

**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:
- (1) unlawfully harass or unlawfully discriminate against persons* on the basis of any protected characteristic; or
 - (2) unlawfully ~~for the purpose of~~ retaliate against persons~~ion~~.
- (b) In relation to a law firm's operations, a lawyer shall not:
- (1) on the basis of any protected characteristic ~~or for the purpose of retaliation,~~
~~unlawfully:~~
 - (A1i) unlawfully discriminate or knowingly* permit unlawful discrimination;
 - (B2ii) unlawfully 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
 - (C3iii) unlawfully 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; or
 - (2) unlawfully retaliate against persons.
- (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) “retaliate~~ion~~” means to take adverse action against a person because ~~a~~that person* has (i) opposed, or (ii) pursued, participated in, or assisted any action alleging, any conduct prohibited by paragraphs (a)(1) or (b)(1) of 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 or permitted by Rule 1.16. This Rule also does not preclude advice or advocacy otherwise required or permitted by 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, as required or permitted by 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.

**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.	The Commission's proposed Alt1 provides the State Bar with authority to address unlawful discrimination, harassment, or retaliation.
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.	The Commission believes that lawyers who engage in unlawful discrimination, harassment, or retaliation do not meet the high standards expected of them, and should be subject to discipline. The approach taken by the Commission's proposed Alt1 is consistent with recently adopted ABA Model Rule 8.4(g) in not requiring a civil action before discipline for such conduct may be imposed.
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	The approach taken by the Commission's proposed Alt1 is consistent with recently adopted ABA Model Rule 8.4(g) in not requiring a civil

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

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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>	<p>action before discipline for unlawful discrimination, harassment, or retaliation may be imposed.</p> <p>The definition of prohibited characteristic extends to unspecified categories only to the extent they may in the future be affirmatively recognized by other law. The Commission has modified the proposed Rule to make even more clear that it permits discipline for discrimination, harassment, or retaliation only to the extent the conduct is recognized by state or federal law to be unlawful.</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</p>	No response necessary.

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					to put a stop to this outlandish 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.	<p>The Commission has modified the proposed Rule to make even more clear that it permits discipline for discrimination, harassment, or retaliation only to the extent the conduct is recognized by state or federal law to be unlawful. Further, Comment [2] specifies that the Rule does not apply to conduct protected by the First Amendment to the US Constitution or Article I, § 2 of the California Constitution.</p> <p>The Commission has modified the proposed comments to state that a lawyer does not violate the 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, as required or permitted by these Rules or other law." The Commission believes that this eliminates</p>

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						any potential conflict with other Rules relating to competence and conflicts, and makes clear that lawyers remain free to select clients for legitimate advocacy-based reasons.
X-2016-27a	Cross, Terrence	N	D		[no comment provided]	No response necessary.
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 provide people with certain sexual orientations to impose the full weight of governmental power on someone that may ultimately</p>	<p>Comment [2] specifies that the Rule does not apply to conduct protected by the First Amendment to the US Constitution or Article I, § 2 of the California Constitution.</p> <p>The Commission believes that lawyers who engage in unlawful discrimination, harassment, or retaliation do not meet the high standards expected of them, and should be subject to discipline. The approach taken by the Commission's proposed Alt1 is consistent with recently adopted ABA Model Rule 8.4(g) in not requiring a civil action before discipline for such conduct may be imposed.</p> <p>The Commission has modified the proposed Rule to make even more clear that it permits</p>

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					be found not to have done anything wrong. This is unconscionable!	discipline for discrimination, harassment, or retaliation only to the extent the conduct is recognized by state or federal law to be unlawful.
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 be found to be without merit.</p>	<p>The Commission believes that lawyers who engage in unlawful discrimination, harassment, or retaliation do not meet the high standards expected of them, and should be subject to discipline. The approach taken by the Commission's proposed Alt1 is consistent with recently adopted ABA Model Rule 8.4(g) in not requiring a civil action before discipline for such conduct may be imposed.</p>

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					The State Bar Court should not take on those issues for which the general civil and criminal trial courts provide adequate protection.	
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. However, should the commission choose Alternative One, with no</p>	See response to Public Comment 2016-521 below.

