule 3.3, not rule 8.1, should apply to applications for certification or registration under the California Rules of Court. (See also the concern expressed in the Dissent, which this change addresses.)

Text. The Commission limited the scope of proposed rule 8.1 to applications for admission to practice law rather than including within its scope applications for certification or registration under provisions of the Rules of Court. This change is reflected by the substitution of new paragraph (d), which defines "application to practice law" in place of former paragraph (a), which delimited the scope of the rules application to include applications for certification or registration.

In addition to this global change in scope, the Commission has also added a further requirement to former paragraph (b) [now paragraph (a)] that in addition to not making a statement *in connection with his or her own application* that the lawyer knows to be false, the lawyer also must not make such a statement "with reckless disregard to its truth or falsity." This change was made in response to a public comment received from OCTC.

The Commission also revised former paragraph (c) [now paragraph (b)] to clarify the duties of a lawyer who makes a statement of material fact *in connection with another person's* application.

The Commission has added new paragraph (c), that imposes a duty on a lawyer, whether in connection with his or her own application or the application of another, to disclose a fact to correct a statement previously made that the lawyer knows has created a "material misapprehension" in the matter, unless the disclosure would violate Bus. & Prof. Code § 6068(e) or rule 1.6.

Comment. The Commission modified Comment [1] to clarify its application and to provide a citation to a landmark California Supreme Court opinion on admission. The Commission has also added new Comment [2] to clarify the scope of the rule's application. It has also revised Comment [3] to identify with specificity the obligations of a lawyer who represents an applicant for admission.

With these changes, the Board authorized an additional 45-day public comment period on the revised proposed rule.

Final Modifications to the Proposed Rule

After consideration of comments received in response to the additional 45-day public comment period, the Commission made one non-substantive revision. In paragraph (d), the Commission substituted the word “process” for “provision” to read: “. . . and any similar process relating to admission or certification to practice law in California or elsewhere.”

With this change, the rule Commission voted to recommend that the Board adopt the proposed rule.

COMMISSION REPORT AND RECOMMENDATION: RULE 8.1 [1-200]

Commission Drafting Team Information

Lead Drafter: Nanci Clinch
Co-Drafters: Joan Croker, Robert Kehr

I. CURRENT CALIFORNIA RULE

Rule 1-200 False Statement Regarding Admission to the State Bar

(A) A member shall not knowingly make a false statement regarding a material fact or knowingly fail to disclose a material fact in connection with an application for admission to the State Bar.

(B) A member shall not further an application for admission to the State Bar of a person whom the member knows to be unqualified in respect to character, education, or other relevant attributes.

(C) This rule shall not prevent a member from serving as counsel of record for an applicant for admission to practice in proceedings related to such admission.

Discussion:

For purposes of rule 1-200 "admission" includes readmission.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: January 20, 2017
Action: Recommend Board Adoption of Proposed Rule 8.1 [1-200]
Vote: 14 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: March 9, 2017
Action: Board Adoption of Proposed Rule 8.1 [1-200]
Vote: 11 (yes) – 0 (no) – 0 (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 8.1 [1-200] False Statement Regarding Application for Admission, Readmission, Certification or Registration

(a) An applicant for admission to practice law shall not, in connection with that person's own application for admission, make a statement of material fact that the lawyer

knows* to be false, or make such a statement with reckless disregard as to its truth or falsity.

(b) A lawyer shall not, in connection with another person's application for admission to practice law, make a statement of material fact that the lawyer knows* to be false.

(c) An applicant for admission to practice law, or a lawyer in connection with an application for admission, shall not fail to disclose a fact necessary to correct a statement known by the applicant or the lawyer to have created a material misapprehension in the matter, except that this rule does not authorize disclosure of information protected by Business and Professions Code § 6068(e) and rule 1.6.

(d) As used in this rule, "admission to practice law" includes admission or readmission to membership in the State Bar; reinstatement to active membership in the State Bar; and any similar process relating to admission or certification to practice law in California or elsewhere.

