

## McCurdy, Lauren

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**From:** Kevin Mohr [kemohr@charter.net]  
**Sent:** Wednesday, September 30, 2009 10:11 PM  
**To:** McCurdy, Lauren  
**Cc:** Foy, Linda; kevin\_e\_mohr@csi.com; Difuntorum, Randall; hbsondheim@verizon.net; Lee, Mimi  
**Subject:** Re: RRC - 1-200 [8.1] - Materials for Agenda Item III.X Rule 8.1  
**Attachments:** RRC - 1-200 [8-1] - Dashboard - ADOPT - DFT2 (09-27-09)LF-KEM.doc; RRC - 1-200 [8-1] - Public Comment Chart - By Commenter - DFT1 (09-27-09)-KEM.doc; RRC - 1-200 [8-1] - Compare - Rule & Comment Explanation - DFT2 (09-29-09)LF-KEM.doc; RRC - 1-200 [8-1] - Compare - Introduction - DFT2 (09-22-09)LF-KEM.doc; RRC - 1-200 [8-1] - Dash, Intro, Rule, Comment, Pub Com - COMBO - DFT2 (09-27-09)LF-KEM.pdf

Greetings Lauren:

Greetings Lauren:

To make your job a little easier, I've attached all the materials you need for 8.1 in a single, scaled PDF file. The ingredients of the attached file are also attached, in Word.

See footnote 1 to the Explanation of Changes for the deletion of MR 8.1, cmt. [2]. I have no record of why we rejected that Comment and wonder if perhaps there is something from the previous iteration of the Commission that would shed light on this. I'm not sure the Explanation I've suggested will fly.

In addition to the combination PDF file, here is what I've attached, all in Word:

1. Dashboard, Draft 2 (9/30/09)-LF-KEM. Revised summary to simply cross-reference the Introduction.
2. Introduction, Draft 2 (9/22/09)-LF-KEM. Some nits.
3. Rule & Comment Chart, Draft 2 (9/29/09)-LF-KEM. See note 1 on page 4 of 5.
4. Public Comment Chart, Draft 1 (9/30/09)-KEM. Not much to this.

Please let me know if you have any questions. Thanks,

Kevin

McCurdy, Lauren wrote:

Kevin, I didn't receive a public comment chart for 8.1. There was at least one comment on this rule from LACBA. I'll have to look further tomorrow morning to see if there are any others. Did you and Linda discuss the public comment chart? I would ask Linda, but she's on vacation. Thanks. Lauren

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**From:** Foy, Linda [<mailto:Linda.Foy@jud.ca.gov>]

**Sent:** Tuesday, September 22, 2009 5:47 PM

**To:** McCurdy, Lauren; Kevin Mohr; [kevin\\_e\\_mohr@csi.com](mailto:kevin_e_mohr@csi.com); Difuntorum, Randall; [hbsondheim@verizon.net](mailto:hbsondheim@verizon.net); Lee, Mimi

**Subject:** Materials for Agenda Item III.X Rule 8.1

Kevin, Lauren:

Attached are (1) Dashboard, (2) Introduction and (3) Rule and Comment Comparison and Explanation Chart for Proposed Rule 8.1. I had some difficulty reconstructing the Commission's reasoning regarding some of the departures from the Model Rule (Kurt's detailed memory of the prior commission's deliberations two decades ago leaves me breathless. . .) and have no pride of authorship in any of the attached.

I will be online this evening and briefly tomorrow morning, then away on vacation with very limited email access until 10/10.

Thanks again for indefatigability and all of your careful, hard work.

Linda

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# Proposed Rule 8.1 [RPC 1-200]

## “False Statement Regarding Application for Admission to Practice of Law”

(Draft # 3, 7/2/2007)

**Summary:** Proposed Rule 8.1, which prohibits certain conduct in applying to be admitted to practice law in California, substantially follows Model Rule 8.1, with three principal departures. See Introduction.

Rule	Comparison with ABA Counterpart Comment
<input type="checkbox"/> ABA Model Rule substantially adopted <input type="checkbox"/> ABA Model Rule substantially rejected <input checked="" type="checkbox"/> Some material additions to ABA Model Rule <input checked="" type="checkbox"/> Some material deletions from ABA Model Rule <input type="checkbox"/> No ABA Model Rule counterpart	<input type="checkbox"/> ABA Model Rule substantially adopted <input type="checkbox"/> ABA Model Rule substantially rejected <input checked="" type="checkbox"/> Some material additions to ABA Model Rule <input checked="" type="checkbox"/> Some material deletions from ABA Model Rule <input type="checkbox"/> No ABA Model Rule counterpart

### Primary Factors Considered

Existing California Law

Rule

RPC 1-200; Cal. Rules of Court, Rules 9.40 to 9.46.