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					<p>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 to accommodate an individual <i>without disabilities</i> who seeks 	

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					<p>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 firm” means and refers to any association, partnership, limited</p>	The proposed Rule includes age as a “protected characteristic” on the basis of which unlawful discrimination or harassment may result in discipline. The Commission believes that the proposed Rule appropriately addresses age discrimination, and that a more specific rule addressing only age discrimination is not necessary.

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					<p>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 prospective employee or prospective independent</p>	

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					<p>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 required to report to the California State Bar the filing of three claims</p>	

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					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> <p>The proposed rule would limit the</p>	The Commission has modified the proposed Rule to make even more clear that it permits discipline for discrimination, harassment, or retaliation only to the extent the conduct is recognized by state or federal law to be unlawful. Further, Comment [2] specifies that the Rule does not apply to conduct protected by the First Amendment to the US Constitution or Article I, § 2 of the California Constitution.

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					<p>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>	<p>The Commission does not believe there is any even potential conflict with the proposed Rule relating to diligence. The Commission has modified the proposed comments to state that a lawyer does not violate the 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, as required or permitted by these Rules or other law.” The Commission believes that this eliminates any potential conflict with other Rules relating to competence and conflicts, and makes clear that lawyers remain free to select clients for legitimate advocacy-based reasons.</p> <p>A large number of public comments support the Commission’s determination that there is a demonstrable need for the Rule. The need for such a Rule is also supported by the record underlying the ABA’s recent</p>

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						decision to adopt ABA Model Rule 8.4(g),
X-2016-53	Price, Pamela	N	A		<p>I support the Commission's recommended version (ALT1). A victim of discrimination by an attorney in this State should not have to wait until he or she gets a judgment to bring the matter for discipline by the State Bar.</p> <p>In my 33 years of experience litigating discrimination claims, I can state unequivocally that discrimination, especially race discrimination, is very hard to prove. Getting a final judgment is even harder. The amount of time and money it takes to traverse our judicial system discourages most victims. Even finding a lawyer to pursue a discrimination claim against "a big firm" is almost impossible.</p>	No response necessary.
X-2016-57	Copi, Margaret	N	A		<p>I agree with eliminating the requirement for a judgment of discrimination before the State Bar can enforce its rule against discrimination, as with all other rules. The Commission's recommended version of the rule (ALT1) has been watered down by a Staff version (ALT2) to keep the State Bar from enforcing the rule unless and until there has been a judgment against the</p>	No response necessary.

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

TOTAL = XX **A = X**
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					lawyer. I support the Commission's recommended version (ALT1).	
X-2016-51	Johnson, Maxine	N	A		I am an employee for a law firm and I have expressed to my boss that he needs to close the gap between me and another paralegal in the office who is paid more than I am. I feel that I am being discriminated against.	No response necessary.
X-2016-52t	Law Professors (Zitrin)	Y	A		<p>We note that there are two alternative proposed rules presented for public comment. After considerable thought and discussion about these two alternatives, we recommend Alternative One, <u>but</u> with the proviso that there be <u>a carve-out for appropriate discretion permitted in client-selection</u>.</p> <p>We believe there should be no requirement for a prior adjudication before bringing a disciplinary action under the rule.</p> <p>However, if Alternative One is chosen, lawyers in appropriate circumstances should be able to choose their clients despite certain "protected characteristics" under the rule. Proposed Rule 8.4.1(a) currently states that "in terminating <u>or refusing to accept</u>" a client the lawyer "may not unlawfully discriminate." The term</p>	<p>The Commission has modified the proposed Rule to make even more clear that it permits discipline for discrimination, harassment, or retaliation only to the extent the conduct is recognized by state or federal law to be unlawful.</p> <p>In addition, the Commission has modified the proposed comments to state that a lawyer does not violate the 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, as required or permitted by these Rules or other law." The Commission believes that this eliminates any potential conflict with other</p>

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

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					<p>“unlawfully” is only vaguely defined in section (c)(3) of the rule. This would give trial counsel huge discretion in determining what is “unlawful.” (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.)</p> <p>Therefore, the Commission should change the language “in terminating or refusing to accept...” to read “<u>in terminating or accepting...</u>” We believe this modification must be accompanied by the following language (or similar) to be inserted into one of the comment paragraphs: “<u>A lawyer may restrict the types of people who will be accepted as clients for legitimate practice-based reasons.</u>”</p> <p>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; 	Rules relating to competence and conflicts, and makes clear that lawyers remain free to select clients for legitimate advocacy-based reasons.

