

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 2-400

**Lead Drafter:** Kehr  
**Co-Drafters:** Kornberg, Rothschild  
**Meeting Date:** September 25 – 26, 2015

### I. CURRENT CALIFORNIA RULE

#### Rule 2-400 Prohibited Discriminatory Conduct in a Law Practice

(A) For purposes of this rule:

- (1) "law practice" includes sole practices, law partnerships, law corporations, corporate and governmental legal departments, and other entities which employ members to practice law;
- (2) "knowingly permit" means a failure to advocate corrective action where the member knows of a discriminatory policy or practice which results in the unlawful discrimination prohibited in paragraph (B); and
- (3) "unlawfully" and "unlawful" shall be determined by reference to applicable state or federal statutes or decisions making unlawful discrimination in employment and in offering goods and services to the public.

(B) In the management or operation of a law practice, a member shall not unlawfully discriminate or knowingly permit unlawful discrimination on the basis of race, national origin, sex, sexual orientation, religion, age or disability in:

- (1) hiring, promoting, discharging, or otherwise determining the conditions of employment of any person; or
- (2) accepting or terminating representation of any client.

(C) No disciplinary investigation or proceeding may be initiated by the State Bar against a member under this rule unless and until a tribunal of competent jurisdiction, other than a disciplinary tribunal, shall have first adjudicated a complaint of alleged discrimination and found that unlawful conduct occurred. Upon such adjudication, the tribunal finding or verdict shall then be admissible evidence of the occurrence or non-occurrence of the alleged discrimination in any disciplinary proceeding initiated under this rule. In order for discipline to be imposed under this rule, however, the finding of unlawfulness must be upheld and final after appeal, the time for filing an appeal must have expired, or the appeal must have been dismissed.

#### **Discussion:**

In order for discriminatory conduct to be actionable under this rule, it must first be found to be unlawful by an appropriate civil administrative or judicial tribunal under applicable state or federal law. Until there is a finding of civil unlawfulness, there is no basis for disciplinary action under this rule.

A complaint of misconduct based on this rule may be filed with the State Bar following a finding of unlawfulness in the first instance even though that finding is thereafter appealed.

## **DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 2-400**

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A disciplinary investigation or proceeding for conduct coming within this rule may be initiated and maintained, however, if such conduct warrants discipline under California Business and Professions Code sections 6106 and 6068, the California Supreme Court's inherent authority to impose discipline, or other disciplinary standard.

### **II. DRAFTING TEAM'S RECOMMENDATION AND VOTE**

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

### **III. PROPOSED RULE (CLEAN)**

#### **Rule 2-400 Prohibited Discrimination in Law Practice Management and Operation**

(a) For purposes of this rule:

- (1) "knowingly permit" means a failure to advocate corrective action where the lawyer knows of a discriminatory policy or practice that results in the unlawful discrimination prohibited by paragraph (b); and
- (2) "unlawfully" and "unlawful" shall be determined by reference to applicable state or federal statutes or decisions making unlawful discrimination in employment and in offering goods and services to the public.

(b) In the management or operation of a law firm, a lawyer shall not unlawfully discriminate or knowingly permit unlawful discrimination on the basis of race, national origin, sex, sexual orientation, religion, age, or disability in:

- (1) hiring, promoting, discharging, or otherwise determining the conditions of employment of any person; or
- (2) accepting or terminating representation of any client.

(c) No disciplinary investigation or proceeding may be initiated by the State Bar against a lawyer under this Rule unless and until a tribunal of competent jurisdiction, other than a disciplinary tribunal, first has adjudicated a complaint of alleged discrimination and found that unlawful conduct occurred. A tribunal finding or verdict regarding unlawful conduct shall be admissible evidence of the occurrence or non-occurrence of the alleged discrimination in any disciplinary proceeding initiated under this Rule. In order for discipline to be imposed under this Rule, however, the finding of unlawfulness must be upheld and final after appeal, the time for filing an appeal must have expired, or the appeal must have been dismissed.

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### Comment:

[1] This Rule applies to all lawyers, whether or not they have any formal role in the management of the law firm in which they practice. This Rule does not apply to lawyers while engaged in providing non-legal services that are not connected with or related to the management or operation of a law firm, although lawyers always have a duty to uphold state and federal law, a breach of which can be cause for discipline. See Business and Professions Code § 6068(a).

[2] This Rule addresses the internal management and operation of a law firm. With regard to discriminatory conduct of lawyers while representing clients, see Rule 8.4(d).

## IV. PROPOSED RULE (REDLINE TO CURRENT CALIFORNIA RULE 2-400)

### Rule 2-400 Prohibited Discrimination in Law Practice Management and Operation ~~Discriminatory Conduct in a Law Practice~~<sup>1</sup>

(Aa) For purposes of this rule:

~~(1) “law practice” includes sole practices, law partnerships, law corporations, corporate and governmental legal departments, and other entities which employ members to practice law;~~<sup>2</sup>

~~(2)~~ “knowingly permit” means a failure to advocate corrective action where the ~~member~~ lawyer knows of a discriminatory policy or practice ~~which~~ that results in the unlawful discrimination prohibited ~~in~~ by paragraph (Bb); and

~~(3)~~ “unlawfully” and “unlawful” shall be determined by reference to applicable state or federal statutes or decisions making unlawful discrimination in employment and in offering goods and services to the public.

(Bb) In the management or operation of a law ~~practice~~ firm, a ~~member~~ lawyer shall not unlawfully discriminate or knowingly permit unlawful discrimination on the basis of race, national origin, sex, sexual orientation, religion, age, ~~or~~ disability, or other category of discrimination prohibited by applicable law in:

(1) hiring, promoting, discharging, or otherwise determining the conditions of employment of any person; or

<sup>1</sup> We recommend this change in title in order to more accurately reflect the content of the proposed Rule.