Statute

Bus. & Prof. Code §§ 6062, 6068(c),(d),(e); Code Civ. Pro. § 1282.4

Case law

State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

Other Primary Factor(s)

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## Rule Revision Commission Action/Vote to Recommend Rule Adoption

(14 Members Total – votes recorded may be less than 14 due to member absences)

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Approved on 10-day Ballot, Less than Six Members Opposing Public Comment Distribution

Vote (see tally below)

Favor Rule as Recommended for Adoption \_\_\_\_\_

Opposed Rule as Recommended for Adoption \_\_\_\_\_

Abstain \_\_\_\_\_

Approved on Consent Calendar

Approved by consensus

Minority/Dissenting Position Included on Model Rule Comparison Chart:  Yes  No

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## Stakeholders and Level of Controversy

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No Known Stakeholders

The Following Stakeholders Are Known:

Very Controversial – Explanation:

Moderately Controversial – Explanation:

Not Controversial

# COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

## Proposed Rule 8.1\* False Statement Regarding Application for Admission to Practice Law

October 2009

(Draft rule following consideration of public comment)

*INTRODUCTION:* Proposed Rule 8.1 substantially follows ABA Model Rule 8.1 with two principal departures: (1) proposed Rule 8.1 addresses statements made in connection with applications for “admission to practice law”, whereas Model Rule 8.1 more narrowly addresses statements made in connection with applications for “admission to the bar”; (2) unlike Model Rule 8.1, proposed Rule 8.1 does not address statements made in connection with disciplinary proceedings; and (3) proposed Rule 8.1 imposes a more stringent standard on applicants with respect to their own applications for admission (prohibiting both false statements of material fact *and* failure to disclose a material fact) than on members with respect to *other* persons’ applications for admission (prohibiting false statements of material fact). Paragraph (c) and Comment [2] to Proposed Rule also provide illustrations of the various proceedings that constitute “applications for admission to practice law” in California and pertinent related authority.

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\* Proposed Rule 8.1, Draft 3 (7/2/07).

<p align="center"><u>ABA Model Rule</u> Rule 8.1 Bar Admission And Disciplinary Matters</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 8.1 False Statement Regarding Application for Admission to Practice of Law</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:</p>	<p><del>An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:</del></p>	<p>The title of proposed Rule 8.1 has been revised from Model Rule 8.1 to emphasize that the rule prohibits (1) the making of a false statements (2) in connection with applications for "admission to practice law" and not solely (as in Model Rule 8.1) to applications for "admission to the bar," and provides examples of the broader concept of "admission to practice law" in paragraph (c) and Comment [2]. The expanded scope of the proposed Rule is intended to provide greater public protection.</p> <p>The proposed Rule does not address statements made by a member in connection with disciplinary matters.</p>
	<p>(a) <a href="#">An applicant for admission to practice law shall not knowingly make a false statement of material fact or knowingly fail to disclose a material fact in connection with that person's own application for admission.</a></p>	<p>Unlike the Model Rule, the proposed Rule creates a two-tier standard, (1) prohibiting an applicant for admission from knowingly making a false statement <u>or</u> knowingly failing to disclose a material fact in connection with the applicant's own application for admission (paragraph (a)) and (2) prohibiting a lawyer from knowing making a false statement in connection with another's application for admission (paragraph (b)).</p>
<p>(a) knowingly make a false statement of material fact; or</p>	<p>(<del>a</del>b) <a href="#">A lawyer shall not</a> knowingly make a false statement of material fact<del>;</del><del>or</del> <a href="#">in connection with another person's application for admission to practice law.</a></p>	<p>See Explanation of Changes for paragraph (a), above.</p>

\* Proposed Rule 8.1, Draft 3 (7/2/07). Redline/strikeout showing changes to the ABA Model Rule

<p align="center"><u>ABA Model Rule</u> Rule 8.1 Bar Admission And Disciplinary Matters</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 8.1 False Statement Regarding Application for Admission to Practice of Law</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.</p>	<p><del>(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.</del></p>	<p>The proposed Rule does not impose an affirmative obligation to correct a known misapprehension or sanction the failure to respond to a lawful demand for information, because the Commission did not believe that the omissions described should be the basis for discipline.</p>
	<p>(c) <u>As used in this Rule, "admission to practice law" includes admission or readmission to membership in the State Bar; reinstatement to active membership in the State Bar; an application for permission to appear pro hac vice; and any similar provision relating to admission or certification to practice law in California or elsewhere.</u></p>	<p>Proposed Rule 8.1 provides illustrations of some of the diverse proceedings encompassed by the term, "admission to practice law," in new paragraph (c) for guidance, and Comment [2] to the proposed Rule lists additional examples.</p>

