RRC2 – Rule 1-700 [8.2]
Post-Agenda E-mails, etc. – Revised (November 9, 2015)
Stout (Lead), Chou, Clopton

Table of Contents

October 7, 2015 Stout Email to Drafting Team, cc Difuntorum, Mohr, Andresen, McCurdy & Lee:

I'm sorry I didn't catch this earlier, but I think we may have a typo regarding the open issue in the comments. I believe the open issue that Danny flagged in his email of October 3, 2015 7:40 p.m. pertained to the first sentence in comment [3] not comment [1]. If so, we may need to make a correction in the Drafting Team Report and Recommendation on page 5, Section VIII. A.4 (line 4 from the bottom of the "Pros" section), and page 6, Section IX 1. (first line), changing Comment [1] to Comment [3].

If it's too late, we can be sure to note the correction at the meeting.

October 8, 2015 Mohr Email to Drafting Team, cc Difuntorum, Mohr, Andresen, McCurdy & Lee:

I'm working my way through today's emails. I apologize for the glitch. The statements made are accurate except that we need to substitute "[3]" for "[1]" in the various places. I bracketed the first sentence of comment [3] in the Report (to indicate that it is an open issue] but wrote "[1]" instead of "[3]" in the places identified below. I made the required changes in the attached report draft and highlighted them in yellow. (See pp. 5 and 6 of attached.) I think we can timely post the corrected version next week when the staff returns from the Annual Meeting. Thanks,

Attached:
RRC2 - [1-700][8.2] - Report & Recommendation - DFT1.5 (10-08-15)-CA-ML-RD-KEM.docx

October 9, 2015 Stout Email to Drafting Team, cc Difuntorum, Mohr, Andresen, McCurdy & Lee:

Thanks Kevin. I noticed the brackets and think everyone will understand, but if staff has time to make the slight changes that's great. I don't know know how you track everything so well. Amazing work.

October 10, 2015 Martinez Email to Drafting Team, cc Difuntorum & Mohr:

1. Paragraph (a) encompasses false statements etc., about the qualifications of a "public legal officer." The phrase "public legal officer" is not defined and therefore can include any public official (e.g. the president of the U.S.). The only definition I could find is in Gov. Code § 75030.5 which states that "public legal officer" means the "holder of any legal office of the state or any agency of the state or of any county or city in the state who is paid a salary or other fixed regular compensation and who is admitted and licensed to practice law in the State of California during the time of holding the office and whose principal duties in the office are legal in nature, such as the Attorney General, Legislative Counsel, Commissioner of Corporations, a district attorney, county counsel, city attorney, city prosecutor, public defender, or a deputy of any such office, or a secretary to the Governor whose duties include the hearing of extradition matters, admitted and licensed to practice law in the State of California during the time of holding the office and whose principal duties in the office are legal in nature."

   I realize the ABA rule uses this phrase, but this only illustrates the dangers in adopting the ABA rules hook line and sinker. I suggest we delete this phrase, as well as "or legal" at the end of paragraph (a).

2. Do we really want to incorporate all of Canon 5—see, e.g, requirement to complete a judicial campaign ethics course approved by the Supreme Court. The Canon is designed to apply to judges and I'm not sure that wholesale incorporation is a good idea.

3. I wonder if paragraph (c) really adds anything since applications for judicial appointment are confidential. To prove a violation, for example, the State Bar or JNE would have to breach the confidentiality of the process. See Govt Code 12011.5(c) ["State Bar shall use appropriate confidential procedures to evaluate and determine the qualifications of each candidate …."]. The rule would send the message that the process is not really so confidential after all.

October 11, 2015 Stout Email to Martinez, cc Drafting Team, Difuntorum & Mohr:

Raul, thank you for your thoughtful review and comments on proposed Rule 8.2

1. Perhaps we could specifically provide that "public legal officer" is defined as provided in Gov. Code section 75030.5, and amend the end of subdivision (a) to provide "….or appointment to judicial office or a position as a "public legal officer." Would that satisfy your concern and otherwise be adequately inclusive?

