

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 retaliate against persons.
- (b) In relation to a law firm's operations, a lawyer shall not:
 - (1) on the basis of any protected characteristic,
 - (i) unlawfully discriminate or knowingly* permit unlawful discrimination;
 - (ii) 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
 - (iii) 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" means to take adverse action against a person because 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 being issued a notice of a disciplinary charge under this Rule, a lawyer shall:
 - (1) if the notice is of a disciplinary charge under paragraph (a) of this Rule, provide a copy of the notice to the California Department of Fair Employment and Housing, State Solicitor General at the Office of the Attorney General, and the United States Department of Justice, Coordination and Review Section; or
 - (2) if the notice is of a disciplinary charge under paragraph (b) of this Rule, 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 preclude a lawyer from:
 - (1) representing a client alleged to have engaged in unlawful discrimination, harassment, or retaliation;
 - (2) declining or withdrawing from a representation as required or permitted by Rule 1.16; or
 - (3) providing advice and engaging in advocacy as otherwise required or permitted by these Rules and the State Bar Act.

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. While both the parties and the court retain discretion to refer such conduct to the State Bar, a court's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (a).

[3] 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. A lawyer

also does not violate this Rule by otherwise restricting who will be accepted as clients for advocacy-based reasons, as required or permitted by these Rules or other law.

[4] 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.

[5] 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.

[6] 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.

[7] 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.

[8] 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.

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

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 retaliate against persons.
- (b) In relation to a law firm's operations, a lawyer shall not:
 - (1) on the basis of any protected characteristic,
 - (i) unlawfully discriminate or knowingly* permit unlawful discrimination;
 - (ii) 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
 - (iii) 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" means to take adverse action against a person because 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 being issued~~ing~~ a notice of a disciplinary charge under this Rule, a lawyer shall:
- (1) ~~If~~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, State Solicitor General at the Office of the Attorney General, and the United States Department of Justice, Coordination and Review Section; or
 - (2) ~~If~~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 preclude a lawyer from:
- (1) ~~vent a lawyer from~~ representing a client alleged to have engaged in unlawful discrimination, harassment, or retaliation; ;
 - (2g) ~~This Rule does not limit the ability of a lawyer to~~ declining or withdrawing from a representation as required or permitted by Rule 1.16; or
 - (3) providing advice and engaging in ~~This Rule also does not preclude advice or~~ advocacy as otherwise required or permitted by these Rules and the State Bar Act.

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. While both the parties and the court retain discretion to refer such conduct to the State Bar, a court's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (a).

[3] 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. A lawyer also does not violate this Rule ~~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.

[4] 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 peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (a).~~

[53] 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.

[64] 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.

[75] 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.

[86] 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.

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 - (2) unlawfully retaliate against persons.
- (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) on the basis of any protected characteristic.
 - ~~(i)~~ unlawfully discriminate or knowingly* permit unlawful discrimination;
 - ~~(2)~~ ii 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
 - ~~(3)~~ iii 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) “~~retaliation~~retaliate” means to take adverse action against a person because ~~at 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~~being issued a notice of a disciplinary charge under this Rule, a lawyer shall:
- (1) ~~If~~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, State Solicitor General at the Office of the Attorney General, and the United States Department of Justice, Coordination and Review Section; or
 - (2) ~~If~~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 preclude a lawyer from:
- (~~1~~) ~~This Rule shall not prevent a lawyer from~~ representing a client alleged to have engaged in unlawful discrimination, harassment, or retaliation;
 - (2) declining or withdrawing from a representation as required or permitted by Rule 1.16; or
 - (3) providing advice and engaging in advocacy as otherwise required or permitted by these Rules and the State Bar Act.

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 supervisorial 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.

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~~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).

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[4] 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.

~~[35]~~ 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.

~~[46]~~ 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.

~~[57]~~ 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.

~~[68]~~ 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.

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

**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:
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 - (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.

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[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.

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[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 = 49 **A = 11**
D = 30
M = 6
NI = 2

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 (07-25-16)	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 (08-01-16)	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 (08-01-16)	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 (07-28-16)	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 required.

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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 (08-02-16)	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 [4] 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," "limiting the lawyer's practice to members of underserved populations," or "otherwise restricting who will be accepted as clients for 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</p>

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						relating to competence and conflicts, and makes clear that the Rule does not improperly interfere with a lawyer's selection of clients.
X-2016-27a	Cross, Terrence (08-02-16)	N	D		[No comment provided.]	No response required.
X-2016-28	Fisher, Frank (08-02-16)	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 be found not to have done anything wrong. This is</p>	<p>Comment [4] 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 discipline for discrimination, harassment, or retaliation only</p>

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

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					unconscionable!	to the extent the conduct is recognized by state or federal law to be unlawful.
X-2016-30	Nelson, Sheila (08-03-16)	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 State Bar Court should not take on those issues for which</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. Paragraphs (d) and (e), and Comments [6] and [7] provide mechanisms for addressing parallel civil and administrative proceedings.</p>

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					the general civil and criminal trial courts provide adequate protection.	
X-2016-32t	Law Professors (Zitrin) (07-25-16)	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 pre-adjudication, it would give trial counsel huge discretion in</p>	See response to Public Comment 2016-52t below.

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					<p>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 help regarding perceived discrimination <i>against</i> him might 	

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					<p>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 (08-02-16)	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 partnership, limited liability partnership, law corporation,</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>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 contractor, or otherwise require that a prospective or actual</p>	

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					<p>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 alleging discrimination within any twelve month period, whether</p>	

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					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 (08-15-16)	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 autonomy of lawyers to accept and decline representation,</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 [4] 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 does not believe there is any even</p>

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					<p>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>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,” “limiting the lawyer’s practice to members of underserved populations,” or “otherwise restricting who will be accepted as clients for 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 the Rule does not improperly interfere with a lawyer’s selection of clients.</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 decision to adopt ABA Model Rule 8.4(g),</p>

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X-2016-53	Price, Pamela (08-24-16)	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 required.
X-2016-57	Copi, Margaret (08-31-16)	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 lawyer. I support the Commission's recommended version (ALT1).</p>	No response required.

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X-2016-51	Johnson, Maxine (08-23-16)	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 required.
X-2016-52t	Law Professors (Zitrin) (08-24-16)	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 “unlawfully” is only vaguely defined in section (c)(3) of the rule. This would give trial counsel</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,” “limiting the lawyer’s practice to members of underserved populations,” or “otherwise restricting who will be accepted as clients for 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 the Rule does not improperly</p>

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					<p>huge discretion in determining was 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; • An Afghani-American lawyer in a busy sole practice focused on immigration rights of people from 	interfere with a lawyer’s selection of clients.

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					<p>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 <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 [4] 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>

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X-2016-70	Dickinson, Glenn (09-23-16)	N	D		<p>Proposed Rule 8.4.1 will invade the historically recognized right of attorneys to exercise moral and professional autonomy in choosing whether to engage in legal representation and undermines other fundamental ethical duties.</p> <p>The proposed rule fails to respect attorneys' consciences and professional judgments.</p> <p>The proposed rule undermines attorneys' duties of diligence and zealous client representation.</p> <p>The proposed rule creates unacceptable conflicts of interest between the attorney and client.</p> <p>The proposed rule is unconstitutional because it unconstitutionally chills and compels speech; and it is void for vagueness.</p> <p>The proposed rule would sever the rules from legitimate interests of the legal profession and significantly undermine these interests.</p> <p>A competent tribunal should first determine that the alleged discrimination or harassment was</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 [4] 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 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," "limiting the lawyer's practice to members of underserved populations," or "otherwise restricting who will be accepted as clients for 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</p>