<p align="center"><u>ABA Model Rule</u> Rule 8.1 Bar Admission And Disciplinary Matters Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 8.1 False Statement Regarding Application for Admission to Practice of Law Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[1] The duty imposed by this Rule extends to persons seeking admission to the bar as well as to lawyers. Hence, if a person makes a material false statement in connection with an application for admission, it may be the basis for subsequent disciplinary action if the person is admitted, and in any event may be relevant in a subsequent admission application. The duty imposed by this Rule applies to a lawyer's own admission or discipline as well as that of others. Thus, it is a separate professional offense for a lawyer to knowingly make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct. Paragraph (b) of this Rule also requires correction of any prior misstatement in the matter that the applicant or lawyer may have made and affirmative clarification of any misunderstanding on the part of the admissions or disciplinary authority of which the person involved becomes aware.</p>	<p><del>[1] The duty imposed by this Rule extends to persons seeking admission to the bar as well as to lawyers. Hence, if a person makes a material false statement in connection with an application for admission, it may be the basis for subsequent disciplinary action if the person is admitted, and in any event may be relevant in a subsequent admission application. The duty imposed by this Rule applies to a lawyer's own admission or discipline as well as that of others. Thus, it is a separate professional offense for a lawyer to knowingly make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct. Paragraph (b) of this Rule also requires correction of any prior misstatement in the matter that the applicant or lawyer may have made and affirmative clarification of any misunderstanding on the part of the admissions or disciplinary authority of which the person involved becomes aware.</del></p>	<p>The proposed Rule retains the first part of Model Rule Comment [1] stating that an applicant for admission who makes a material false statement in connection with that application may be subject to subsequent discipline if admitted. See proposed Comment [1], <i>below</i>.</p> <p>The proposed Rule omits the second part of Model Rule Comment [1] noting that the duty imposed by the rule applies both to a member's statements both with respect to his or her own application for admission and with respect to another person's application for admission because it merely repeats the rule as revised. However, like Proposed Rule 8.1, Comment [1] to the Proposed Rule omits any reference to statements made in connection with disciplinary proceedings.</p>

<p align="center"><u>ABA Model Rule</u> Rule 8.1 Bar Admission And Disciplinary Matters Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 8.1 False Statement Regarding Application for Admission to Practice of Law Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[2] This Rule is subject to the provisions of the Fifth Amendment of the United States Constitution and corresponding provisions of state constitutions. A person relying on such a provision in response to a question, however, should do so openly and not use the right of nondisclosure as a justification for failure to comply with this Rule.</p>	<p><del>[2] This Rule is subject to the provisions of the Fifth Amendment of the United States Constitution and corresponding provisions of state constitutions. A person relying on such a provision in response to a question, however, should do so openly and not use the right of nondisclosure as a justification for failure to comply with this Rule.</del></p>	<p>[The Commission recommends deleting Model Rule 8.1, cmt. [2] because the applicability of the Fifth Amendment of the United States Constitution or corresponding provisions of state constitutions is beyond the scope of these Rules.<sup>1</sup></p>
<p>[3] A lawyer representing an applicant for admission to the bar, or representing a lawyer who is the subject of a disciplinary inquiry or proceeding, is governed by the rules applicable to the client-lawyer relationship, including Rule 1.6 and, in some cases, Rule 3.3.</p>	<p><del>[3] A lawyer representing an applicant for admission to the bar, or representing a lawyer who is the subject of a disciplinary inquiry or proceeding, is governed by the rules applicable to the client-lawyer relationship, including Rule 1.6 and, in some cases, Rule 3.3.</del></p>	<p>Comment [3] to Proposed Rule 8.1 substantially tracks Comment [3] to the Model Rule, except that it cites applicable California authority and Rules of Professional Conduct. See proposed Comment [3], below.</p>
	<p><a href="#">[1] A person who makes a false statement in connection with that person's own application for admission to practice law may, inter alia, be subject to discipline under this Rule after that person has been admitted.</a></p>	<p>See Explanation of Changes for Model Rule 8.1, cmt. [1], above.</p>

<sup>1</sup> **Consultant's Note:** Rule 1-200 is the first rule that the Commission voted to send out for public comment, when its focus was primarily the California Rules. I cannot find any record either in my notes or the sparse e-mails I have on this Rule that Comment [2] to Rule 8.1 was considered in the drafting of Rule 1-200. Is there any evidence that the Commission considered Rule 8.1, which is unchanged from the 1983 version, during the Commission's first iteration?