Comment

[1] A person* who makes a false statement in connection with that person's own application for admission to practice law may be subject to discipline under this rule after that person* has been admitted. See, e.g., *In re Gossage* (2000) 23 Cal.4th 1080 [99 Cal.Rptr.2d 130].

[2] A lawyer's duties with respect to a *pro hac vice* application or other application to a court for admission to practice law are governed by rule 3.3.

[3] A lawyer representing an applicant for admission to practice law is governed by the rules applicable to the lawyer-client relationship, including Business and Professions Code § 6068(e)(1) and rule 1.6. A lawyer representing a lawyer who is the subject of a disciplinary proceeding is not governed by this rule but is subject to the requirements of rule 3.3.

IV. COMMISSION'S PROPOSED RULE (REDLINE TO CURRENT CALIFORNIA RULE 1-200)

Rule 8.1 [1-200] False Statement Regarding Application for Admission to ~~the State Bar~~Practice Law

~~(A) A member shall not knowingly make a false statement regarding a material fact or knowingly fail to disclose a material fact in connection with an application for admission to the State Bar.~~

~~(B) A member shall not further an application for admission to the State Bar of a person whom the member knows to be unqualified in respect to character, education, or other relevant attributes.~~

~~(C) This rule shall not prevent a member from serving as counsel of record for an applicant for admission to practice in proceedings related to such admission.~~

(a) An applicant for admission to practice law shall not, in connection with that person's own application for admission, make a statement of material fact that the lawyer knows* to be false or make such a statement with reckless disregard as to its truth or falsity.

(b) A lawyer shall not, in connection with another person's application for admission to practice law, make a statement of material fact that the lawyer knows* to be false.

(c) An applicant for admission to practice law, or a lawyer in connection with an application for admission, shall not fail to disclose a fact necessary to correct a statement known* by the applicant or the lawyer to have created a material misapprehension in the matter, except that this rule does not authorize disclosure of information protected by Business and Professions Code § 6068(e) and rule 1.6.

(d) As used in this rule, "admission to practice law" includes admission or readmission to membership in the State Bar; reinstatement to active membership in the State Bar; and any similar process relating to admission or certification to practice law in California or elsewhere.

~~Discussion~~Comment

~~For purposes of rule 1-200 "admission" includes readmission.~~

[1] A person* who makes a false statement in connection with that person's own application for admission to practice law may be subject to discipline under this rule after that person* has been admitted. See, e.g., *In re Gossage* (2000) 23 Cal.4th 1080 [99 Cal.Rptr.2d 130].

[2] A lawyer's duties with respect to a *pro hac vice* application or other application to a court for admission to practice law are governed by rule 3.3.

[3] A lawyer representing an applicant for admission to practice law is governed by the rules applicable to the lawyer-client relationship, including Business and Professions Code § 6068(e)(1) and rule 1.6. A lawyer representing a lawyer who is the subject of a disciplinary proceeding is not governed by this rule but is subject to the requirements of rule 3.3.

V. RULE HISTORY

The predecessor to current rule 1-200, former rule 1-101, became operative January 1, 1975. It was entitled "Maintaining Integrity and Competence of the Legal Profession." Former rule 1-101 incorporated two concepts from Disciplinary Rule (DR) 1-101 of the ABA Model Code of Professional Responsibility. First, the rule prohibited a member

from furthering the application for admission of another person known to be unqualified in respect to character, education, or other relevant attribute of a lawyer. Second, the rule provided an exception that permitted a member to serve as counsel of record to an applicant for admission in proceedings related to such admission.

Former rule 1-101 was amended, renumbered, and made operative effective May 27, 1989. The amendments included renaming the rule to "False Statement Regarding Admission to the State Bar." In addition to carrying forward the ABA-derived prohibition and exception identified above, current rule 1-200 was expanded to prohibit false statements on one's own application for admission. This expansion was based on the Supreme Court's inherent power to discipline a member for acts committed prior to submission. (*Stratmore v. State Bar* (1975) 14 Cal.3d 887.) The new language was derived from ABA Model Code of Professional Responsibility DR 1-101, language that had previously been rejected in the 1975 version of the rule. In addition, the 1989 amendments added a Discussion section that provides: "For purposes of Rule 1-200 'admission' includes readmission."