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					unlawful before the state bar discipline mechanisms are engaged.	relating to competence and conflicts, and makes clear that the Rule does not improperly interfere with a lawyer's selection of clients. 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 decision to adopt ABA Model Rule 8.4(g),
X-2016-66ae	San Diego County Bar Association (Riley) (09-15-16)	Y	M		First, we believe it important to state unequivocally that lawyers have an ethical obligation not to engage in unlawful discrimination, harassment or retaliation for the very reason stated in the first sentence of the Comment: such conduct undermines the core principle of our democracy that all persons are equal, a principle at the heart of our profession. We are aware of the concerns some have raised about the inclusion of the phrase "in terminating or refusing to accept the representation of any client," as a potential ground for discipline, because it might	No response required to the preference for Alt-1 over Alt-2. With respect to the balance of the comment, 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 [4] 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. In addition, the Commission has modified the proposed

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					<p>infringe on the independence of a lawyer to choose which client the lawyer wants to represent or to continue to represent—for reasons wholly removed from unlawful discrimination. . . . Worse it could give rise to groundless complaints against lawyers who decline or terminate the representation of a client for legitimate reasons, only to have the disappointed, putative or former client file baseless State Bar discipline charges; charges nonetheless to which the lawyer must at some level respond.</p> <p>We do not believe, however, that a new discipline rule should contain such inherent uncertainty and provide such grounds for possible mischief. Consequently, we recommend that the Commission remove the phrase, “in terminating or refusing to accept the representation of any client,” from subsection (a). With this recommendation, we support the proposed rule.</p> <p>Further, we support Alternative 1, and disagree with adoption of Alternative 2 for the following reasons. Alternative 2 would prohibit the State Bar from even opening an investigation, or</p>	<p>comments to state that a lawyer does not violate the Rule by “limiting the scope or subject matter of the lawyer’s practice,” “limiting the lawyer’s practice to members of underserved populations,” or “otherwise restricting who will be accepted as clients for advocacy-based reasons, as required or permitted by these Rules or other law.” The Commission believes that these changes make clear that the Rule does not improperly interfere with a lawyer’s selection of clients.</p>

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					<p>commencing any proceeding, for any alleged violation of the rule—no matter how egregious the alleged conduct—until a final administrative or court judgment finding unlawful discrimination or harassment.</p> <p>In effect, Alternative 2 would require the victim of alleged unethical conduct to initiate an administrative or civil proceeding (or an administrative proceeding sufficient to obtain a “Right to Sue” letter), and then pursue that proceeding to a final judgment—arguably foregoing even a beneficial civil settlement—before the State Bar could even open an investigation into the alleged unethical conduct. If the victim should initiate a civil action and then elect a favorable settlement and choose to “get on with his or her life,” the State Bar’s hands would be tied, no matter how blatantly the lawyer’s conduct violated the rule.</p> <p>We believe that the investigation, and as appropriate the prosecution, of alleged violations of the Rules of Professional Conduct should not depend on the victim not only initiating an independent action but then</p>	

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					<p>prosecuting it to final judgment; nowhere else in the Rules of Professional Conduct do the rules impose such an obligation on victims of lawyer misconduct, and nowhere else do the rules so restrict the independence of the State Bar to investigate and pursue alleged misconduct.</p> <p>We are aware of the position of the Office of Chief Trial Counsel that it presently does not have the expertise or personnel to address what may be a surge in employment-related complaints.</p> <p>While the concerns of the Office of Chief Trial Counsel are legitimate, we believe they can be addressed within the proposed rule. First, the State Bar Act, Business and Professions Code section 6044.5(b)(1), permits the Chief Trial Counsel or designee to disclose non-public information to government agencies responsible for enforcement of civil laws; and the State Bar Rules of Procedure permit the State Bar to abate a proceeding when waiting for the disposition of a related proceeding that would expedite the State Bar matter. Consequently, if the Office of</p>	

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					Chief Trial Counsel believed that the expertise of DFEH or the EEOC should better address any given complaint, we believe it has the tools available to refer those complaints to the appropriate agency and abate its own investigation or proceeding until the agency has had an opportunity to act in the first instance. In the past, the Office of Chief Trial Counsel has abated investigations while waiting for civil cases to proceed. We believe the Office of Chief Trial Counsel has the experience and ability to make similar determinations should it be faced with a surge of employment-related discrimination complaints.	
X-2016-73	Rainboldt, James (09-23-16)	N	D		An example of the cure being worse than the disease. Governing bodies which attempt to make the world perfectly fair, just and its people always or even mostly benevolent inevitably become totalitarian and work their own grave injustices. The object of a more fair and kinder world is virtuous, but this is not the way to do it.	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 decision to adopt ABA Model Rule 8.4(g),
X-2016-74	Harrison, John (09-23-16)	N	D		I am concerned that this proposed rule will be misused – and serve as a way to punish and root out someone who is characterized as an evil person	The Commission has modified the proposed Rule to make even more clear that it permits discipline for discrimination, harassment, or retaliation only

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					when they choose to take on or not take on certain clients for various reasons – and the rejected client will somehow find a violation of this rule. This rule appears to protect clients but I think it will serve to harass and remove attorneys who the majority finds repulsive and not to their liking.	<p>to the extent the conduct is recognized by state or federal law to be unlawful. Further, Comment [4] 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,” “limiting the lawyer’s practice to members of underserved populations,” or “otherwise restricting who will be accepted as clients for 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 the Rule does not improperly interfere with a lawyer’s selection of clients.</p>
X-2016-75e	Kerins, Steve (09-25-16)	N	D	(a)	<p>In my opinion, the existing rule is sufficient for public protection.</p> <p>I am concerned that paragraph (a) of the proposed rule could be</p>	The Commission has modified the proposed Rule to make even more clear that it permits discipline for discrimination, harassment, or retaliation only

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[ALT1] Synopsis of Public Comments**

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				(b)	<p>read to infringe on a lawyer's discretion in choosing his or her clients and cases, and thereby risk infringing on his or her right to free speech and expression.</p> <p>I am also greatly concerned by very broad language in paragraph (b) – for example, the lack of any clear scienter requirement in the specific language in the rule for persons alleged to have engaged in discriminatory conduct. The proposed rule also clearly indicates that it is a disciplinary offense for a lawyer to “knowingly permit” unlawful discrimination or harassment, which, as defined, could impose an enormous burden on young, new, and subordinate lawyers. This standard also runs the risk of turning lawyers in the same firm or office into mandatory monitors and enforcers of one another's conduct, which, again, would be a great overreach and would serve to inhibit their professional collaboration in general as well as in the context of representing the firm's clients.</p>	<p>to the extent the conduct is recognized by state or federal law to be unlawful. Further, Comment [4] 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,” “limiting the lawyer's practice to members of underserved populations,” or “otherwise restricting who will be accepted as clients for 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 the Rule does not improperly interfere with a lawyer's selection of clients. With respect to scienter, the Rule's requirement that the conduct be “unlawful” incorporates the scienter requirements of the applicable</p>
				(d) and (e)	<p>Finally, paragraphs (d) and (e) again would seem to operate to tie the attorney discipline process</p>	

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					to civil and administrative employment and civil rights proceedings to an inappropriate extent.	<p>law defining the unlawful discrimination, harassment, or retaliation. With respect to “knowingly permit,” this is a defined term in the Rule, which requires that the lawyer know of the conduct at issue. Moreover, Comment [5] makes clear that what constitutes appropriate corrective action can vary with a lawyer’s relative position within a law firm, accounting for such factors as seniority and subordination.</p> <p>The Commission believes paragraphs (d) and (e), and Comments [6] and [7], are necessary to provide a mechanism for addressing parallel civil and administrative actions and that there is a demonstrable need for the Rule.</p>
X-2016-76y	Los Angeles County Bar Association Professional Responsibility and Ethics Committee (PREC) (Schmid) (09-24-16)	Y	M		<p>PREC supports Proposed Rule 8.4.1 [Prohibited Discrimination, Harassment and Retaliation [ALT 1]].</p> <p>PREC also recommends the addition of a comment from current Rule 2-400, which provides that a disciplinary investigation or proceeding for conduct coming within the rule</p>	The Commission has added the requested Comment to make clear that conduct falling within this Rule may also be subject to discipline under other applicable provisions.