<p align="center"><u>ABA Model Rule</u> Rule 8.1 Bar Admission And Disciplinary Matters Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 8.1 False Statement Regarding Application for Admission to Practice of Law Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p><a href="#">[2] The examples in paragraph (c) are illustrative. As used in paragraph (c), "similar provision relating to admission or certification" includes, but is not limited to, an application by an out-of-state attorney for admission to practice law under Business and Professions Code section 6062; an application to appear as counsel pro hac vice under Rule of Court 9.40; an application by military counsel to represent a member of the military in a particular cause under Rule of Court 9.41; an application to register as a certified law student under Rule of Court 9.42; proceedings for certification as a Registered Legal Services attorney under Rule of Court 9.45 and related State Bar Rules; certification as a Registered In-house Counsel under Rule of Court 9.46 and related State Bar Rules; certification as an Out-of-State Attorney Arbitration Counsel under Rule of Court 9.43, Code of Civil Procedure section 1282.4, and related State Bar Rules; and certification as a Registered Foreign Legal Consultant under Rule of Court 9.44 and related State Bar Rules.</a></p>	<p>See Explanation of Changes for paragraph (c), above.</p>
	<p><a href="#">[3] This Rule shall not prevent a lawyer from representing an applicant for admission to practice in proceedings related to such admission. Other laws or rules govern the responsibilities of a lawyer representing an applicant for admission. See, e.g., Bus. &amp; Prof. Code § 6068(c), (d) &amp; (e); Rule 5-200.</a></p>	<p>See Explanation of Changes for deleted Model Rule 8.1, cmt. [3], above.</p>

**Rule 8.1 False Statement Regarding Application for Admission to Practice Law.  
[Sorted by Commenter]**

TOTAL = \_\_ Agree = \_\_  
Disagree = \_\_  
Modify = \_\_  
NI = \_\_

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Los Angeles County Bar Association	A			Supports as drafted.	No response required.
2	San Diego County Bar Association	A			Supports as drafted.	No response required.
3						

<sup>1</sup> A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

## Rule 8.1: False Statement Regarding Application for Admission to Practice

### STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: Statutes and Standards (2009 Ed.)  
by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

**California:** Rule 1-200 provides as follows:

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

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

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

**Colorado:** Rule 8.1(a) also applies to “readmission” and “reinstatement.”

**Georgia** has adopted a Rule 9.3, entitled “Cooperation with Disciplinary Authority,” which provides as follows: “During the investigation of a grievance filed under these Rules, the lawyer complained against shall respond to disciplinary authorities in accordance with State Bar Rules.” Comment 2 to this provision states: “Nothing in this Rule prohibits a lawyer from responding by making a Fifth Amendment objection, if appropriate. However, disciplinary

proceedings are civil in nature and the use of a Fifth Amendment objection will give rise to a presumption against the lawyer.”

**Illinois:** Rule 8.1(b) provides that a lawyer “shall not further the application for admission to the bar of another person known by the lawyer to be unqualified in respect to character, education, or any other relevant attribute.”

**Michigan** adds the following new language to its version of ABA Model Rule 8.1:

(b) An applicant for admission to the bar

(1) shall not engage in the unauthorized practice of law (this does not apply to . activities permitted under MCR 8.120), and

(2) has a continuing obligation, until the date of admission, to inform the standing committee on character and fitness, in writing, if any answers in the applicant’s affidavit of personal history change or cease to be true.

**New York:** DR 1-101(A) makes a lawyer subject to discipline if the lawyer “has made a materially false statement in, or has deliberately failed to disclose a material

fact requested in connection with, the lawyer's application for admission to the bar." Rule 1-101(B) provides as follows: "A lawyer shall not further the application for admission to the bar of another person that the lawyer knows to be unqualified in respect to character, education, or other relevant attribute."

**Ohio:** Rule 8.1 (a) deletes the opening phrase "[a]n applicant for admission to the bar." According to the Ohio Supreme Court's note, Rule 8.1(b) clarifies the "unwieldy" language of the ABA Model Rule but does not lower the standard of candor expected of a lawyer in bar admission or disciplinary matters.

**Virginia:** Rule 8.1 adds language to cover certifications required to be filed as a condition of maintaining or renewing a law license. Virginia also moves the second clause of Rule 8.1(b) to separate subparagraph (c), and adds Rule 8.1(d), which makes separate violation to obstruct a lawful investigation by an admissions or disciplinary authority."

