

To: Rules Revision Commission
From: Rule 8.4.1 Drafting Team
Re: Proposed Rule 8.4.1
Date: August 16, 2016
Materials for August 26, 2016 meeting

The drafting team has proposed revisions to proposed Rule 8.4.1, which are derived in part from the recent revisions to Model Rule 8.4, paragraph (g), and associated comments (See attached Revised Report 109). The drafting team welcomes comments on the proposed changes. The drafting team has deferred drafting responses to the public comments received to date until after the discussion of the rule at the August 26, 2016 meeting.

Attached:

Rule, ALT1, Draft 5 (02-19-16)
Rule, ALT1, Draft 6.1 (08-15-16), redline comparison to Draft 5
Rule, ALT2, Draft 5 (06-26-16), drafted at the direction of the Board
ALT1 Public Comment Synopsis Table (08-16-16)
ALT2 Public Comment Synopsis Table (08-16-16).
July 25, 2016 Law Professors (Zitrin) Letter re 8.4.1
ABA Revised Report 109 (August 2016)

**Rule 8.4.1 [2-400] Prohibited Discrimination, Harassment and Retaliation
(Commission's Proposed Rule Adopted on February 19 – 20, 2016 ("ALT1") –
Clean Version)**

- (a) In representing a client, or in terminating or refusing to accept the representation of any client, a lawyer shall not unlawfully harass or unlawfully discriminate against persons* on the basis of any protected characteristic or for the purpose of retaliation.
- (b) In relation to a law firm's operations, a lawyer shall not, on the basis of any protected characteristic or for the purpose of retaliation, unlawfully:
 - (1) discriminate or knowingly* permit unlawful discrimination;
 - (2) harass or knowingly* permit the unlawful harassment of an employee, an applicant, an unpaid intern or volunteer, or a person* providing services pursuant to a contract; or
 - (3) refuse to hire or employ a person,* or refuse to select a person for a training program leading to employment, or bar or discharge a person* from employment or from a training program leading to employment, or discriminate against a person* in compensation or in terms, conditions, or privileges of employment.
- (c) For purposes of this rule:
 - (1) "protected characteristic" means 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, age, military and veteran status, or other category of discrimination prohibited by applicable law, whether the category is actual or perceived;
 - (2) "knowingly permit" means to fail to advocate corrective action where the lawyer knows* of a discriminatory policy or practice that results in the unlawful discrimination or harassment prohibited by paragraph (b);
 - (3) "unlawfully" and "unlawful" shall be determined by reference to applicable state and federal statutes and decisions making unlawful discrimination or harassment in employment and in offering goods and services to the public; and
 - (4) "retaliation" means to take adverse action because a person* has (i) opposed, or (ii) pursued, participated in, or assisted any action alleging, any conduct prohibited by this Rule.
- (d) A lawyer who is the subject of a State Bar investigation or State Bar Court proceeding alleging a violation of this Rule shall promptly notify the State Bar of

any criminal, civil, or administrative action premised, whether in whole or part, on the same conduct that is the subject of the State Bar investigation or State Bar Court proceeding.

- (e) Upon issuing a notice of a disciplinary charge under this Rule:
 - (1) If the notice is of a disciplinary charge under paragraph (a) of this Rule, the State Bar shall provide a copy of the notice to the California Department of Fair Employment and Housing and the United States Department of Justice, Coordination and Review Section.
 - (2) If the notice is of a disciplinary charge under paragraph (b) of this Rule, the State Bar shall provide a copy of the notice to the California Department of Fair Employment and Housing and the United States Equal Employment Opportunity Commission.
- (f) This Rule shall not prevent a lawyer from representing a client alleged to have engaged in unlawful discrimination, harassment, or retaliation.

Comment

[1] Conduct that violates this Rule 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). In relation to a law firm's operations, this Rule imposes on all law firm* lawyers the responsibility to advocate corrective action to address known* harassing or discriminatory conduct by the firm* or any of its other lawyers or nonlawyer personnel. Law firm* management and supervisory lawyers retain their separate responsibility under Rules 5.1 and 5.3. Neither this Rule nor Rule 5.1 or 5.3 imposes on the alleged victim of any conduct prohibited by this Rule any responsibility to advocate corrective action.

[2] The conduct prohibited by paragraph (a) includes the conduct of a lawyer in a proceeding before a judicial officer. (See Canon 3B(6) of the Code of Judicial Ethics providing, in part, that: "A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation against parties, witnesses, counsel, or others.") A lawyer does not violate paragraph (a) by referring to any particular status or group when the reference is relevant to factual or legal issues or arguments in the representation. This Rule does not apply to conduct protected by the First Amendment to the United States Constitution or by Article I, § 2 of the California Constitution. While both the parties and the court retain discretion to refer such conduct to the State Bar, a court's finding that preemptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (a).

[3] What constitutes a failure to advocate corrective action under paragraph (c)(2) will depend on the nature and seriousness of the discriminatory policy or practice, the

extent to which the lawyer knows* of unlawful discrimination or harassment resulting from that policy or practice, and the nature of the lawyer's relationship to the lawyer or law firm* implementing that policy or practice. For example, a law firm* non-management and non-supervisory lawyer who becomes aware that the law firm* is engaging in a discriminatory hiring practice may advocate corrective action by bringing that discriminatory practice to the attention of a law firm* management lawyer who would have responsibility under Rule 5.1 or 5.3 to take reasonable* remedial action upon becoming aware of a violation of this Rule.

[4] Paragraph (d) ensures that the State Bar and the State Bar Court will be provided with information regarding related proceedings that may be relevant in determining whether a State Bar investigation or a State Bar Court proceeding relating to a violation of this Rule should be abated.

[5] Paragraph (e) recognizes the public policy served by enforcement of laws and regulations prohibiting unlawful discrimination, by ensuring that the state and federal agencies with primary responsibility for coordinating the enforcement of those laws and regulations is provided with notice of any allegation of unlawful discrimination, harassment, or retaliation by a lawyer that the State Bar finds has sufficient merit to warrant issuance of a notice of a disciplinary charge.

[6] This Rule permits the imposition of discipline for conduct that would not necessarily result in the award of a remedy in a civil or administrative proceeding if such proceeding were filed.

Rule 8.4.1 [2-400] Prohibited Discrimination, Harassment and Retaliation

- (a) In representing a client, or in terminating or refusing to accept the representation of any client, a lawyer shall not unlawfully harass or unlawfully discriminate against persons* on the basis of any protected characteristic or for the purpose of retaliation.
- (b) In relation to a law firm's operations, a lawyer shall not, on the basis of any protected characteristic or for the purpose of retaliation, unlawfully:
 - (1) discriminate or knowingly* permit unlawful discrimination;
 - (2) harass or knowingly* permit the unlawful harassment of an employee, an applicant, an unpaid intern or volunteer, or a person* providing services pursuant to a contract; or
 - (3) refuse to hire or employ a person,* or refuse to select a person for a training program leading to employment, or bar or discharge a person* from employment or from a training program leading to employment, or discriminate against a person* in compensation or in terms, conditions, or privileges of employment.
- (c) For purposes of this rule:
 - (1) "protected characteristic" means 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, age, military and veteran status, or other category of discrimination prohibited by applicable law, whether the category is actual or perceived;
 - (2) "knowingly permit" means to fail to advocate corrective action where the lawyer knows* of a discriminatory policy or practice that results in the unlawful discrimination or harassment prohibited by paragraph (b);
 - (3) "unlawfully" and "unlawful" shall be determined by reference to applicable state and federal statutes and decisions making unlawful discrimination or harassment in employment and in offering goods and services to the public; and
 - (4) "retaliation" means to take adverse action because a person* has (i) opposed, or (ii) pursued, participated in, or assisted any action alleging, any conduct prohibited by this Rule.
- (d) A lawyer who is the subject of a State Bar investigation or State Bar Court proceeding alleging a violation of this Rule shall promptly notify the State Bar of any criminal, civil, or administrative action premised, whether in whole or part, on the same conduct that is the subject of the State Bar investigation or State Bar Court proceeding.
- (e) Upon issuing a notice of a disciplinary charge under this Rule:
 - (1) If the notice is of a disciplinary charge under paragraph (a) of this Rule, the State Bar shall provide a copy of the notice to the California Department of Fair

Employment and Housing and the United States Department of Justice, Coordination and Review Section.

- (2) If the notice is of a disciplinary charge under paragraph (b) of this Rule, the State Bar shall provide a copy of the notice to the California Department of Fair Employment and Housing and the United States Equal Employment Opportunity Commission.
- (f) This Rule shall not prevent a lawyer from representing a client alleged to have engaged in unlawful discrimination, harassment, or retaliation.
- (g) This Rule does not limit the ability of a lawyer to decline or withdraw from a representation as required by Rule 1.16. This Rule also does not preclude legitimate advice or advocacy consistent with these Rules.

Comment

[1] Conduct that violates this Rule 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). In relation to a law firm's operations, this Rule imposes on all law firm* lawyers the responsibility to advocate corrective action to address known* harassing or discriminatory conduct by the firm* or any of its other lawyers or nonlawyer personnel. Law firm* management and supervisory lawyers retain their separate responsibility under Rules 5.1 and 5.3. Neither this Rule nor Rule 5.1 or 5.3 imposes on the alleged victim of any conduct prohibited by this Rule any responsibility to advocate corrective action.

[2] The conduct prohibited by paragraph (a) includes the conduct of a lawyer in a proceeding before a judicial officer. (See Canon 3B(6) of the Code of Judicial Ethics providing, in part, that: "A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation against parties, witnesses, counsel, or others.") A lawyer does not violate paragraph (a) by referring to any particular status or group when the reference is relevant to factual or legal issues or arguments in the representation. A lawyer does not violate this Rule by limiting the scope or subject matter of the lawyer's practice, or by limiting the lawyer's practice to members of underserved populations or by otherwise restricting who will be accepted as clients for legitimate advocacy-based reasons, in accordance with these Rules or other law. This Rule does not apply to conduct protected by the First Amendment to the United States Constitution or by Article I, § 2 of the California Constitution. While both the parties and the court retain discretion to refer such conduct to the State Bar, a court's finding that ~~preemptory~~ peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (a).

