

# **COMMISSION PROVISIONAL REPORT AND RECOMMENDATION: RULE 8.4.1 [2-400]**

## **Commission Drafting Team Information**

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## **I. CURRENT CALIFORNIA RULE**

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

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

## **Discussion:**

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

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

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

## **II. FINAL VOTES BY THE COMMISSION AND THE BOARD**

### **Commission:**

Date of Vote: January 20 & 21, 2017

Action: Recommend Board Adoption of Proposed Rule 8.4.1 [2-400]

Vote: 13 (yes) – 1 (no) – 1 (abstain)

### **Board:**

Date of Vote: March 10, 2017

Action: Board Adoption of Proposed Rule 8.4.1 [2-400]

Vote: X (yes) – X (no) – X (abstain)

## **III. PROPOSED RULE 8.4.1 (CLEAN)**

### **Rule 8.4.1 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 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.

#### **IV. COMMISSION'S PROPOSED RULE 8.4.1 (REDLINE TO CURRENT CALIFORNIA RULE 2-400)**

Rule 8.4.1 ~~[2-400]~~ **Prohibited Discriminatory Conduct in a Law Practice** 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.

(Ac) For purposes of this rule:

- (1) ~~“law practice” includes sole practices, law partnerships, law corporations, corporate and governmental legal departments, and other entities which employ members to practice law;~~ 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 ~~a failure to fail~~ to fail to advocate corrective action where the ~~member~~ lawyer knows\* of a discriminatory policy or practice ~~which that~~ results in the unlawful discrimination or harassment prohibited ~~in by~~ paragraph (Bb); and
- (3) “unlawfully” and “unlawful” shall be determined by reference to applicable state ~~or and~~ federal statutes ~~or 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 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:

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

~~(1) hiring, promoting, discharging, or otherwise determining the conditions of employment of any person; or~~representing a client alleged to have engaged in unlawful discrimination, harassment, or retaliation;

~~(2) accepting or terminating~~declining or withdrawing from a representation ~~of any client.~~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.~~

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

## Comment~~Discussion~~

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

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

[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~~Rule may also be initiated and maintained, ~~however,~~ if such conduct warrants discipline under California Business and Professions Code ~~sections~~§§ 6106 and 6068, the California Supreme Court's inherent authority to impose discipline, or other disciplinary standard.

## **V. RULE HISTORY**

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

## VI. OCTC / STATE BAR COURT COMMENTS

### • **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016** **(In response to 90-day public comment circulation):**

- OCTC supports subsections (a) and (d) of this rule.
- 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 *Butler v. State Bar* (1986) 42 Cal.3d 323, 328-329 [circumstances known to the attorney may require an investigation].)
- 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.
- OCTC supports Comments 2.
- 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.
- 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 *Butler v. State Bar* (1986) 42 Cal.3d 323, 328-329 [circumstances known to the attorney may require an investigation].)

### • **Gregory Dresser, Office of Chief Trial Counsel, 1/9/2017** **(In response to 45-day public comment circulation):**

1. OCTC supports subsections (a) and (d) of this rule.
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 rules 1.9 and 3.3 of this letter and the General Comments section of OCTC’s September 27, 2106 letter. The rules should not encourage willful blindness, gross negligence, recklessness, or

a failure to investigate. (See *Butler v. State Bar* (1986) 42 Cal.3d 323, 328-329 [circumstances known to the attorney may require an investigation].)

3. OCTC supports Comments 2, 7, 8, and 9.
4. 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. Further, OCTC is concerned with the use of the term “knowingly” in Comment 5 for the same reasons expressed regarding that term in proposed rules 1.9 and 3.3 in this letter, and the General Comments section of OCTC’s September 27, 2016 letter.
5. Comments 3 and 6 are unnecessary.

- **Colin Wong, State Bar Court, 11/02/2015:**

The State Bar Court appreciates the opportunity to respond to the proposed revisions to rule 2-400 of the Rules of Professional Conduct, regarding prohibiting discriminatory conduct in a law practice. Specifically, the Court wishes to comment on the proposed revisions by the Committee on Access and Fairness.

