

Proposed Rule 8.2 [1-700] “Judicial and Legal Officials”

(Draft #4.1, 04/03/10)

Summary: Proposed Rule which imposes duties on lawyers with respect to judicial and legal officials, and when a lawyer is a candidate for judicial office, closely tracks Model Rule 8.2, but also carries forward provisions in current California Rule 1-700 (“Member as Candidate for Judicial Office”). See Introduction.

Comparison with ABA Counterpart

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

Primary Factors Considered

- Existing California Law

Rule

RPC 1-700.

Statute

Bus. & Prof. Code § 6068(b).

Case law

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

- Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(13 Members Total – votes recorded may be less than 13 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption

Vote (see tally below)

Favor Rule as Recommended for Adoption 9

Opposed Rule as Recommended for Adoption 1

Abstain 0

Approved on Consent Calendar

Approved by Consensus

Commission Minority Position, Known Stakeholders and Level of Controversy

Minority Position Included. (See Introduction): Yes No

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 8.2* Judicial and Legal Officials

April 2010

(Draft following consideration of public comment.)

INTRODUCTION:

Proposed Rule 8.2, which imposes duties on lawyers with respect to judicial and legal officials, and when a lawyer is a candidate for judicial office, closely tracks Model Rule 8.2, but also carries forward provisions in current California Rule 1-700 (“Member as Candidate for Judicial Office”). Paragraph (a) incorporates the concept of respect for the judiciary more generally stated in Bus. & Prof. Code § 6068(b), but also adds an obligation not to make false statements of fact concerning candidates for judicial office. Paragraphs (b) through (d) provide a means by which the State Bar can discipline lawyers who violate ethical duties imposed by Canons 5 and 5B of the California Code of Judicial Ethics when seeking appointment or election to judicial office.

The Comment to the Rule largely tracks the comment to Model Rule 8.2, although one Model Rule comment has been deleted because it neither explains nor clarifies the application of the Rule.

Previously, the Board of Governors approved circulation of proposed Rule 2.4.2, which is based on current rule 1-700, for public comment. Paragraph (b) and (d) are carried forward from that Rule, which in turn carried forward the provisions of current rule 1-700. The concept of paragraph (c), which concerns lawyers seeking appointment to judicial office, is also carried forward from proposed Rule 2.4.2, but has been separated out as a separate paragraph for clarity.

* Proposed Rule 8.2, Draft 4.1 (4/3/2010).

<p style="text-align: center;"><u>ABA Model Rule</u> Rule 8.2 Judicial and Legal Officials</p>	<p style="text-align: center;"><u>Commission’s Proposed Rule*</u> Rule 8.2 Judicial and Legal Officials</p>	<p style="text-align: center;"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(a) A lawyer shall not make a statement 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.</p>	<p>(a) A lawyer shall not make a statement <u>of fact</u> 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.</p>	<p>Paragraph (a) is identical to Model Rule 8.2(a), except that the phrase “of fact” has been added to address Constitutional concerns about the ability of a lawyer to express an opinion.</p>
<p>(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.</p>	<p>(b) A lawyer who is a candidate for judicial office <u>in California</u> shall comply with the applicable provisions <u>Canon 5</u> of the <u>California</u> Code of Judicial Conduct <u>Ethics</u>.</p>	<p>Paragraph (b) substantially follows Model Rule 8.2(b). It has been modified only to reference the applicable California Code of Judicial Ethics when a lawyer seeks office in California.</p>
	<p>(c) <u>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</u></p>	<p>There is no counterpart in the Model Rules to paragraph (c). It is included to provide a disciplinary path for lawyers who violate their duty as applicants for appointment to judicial office by requiring that those lawyers comply with the substantive provisions of Canon 5B, as currently provided in the California Code of Judicial Ethics. This paragraph also sets forth when a lawyer is deemed to have commenced or terminated his or her status as an applicant for appointment.</p>

* Proposed Rule 8.2, Draft 4.1 (4/3/10). Redline/strikeout showing changes to the ABA Model Rule

<p align="center"><u>ABA Model Rule</u> Rule 8.2 Judicial and Legal Officials</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 8.2 Judicial and Legal Officials</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p><u>comply with this Rule shall end when the lawyer advises the appointing authority of the withdrawal of the lawyer's application.</u></p>	
	<p>(d) <u>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.</u></p>	<p>There is no counterpart in the Model Rules to paragraph (d). It references the terminology used in the Code of Judicial Ethics, and expands on the Code section's explanation as to when a candidacy for election or retention to judicial office ends.</p>

<p align="center"><u>ABA Model Rule</u> Rule 8.2 Judicial and Legal Officials Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 8.2 Judicial and Legal Officials Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[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.</p>	<p>[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.</p>	<p>Comment [1] is identical to Model Rule 8.2, cmt. [1].</p>
<p>[2] When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.</p>	<p>[2] When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity. Nothing in this Rule shall be deemed to limit the applicability of any other rule or law.</p>	<p>Model Rule 8.2, cmt. [2] has been deleted because it neither explains nor clarifies the application of the Rule. In its place, the Commission recommends substituting a new Comment [2], which simply carries forward Discussion paragraph 1 of current rule 1-700.</p>
<p>[3] To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.</p>	<p>[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).</p>	<p>The first sentence of Comment [3] is identical to Model Rule 8.2, cmt. [3]. The second sentence is a verbatim statement of Bus. & Prof. Code § 6068(b). The Commission recommends its inclusion to provide notice to lawyers of this statutory obligation.</p>

Rule 8.2: Judicial and Legal Officials

(Comparison of the Current Proposed Rule to the initial Public Comment Draft)

- (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 ~~comply with Canon 5B of not make statements to the California Code of Judicial Ethics~~ 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.