<sup>2</sup> We have removed paragraph (a)(1) based on the assumption that there will be a definition section that includes the term “law firm.”

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(2) accepting or terminating representation of any client.

(C) No disciplinary investigation or proceeding may be initiated by the State Bar against a ~~member-lawyer~~ under this ~~rule~~ Rule unless and until a tribunal of competent jurisdiction, other than a disciplinary tribunal, ~~shall have first~~ has adjudicated a complaint of alleged discrimination and found that unlawful conduct occurred. ~~Upon such adjudication, the A~~ tribunal finding or verdict regarding unlawful conduct shall then shall be admissible evidence of the occurrence or non-occurrence of the alleged discrimination in any disciplinary proceeding initiated under this ~~r~~Rule. In order for discipline to be imposed under this ~~r~~Rule, however, the finding of unlawfulness must be upheld and final after appeal, the time for filing an appeal must have expired, or the appeal must have been dismissed.

### DiscussionComment:

~~In order for discriminatory conduct to be actionable under this rule, it must first be found to be unlawful by an appropriate civil administrative or judicial tribunal under applicable state or federal law. Until there is a finding of civil unlawfulness, there is no basis for disciplinary action under this rule.~~

~~A complaint of misconduct based on this rule may be filed with the State Bar following a finding of unlawfulness in the first instance even though that finding is thereafter appealed.—<sup>3</sup>~~

~~A disciplinary investigation or proceeding for conduct coming within this rule may be initiated and maintained, however, if such conduct warrants discipline under California Business and Professions Code sections 6106 and 6068, the California Supreme Court's inherent authority to impose discipline, or other disciplinary standard.<sup>4</sup>~~

[1] This Rule applies to all lawyers, whether or not they have any formal role in the management of the law firm in which they practice. This Rule does not apply to lawyers while engaged in providing non-legal services that are not connected with or related to the management or operation of a law firm, although lawyers always have a duty to uphold state and federal law, a breach of which can be cause for discipline. See Business and Professions Code § 6068(a).

[2] This Rule addresses the internal management and operation of a law firm. With regard to discriminatory conduct of lawyers while representing clients, see Rule 8.4(d).<sup>5</sup>

<sup>3</sup> The first two paragraphs of the current Discussion section merely repeat the rule and therefore are omitted.

<sup>4</sup> This paragraph states underlying policy rather than explaining the rule and therefore is omitted.

<sup>5</sup> This paragraph is a place holder pending the Commission's consideration of a possible Rule 8.4.

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### V. PUBLIC COMMENTS SUMMARY

- **David Wolf, Bar Association of San Francisco (June 17, 2015)**  
Concerned that current rule has too many restrictions on discipline. Recommend revising rule to make it more meaningful.
- **Karen Clopton, State Bar Council on Access and Fairness (June 16, 2015)**  
Recommends updates to the current rule to reflect current discrimination protections under existing law. Recommends new rule or rule language to educate lawyers on promoting diversity in the legal profession. *[Comment letter includes proposed language]*
- **Tom Hudson (June 16, 2015)**  
Recommends this rule not be retained as it interferes with the attorney-client relationship and requires attorneys to accept clients that they otherwise do not wish to represent.

### VI. OCTC / STATE BAR COURT COMMENTS

- **JAYNE KIM, OCTC, DATE: OCTC (SEPTEMBER 2, 2015) WROTE AS FOLLOWS:**  

OCTC supports a rule prohibiting discriminatory conduct. Current rule 2-400, for example, provides clarity by requiring that a court of competent jurisdiction find conduct discriminatory before the State Bar may seek discipline. As written, the rule prohibits discriminatory conduct while allowing the criminal and civil courts, with their expertise, to maintain initial responsibility for addressing the unlawful conduct. Many of these cases are handled by government agencies that are specifically authorized and funded to investigate and prosecute such conduct. These agencies have a high level of expertise in these areas. Additionally, the current rule discourages frivolous complaints of discrimination against attorneys while protecting the public from serious complaints of discrimination.

The Commission inquired of OCTC whether it could develop the necessary expertise to enforce a broader anti-discrimination rule and whether it would allocate sufficient resources to such investigations and prosecutions. As with any new or amended rule, OCTC would allocate the needed resources (including expertise development) to enforce the new rule as it does with all of the Rules of Professional Conduct and statutes of the State Bar Act.
- **State Bar Court:** No comments received from State Bar Court.

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

- There is no Model Rule counterpart (although ABA Model Rule 8.4 and proposed rule 8.4(e) deal with discrimination by individual lawyers while representing a client).

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- Twenty-three jurisdictions have adopted rules of professional conduct that prohibit discrimination.<sup>6</sup> Sixteen of those jurisdictions have rules that specifically prohibit discrimination in conduct that occurs by a lawyer in a professional capacity.<sup>7</sup> Four jurisdictions have rules that prohibit discrimination in representing a client.<sup>8</sup> Two jurisdictions have rules that prohibit discrimination in connection with a proceeding before a tribunal.<sup>9</sup>
- No ABA State Adoption Chart for 2-400 [8.4.1].

### VIII. CONCEPTS ACCEPTED/REJECTED; CHANGES IN DUTIES; NON-SUBSTANTIVE CHANGES; ALTERNATIVES CONSIDERED

#### A. Concepts Accepted (Pros and Cons):

1. Expand the current Rule to cover other protected categories.
  - Pros: The identification of protect classes is not static, and we therefore have added to proposed paragraph (b): “or other category of discrimination prohibited by applicable law”. Lawyers are obligated to obey the law as are nonlawyers, and this addition would permit professional discipline whatever applicable anti-discrimination laws might exist in the future without the need to amend this Rule.
  - Cons: None identified.