[3] What constitutes a failure to advocate corrective action under paragraph (c)(2) will depend on the nature and seriousness of the discriminatory policy or practice, the extent to which the lawyer knows* of unlawful discrimination or harassment resulting from that policy or practice, and the nature of the lawyer's relationship to the lawyer or law firm* implementing that policy or practice. For example, a law firm* non-management and non-supervisory lawyer who becomes aware that the law firm* is engaging in a discriminatory hiring practice may advocate corrective action by bringing that discriminatory practice to the attention of a law firm*

management lawyer who would have responsibility under Rule 5.1 or 5.3 to take reasonable* remedial action upon becoming aware of a violation of this Rule.

[4] Paragraph (d) ensures that the State Bar and the State Bar Court will be provided with information regarding related proceedings that may be relevant in determining whether a State Bar investigation or a State Bar Court proceeding relating to a violation of this Rule should be abated.

[5] Paragraph (e) recognizes the public policy served by enforcement of laws and regulations prohibiting unlawful discrimination, by ensuring that the state and federal agencies with primary responsibility for coordinating the enforcement of those laws and regulations is provided with notice of any allegation of unlawful discrimination, harassment, or retaliation by a lawyer that the State Bar finds has sufficient merit to warrant issuance of a notice of a disciplinary charge.

[6] This Rule permits the imposition of discipline for conduct that would not necessarily result in the award of a remedy in a civil or administrative proceeding if such proceeding were filed.

**Rule 8.4.1 [2-400] Prohibited Discrimination, Harassment and Retaliation
(Staff's Proposed Rule Drafted at the Direction of the Board ("ALT2") –
Clean Version)**

- (a) In representing a client, or in terminating or refusing to accept the representation of any client, a lawyer shall not unlawfully harass or unlawfully discriminate against persons* on the basis of any protected characteristic or for the purpose of retaliation.
- (b) In relation to a law firm's operations, a lawyer shall not, on the basis of any protected characteristic or for the purpose of retaliation, unlawfully:
 - (1) discriminate or knowingly* permit unlawful discrimination;
 - (2) harass or knowingly* permit the unlawful harassment of an employee, an applicant, an unpaid intern or volunteer, or a person* providing services pursuant to a contract; or
 - (3) refuse to hire or employ a person,* or refuse to select a person* for a training program leading to employment, or bar or discharge a person* from employment or from a training program leading to employment, or discriminate against a person* in compensation or in terms, conditions, or privileges of employment.
- (c) For purposes of this rule:
 - (1) "protected characteristic" means 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, age, military and veteran status, or other category of discrimination prohibited by applicable law, whether the category is actual or perceived;
 - (2) "knowingly permit" means to fail to advocate corrective action where the lawyer knows* of a discriminatory policy or practice that results in the unlawful discrimination or harassment prohibited by paragraph (b);
 - (3) "unlawfully" and "unlawful" shall be determined by reference to applicable state and federal statutes and decisions making unlawful discrimination or harassment in employment and in offering goods and services to the public; and
 - (4) "retaliation" means to take adverse action because a person* has (i) opposed, or (ii) pursued, participated in, or assisted any action alleging, any conduct prohibited by this Rule.

- (d) 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, shall have first:
- (1) adjudicated a complaint of alleged harassment or discrimination and found that unlawful conduct occurred; or
 - (2) has entered an order sanctioning a lawyer for such unlawful conduct.
- Upon adjudication or entry of order, the tribunal's finding, verdict or order shall then be admissible evidence of the occurrence or non-occurrence of the harassment or discrimination alleged in any disciplinary proceeding initiated under this Rule.
- (e) This Rule shall not prevent a lawyer from representing a client alleged to have engaged in unlawful discrimination, harassment, or retaliation.

Comment

[1] Conduct that violates this Rule 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). In relation to a law firm's operations, this Rule imposes on all law firm* lawyers the responsibility to advocate corrective action to address known* harassing or discriminatory conduct by the firm* or any of its other lawyers or nonlawyer personnel. Law firm* management and supervisory lawyers retain their separate responsibility under Rules 5.1 and 5.3. Neither this Rule nor Rule 5.1 or 5.3 imposes on the alleged victim of any conduct prohibited by this Rule any responsibility to advocate corrective action.

[2] The conduct prohibited by paragraph (a) includes the conduct of a lawyer in a proceeding before a judicial officer. (See Canon 3B(6) of the Code of Judicial Ethics providing, in part, that: "A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation against parties, witnesses, counsel, or others.") A lawyer does not violate paragraph (a) by referring to any particular status or group when the reference is relevant to factual or legal issues or arguments in the representation. This Rule does not apply to conduct protected by the First Amendment to the United States Constitution or by Article I, § 2 of the California Constitution. While both the parties and the court retain discretion to refer such conduct to the State Bar, a court's finding that preemptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (a).

[3] What constitutes a failure to advocate corrective action under paragraph (c)(2) will depend on the nature and seriousness of the discriminatory policy or practice, the

extent to which the lawyer knows* of unlawful discrimination or harassment resulting from that policy or practice, and the nature of the lawyer's relationship to the lawyer or law firm* implementing that policy or practice. For example, a law firm* non-management and non-supervisory lawyer who becomes aware that the law firm* is engaging in a discriminatory hiring practice may advocate corrective action by bringing that discriminatory practice to the attention of a law firm* management lawyer who would have responsibility under Rule 5.1 or 5.3 to take reasonable* remedial action upon becoming aware of a violation of this Rule.

[4] In order for harassment or 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.

[5] 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.

[6] This Rule permits the imposition of discipline for conduct that would not necessarily result in the award of a remedy in a civil or administrative proceeding if such proceeding were filed.

**Proposed Rule 8.4.1 [2-400] Prohibited Discrimination, Harassment and Retaliation
[ALT1] Synopsis of Public Comments**

TOTAL = XX **A = X**
D = X
M = X
NI = X

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
X-2016-13	Robinson, Bari	N	A		I have been an attorney for almost 40 years and have had instances in my career where I feel I was victim of bias and discrimination. The experiences were very debilitating to me personally and did harm to my career . . . the instances of bias and discrimination of many I have mentored are distressingly similar to mine.	
X-2016-15a	Garen, Clark	N	D		Discrimination should not be a basis for taking action against an attorney's license, <u>especially</u> prior to a civil adjudication of liability. Every employee who is terminated now enters the courtroom lottery for discrimination claims. Subjecting an attorney's license to action based on a discrimination claim will give the discharged employee additional leverage with which to extort a settlement from the attorney. This is not a proper field of regulation and any regulation should only occur after a civil action is concluded.	
X-2016-19b	Anderson, Mark	N	D		I agree with the concerns raised by the Board of Trustees concerning due process, the increased demands on State Bar resources that may result, and	

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

**Proposed Rule 8.4.1 [2-400] Prohibited Discrimination, Harassment and Retaliation
[ALT1] Synopsis of Public Comments**

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					<p>questions regarding any evidentiary or preclusive effects a State Bar Court decision may have in other proceedings.</p> <p>There is no good reason to undercut the formal court processes by having the ability to institute parallel proceedings, especially if there is no proof of damage as would be required in a court proceeding.</p> <p>I'm also concerned about the "catch-all" phrase addition, as being vague enough to enlarge prosecution even where a court might not find liability.</p>	
X-2016-21	Hills, Nickcolyer	N	A		<p>The State Bar Court and OCTC are perfectly well suited to litigate discrimination claims against lawyers by clients and their employees. It is no more unique than fraud, misrepresentation, or theft of client funds.</p> <p>The attorneys or their firms are sanctioned, disciplined and monitored for many rule violations, but the basic requirements of Rule 2-400 are not enforced unless and until there has been a final court decision finding discrimination by the attorney or his firm. It's time to put a stop to this outlandish</p>	

**Proposed Rule 8.4.1 [2-400] Prohibited Discrimination, Harassment and Retaliation
[ALT1] Synopsis of Public Comments**

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					practice and demand that our attorneys and their counterparts be held to the same high standards as everyone else.	
X-2016-26	Shepard, Stephen	N	D		The proposed rule interferes with an attorney's freedom to pick and choose clients and whom the attorney will or will not represent. Further, the proposed rule constitutionally prohibits the right to associate.	
X-2016-27a	Cross, Terrence	N	D		[no comment provided]	
X-2016-28	Fisher, Frank	N	D		<p>The discrimination rules should have a conscience exception for those attorneys that have religious convictions that would require certain prohibited conduct to violate their deeply-held religious beliefs. We as attorneys should be upholding constitutional protections for conscience concerns. An attorney should not lose his or her livelihood merely because the attorney cannot act in a manner contrary to that warranted by his or her free exercise of religious beliefs.</p> <p>Furthermore, an attorney should not be subject to discipline until there has been a final adjudication that he or she has discriminated. Such a rule will</p>	

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					provide people with certain sexual orientations to impose the full weight of governmental power on someone that may ultimately be found not to have done anything wrong. This is unconscionable!	
X-2016-30	Nelson, Sheila	N	D		<p>Eliminating current Rule 2-400(C)'s pre-discipline adjudication requirement raises serious concerns regarding the need to assure due process, potential increased demands on State Bar resources, and significant questions regarding any evidentiary or preclusive effects a State Bar Court decision may have in other proceedings.</p> <p>The Board can and should adopt the rule that broadens the definition of protected classes while preserving the protection of due process that attaches to a civil adjudication of discrimination.</p> <p>Alternative 2, which incorporates the expanded list of protected characteristics and broadening of the rule's scope as reflected in Alternative 1, but which largely retains the jurisdictional limitation in current Rule 2-400(C) and can act as a safe guard against claims of discrimination that may</p>	

**Proposed Rule 8.4.1 [2-400] Prohibited Discrimination, Harassment and Retaliation
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					<p>be found to be without merit.</p> <p>The State Bar Court should not take on those issues for which the general civil and criminal trial courts provide adequate protection.</p>	
X-2016-32t	Law Professors (Zitrin)	Y	NI		<p>The difference between the two alternative rules is substantial, as the first alternate draft does not require pre-adjudication. Although current rule 2-400 does have such a requirement, that does not mean a new rule should.</p> <p>However, the commission must carefully consider, if Alternative One is chosen, whether lawyers in appropriate circumstances, should be able to choose their clients despite certain “protected characteristics” under the rule. MR 8.4.1(a) currently states that “in terminating <i>or refusing to accept</i>” a client the lawyer “may not unlawfully discriminate.” The term “unlawfully” is only vaguely defined in section (c)(3) of the rule.</p> <p>We understand why many on the commission felt that Alternative Two, requiring independent pre-adjudication, may take much of the teeth out of this rule.</p>	