**Table of Contents**

August 19, 2002 Voogd E-mail to KEM: .....	3
August 19, 2002 KEM E-mail to Voogd: .....	3
August 19, 2002 Voogd E-mail to KEM: .....	5
October 16, 2002 Sondheim E-mail to Foy & Sapiro, cc Difuntorum & KEM: .....	5
October 17, 2002 Sapiro E-mail to Sondheim: .....	6
October 31, 2002 Difuntorum E-mail to Drafters, cc Staff & Yen:.....	6
November 1, 2002 Sondheim E-mail to Sapiro, cc Foy, Tuft, Vapnek, Difuntorum & KEM: .....	6
November 1, 2002 Difuntorum E-mail to Drafters, cc Staff & Yen:.....	6
November 4, 2002 Foy E-mail to Sondheim, cc Sapiro, Tuft, Vapnek, Difuntorum & KEM: .....	6
November 4, 2002 Sondheim E-mail to Drafters, cc Tuft, Vapnek, Difuntorum & KEM: .....	7
November 20, 2002 Sondheim E-mail to Drafters, cc Tuft, Vapnek, Difuntorum & KEM:.....	7
November 27, 2002 Difuntorum E-mail to Drafters, cc Chair, Tuft, Vapnek & Staff: .....	7
November 27, 2002 Sondheim E-mail to Drafters, cc Tuft, Vapnek & Staff: .....	7
February 14, 2003 Difuntorum E-mail to KEM, cc McCurdy:.....	8
KEM 10/04/2004 Note to File re Rule 1-200:.....	8
March 20, 2006 Sapiro E-mail to RRC:.....	8
April 6, 2009 KEM E-mail to Difuntorum & McCurdy: .....	8
October 11, 2006 LACBA Ethics Committee Comment (12/1/06 Meeting Materials, p. 51): .....	9
October 16, 2006 SDCBA Comments (12/1/06 Meeting Materials, pp. 49-50): .....	9
November 7, 2006 Foy/Sapiro Memo to RRC: .....	9
September 21, 2009 Foy E-mail to McCurdy & KEM: .....	11
September 21, 2009 KEM E-mail to Foy, cc McCurdy: .....	11
September 21, 2009 KEM E-mail to Lee, cc McCurdy & Difuntorum: .....	11
September 21, 2009 Foy E-mail to McCurdy & KEM: .....	11
September 22, 2009 KEM E-mail to Foy, cc Staff: .....	11
September 22, 2009 KEM E-mail to Foy, cc Staff: .....	11
September 22, 2009 Foy E-mail to McCurdy & KEM, cc Chair & Staff: .....	11
September 30, 2009 McCurdy E-mail to KEM, cc Foy, Chair & Staff:.....	12
September 30, 2009 KEM E-mail #1 to McCurdy, cc Foy, Chair & Staff:.....	12
September 30, 2009 KEM E-mail #2 to McCurdy, cc Foy, Chair & Staff:.....	12
October 1, 2009 Foy E-mail to KEM, cc Chair & Staff: .....	13
October 2, 2009 KEM E-mail to Foy, cc Chair & Staff: .....	13
October 3, 2009 Kehr E-mail to RRC:.....	13
October 4, 2009 KEM E-mail to RRC: .....	13
October 5, 2009 Sondheim E-mail to RRC:.....	14
October 5, 2009 Ruvolo E-mail to RRC: .....	14
October 5, 2009 Kehr E-mail to Sondheim, cc RRC:.....	14
October 5, 2009 Martinez E-mail to Sondheim, cc RRC: .....	15
October 6, 2009 Sapiro E-mail to Sondheim, cc RRC:.....	16
October 7, 2009 Sapiro E-mail to RRC:.....	16
October 7, 2009 Sondheim E-mail to RRC:.....	16
October 7, 2009 Tuft E-mail to RRC List: .....	16
October 12, 2009 Lamport E-mail to RRC: .....	17

**September 21, 2009 Foy E-mail to McCurdy & KEM:**

I have not received the materials (draft comparison chart, draft “dashboard” and chart summarizing public comment), nor the meeting notes for this agenda item. Would you kindly send along?

**September 21, 2009 KEM E-mail to Foy, cc McCurdy:**

To get you started, I've attached the template for the Rule & Comment comparison chart -- all you need do is fill in the third column explanation (In Word). To assist w/ that, I've attached my cumulative meeting notes for Rule 8.1 [1-200] (in PDF).

I've also attached the Introduction template for the Rule (In Word).

We'll get you the Dashboard & Public Comment Chart (if there is one) tomorrow.

**September 21, 2009 KEM E-mail to Lee, cc McCurdy & Difuntorum:**

I'm forwarding you this e-mail message I just sent to Linda. I thought Linda had copied you but I was mistaken. Anyway, I've sent Linda the Rule & Comment Comparison chart you had prepared (it looked fine; all I did was add a footer) and also the Introduction template for the Rule.

We have to send her a Dashboard and public comment chart. I can send her the former; was there a pub com chart? I can't recall if anyone had any interest in this Rule.