VI. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016 (In response to 90-day public comment circulation):**

    1. OCTC has concerns about the use of "knowingly" in this rule for the same reasons expressed regarding that term in proposed Rule 1.9, proposed Rule 3.3, 4.1, and the General Comments section of this letter. False statements made with reckless disregard, gross negligence, or willful blindness are, and should be, disciplinable. Moreover, the "knowing" requirement is inconsistent with Supreme Court's direction for applicants and would lessen the current standards required of applicants by the Supreme Court. In *In re Gossage*, the Supreme Court stated that "Whether it is caused by intentional concealment, reckless disregard for the truth, or an unreasonable refusal to perceive the need for disclosure, such an omission is itself strong evidence that the applicant lacks the 'integrity' and/or 'intellectual discernment' required to be an attorney." The Court went on to hold: "Contrary to what the majority of the Review Department found, the unusual severity and scope of Gossage's criminal record strengthened — not lessened — his obligation to ensure the accuracy of his Application even if independent research was required. . . . To excuse defective preparation of the Application under these circumstances would set a dangerous precedent — encouraging the worst criminal offenders to make the least effort in complying with the disclosure requirements on State Bar applications. In a related vein, we refuse to assume that *Gossage* or any other applicant in his position cannot reasonably be expected to discover and provide the necessary information. More rigorous intellectual tasks are often performed by attorneys in the practice of law." (*In re Gossage* (2000) 23 Cal.4th 1080, 1102-1104.)

        Commission Response: No response required.

2. OCTC is concerned that this proposed rule and Comment [1] to this rule would only prohibit a false statement of fact or law, 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.].) 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.)

   Commission Response: The Commission agrees with the commenter regarding paragraph (b) and has made the suggested change. However, the Commission does not agree that "reckless disregard" should be a standard in paragraph (c), which concerns failure to disclose, and has not made the change.

3. OCTC supports Comment [3]. OCTC takes no position as to Comment [2].

   Commission Response: No response required.

4. Comment [1] to this rule would only prohibit a false statement of fact or law, not other misleading statements. California has long held that an attorney is required certification to practice law in California or elsewhere" does not seem to follow in that there is no "provision" earlier identified in the definition and the definition lacks parallel construction, which renders it difficult to comprehend. Thus, it is not clear what type of "provision" is being referred to – a legal provision, such as a Rule or statute, or the State Bar providing something to an attorney? If the intent is to refer simply to reinstatement after disbarment or resignation or applications for a certified legal specialty, then that intention should be clearly stated to eliminate this inherent ambiguity.

   Further, on its face, it would not appear that "admission or readmission" or "reinstatement" is a type of "provision." Perhaps changing the word "provision" to "process" or removing the words "provision relating to" would provide the needed clarity. Either way, the sentence as presently constructed does not, in our opinion, clearly convey its meaning and should be clarified.

   Commission Response: The Commission previously replied to this comment and continues to believe that a prohibition on misstatements of fact or law is an appropriate

- **Gregory Dresser, Office of Chief Trial Counsel, 1/9/2017 (In response to 45-day public comment circulation):**

    1. OCTC supports the revision of paragraph (a) of this rule to include that it can be violated by an applicant making a statement in his or her application in reckless disregard for the truth or falsity of a statement, as well as knowingly. This is consistent with *In re Gossage* (2000) 23 Cal.4th 1080.

        Commission Response: No response required.

    2. The "reckless disregard" language should be in paragraphs (b) and (c). As previously discussed, gross negligence or recklessness in preparing, responding, or correcting false or misleading statements should be disciplinable.

        Commission Response: The Commission agrees with the commenter regarding paragraph (b) and has made the suggested change. However, the Commission does not agree that "reckless disregard" should be a standard in paragraph (c), which concerns failure to disclose, and has not made the change.