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					may be initiated and maintained if such conduct warrants discipline under California Business and Professions Code sections 6106 and 6068, the California Supreme Court's inherent authority to impose discipline, or other disciplinary standard. PREC opposes [ALT 2] of the Proposed Rule, which moderates, but does not eliminate, the 2-400(C) precondition.	
X-2016-80a	Freedom X (Becker) (09-26-16)	Y	D		<p>We wish to submit objection to proposed rule 8.4.1, which dangerously forecloses the legal representation of people exercising their constitutional rights of freedom of expression and religious liberty and imperils that liberty for everyone. It is, specifically, an unconstitutional abridgement of speech designed to suppress political dissent, granting intellectual autonomy to the state's favored ideas, while putting a boot on the necks of those members of society who wish to resist state-compelled thoughts that are unorthodox, or are outside the official government platform. Accordingly, if adopted, it would deny organizations like ours the right to advocate on behalf of individuals expressing, <i>inter alia</i>, sincerely held religious and moral</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 [4] 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," "limiting the lawyer's practice to members of underserved populations," or "otherwise restricting who</p>

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					beliefs regarding sexual conduct and national sovereignty, while simultaneously compelling advocacy on behalf of individuals promoting, <i>inter alia</i> , Islamic sharia and satanism.	will be accepted as clients for 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 the Rule does not improperly interfere with a lawyer’s selection of clients.
X-2016-52t	Law Professors (Zitrin) (09-21-16)	Y	A		See X-2016-52t Law Professors (Zitrin) dated August 24, 2016 for the comment synopsis. The comments are identical and the only difference is the signatories.	See X-2016-52t for the Commission’s response to the Law Professors’ comments.
X-2016-84a	Hadley, Sheldon (09-26-16)	N	D		No explanation provided.	No response necessary.
X-2016-85	Black Women Lawyers Association of Los Angeles (BWL) (Husband) (09-26-16)	Y	A		<p>BWL strongly supports the elimination of the pre-discipline adjudication requirement.</p> <p>However, we believe paragraph (c)(3) should be revised as follows:</p> <p>“(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. <u>Provisions in such</u></p>	<p>The Commission believes that the structure of the Rule and the use of the term “by reference to” in paragraph (c)(3) make clear that provisions of the type cited by the BWL are not incorporated into the definition of “unlawful.”</p> <p>As a result, the Commission believes that Comment [6] is consistent with the Rule. The Commission believes that the more general statement in Comment [6] better serves the underlying purpose than efforts to define more</p>

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					<p><u>statutes and decisions defining unlawful practices and conduct are to be applied in reference to this rule without regard to other provisions in the statutes and/or decisions that: (a) limit their applicability to employment relationships or the offering of goods and services to the public; (b) limit coverage to entities with a certain minimum number of employees; or (c) set forth other non-substantive restrictions on the scope of coverage of those statutes or decisions</u></p> <p>We believe this, or similar language, is necessary to make the Rule consistent with both Comment [6], and the Commission's intent to broaden the applicability of the Rule to situations outside of the law practice employment context.</p> <p>In sum, we strongly support adoption of ALT 1, with modifications to clarify the terms "unlawful" and "unlawfully" so they are consistent with Comment [6] and the broader scope of the amended rule.</p>	specifically (with the risk of potentially missing some) the types of provisions that are not incorporated within the Rule's definition of "unlawful."
X-2016-88	St. Lawrence, Isaac; Hartsock, Robert; and McMurtrey, Gene (09-27-16)	N	D		Proposed Rule 8.4.1 undermines the recognized right of attorneys to exercise moral and professional autonomy in	The Commission has modified the proposed Rule to make even more clear that it permits discipline for discrimination,

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					<p>choosing whether to engage in legal representation.</p> <p>The proposed rule will result in violation of other rules of professional conduct.</p> <p>The proposed rule creates unacceptable conflicts of interest between the attorney and client.</p> <p>The proposed rule fails to respect attorneys' consciences and professional judgments.</p> <p>The proposed rule in unconstitutional in that it chills and compels speech; and it is void for vagueness.</p> <p>A competent tribunal should first determine that the alleged discrimination or harassment was unlawful before the State Bar discipline mechanism's engage.</p>	<p>harassment, or retaliation only to the extent the conduct is recognized by state or federal law to be unlawful. Further, Comment [4] 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," "limiting the lawyer's practice to members of underserved populations," or "otherwise restricting who will be accepted as clients for 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 the Rule does not improperly interfere with a lawyer's selection of clients.</p> <p>A large number of public comments support the Commission's determination</p>

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						that there is a demonstrable need for the Rule, and a move away from the requirement of a prior determination by another tribunal. The need for such a Rule is also supported by the record underlying the ABA's recent decision to adopt ABA Model Rule 8.4(g),
X-2016-90	Equal Rights Advocates (Ramey) (09-27-16)	N	D		<p>We strongly oppose the inclusion of the requirement of unlawfulness contained in both proposed versions of Rule 8.4.1. Inclusion of this requirement runs counter to the Rules' stated purpose of mandating professional discipline for conduct that serves to "undermine confidence in the legal profession" and that is "contrary to the fundamental principle that all people are created equal." The unlawfulness requirement is also plainly inconsistent with both the spirit and the letter of the applicable provisions of Rule 2.3(C) of the Model Code of Judicial Conduct and with newly adopted ABA Model Rule 8.4(g) and the corresponding rules of the majority of the 23 states which have adopted antidiscrimination rules.</p> <p>The carving out of harmful</p>	<p>The Commission believes that the proposed Rule reflects a significant step forward from the current California rule. The Commission believes that inclusion of the requirement of "unlawfulness" is appropriate both given its charter to draft clear rules of discipline and to provide additional assurance that the Rule cannot be applied in ways that would intrude on Constitutional protections or improperly limit a lawyer's ability to select clients.</p>

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					<p>attorney conduct which is discriminatory in nature so as to provide much more limited access to, or deterrence by, the legal discipline system than for other misconduct, and, ultimately, for much narrower recourse for victims, who by definition are members of groups historically mistreated by our own profession and the broader society, has no reasonable justification.</p> <p>As officers of the court, lawyers are held to a higher standard than just not being crooks or scofflaws. We stand at the gates of the legal system, charged with upholding the rule of law, and ensuring equal justice under the law for all, and with preserving the public trust in the justice system that ethical conduct engenders. Lawyers are held accountable when they violate that trust, and, irrespective of whether or not they have broken a law, they undeniably do actionable violence to the profession's commitment to equal justice and fundamental fairness when they discriminate, harass or retaliate against members of protected groups in the course of client representation.</p>	

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					We respectfully urge that the Board of Trustees reject the “unlawfulness” requirement as currently contained in proposed Rule 8.4.1.	
X-2016-91a	Secord, James (09-27-16)	N	D		[No comment provided.]	No response required.
X-2016-92a	Home School Legal Defense Association (Estrada) (09-27-16)	Y	D		[No comment provided.]	No response required.
X-2016-95a	Green, Samuel (09-27-16)	N	D		I am strongly opposed to this proposed rule. As noted by others, proposed Rule 8.4.1 is likely to adversely impact the relationship between attorneys and their clients, the ability of attorneys to faithfully execute their duties, the ability of citizens to obtain zealous representation, and the ability of attorneys to exercise their constitutional rights.	<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 [4] 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 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</p>

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						subject matter of the lawyer's practice," "limiting the lawyer's practice to members of underserved populations," or "otherwise restricting who will be accepted as clients for 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 the Rule does not improperly interfere with a lawyer's selection of clients.
X-2016-106	The National Center for Law & Policy (Broyles) (09-27-16)	Y	D		<p>Proposed Rule 8.4.1 will invade the historically recognized right of attorneys to exercise moral and professional autonomy in choosing whether to engage in legal representation and undermines other fundamental ethical duties.</p> <p>The proposed rule fails to respect attorneys' consciences & professional judgment.</p> <p>The proposed rule undermines attorneys' duties of diligence and zealous client representation.</p> <p>The proposed rule creates unacceptable conflicts of interest</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 [4] 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 does not believe there is any even potential conflict with the proposed Rule relating to</p>

