

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-700 [8.2]

Lead Drafter: Stout
Co-Drafters: Chou, Clopton
Meeting Date: October 23, 2015

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. DRAFTING TEAM’S RECOMMENDATION AND VOTE

There was consensus among the drafting team members to recommend a proposed amended rule 1-700 (8.2) as set forth below in Section III. The vote was unanimous in favor of making the recommendation.

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

Rule 8.2 Judicial and Legal 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, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal 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

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end when the lawyer advises the appointing authority of the withdrawal of the lawyer's application.

COMMENT

[1] Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney general, prosecuting attorney and public defender. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

[2] Nothing in this Rule shall be deemed to limit the applicability of any other rule or law.

[3] [To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to 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 section 6068(b).

IV. PROPOSED RULE 8.3 (REDLINE TO CURRENT CALIFORNIA RULE 1-700)

Rule ~~1-700~~8.2 ~~Member as Candidate for~~ **Judicial Office** and Legal 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, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal 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, "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.

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DiscussionCOMMENT

[1] Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney general, prosecuting attorney and public defender. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

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

[3] [To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to 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 section 6068(b).

V. PUBLIC COMMENTS SUMMARY

- None.

VI. OCTC / STATE BAR COURT COMMENTS

- **JAYNE KIM, OCTC, 9/29/2015:**
 1. Rule 1-700 incorporates and applies Canon 5 of the Code of Judicial Ethics to members who are candidates for judicial office. The rule does not alter the canon.
 2. OCTC does not recommend any revisions to the rule. However, it notes that in *In the Matter of Parish* (Review Dept. 2015) 5 Cal. State Bar Ct. Rptr. 370, the Review Department held that statements that are literally true but otherwise misleading are not disciplinable under rule 1-700. Members can only be disciplined under that rule for making statements that are literally false. Therefore, statements that are misleading but literally true may have to be prosecuted under Business and Professions Code section 6106.
- **RUSSELL WEINER, OCTC, 6/15/2010:**

OCTC supports this rule. However, Comment 1 is more appropriate for treatises, law review articles, and ethics opinions. Comment 2 states that nothing in this rule shall be deemed to limit the applicability of any other rule or law. It should not be a comment, but part of the rule. OCTC thanks the Commission for its change of Comment 3 [clarifying the reference in the Comment to a lawyer's duty under Business and Professions Code § 6068(b)].
- **State Bar Court:** No comments received from State Bar Court.

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VII. COMPARISON OF PROPOSED RULE TO APPROACHES IN OTHER JURISDICTIONS (NATIONAL BACKDROP)

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
- Thirty-two jurisdictions have adopted Model Rule 8.2 verbatim.¹ Fourteen jurisdictions have adopted a slightly modified version of Model Rule 8.2.² Four jurisdictions either have no comparable rule, or have adopted a version of the rule that is substantially different from Model Rule 8.2.³

VIII. 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.

¹ 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.

² The fourteen jurisdictions are: Alabama, Alaska, Colorado, Florida, Maryland, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Tennessee, Texas, and Washington.

³ The four jurisdictions are: District of Columbia, Georgia, Massachusetts, and Virginia.

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- 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.
 - 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 new comments [1] and [3] derived from counterpart comments to Model Rule 8.2
 - Pros: Comment [1] is analogous to the purpose statement in the Judicial Advisory Committee Commentary to Canon 5B. In part, it clarifies that false statements by lawyers about candidates for judicial office harm confidence in the legal profession. Comment [3], in part, recognizes the cross-over regulation with the duty of an attorney, in general, to maintain the respect due to courts and judges. Both new comments promote lawyer compliance with obligations imposed by the rule. Nevertheless, the drafting team requests that the Commission consider the first sentence of Comment [3] as an open issue. The drafting team has included it because it states an important policy underlying the Rule and thus should provide helpful guidance in interpreting and applying the Rule. (See Section IX.1, Open Issues, below.)
 - Cons: These comments might be criticized as unnecessary for the application of the rule.

B. Concepts Rejected (Pros and Cons):

1. Delete the current Discussion paragraph to existing rule 1-700 that states the rule does not limit the applicability of other law
 - Pros: The drafting team was not aware of any problems caused by the existing discussion.
 - Cons: If the drafting team was working with a "clean slate," this Discussion paragraph arguably does not qualify as a necessary comment under the Commission's charter.

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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.

IX. OPEN ISSUES/CONCEPTS FOR THE COMMISSION TO CONSIDER

1. The drafting team has included the first sentence of Comment [3] but submits it to the Commission for further consideration. Although arguably aspirational, the drafting team has included it because it states an important policy underlying the Rule and thus should provide helpful guidance in interpreting and applying the Rule. (See VIII.A.4, above.)