    3. OCTC supports Comment [3]. OCTC takes no position as to Comment [2].

        Commission Response: No response required.

    4. Comment [1] to this rule would only prohibit a false statement of fact or law, not other misleading statements. 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. Further, express and implied representations, as well as material omissions, support finding a statement misleading.

        Commission Response: The Commission previously replied to this comment and continues to believe that a prohibition on misstatements of fact or law is an appropriate limitation in an application process.

- **State Bar Court:** No comment was received from the State Bar court.

VII. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, three public comments were received. All three comments agreed only if modified. During the 45-day public comment period, two public comments were received. Both comments agreed with the proposed rule. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

1. Fiduciary Self-Dealing – Presumption of Undue Influence

California law recognizes a fiduciary's potential for exerting undue influence in transactions with a beneficiary. Under Probate Code, § 16004, the law presumes a fiduciary has used this influence to the fiduciary's advantage in all dealings with the beneficiary of the trust that "... occurs during the existence of the trust or while the trustee's influence with the beneficiary remains ...." Section 16004 applies to the lawyer-client relationship. (See *BGJ Associates, LLC v. Wilson* (2003) 113 Cal.App.4th 1217, 1227. See also, *Ramirez v. Sturdevant* (1994) 21 Cal.App.4th 904, 916.) This standard does not apply to the negotiation of the agreement creating the fiduciary relationship. (See *Seltzer v. Robinson* (1962) 57 Cal.2d 213, 217 [concluding that an attorney should not be put in the "impossible position of becoming the prospective client's attorney while he was attempting to reach an agreement with him as to whether he should become his attorney or not."].)

2. Business and Professions Code, § 6175.3 (Sale of Financial Products to an Elder, Dependent Adult, Client or Former Client)

Business and Professions Code, § 6175.3 is similar to current rule 3-300 in that it governs transactions with persons with whom the lawyer has a fiduciary relationship. It applies to a lawyer selling financial products to an elder, or dependent adult, client or former client and has similar requirements to rule 3-300 (e.g. fair and reasonable terms, requirement to advise client they may seek independent advice, client's written consent). It also includes additional heightened requirements (e.g. the written disclosure must be clear and conspicuous and meet specific formatting requirements, the lawyer must disclose the lawyer's interest in the sale), and applies for three years following the termination of the lawyer-client relationship.

In its 2001 comment, OCTC suggested language changes to rule 3-300 that tracked the requirements under § 6175.3, reasoning that the changes would simply extend protections already provided for some clients to all clients.

3. Duty to Advise Client: Seeking Independent Counsel

Current rule 3-300 requires lawyers to advise the client that the client "may seek the advice" of independent counsel regarding the transaction or acquisition. The State Bar Review Department indicated that the language of the current rule is inconsistent with California Supreme Court authority that require a lawyer to advise the client *to seek* independent advice. *Matter of Silverton II* (2004) 4 Cal. State Bar Ct. Rptr. 643, n. 16. In *Rose v. State Bar* (1989) 49 Cal.3d 646, 663 [262 Cal.Rptr. 702], where the lawyer told the client that she could consult another lawyer regarding the transaction, but did not advise her to, and implied that doing so would be unnecessary, the court stated that the lawyer, in entering such transactions with the client, was required to advise the client to seek independent counsel. In *Rodgers v. State Bar* (1989) 48 Cal.3d 300, 309

[256 Cal.Rptr. 381], where the client transferred conservatorship funds to the lawyer for investment with the lawyer's former client, who owed the lawyer money, the court stated that the lawyer was required to *encourage* the client to consult with other counsel.