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					<p>between the attorney and the client.</p> <p>The proposed rule is unconstitutional because it will chill and compel speech.</p> <p>The proposed rule is void for vagueness.</p> <p>The proposed rule would sever the rules from legitimate interests of the legal profession and significantly undermine these interests.</p> <p>A competent tribunal should first determine that the alleged discrimination or harassment was unlawful before the State Bar discipline mechanism's engages.</p>	<p>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," "limiting the lawyer's practice to members of underserved populations," or "otherwise restricting who will be accepted as clients for 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 the Rule does not improperly interfere with a lawyer's selection of clients.</p> <p>A large number of public comments support the Commission's determination that there is a demonstrable need for the Rule, and a move away from the requirement of a prior determination by another tribunal.. The need for such a Rule is also supported by the record underlying the ABA's recent decision to adopt ABA Model Rule 8.4(g),</p>

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X-2016-100	Clements, Richard (09-27-16)	N	D		<p>I have reviewed both drafts. I am exceedingly troubled with the prospect of possibly denying representation to one of a "perceived" class. The undefined words "harassed" and "perceived" smack more of social engineering rather than the practice of law. Example: Would the State Bar really prosecute former Attorney General Jerry Brown and present Attorney General Kamala Harris for their refusal to represent the proponents of former Proposition 8 (the non action was criticized by Irvine Law School Dean Erwin Chemerinsky at the time)? I reserve the right to decline representation to anyone who falls outside my area of practice regardless of perception. If, during an intake conference, I determine that the subject should be the subject of scrutiny and evaluated by a qualified proctologist I still reserve the right irregardless of perception. To characterize these attempts at language is to attempt to regulate fog and penalize for not doing so. What is really going on anyway?</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 [4] 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," "limiting the lawyer's practice to members of underserved populations," or "otherwise restricting who will be accepted as clients for 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 the Rule does not improperly interfere with a lawyer's selection of clients.</p>

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						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 decision to adopt ABA Model Rule 8.4(g),
X-2016-99	State Bar Council on Access & Fairness (COAF) (Downing) (09-27-16)	Y	M		<p>COAF recommends the adoption of Rule 8.4.1 (ALT1) with the below minor amendment:</p> <p>(e) Upon issuing a notice of a disciplinary charge under this Rule:</p> <p>(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, <u>State Solicitor General at the Office of the Attorney General</u>, and the United States Department of Justice, Coordination and Review Section.</p> <p>The rationale for the recommendation is as follows. In addition to the anti-discrimination protections under the employment provisions of the</p>	The Commission has made the requested change.

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					FEHA, ALT 1 also implicates antidiscrimination protections under the public accommodations provisions of the Unruh Act.	
X-2016-101a	Gossling, Doug (09-27-16)	N	D		<p>Proposed Rule 8.4.1 will invade the historically recognized right of attorneys to exercise moral and professional autonomy in choosing whether to engage in legal representation and undermines other fundamental ethical duties.</p> <p>The proposed rule fails to respect attorneys' consciences & professional judgment.</p> <p>The proposed rule undermines attorneys' duties of diligence and zealous client representation.</p> <p>The proposed rule creates unacceptable conflicts of interest between the attorney and the client.</p> <p>The proposed rule is unconstitutional because it will chill and compel speech.</p> <p>The proposed rule is void for vagueness.</p> <p>The proposed rule would sever the rules from legitimate interests of the legal profession and</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 [4] 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 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," "limiting the lawyer's practice to members of underserved populations," or "otherwise restricting who will be accepted as clients for advocacy-based reasons, as required or permitted by these</p>

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					<p>significantly undermine these interests.</p> <p>A competent tribunal should first determine that the alleged discrimination or harassment was unlawful before the State Bar discipline mechanism's engages.</p>	<p>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 the Rule does not improperly interfere with a lawyer's selection of clients.</p> <p>A large number of public comments support the Commission's determination that there is a demonstrable need for the Rule, and a move away from the requirement of a prior determination by another tribunal. The need for such a Rule is also supported by the record underlying the ABA's recent decision to adopt ABA Model Rule 8.4(g),</p>
X-2016-118a	Dexter, Scott (09-27-16)	N	D		No explanation provided.	No response necessary.
X-2016	Bar Association of San Francisco Legal Ethics Committee (BASF) (Banola) (09-27-16)	Y	A		<p>BASF supports expanding current Rule 2-400 to cover discrimination or harassment in representing a client.</p> <p>BASF supports the removal of the pre-adjudication precondition. To allow a precondition to be imposed as to this rule alone is discriminatory and biased in and of itself because this rule would</p>	No response required.

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					be singled out and treated differently than all other rules.	
X-2016-104-bo	Office of Chief Trial Counsel (OCTC) (Dresser) (09-27-16)	Y	M		<p>1. OCTC supports subsections (a) and (d) of this rule.</p> <p>2. OCTC supports the general concepts in subsections (b) and (c), but is concerned that subsections (b)(1) and (2) and (c)(2) require “knowingly” for the same reasons expressed regarding that term in proposed Rule 1.9, proposed Rules 3.3 and 4.1, and the General Comments section of this letter. The rules should not encourage willful blindness or a failure to investigate. (See <i>Butler v. State Bar</i> (1986) 42 Cal.3d 323, 328-329 [circumstances known to the attorney may require an investigation].)</p> <p>3. OCTC is concerned that subsection (e) and Comment 4 places requirements on the State Bar and is not a disciplinable offense. The purpose of the Rules of Professional Conduct is to regulate the practice of law, not to regulate the State Bar. This is beyond the direction and the authority the Supreme Court</p>	<p>1. No response required.</p> <p>2. The definition of “knowingly” in Rule 1.0.1(f) makes clear that knowledge can be inferred from the circumstances. With this definition, the Commission believes that the “knowingly” standard is appropriately used in the referenced paragraphs and Comment [5] (formerly Comment [3]), which address not a lawyer’s own discrimination or harassment, but rather a lawyer’s failure to address discrimination or harassment engaged in by others, and will not encourage willful blindness or failure to investigate.</p> <p>3. The Commission has modified subsection (e) to impose the reporting obligation on the lawyer receiving the notice of disciplinary charge rather than on the State Bar.</p>

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					<p>provided the Commission. Moreover, subsection (e) is vague as to which division of the State Bar is required to provide this information, the State Bar Court, OCTC, General Counsel, or some other unit.</p> <p>4. OCTC supports Comments 2.</p> <p>5. OCTC is concerned that Comments 1 and 5 are more appropriate for treatises, law review articles, and ethics opinions. They are merely a philosophical discussion of the reasons for the rule.</p> <p>6. OCTC is concerned that Comment 3 is unnecessary. Further, OCTC is concerned with the use of the term “knowingly” in this Comment for the same reasons expressed regarding that term in proposed Rule 1.9, proposed Rules 3.3 and 4.1, and the General Comments section of this letter. The rules should not encourage willful blindness or a failure to investigate. (See <i>Butler</i></p>	<p>4. No response required.</p> <p>5. The Commission believes these Comments fit within its charter. Comment [1] provides useful guidance regarding the interplay between this Rule and the supervision provisions of Rules 5.1 and 5.3. Comment [7] (formerly Comment [5]) provides the underlying purpose of subsection (e) and (f) and so provides guidance for their interpretation and application.</p> <p>6. As demonstrated by other public comments, the Commission believes Comment [5] (formerly Comment [3]) is necessary to make clear that what constitutes a failure to advocate meaningful corrective action may vary with the circumstances, including in particular a lawyer’s seniority and position within a firm.</p>