#### B. Concepts Rejected (Pros and Cons):

1. Expand the current rule by removing the requirement that there be a civil determination of wrongful discrimination before a disciplinary investigation can commence or discipline can be imposed.
  - Pros: Would add the Bar’s enforcement authority to the effort to prevent wrongful discrimination.
  - Cons: It has been the judgment of prior versions of this Commission over a number of years that OCTC lacks the resources in terms of staffing and budget to handle the volume of complaints it might receive if OCTC were given original jurisdiction over claims of discrimination by lawyers. One can imagine, for example, that client complaints about lawyers’ billing practices, competence,

<sup>6</sup> The twenty-three jurisdictions are: Colorado, District of Columbia, Florida, Illinois, Indiana, Iowa, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Rhode Island, Texas, Vermont, Washington, and Wisconsin.

<sup>7</sup> The sixteen jurisdictions are: District of Columbia, Florida, Illinois, Indiana, Iowa, Maryland, Massachusetts, Minnesota, Nebraska, New Jersey, New York, Ohio, Rhode Island, Vermont, Washington, and Wisconsin.

<sup>8</sup> The four jurisdictions are: Colorado, Missouri, North Dakota, and Oregon.

<sup>9</sup> The two jurisdictions are: New Mexico and Texas.

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and other matters would include claims that the lawyer was motivated by the clients' membership in protected groups, materially complicating OCTC's investigatory process as this might, among other things, require investigation of how the lawyers have treated other members of the same protected group. There are specialized government lawyers for civil rights law enforcement; giving OCTC original jurisdiction would require California lawyers to bear the financial burden of funding civil rights enforcement when there is a need to fund general disciplinary prosecutions. In addition, both OCTC and the State Bar Court would be challenged by a new need to gain expertise in the many state and federal laws and regulations that address discrimination. This challenge would be to both the State Bar Court judges and to Court counsel (who assist the judges in preparations of orders regarding motions and decisions) who also would have to learn a new body of law that is not in the professional responsibility area and has a completely different (and vast) set of principles, rules, procedures, reported appellate opinions, and academic articles and treatises. Although OCTC's comment letter dated 9/2/15 provides assurance that OCTC would be able to allocate the resources needed to develop the expertise needed to deal with an expanded Rule, the first paragraph of the OCTC letter acknowledges the expertise of the civil courts and other governmental agencies, and it recognizes that "the current rule discourages frivolous complaints of discrimination against attorneys while protecting the public from serious complaints of discrimination."

2. Expand the current Rule by including conduct unrelated to the practice of law.
  - Pros: This could improve lawyer conduct.
  - Cons: We recommend against this expansion for the reasons stated immediately above.
3. Expand the current rule or add a new rule to educate lawyers on promoting diversity in the legal profession.
  - Pros: This could improve lawyer conduct.
  - Cons: This would be an aspirational rule that would conflict with the Commissions charter to adhere to rules written narrowly for disciplinary purposes.
4. Delete this rule under the theory that it interferes with the lawyer-client relationship by requiring lawyers to accept clients that they otherwise do not wish to represent.
  - Pros: None identified.
  - Cons: Lawyers, no less than any other citizens, have an obligation to obey applicable anti-discrimination laws and regulations. Removing this Rule would not alter that fact that this Rule only creates an explicit basis for professional discipline when a lawyer has been found by a civil court to have violated applicable law.

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5. Restrict the current rule so that it applies only to managerial and supervisory lawyers within a law firm.
  - Pros: RRC-1 made this change, apparently under the theory that Rule 5.1 does not require subordinate lawyers to advocate for improvement in law firm conduct and Rule 5.2 permits a subordinate lawyer to accept a senior lawyer's reasonable directions, and that this Rule should be consistent with those Rules.
  - Cons: We do not see any reason why this Rule must be consistent with Rules 5.1 and 5.2. Each lawyer has an affirmative obligation to comply with non-discrimination law, and a civil finding of violation would seem to show that a senior lawyer's directions were not reasonable within the meaning of Rule 5.2.

### **C. Changes in Duties/Substantive Changes to the Current Rule:**

None.

### **D. Non-Substantive Changes to the Current Rule:**

- The proposal conforms to the Commission's decision to adopt the Model Rule use of "lawyer" in place of "member" and to replace capital with lower case letters in the numbering subparagraphs. This also replaces "law practice" with "law firm".

### **E. Alternatives Considered:**

None

## **IX. OPEN ISSUES/CONCEPTS FOR THE COMMISSION TO CONSIDER**

None

## **X. COMMENTS FROM DRAFTING TEAM MEMBERS OR OTHER COMMISSION MEMBERS**

### **Kehr**

- [Date]: Email Comment
- [Date]: Email Comment

### **Kornberg**

- [Date]: Email Comment
- [Date]: Email Comment

### **Rothschild**

- [Date]: Email Comment
- [Date]: Email Comment

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### XI. RECOMMENDATION AND PROPOSED COMMISSION RESOLUTION

**Recommendation:**

That the Commission recommend that the Board of Trustees of the State Bar of California adopt proposed amended Rule 8.4.1 in the form attached to this report and recommendation.

**Proposed Resolution:**

RESOLVED: That the Commission for the Revision of the Rules of Professional Conduct recommends that the Board of Trustees adopt proposed amended Rule 8.4.1 in the form attached to this Report and Recommendation.

### XII. DISSENTING POSITION(S)

None.