4. Modification of Fee Agreements

No rule of professional conduct specifically addresses modifications to fee agreements. The Discussion to rule 3-300 states the rule is not applicable to agreements by which the lawyer is retained unless it confers an interest adverse to the client, but is silent regarding modification of the initial agreement. Since the last amendments to rule 3-300, numerous diverging interpretations of the rule's applicability to modifications of fee agreements have emerged.[1]

B. ABA Model Rule Adoptions

The ABA State Adoption Chart for Model Rule 8.1, which is the direct counterpart to rule 1-200, revised September 15, 2016, is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_8_1.authcheckdam.pdf (Last accessed on 2/7/17)

- Thirty-four jurisdictions have adopted Model Rule 8.1 verbatim;[2] fourteen jurisdictions have adopted something substantially similar to Model Rule 8.1;[3] and three jurisdictions have adopted a rule that is substantially different from Model Rule 8.1.[4]

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[1] See, Ethics Hotliner, Ethics Alert: Uncertain Ethics Requirements for Attorney Fee Modifications - Counsel Compliance with Rule 3-300 when Modifying a Fee Agreement (COPRAC 2009) found at:

http://ethics.calbar.ca.gov/Portals/9/documents/Publications/EthicsHotliner/Ethics_Hotliner-Fee_Modification_Rule_3-300-Summer_09.pdf

[2] The thirty-four jurisdictions are: Alabama, Alaska, Arizona, Arkansas, Connecticut, District of Columbia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Massachusetts, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Vermont, West Virginia, Wisconsin, and Wyoming.

[3] The fourteen jurisdictions are: Colorado, Delaware, Florida, Georgia, Louisiana, Maryland, Michigan, Missouri, New Hampshire, Ohio, Oregon, Rhode Island, Virginia, and Washington.

[4] The three jurisdictions are: California, New York, and Texas.

New York Rule 8.1 provides:

> **8.1 Candor in Admission Process**
>
> (a) A lawyer shall be subject to discipline if, in connection with the lawyer's own application for admission to the bar previously filed in this state or in any other jurisdiction, or in connection with the application of another person for admission to the bar, the lawyer knowingly:

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

A. Concepts Accepted (Pros and Cons):

1. Change title of the Current Rule

   - Pros: Conforms the title to expanded scope of the proposed rule. See Section IX.A.2, below.

   - Cons: None identified.

2. Expand the scope of the current rule to include other forms of applications related to the practice of law.

   - Pros: The policy and intended public protection of current rule 1-200 should extend to other lawyer applications related to law practice. For example, a lawyer who knowingly makes a false statement of a material fact in connection with an application to become a certified specialist commits misconduct that involves deception and demonstrates a probable intent to mislead clients and the public. False statements of material fact in all such applications pose a similar danger to the public and to the reputation of the Bar and the legal system.

   - Cons: Although there are no known cons to this proposed change, one might criticize the expansion as incomplete because it does not cover all lawyer submissions to the State Bar. Such submissions include, but are not limited to, the following: submissions concerning MCLE compliance cards, applications for registration as a law corporation or limited liability partnership, IOLTA account update forms, applications to be transferred to or from voluntary inactive status, or applications for membership fee waivers.

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(1) has made or failed to correct a false statement of material fact; or

(2) has failed to disclose a material fact requested in connection with a lawful demand for information from an admissions authority

Texas Rule 8.01 provides:

8.01 Bar Admission, Reinstatement, and Disciplinary Matters

An applicant for admission to the bar, a petitioner for reinstatement to the bar, or a lawyer in connection with a bar admission application, a petition for reinstatement, or a disciplinary matter, shall not:

(a) knowingly make a false statement of material fact; or

(b) fail to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admission, reinstatement, or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.05.

3. Expand the scope of the rule to include applications by individuals who are not members of the State Bar to appear and practice in California, such as an application by a lawyer licensed in another state for registration as a registered in-house counsel in California.

    - Pros: This change increases public protection and recognizes multijurisdictional practice ("MJP") developments that have occurred since the last comprehensive revision of the Rules. Given the reality of MJP, the current rule is too narrow in only protecting the public from conduct committed by persons seeking admission or readmission as members of the State Bar. Non-California lawyers who apply for or otherwise seek express authorization to practice law in California without becoming a member of the Bar pose the same risk of harm and should be included within the scope of this Rule. In terms of the need for oversight and public protection, there is little difference between an application submitted by a bar applicant seeking to become a member of the State Bar and an application, for example, by a non-California lawyer seeking authorization to practice as a registered in-house counsel in California.