2. I may be in error, but I believe that by its terms, all of the provisions of Canon 5 of the Code of Judicial Ethics apply not only to judges, but also to "candidates for judicial office." The "Terminology" section of the Code of Judicial Ethics provides in pertinent part that a "candidate for judicial office is a person seeking election to or retention of judicial office…." (emphasis added) The language of the first sentence of our proposed Rule 8.2 (b) is identical to the current Rule 1-700 (A) with the change from member to lawyer.

3. Even though a violation of a rule may be difficult or impossible to prove in any given case, I don't believe that's necessarily a reason to eliminate or exclude the rule. The provisions of Canon 5 B can be violated by statements to the public (electorate), as well as to the "appointing authority. " I assume the "appointing authority" within the meaning of Canon 5 B is the Governor of California. (I would note that your concerns regarding the confidential process of the State Bar/JNE may also apply to applications submitted to the Governor….I'd need to conduct further research on the confidentiality of the Governor's process.) In any event, while I appreciate the concern that we don't undermine anyone's confidence in the confidentiality of applicable processes, on balance, I believe the need for the State Bar to be able to discipline lawyers who violate the provisions of Canon 5 B is more important.

I invite others to join the discussion.

October 11, 2015 Martinez Email to Stout, cc Drafting Team, Difuntorum & Mohr:

Thanks. A few further thoughts on these issues:

1. I would still delete the reference to "public legal officer." The rule is really designed to address false statements about judicial officers. The term "public legal officer" covers a host of public officials who are not judges such as city attorneys, attorney generals etc. The Rule would chill political speech and raise first amendment problems. Also, the rule raises equal protection problems since it would apply only to lawyers; a non-lawyer could make false and disparaging remarks about a legal office but a lawyer could not. We would also be transporting section 75030.5 into a context for which it was never intended. Section 75030.5 applies to retirement benefits.

2. Yes, it looks like Canon 5 applies to judges and "candidates for judicial office." If so, why do we need a rule if the Code covers the same territory? Does CJA have jurisdiction over lawyers who are candidates for judicial office? The Code defines "Candidate for judicial office" as "a person seeking election to or retention of a judicial office." However, it's unclear if this applies to lawyer-candidates, as well as judges, judges pro tem, reference judges, commissioners, temporary judges, retired judges or others who are subject to the jurisdiction of the Code. (Canon 6 lists what persons are subject to the Code.) Hence the question is whether "candidates for judicial office" encompasses only judges, judges pro tem, reference judges, commissioners, temporary judges, and retired judges, as defined in Canon 6 who are running for office.

3. As for the appointment process, I'm not sure of the Governor's obligation of confidentiality either. However, I am not aware that Personal Data Questionnaires are ever made public by the Governor.

October 12, 2015 Stout Email to Martinez, cc Drafting Team, Difuntorum & Mohr:

Regarding 2. Perhaps I'm mistaken, but I believe the underlying reason for 1-700 is that the Commission on Judicial Performance does not have jurisdiction over lawyers, even "candidates for judicial office."

October 12, 2015 Mohr Email to Drafting Team, cc Difuntorum & Andresen:

That is correct. The Rule History in the Rule Assignment Memo discusses this point:

> 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.

October 12, 2015 Chou Email to Martinez, cc Drafting Team, Difuntorum & Mohr:

Thanks for the thoughtful comments, Raul. Here is my take:

1. I would lean toward keeping "public legal officer" in the rule and adopting the definition of Government Code 75035.5. I think the same concerns that animate this rule with respect to candidates for judicial office apply equally to candidates for public legal office. In both

instances, the statements of lawyers as to qualifications or integrity carry extra weight because of their specialized legal knowledge and expertise. I also do not believe that the constitutional concerns are significant. The rule expressly imposes an actual malice standard per NYT v. Sullivan and is limited to statements that are actually false (and not simply misleading) -- which should eliminate any first amendment concerns. The equal protection issues also do not seem problematic to me. Lawyers are not a protected class so there would be rational basis review. I also do not believe that the rule implicates a fundamental right (once you eliminate the First Amendment concern) – which would again support rational basis review. And I think this rule would easily satisfy the lowest level of constitutional review. In any event, I do not see why these constitutional concerns would be any different for candidates for judicial office and candidates for other public offices that require a legal background and the performance of legal work. Given that 32 jurisdictions have adopted this language verbatim and presumably without a successful constitutional challenge (Kevin – can you confirm?), any constitutional concerns should not affect the decision to adopt subdivision (a). (I do not believe that California's free speech has never been interpreted to provide greater protection than the US Constitution with respect to public figures. I also believe that California's equal protection clause is unlikely to be interpreted differently than the EPC in the US Constitution in this situation.)