### XIII. FINAL COMMISSION VOTE/ACTION

Date of Vote:

Action:

Vote: X (yes) – X (no) – X (abstain)





# THE STATE BAR OF CALIFORNIA

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Date: September 2, 2015

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

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

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

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- B. Points for Consideration, as calendared
  - A. Rule 3-500: Communication
  - B. Rule 5-110 and Model Rule 3.8 [Special Responsibilities of a Prosecutor]
  - C. Rule 3-110: Failing to Act Competently [Model Rules 1.1, 1.3, 5.1, 5.2, and 5.3]
  - D. Rule 4-200: Fees for Legal Services [Model Rules 1.5]
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  - F. Rule 2-200: Financial Arrangements Among Lawyers [Model Rule 1.5(e)]
  - G. Rule 2-400: Prohibited Discriminatory Conduct in a Law Practice
- C. Closing Comment

### I.

#### OPENING COMMENT

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

**II.**  
**POINTS FOR CONSIDERATION**

**[TEXT OMITTED]**

**G. Rule 2-400: Prohibited Discriminatory Conduct in a Law Practice**

OCTC supports a rule prohibiting discriminatory conduct. Current rule 2-400, for example, provides clarity by requiring that a court of competent jurisdiction find conduct discriminatory before the State Bar may seek discipline. As written, the rule prohibits discriminatory conduct while allowing the criminal and civil courts, with their expertise, to maintain initial responsibility for addressing the unlawful conduct. Many of these cases are handled by government agencies that are specifically authorized and funded to investigate and prosecute such conduct. These agencies have a high level of expertise in these areas. Additionally, the current rule discourages frivolous complaints of discrimination against attorneys while protecting the public from serious complaints of discrimination.

The Commission inquired of OCTC whether it could develop the necessary expertise to enforce a broader anti-discrimination rule and whether it would allocate sufficient resources to such investigations and prosecutions. As with any new or amended rule, OCTC would allocate the needed resources (including expertise development) to enforce the new rule as it does with all of the Rules of Professional Conduct and statutes of the State Bar Act.

**[TEXT OMITTED]**

**III.**  
**CLOSING COMMENT**

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

**Initial Public Comments**  
**[Rule 2-400 – Prohibited Discriminatory Conduct in a Law Practice]**

No.	Commenter	Comment on Behalf of Group?	Rule	Comment	RRC Response
2015-044e	Bar Association of San Francisco – 6/17/2015	Yes	2-400	Concerned that current rule has too many restrictions on discipline. Recommend revising rule to make it more meaningful.	
2015-027	State Bar Council on Access & Fairness (COAF)	Yes	2-400	<p>Recommends updates to the current rule to reflect current discrimination protections under existing law. Recommends new rule or rule language to educate lawyers on promoting diversity in the legal profession.</p> <p><i>[Comment letter includes proposed language]</i></p>	
2015-039	Hudson, Tom	No	2-400	Recommends this rule not be retained as it interferes with the attorney-client relationship and requires attorneys to accept clients that they otherwise do not wish to represent.	



## FULL TEXT OF INITIAL PUBLIC COMMENT LETTERS RECEIVED RE RULE 2-400

**From:** David Wolf and Sarah Banola, Legal Ethics Committee of Bar Association of San Francisco

**Date:** June 17, 2015

**Re:** Rule 2-400

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### **Discrimination**

Although current Rule 2-400 prohibits invidious discrimination, we find it too circumscribed by qualifications and restrictions on discipline for even blatant discriminatory conduct that causes demonstrable harm. For example, a disciplinary investigation or proceeding may not be initiated unless a tribunal "of competent jurisdiction" has first adjudicated a complaint and found that unlawful conduct has occurred. No discipline may be imposed unless the finding has been upheld on appeal, the time for appeal has expired, or the appeal has been dismissed. As a result of these limitations, the Office of Chief Trial Counsel ("OCTC") cannot timely investigate or institute proceedings for even a serious violation and discipline for a demonstrable violation may never occur. For example, if an associate sues her firm for discriminatory conduct, and the jury returns a verdict after five years of litigation, OCTC cannot prosecute if the case settles before judgment was entered, even if the verdict was for the associate. We recommend that the Commission consider revising the rule to make it meaningful.

**From:** Karen Clopton, Council on Access & Fairness

**Date:** June 16, 2015

**Re:** Rule 2-400

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The State Bar Council on Access & Fairness is charged with implementing the State Bar goals and strategies for increasing diversity in the legal profession and the elimination of bias in the practice of law. COAF has focused on Rule 2-400 of the Rules of Professional Conduct as it related to discrimination in the practice of law.

COAF recommends that current Rule 2-400 be updated to reflect current employment protections under the Fair Employment and Housing Act (Gov. Code, § 12900 et seq.) (FEHA) and public accommodations protections under the Unruh Civil Rights Act (Unruh Act) (Civ. Code, § 51 et seq.). We have not cited to federal law, such as Title VII of the Civil Rights Act or the Americans with Disabilities Act, because protections under California law exceed that under federal law. In addition, minor word changes and grammatical edits are recommended. Please see the proposed edits and new language below and feel free to contact me if you have questions or need additional information at [kvc@cpuc.ca.gov](mailto:kvc@cpuc.ca.gov)

### **PROPOSED EDITS TO CURRENT RULE 2-400:**

#### **Rule 2-400 Prohibited Discriminatory Conduct in a Law Practice.**

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(A) For purposes of this rule:

- (1) "law practice" includes sole practices, law partnerships, law corporations, corporate and governmental legal departments, and other entities, which employ members to practice law;

## FULL TEXT OF INITIAL PUBLIC COMMENT LETTERS RECEIVED RE RULE 2-400

(2) "knowingly permit" means a failure to advocate corrective action where the member knows or should have known of a discriminatory policy or practice and fails to take immediate and appropriate corrective action,<sup>1</sup> which results in the unlawful discrimination prohibited in paragraph (B); and

(3) "unlawfully" and "unlawful" shall be determined by reference to applicable state and/or federal statutes or decisions making unlawful discrimination in employment and in offering goods and services to the public.