The current proposal seeks to delete subsection (c) which provides that:

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

We believe that the deletion of subsection (c) could allow the initiation of discipline charges based on alleged discriminatory conduct to be filed in the State Bar Court in the first instance, thereby bypassing other government agencies that are specifically authorized to investigate and prosecute such conduct. While the State Bar Court makes no comment on the desirability or feasibility of such a possibility, the Court would like the Commission to consider the following:

Limited Discovery in State Bar Court Proceedings

Discovery in State Bar Court proceedings is generally limited and permitted only upon Court order. (Rules of Proc. of State Bar, rule 5.65) [No discovery subpoenas without prior Court order (Rule 5.61(A)); Depositions allowed only

upon court order (Rule 5.61(C)); Additional discovery only upon motion and showing of good cause (Rule 5.66(A)).

### Burden of Proof in State Bar Court Proceedings

Unlike in civil proceedings, in a disciplinary proceeding, the State Bar must prove culpability by clear and convincing evidence. Clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)

### Evidence Code Not Applicable in State Bar Court Proceedings

State Bar Court proceedings are not conducted according to the Evidence Code as applied in civil cases. Instead, any relevant evidence must be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions. (Rule

5.104(C).) In addition, hearsay evidence may be used for the purpose of supplementing or explaining other evidence. (Rule 5.104(D).)

### No Jury Trials

In disciplinary proceedings, attorneys are not entitled to a jury trial. (*Johnson v. State Bar of Cal.* (1935) 4 Cal.2d 744, 758. Instead, all trials are conducted by a Hearing Department Judge. (Bus. & Prof. Code, § 6079.1(1).)

As described above, the unique nature of the State Bar Court and its own Rules of Procedure differ significantly from Superior Court civil proceedings. The State Bar Court respectfully requests that these differences be evaluated by the Commission when determining whether the proposed amendments to rule 2-400 should be adopted.

## **VII. PUBLIC COMMENTS & PUBLIC HEARING TESTIMONY**

One comment was received, from OCTC, which agreed only if modified. A public comment synopsis table, with the Commission's responses to each comment, is provided at the end of this report.

One speaker appeared at the public hearing whose testimony was not in support of the proposed rule

## **VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS**

- Prior to August 8, 2016, there was no Model Rule counterpart for 2-400 (although, as discussed below, Comment [3] to ABA Model Rule 8.4(d) specified that it

addressed discrimination by individual lawyers while representing a client). Twenty-three jurisdictions have adopted rules of professional conduct that prohibit discrimination.<sup>1</sup> Sixteen of those jurisdictions have rules that specifically prohibit discrimination in conduct that occurs by a lawyer in a professional capacity.<sup>2</sup> Four jurisdictions have rules that prohibit discrimination in representing a client.<sup>3</sup> Two jurisdictions have rules that prohibit discrimination in connection with a proceeding before a tribunal.<sup>4</sup> Michigan Rule 6.5 requires lawyers to treat all persons involved in the legal process with courtesy and respect. A comment to Michigan rule 6.5 provides that “a supervisory lawyer should make reasonable efforts to ensure that the firm has in effect policies and procedures that do not discriminate against members or employees of the firm.”

- Prior to August 8, 2016, Comment [3] to Model Rule 8.4(d) was related and prohibited lawyers, in the course of representing a client, from knowingly manifesting, by words or conduct, bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, when such actions are prejudicial to the administration of justice. Of the jurisdictions with no black letter rule on discrimination, thirteen have adopted Commentary with language identical or substantially similar to Comment [3]. Similar language was also included in proposed Comment [3] to the first Commission’s proposed rule 8.4. Fourteen jurisdictions do not have a rule or commentary addressing these issues. The ABA State Adoption Chart, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 8.4: Misconduct, Comment [3],” revised June 15, 2015, is available at:
- [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_8\\_4\\_cmt\\_3.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_8_4_cmt_3.authcheckdam.pdf)
- On or about August 8, 2016, the ABA House of Delegates adopted amendments to Model Rule 8.4 to add a new section (g) and accompanying Comments [3], [4], and [5] that would make it professional misconduct for a lawyer to:

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This

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<sup>1</sup> The twenty-three jurisdictions are: Colorado, District of Columbia, Florida, Illinois, Indiana, Iowa, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Rhode Island, Texas, Vermont, Washington, and Wisconsin.

<sup>2</sup> The sixteen jurisdictions are: District of Columbia, Florida, Illinois, Indiana, Iowa, Maryland, Massachusetts, Minnesota, Nebraska, New Jersey, New York, Ohio, Rhode Island, Vermont, Washington, and Wisconsin.