**September 21, 2009 Foy E-mail to McCurdy & KEM:**

Got it, thanks very much.

**September 22, 2009 KEM E-mail to Foy, cc Staff:**

You'll probably notice that although we updated the references to the Rules of Court in Comment [2], we didn't update the reference to Rule 5-200 in Comment [3]. It should be to Rule 3.3. Would you please make that change?

**September 22, 2009 KEM E-mail to Foy, cc Staff:**

I've attached a Dashboard template for Rule 8.1, partially filled out. We need you to add a summary and check the boxes for the Rule Comparison w/ Model Rule on page 1 -- both Rule and Comment.

We can fill in the vote totals after the October meeting.

**September 22, 2009 Foy E-mail to McCurdy & KEM, cc Chair & Staff:**

Attached are (1) Dashboard, (2) Introduction and (3) Rule and Comment Comparison and Explanation Chart for Proposed Rule 8.1. I had some difficulty reconstructing the Commission's reasoning regarding some of the departures from the Model Rule (Kurt's detailed memory of the

prior commission's deliberations two decades ago leaves me breathless. . .) and have no pride of authorship in any of the attached.

I will be online this evening and briefly tomorrow morning, then away on vacation with very limited email access until 10/10.

Thanks again for indefatigability and all of your careful, hard work.

**Attachments:**

- Dashboard, Draft 1 (9/22/09)LF
- Introduction, Draft 1 (9/22/09)LF
- Rule & Comment Chart, Draft 1 (9/22/09)LF

**September 30, 2009 McCurdy E-mail to KEM, cc Foy, Chair & Staff:**

Kevin, I didn't receive a public comment chart for 8.1. There was at least one comment on this rule from LACBA. I'll have to look further tomorrow morning to see if there are any others. Did you and Linda discuss the public comment chart? I would ask Linda, but she's on vacation.

**September 30, 2009 KEM E-mail #1 to McCurdy, cc Foy, Chair & Staff:**

As I recall, that was one of the rules that was not sent out on 9/18 w/ your mega package. I've started to do the chart and I had some other nits on 8.1 that I've mostly completed. I'll get you those later tonight (w/ those other matters). I hope that will be time enough.

**September 30, 2009 KEM E-mail #2 to McCurdy, cc Foy, Chair & Staff:**

To make your job a little easier, I've attached all the materials you need for 8.1 in a single, scaled PDF file. The ingredients of the attached file are also attached, in Word.

See footnote 1 to the Explanation of Changes for the deletion of MR 8.1, cmt. [2]. I have no record of why we rejected that Comment and wonder if perhaps there is something from the previous iteration of the Commission that would shed light on this. I'm not sure the Explanation I've suggested will fly.

In addition to the combination PDF file, here is what I've attached, all in Word:

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4. Public Comment Chart, Draft 1 (9/30/09)-KEM. Not much to this.

Please let me know if you have any questions.

**October 1, 2009 Foy E-mail to KEM, cc Chair & Staff:**

Many thanks for your follow-up and consolidation. I have had limited email access, but do not think I've seen anything regarding a public comment chart. Nothing to review on that front?

**October 2, 2009 KEM E-mail to Foy, cc Chair & Staff:**

The only public comment we received was from LACBA and SDCBA, both of which approved the rule w/ not changes, so the chart is perfunctory. No need to review.

**October 3, 2009 Kehr E-mail to RRC:**

I have two comments on these materials:

1. The Introduction says that “admission to the bar” is narrower than “admission to practice law”. This is not explained in the Introduction and is not so obvious that anyone reading the Introduction can be expected to understand what the Commission has in mind. I suggest that we insert before the semicolon that precedes “(2)”: “(a difference that is explained in paragraph (c) of the proposed Rule)”.

2. The Introduction and the paragraph (a) explanation both say that the MR covers statements made in disciplinary proceedings but that the proposed Rule does not. However, neither one gives any hint at the Commission's reasoning. My limited materials on this Rule include no discussion of the topic that I can locate. Is it possible that the change in the MR was b/c the Commission at that early point was working from current rule 1-200? (I just noticed Kevin's fn. 1, which raises a similar question about MR Comment [2]).

At this stage in the life of the Commission, I vote to send this to the Board but with the hope that we later will be able to discuss the second of these points as it is substantive.

**October 4, 2009 KEM E-mail to RRC:**

Two points w/ respect to Bob's point #2, below.