(B) In the management or operation of a law practice, a member shall not unlawfully discriminate or knowingly permit unlawful discrimination on the basis of race-, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression sexual orientation, religion, age, or disability- or military and veteran status, whether actual or perceived, to harass an employee, an applicant, an unpaid intern or volunteer, or a person providing services pursuant to a contract<sup>2</sup> in:

(1) to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment<sup>3</sup> hiring, promoting, discharging, or otherwise determining the conditions of employment of any person; or

(2) to refuse to offer full and equal accommodations, advantages, facilities, privileges, or services to any client, including but not limited to, accepting or terminating representation of any client. This section shall not be construed to confer any right or privilege on a person that is conditioned or limited by law or that is applicable alike to persons of every enumerated basis described in section (B) above.<sup>4</sup> Nothing in this section shall be construed to require any construction, alteration, repair, structural or otherwise, or modification of any sort whatsoever, beyond that construction, alteration, repair, or modification that is otherwise required by other provisions of law, to any new or existing establishment, facility, building, improvement, or any other structure, nor shall anything in this section be construed to augment, restrict, or alter in any way the authority of the State Architect to require construction, alteration, repair, or modifications that the State Architect otherwise possesses pursuant to other laws.<sup>5</sup>

<sup>1</sup> Government Code section 12940, subdivision (j)(1) & (3).

<sup>2</sup> Government Code section 12940; Cal. Code Regs., title 2, sections 11035, subdivision (q), 11036, 11039 and 11064.

<sup>3</sup> Government Code section 12940, subdivision (a); Civil Code section 51, subdivision (b).

<sup>4</sup> Civil Code section 51, subdivision (c).

<sup>5</sup> Civil Code section 51, subdivision (d).

### **PROPOSED NEW RULE OR ADDED LANGUAGE to RULE 2-400:**

Given COAF's charge to help eliminate bias in the practice of law, COAF also offers new additional language to educate members about their professional responsibility related to access, fairness and the elimination of bias as they impact the nature and quality of services provided by members of the legal profession to diverse members of the public.

## FULL TEXT OF INITIAL PUBLIC COMMENT LETTERS RECEIVED RE RULE 2-400

(C) No disciplinary investigation or proceeding may be initiated by the State Bar against a member under this rule unless and until a tribunal of competent jurisdiction, other than a disciplinary tribunal, shall have first adjudicated a complaint of alleged discrimination and found that unlawful conduct occurred. Upon such adjudication, the tribunal finding or verdict shall then be admissible evidence of the occurrence or non-occurrence of the alleged discrimination in any disciplinary proceeding initiated under this rule. In order for discipline to be imposed under this rule, however, the finding of unlawfulness must be upheld and final after appeal, the time for filing an appeal must have expired, or the appeal must have been dismissed.

### ***Discussion:***

In order for discriminatory conduct to be actionable under this rule, it must first be found to be unlawful by an appropriate civil, administrative or judicial tribunal under applicable state and/or federal law. Until there is a finding of civil unlawfulness, there is no basis for disciplinary action under this rule.

A complaint of misconduct based on this rule may be filed with the State Bar following a finding of unlawfulness in the first instance even though that finding is thereafter appealed.

A disciplinary investigation or proceeding for conduct coming within this rule may be initiated and maintained, however, if such conduct warrants discipline under California Business and Professions Code sections 6106 and 6068, the California Supreme Court's inherent authority to impose discipline, or other disciplinary standard. (Added by order of Supreme Court, effective March 1, 1994.)

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[Footnote continued...]

PROPOSED LANGUAGE TO BE ADDED TO RULE 2-400 or a new rule:  
Promote Diversity and Inclusion in the Legal Profession:

In the management and operation of a law practice and in order to understand and properly protect and promote the public interest, members must engage in and promote a diverse and inclusive legal profession and practice. A diverse, inclusive and non-discriminatory legal profession can be created and maintained through community engagement, strategic partnerships, education on access, fairness and the elimination of bias and by supporting a practice that reflects and is representative of the public and client community to be served.

## FULL TEXT OF INITIAL PUBLIC COMMENT LETTERS RECEIVED RE RULE 2-400

**From:** Tom Hudson

**Date:** June 16, 2015

**Re:** Rule 2-400

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I am concerned that this proposal appears to have been designed so that the California State Bar will be able to use the awesome power of the State to punish individual attorneys for their private decisions about who they choose not to represent.

An attorney should not face discipline or any adverse action for respectfully declining to represent a client that he does not wish to represent, even if that decision was allegedly influenced or based on some discriminatory intent. The attorney-client relationship is an intensely personal matter that requires a workable agreement between the parties that they will cooperate in good faith. The State Bar should not seek to force unwilling parties into such a personal relationship.

Aside from the obvious Constitutional concerns and the denial of individual freedom and moral autonomy that would occur if the State Bar forced attorneys to accept unwanted clients, it must also be said that the likely result of such compulsion would not be good for clients. Nothing good can come from forcing an attorney to represent an undesirable client against his will. No one should be surprised if clients are more likely to lose when they are represented by attorneys who are only representing them because the State Bar left them no choice in the matter.

**CURRENT CALIFORNIA RULE 2-400**  
**“Prohibited Discriminatory Conduct in a Law Practice”**

***I. Text of Current Rule:***

- (A) For purposes of this rule:
- (1) "law practice" includes sole practices, law partnerships, law corporations, corporate and governmental legal departments, and other entities which employ members to practice law;
  - (2) "knowingly permit" means a failure to advocate corrective action where the member knows of a discriminatory policy or practice which results in the unlawful discrimination prohibited in paragraph (B); and
  - (3) "unlawfully" and "unlawful" shall be determined by reference to applicable state or federal statutes or decisions making unlawful discrimination in employment and in offering goods and services to the public.
- (B) In the management or operation of a law practice, a member shall not unlawfully discriminate or knowingly permit unlawful discrimination on the basis of race, national origin, sex, sexual orientation, religion, age or disability in:
- (1) hiring, promoting, discharging, or otherwise determining the conditions of employment of any person; or
  - (2) accepting or terminating representation of any client.
- (C) No disciplinary investigation or proceeding may be initiated by the State Bar against a member under this rule unless and until a tribunal of competent jurisdiction, other than a disciplinary tribunal, shall have first adjudicated a complaint of alleged discrimination and found that unlawful conduct occurred. Upon such adjudication, the tribunal finding or verdict shall then be admissible evidence of the occurrence or non-occurrence of the alleged discrimination in any disciplinary proceeding initiated under this rule. In order for discipline to be imposed under this rule, however, the finding of unlawfulness must be upheld and final after appeal, the time for filing an appeal must have expired, or the appeal must have been dismissed.

