**RRC2 – Rule 1-200 [8.1]**
**E-mails, etc. – Revised (5/26/15)**
**Drafting Team: Clinch (Lead), Kehr & Peters**

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# Intra-Commission Emails Following Agenda Mailing:

**May 19, 2015 Rothschild Email to Drafting Team, cc Difuntorum & Mohr:**

I have a question regarding rule 1-200. In Discussion paragraph [2], there is a reference to the Fifth Amendment of the US Constitution and "corresponding provisions of applicable state constitutions". Under what circumstances would the provisions of the Arkansas (or any other state) constitution apply? I know that is the language in Comment 2 of Rule 8.1, but I wonder if it really means anything, or if it should just refer to the California constitution?

**May 19, 2015 Difuntorum Email to Rothschild, cc Drafting Team & Mohr:**

Some states use the Model Rule language that refers to "corresponding provisions of state constitutions," see Arkansas Rule 8.1:
https://courts.arkansas.gov/rules-and-administrative-orders/court-rules/rule-81-bar-admission-and-disciplinary-matters

Other states substitute a specific reference as Massachusetts does in its Rule 8.1 (substituting "Article 12 of the Massachusetts Declaration of Rights" for the Model Rule language):
http://www.mass.gov/obcbbo/rpc8.htm

In the State Bar Act, Bus. & Prof. Code sec. 6068(i), there is an analogous reference to an attorney's privilege against self-incrimination and the following language is used that does not specify the California constitution. The reference is to the U.S. Constitution and "any other constitutional or statutory privileges."

> It is the duty of an attorney to do all of the following:
>
> * * * * *
>
> (i) To cooperate and participate in any disciplinary investigation or other regulatory or disciplinary proceeding pending against himself or herself. However, this subdivision shall not be construed to deprive an attorney of any privilege guaranteed by the Fifth Amendment to the Constitution of the United States, or any other constitutional or statutory privileges. This subdivision shall not be construed to require an attorney to cooperate with a request that requires him or her to waive any constitutional or statutory privilege or to comply with a request for information or other matters within an unreasonable period of time in light of the time constraints of the attorney's practice. Any exercise by an attorney of any constitutional or statutory privilege shall not be used against the attorney in a regulatory or disciplinary proceeding against him or her.

Hope this helps.

**May 19, 2015 Rothschild Email to Difuntorum, cc Drafting Team & Mohr:**

Thanks, Randy. It is interesting that I picked Arkansas at random. I think 6068 (i) is not necessarily referring to other states, but to other constitutional or statutory privileges other than self-incrimination. While it doesn't specify California, I think it can be read that way. And I still

wonder under what circumstances some other state's self-incrimination would apply to a California application for admission,etc.

**May 19, 2015 Kehr Email to Rothschild, cc Drafting Team, Difuntorum & Mohr:**

It is tempting to think that the ABA's use of "corresponding provisions of state constitutions" is due to its potentially nation-wide application, and that Massachusetts caught this in writing its Rules so as to specify its own constitution. But it is imaginable that a CA lawyer would want to rely on another state's constitutional protections. Here is my example: One Toby Rothschild, an innocent CA lawyer, invests in an Arkansas development project known as White Water ….

I think the generalized language of proposed Comment [2] works.

**May 21, 2015 Ham Email to Drafting Team, cc Difuntorum, Mohr, Lee & McCurdy:**

Proposed Rule 1-200(E) states: "Other laws or rules govern the responsibility of a lawyer representing such applicant."

What does that mean? I am not aware of any unique or special rules that govern the "responsibility of a lawyer" representing an applicant, other than universal rules that govern all lawyer conduct, such as rules of procedure and rules of practice implemented by the tribunal. However, that doesn't need to be said in this rule, as it is a concept that is universal to all lawyer representation of clients. I am concerned about the sentence because it is vague and somewhat vacuous. I am not sure what purpose it serves.

The subcommittee should consider either deleting this sentence as unnecessary to the purpose and function of the rule, or provide clarification as to what, exactly, is being referenced.

**May 21, 2015 Kehr Email to Ham, cc Drafting Team, Difuntorum, Mohr, Lee & McCurdy:**

I hope your concern is answered by the balance of the proposed Comment: "Other laws or rules govern the responsibilities of a lawyer representing an applicant for admission. See, e.g., Business and Professions Code sections 6068(c), (d) & (e); Rule 3.3 [*i.e.* current rule 5-200]." See you next week.

**May 21, 2015 Ham Email to Kehr, cc Drafting Team, Difuntorum, Mohr, Lee & McCurdy:**

I will look at this, but it seems entirely gratuitous. Every lawyer must abide by those same rules in representing any client. Why the need to single out lawyers representing applicants? It does not seem like a needed "exception".

**May 21, 2015 Ham Email to Kehr, cc Drafting Team, Difuntorum, Mohr, Lee & McCurdy:**

I have confirmed my initial thoughts. The B & P sections referenced in the comment of course apply to all lawyers representing all clients. I see no purpose in the language of the proposed rule other than to imply that applicants who appear before the moral character committee are inherently suspect and any lawyer representing them needs to exercise special care. This is not appropriate.

If anyone can offer a logical rationale for including this language because it serves some purpose needed for applicant attorneys that is otherwise not needed for lawyers generally, I am all ears.

These rules are really poorly written. Perhaps this is an opportunity to clean up at least some of the confusing and poorly reasoned underbrush.

**May 22, 2015 Kehr Email to Ham, cc Drafting Team, Difuntorum, Mohr, Lee & McCurdy:**

It seems clear to me that the purpose of the Comment is to assure lawyers who appear as advocates in Bar matters that they are not held to a different standard because of rule 1-200 than are all advocates in all other proceedings. This is not a gratuitous insult to Bar defense lawyers but protection for them.

**May 22, 2015 Ham Email to Kehr, cc Drafting Team, Difuntorum, Mohr, Lee & McCurdy:**

I understand your point about the interplay between 1-200(A) and 1-200(B) of the existing rule, and how you reach that conclusion as to subsection (C). I suppose the problem actually lies in the ambiguity caused by an unclear definition of aiding and abetting an unqualified member's admission to the bar. In practice, and I am not aware of any lawyers who have been disciplined for that violation, although there might have been one or two in the past many decades, but it would be very difficult to prove.

We can leave it be if you think that it is a necessary clarification in light the aiding and abetting proscription contained in the rule.

**May 22, 2015 Cardona Email to Drafting Team, cc Difuntorum & Mohr:**

I have a couple of comments/questions regarding the proposed rule:

1. For subsection (C), it appears that the requirement that a member not "knowingly fail to disclose a material fact" "in connection with another person's application" could be read as imposing an affirmative obligation on any member who is aware of an application to disclose material facts relating to that application, even if they are not otherwise taking any action relating to the application, that is, even if they are not doing anything to support or oppose the application, and even if they are not aware of any misstatement in the application (correction of misstatements of which they become aware being a separate obligation covered by subsection D). Is this intended? It seems to me that the affirmative obligation to disclose known material facts even when unaware of any misstatement in an application should apply only if the member is somehow involved in the application (whether in supporting or opposing it).

2. ABA Model Rule 8.1(b) provides an exception for confidential information protected by Rule 1.6 to the only duty it imposes to affirmatively disclose facts. Subsection (D) of the proposed rule provides a similar exception (for confidential information protected by Rule 3-100) to the duty it imposes to affirmatively disclose facts necessary to correct a statement known to have create a material misapprehension. Both sections (B) and (C) of the proposed rule also impose affirmative duties to disclose material facts. Should the exception for confidential information apply to these sections as well?