

Rule 8.2 Judicial Officials
(Proposed Rule Adopted by the Board on November 17, 2016)

- (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).

PROPOSED RULE OF PROFESSIONAL CONDUCT 8.2
(Current Rule 1-700)
Judicial Officials

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) evaluated current rule 1-700 (Member as Candidate for Judicial Office) in accordance with the Commission Charter, with a focus on the function of the rule as a disciplinary standard, and with the understanding that the rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. In addition, the Commission considered the national standard of ABA Model Rule 8.2 (Judicial And Legal Officials). 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 8.2 (Judicial Officials).

Rule As Issued For 90-day Public Comment

Current rule 1-700 requires that a member who is a candidate for judicial office comply with Canon 5 of the Code of Judicial Ethics. The current rule, includes a provision defining “candidate for judicial office” describing when such candidacy starts and ends (the Model rule does not). Both Model Rule 8.2 and current rule 1-700 require compliance with the applicable provision of the Code of Judicial Ethics. Model Rule 8.2 also 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. Proposed rule 8.2 tracks this aspect of Model Rule 8.2 by including a revision to paragraph (a) prohibiting lawyers from making false or reckless statements concerning the qualifications or integrity of a judge or judicial officer, or of a candidate for election or appointment to judicial office.

Paragraph (a) of proposed rule 8.2 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. The rationale for adding this provision is to enhance public confidence in the legal profession. This concept has precedent generally in a lawyer’s duty of respect to the courts and judicial officers (Bus. & Prof. Code § 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]).

Paragraph (b) of proposed rule 8.2 makes clear that a lawyer who is a candidate for judicial office shall comply with Canon 5 of the California Code of Judicial Ethics. Like current rule 1-700(B), proposed rule 8.2 defines “candidate for judicial office” and addresses the determination of when a member is a candidate for judicial office as well as sets forth the criteria for determination of when the lawyer’s judicial candidacy ends.

Paragraph (c) is a new paragraph 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. Similar to the policy and intended function of the current rule, new paragraph (c) could result in State Bar disciplinary charges for violations of the applicable provisions of the Code of Judicial Ethics.

There are two new Comments to proposed rule 8.2. Both new Comments promote lawyer compliance with obligations imposed by the rule and are revisions to the corresponding ABA Model Rule 8.2. Comment [1] recognizes the duties of lawyers to maintain respect due to the courts and judges (Bus. & Prof. Code § 6068(b)) and encourages lawyers to defend judges and courts unjustly criticized. Comment [2] in part explains that false statements by lawyers about candidates for judicial office harm confidence in the legal profession.

Post Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission deleted Comment [2] because it was deemed aspirational and unnecessary and made non-substantive stylistic edits. The Commission voted to recommend that the Board adopt the proposed rule.

COMMISSION 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

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. COMMISSION’S PROPOSED RULE (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
(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.
- (Ab) 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. 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 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.)

Commission Response: The Commission declines to make the suggested change. The prohibition is limited to false and misleading statements of fact to avoid Constitutional infirmities. Compare *Standing Committee on Discipline of the United States District Court for the Central District of California v. Yagman* (9th Cir. 1995) 55 F.3d 1430, 1438 (lawyer may freely criticize the judiciary if the criticisms are supported by a reasonable factual basis).

The Commission declines to delete the first sentence of Comment [1]. The sentence states the public policy underpinning the rule. By doing, the sentence clarifies both the scope of the rule and how it should be applied, and thus enhances compliance and facilitates enforcement.

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

Commission Response: The Commission declines to make the suggested change. The prohibition is limited to false and misleading statements of fact to avoid Constitutional infirmities. Compare *Standing Committee on Discipline of the United States District Court for the Central District of California v. Yagman* (9th Cir. 1995) 55 F.3d 1430, 1438 (lawyer may freely criticize the judiciary if the criticisms are supported by a reasonable factual basis).