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					<p>However, should the commission choose Alternative One, with no pre-adjudication, it would give trial counsel huge discretion in determining what is “unlawful.”</p> <p>If choosing Alternative One, therefore, the commission might want to consider removing the language “or refusing to accept...” to remove that issue from trial counsel’s potentially over-zealous discretion. We note the unusually dense and lengthy nature of the rule itself, which will make interpretation difficult may also serve to vest even more interpretive discretion in trial counsel. For example, consider:</p> <ul style="list-style-type: none"> • A lawyer supervising a legal clinic at a law school affiliated with a battered-women’s shelter would be violating this rule by accepting only women clients in the clinic; • An Afghani-American lawyer in a busy sole practice focused on immigration rights of people from Afghanistan could be disciplined for declining to represent refugees from Latin America or Syria; • A lawyer supervising a disability rights clinic who refuses 	

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					<p>to accommodate an individual <i>without disabilities</i> who seeks help regarding perceived discrimination <i>against</i> him might arguably violate this rule.</p> <p>Should these lawyers be subject to discipline absent a separate independent finding? Absent an adjudication, we are not persuaded that discipline is warranted. However, if the “refuse to accept” language is removed, striking pre-adjudication is more viable.</p>	
X-2016-36	Eisner, Paul	N	M		<p>While the proposed repeal of 2-400(C) is a step in the right direction, it is far from adequate reform.</p> <p>Age discrimination is treated differently and age discrimination is rampant in the legal profession. Firms frequently set forth criteria which discriminates against those attorneys who were traditional law students, promptly passed and are forty years of age or older. Age discrimination is rampant in the legal profession and the bar is complicit, taking no action to terminate it.</p> <p>I would recommend the following rule be adopted: “(1) As used herein, the term “law</p>	

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					<p>firm” means and refers to any association, partnership, limited partnership, limited liability partnership, law corporation, limited liability corporation or other entity through one or more attorneys join for the practice of law.</p> <p>(2) All advertisements, listings and other solicitations seeking to employ or obtain the contract services of an attorney shall state the name, address, telephone number and e-mail address of both the attorney(s) and law firm or other entity seeking to employ or retain the contract services of an attorney. Any advertisement, listing or other solicitation which is incomplete, but from which the name, address, telephone number and e-mail address of both the attorney(s) and law firm or other entity seeking to employ or retain the contract services of an attorney can be readily ascertained by viewing the attorney information on the State Bar website shall be in substantial compliance with this Rule.</p> <p>(3) No attorney, law firm or other entity may advertise, list, make any advertisement stating that a</p>	

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					<p>prospective employee or prospective independent contractor, or otherwise require that a prospective or actual employee:</p> <ul style="list-style-type: none"> (a) Must or is preferred to be a graduate of a particular year(s) or class(es), (b) Is or is preferred to be a recent graduate or have been admitted to practice in a particular year(s), (c) Has or is preferred not to have a maximum amount of experience whether expressly stated or set forth in form of a range with low to high number of years of experience, (d) Is or is preferred not to be of or over a certain chronological age, or (e) Is or is preferred to be or not to be of a particular race, creed, religion, national origin, ethnicity, gender, sexual preference or marital status. <p>(4) This rule does not apply to any potential or actual client who is not an attorney, seeking to hire or retain an attorney to represent him, her or it.</p> <p>(5) Every attorney and law firm is</p>	

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					required to report to the California State Bar the filing of three claims alleging discrimination within any twelve month period, whether with Department of Fair Employment and Housing, Equal Employment Opportunity Commission, or any other federal, state (including but not limited to California) or local public agency having investigatory, adjudicatory or quasi-adjudicatory powers in matters of employment discrimination prohibited by federal, state (including but not limited to California) or local law. The reporting requirement applies when three claims are filed counting all agencies even though no agency may have had more than one claim filed.”	
X-2016-40	Allen, Adeline	N	D		<p>The proposed rule violates the First Amendment rights of attorneys, including free speech, free association, and free exercise.</p> <p>The new rule would essentially create a free-standing speech code for lawyers, pursuant to which lawyers will be subject to professional discipline simply for engaging in politically incorrect speech.</p>	

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					<p>The proposed rule would limit the autonomy of lawyers to accept and decline representation, thereby interfering with the historically recognized right of attorneys to determine which clients and cases to accept and which to decline. The rule will compel lawyers to take cases and/or clients they would otherwise not take, forcing attorneys into fiduciary, confidential, and oftentimes long-term attorney-client relationships with unwanted clients. Such a scenario is not only bad for the attorney, it is bad for the client as well.</p> <p>The proposed rule and Comments conflict with other rules of professional conduct, such as rule regarding diligence and zeal, conflicts of interest, and accepting appointments. Hence, in complying with the new rule attorneys may be violating other rules, placing lawyers in a no-win situation.</p> <p>There is no factually demonstrated need for the proposed rule.</p>	

**Proposed Rule 8.4.1 [2-400] Prohibited Discrimination, Harassment and Retaliation
[ALT2] Synopsis of Public Comments**

TOTAL = XX
A = X
D = X
M = X
NI = X

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
X-2016-15b	Garen, Clark	N	D		<p>The discrimination laws are already heavily weighed in favor of the employee. If the employee wins, the employer pays plaintiff and defense attorney fees. If the employee loses, the employer still gets to pay their own attorney fees. The attorney fees usually far exceed the amount of any award.</p> <p>Subjecting an attorney to professional discipline for discrimination gives the employee an unreasonable tool to compel the attorney employer to pay extortion money. Every discharged employee has the option to play the litigation lottery with everything to gain and nothing to lose. Causing an attorney to lose his license for claims of terminated employees is an unreasonable risk to the attorney and provides the employees with unneeded extra leverage to force settlements. Any professional action should be postponed until the conclusion of a civil action and be based primarily on the record in that civil action.</p>	

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

**Proposed Rule 8.4.1 [2-400] Prohibited Discrimination, Harassment and Retaliation
[ALT2] Synopsis of Public Comments**

TOTAL = XX
A = X
D = X
M = X
NI = X

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
X-2016-27b	Cross, Terrence	N	D		Existing antidiscrimination and anti-retaliation laws provide adequate incentives and remedies. There is no need to overlay a rule of professional conduct, including the existing rule.	
X-2016-32t	Law Professors (Zitrin)	Y	NI		<p>The difference between the two alternative rules is substantial, as the first alternate draft does not require pre-adjudication. Although current rule 2-400 does have such a requirement, that does not mean a new rule should.</p> <p>However, the commission must carefully consider, if Alternative One is chosen, whether lawyers in appropriate circumstances, should be able to choose their clients despite certain “protected characteristics” under the rule. MR 8.4.1(a) currently states that “in terminating <i>or refusing to accept</i>” a client the lawyer “may not unlawfully discriminate.” The term “unlawfully” is only vaguely defined in section (c)(3) of the rule.</p> <p>We understand why many on the commission felt that Alternative Two, requiring independent pre-adjudication, may take much of the teeth out of this rule.</p>	

**Proposed Rule 8.4.1 [2-400] Prohibited Discrimination, Harassment and Retaliation
[ALT2] Synopsis of Public Comments**

TOTAL = XX **A = X**
D = X
M = X
NI = X

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
					<p>However, should the commission choose Alternative One, with no pre-adjudication, it would give trial counsel huge discretion in determining what is “unlawful.”</p> <p>If choosing Alternative One, therefore, the commission might want to consider removing the language “or refusing to accept...” to remove that issue from trial counsel’s potentially over-zealous discretion. We note the unusually dense and lengthy nature of the rule itself, which will make interpretation difficult may also serve to vest even more interpretive discretion in trial counsel. For example, consider:</p> <ul style="list-style-type: none"> • A lawyer supervising a legal clinic at a law school affiliated with a battered-women’s shelter would be violating this rule by accepting only women clients in the clinic; • An Afghani-American lawyer in a busy sole practice focused on immigration rights of people from Afghanistan could be disciplined for declining to represent refugees from Latin America or Syria; • A lawyer supervising a 	

**Proposed Rule 8.4.1 [2-400] Prohibited Discrimination, Harassment and Retaliation
[ALT2] Synopsis of Public Comments**

TOTAL = XX **A = X**
D = X
M = X
NI = X

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
					<p>disability rights clinic who refuses to accommodate an individual <i>without disabilities</i> who seeks help regarding perceived discrimination <i>against</i> him might arguably violate this rule.</p> <p>Should these lawyers be subject to discipline absent a separate independent finding? Absent an adjudication, we are not persuaded that discipline is warranted. However, if the “refuse to accept” language is removed, striking pre-adjudication is more viable.</p>	
X-2016-35	Arthur, David	N	D		<p>A highly likely use of either proposed amendment to Rule 2-400 will be to create fear and/or to harass attorneys who hold certain political or social views.</p> <p>Some special interest groups keep asserting new categories of “protected characteristics,” and to apply those characteristics retroactively. Expanding an attorney disciplinary rule to potentially include all manner of newly invented protected characteristics creates an atmosphere of fear that will stifle free expression and zealous representation of clients.</p>	



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July 25, 2016

Hon. Lee Smalley Edmon, Chair
and all members
Second Commission for the Revision of the Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105
BY U.S. MAIL and EMAIL c/o Lauren.McCurdy@calbar.ca.gov

Re: Comment on proposed rules of professional conduct

Dear Chair Edmon and members of the Commission:

Please consider this comment on behalf of each of the undersigned, each currently or in the recent past a teacher of Legal Ethics or Professional Responsibility at a law school in California. We are providing you with identification for each professor, including law school affiliation and, in some cases, other significant identifying information. The information is for identification purposes only.

Introductory remarks:

Preliminarily, groups of ethics professors have written to the State Bar Board in 2010 and the Supreme Court in 2014¹ concerning the first rules commission's work product. We note the following points made in those letters:

First, we believe that the ethical rules that govern the conduct of lawyers in California are extraordinarily important to the daily practice of law.