X. COMMENTS FROM DRAFTING TEAM MEMBERS OR OTHER COMMISSION MEMBERS

Stout

- [Date]: Email Comment

Chou

- [Date]: Email Comment

Clopton

- [Date]: Email Comment

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XI. RECOMMENDATION AND PROPOSED COMMISSION RESOLUTION

Recommendation:

That the Commission recommend that the Board of Trustees of the State Bar of California adopt proposed amended Rule 1-700 [8.2] in the form attached to this report and recommendation.

Proposed Resolution:

RESOLVED: That the Commission for the Revision of the Rules of Professional Conduct recommends that the Board of Trustees adopt proposed amended Rule 1-700 [8.2] in the form attached to this Report and Recommendation.

XII. DISSENTING POSITION(S)

None.

XIII. FINAL COMMISSION VOTE/ACTION

Date of Vote:

Action:

Vote: X (yes) – X (no) – X (abstain)



THE STATE BAR OF CALIFORNIA

Date: September 29, 2015

To: Justice Lee Edmon, Chair, and the Members of the Commission for the Revision of the Rules of Professional Conduct

From: Jayne Kim, Chief Trial Counsel, Office of Chief Trial Counsel

Subject: OCTC's comment on the Rules of Professional Conduct for October 2015 meeting

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- C. Points for Consideration, as calendared
 - A. Rule 1-100(D): Geographic Scope of Rules and Model Rule 8.5
 - B. Rule 1-500: Agreements Restricting a Member's Practice
 - C. Model Rules 6.1, 6.2, 6.3, 6.4, and 6.5 [Public Service]
 - D. Rule 1-700: Member as Candidate for Judicial Office
 - E. Rule 1-710: Member as Temporary Judge, Referee, or Court-Appointed Arbitrator
- D. Closing Comment

I.

OPENING COMMENT

The following comments address the rules to be considered at the Commission's October 2015 meeting. As requested by the Commission, OCTC will submit additional comments on the rules as the revision process progresses.

II.
POINTS FOR CONSIDERATION

[TEXT OMITTED]

D. Rule 1-700: Member as Candidate for Judicial Office

1. Rule 1-700 incorporates and applies Canon 5 of the Code of Judicial Ethics to members who are candidates for judicial office. The rule does not alter the canon.
2. OCTC does not recommend any revisions to the rule. However, it notes that in *In the Matter of Parish* (Review Dept. 2015) 5 Cal. State Bar Ct. Rptr. 370, the Review Department held that statements that are literally true but otherwise misleading are not disciplinable under rule 1-700. Members can only be disciplined under that rule for making statements that are literally false. Therefore, statements that are misleading but literally true may have to be prosecuted under Business and Professions Code section 6106.

[TEXT OMITTED]

III.
CLOSING COMMENT

OCTC appreciates the opportunity to participate in the Commission's evaluation of the Rules of Professional Conduct and remains available to assist as requested.

CURRENT CALIFORNIA RULE 1-700
“Member as Candidate for Judicial Office”

I. Text of Current Rule:

- (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. Background/Purpose:

A. 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.

B. The first Commission's Proposed Rule

The first Commission's proposed rule 8.2 followed the organization of ABA Model Rule 8.2, while carrying forward the provisions contained in current rule 1-700 (the content of Model Rule 8.2(b) and current rule 1-700(A) overlap.) In addition to retaining current rule 1-700, proposed rule 8.2 added the model rule provision prohibiting a lawyer from making false statements of fact concerning a judge or candidate for judicial or legal office (Model Rule 8.2(a)), and added a new provision that expressly prohibited a lawyer who was seeking appointment to judicial office from making statements that commit the lawyer with respect to issues that may come before the courts, or from making misrepresentations of fact concerning the lawyer (RRC1 proposed Rule 8.2(c)).¹

III. Input from the State Bar Office of the Chief Trial Counsel (OCTC):

A. 2015 Comment

In a _____, 2015 memorandum to the Commission, OCTC provided the following comment regarding rule 1-700:

(Note: OCTC is expected to provide new comments on this rule. These comments will be distributed to the drafting team when they are received from OCTC.)

B. 2010 Comment

¹ RRC1 Proposed Rule 8.2 provided:

Rule 8.2 Judicial and Legal Officers

(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, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal 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.

(c) A lawyer who seeks appointment to judicial office shall not make statements to the appointing authority that commit the lawyer with respect to cases, controversies, or issues that could come before the courts, or knowingly, or with reckless disregard for the truth, misrepresent the identity, qualifications, present position, or any other fact concerning the lawyer. A lawyer commences to become 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.

(d) 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.

In a June 15, 2010 memorandum to the first Commission, OCTC provided the following comment on proposed rule 8.2:

OCTC supports this rule. However, Comment 1 is more appropriate for treatises, law review articles, and ethics opinions. Comment 2 states that nothing in this rule shall be deemed to limit the applicability of any other rule or law. It should not be a comment, but part of the rule. OCTC thanks the Commission for its change of Comment 3 [clarifying the reference in the Comment to a lawyer's duty under Business and Professions Code § 6068(b)].