**Discussion:**

In order for discriminatory conduct to be actionable under this rule, it must first be found to be unlawful by an appropriate civil administrative or judicial tribunal under applicable state or federal law. Until there is a finding of civil unlawfulness, there is no basis for disciplinary action under this rule.

A complaint of misconduct based on this rule may be filed with the State Bar following a finding of unlawfulness in the first instance even though that finding is thereafter appealed.

A disciplinary investigation or proceeding for conduct coming within this rule may be initiated and maintained, however, if such conduct warrants discipline under California Business and Professions Code sections 6106 and 6068, the California Supreme Court's inherent authority to impose discipline, or other disciplinary standard.

## **II. Background/Purpose:**

### **A. Rule History**

In 1990, the Judicial Council's Subcommittee on Gender Bias in the Courts recommended promulgation of a Rule of Professional Conduct prohibiting employment discrimination. In addition, in 1989, 1991 and 1992, the Conference of Delegates of the State Bar approved resolutions recommending State Bar promulgation of a new Rule of Professional Conduct that would subject attorneys to discipline for discrimination, including discrimination in the acceptance and termination of clients. In response, the State Bar prepared a new rule 2-400 that was adopted by the Board on March 6, 1993, and approved by the Supreme Court, effective March 1, 1994. (The foregoing origin of current rule 2-400, including studies by the Commission and a specially formed State Bar Anti-Bias Rule Committee, is discussed fully in the State Bar's "Request that the Supreme Court of California Approve Proposed Rule 2-400 of the Rules of Professional Conduct of the State Bar of California and Memorandum and Supporting Documents in Explanation," July, 1993, Supreme Court case number S034144.)

### **B. The first Commission's Proposed Rule**

The first Commission's proposed rule 8.4.1 carried forward current rule 2-400. Current rule 2-400 prohibits unlawful discrimination based upon race, national origin, sex, gender, sexual orientation, religion, age or disability in the management and operation of a law firm or in accepting or terminating the representation of any client. Proposed rule 8.4.1 has no ABA Model Rule counterpart; however, both ABA Model Rule 8.4(d)<sup>1</sup>

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<sup>1</sup> Model Rule 8.4(d) provides it is misconduct for a lawyer to: "(d) engage in conduct that is prejudicial to the administration of justice." A Model Rule comment clarifies the application of paragraph (d):

"[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule."

and the first Commission's proposed rule 8.4(d)<sup>2</sup> addressed discrimination by individual lawyers while representing a client.

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

A. 2015 Comment

In a \_\_\_\_\_, 2015 memorandum to the Commission, OCTC provided the following comment regarding rule 2-400:

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

B. 2010 Comment

In a June 15, 2010 memorandum to the first Commission, OCTC provided the following comment on proposed rule 8.4.1:

Some of the Comments are more appropriate for treatises, law review articles, and ethics opinions. We would support Comment 2.

C. 2001 Comment

None.

**IV. *Initial Public Comments Received:***

At its April 24, 2015 meeting, the Board of Trustees Regulation and Discipline Committee authorized a 45-day public comment period to seek general input on possible amendments to the Rules of Professional Conduct that ought to be considered by the Commission. A synopsis of public comments received on rule 2-400 and the full text of those comments is enclosed with this assignment.

Three comments specific to current rule 2-400 were received. An individual commenter recommended deleting the rule as it interferes with the attorney-client relationship. The Bar Association of San Francisco recommended revisions to the rule to make it less restrictive and more meaningful. The State Bar Council on Access and Fairness (COAF) suggested modifications to the rule to incorporate language from current California statutes to better reflect current employment protections, and suggested additional language to promote diversity within the legal profession. COAF included suggested language in its comment.

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<sup>2</sup> The first Commission's proposed rule 8.4(d) provided it would be misconduct for a lawyer to: "(d) engage in conduct in connection with the practice of law, including when acting in propria persona, that is prejudicial to the administration of justice."

## **VI. Potential Deficiencies in the Current Rule:**

- A. See above input from OCTC.
- B. The current rule contains ambiguities as to whether the rule applies only to managerial or supervisory lawyers. If so, the Rules do not contain any prohibitions on discriminatory conduct by a non-managerial lawyer.
- C. The current rule language is outdated and does not reflect current statutory employment protections.
- D. The current rule limits discipline to situations where there is a final judgment from a tribunal of final jurisdiction that has found discriminatory conduct has occurred. This limits the State Bar's ability to enforce prohibitions on discriminatory conduct in the operation or management of a law practice.
- E. The current rule is limited to situations relating to the "the management or operation of a law practice," and does not reach conduct by lawyer in providing legal services to a client, except to the extent that the lawyer might discriminate in the acceptance or termination of a representation. (Compare Model Rule 8.4(d), which applies to any conduct by a lawyer that is prejudicial to the administration of justice, including discriminatory conduct.) (See section VII.A. and note 1; see also section VIII.B. concerning proposed Model Rule 8.4(g).)

