



The State Bar of California

OPEN SESSION AGENDA ITEM 6.2 MAY 2025 BOARD OF TRUSTEES

DATE: May 22, 2025

TO: Members, Board of Trustees Sitting as the Regulation and Discipline Committee

FROM: Catherine Ongiri, Program Director, Office of Professional Competence
Rachel Brewer, Managing Attorney, Office of Professional Competence

SUBJECT: Proposed Amendments to Rules of Professional Conduct (Rules 8.2 and 8.4):
Request to Circulate for Public Comment

EXECUTIVE SUMMARY

This staff report seeks Board approval to release the State Bar's Standing Committee on Professional Responsibility and Conduct (COPRAC) proposed amendments to the Rules of Professional Conduct, rules 8.2 and 8.4 for a 45-day public comment period. COPRAC prepared amendments to the Rules of Professional Conduct that, if adopted, would clarify that lawyers shall not make false or misleading statements to the public and media that could prejudice judicial proceedings or endanger judicial officers and court personnel where such statements are not protected by the First Amendment to the United States Constitution or by Article I, section 2 of the California Constitution.

RECOMMENDED ACTION

This staff report requests that the Board publish proposed amendments to rules 8.2 and 8.4 of the California Rules of Professional Conduct for public comment.

DISCUSSION

COPRAC is charged with addressing matters involving legal ethics, including studying and recommending changes to the Rules of Professional Conduct to the Board, which if approved by the Board must be adopted by the California Supreme Court. (See Business and Professions section 6077; State Bar Board Book, Section 4.12 & Appen. B.)

On November 26, 2024, the California Judges Association submitted a request to COPRAC

requesting modifications to the Rules of Professional Conduct in response to increased public criticism resulting in threats and violence against judges due to their rulings. This endangers judicial independence and public trust in the legal system.

COPRAC issued an ethics alert in March of 2025 addressing the ethical obligations of attorneys when making disparaging comments about judicial officers.¹

HISTORY OF THREATS TO THE JUDICIARY

Judges and judicial officers are increasingly the subject of personal attacks, unfounded allegations of improper conduct, and threats to their personal safety and the safety of their families.² “Credible threats of harm against the judiciary have risen sharply, from 175 in 2019 to 500 in 2023.”³

Recently proposed federal legislation underscores the wide-ranging nature of such conduct:

In 2021, individuals protected by the U.S. Marshals Service—including federal judges, prosecutors, and court officials—faced over 4,500 threats, a 400% increase since 2015. Numerous threats have also been made toward state and local judiciary members, including the October 2023 murder of Washington County Circuit Court Judge Andrew F. Wilkinson outside his Maryland home and the 2022 murder of Former Juneau County Circuit Court Judge John Roemer in his Wisconsin home. Criminals have attacked or threatened state judges and court personnel in Nevada, Colorado, Texas, Ohio, Mississippi, Rhode Island, New York, California, Kentucky, Michigan, Wyoming, Idaho, and Indiana. Recently, nationwide bomb threats were issued about state court facilities. Court clerks are threatened and harassed daily, and state supreme court justices handling controversial cases are seeing increased incidents of threats and intimidation.⁴

¹ ETHICS ALERT, Activities that Threaten the Safety of Judges and Judicial Officers, Committee on Professional Responsibility and Conduct (March 2025)
https://www.calbar.ca.gov/Portals/0/documents/ethics/COPRAC/Ethics-Alert_Rules-Activities-that-Threaten-the-Safety-of-Judges-and-Judicial-Officers.pdf

² See, e.g., Mich. State Bar, Ethics Op. JI-157 (opining that “[j]udicial officers should conduct a disqualification analysis if the judicial officer *or their family* is threatened or physically attacked.”) (emphasis added).

³ Defusing the violence against judges, as courts under attack, American Bar Association (Aug. 4, 2024), <https://www.americanbar.org/news/abanews/aba-news-archives/2024/08/defusing-violence-against-judges-under-attack/>.