1. First, the rules in Batches 1, 2 and 3 are going to BOG for adoption, i.e., so BOG does not have to consider all 6 batches of rules at one shot. It is not clear that we will have an opportunity to revisit substantive issues in the future. I think the idea is that we will be able to return to these rules to update cross-references, correct typos, etc., but that the substantive concerns will have been addressed unless, for example, a change to a subsequent rule might require a substantive revision to the already-adopted Rule. I may be wrong on this but it is my understanding. **Randy, Harry or Bob Hawley**: Please correct me if I'm wrong about this.

2. Second, because of the first point, if we need to give a reason for not including disciplinary matters in the rule, then we should include it now. As Ethics 2000 did not change 8.1, adopting it verbatim from the 1983 Model Rules, and the earlier iteration of this Commission would have considered MR 8.1 in drafting current rule 1-200, does anyone recall why the Commission chose not to include disciplinary matters in the rule?

a. Similarly, there was no discussion this time around concerning the rejection of MR 8.1, cmt. [2]. Please review the Explanation for the deletion of MR 8.1, cmt. [2] and footnote 1. Can anyone shed light on why we reject MR 8.1, cmt. [2], which seems to be a comment that we should include.

**October 5, 2009 Sondheim E-mail to RRC:**

I am hopeful that at least 2 of you will join me to request that this rule will be discussed at our upcoming meeting.

First, as to Kevin's understanding let me explain my understanding. We are asked to approve the Batches 1, 2 and 3 rules for inclusion in our final batch which will contain all the rules. RAC is therefore being asked after our meeting to include these rules in the final batch for public comment. After the public comment, we will give further consideration to the final batch with the hope that no substantive changes are made which would require further public comment and thereby delay final adoption of the rules by the BOG. Thus Kevin is correct in suggesting that if we have any substantive matters we should deal with them now. If we wait, it might require another round of public comment.

This leads me to the substantive matter upon which I hope at least 2 of you will join me. The Explanation for our not adopting paragraph (a) of the ABA rule is that "the expanded scope of the proposed rule is intended to provide greater public protection." (Agenda materials, p. 6.) Yet at the same time we reject paragraph (b) of the ABA rule on the basis that "the Commission did not believe that the omissions described should be the basis for discipline." (Agenda materials, p. 7.) I do not join in this belief because It provides less public protection. Shouldn't there be public protection when someone does not correct a known "misapprehension" or fails to respond to a "lawful demand for information from an admissions or disciplinary authority." At a minimum I think we need to alert the Office of Trial Counsel that we, in essence, are impeding their work.

Finally, a small nit. The first line of the Introduction speaks of "two principal departures," but there are 3 listed. (Agenda materials, p. 5.) Therefore "two" should be changed to "3."

**October 5, 2009 Ruvolo E-mail to RRC:**

I join.

**October 5, 2009 Kehr E-mail to Sondheim, cc RRC:**

Harry: The chart's explanation for the rejection of MR paragraph (b) is accurate in that the only direct mention of that paragraph that I can see in the cumulative meeting notes is the off-hand

comment that it describes situations that should not be the basis of discipline. The notes don't show any substantive discussion of MR paragraph (b) that I can locate.

You proposed the addition of a paragraph that can be read a diluted version of MR paragraph (b) (your proposal was defeated both as a Rule and a Comment provision). Your proposal suggests to me that there might have been additional discussion not captured in the notes. Your proposal addressed the conduct of a lawyer who did not represent the applicant for admission. Perhaps this reflects a Commission discussion that MR paragraph (b) would be inconsistent with the duty of undivided loyalty the lawyer would owe to his client.

I think that would be a valid criticism of the MR provision. Also: (i) MR paragraph (b) goes well beyond the parallel provision in Rule 3.3; (ii) depending on how we define "tribunal", Rule 3.3 might apply to the same situation, which would create a greater responsibility in admission and disciplinary proceedings than would exist with any other court, say, in matters pending before the Supreme Court; and (iii) even if the lawyer does not represent the applicant for admission or the subject of the disciplinary proceeding, and even if the lawyer's disclosure under MR paragraph (b) does not involve confidential client information, the disclosure could be inconsistent with the interests of a client or even a violation of a client's directions (reasons the Commission gave for rejecting mandatory disclosure under Rule 8.3).

Although I didn't vote on Rule 8.1, I support the Commission's decision. I would keep it as is but change the explanation as I've suggested above.

**October 5, 2009 Martinez E-mail to Sondheim, cc RRC:**

I disagree with your proposed substantive change (i.e., to reconsider adopting paragraph (b) of the ABA rule) for the reason that this rule suffers from the type of vagueness that plagues many of the ABA rules. First, by requiring a lawyer to disclose a "fact" necessary to correct a "misapprehension", the lawyer would be required to correct every possible misunderstanding that a bar admissions officer might have regarding the matter. Thus, if an inquiry from the Bar misstates something trivial (like a wrong birth date, misspelled name, etc.), the lawyer would have to set the record straight. A lawyer would also have to "read minds" to comply with the rule--i.e., know there is a misapprehension.