## **VII. California Context:**

### **A. Former California Law Encompassing Bias**

Currently, California does not have a rule or commentary prohibiting conduct prejudicial to the administration of justice or prohibiting bias or prejudice where that conduct is prejudicial to the administration of justice. (See ABA Model Rule 8.4 and Comment [3].) However, former Business and Professions Code section 6068, subdivision (f) prohibited in part "offensive personality." (See also, Code of Civ. Proc. Sec. 282(6), discussed in *Peters v. State Bar* (1933) 219 Cal. 218.) In *U.S. v. Wunsch* (9th Cir. 1996) 84 F.3d 1110, that part of section 6068(f) was found unconstitutionally vague and a regulation against personality rather than speech or conduct. The following case law demonstrates how this provision was applied prior to invalidation and demonstrates what type of conduct was considered to reflect an "offensive personality."

- Attorney described a judge as under a "political obligation" to opposing counsel. *Peters v. State Bar* (1933) 219 Cal. 218.
- Attorney charged the presiding judge with acting as a prosecutor and attorney for the plaintiff and being prejudiced against certain witnesses because of their religion. *Hogan v. State Bar* (1951) 36 Cal.2d 807.
- Defense attorney referred to prosecutor as a "high-priced lawyer." *Hawk v. Superior Court* (1974) 42 Cal.App.3d 108.

- In a dispute with a former client, attorney disclosed the irrelevant fact that client's sister was having an affair. *Dixon v. State Bar* (1982) 32 Cal.3d 728.
- Attorney described a judge as having a "boudoir." *Maltaman v. State Bar* (1987) 43 Cal.3d 924.
- Attorney referred to the court as "dirty," characterized judges as "the four stooges," and told a court clerk that a judge is a "swine." *Lebbos v. State Bar* (1991) 53 Cal.3d 37.
- Attorney called opposing counsel "a slob." *People v. Brown* (1992) 7 Cal.Rptr.2d 370 (ordered not published, previously published at: 5 Cal.App.4<sup>th</sup> 950).

#### B. California Law Related to Sexual Harassment of Clients

Issues relating to preventing discrimination and bias in the legal profession overlap with issues concerning sexual harassment. In addition to current rule 3-120, which prohibits attorneys from demanding sexual relations with clients, or from using coercion, intimidation, or undue influence in entering into a sexual relationship with a client, California case law also addresses sexual harassment and sexual offenses by attorneys. For example, the Court of Appeal held that an attorney engaging in sexual harassment of a client, and withholding legal services where sexual favors were not granted, could constitute outrageous conduct for purposes of intentional infliction of emotional distress. *McDaniel v. Gile* (1991) 230 Cal.App.3d 363, 373. Additionally, the State Bar has imposed discipline against attorneys for sexual harassment and other sexual offenses under Business and Professions Code section 6106, which subjects attorneys to discipline for acts involving moral turpitude. In one instance, an attorney was disciplined for sexual harassment of a client and intentional infliction of emotional distress. *In the Matter of Torres* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 138. In other cases, attorneys have been disciplined for sexual crimes involving moral turpitude. *In re Lesansky* (2001) 25 Cal.4th 11 [104 Cal.Rptr.2d 409] (lewd act on a child); *In re Safran* (1976) 18 Cal.3d 134 [133 Cal.Rptr. 9] (annoying or molesting a child under 18); *In the Matter of Meza* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 608 (three or more acts of sexual conduct with a child under age 14).

#### C. Incentives for Diversity.

Related to the elimination of bias and prejudice in the workplace, various California statutes offer incentives to minority and women business enterprises. For contracts awarded by state entities, Public Contract Code section 10115 et. seq. sets participation goals for minority, women, and disabled veteran business enterprises, and requires that the awarding entity consider the efforts of the bidders to meet the diversity goals set forth in the statute. Similar participation goals are included for state agencies awarding contracts for professional bond services. Government Code section 16850 et. seq. Similar to the goals behind rule 2-400, these incentives seek to encourage diversity in the workplace as well as the elimination of bias and discrimination.

D. Attorney Oath.

Recent amendments to California Rule of Court 9.4 added new language to the oath taken by attorneys upon admission to practice law. The additional language states: “As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity.” Similar to the policies and concepts behind current rule 2-400 of preventing discrimination, promoting diversity, and eliminating bias in the legal profession, the attorney oath provision seeks to ensure the legal profession displays respect and courtesy to other lawyers, clients, and the public.

**VIII. Approach In Other Jurisdictions (National Backdrop):**

A. Variations on Rules Prohibiting Discrimination.

There is no ABA Model Rule counterpart to rule 2-400 that prohibits discrimination in the operation and management of a law firm. However, twenty-three jurisdictions have adopted rules of professional conduct that prohibit discrimination.<sup>3</sup> Sixteen of those jurisdictions have rules that specifically prohibit discrimination in conduct that occurs by a lawyer in a professional capacity.<sup>4</sup> Four jurisdictions have rules that prohibit discrimination in representing a client.<sup>5</sup> Two jurisdictions have rules that prohibit discrimination in connection with a proceeding before a tribunal.<sup>6</sup> Michigan Rule 6.5 requires lawyers to treat all persons involved in the legal process with courtesy and respect. A comment to Michigan rule 6.5 provides that “a supervisory lawyer should make reasonable efforts to ensure that the firm has in effect policies and procedures that do not discriminate against members or employees of the firm.”

In addition, Comment [3] to Model Rule 8.4 is related and prohibits lawyers from knowingly manifesting bias or prejudice by words or conduct when such actions are prejudicial to the administration of justice. Of the jurisdictions with no black letter rule on discrimination, thirteen have adopted Commentary with language identical or substantially similar to Comment [3].<sup>7</sup> Similar language was also included in Comment [3] to the first Commission’s proposed rule 8.4. Fourteen jurisdictions do not have a rule

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<sup>3</sup> The twenty-three jurisdictions are: Colorado, District of Columbia, Florida, Illinois, Indiana, Iowa, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Rhode Island, Texas, Vermont, Washington, and Wisconsin.