    - Cons: The administrative costs associated with pursuing discipline against a person who is not a California lawyer and possibly a not a California resident might be higher than the costs when disciplining a member.

4. As part of the foregoing expansion of the rule, identify with some specificity what kinds of applications for admission, readmission, certification or registration are covered by the rule. (See proposed paragraph (d).)

    - Pros: The proposed paragraph adds clarity as to what conduct is prohibited and facilitates both compliance and enforcement.

    - Cons: None identified.

6. Clarify that current rule 1-200(A) prohibits false statement *by an applicant* for admission from making a statement of material fact that the applicant knows to be false. The Commission recommends revising rule 1-200(A) to include that the applicant also be prohibited from making such a statement with reckless disregard as to its truth or falsity. This addition adds clarity and is consistent with *In re Gossage* (2000) 23 Cal.4th 1080.

    - Pros: In order to clarify rule 1-200(A), the Commission included the additional prohibition recommended by the Office of Chief Trial Counsel, which is set forth in proposed Rule 8.1(a). The reckless disregard standard in proposed paragraph (a), which is omitted from proposed paragraph (b) (see below), emphasizes the breadth of an applicant's duties by adding a gross negligence standard.

    - Cons: COPRAC commented that the recommended paragraph (a) and ABA Model Rule 8.1 "both include the materiality limitation, but each applies only to statements made in connection with an application for admission to the State Bar, not applications made to a tribunal, such that the inconsistent

standard of truthfulness present in proposed Rule 8.1 is not present in either." (See proposed Rule 3.3 which addresses candor toward the tribunal.)

7. Current rule 1-200(B) is indefinite in addressing a lawyer "furthering" an application. A more tightly written and objective standard would clarify the application of the prohibition.

    - Pros: Proposed paragraph (b) clarifies that its prohibition applies to statements of material fact and not to other undefined conduct, and that it applies only to statements made in connection with an other's person's application, not the lawyer's own application. The "reckless disregard" standard of proposed paragraph (a) is not included in proposed paragraph (b) so that a lawyer aiding another person's application does not carry the same burden as the applicant. The Commission believes that many applicants solicit support from someone, such as a judge or law professor, who is not in a position to do any investigation, and it is better for the process to not discourage such persons from providing their assistance.

    - Cons: The application would be improved by imposing a duty to investigate on lawyers who support the applications of others.

8. Remove current paragraph (C), which states that the current rule does not prohibit a lawyer from representing another lawyer in an application, and replace it with guidance as to the standards that apply in the representational setting. See proposed Comment [3].

    - Pros: Current paragraph (C) is unneeded because it goes without saying that an applicant is entitled to legal representation. Proposed Comment [3] provides guidance by way of cross-references to the standards that apply in that situation.

    - Cons: None identified.

9. Add a provision establishing a duty to correct prior errors.

    - Pros: Current paragraph (A) addresses the making of a false statement, but the current rule does not require the correction of any prior misleading statements. Proposed paragraph (c) adds a duty to disclose facts necessary to correction material misapprehension.

    - Cons: None identified.

10. Add a statement reminding that a person who makes a false statement in connection with that person's own application for admission or readmission may be subject to discipline after admission. This is included in proposed Comment [1].

    - Pros: To be effective, the Rule should deter the prohibited conduct. The prospect of discipline offers a level of deterrence but additional deterrence

should be achieved by indicating that a person's law license may be subject to cancellation.

- Cons: None identified.

B. Concepts Rejected (Pros and Cons):

1. Substituting 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.

2. Including a definition of "material fact," for example: "(1) 'Material fact' as used in this rule 1-200 means a substantial likelihood that a reasonable person would consider it important in evaluating whether an applicant for admission, readmission, certification or registration by the State Bar is of requisite good moral character. (See *In the Matter of Pasyanos* (Rev. Dept. 2005) 4 Cal. State Bar Ct. Rptr. 746." This addition could be part of the rule or in a Comment paragraph.