If we adopt the definition of Government Code 75035.5, I would suggest adding after the phrase "public legal officer" in subdivision (a), the phrase "as defined in Government Code section 75035.5."

2. I agree with Judge Stout and Kevin. The lack of jurisdiction over failed judicial candidates justified the inclusion of the original rule and supports the inclusion of subdivision (b).

3. Given that Canon 5B(1) of the Code of Judicial Ethics now expressly applies to applicants for appointment to judicial office, I think the reasoning for the original rule 1-700 as well as the continued inclusion of subdivision (b) applies equally to applicants for appointment. Because CJP has no jurisdiction over failed applicants for appointments, subdivision (c) is necessary to provide some form of potential disciplinary action for those failed applicants. I agree that it would be helpful to better understand the Governor's obligations with respect to PDQs (can the Governor's Office refer an issue in the PDQs to the State Bar if it believes that there is an egregious violation of 5B(1)?) but, like Judge Stout, I believe that there are other statements that could be covered that would not be confidential even if the PDQs can never be the basis for discipline under 5B(1). In any event, I assume that PDQs are not so protected that they could not form the basis for CJP sanctions of a sitting judge who violated Canon 5B(1). If that is the case, then I do not understand how the PDQs could not form the basis for discipline under proposed subdivision (c). Randy – I assume that JNE or somebody at the State Bar has some understanding of the protections accorded PDQs and can provide some clarifications – particularly with respect to whether a PDQ could form the basis for discipline of a sitting judge for violating Canon 5B(1).

October 12, 2015 Martinez Email to Drafting Team, cc Difuntorum & Mohr:

Kevin, do you know why Rule 1-700 was not drafted to apply to lawyers seeking judicial appointments or why the Court did not ask that the Rule include lawyers seeking judicial appointment?

Also, if paragraph (c) of the proposed draft is retained, I suggest it be collapsed into (b). It would read something like:

> (b) A lawyer who is a candidate for judicial office in California <u>or who seeks appointment to judicial office</u> 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. …

In this regard, are the last two sentences of (b), which describe when a lawyer becomes an applicant and when the duty ends, really necessary? Do those sentences derive from the Code of Judicial Conduct? If not, why single out lawyers, not judges in defining when the obligations begin and end? In other words, there should be some symmetry between the Code and our Rules where possible.

October 12, 2015 Mohr Email to Martinez, cc Drafting Team, Difuntorum & Andresen:

The answer to your question, below [why didn't original 1-700 include applicants], is that Canon 5 did not apply to applicants for judicial office until the comprehensive amendments to the Code of Judicial Ethics became operative on January 1, 2013. In 1996 when the S.Ct. asked the State Bar to recommend a rule applying to candidates for judicial office, there were no basis in for finding a violation by an applicant might have occurred. Granted, the Court could have requested that the rule state that lawyer applicants for judicial office also be subject to Canon 5 even if not expressly regulated under the Canon, but given the apparent focus of Canon 5 on campaigns for judicial office (see attachment, where you can see the previous version of Canon 5 was on the campaigns of candidates), applicants were probably not viewed as part of the problem.

I've attached a redline of Canon 5, as amended, effective 1/1/2013, so you can see that the focus of the old Canon appeared to on the public campaigning of the candidates, something that applicants would generally not do (though perhaps there would be some behind-the-scenes campaigning).

Attached:
RRC2 - 1-700 [8.2] - Cal. Code of Judicial Ethics, Canon 5 - REV (01-01-13)-REDLINE.pdf

October 12, 2015 Stout Email to Drafting Team, cc Martinez, Difuntorum & Mohr:

Thanks. I concur.

October 12, 2015 Clopton Email to Drafting Team, cc Martinez, Difuntorum & Mohr:

Thank you Danny, indeed lawyers are not a protected class, but in fact the "protectors".