Second, we believe that in the past, taken as a whole the proposed rules have fallen short in their charge, first and foremost, to protect clients and the public. Any variation from this path that puts the profession's self-interest or self-protection ahead of the needs of clients or the public must fail. Not only would such a course be a disservice to the consumers of legal services, but it would likely result in damaging the integrity of, respect for, and confidence in the profession that the rules are expressly designed to foster.

We now add to those points. Thus, third, we applaud much of the work product of this second commission. It is significantly more client- and public-protective than the first commission's work product. We also commend this commission for its ability to get these rules

¹ Respectively, Letter of June 15, 2010 to State Bar Board of Governors signed by 30 California law professors who teach legal ethics; and Letter of March 3, 2014 to each member of the California Supreme Court, signed by 55 California law professors who teach legal ethics. These letters are substantively identical. We will refer to them here as the "first ethics professors' letter."

to public comment on a tight timetable while still seeking to meet the goals of both the rules and the charge from the California Supreme Court. There are still important issues – see below, Part II – but many positive steps have been taken.

Fourth, we believe that within the Court’s charge to the second commission, the black-letter rules and brief comments should serve not only as rules of discipline for those lawyers accused of offenses, but as guidance for the overwhelming majority of responsible and ethical lawyers who look to the rules for benchmarks that govern their behavior. Few California lawyers have the level of sophistication that members of the Rules Commission have, and they need this guidance. For the most part, we believe the commission has successfully provided it.

Three preliminary notes:

1. We note that this letter is not all-inclusive. Rather, it is an attempt to articulate some of the most important and more global concerns that we share about this rules draft. There are a number of issues we have left unaddressed, such as proposed rules 6.1 (not adopted), 3.10, 1.8.10, the chapter 5 series, and others.

2. While the signatories have all concurred in the entire text of this letter, some would have expressed their agreement in somewhat different language than the drafters have used. Additionally, when we refer to other, earlier ethics professors’ letters and reference the pronoun “we,” this should not be taken to mean that the signatories here are identical to those on other letters. We use it for convenience; the signatures on each letter including this one speak for themselves. This letter will be updated during public comment as new signatories are added.

3. We have divided the letter into three parts: first, proposed rules that have been modified since the first commission with which we largely agree; second, rules where we still have significant concerns and thus specific recommendations for modifications; and third, rules on which we have commented without a recommendation either way. **Bolded** rules relate to those rules we believe are most significant.

[TEXT OMITTED]

III. Other comments and observations.

[TEXT OMITTED]

2. Model Rule 8.4.1:

An anti-harassment rule and anti-discrimination rule is vital. Making discrimination in the workplace and elsewhere subject to discipline is an appropriate step that we similarly applaud. There is no place for such behavior in our profession.

We note that there are two alternative proposed rules presented for public comment. We do not choose between them. However, we note that the difference between them is primarily that the second alternative requires, in the words of Comment 4 to the Alternative Two, that:

In order for harassment or 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.

This difference between the two alternatives is substantial, as the first alternate draft does not require such pre-adjudication. Although current Rule 2-400 does have such a requirement, that does not mean a new rule should.

However, the commission must carefully consider, if Alternative One is chosen, whether lawyers in appropriate circumstances, should be able to choose their clients despite certain “protected characteristics” under the rule. MR 8.4.1(a) currently states that “in terminating or refusing to accept” a client the lawyer “may not unlawfully discriminate.” The term “unlawfully” is only vaguely defined in section (c)(3) of the rule.

We understand why many on the commission felt that Alternative Two, requiring independent pre-adjudication, may take much of the teeth out of this rule. However, should the commission choose Alternative One, with no pre-adjudication, it would give trial counsel huge discretion in determining what is “unlawful.”

If choosing Alternative One, therefore, the commission might want to consider removing the language “or refusing to accept...” to remove that issue from trial counsel’s potentially over-zealous discretion. We note the unusually dense and lengthy nature of the rule itself, which will make interpretation difficult may also serve to vest even more interpretive discretion in trial counsel. For example, consider:

- A lawyer supervising a legal clinic at a law school affiliated with a battered-women's shelter would be violating this rule by accepting only women clients in the clinic;
- An Afghani-American lawyer in a busy sole practice focused on immigration rights of people from Afghanistan could be disciplined for declining to represent refugees from Latin America or Syria;
- A lawyer supervising a disability rights clinic who refuses to accommodate an individual without disabilities who seeks help regarding perceived discrimination against him might arguably violate this rule.

Should these lawyers be subject to discipline absent a separate independent finding? Absent an adjudication, we are not persuaded that discipline is warranted. However, if the "refuse to accept" language is removed, striking pre-adjudication is more viable.

[TEXT OMITTED]

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AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY
SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE
COMMISSION ON DISABILITY RIGHTS
DIVERSITY & INCLUSION 360 COMMISSION
COMMISSION ON RACIAL AND ETHNIC DIVERSITY IN THE PROFESSION
COMMISSION ON SEXUAL ORIENTATION AND GENDER IDENTITY
COMMISSION ON WOMEN IN THE PROFESSION

REPORT TO THE HOUSE OF DELEGATES

REVISED RESOLUTION

RESOLVED, That the American Bar Association amends Rule 8.4 and Comment of the ABA Model Rules of Professional Conduct as follows (insertions underlined, deletions ~~struck through~~):

Rule 8.4: Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; ~~or~~

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination ~~harass or discriminate~~ on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This ~~Rule paragraph~~ does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

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Comment

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

~~[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.~~

[3] Discrimination and harassment by lawyers in violation of paragraph (g) undermines confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others ~~because of their membership or perceived membership in one or more of the groups listed in paragraph (g).~~ Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct ~~towards a person who is, or is perceived to be, a member of one of the groups.~~ Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).

[4] Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. ~~Paragraph (g) does not prohibit conduct undertaken to promote diversity.~~ Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at

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recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.

~~[5] Paragraph (g) does not prohibit legitimate advocacy that is material and relevant to factual or legal issues or arguments in a representation. A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). A~~
lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance with these Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. See Rule 6.2(a), (b) and (c). A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. See Rule 1.2(b).

~~[4] [6]~~ A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

~~[5] [7]~~ Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

REPORT

“Lawyers have a unique position in society as professionals responsible for making our society better. Our rules of professional conduct require more than mere compliance with the law. Because of our unique position as licensed professionals and the power that it brings, we are the standard by which all should aspire. Discrimination and harassment . . . is, and unfortunately continues to be, a problem in our profession and in society. Existing steps have not been enough to end such discrimination and harassment.”

ABA President Paulette Brown, February 7, 2016 public hearing on amendments to ABA Model Rule 8.4, San Diego, California.

I. Introduction and Background

The American Bar Association has long recognized its responsibility to represent the legal profession and promote the public’s interest in equal justice for all. Since 1983, when the Model Rules of Professional Conduct (“Model Rules”) were first adopted by the Association, they have been an invaluable tool through which the Association has met these dual responsibilities and led the way toward a more just, diverse and fair legal system. Lawyers, judges, law students and the public across the country and around the world look to the ABA for this leadership.

Since 1983, the Association has also spearheaded other efforts to promote diversity and fairness. In 2008 ABA President Bill Neukum led the Association to reformulate its objectives into four major “Goals” that were adopted by the House of Delegates.¹ Goal III is entitled, “Eliminate Bias and Enhance Diversity.” It includes the following two objectives:

1. Promote full and equal participation in the association, our profession, and the justice system by all persons.
2. Eliminate bias in the legal profession and the justice system.

A year before the adoption of Goal III the Association had already taken steps to address the second Goal III objective. In 2007 the House of Delegates adopted revisions to the Model Code of Judicial Conduct to include Rule 2.3, entitled, “Bias, Prejudice and Harassment.” This rule prohibits judges from speaking or behaving in a way that manifests, “bias or prejudice,” and from engaging in harassment, “based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation.” It also calls upon judges to require lawyers to refrain from these activities in proceedings before the court.² This current proposal now before the House will further implement the Association’s Goal III objectives by placing a similar provision into the Model Rules for lawyers.

¹ ABA MISSION AND GOALS, http://www.americanbar.org/about_the_aba/aba-mission-goals.html (last visited May 9, 2016).

² Rule 2.3(C) of the ABA Model Code of Judicial Conduct reads: “A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited to race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, against parties, witnesses, lawyers, or others.”

When the Model Rules were first adopted in 1983 they did not include any mention of or reference to bias, prejudice, harassment or discrimination. An effort was made in 1994 to correct this omission; the Young Lawyers Division and the Standing Committee on Ethics and Professional Responsibility (SCEPR³) each proposed language to add a new paragraph (g) to Rule 8.4, “Professional Misconduct,” to specifically identify bias and prejudice as professional misconduct. However, in the face of opposition these proposals were withdrawn before being voted on in the House. But many members of the Association realized that something needed to be done to address this omission from the Model Rules. Thus, four years later, in February 1998, the Criminal Justice Section and SCEPR developed separate proposals to add a new antidiscrimination provision into the Model Rules. These proposals were then combined into Comment [3] to Model Rule 8.4, which was adopted by the House at the Association’s Annual Meeting in August 1998. This Comment [3] is discussed in more detail below. Hereinafter this Report refers to current Comment [3] to 8.4 as “the current provision.”

It is important to acknowledge that the current provision was a necessary and significant first step to address the issues of bias, prejudice, discrimination and harassment in the Model Rules. But it should not be the last step for the following reasons. It was adopted before the Association adopted Goal III as Association policy and does not fully implement the Association’s Goal III objectives. It was also adopted before the establishment of the Commission on Sexual Orientation and Gender Identity, one of the co-sponsors of this Resolution, and the record does not disclose the participation of any of the other Goal III Commissions—the Commission on Women in the Profession, Commission on Racial and Ethnic Diversity in the Profession, and the Commission on Disability Rights—that are the catalysts for these current amendments to the Model Rules.