Second, since the ABA rule applies equally to disciplinary proceedings, a lawyer testifying as a witness "in connection with a disciplinary matter" would have to volunteer information, even under cross-examination, to correct any misunderstanding. As lawyers, we tell witnesses in trials and depositions just to answer the question that's posed, and not to volunteer information--the idea being that it's the burden of the opposing party to correct the record by asking proper questions. This is basic advocacy. However, this rule requires lawyers to correct any misapprehension that occurs even in disciplinary proceedings and even during cross-examination. We might as well throw out the rules of evidence.

Third, the ABA rule requires a lawyer to "respond to a lawful demand for information from an admissions or disciplinary authority." This means that Trial Counsel can compel cooperation from lawyers without the need of a subpoena. (And who knows what "lawful" means in this rule.) Further, the rule does not give the respondent in the disciplinary matter the same right that it gives the prosecutor/disciplinary authority.

**October 6, 2009 Sapiro E-mail to Sondheim, cc RRC:**

I am not sure that I agree with Harry on the merits of paragraph (b) of the model rule, but the explanation may be wrong. I vote “no” so we can discuss it.

More comments on this rule will follow tomorrow.

**October 7, 2009 Sapiro E-mail to RRC:**

I agree with Bob Kehr’s recommendations.

1. In the spreadsheet of explanation of changes for the rule, at page 1 of 5, explanation column, I would change “knowing” to “knowingly.”
2. At page 3 of 5, in the explanation of changes for Comment [1], in the first line of each paragraph, I would change the first word “Rule” to the word “Comment.” I think using “Comment” will make the intent of the sentences clearer.
3. I have not taken the time to review my notes from our earlier deliberations. However, to respond in part to Bob’s question, it is my recollection that a part of the discussion was the concern that a lawyer who is an advocate for an applicant for admission, but whose arguments are rejected, and a lawyer who testifies, but whose testimony is discounted, should not face discipline under this rule.

If I later find any discussion in my notes, or if that rings true with others, I suggest that this concept be added to the explanation of changes.

4. I vote “no” on the rule, itself, and I vote “no” on whether to send these materials to the Board, so we can discuss Bob’s and Harry’s issues.

**October 7, 2009 Sondheim E-mail to RRC:**

Since there are more than 3 nos, this agenda item has been taken off the consent calendar and will be discussed at the meeting.

**October 7, 2009 Tuft E-mail to RRC List:**

Comments on Proposed Rule 8.1:

1. Introduction: There appear to be three rather than two principal departures from the Model Rule.
2. Comment [1]: The first sentence of the Model Rule comment is useful in explaining the intended scope of the rule and should be retained. It is much better than using the phrase “inter alia,” which I believe should not be used in drafting rule comments.

The first sentence in the comment should read:

"The duty imposed by this Rule applies to persons seeking admission to the bar as well as to lawyers."

The existing sentence in the comment would become the second sentence without the words "inter alia."

3. MR Comment [2]: I do not understand the explanation for deleting MR Comment [2]. Rules do reference applicable constitutional provisions. (e.g., 3-100, 1-400.) Why not here? **We should include MR Comment [2].**

**October 12, 2009 Lamport E-mail to RRC:**

I agree that saying we did not believe that the 8.1(b) should be a basis for discipline is not enough. If we are going to say something should not be the basis for discipline, we should also explain why we hold that belief. **So, although my vote is not needed to take this off the consent agenda, I agree that we should do so.**

I am having a hard time recalling at the moment what our rationale was when we made this decision. I generally recall that there was concern that it would chill lawyers acting as a reference for someone seeking admission to practice. It is one thing to knowingly proffer false information when making a recommendation. It is another to be second guessed after the fact over whether the lawyer should have disclosed more. I note that Model Rule 8.1(b) is not tied to correcting information the lawyer provided, but to any "misapprehension" known to have arisen in the matter. While Model Rule Comment [1] states that (b) requires correction of a prior misstatement or to clarify any misunderstanding on the part of the Bar, the language in the rule is not so limited. There are enough ambiguities in the Model Rule that lawyers who offer information to the Bar with respect to admission to practice could end up doing so at their peril.

While we have the Rule in front of us, **I believe there is good reason to include at least the first sentence of Comment [2] to the Model Rule in the Comment to our proposed Rule.** I think the 6th Amendment is applicable to this Rule. In situations where the issue comes up, people will point to the Model Rule Comment. If we do not disagree with the substantive point, leaving it out may engender unnecessary debate over whether we meant something by leaving it out, which I think we should avoid causing.