<sup>3</sup> The four jurisdictions are: Colorado, Missouri, North Dakota, and Oregon.

<sup>4</sup> The two jurisdictions are: New Mexico and Texas.

Rule does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16.

## **Comment**

\* \* \*

- [3] Discrimination and harassment by lawyers in violation of paragraph (g) undermines confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).
- [4] Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.
- [5] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance with these Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. See Rule 6.2(a), (b) and (c). A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. See Rule 1.2(b).

In adopting these amendments, the ABA House of Delegates had before it a memorandum issued by the ABA Standing Committee on Ethics and Professional Responsibility (the "ABA Memo") setting out the reasoning for the amendments. Because much of this reasoning applies as well to the Commission's proposal for this rule, a copy of the ABA Memo is attached to this Report & Recommendation for reference.

**IX. CONCEPTS ACCEPTED/REJECTED; CHANGES IN DUTIES;  
NON-SUBSTANTIVE CHANGES; ALTERNATIVES CONSIDERED**

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

1. Expand the Rule beyond management or operation of a law firm to also encompass discrimination or harassment more generally in “representing a client, or in terminating or refusing to accept the representation of any client”.
  - Pros: The current rule already applies to discrimination in the management or operation of a law firm in “accepting or terminating representation of any client,” and there seems no justification for not extending this prohibition outside the arena of law firm management. Adopting a rule prohibiting unlawful discrimination or harassment generally while engaged in representing a client is consistent with former ABA Model Rule 3.8(d), Comment [3], and, as noted in the ABA Memo, with new ABA Model Rule 3.8(g) and many other professions that prohibit this same behavior in their codes of conduct. Finally, particularly for a profession that is dedicated to enforcing the rule of law, it seems appropriate to impose a professional obligation that requires lawyers not to unlawfully discriminate or harass while engaged in the core conduct of that profession, representing clients. Proposed paragraph (a) applies to conduct “in representing a client” rather than using the language of the ABA’s new Rule 3.8(g) “conduct related to the practice of law” because, consistent with current California rule 2-400, we have retained separate section (b) addressing conduct “in the management or operation of a law firm” rather than trying to have a single provision apply to all conduct, and rather than extending the rule’s prohibitions (as does the ABA’s new Rule 3.8(g) to bar association, business or social activities in connection with the practice of law. Any concern that the expansion of the Rule may pose First Amendment issues is addressed by the requirement in the Rule itself that conduct be “unlawful” by reference to applicable federal and state statutes and decisions and by inclusion of proposed Comment [4] that makes clear that the Rule does not apply to conduct permitted by the First Amendment or Article 1.
  - Cons: None Identified
2. Expand the Rule to cover protected categories other than those listed in current rule 2-400.
  - Pros: Current rule 2-400’s limited list of protected characteristics on the basis of which discrimination is unlawful is narrower than current California law. Moreover, identification of protected characteristics is not static. The Commission therefore recommends adding in section (c)(1) a definition of “protected characteristic” that is consistent with current California law and that also includes a catchall for any “other category of discrimination prohibited by applicable law”. Lawyers are obligated to obey the law as are nonlawyers,

and this addition would permit professional discipline whatever applicable anti-discrimination laws might exist in the future without the need to amend this Rule.

- Cons: None Identified.

3. Expand the Rule to encompass unlawful retaliation, as well as unlawful discrimination and harassment based on a protected characteristic.

- Pros: Lawyers are obligated to obey the law as are nonlawyers, and this addition would permit professional discipline where a lawyer, in representing a client or in the management or operation of a law firm, unlawfully retaliates against a person because the person has taken action to oppose unlawful discrimination or harassment. The addition of this prohibited conduct serves as additional protection for those obligated by the Rule itself, which includes lower level lawyers within a law firm, to advocate corrective action where they know of unlawful discrimination or harassment within the firm, even if by higher level lawyers within the firm.

- Cons: None identified.

4. Expand the current rule by removing the requirement that there be a final civil determination of wrongful discrimination before a disciplinary investigation can commence or discipline can be imposed.

- Pros: No other rule in the California Rules of Professional Conduct contains a similar limitation on State Bar original jurisdiction. It is not clear why such a limitation should be placed on a rule that is intended to prevent discrimination in the legal profession. In fact, including any such limitation may be viewed as inappropriately detracting from the intended message of the proposed rule that unlawful discriminatory conduct should provide a basis for discipline.