Second, Comments are not Rules; they have no authority as such. Authority is found only in the language of the Rules. “The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.”³

Third, even if the text of the current provision were in a Rule it would be severely limited in scope: It applies (i) only to conduct by a lawyer that occurs in the course of representing a client, and (ii) *only* if such conduct is also determined to be “prejudicial to the administration of justice.” As the Association’s Goal III Commissions noted in their May 2014 letter to SCEPR:

It [the current provision] addresses bias and prejudice only within the scope of legal representation and only when it is prejudicial to the administration of justice. This limitation fails to cover bias or prejudice in other professional capacities (including attorneys as advisors, counselors, and lobbyists) or other professional settings (such as law schools, corporate law departments, and employer-employee relationships within law firms). The comment also does not address harassment at all, even though the judicial rules do so.

In addition, despite the fact that Comments are not Rules, a false perception has developed over the years that the current provision is equivalent to a Rule. In fact, this is the only example in the Model Rules where a Comment is purported to “solve” an ethical issue that otherwise would require resolution through a Rule. Now—thirty-three years after the Model Rules were first

³ MODEL RULES OF PROF’L CONDUCT, Preamble & Scope [21] (2016).

adopted and eighteen years after the first step was taken to address this issue—it is time to address this concern in the black letter of the Rules themselves. In the words of ABA President Paulette Brown: “The fact is that skin color, gender, age, sexual orientation, various forms of ability and religion still have a huge effect on how people are treated.”⁴ As the Recommendation and Report of the Oregon New Lawyers to the Assembly of the Young Lawyers Division at the Annual Meeting 2015 stated: “The current Model Rules of Professional Conduct (the “Model Rules”), however, do not yet reflect the monumental achievements that have been accomplished to protect clients and the public against harassment and intimidation.”⁵ The Association should now correct this omission. It is in the public’s interest. It is in the profession’s interest. It makes it clear that discrimination, harassment, bias and prejudice do not belong in conduct related to the practice of law.

II. Process

Over the past two years, SCEPR has publicly engaged in a transparent investigation to determine, first whether, and then how, the Model Rules should be amended to reflect the changes in law and practice since 1998. The emphasis has been on open discussion and publishing drafts of proposals to solicit feedback, suggestions and comments. SCEPR painstakingly took that feedback into account in subsequent drafts, until a final proposal was prepared.

This process began on May 13, 2014 when SCEPR received a joint letter from the Association’s four Goal III Commissions: the Commission on Women in the Profession, Commission on Racial and Ethnic Diversity in the Profession, Commission on Disability Rights, and the Commission on Sexual Orientation and Gender Identify. The Chairs of these Commissions wrote to the SCEPR asking it to develop a proposal to amend the Model Rules of Professional Conduct to better address issues of harassment and discrimination and to implement Goal III. These Commissions explained that the current provision is insufficient because it “does not facially address bias, discrimination, or harassment and does not thoroughly address the scope of the issue in the legal profession or legal system.”⁶

In the fall of 2014 a Working Group was formed under the auspices of SCEPR and chaired by immediate past SCEPR chair Paula Frederick, chief disciplinary counsel for the State Bar of Georgia. The Working Group members consisted of one representative each from SCEPR, the Association of Professional Responsibility Lawyers (“APRL”), the National Organization of Bar Counsel (“NOBC”) and each of the Goal III Commissions. The Working Group held many teleconference meetings and two in-person meetings. After a year of work Chair Frederick

⁴ Paulette Brown, *Inclusion Not Exclusion: Understanding Implicit Bias is Key to Ensuring An Inclusive Profession*, ABA J. (Jan. 1, 2016, 4:00 AM),

http://www.abajournal.com/magazine/article/inclusion_exclusion_understanding_implicit_bias_is_key_to_ensuring.

⁵ In August 2015, unaware that the Standing Committee on Ethics and Professional Responsibility was researching this issue at the request of the Goal III Commissions, the Oregon State Bar New Lawyers Division drafted a proposal to amend the Model Rules of Professional Conduct to include an anti-harassment provision in the black letter. They submitted their proposal to the Young Lawyers Division Assembly for consideration. The Young Lawyers Division deferred on the Oregon proposal after learning of the work of the Standing Committee on Ethics and Professional Responsibility and the Goal III Commissions.

⁶ Letter to Paula J. Frederick, Chair, ABA Standing Committee on Ethics and Professional Responsibility 2011-2014.

presented a memorandum of the Working Group's deliberations and conclusions to SCEPR in May 2015. In it, the Working Group concluded that there was a need to amend Model Rule 8.4 to provide a comprehensive antidiscrimination provision that was nonetheless limited to the practice of law, in the black letter of the rule itself, and not just in a Comment.

On July 8, 2015, after receipt and consideration of this memorandum, SCEPR prepared, released for comment and posted on its website a Working Discussion Draft of a proposal to amend Model Rule of Professional Conduct 8.4. SCEPR also announced and hosted an open invitation Roundtable discussion on this Draft at the Annual Meeting in Chicago on July 31, 2015.

At the Roundtable and in subsequent written communications SCEPR received numerous comments about the Working Discussion Draft. After studying the comments and input from the Roundtable, SCEPR published in December 2015 a revised draft of a proposal to add Rule 8.4(g), together with proposed new Comments to Rule 8.4. SCEPR also announced to the Association, including on the House of Delegates listserv, that it would host a Public Hearing at the Midyear Meeting in San Diego in February 2016.⁷ Written comments were also invited.⁸ President Brown and past President Laurel Bellows were among those who testified at the hearing in support of adding an antidiscrimination provision to the black letter Rule 8.4.

After further study and consideration SCEPR made substantial and significant changes to its proposal, taking into account the many comments it received on its earlier drafts.

III. Need for this Amendment to the Model Rules

As noted above, in August 1998 the American Bar Association House of Delegates adopted the current provision: Comment [3] to Model Rule of Professional Conduct 8.4, *Misconduct*, which explains that certain conduct may be considered “conduct prejudicial to the administration of justice,” in violation of paragraph (d) to Rule 8.4, including when a lawyer knowingly manifests, by words or conduct, bias or prejudice against certain groups of persons, while in the course of representing a client *but only* when those words or conduct are also “prejudicial to the administration of justice.”

Yet as the Preamble and Scope of the Model Rules makes clear, “Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.”⁹ Thus, the ABA did not squarely and forthrightly address prejudice, bias, discrimination and harassment as would have been the case if this conduct were addressed in the text of a Model Rule. Changing the Comment to a black letter rule makes an important statement to our profession and the public that the profession does not tolerate prejudice, bias, discrimination and harassment. It also clearly puts lawyers on notice that refraining from such conduct is more than an illustration in a comment to a rule about the administration of justice. It is a specific requirement.

⁷ American Bar Association Public Hearing (Feb. 7, 2016), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/february_2016_public_hearing_transcript.authcheckdam.pdf.

⁸ MODEL RULE OF PROFESSIONAL CONDUCT 8.4 DEC. 22 DRAFT PROPOSAL COMMENTS RECEIVED, http://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/modruleprofconduct8_4.html (last visited May 9, 2016).

⁹ MODEL RULES OF PROF'L CONDUCT, Preamble & Scope [14] & [21] (2016).

Therefore, SCEPR, along with its co-sponsors, proposes amending ABA Model Rule of Professional Conduct 8.4 to further implement Goal III by bringing into the black letter of the Rules an antidiscrimination and anti-harassment provision. This action is consistent with other actions taken by the Association to implement Goal III and to eliminate bias in the legal profession and the justice system.

For example, in February 2015, the ABA House of Delegates adopted revised *ABA Standards for Criminal Justice: Prosecution Function and Defense Function*, which now include anti-bias provisions. These provisions appear in Standards 3-1.6 of the Prosecution Function Standards, and Standard 4.16 of the Defense Function Standards.¹⁰ The Standards explain that prosecutors and defense counsel should not, “manifest or exercise, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, gender identity or socioeconomic status.” This statement appears in the black letter of the Standards, not in a comment. And, as noted above, one year before the adoption of Goal III, the Association directly addressed prejudice, bias and harassment in the black letter of Model Rule 2.3 in the 2007 Model Code of Judicial Conduct.

Some opponents to bringing an antidiscrimination and anti-harassment provision into the black letter of the Model Rules have suggested that the amendment is not necessary—that the current provision provides the proper level of guidance to lawyers. Evidence from the ABA and around the country suggests otherwise. For example:

- Twenty-five jurisdictions have not waited for the Association to act. They have already concluded that the current Comment to an ABA Model Rule does not adequately address discriminatory or harassing behavior by lawyers. As a result, they have adopted antidiscrimination and/or anti-harassment provisions into the black letter of their rules of professional conduct.¹¹ By contrast, only thirteen jurisdictions have decided to address this

¹⁰ ABA FOURTH EDITION CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION, http://www.americanbar.org/groups/criminal_justice/standards.html (last visited May 9, 2016); ABA FOURTH EDITION CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION, http://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition.html (last visited May 9, 2016).

¹¹ See California Rule of Prof'l Conduct 2-400; Colorado Rule of Prof'l Conduct 8.4(g); Florida Rule of Prof'l Conduct 4-8.4(d); Idaho Rule of Prof'l Conduct 4.4 (a); Illinois Rule of Prof'l Conduct 8.4(j); Indiana Rule of Prof'l Conduct 8.4(g); Iowa Rule of Prof'l Conduct 8.4(g); Maryland Lawyers' Rules of Prof'l Conduct 8.4(e); Massachusetts Rule of Prof'l Conduct 3.4(i); Michigan Rule of Prof'l Conduct 6.5; Minnesota Rule of Prof'l Conduct 8.4(h); Missouri Rule of Prof'l Conduct 4-8.4(g); Nebraska Rule of Prof'l Conduct 8.4(d); New Jersey Rule of Prof'l Conduct 8.4(g); New Mexico Rule of Prof'l Conduct 16-300; New York Rule of Prof'l Conduct 8.4(g); North Dakota Rule of Prof'l Conduct 8.4(f); Ohio Rule of Prof'l Conduct 8.4(g); Oregon Rule of Prof'l Conduct 8.4(a)(7); Rhode Island Rule of Prof'l Conduct 8.4(d); Texas Rule of Prof'l Conduct 5.08; Vermont Rule of Prof'l Conduct 8.4(g); Washington Rule of Prof'l Conduct 8.4(g); Wisconsin Rule of Prof'l Conduct 8.4(i); D.C. Rule of Prof'l Conduct 9.1.

issue in a Comment similar to the current Comment in the Model Rules.¹² Fourteen states do not address this issue at all in their Rules of Professional Conduct.¹³

- As noted above, the ABA has already brought antidiscrimination and anti-harassment provisions into the black letter of other conduct codes like the *ABA Standards for Criminal Justice: Prosecution Function and Defense Function* and the 2007 ABA Model Code of Judicial Conduct, Rule 2.3.
- The Florida Bar’s Young Lawyer’s Division reported this year that in a survey of its female members, 43% of respondents reported they had experienced gender bias in their career.¹⁴
- The supreme courts of the jurisdictions that have black letter rules with antidiscrimination and anti-harassment provisions have not seen a surge in complaints based on these provisions. Where appropriate, they are disciplining lawyers for discriminatory and harassing conduct.¹⁵

IV. Summary of Proposed Amendments

A. Prohibited Activity

SCEPR’s proposal adds a new paragraph (g) to Rule 8.4, to prohibit conduct by a lawyer related to the practice of law that harasses or discriminates against members of specified groups. New Comment [3] defines the prohibited behavior.