⁴ Countering Threats and Attacks on Our Judges Act, Conference of Chief Justices (last visited April 16, 2025), https://ccj.ncsc.org/_data/assets/pdf_file/0006/101022/Judge-Safety-Bill_0524_F.pdf.

Judges across jurisdictions have expressed their concerns with the practical consequences of this risk to personal safety:⁵

“Threats and attacks on judges can also lead to continued and increased judicial threats and attacks. When people attempt to harm or kill a judge or their family member because of their position and the work they do, this emboldens others to do so as well.” Chief Justice Boggs of Georgia.

“While judges have always lived with a certain level of risk, we have never experienced risk on the scale that we currently see today. We are facing an entirely new threat environment that drives to the very heart of the rule of law and the fair administration of justice under law.” Chief Justice Fader of Maryland.

Such statements may also risk undermining public confidence in the judicial system:⁶

“A safe and secure judiciary is vital to upholding the rule of law and ensuring that all judges are well-positioned to make fair and impartial rulings, and that their decisions cannot be influenced or changed by any threats, intimidation, or retaliation.” Chief Judge Blackburne-Rigsby of D.C.

RECENT STATE BAR COURT DECISIONS INVOLVING ATTORNEY SPEECH AND FIRST AMENDMENT CONSIDERATIONS

Recent California State Bar Court decisions provide important guidance on the ethical boundaries of attorney speech and when such speech may warrant discipline. In *In re Hook* (SBC-23-O-30725), the State Bar Court imposed discipline for an attorney who sent multiple threatening and harassing emails to opposing counsel during settlement discussions. The emails contained profanity, derogatory language, and implicit threats of violence, with the attorney stating he would “water board” witnesses and telling opposing counsel, “[d]on't make me come down there and beat [it] out of you.” The attorney’s conduct was found to be prejudicial to the administration of justice in violation of Rule 8.4(d). While occurring in the context of heated litigation, the threatening communications went far beyond zealous advocacy and had no legitimate purpose. The court noted that such conduct undermines the legal profession’s standards of civility and professionalism.

Additionally, in *In re Pavone* (SBC-20-O-30496), the State Bar Court found an attorney committed misconduct by making unsupported accusations that a judge intentionally refused to follow the law and engaged in judicial advocacy rather than impartial decision-making. The court held that allegations implying actual facts about a judge’s motives and conduct, when

⁵ Texas Judge Makes Impassioned Pleas to Congress for Improved Security, National Center for State Courts (last visited April 21, 2025), <https://www.ncsc.org/newsroom/at-the-center/2024/texas-judge-makes-impassioned-plea-to-congress-for-improved-security>

⁶ *Id.*

made with reckless disregard for their truth or falsity, are not constitutionally protected and violate Business and Professions Code section 6068(b).

In contrast, in a 2023 disciplinary matter, the State Bar Court dismissed all charges against an attorney who made inflammatory statements in filings describing judicial rulings, finding that certain types of “rhetorical hyperbole” are protected by the First Amendment even if distasteful. However, the court emphasized that this protection extends only to statements that could not reasonably be understood as declaring or implying actual facts capable of being proven true or false.

These recent cases underscore that attorneys have a special duty as officers of the court and must exercise care when making public statements about judges, opposing counsel, or any other participants in the legal system, especially allegations that could undermine confidence in the judiciary. While the First Amendment protects robust criticism and advocacy, it does not shield attorneys from discipline for making reckless or knowingly false statements that unjustifiably impugn judicial integrity. As such, COPRAC carefully considered First Amendment issues and created a carve out for constitutionally protected speech.

CLARIFYING AMENDMENTS

COPRAC prepared amendments to the Rules of Professional Conduct that, if adopted, would clarify that lawyers shall not make false or misleading statements to the public and media that could prejudice judicial proceedings or endanger judicial officers and court personnel where such statements are not protected by the First Amendment to the United States Constitution or by Article I, section 2 of the California Constitution and violations are subject to discipline.