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] When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.~~
- [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).
- ~~[4] Nothing in this Rule shall be deemed to limit the applicability of any other rule or law.~~

Rule 8.2: Judicial and Legal Officials

(Commission's Proposed Rule – Clean Version)

- (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.

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).

TOTAL = 7 Agree = 5
Disagree = 0
Modify = 2
NI = 0

**Rule 8.2 Judicial and Legal Officials
[Sorted by Commenter]**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Anonymous	A			Although commenter did not specifically reference this rule, she expressed her support for all the rules contained in Batch 6.	No response required.
2	Committee on Professional Responsibility and Conduct ("COPRAC")	M		(c)	<p>COPRAC generally supports the adoption of proposed Rule 8.2 subject to the following comment.</p> <p>Canon 5B employs a definition of "candidate" that only applies to persons seeking judicial office by election and not to persons seeking judicial office by appointment. Therefore, the reference in 8.2(c) to Canon 5B is ambiguous. We propose replacing the first sentence of 8.2(c) with the actual language from Canon 5B so that it reads as follows:</p> <p>"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."</p>	<p>No response required.</p> <p>The Commission agrees with the comment and has made the suggested change.</p>

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

TOTAL = 7
 Agree = 5
 Disagree = 0
 Modify = 2
 NI = 0

**Rule 8.2 Judicial and Legal Officials
 [Sorted by Commenter]**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
3	McIntyre, Sandra K.	A			No comment.	No response required.
4	Office of the Chief Trial Counsel	M		Cmts. [1], [2]	OCTC agrees with requiring the lawyer who seeks a judicial appointment shall comply with Canon 5B of the California Code of Judicial Ethics. OCTC, however, would eliminate Comments [1] and [2] as unnecessary.	No response required. The Commission disagrees as to Cmt [1]. The comment is taken verbatim from the Model Rule and explains the policy underlying the Rule, thereby providing lawyers with additional information by which they can conform their conduct to the Rule's standards. The Commission agrees that Cmt. [2] should be deleted because it neither explains nor clarifies the application of the Rule.
				Cmt. [3]	Comment [3] is confusing. It is misleading because nothing in B&P Code section 6068(b) requires lawyers to defend judges, just not disrespect them. If the intent of this Comment is to remind lawyers of the duty not to unjustly criticize judges, OCTC supports that but the Comment should just state that. If the intent of the Comment is to encourage lawyers to defend judges and the court, then the reference to B&P Code section 6068(b) should be stricken.	The Commission believes the commenter has misread the comment. There is no requirement to defend judges; however, lawyers are "encouraged" to do so as is traditional for the legal profession. Nevertheless, the Commission has substituted added a second sentence that restates section 6068(b), and provides a cross-reference to put lawyers on notice of this statutory duty.

TOTAL = 7
Agree = 5
Disagree = 0
Modify = 2
NI = 0

Rule 8.2 Judicial and Legal Officials
[Sorted by Commenter]

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Cmt. [4]	Comment [4] 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.	Provisions such as Comment [4] (now Comment [2]) have regularly been placed in the Discussion to current Rules of Professional Conduct. This provision, in fact, carries forward Discussion ¶.1 to current rule 1-700. The Commission does not understand why the Comment must be part of the Rule to have the desired effect of putting lawyers on notice that other rules or laws might be applicable.
5	Orange County Bar Association	A			We support the adoption of proposed Rule 8.2 and agree with the recommendations of the Commission.	No response required.
6	San Diego County Bar Association Legal Ethics Committee	A			We approve the new rule in its entirety.	No response required.
7	Santa Clara County Bar Association	A			No comment.	No response required.

Rule 8.2: Judicial and Legal Officials

STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: Statutes and Standards (2010 Ed.)
by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

California: The California Rules of Professional Conduct have no comparable provision, but California Business & Professions Code §6068(b) provides that it is the duty of an attorney to “maintain the respect due to the courts of justice and judicial officers.”

District of Columbia omits ABA Model Rule 8.2.

Florida: Rule 8.2(a) also applies to statements about a mediator, arbitrator, juror or member of the venire.

Georgia omits ABA Model Rule 8.2(a) but adopts Rule 8.2(b) verbatim.

Maryland: Rule 8.2(b)(2) provides that a lawyer who is a candidate for judicial office “with respect to a case, controversy or issue that is likely to come before the court, shall not make a commitment, pledge, or promise that is inconsistent with the impartial performance of the adjudicative duties of the office.”

New Jersey: Rule 8.2(b) provides that a lawyer who “has been confirmed for judicial office” shall comply with the applicable provisions of the Code of Judicial Conduct. The rule does not apply to lawyers who are only candidates for judicial office.

New York: In the rules effective April 1, 2009, Rule 8.2 provides as follows: “(a) A lawyer shall not knowingly make a false statement of fact concerning the qualifications, conduct or integrity of a judge or other adjudicatory officer or of a candidate for election or appointment to judicial office. (b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of Part 100 of the Rules of the Chief Administrator of the Courts.”

Ohio: Rule 8.2(a) omits the ABA reference to an “adjudicatory officer or public legal officer.”

Pennsylvania: Rule 8.2 replaces all of ABA Model Rule 8.2(a) with language taken verbatim from DR 8-102(A) and (B) and 8-103(A) of the ABA Model Code of Professional Responsibility.

Virginia: Rule 8.2 provides, in its entirety as follows: “A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge or other judicial officer.”