¹² See Arizona Rule of Prof’l Conduct 8.4, cmt.; Arkansas Rule of Prof’l Conduct 8.4, cmt. [3]; Connecticut Rule of Prof’l Conduct 8.4, Commentary; Delaware Lawyers’ Rule of Prof’l Conduct 8.4, cmt. [3]; Idaho Rule of Prof’l Conduct 8.4, cmt. [3]; Maine Rule of Prof’l Conduct 8.4, cmt. [3]; North Carolina Rule of Prof’l Conduct 8.4, cmt. [5]; South Carolina Rule of Prof’l Conduct 8.4, cmt. [3]; South Dakota Rule of Prof’l Conduct 8.4, cmt. [3]; Tennessee Rule of Prof’l Conduct 8.4, cmt. [3]; Utah Rule of Prof’l Conduct 8.4, cmt. [3]; Wyoming Rule of Prof’l Conduct 8.4, cmt. [3]; West Virginia Rule of Prof’l Conduct 8.4, cmt. [3].

¹³ The states that do not address this issue in their rules include Alabama, Alaska, Georgia, Hawaii, Kansas, Kentucky, Louisiana, Mississippi, Montana, Nevada, New Hampshire, Oklahoma, Pennsylvania, and Virginia.

¹⁴ The Florida Bar, *Results of the 2015 YLD Survey on Women in the Legal Profession* (Dec. 2015), [http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/13AC70483401E7C785257F640064CF63/\\$FILE/RESULTS%20OF%202015%20SURVEY.pdf?OpenElement](http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/13AC70483401E7C785257F640064CF63/$FILE/RESULTS%20OF%202015%20SURVEY.pdf?OpenElement).

¹⁵ In 2015 the Iowa Supreme Court disciplined a lawyer for sexually harassing four female clients and one female employee. *In re Moothart*, 860 N.W.2d 598 (2015). The Wisconsin Supreme Court in 2014 disciplined a district attorney for texting the victim of domestic abuse writing that he wished the victim was not a client because she was “a cool person to know.” On one day, the lawyer sent 19 text messages asking whether the victim was the “kind of girl who likes secret contact with an older married elected DA . . . the riskier the better.” One day later, the lawyer sent the victim 8 text messages telling the victim that she was pretty and beautiful and that he had a \$350,000 home. *In re Kratz*, 851 N.W.2d 219 (2014). The Minnesota Supreme Court in 2013 disciplined a lawyer who, while acting as an adjunct professor and supervising law students in a clinic, made unwelcome comments about the student’s appearance; engaged in unwelcome physical contact of a sexual nature with the student; and attempted to convince the student to recant complaints she had made to authorities about him. *In re Griffith*, 838 N.W.2d 792 (2013). The Washington Supreme Court in 2012 disciplined a lawyer, who was representing his wife and her business in dispute with employee who was Canadian. The lawyer sent two ex parte communications to the trial judge asking questions like: are you going to believe an alien or a U.S. citizen? *In re McGrath*, 280 P.3d 1091 (2012). The Indiana Supreme Court in 2009 disciplined a lawyer who, while representing a father at a child support modification hearing, made repeated disparaging references to the facts that the mother was not a U.S. citizen and was receiving legal services at no charge. *In re Campiti*, 937 N.E.2d 340 (2009). The Indiana Supreme Court in 2005 disciplined a lawyer who represented a husband in an action for dissolution of marriage. Throughout the custody proceedings the lawyer referred to the wife being seen around town in the presence of a “black male” and that such association was placing the children in harm’s way. During a hearing, the lawyer referred to the African-American man as “the black guy” and “the black man.” *In re Thomsen*, 837 N.E.2d 1011 (2005).

Proposed new black letter Rule 8.4(g) does not use the terms “manifests . . . bias or prejudice”¹⁶ that appear in the current provision. Instead, the new rule adopts the terms “harassment and discrimination” that already appear in a large body of substantive law, antidiscrimination and anti-harassment statutes, and case law nationwide and in the Model Judicial Code. For example, in new Comment [3], “harassment” is defined as including “sexual harassment and derogatory or demeaning verbal or physical conduct . . . of a sexual nature.” This definition is based on the language of Rule 2.3(C) of the ABA Model Code of Judicial Conduct and its Comment [4], adopted by the House in 2007 and applicable to lawyers in proceedings before a court.¹⁷

Discrimination is defined in new Comment [3] as “harmful verbal or physical conduct that manifests bias or prejudice towards others.” This is based in part on ABA Model Code of Judicial Conduct, Rule 2.3, Comment [3], which notes that harassment, one form of discrimination, includes “verbal or physical conduct,” and on the current rule, which prohibits lawyers from manifesting bias or prejudice while representing clients.

Proposed new Comment [3] also explains, “The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).” This provision makes clear that the substantive law on antidiscrimination and anti-harassment is not necessarily dispositive in the disciplinary context. Thus, conduct that has a discriminatory impact alone, while possibly dispositive elsewhere, would not necessarily result in discipline under new Rule 8.4(g). But, substantive law regarding discrimination and harassment can also guide a lawyer’s conduct. As the Preamble to the Model Rules explains, “A lawyer’s conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer’s business and personal affairs.”¹⁸

B. Knowledge Requirement

SCEPR has received substantial and helpful comment that the absence of a “mens rea” standard in the rule would provide inadequate guidance to lawyers and disciplinary authorities. After consultation with cosponsors, SCEPR concluded that the alternative standards “knows or reasonably should know” should be included in the new rule. Consequently, revised Rule 8.4(g) would make it professional misconduct for a lawyer to “engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination....”

Both “knows” and “reasonably should know” are defined in the Model Rules. Rule 1.0(f) defines “knows” to denote “actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.” The inference to be made in this situation is not what the lawyer should or might have known, but whether one can infer from the circumstances what the lawyer actually knew. Thus, this is a subjective standard; it depends on ascertaining the lawyer’s actual state of mind. The evidence, or “circumstances,” may or may not support an inference about what the lawyer knew about his or her conduct.

¹⁶ The phrase, “manifestations of bias or prejudice” is utilized in proposed new Comment [3].

¹⁷ ABA Model Code of Judicial Conduct Rule 2.3, Comment [4] reads: “Sexual harassment includes but is not limited to sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that is unwelcome.”

¹⁸ MODEL RULES OF PROF’L CONDUCT, Preamble & Scope [5] (2016).

Rule 1.0(j) defines “reasonably should know” when used in reference to a lawyer to denote “that a lawyer of reasonable prudence and competence would ascertain the matter in question.” The test here is whether a lawyer of reasonable prudence and competence would have comprehended the facts in question. Thus, this is an objective standard; it does not depend on the particular lawyer’s actual state of mind. Rather, it asks what a lawyer of reasonable prudence and competence would have comprehended from the circumstances presented.

SCEPR believes that any standard for the conduct to be addressed in Rule 8.4(g) must include as alternatives, both the “knowing” and “reasonably should know” standards as defined in Rule 1.0. As noted, one standard is a subjective and the other is objective. Thus, they do not overlap; and one cannot serve as a substitute for the other. Taken together, these two standards provide a safeguard for lawyers against overaggressive prosecutions for conduct they could not have known was harassment or discrimination, as well as a safeguard against evasive defenses of conduct that any reasonable lawyer would have known is harassment or discrimination.

There is also ample precedent for using the “knows or reasonably should know” formulation in proposed Rule 8.4(g). It has been part of the Model Rules since 1983. Currently, it is used in Rule 1.13(f), Rule 2.3(b), Rule 2.4(b), Rule 3.6(a), Rule 4.3 [twice] and Rule 4.4(b).

“Harassment” and “discrimination” are terms that denote actual conduct. As explained in proposed new Comment [3], both “harassment” and “discrimination” are defined to include verbal and physical conduct against others. The proposed rule would not expand on what would be considered harassment and discrimination under federal and state law. Thus, the terms used in the rule—“harassment” and “discrimination”—by their nature incorporate a measure of intentionality while also setting a minimum standard of acceptable conduct. This does not mean that complainants should have to establish their claims in civil courts before bringing disciplinary claims. Rather, it means that the rule intends that these words have the meaning established at law.

The addition of “knows or reasonably should know” as a part of the standard for the lawyer supports the rule’s focus on conduct and resolves concerns of vagueness or uncertainty about what behavior is expected of the lawyer.

C. Scope of the Rule

Proposed Rule 8.4(g) makes it professional misconduct for a lawyer to harass or discriminate while engaged in “conduct related to the practice of law” when the lawyer knew or reasonably should have known the conduct was harassment or discrimination. The proposed rule is constitutionally limited; it does not seek to regulate harassment or discrimination by a lawyer that occurs outside the scope of the lawyer’s practice of law, nor does it limit a lawyer’s representational role in our legal system. It does not limit the scope of the legal advice a lawyer may render to clients, which is addressed in Model Rule 1.2. It permits legitimate advocacy. It does not change the circumstances under which a lawyer may accept, decline or withdraw from a representation. To the contrary, the proposal makes clear that Model Rule 1.16 addresses such conduct. The proposal also does not limit a lawyer’s ability to charge and collect a reasonable fee for legal services, which remains governed by Rule 1.5.