**Proposed Rule 8.4.1 [2-400] Prohibited Discrimination, Harassment and Retaliation
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					<ul style="list-style-type: none"> 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 <u>without disabilities</u> who seeks help regarding perceived discrimination <u>against</u> him might arguably violate this rule. <p>Should these lawyers be subject to discipline? We think the answer is no.</p>	
Public Hearing	McDermott, Michael (Provided oral public hearing testimony on July 26, 2016. See pages 48-52 of the public hearing transcript.)	N	D		<p>This rule is designed primarily to prevent or punish representation of politically incorrect viewpoints.</p> <p>"If you force me and others, like the Catholic Church, to hire people or be conflicted with people who are determined to destroy the faith, the teaching and the position morally taken by the Church ... is to deny representation to most of the people in this state based on political ideology, not based on any right to be a representative of the law."</p>	<p>The Rule is not designed to prevent or punish representation of politically incorrect viewpoints.</p> <p>The Commission has modified the proposed Rule to make even more clear that it permits discipline for discrimination, harassment, or retaliation only to the extent the conduct is recognized by state or federal law to be unlawful. Further, Comment [2] specifies that the Rule does not apply to conduct protected by the First Amendment to the US Constitution or Article I, § 2 of</p>

**Proposed Rule 8.4.1 [2-400] Prohibited Discrimination, Harassment and Retaliation
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						the California Constitution.

**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
[ALT2] Synopsis of Public Comments**

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X-2016-15b	Garen, Clark	N	D		<p>The discrimination laws are already heavily weighted 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>	The Commission believes that lawyers who engage in unlawful discrimination, harassment, or retaliation do not meet the high standards expected of them, and should be subject to discipline. The approach taken by the Commission's proposed Alt1 is consistent with recently adopted ABA Model Rule 8.4(g) in not requiring a civil action before discipline for such conduct may be imposed.

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**

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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.	<p>The Commission believes that lawyers who engage in unlawful discrimination, harassment, or retaliation do not meet the high standards expected of them, and should be subject to discipline.</p> <p>The Commission notes that both current California Rule 2-400 and the ABA's recent adoption of ABA Model Rule 8.4(g) include anti-discrimination provisions in the rules of professional conduct..</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 or refusing to accept" a client the lawyer "may not unlawfully discriminate." The term "unlawfully" is only vaguely</p>	<p>The Commission has modified the proposed Rule to make even more clear that it permits discipline for discrimination, harassment, or retaliation only to the extent the conduct is recognized by state or federal law to be unlawful.</p> <p>In addition, the Commission has modified the proposed comments to state that a lawyer does not violate the 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</p>

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					<p>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. 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 	<p>reasons, as required or permitted by these Rules or other law.” The Commission believes that this eliminates any potential conflict with other Rules relating to competence and conflicts, and makes clear that lawyers remain free to select clients for legitimate advocacy-based reasons.</p>

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					<p>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;</p> <ul style="list-style-type: none"> • A lawyer supervising a 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>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</p>	The Commission has modified the proposed Rule to make even more clear that it permits discipline for discrimination, harassment, or retaliation only to the extent the conduct is recognized by state or federal law to be unlawful. Further, Comment [2] specifies that the Rule does not apply to conduct protected by the First Amendment to the US

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					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>Constitution or Article I, § 2 of the California Constitution.</p> <p>The definition of prohibited characteristic extends to unspecified categories only to the extent they may in the future be affirmatively recognized by other law.</p>
X-2016-55	Shepard, Stephen	N	D		This rule imposes an unreasonable burden on the freedom of lawyers to choose which clients they will represent and which ones they will not.	<p>The Commission has modified the proposed Rule to make even more clear that it permits discipline for discrimination, harassment, or retaliation only to the extent the conduct is recognized by state or federal law to be unlawful. Further, Comment [2] specifies that the Rule does not apply to conduct protected by the First Amendment to the US Constitution or Article I, § 2 of the California Constitution.</p> <p>The Commission has modified the proposed comments to state that a lawyer does not violate the 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</p>

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						reasons, as required or permitted by these Rules or other law.” The Commission believes that this eliminates any potential conflict with other Rules relating to competence and conflicts, and makes clear that lawyers remain free to select clients for legitimate advocacy-based reasons.