Amendments to rule 8.2 would:

- Clarify through a new Comment [1] that a statement asserted as opinion, can be the basis for discipline if that “statement implies actual facts that are capable of objective verification,” citing *In re Yagman* (9th Cir. 1995) 55 F.3d 1430, 1441.

Amendments to rule 8.4 would:

- Relocate who is a “judge” or “judicial officer” for purposes of the rule from paragraph (f) to new Comment [8].
- Clarify through a new Comment [7] that certain types of unprotected activities, including speech, may be the basis for discipline under rule 8.4

At its January 31, 2025, meeting, COPRAC approved proposed amended rules 8.2 and 8.4 for a 60-day public comment period.

OVERVIEW OF THE PUBLIC COMMENTS RECEIVED

COPRAC received eight written public comments regarding the proposed amendments to rules 8.2 and 8.4 with mixed support. Of the commenters, three agreed with rule 8.2 amendments, one supported with modifications, and four opposed; five agreed with rule 8.4 amendments, one supported with modifications, and two opposed. Opposition mainly cited Constitutional free speech concerns. The Bar Association of San Francisco suggested clarifying that rule 8.2

applies only to false statements to align with rule 8.4. The Orange County Bar Association supported rule 8.2 as proposed but recommended modifying rule 8.4 by removing the final sentence of Comment [7] regarding the “reasonable attorney” standard. In response to public comment, rule 8.2 was revised to add language to Comment [1] clarifying that statements must be false and made “with knowledge or reckless disregard of the truth or the falsity of those facts.” For rule 8.4, the revisions maintained the three categories of unprotected activities and maintained the objective “reasonable attorney” standard.

A summary of the public comments COPRAC received and the version of the rule that was circulated for public comment are provided as Attachment C. The complete set of comments are provided as Attachment D.

PREVIOUS ACTION

At its January 31, 2025, meeting, COPRAC approved proposed amended rules 8.2 and 8.4 for a 60-day public comment period.

FISCAL/PERSONNEL IMPACT

None

AMENDMENTS TO RULES

This agenda item requests Board adoption of proposed amendments to rules 8.2 and 8.4 of the California Rules of Professional Conduct.

AMENDMENTS TO BOARD OF TRUSTEES POLICY MANUAL

None

STRATEGIC PLAN GOALS & IMPLEMENTATION STEPS

Goal 1. Protect the Public by Strengthening the Attorney Discipline System

- d. 2. Develop strategies to effectively investigate and prosecute attorneys who commit misconduct, regardless of the nature of their practice, including attorneys in large organizations and firms.

RESOLUTIONS

Should the Board of Trustees, sitting as the Regulation and Discipline Committee concur, it is:

RESOLVED, that the Board of Trustees, sitting as the Regulation and Discipline Committee, authorizes staff to make available for public comment, for a period of 45 days, the Committee on Professional Responsibility and Conduct’s proposed amendments to rule 8.2 of the California Rules of Professional Conduct with as provided in Attachment A; and it is

FURTHER RESOLVED, that the Board of Trustees, sitting as the Regulation and Discipline Committee, authorizes staff to make available for public comment, for a period of 45 days, the Committee on Professional Responsibility and Conduct's proposed amendments to rule 8.4 of the California Rules of Professional Conduct with as provided in Attachment B; and it is

FURTHER RESOLVED, that this authorization for release of public comment is not, and shall not be construed as, a statement or recommendation of approval of the proposed new Rule of Professional Conduct.

ATTACHMENTS LIST

- A.** Proposed Rule 8.2
- B.** Proposed Rule 8.4
- C.** COPRAC January 2025 Version of Proposed Amendments to Rule 8.2 and 8.4 and Summary of Public Comments Table
- D.** Written Public Comments