I agree with the analysis and the inclusion of "public legal officer."

October 12, 2015 Chou Email to Martinez, cc Drafting Team, Difuntorum, Mohr & Andresen:

My understanding (Kevin – please correct me if I'm wrong) that the recent revision of the Code of Judicial Ethics makes it clear that Canon 5(B)(1) applies to applicants for appointment while the previous version was limited to candidates. As a result, rule 1-700 only applied to candidates for judicial election because the old Canon 5 only applied to candidates.

We did not collapse (b) and (c) because only Canon 5(B)(1) applies to applicants for appointment, and we were concerned about any confusion that might be created in a rule suggesting that Canon 5 in its entirety could apply to applicants for appointment with respect to lawyer discipline. We therefore decided to separate (b) and (c) to highlight that there are

different obligations imposed on candidates for judicial election and applicants for judicial appointment.

Finally, we thought it would be helpful to tell people when they will fall within subdivision (c). In this respect, it would provide symmetry with previous Rule 1-700 and current subdivision (b) – which provides similar guidance for candidates for judicial election.

October 12, 2015 Stout Email to Martinez, cc Drafting Team, Difuntorum, Mohr & Andresen:

My understanding as well.

October 12, 2015 Stout Email to Clopton, cc Drafting Team, Martinez, Difuntorum & Mohr:

Judge Clopton,
Well stated.

October 12, 2015 Martinez Email to Drafting Team, cc Difuntorum & Mohr:

I think it's a mistake to include "public legal officers" in the Rule. Consider the implications:

First, equal protection. The rule would apply to lawyers but not to non lawyers. A nonlawyer would not be constrained by this rule. The nonlawyer could make a provably false assertion of fact (e.g., that Obama is a Muslim or that Planned Parenthood sells fetuses for profit) and get away with it, but a lawyer could be disciplined for the same statement.

Second, overbreadth. The rule as postured applies to a lawyer not in the course of representing a client or even as a candidate, but acting as a public citizen engaged in political discourse.

Third, under-inclusiveness. The section 75030.5 standard would apply only to California public officials.

Fourth, vagueness. The section 75030.5 standard would apply only to officials whose "duties in the office are legal in nature." This includes every mayor, councilman, and legislator in the state. That standard may work for determining retirement benefits, which is where section 75030.5 was designed to apply, but will not work for a rule that clearly regulates speech. The New York Times standard notwithstanding, the chilling effect on speech would be enormous.

October 12, 2015 Chou Email to Martinez, cc Drafting Team, Difuntorum & Mohr:

Thanks for the additional points. Here's my take:

1. As to your first point, I would distinguish between whether the rule would violate the EPC versus whether it would be good policy. I do not think that a rule imposing discipline on lawyers who with actual malice makes false statements about the integrity or qualifications of a public legal officer would be a violation of the EPC. It would be subject to rational basis review and should satisfy that standard. The question whether lawyers -- but not non-lawyers -- should be subject to additional discipline for making false statements about a public legal officer is a good policy choice is a different question. On balance, I believe that the higher ethical standards placed on lawyers because of what they do justifies subjecting them to discipline whenever their false statements made with actual malice carry extra weight because of their legal expertise. In this respect, I do not see why public legal officers should be treated any differently than judges.

2. As to the overbreadth argument, I thought that objectively false statements made with actual malice are not protected under NYT v. Sullivan? If that is the case, it's not clear to me why subjecting a lawyer to discipline for such statements would result in the likely sanction or unconstitutional chilling of otherwise protected speech.

3. As to the underinclusiveness argument, it is not clear to me that limiting the rule to California officers would be fatally underinclusive. Given that this is a rule governing California lawyers created by the California Supreme Court, it would appear reasonable to limit the rule to California legal officers. False statements by California lawyers would most likely be made in connection with California legal officers, and such statements would have the greatest impact as to California legal officers as opposed to federal legal officers or legal officers of other states. That being said, I am open to taking Government Code 75030.5's definition of a "legal officer" and removing the limitation to California legal officers. I am also open to leaving the term undefined so that the courts can construe its meaning in a manner that would be constitutional.