C. 2001 Comment

None.

IV. Initial Public Comments Received:

At its April 24, 2015 meeting, the Board of Trustees Regulation and Discipline Committee authorized a 45-day public comment period to seek general input on possible amendments to the Rules of Professional Conduct that ought to be considered by the Commission. The Commission did not receive any public comments specific to rule 1-700.

V. Potential Deficiencies in the Current Rule:

A. See above input from OCTC. As noted, in 2010, OCTC supported the first Commission's proposed blackletter but took issue with two of the comments to the rule.

B. The current rule is not applicable to lawyers seeking an appointment to judicial office. While Canon 5B is applicable to applicants seeking appointment to judicial office, the current rule expressly applies only to candidates by election.

C. The current rule does not prohibit 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.

D. The current rule does not prohibit a lawyer who is seeking appointment to judicial office from misrepresenting facts concerning the lawyer, nor from making statements committing the lawyer to a position regarding cases, controversies or issues that could come before the courts. (See paragraph (B) above.)

VI. California Context:

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 section 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 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.

VII. Approach In Other Jurisdictions (National Backdrop):

A. ABA Model Rule 8.2.

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.

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.

- B. The ABA State Adoption Chart, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 8.2: Judicial and Legal Officials,” revised August 10, 2015, is available at:

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

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

VIII. Public Comment Received by the First Commission:

The first Commission received comments on proposed rule 8.2 during two separate public comment periods. Following publication of an initial draft of proposed rule 8.2, the Commission received seven public comments. The synopsis of the public comments received by the first Commission on on the initial draft of proposed rule 8.2 and the full text of those comments are enclosed with this assignment. The first Commission made several modifications to the proposed rule based on the comments received.

During the second public comment period, the Commission received additional public comment on the revised draft of proposed rule 8.2. The clean text of proposed rule 8.2 drafted by the first Commission and adopted by the Board to replace rule 1-700 is enclosed with this assignment, together with the synopsis of public comments received on that proposed rule and the full text of those comments. Although the proposed rule differs from current rule 1-700, the drafting team might consider to what extent, if any,

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.

the public comments received on the proposed rule provide helpful information in analyzing the current rule.

To facilitate the review and to appreciate the relevance of these public comments, a redline comparison of the first Commission's proposed rule showing changes to rule 1-700 is also enclosed with the public comments received. However, given the Board's charge to engage in a comprehensive review of the current rules and to retain the historical nature of the California Rules as "a clear and enforceable articulation of disciplinary standards," a drafting team that considers amendments developed by the first Commission should not presume that the approach taken by the first Commission was appropriate to achieve those objectives.

IX. Potential Issues Identified by Professional Competence Staff Following Review of the Proposed Rule Developed by the First Commission and Adopted by the Board:

Bearing in mind the Commission's Charter to engage in a comprehensive review of the current rules and to retain the historical nature of the California Rules as "a clear and enforceable articulation of disciplinary standards," Professional Competence staff identified the following rule amendment issues (in no particular order) that the drafting team might consider. The drafting team need not address any of the issues. For example, if after critically evaluating an issue addressed by a revision made by the first Commission, the drafting team determines that the revision does not address an actual (as opposed to theoretical) public protection deficiency in the current rule, then the drafting team should hesitate to recommend a change to the current rule despite the prior decision by the first Commission and the Board to address the issue. (Note: For the sake of completeness and ease of reference, some of the issues listed below may have already been mentioned in connection with other information provided above, such as in connection with the approaches taken in other jurisdictions or prior public comment. Multiple mentions of an issue do not necessarily warrant the drafting team taking action on an issue.)

1. Whether the rule should be amended to expressly prohibit lawyers from making false statements 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, legal officer or candidate for election or appointment. (Cf. MR 8.2(a); RRC1 proposed Rule 8.2(a).)
2. Whether the rule should be amended to add a provision lawyers seeking appointment to judicial office that are analogous to the provision applicable to both candidates for judicial office by election. (Cf. RRC1 proposed Rule 8.2(c), which imposes duties on applicants analogous to those that apply to candidates in proposed Rule 8.2(b).)
3. Whether the rule should be amended to clarify that a lawyer commences to become an applicant seeking judicial office by appointment at the time of first submission of an application or personal data questionnaire to the appointing

authority and that the duty to comply with the rule ends when the lawyer advises the appointing authority of the withdrawal of the lawyer's application. (Cf. RRC1 proposed Rule 8.2(c).) Such a provision would be analogous to the relevant part current rule 1-700(B) that is applicable to candidates for judicial office.

X. *Research Resources:*

- *In the Matter of Parish* (Review Dept. 2015) 5 Cal. State Bar Ct. Rptr. 370
- Business and Professions Code section 6068, subdivision (b)