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					<i>v. State Bar</i> (1986) 42 Cal.3d 323, 328-329 [circumstances known to the attorney may require an investigation].)	
X-2016-107	Sonoma County Women in Law (Winters) (09-27-16)	Y	A		<p>We are happy to see proposed revisions that clarify this rule while emphasizing its importance in this profession. As an organization, we have discussed experiences and frustrations resulting from the inability to enforce this rule and the lack of compliance we have observed from some in the legal industry.</p> <p>We fully agree to the proposed language and support this monumental change.</p>	No response required.
X-2016-109a	Pacific Justice Institute (Snider) (09-27-16)	Y	D		<p>I have provided my name in a letter opposing proposed Rule 8.4.1. However, I also am compelled to write separately to discuss an issue not raised in the letter, namely, the unique impact that such a rule could have on in-house counsel for religious corporations.</p> <p>Subsection b of Rule 8.4.1 places a restriction on attorneys at "law firms." A <i>law firm</i> is defined in Rule 1-100. The definition includes the plain meaning of the term, i.e., a combination of lawyers engaged in the practice</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 [4] 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. The Commission believes that these provisions eliminate any possibility that the Rule would

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

TOTAL = 49 **A = 11**
D = 30
M = 6
NI = 2

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
					<p>of law. But the rule reaches far beyond that to capture in-house attorneys working for a “business entity.” The term <i>business entity</i> has been interpreted broadly by California courts in certain contexts to encompass nonprofit corporations. Although the rules are not a picture of clarity regarding the term <i>law firm</i>, the fear is that the proposed rule will act as a riptide that pulls in-house counsel for nonconforming religious nonprofits out to sea to drown in the waters of political correctness.</p> <p>In relation to the operation of a <i>law firm</i>, an attorney cannot “refuse to hire” based upon a protected characteristic. In-house counsel is routinely involved in some aspect of the hiring process for any given employee and thus would fall under the proposed rule. Lawyers that work for faith-based institutions would find themselves in an untenable position. Religiously conservative entities typically require all employees to agree with the views of the entity’s respective religion and conduct themselves in a manner that is consistent with those beliefs. The member of the Bar working for such an</p>	improperly intrude on employment decisions that implicate Constitutional protections relating to religious beliefs.

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

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					entity has a primary task of providing all necessary legal protections to safeguard the religious rights and identity of the religious institution.	
X-2016-110	Homeless Action Center (Gilg) (09-27-16)	Y	NI		Homeless Action Center hereby agrees with and signs onto the comment submitted by Equal Rights Advocates.	See response to X-2016-90.
X-2016-112	Monroe, Bruce (09-27-16)	N	D		<p>Proposed Rule 8.4.1 will invade the historically recognized right of attorneys to exercise moral and professional autonomy in choosing whether to engage in legal representation and undermines other fundamental ethical duties.</p> <p>The proposed rule fails to respect attorneys' consciences & professional judgment.</p> <p>The proposed rule undermines attorneys' duties of diligence and zealous client representation.</p> <p>The proposed rule creates unacceptable conflicts of interest between the attorney and the client.</p> <p>The proposed rule is unconstitutional because it will chill and compel speech.</p> <p>The proposed rule is void for</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 [4] 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 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," "limiting the lawyer's practice to members of</p>

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

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					<p>vagueness.</p> <p>The proposed rule would sever the rules from legitimate interests of the legal profession and significantly undermine these interests.</p> <p>A competent tribunal should first determine that the alleged discrimination or harassment was unlawful before the State Bar discipline mechanism's engages.</p>	<p>underserved populations," or "otherwise restricting who will be accepted as clients for 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 the Rule does not improperly interfere with a lawyer's selection of clients.</p> <p>A large number of public comments support the Commission's determination that there is a demonstrable need for the Rule, and a move away from the requirement of a prior determination by another tribunal. The need for such a Rule is also supported by the record underlying the ABA's recent decision to adopt ABA Model Rule 8.4(g),</p>
X-2016-113a	Christian Legal Society (Colby) (09-27-16)	Y	D		<p>Rule 2-400 should be preserved as written because, for over two decades, it has done an excellent job of protecting the public and the legal profession.</p> <p>Rule 2-400 works and both alternative versions of proposed rule 8.4.1 would drastically and</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 [4] specifies that the</p>

**Proposed Rule 8.4.1 [2-400] Prohibited Discrimination, Harassment and Retaliation
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					<p>needlessly change 2-400.</p> <p>Proposed Rule 8.4.1 would have a negative impact on attorneys' First Amendment rights. The First Amendment protects lawyers' freedom of speech and free exercise of religion. The proposed rule unconstitutionally chills attorneys' First Amendment rights.</p> <p>Attorneys' service on boards of religious institutions may be subject to discipline if the proposed rule were adopted.</p> <p>The proposed rule fails to define "harass" and, therefore, does not pass constitutional muster.</p> <p>The proposed rule would have a negative impact on attorneys' Fourteenth Amendment rights.</p> <p>The proposed rule is unconstitutionally vague.</p>	<p>Rule does not apply to conduct protected by the First Amendment to the US Constitution or Article I, § 2 of the California Constitution. The Commission believes that these provisions ensure that the Rule is not unconstitutionally vague, will not unconstitutionally chill the exercise of Constitutional rights relating to free speech and religion or Fourteenth Amendment rights, and cannot be interpreted or applied to impose discipline for service on boards of religious institutions.</p> <p>A large number of public comments support the Commission's determination that there is a demonstrable need for the Rule, and a move away from the requirement of a prior determination by another tribunal. The need for such a Rule is also supported by the record underlying the ABA's recent decision to adopt ABA Model Rule 8.4(g),</p>
X-2016-116a	Hamilton, Thomas (09-28-16)	N	D		[No comment provided.]	No response required.

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

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X-2016-119	Garret, Amy (09-27-16)	N	D		I am respecting requesting that the Commission reject both alternatives of Proposed Rule 8.4.1.	A large number of public comments support the Commission's determination that there is a demonstrable need for the Rule, and a move away from the requirement of a prior determination by another tribunal. The need for such a Rule is also supported by the record underlying the ABA's recent decision to adopt ABA Model Rule 8.4(g),
X-2016-121i	California Commission on Access to Justice (09-23-16)	Y	A		The Access Commission supports proposed Rule 8.4.1. We agree that lawyers should not engage in harassment or discrimination or be permitted to terminate or refuse representation of a client on the basis of any protected characteristic or for the purpose of retaliation.	No response required.
X-2016-128	Morse, Gregory (09-27-16)	N	D		While we believe that highly held intentions are admirable and we all have concern for those values, these proposed versions are not the way within the purview of the Rules of Professional Conduct to manifest such an infringement on lawyer autonomy in representing their clients. First, those firms and attorneys who represent First Amendment issues; freedom of expression,	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 [4] 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.

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

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					<p>religious workers and entities, victims of civil rights violations to name a few, will have their rights of representation compromised. Currently, protections exist that prohibit government from taking discriminatory action against a person on the basis that such person believes or acts in accordance with a religious belief or moral conviction. These proposed rules would fly in the face of those protections, arguably invalidating those protections with imposition of these proposed rules. Congress and the courts are the place to address these issues, not the State Bar administration. What interested parties cannot achieve in the courts, they will try and control or stifle the messenger of court combatants through State Bar regulation.</p> <p>A lawyer has the right to determine whom and how they will represent their client. Lawyers should not be subject to being set up by some ambiguous, yet to be determined limitations based in the future, interpretation of these versions by some vagaries, with the potential to lose their license to practice law.</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,” “limiting the lawyer’s practice to members of underserved populations,” or “otherwise restricting who will be accepted as clients for 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 the Rule does not improperly interfere with a lawyer’s selection of clients.</p>

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

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					This type of rule could easily be commandeered by special interests to prosecute lawyers without specific hard facts, to promote their own special interests. Lawyers could in fact be prosecuted on minimal trumped evidence without true recourse. Prosecution could occur in the media and press prior to proper review resulting in libelous career character assassination.	
X-2016-114	Legal Services for Prisoners with Children (Barry) (09-27-16)	Y	D		Legal Services for Prisoners with Children hereby agrees with and signs onto the comment submitted by Equal Rights Advocates.	See response to X-2016-90. [Note: This comment was originally submitted for proposed Rule 4.1 but was subsequently moved to the 8.4.1 table because of the substance of the comment.]
X-2016-108b	Law Foundation of Silicon Valley (Brunner) (09-27-16)	Y	M		Law Foundation of Silicon Valley adopts the same comment submitted by Equal Rights Advocates.	See response to X-2016-90.