Note also that while the provision in current Comment [3] limits the scope of Rule 8.4(d) to situations where the lawyer is representing clients, Rule 8.4(d) itself is not so limited. In fact, lawyers have been disciplined under Rule 8.4(d) for conduct that does not involve the representation of clients.¹⁹

Some commenters expressed concern that the phrase, “conduct related to the practice of law,” is vague. “The definition of the practice of law is established by law and varies from one jurisdiction to another.”²⁰ The phrase “conduct related to” is elucidated in the proposed new Comments and is consistent with other terms and phrases used in the Rules that have been upheld against vagueness challenges.²¹ The proposed scope of Rule 8.4(g) is similar to the scope of existing antidiscrimination provisions in many states.²²

Proposed new Comment [4] explains that conduct related to the practice of law includes, “representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities *in connection with the practice of law*.” (Emphasis added.) The nexus of the conduct regulated by the rule is that it is conduct lawyers are permitted or required to engage in because of their work as a lawyer.

The scope of proposed 8.4(g) is actually narrower and more limited than is the scope of other Model Rules. “[T]here are Rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity.”²³ For example, paragraph (c) to Rule 8.4 declares that it is professional misconduct for a lawyer to engage in conduct “involving dishonesty, fraud, deceit or misrepresentation.” Such conduct need not be

¹⁹ See, e.g., *Neal v. Clinton*, 2001 WL 34355768 (Ark. Cir. Ct. Jan. 19, 2001).

²⁰ MODEL RULES OF PROF’L CONDUCT R. 5.5 cmt. [2].

²¹ See, e.g., *Grievance Adm’r v. Fieger*, 719 N.E.2d 123 (Mich. 2016) (rejecting a vagueness challenge to rules requiring lawyers to “treat with courtesy and respect all person involved in the legal process” and prohibiting “undignified or discourteous conduct toward [a] tribunal”); *Chief Disciplinary Counsel v. Zelotes*, 98 A.3d 852 (Conn. 2014) (rejecting a vagueness challenge to “conduct prejudicial to the administration of justice”); *Florida Bar v. Von Zamft*, 814 So. 2d 385 (2002); *In re Anonymous Member of South Carolina Bar*, 709 S.E.2d 633 (2011) (rejecting a vagueness challenge to the following required civility clause: “To opposing parties and their counsel, I pledge fairness, integrity, and civility”); *Canatella v. Stovitz*, 365 F.Supp.2d 1064 (N.D. Cal. 2005) (rejecting a vagueness challenge to these terms regulating lawyers in the California Business and Profession Code: “willful,” “moral turpitude,” “dishonesty,” and “corruption”); *Motley v. Virginia State Bar*, 536 S.E.2d 97 (Va. 2000) (rejecting a vagueness challenge to a rule requiring lawyers to keep client’s “reasonably informed about matters in which the lawyer’s services are being rendered”); *In re Disciplinary Proceedings Against Beaver*, 510 N.W.2d 129 (Wis. 1994) (rejecting a vagueness challenge to a rule against “offensive personality”).

²² See Florida Rule of Professional Conduct 4-8.4(d) which addresses conduct “in connection with the practice of law”; Indiana Rule of Prof’l Conduct 8.4(g) which addresses conduct a lawyer undertakes in the lawyer’s “professional capacity”; Iowa Rule of Prof’l Conduct 8.4(g) which addresses conduct “in the practice of law”; Maryland Lawyers’ Rules of Prof’l Conduct 8.4(e) with the scope of “when acting in a professional capacity”; Minnesota Rule of Prof’l Conduct 8.4(h) addressing conduct “in connection with a lawyer’s professional activities”; New Jersey Rule of Prof’l Conduct 8.4(g) addressing when a lawyer’s conduct is performed “in a professional capacity”; New York Rule of Prof’l Conduct 8.4(g) covering conduct “in the practice of law”; Ohio Rule of Prof’l Conduct 8.4(g) addressing when lawyer “engage, in a professional capacity, in conduct”; Washington Rule of Prof’l Conduct 8.4(g) covering “connection with the lawyer’s professional activities”; and Wisconsin Rule of Prof’l Conduct 8.4(i) with a scope of conduct “in connection with the lawyer’s professional activities.”

²³ MODEL RULES OF PROF’L CONDUCT, Preamble [3].

related to the lawyer's practice of law, but may reflect adversely on the lawyer's fitness to practice law or involve moral turpitude.²⁴

However, insofar as proposed Rule 8.4(g) applies to "conduct related to the practice of law," it is broader than the current provision. This change is necessary. The professional roles of lawyers include conduct that goes well beyond the representation of clients before tribunals. Lawyers are also officers of the court, managers of their law practices and public citizens having a special responsibility for the administration justice.²⁵ Lawyers routinely engage in organized bar-related activities to promote access to the legal system and improvements in the law. Lawyers engage in mentoring and social activities related to the practice of law. And, of course, lawyers are licensed by a jurisdiction's highest court with the privilege of practicing law. The ethics rules should make clear that the profession will not tolerate harassment and discrimination in any conduct related to the practice of law.

Therefore, proposed Comment [4] explains that operating or managing a law firm is conduct related to the practice of law. This includes the terms and conditions of employment. Some commentators objected to the inclusion of workplace harassment and discrimination within the scope of the Rule on the ground that it would bring employment law into the Model Rules. This objection is misplaced. First, in at least two jurisdictions that have adopted an antidiscrimination Rule, the provision is focused entirely on employment and the workplace.²⁶ Other jurisdictions have also included workplace harassment and discrimination among the conduct prohibited in their Rules.²⁷ Second, professional misconduct under the Model Rules already applies to substantive areas of the law such as fraud and misrepresentation. Third, that part of the management of a law practice that includes the solicitation of clients and advertising of legal services is already subjects of regulation under the Model Rules.²⁸ And fourth, this would not be the first time the House of Delegates adopted policy on the terms and conditions of lawyer employment. In 2007, the House of Delegates adopted as ABA policy a recommendation that law firms should discontinue mandatory age-based retirement policies,²⁹ and earlier, in 1992, the House recognized that "sexual harassment is a serious problem in all types of workplace settings, including the legal profession, and constitutes a discriminatory and unprofessional practice that must not be tolerated in any work

²⁴ MODEL RULES OF PROF'L CONDUCT R. 8.4 cmt. [2].

²⁵ MODEL RULES OF PROF'L CONDUCT, Preamble [1] & [6].

²⁶ See D.C. Rule of Prof'l Conduct 9.1 & Vermont Rule of Prof'l Conduct 8.4(g). The lawyer population for Washington DC is 52,711 and Vermont is 2,326. Additional lawyer demographic information is available on the American Bar Association website: http://www.americanbar.org/resources_for_lawyers/profession_statistics.html.

²⁷ Other jurisdictions have specifically included workplace harassment and discrimination among the conduct prohibited in their Rules. Some jurisdictions that have included workplace harassment and discrimination as professional misconduct require a prior finding of employment discrimination by another tribunal. See California Rule of Prof'l Conduct 2-400 (lawyer population 167,690); Illinois Rule of Prof'l conduct 8.4(j) (lawyer population 63,060); New Jersey Rule of Prof'l Conduct 8.4(g) (lawyer population 41,569); and New York Rule of Prof'l Conduct 8.4(g) (lawyer population 175,195). Some jurisdictions that have included workplace harassment and discrimination as professional misconduct require that the conduct be unlawful. See, e.g., Iowa Rule of Prof'l Conduct 8.4(g) (lawyer population of 7,560); Ohio Rule of Prof'l Conduct 8.4(g) (lawyer population 38,237); and Minnesota Rule of Prof'l Conduct 8.4(h) (lawyer population 24,952). Maryland has included workplace harassment and discrimination as professional misconduct when the conduct is prejudicial to the administration of justice. Maryland Lawyers' Rules of Prof'l Conduct 8.4(e), cmt. [3] (lawyer population 24,142).

²⁸ See MODEL RULES OF PROFESSIONAL CONDUCT R. 7.1 - 7.6.

²⁹ ABA HOUSE OF DELEGATES RESOLUTION 10A (Aug. 2007).

environment.”³⁰ When such conduct is engaged in by lawyers it is appropriate and necessary to identify it for what it is: professional misconduct.

This Rule, however, is not intended to replace employment discrimination law. The many jurisdictions that already have adopted similar rules have not experienced a mass influx of complaints based on employment discrimination or harassment. There is also no evidence from these jurisdictions that disciplinary counsel became the tribunal of first resort for workplace harassment or discrimination claims against lawyers. This Rule would not prohibit disciplinary counsel from deferring action on complaints, pending other investigations or actions.

Equally important, the ABA should not adopt a rule that would apply to lawyers acting outside of their own law firms or law practices but not to lawyers acting within their offices, toward each other and subordinates. Such a dichotomy is unreasonable and unsupportable.

As also explained in proposed new Comment [4], conduct related to the practice of law includes activities such as law firm dinners and other nominally social events at which lawyers are present solely because of their association with their law firm or in connection with their practice of law. SCEPR was presented with substantial anecdotal information that sexual harassment takes place at such events. “Conduct related to the practice of law” includes these activities.

Finally with respect to the scope of the rule, some commentators suggested that because legal remedies are available for discrimination and harassment in other forums, the bar should not permit an ethics claim to be brought on that basis until the claim has first been presented to a legal tribunal and the tribunal has found the lawyer guilty of or liable for harassment or discrimination.

SCEPR has considered and rejected this approach for a number of reasons. Such a requirement is without precedent in the Model Rules. There is no such limitation in the current provision. Legal ethics rules are not dependent upon or limited by statutory or common law claims. The ABA takes pride in the fact that “the legal profession is largely self-governing.”³¹ As such, “a lawyer’s failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process,” not the civil legal system.³² The two systems run on separate tracks.

The Association has never before required that a party first invoke the civil legal system before filing a grievance through the disciplinary system. In fact, as a self-governing profession we have made it clear that “[v]iolation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached.”³³ Thus, legal remedies are available for conduct, such as fraud, deceit or misrepresentation, which also are prohibited by paragraph (c) to Rule 8.4, but a claimant is not required as a condition of filing a grievance based on fraud, deceit or misrepresentation to have brought and won a civil action against the respondent lawyer, or for the lawyer to have been charged with and convicted

³⁰ ABA HOUSE OF DELEGATES RESOLUTION 117 (Feb. 1992).