The Commission declines to delete the first sentence of Comment [1]. The sentence states the public policy underpinning the rule. By doing, the sentence clarifies both the scope of the rule and how it should be applied, and thus enhances compliance and facilitates enforcement.

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

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.

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. One comment agreed with the proposed rule and two comments agreed only if modified. 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. California law related to current rule 1-700.

In a case of first impression, the State Bar Court Review Department considered violations of rule 1-700 in *In the Matter of Parish* (Review Dept. 2015) 5 Cal. State Bar Ct. Rptr. 370. The State Bar's Notice of Disciplinary Charges asserted that during the respondent lawyer's campaign for judicial election, the lawyer sent a mailer that was critical of his opponent who was a sitting judge, and the lawyer made statements about himself that inaccurately reflected his experience and endorsements.

As to the statements in the mailer, the Review Department found that the attorney violated rule 1-700 with his false statements that implicated the judge in bribery and corporate fraud. However, the Review Department held that other statements in the mailer, which were not false statements of fact but which may have created a false impression as to the judge's involvement with the commutation of a convicted murderer, did not violate rule 1-700 because the rule only reaches factual misrepresentations. Rule 1-700 and Canon 5 of the Code of Judicial Ethics "do not purport to regulate true statements that may be misleading or true statements that might imply or suggest through innuendo that voters draw false conclusions." *Id.*

As to the lawyer's statements about himself, the Review Department held that there was no violation of rule 1-700 because one statement was a reasonable representation and the other was a de minimus mistake that was promptly corrected.

B. California law related to concepts in Model Rule 8.2(a).

Business and Professions Code § 6068, subdivision (b) provides that it is the duty of an attorney "[t]o maintain the respect due to the courts of justice and judicial officers." Disciplinary case law establishes that false statements about a judge's qualifications or integrity are subject to discipline under this section. *Matter of Anderson* (1997) 3 Cal. State Bar Ct. Rptr. 775, 778 (holding a lawyer subject to discipline for making "false statements that impugn the honesty or integrity of the court if those statements either are knowingly false or are made with reckless disregard for their truth or falsity")². The

² Relying on *Standing Committee v. Yagman* (9th Cir.1995) 55 F.3d 1430, the Review Department also held that OCTC bears the burden of proving the falsity of the statements and remanded the case to determine whether OCTC met its burden.

following case law demonstrates the type of conduct that is subject to discipline under subdivision (b).

- Attorney falsely accused court clerk/ex officio judge of taking bribes. *In re Elkins* (Review Dept. 2009) 5 Cal. State Bar Ct. Rptr. 160, 167.
- Attorney's statement that the presiding judge was prejudiced against certain witnesses because of their religion was found false by a local administrative committee, whose findings were adopted by the State Bar's Board of Governors. *Hogan v. State Bar* (1951) 36 Cal.2d 807, 808-809.
- In an effort to disqualify a judge, attorney made a knowingly false statement that the judge had sent her client home prior to entering an adverse *ex parte* order. *Lebbos v. State Bar* (1991) 53 Cal.3d 37, 42.

C. 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, revised December 12, 2016, is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_8_2.authcheckdam.pdf (Last accessed on 2/7/17)
- Thirty-two jurisdictions have adopted Model Rule 8.2 verbatim.³ Fourteen jurisdictions have adopted a slightly modified version of Model Rule 8.2.⁴ Four jurisdictions either have no comparable rule, or have adopted a version of the rule that is substantially different from Model Rule 8.2.⁵

³ 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.

⁴ The fourteen jurisdictions are: Alabama, Alaska, Colorado, Florida, Maryland, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Tennessee, Texas, and Washington.

⁵ The four jurisdictions are: District of Columbia, Georgia, Massachusetts, and Virginia.

**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 § 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.
 - 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 § 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. However, 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:

None.

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 amended Rule 8.2 [1-700] in the form attached to this Report and Recommendation.