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 retaliate against persons.
- (b) In relation to a law firm's operations, a lawyer shall not:
 - (1) on the basis of any protected characteristic,
 - (i) unlawfully discriminate or knowingly* permit unlawful discrimination;
 - (ii) 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
 - (iii) 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" means to take adverse action against a person because 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) 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 preclude a lawyer from:
- (1) representing a client alleged to have engaged in unlawful discrimination, harassment, or retaliation;
 - (2) declining or withdrawing from a representation as required or permitted by Rule 1.16; or
 - (3) providing advice and engaging in advocacy as otherwise required or permitted by these Rules and the State Bar Act.

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. 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] 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 the underserved populations. A

lawyer also does not violate this Rule by otherwise restricting who will be accepted as clients for advocacy-based reasons, as required or permitted by these Rules or other law.

[4] 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.

[5] 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.

[6] 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.

[7] 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.

[8] 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.

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

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) ~~for the purpose of retaliation~~ unlawfully retaliate against persons.
- (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:~~
 - (1i) unlawfully discriminate or knowingly* permit unlawful discrimination;
 - (2ii) 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
 - (3iii) 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~~ 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) “~~retaliation~~ retaliate” 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) 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~~ preclude a lawyer from:
- (1) representing a client alleged to have engaged in unlawful discrimination, harassment, or retaliation;
 - (2) declining or withdrawing from a representation as required or permitted by Rule 1.16; or
 - (3) providing advice and engaging in advocacy as otherwise required or permitted by these Rules and the State Bar Act.

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] 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 the underserved populations. A

lawyer also does not violate this Rule by otherwise restricting who will be accepted as clients for advocacy-based reasons, as required or permitted by these Rules or other law.

[4] 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.

[5] 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.

[46] 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.

[57] 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.

[68] 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.

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

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**

TOTAL = 25 **A = 0**
D = 23
M = 1
NI = 1

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 (08-01-16)	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**

TOTAL = 25 **A = 0**
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X-2016-27b	Cross, Terrence (08-02-16)	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) (07-25-16)	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</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>

**Proposed Rule 8.4.1 [2-400] Prohibited Discrimination, Harassment and Retaliation
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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 (08-09-16)	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.	Constitution or Article I, § 2 of the California Constitution. The definition of prohibited characteristic extends to unspecified categories only to the extent they may in the future be affirmatively recognized by other law.
X-2016-55	Shepard, Stephen (08-30-16)	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.	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. 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

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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.
X-2016-70	Glenn, Dickinson (09-23-16)	N	D		<p>Proposed Rule 8.4.1 will invade the historically recognized right of attorneys to exercise moral and professional autonomy in choosing whether to engage in legal representation and undermines other fundamental ethical duties.</p> <p>The proposed rule fails to respect attorneys’ consciences and professional judgments.</p> <p>The proposed rule undermines attorneys’ duties of diligence and zealous client representation.</p> <p>The proposed rule creates unacceptable conflicts of interest between the attorney and client.</p> <p>The proposed rule is unconstitutional because it unconstitutionally chills and compels speech; and it is void for vagueness.</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 [4] 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 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,” “limiting the lawyer’s</p>

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					<p>The proposed rule would sever the rules from legitimate interests of the legal profession and significantly undermine these interests.</p> <p>A competent tribunal should first determine that the alleged discrimination or harassment was unlawful before the state bar discipline mechanisms are engaged.</p>	<p>practice to members of underserved populations,” or “otherwise restricting who will be accepted as clients for 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 the Rule does not improperly interfere with a lawyer’s selection of clients.</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 decision to adopt ABA Model Rule 8.4(g),</p>
X-2016-75f	Kerins, Steve (09-25-16)	N	D	(a)	<p>In my opinion, the existing rule is sufficient for public protection.</p> <p>I am concerned that paragraph (a) of the proposed rule could be read to infringe on a lawyer’s discretion in choosing his or her clients and cases, and thereby risk infringing on his or her right to free speech and expression.</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 [4] specifies that the Rule does not apply to conduct

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				(b)	I am also greatly concerned by very broad language in paragraph (b) – for example, the lack of any clear scienter requirement in the specific language in the rule for persons alleged to have engaged in discriminatory conduct. The proposed rule also clearly indicates that it is a disciplinary offense for a lawyer to “knowingly permit” unlawful discrimination or harassment, which, as defined, could impose an enormous burden on young, new, and subordinate lawyers. This standard also runs the risk of turning lawyers in the same firm or office into mandatory monitors and enforcers of one another’s conduct, which, again, would be a great overreach and would serve to inhibit their professional collaboration in general as well as in the context of representing the firm’s clients.	protected by the First Amendment to the US Constitution or Article I, § 2 of the California Constitution. 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,” “limiting the lawyer’s practice to members of underserved populations,” or “otherwise restricting who will be accepted as clients for 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 the Rule does not improperly interfere with a lawyer’s selection of clients. With respect to scienter, the Rule’s requirement that the conduct be “unlawful” incorporates the scienter requirements of the applicable law defining the unlawful discrimination, harassment, or retaliation. With respect to “knowingly permit,” this is a defined term in the Rule, which
				(d) and (e)	Finally, paragraphs (d) and (e) again would seem to operate to tie the attorney discipline process to civil and administrative employment and civil rights proceedings to an inappropriate extent.	

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						<p>requires that the lawyer know of the conduct at issue. Moreover, Comment [5] makes clear that what constitutes appropriate corrective action can vary with a lawyer's relative position within a law firm, accounting for such factors as seniority and subordination.</p> <p>The Commission believes paragraphs (d) and (e), and Comments [6] and [7], are necessary to provide a mechanism for addressing parallel civil and administrative actions and that there is a demonstrable need for the Rule.</p>
X-2016-76z	Los Angeles County Bar Association Professional Responsibility and Ethics Committee (PREC) (Schmid) (09-24-16)	Y	D		LACBA supports proposed rule 8.4.1 [ALT1].	No response required.
X-2016-80b	Freedom X (Becker) (09-26-16)	Y	D		We wish to submit objection to proposed rule 8.4.1, which dangerously forecloses the legal representation of people exercising their constitutional rights of freedom of expression and religious liberty and imperils that liberty for everyone. It is, specifically, an unconstitutional abridgement of speech designed	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 [4] specifies that the Rule does not apply to conduct

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					to suppress political dissent, granting intellectual autonomy to the state's favored ideas, while putting a boot on the necks of those members of society who wish to resist state-compelled thoughts that are unorthodox, or are outside the official government platform. Accordingly, if adopted, it would deny organizations like ours the right to advocate on behalf of individuals expressing, <i>inter alia</i> , sincerely held religious and moral beliefs regarding sexual conduct and national sovereignty, while simultaneously compelling advocacy on behalf of individuals promoting, <i>inter alia</i> , Islamic sharia and satanism.	protected by the First Amendment to the US Constitution or Article I, § 2 of the California Constitution. 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," "limiting the lawyer's practice to members of underserved populations," or "otherwise restricting who will be accepted as clients for 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 the Rule does not improperly interfere with a lawyer's selection of clients.
X-2016-84b	Hadley, Sheldon (09-26-16)	N	D		No explanation provided.	No response necessary.
X-2016-88	St. Lawrence, Isaac; Hartsock, Robert; and McMurtrey, Gene (09-27-16)	N	D		Proposed Rule 8.4.1 undermines the recognized right of attorneys to exercise moral and professional autonomy in choosing whether to engage in legal representation.	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