   - Pros: Including a definition of "material fact," which is part of the standard in paragraphs (b) and (c), would provide important guidance to lawyers concerning what statements will violate the rule, thus promoting compliance with the rule.

   - Cons: Neither the Rules nor Comments should be burdened with definitions of concepts of general legal application, as opposed to words or phrases that are defined for the Rules.

3. Expanding the scope of the current rule to cover a member's submission of MCLE compliance cards.

   - Pros: Similar to the other expansions proposed to the drafting team, this change would be a substantive change that expands a lawyer's duties and enhances public protection.

   - Cons: The State Bar's recent MCLE audit activity suggests that this change is not necessary to redress deceptive submissions of MCLE compliance. See, e.g., *In the Matter of Anna Christina Yee* (Rev. Dept. 2014) 5 Cal. State Bar Ct. Rptr. 330 [2014 WL 3748590] [Gross negligence amounting to moral turpitude found in an attorney's failure to accurately report compliance MCLE requirements to the State Bar.]

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 proposed rule would be expanded to cover: (1) applications by individuals who are not members of the State Bar to appear and practice in California, such as an application by a lawyer licensed in another state for registration as a registered in-house counsel in California; and (2) member applications made to the State Bar for certification, such as a member's application for certification as a specialist. Both of these proposed expansions are substantive changes to the current rule that add new duties in the Rules.

2. The proposed rule would establish a definite distinction between the burden of accuracy and completeness imposed on a lawyer with regard to the lawyer's own application and the burden imposed on a lawyer who aids another person's application, and this can be seen as a substantive change.

3. Proposed paragraph (c) imposes a duty to disclose facts necessary to correction material misapprehension.

D. Non-Substantive Changes to the Current Rule:

1. Change of title to accurately reflect expanded scope of the proposed rule.

2. Reordering the rule to include a description of the rule's expanded scope in the first paragraph so that a reader will understand when the rule applies.

E. Alternatives Considered:

1. Retain the current rule without any changes. Retaining the current rule would promote continuity on this longstanding disciplinary standard. On the other hand, ambiguities in current rule 1-200 would be perpetuated and an opportunity to expand the scope of the rule would be lost. Retaining the current rule would also fail to address the development of MJP in California.

2. As suggested by OCTC, the Commission considered a change to the current rule's prohibition that would have included an explicit "gross negligence" standard with regard to both false statements and failures to disclose material facts. The Commission decided not to recommend this change. The Commission sees no need for a gross negligence standard with respect to the applicant because he or she will know the accuracy of information provided in any of the settings addressed by the rule; the applicant already is subject to professional discipline for providing material false information. The Commission also declined to recommend such a change for a lawyer who supports or opposes an applicant because doing so would interfere with the processing of applications by making it

more difficult for an applicant to obtain support or for the State Bar to receive important negative information about applicants. It is foreseeable that this would occur because of the additional investigatory burden placed on the second lawyer and the threat of discipline for investigating badly. Nevertheless, although the Commission declined to recommend "codification" of a gross negligence standard in the proposed amended rule, there is no intent to change existing case law that might permit OCTC to seek discipline on a gross negligence theory. (See above for the cases concerning gross negligence cited by OCTC in Section VI and the reference to *In the Matter of Anna Christina Yee* in Section IX.B.2.)

3. Regarding the proposed expansion to cover other applications besides admission or readmission, the Commission considered the alternative of simply having the disciplinary authorities rely on existing general law, such as rule 1-100(D)(2) (re applicability of rules generally to non-California lawyers), the prohibition against conduct involving moral turpitude, and the ability to seek discipline for signing a document under penalty of perjury that includes false statements of material fact. Although such an approach might be feasible, the Commission determined that a more precisely targeted rule would enhance public protection, facilitate greater lawyer awareness and improve compliance. (See Sections IX.A.2 & 3, above.)

X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 8.1 [1-200] in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 8.1 [1-200] in the form attached to this Report and Recommendation.