³¹ MODEL RULES OF PROFESSIONAL CONDUCT, Preamble & Scope [10].

³² MODEL RULES OF PROFESSIONAL CONDUCT, Preamble & Scope [19].

³³ MODEL RULES OF PROFESSIONAL CONDUCT, Preamble & Scope [20].

of a crime.³⁴ To now impose such a requirement, only for claims based on harassment and discrimination, would set a terrible precedent and send the wrong message to the public.

In addition, the Model Rules of Professional Conduct reflect ABA policy. Since 1989, the ABA House of Delegates has adopted policies promoting the equal treatment of all persons regardless of sexual orientation or gender identity.³⁵ Many states, however, have not extended protection in areas like employment to lesbian, gay, or transgender persons.³⁶ A Model Rule should not be limited by such restrictions that do not reflect ABA policy. Of course, states and other jurisdictions may adapt ABA policy to meet their individual and particular circumstances.

D. Protected Groups

New Rule 8.4(g) would retain the groups protected by the current provision.³⁷ In addition, new 8.4(g) would also include “ethnicity,” “gender identity,” and “marital status.” The antidiscrimination provision in the ABA Model Code of Judicial Conduct, revised and adopted by the House of Delegates in 2007, already requires judges to ensure that lawyers in proceedings before the court refrain from manifesting bias or prejudice and from harassing another based on that person’s marital status and ethnicity. The drafters believe that this same prohibition also should be applicable to lawyers in conduct related to the practice of law not merely to lawyers in proceedings before the court.

“Gender identity” is added as a protected group at the request of the ABA’s Goal III Commissions. As used in the Rule this term includes “gender expression”, which is a form of gender identity. These terms encompass persons whose current gender identity and expression are different from their designations at birth.³⁸ The Equal Employment Opportunities Commission interprets Title VII as prohibiting discrimination against employees on the basis of sexual orientation and gender identity.³⁹ In 2015, the ABA House adopted revised Criminal Justice Standards for the Defense Function and the Prosecution Function. Both sets of Standards explains that defense counsel and prosecutors should not manifest bias or prejudice based on another’s gender identity. To ensure notice to lawyers and to make these provisions more parallel, the Goal III Commission on Sexual

³⁴ *E.g.*, *People v. Odom*, 941 P.2d 919 (Colo. 1997) (lawyer disciplined for committing a crime for which he was never charged).

³⁵ A list of ABA policies supporting the expansion of civil rights to and protection of persons based on their sexual orientation and gender identity can be found here:

http://www.americanbar.org/groups/sexual_orientation/policy.html.

³⁶ For a list of states that have not extended protection in areas like employment to LGBT individuals see:

<https://www.aclu.org/map/non-discrimination-laws-state-state-information-map>.

³⁷ Some commenters advised eliminating references to any specific groups from the Rule. SCEPR concluded that this would risk including within the scope of the Rule appropriate distinctions that are properly made in professional life. For example, a law firm or lawyer may display “geographic bias” by interviewing for employment only persons who have expressed a willingness to relocate to a particular state or city. It was thought preferable to specifically identify the groups to be covered under the Rule.

³⁸ The U.S. Office of Personnel Management Diversity & Inclusion Reference Materials defines gender identity as “the individual’s internal sense of being male or female. The way an individual expresses his or her gender identity is frequently called ‘gender expression,’ and may or may not conform to social stereotypes associated with a particular gender.” See *Diversity & Inclusion Reference Materials*, UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, <https://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/gender-identity-guidance/> (last visited May 9, 2016).

³⁹ https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm

Orientation and Gender Identity recommended that gender identity be added to the black letter of paragraph (g). New Comment [3] notes that applicable law may be used as a guide to interpreting paragraph (g). Under the Americans with Disabilities Act discrimination against persons with disabilities includes the failure to make the reasonable accommodations necessary for such person to function in a work environment.⁴⁰

Some commenters objected to retaining the term “socioeconomic status” in new paragraph (g). This term is included in the current provision and also is in the Model Code of Judicial Conduct. An Indiana disciplinary case, *In re Campiti*, 937 N.E.2d 340 (2009), provides guidance as to the meaning of the term. In that matter, a lawyer was reprimanded for disparaging references he made at trial about a litigant’s socioeconomic status: the litigant was receiving free legal services. SCEPR has found no instance where this term in an ethics rule has been misused or applied indiscriminately in any jurisdiction. SCEPR concluded that the unintended consequences of removing this group would be more detrimental than the consequences of keeping it in.

Discrimination against persons based on their source of income or acceptance of free or low-cost legal services would be examples of discrimination based on socioeconomic status. However, new Comment [5] makes clear that the Rule does not limit a lawyer’s ability to charge and collect a reasonable fee and reimbursement of expenses, nor does it affect a lawyer’s ability to limit the scope of his or her practice.

SCEPR was concerned, however, that this Rule not be read as undermining a lawyer’s pro bono obligations or duty to accept court-appointed clients. Therefore, proposed Comment [5] does encourage lawyers to be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 to not avoid appointments from a tribunal except for “good cause.”

E. Promoting Diversity

Proposed new Comment [4] to Rule 8.4 makes clear that paragraph (g) does not prohibit conduct undertaken by lawyers to promote diversity. As stated in the first Goal III Objective, the Association is committed to promoting full and equal participation in the Association, our profession and the justice system by all persons. According to the ABA Lawyer Demographics for 2016, the legal profession is 64% male and 36% female.⁴¹ The most recent figures for racial demographics are from the 2010 census showing 88% White, 5% Black, 4% Hispanic, and 3% Asian Pacific American, with all other ethnicities less than one percent.⁴² Goal III guides the ABA toward greater diversity in our profession and the justice system, and Rule 8.4(g) seeks to further that goal.

⁴⁰A reasonable accommodation is a modification or adjustment to a job, the work environment, or the way things usually are done that enables a qualified individual with a disability to enjoy an equal employment opportunity. Examples of reasonable accommodations include making existing facilities accessible; job restructuring; part-time or modified work schedules; acquiring or modifying equipment; changing tests, training materials, or policies; providing qualified readers or interpreters; and reassignment to a vacant position.

⁴¹ American Bar Association, *Lawyer Demographics Year 2016* (2016), http://www.americanbar.org/content/dam/aba/administrative/market_research/lawyer-demographics-tables-2016.authcheckdam.pdf.

⁴² *Id.*

F. How New Rule 8.4(g) Affects Other Model Rules of Professional Conduct

When SCEPR released a draft proposal in December 2015 to amend Model Rule 8.4, some commenters expressed concern about how proposed new Rule 8.4(g) would affect other Rules of Professional Conduct. As a result, SCEPR's proposal to create new Rule 8.4(g) now includes a discussion of its effect on certain other Model Rules.

For example, commenters questioned how new Rule 8.4(g) would affect a lawyer's ability to accept, refuse or withdraw from a representation. To make it clear that proposed new Rule 8.4(g) is not intended to change the ethics rules affecting those decisions, the drafters included in paragraph (g) a sentence from Washington State's Rule 8.4(g), which reads: "This Rule does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16." Rule 1.16 defines when a lawyer shall and when a lawyer may decline or withdraw from a representation. Rule 1.16(a) explains that a lawyer shall not represent a client or must withdraw from representing a client if: "(1) the representation will result in violation of the rules of professional conduct or other law." Examples of a representation that would violate the Rules of Professional Conduct are representing a client when the lawyer does not have the legal competence to do so (*See* Rule 1.1) and representing a client with whom the lawyer has a conflict of interest (*See* Rules 1.7, 1.9, 1.10, 1.11, and 1.12).

To address concerns that this proposal would cause lawyers to reject clients with unpopular views or controversial positions, SCEPR included in proposed new Comment [5] a statement reminding lawyers that a lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities, with a citation to Model Rule 1.2(b). That Rule reads: "A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities."

Also, with respect to this rule as with respect to all the ethics Rules, Rule 5.1 provides that a managing or supervisory lawyer shall make reasonable efforts to insure that the lawyer's firm or practice has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct. Such efforts will build upon efforts already being made to give reasonable assurance that lawyers in a firm conform to current Rule 8.4(d) and Comment [3] and are not manifesting bias or prejudice in the course of representing a client that is prejudicial to the administration of justice.

SCEPR has also agreed to develop a formal Ethics Opinion discussing Model Rule 5.3 and its relationship to the other ethics rules, including this new Rule.

G. Legitimate Advocacy

Paragraph (g) includes the following sentence: "This paragraph does not preclude legitimate advice or advocacy consistent with these Rules." The sentence recognizes the balance in the Rules that exists presently in current Comment [3] to Rule 8.4. It also expands the current sentence in the existing comment by adding the word "advice," as the scope of new Rule 8.4(g) is now not limited to "the course of representing a client" but includes "conduct related to the practice of law."

H. Peremptory Challenges

The following sentence appears in the current provision: “A trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.” SCEPR and the other cosponsors agreed to retain the sentence in the comments.

V. CONCLUSION

As noted at the beginning of this Report the Association has a responsibility to lead the profession in promoting equal justice under law. This includes working to eliminate bias in the legal profession. In 2007 the Model Judicial Code was amended to do just that. Twenty-five jurisdictions have also acted to amend their rules of professional conduct to address this issue directly. It is time to follow suit and amend the Model Rules. The Association needs to address such an important and substantive issue in a Rule itself, not just in a Comment.

Proposed new paragraph (g) to Rule 8.4 is a reasonable, limited and necessary addition to the Model Rules of Professional Conduct. It will make it clear that it is professional misconduct to engage in conduct that the lawyer knows or reasonably should know constitutes harassment or discrimination while engaged in conduct related to the practice of law. And as has already been shown in the jurisdictions that have such a rule, it will not impose an undue burden on lawyers.

As the premier association of attorneys in the world, the ABA should lead antidiscrimination, anti-harassment, and diversity efforts not just in the courtroom, but wherever it occurs in conduct by lawyers related to the practice of law. The public expects no less of us. Adopting the Resolution will advance this most important goal.

Respectfully submitted,

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Standing Committee on Ethics and Professional Responsibility
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