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					<p>The proposed rule will result in violation of other rules of professional conduct.</p> <p>The proposed rule creates unacceptable conflicts of interest between the attorney and client.</p> <p>The proposed rule fails to respect attorneys' consciences and professional judgments.</p> <p>The proposed rule is unconstitutional in that it chills and compels speech; and it is void for vagueness.</p> <p>A competent tribunal should first determine that the alleged discrimination or harassment was unlawful before the State Bar discipline mechanism's engage.</p>	<p>law to be unlawful. Further, Comment [4] 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," "limiting the lawyer's practice to members of underserved populations," or "otherwise restricting who will be accepted as clients for 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 the Rule does not improperly interfere with a lawyer's selection of clients.</p> <p>A large number of public comments support the Commission's determination that there is a demonstrable need for the Rule, and a move away from the requirement of</p>

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						a prior determination by another tribunal. The need for such a Rule is also supported by the record underlying the ABA's recent decision to adopt ABA Model Rule 8.4(g),
X-2016-91a	Secord, James (09-27-16)	N	D		No explanation provided.	No response necessary.
X-2016-92a	Home School Legal Defense Association (Estrada) (09-27-16)	Y	D		No explanation provided.	No response necessary.
X-2016-95b	Green, Samuel (09-27-16)	N	D		I am strongly opposed to this proposed rule. As noted by others, proposed Rule 8.4.1 is likely to adversely impact the relationship between attorneys and their clients, the ability of attorneys to faithfully execute their duties, the ability of citizens to obtain zealous representation, and the ability of attorneys to exercise their constitutional rights.	<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 [4] 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 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</p>

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						Rule by “limiting the scope or subject matter of the lawyer’s practice,” “limiting the lawyer’s practice to members of underserved populations,” or “otherwise restricting who will be accepted as clients for 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 the Rule does not improperly interfere with a lawyer’s selection of clients.
X-2016-106	The National Center for Law & Policy (Broyles) (09-27-16)	Y	D		<p>Proposed Rule 8.4.1 will invade the historically recognized right of attorneys to exercise moral and professional autonomy in choosing whether to engage in legal representation and undermines other fundamental ethical duties.</p> <p>The proposed rule fails to respect attorneys’ consciences & professional judgment.</p> <p>The proposed rule undermines attorneys’ duties of diligence and zealous client representation.</p> <p>The proposed rule creates</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 [4] 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 does not believe there is any even potential conflict with the</p>

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					<p>unacceptable conflicts of interest between the attorney and the client.</p> <p>The proposed rule is unconstitutional because it will chill and compel speech.</p> <p>The proposed rule is void for vagueness.</p> <p>The proposed rule would sever the rules from legitimate interests of the legal profession and significantly undermine these interests.</p> <p>A competent tribunal should first determine that the alleged discrimination or harassment was unlawful before the State Bar discipline mechanism's engages.</p>	<p>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," "limiting the lawyer's practice to members of underserved populations," or "otherwise restricting who will be accepted as clients for 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 the Rule does not improperly interfere with a lawyer's selection of clients.</p> <p>A large number of public comments support the Commission's determination that there is a demonstrable need for the Rule, and a move away from the requirement of a prior determination by another tribunal.. The need for such a Rule is also supported by the record underlying the ABA's recent decision to adopt ABA Model Rule 8.4(g),</p>

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X-2016-100	Clements, Richard (09-27-16)	N	D		I have reviewed both drafts. I am exceedingly troubled with the prospect of possibly denying representation to one of a "perceived" class. The undefined words "harassed" and "perceived" smack more of social engineering rather than the practice of law. Example: Would the State Bar really prosecute former Attorney General Jerry Brown and present Attorney General Kamala Harris for their refusal to represent the proponents of former Proposition 8 (the non action was criticized by Irvine Law School Dean Erwin Chemerinsky at the time)? I reserve the right to decline representation to anyone who falls outside my area of practice regardless of perception. If, during an intake conference, I determine that the subject should be the subject of scrutiny and evaluated by a qualified proctologist I still reserve the right irregardless of perception. To characterize these attempts at language is to attempt to regulate fog and penalize for not doing so. What is really going on anyway?	<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 [4] 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," "limiting the lawyer's practice to members of underserved populations," or "otherwise restricting who will be accepted as clients for 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 the Rule does not improperly interfere with a lawyer's selection of clients.</p>

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						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 decision to adopt ABA Model Rule 8.4(g),
X-2016-118a	Dexter, Scott (09-27-16)	N	D		No explanation provided.	No response necessary.
X-2016-104-bo	Office of Chief Trial Counsel (OCTC) (Dresser) (09-27-16)	Y	M		<p>1. OCTC supports subsections (a) and (d) of this rule.</p> <p>2. OCTC supports the general concepts in subsections (b) and (c), but is concerned that subsections (b)(1) and (2) and (c)(2) require "knowingly" for the same reasons expressed regarding that term in proposed Rule 1.9, proposed Rules 3.3 and 4.1, and the General Comments section of this letter. The rules should not encourage willful blindness or a failure to investigate. (See <i>Butler v. State Bar</i> (1986) 42 Cal.3d 323, 328-329 [circumstances known to the attorney may require an investigation].)</p>	<p>1. No response required.</p> <p>2. The definition of "knowingly" in Rule 1.0.1(f) makes clear that knowledge can be inferred from the circumstances. With this definition, the Commission believes that the "knowingly" standard is appropriately used in the referenced paragraphs and Comment [5] (formerly Comment [3]), which address not a lawyer's own discrimination or harassment, but rather a lawyer's failure to address discrimination or harassment engaged in by others, and will not encourage willful blindness or failure to investigate.</p>

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					<p>3. OCTC is concerned that subsection (e) and Comment 4 places requirements on the State Bar and is not a disciplinable offense. The purpose of the Rules of Professional Conduct is to regulate the practice of law, not to regulate the State Bar. This is beyond the direction and the authority the Supreme Court provided the Commission. Moreover, subsection (e) is vague as to which division of the State Bar is required to provide this information, the State Bar Court, OCTC, General Counsel, or some other unit.</p> <p>4. OCTC supports Comments 2.</p> <p>5. OCTC is concerned that Comments 1 and 5 are more appropriate for treatises, law review articles, and ethics opinions. They are merely a philosophical discussion of the reasons for the rule.</p> <p>6. OCTC is concerned that</p>	<p>3. The Commission has modified subsection (e) to impose the reporting obligation on the lawyer receiving the notice of disciplinary charge rather than on the State Bar.</p> <p>4. No response required.</p> <p>5. The Commission believes these Comments fit within its charter. Comment [1] provides useful guidance regarding the interplay between this Rule and the supervision provisions of Rules 5.1 and 5.3. Comment [7] (formerly Comment [5]) provides the underlying purpose of subsection (e) and (f) and so provides guidance for their interpretation and application.</p> <p>6. As demonstrated by other</p>

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					Comment 3 is unnecessary. Further, OCTC is concerned with the use of the term “knowingly” in this Comment for the same reasons expressed regarding that term in proposed Rule 1.9, proposed Rules 3.3 and 4.1, and the General Comments section of this letter. The rules should not encourage willful blindness or a failure to investigate. (See <i>Butler v. State Bar</i> (1986) 42 Cal.3d 323, 328-329 [circumstances known to the attorney may require an investigation].)	public comments, the Commission believes Comment [5] (formerly Comment [3]) is necessary to make clear that what constitutes a failure to advocate meaningful corrective action may vary with the circumstances, including in particular a lawyer’s seniority and position within a firm.
X-2016-101b	Gossling, Doug (09-27-16)	N	D		<p>Proposed Rule 8.4.1 will invade the historically recognized right of attorneys to exercise moral and professional autonomy in choosing whether to engage in legal representation and undermines other fundamental ethical duties.</p> <p>The proposed rule fails to respect attorneys’ consciences & professional judgment.</p> <p>The proposed rule undermines attorneys’ duties of diligence and zealous client representation.</p> <p>The proposed rule creates unacceptable conflicts of interest between the attorney and the client.</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 [4] 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 does not believe there is any even potential conflict with the proposed Rule relating to diligence. The Commission has modified the proposed</p>