4. As to the definition of public legal officer in Government Code section 75030.5, I do not believe it applies to legislators or most executives or appointees. In fact, the statute expressly distinguishes "Constitutional Officers" – which includes legislators – from public legal officers. When I look at the list of officers that fall within the definition, they all appear to include positions that require a significant amount of what could be described as legal work – like attorney generals, city attorneys, legislative counsels, and county counsels. Under the principal of ejusdem generis (general terms will be restricted by the examples that follow), I do not believe that public legal officers encompass officials like mayors, councilman, legislators, sheriffs, or officials appointed by boards (unless they do legal work). The definition also makes clear that the their "*principal* duties" must be legal in nature. I do not believe that the principal duties of a mayor, legislator, councilman or most other elected or appointed positions are legal in nature. I also think that definition is further limited by the fact that the officer must be admitted and licensed to practice law while they are holding the office. In this way, the definition restricts public legal officers to officials that must actually practice law as part of their duties.

5. With the exception of your fourth point, all of your constitutional arguments would apply equally to candidates for judicial election. I would be interested to know if there have been any constitutional challenges to the application of Model Rule 8.2 as adopted by the 46 jurisdictions that have adopted rule 8.2 or a similar rule.

October 12, 2015 Stout Email to Drafting Team, cc Difuntorum & Mohr:

I agree with Danny, and am open to his suggestions contained in the last two sentences of item 3 below.

October 12, 2015 Martinez Email to Chou, cc Drafting Team, Difuntorum & Mohr:

Attached is the Restatement's view which departs from the ABA in that it limits the prohibition to *judicial* officers. The discussion states in pertinent part:

> The rule of this Section is drawn from the lawyer codes. Unlike the lawyer codes, however, it does not apply to lawyer statements about nonjudicial incumbents of a "public legal office." The latter term could be interpreted to include all public legal offices, such as prosecutors or members of a governmental attorneys' office. Special protection for judges can be justified. Judges are con-strained from public response to charges made against them out of a proper concern not to involve judges in public controversy.

The Restatement notes that unlike judges, "lawyers who are not judges are fully capable of responding to charges against them."

There are a couple of "non-lemming" states like Ohio and Oregon that have wisely deleted the term "public legal officer" from their versions of Rule 8.2.

Attached:
RRC2 - [1-700][8.2] - Rest (3d) Lawyers 114 (2015).rtf

October 13, 2015 Mohr Email to Drafting Team, cc Difuntorum:

I've attached the annotation for Model Rule 8.2. There is a discussion re constitutionality on pp. 2-3 of the attached.

Attached:
RRC2 - [1-700][8.2] - ABA Model Rule 6.5 - ANNOT (8th 2015)A.rtf

November 5, 2015 Kehr Email to Drafting Team, cc Difuntorum, Mohr, McCurdy & Lee:

I have only two concerns about this proposed Rule ---

1) Paragraphs (b) and (c) are directed to candidates and candidacy for judicial office, which seems a reasonably certain category, but paragraph (a) reaches "adjudicatory officer". I don't know what either one means, and the Comments don't discuss this. Now, I don't want to suggest this would prohibit anyone from heaping scorn on the umpires at a baseball game, but the language does seem rather loose, and the MR definition section provides no assistance. There also is no help in the Restatement, which appears not to cover this topic.

2) I have the same problem with the use of "public legal officer". But also, if this were to taken to include elected officials (City Attorney, District Attorney and CA A.G., or some appointed officials such as the A.G. of the U.S.), I would be concerned about the First Amendment implications.

November 5, 2015 Stout Email to Kehr, cc Drafting Team, Difuntorum, Mohr, McCurdy & Lee:

Thank you Robert. I'm rushing to get home, but would mention that Raul raised some of these same concerns. Please see the discussion contained in the e-mails included with the Report and Recommendation.

I don't think we've grappled with a definition of "adjudicatory officer" yet. You'll see that while Raul objects to expanding the rule to include "public legal officers," he did locate a potential definition of the same in Government Code section 75030.5 (used therein in the context of retirement) I understand Mimi will have copies available for distribution at the meeting. More later. Thanks again.