<sup>4</sup> The sixteen jurisdictions are: District of Columbia, Florida, Illinois, Indiana, Iowa, Maryland, Massachusetts, Minnesota, Nebraska, New Jersey, New York, Ohio, Rhode Island, Vermont, Washington, and Wisconsin.

<sup>5</sup> The four jurisdictions are: Colorado, Missouri, North Dakota, and Oregon.

<sup>6</sup> The two jurisdictions are: New Mexico and Texas.

<sup>7</sup> The thirteen jurisdictions are: Arizona, Arkansas, Connecticut, Delaware, Idaho, Maine, North Carolina, South Carolina, South Dakota, Tennessee, Utah, West Virginia, and Wyoming.

or commentary addressing these issues.<sup>8</sup> The ABA State Adoption Chart, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 8.4: Misconduct, Comment [3],” revised June 15, 2015, is available at:

[http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_8\\_4\\_cmt\\_3.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_8_4_cmt_3.authcheckdam.pdf)

B. ABA Revisions to Model Rule 8.4.

In response to the ABA’s Goal III to eliminate bias and enhance diversity, the ABA Standing Committee on Ethics and Professional Responsibility is considering amendments to the black letter of Model Rule 8.4 to expressly address bias, prejudice, and harassment. See ABA Standing Committee on Ethics and Professional Responsibility Working Discussion Draft – Revisions to Model Rule 8.4 Language Choice Narrative, July 16, 2015, enclosed with this assignment. The working draft amendment to Model Rule 8.4 is as follows:

It is professional misconduct for a lawyer to: . . .

(g) knowingly harass or discriminate against persons, on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status, while engaged [in conduct related to] [in] the practice of law.

The ABA Committee has also drafted amendments to Model Rule 8.4, Comment [3].<sup>9</sup>

**IX. Public Comment Received by the First Commission:**

The first Commission received comments on current rule 2-400 and proposed rule 8.4.1 during separate public comment periods. During an initial public comment period, the Commission received public comments on current rule 2-400. The synopsis of the initial

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<sup>8</sup> The fourteen jurisdictions are: Alabama, Alaska, Georgia, Hawaii, Kansas, Kentucky, Louisiana, Mississippi, Montana, New Hampshire, Nevada, Oklahoma, Pennsylvania, and Virginia.

<sup>9</sup> The proposed amendment would replace current Comment [3] with the following:

Conduct that violates paragraph (g) undermines confidence in the legal profession and our legal system and is contrary to the fundamental principle that all people are created equal. A lawyer may not engage in such conduct through the acts of another. See Rule 8.4(a). Legitimate advocacy respecting any of these factors when they are at issue in a representation does not violate paragraph (g). It is not a violation of paragraph (g) for lawyers to limit their practices to clients from underserved populations as defined by any of these factors, or for lawyers to decline to represent clients who cannot pay for their services. A trial judge’s finding that preemptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). Paragraph (g) incorporates by reference relevant holdings by applicable courts and administrative agencies.

public comments received by the first Commission on rule 2-400 and the full text of those comments are enclosed with this assignment.

During the second public comment period, the Commission received public comments on proposed rule 8.4.1. The clean text of proposed rule 8.4.1 drafted by the first Commission and adopted by the Board to replace rule 2-400 is enclosed with this assignment, together with the synopsis of public comments received on that proposed rule and the full text of those comments. Although the proposed rule differs from current rule 2-400, the drafting team might consider to what extent, if any, the public comments received on the proposed rule provide helpful information in analyzing the current rule.

To facilitate the review and to appreciate the relevance of these public comments, a redline comparison of the proposed rule showing changes to rule 2-400 is also enclosed with the public comments received. However, given the Board's charge to engage in a comprehensive review of the current rules and to retain the historical nature of the California Rules as "a clear and enforceable articulation of disciplinary standards," a drafting team that considers amendments developed by the first Commission should not presume that the approach taken by the first Commission was appropriate to achieve those objectives.

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

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

1. Whether the rule should be amended to clarify that the prohibition on discriminatory conduct applies to all managerial or supervisory lawyers, whether or not they have any formal role in the management of the law firm in which they practice.

2. Whether a related new rule generally governing anti-bias speech/conduct by lawyers should be recommended for adoption by the Board. (See the former prohibition against “offensive personality” that was found to be unconstitutionally vague in *U.S. v. Wunsch* (9th Cir. 1996) 84 F.3d 1110.) (See also MR 8.4(d) prohibiting conduct prejudicial to the administration of justice.)
3. Whether current rule 2-400(C) should be deleted or modified to provide the State Bar with an opportunity to investigate and discipline lawyers without the requirement that there first be a final judgment by a tribunal that has found that discriminatory misconduct has occurred.
4. Whether current rule 2-400 should be amended or a new rule similar to proposed Model Rule 8.4(g) should be proposed that would prohibit a lawyer from “knowingly harass[ing] or discriminat[ing] against persons, on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status, while engaged [in conduct related to] [in] the practice of law.” (See section VIII.B, above.)

**XI. Research Resources:**

- [California Rules of Court, Appendix C, proposed guideline 5](#) (bias and prejudice)
- *U.S. v. Wunsch* (9th Cir. 1996) 84 F.3d 1110
- ABA Standing Committee on Ethics and Professional Responsibility Working Discussion Draft – Revisions to Model Rule 8.4 Language Choice Narrative, July 16, 2015

Enclosures:

2015 Initial Public Comments Synopsis Table

2015 Initial Public Comments – Full Text

ABA Standing Committee on Ethics and Professional Responsibility Working Discussion Draft – Revisions to Model Rule 8.4 Language Choice Narrative, July 16, 2015

RRC1 Proposed Rule 8.4.1

RRC1 Redline Comparison of Proposed Rule 8.4.1 to CAL 2-400

RRC1 Public Comments Synopsis Table on Proposed Rule 8.4.1

RRC1 Public Comments on Proposed Rule 8.4.1 – Full Text