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					<p>The proposed rule is unconstitutional because it will chill and compel speech.</p> <p>The proposed rule is void for vagueness.</p> <p>The proposed rule would sever the rules from legitimate interests of the legal profession and significantly undermine these interests.</p> <p>A competent tribunal should first determine that the alleged discrimination or harassment was unlawful before the State Bar discipline mechanism's engages.</p>	<p>comments to state that a lawyer does not violate the Rule by "limiting the scope or subject matter of the lawyer's practice," "limiting the lawyer's practice to members of underserved populations," or "otherwise restricting who will be accepted as clients for 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 the Rule does not improperly interfere with a lawyer's selection of clients.</p> <p>A large number of public comments support the Commission's determination that there is a demonstrable need for the Rule, and a move away from the requirement of a prior determination by another tribunal. The need for such a Rule is also supported by the record underlying the ABA's recent decision to adopt ABA Model Rule 8.4(g),</p>
X-2016-112	Monroe, Bruce (09-27-16)	N	D		Proposed Rule 8.4.1 will invade the historically recognized right of attorneys to exercise moral and	The Commission has modified the proposed Rule to make even more clear that it permits

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

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					<p>professional autonomy in choosing whether to engage in legal representation and undermines other fundamental ethical duties.</p> <p>The proposed rule fails to respect attorneys' consciences & professional judgment.</p> <p>The proposed rule undermines attorneys' duties of diligence and zealous client representation.</p> <p>The proposed rule creates unacceptable conflicts of interest between the attorney and the client.</p> <p>The proposed rule is unconstitutional because it will chill and compel speech.</p> <p>The proposed rule is void for vagueness.</p> <p>The proposed rule would sever the rules from legitimate interests of the legal profession and significantly undermine these interests.</p> <p>A competent tribunal should first determine that the alleged discrimination or harassment was unlawful before the State Bar</p>	<p>discipline for discrimination, harassment, or retaliation only to the extent the conduct is recognized by state or federal law to be unlawful. Further, Comment [4] 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 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," "limiting the lawyer's practice to members of underserved populations," or "otherwise restricting who will be accepted as clients for 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 the Rule does not improperly</p>

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					discipline mechanism's engages.	interfere with a lawyer's selection of clients. A large number of public comments support the Commission's determination that there is a demonstrable need for the Rule, and a move away from the requirement of a prior determination by another tribunal. The need for such a Rule is also supported by the record underlying the ABA's recent decision to adopt ABA Model Rule 8.4(g),
X-2016-113b	Christian Legal Society (Colby) (09-27-16)	Y	D		<p>Rule 2-400 should be preserved as written because, for over two decades, it has done an excellent job of protecting the public and the legal profession.</p> <p>Rule 2-400 works and both alternative versions of proposed rule 8.4.1 would drastically and needlessly change 2-400.</p> <p>Proposed Rule 8.4.1 would have a negative impact on attorneys' First Amendment rights. The First Amendment protects lawyers' freedom of speech and free exercise of religion. The proposed rule unconstitutionally chills attorneys' First Amendment rights.</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 [4] 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. The Commission believes that these provisions ensure that the Rule is not unconstitutionally vague, will not unconstitutionally chill the exercise of Constitutional rights relating to free speech</p>

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					<p>Attorneys' service on boards of religious institutions may be subject to discipline if the proposed rule were adopted.</p> <p>The proposed rule fails to define "harass" and, therefore, does not pass constitutional muster.</p> <p>The proposed rule would have a negative impact on attorneys' Fourteenth Amendment rights.</p> <p>The proposed rule is unconstitutionally vague.</p>	<p>and religion or Fourteenth Amendment rights, and cannot be interpreted or applied to impose discipline for service on boards of religious institutions.</p> <p>A large number of public comments support the Commission's determination that there is a demonstrable need for the Rule, and a move away from the requirement of a prior determination by another tribunal. The need for such a Rule is also supported by the record underlying the ABA's recent decision to adopt ABA Model Rule 8.4(g),</p>
X-2016-116b	Hamilton, Thomas (09-28-16)	N	D		No explanation provided.	No response necessary.
X-2016-109b	Pacific Justice Institute (Snider) (09-27-16)	Y	D		<p>I have provided my name in a letter opposing proposed Rule 8.4.1. However, I also am compelled to write separately to discuss an issue not raised in the letter, namely, the unique impact that such a rule could have on in-house counsel for religious corporations.</p> <p>Subsection b of Rule 8.4.1 places a restriction on attorneys at "law firms." A <i>law firm</i> is defined in Rule 1-100. The definition</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 [4] 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>includes the plain meaning of the term, i.e., a combination of lawyers engaged in the practice of law. But the rule reaches far beyond that to capture in-house attorneys working for a “business entity.” The term <i>business entity</i> has been interpreted broadly by California courts in certain contexts to encompass nonprofit corporations. Although the rules are not a picture of clarity regarding the term <i>law firm</i>, the fear is that the proposed rule will act as a riptide that pulls in-house counsel for nonconforming religious nonprofits out to sea to drown in the waters of political correctness.</p> <p>In relation to the operation of a <i>law firm</i>, an attorney cannot “refuse to hire” based upon a protected characteristic. In-house counsel is routinely involved in some aspect of the hiring process for any given employee and thus would fall under the proposed rule. Lawyers that work for faith-based institutions would find themselves in an untenable position. Religiously conservative entities typically require all employees to agree with the views of the entity’s respective religion and conduct themselves</p>	<p>The Commission believes that these provisions eliminate any possibility that the Rule would improperly intrude on employment decisions that implicate Constitutional protections relating to religious beliefs.</p>

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					in a manner that is consistent with those beliefs. The member of the Bar working for such an entity has a primary task of providing all necessary legal protections to safeguard the religious rights and identity of the religious institution.	
X-2016-119	Garret, Amy (09-27-16)	N	D		I am [respectfully] requesting that the Commission reject both alternatives of Proposed Rule 8.4.1.	A large number of public comments support the Commission's determination that there is a demonstrable need for the Rule, and a move away from the requirement of a prior determination by another tribunal. The need for such a Rule is also supported by the record underlying the ABA's recent decision to adopt ABA Model Rule 8.4(g),
X-2016-128	Morse, Gregory (09-27-16)	N	D		While we believe that highly held intentions are admirable and we all have concern for those values, these proposed versions are not the way within the purview of the Rules of Professional Conduct to manifest such an infringement on lawyer autonomy in representing their clients. First, those firms and attorneys who represent First Amendment issues; freedom of expression, religious workers and entities, victims of civil rights violations to	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 [4] 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. The Commission has modified

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					<p>name a few, will have their rights of representation compromised. Currently, protections exist that prohibit government from taking discriminatory action against a person on the basis that such person believes or acts in accordance with a religious belief or moral conviction. These proposed rules would fly in the face of those protections, arguably invalidating those protections with imposition of these proposed rules. Congress and the courts are the place to address these issues, not the State Bar administration. What interested parties cannot achieve in the courts, they will try and control or stifle the messenger of court combatants through State Bar regulation.</p> <p>A lawyer has the right to determine whom and how they will represent their client. Lawyers should not be subject to being set up by some ambiguous, yet to be determined limitations based in the future, interpretation of these versions by some vagaries, with the potential to lose their license to practice law. This type of rule could easily be commandeered by special</p>	<p>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,” “limiting the lawyer’s practice to members of underserved populations,” or “otherwise restricting who will be accepted as clients for 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 the Rule does not improperly interfere with a lawyer’s selection of clients.</p>

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					interests to prosecute lawyers without specific hard facts, to promote their own special interests. Lawyers could in fact be prosecuted on minimal trumped evidence without true recourse. Prosecution could occur in the media and press prior to proper review resulting in libelous career character assassination.	