- Cons: Eliminating current rule 2-400's threshold requirement that a court of competent jurisdiction has found that the alleged unlawful conduct had occurred raises substantial concerns, including due process, (see comment from State Bar Court, above), lack of OCTC resources and expertise to prosecute the charge effectively, and the potential that disciplinary proceedings would be used as the testing ground for new theories of discrimination, or as leverage in otherwise unrelated civil disputes between lawyers and former clients.

5. Add a new requirement (see proposed paragraph (d) and Comment [6]) of notice to the State Bar of any parallel administrative or judicial proceeding, and leave it to the State Bar to determine whether or not to hold the disciplinary proceeding in abeyance pending the outcome of the related proceeding.

- Pros: See discussion under "Alternatives Considered"



- Cons: See discussion under “Alternatives Considered”
6. Add a new requirement (see proposed paragraph (e) and Comment [7]) that, upon receiving a notice of disciplinary charge under the Rule, a lawyer is required to provide notice of the charge to the State and/or Federal agencies tasked with investigating and addressing the type of conduct that underlies the notice of disciplinary charge.
    - Pros: This provision 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.
    - Cons: Such notice should be left to the discretion of the State Bar. With respect to proposed Comment [7], the language of the proposed Rule addition is clear, and the comment is unnecessary.
  7. Add to the Comments (proposed Comment [2]) a sentence making clear that the conduct prohibited by paragraph (a) of the Rule includes the conduct of a lawyer in a proceeding before a judicial officer.
    - Pros: As noted in proposed Comment [2], this is consistent with Canon 3B(6) of the Code of Judicial Ethics. The addition of this language to the Comment, with a citation to this Canon, provides interpretive guidance that will be of assistance to lawyers in understanding the Rule.
    - Cons: The language of paragraph (a) of the Rule is already clear and does not contain any limitation that would exclude prohibited conduct occurring in a proceeding before a judicial officer. As a result, the addition of this language to the Comments is unnecessary.
  8. Add to the Comments (proposed Comment [3]) explicit statements that the rule is not violated by limitations on the scope or subject matter of the lawyer’s practice or for restricting who will be accepted as clients for advocacy-based reasons.
    - Pros: This avoids any possible conflict with other rules requiring lawyers to accept only clients who they can competently and diligently represent. It also avoids issues and clarifies the intent not to impinge on a lawyer’s associational rights derived from either the constitution or other sources that might be implicated by a lawyer’s lawful selection of clients. The recognition that this conduct is outside the Rule’s intended scope is consistent with the Rule’s limitation to conduct that is unlawful as defined by reference to applicable federal and state statutes and decisions, as well as with the exceptions to the Rule set forth in paragraph (f). The addition of this language is consistent with Comment [5] to new ABA Model Rule 8.4(g).

- Cons: Given that the proposed Rule applies only to “unlawful” discriminatory, harassing, or retaliatory conduct, as well as the exceptions in paragraph (f), this seems implicit, rendering such a statement not strictly necessary.
9. Add to the Comments (proposed Comment [4]) an explicit statement that the Rule does not apply to conduct protected by the First Amendment.
- Pros: To the extent it avoids issues and clarifies the intent not to impinge on First Amendment activities, there would appear to be no harm in adding such an explicit statement to the Comments.
  - Cons: Given that the proposed Rule applies only to “unlawful” discriminatory or harassing conduct, this seems implicit, rendering such a statement not strictly necessary.
10. Add to the Comments (proposed Comment [8]) language clarifying that discipline can be imposed for conduct that is a violation of this Rule, that is discriminatory, harassing, or retaliatory conduct that is unlawful as determined by reference to applicable state and federal law, even if certain additional elements over and above the unlawful conduct itself (for example, severity and pervasiveness in the context of sexually harassing conduct) would have to be established for that conduct to result in the award of a civil or administrative remedy in a civil or administrative proceeding.
- Pros: Holds lawyers to a higher standard, focusing on their conduct in the particular instance(s) at issue, rather than requiring proof of additional elements that, while held necessary for civil or administrative remedies, do not negate the unlawfulness of the conduct.
  - Cons: Additional elements have been developed in civil and administrative proceedings for a reason, and permitting discipline in their absence removes a level of clarity and leaves too much discretion with the State Bar to seek discipline for single instances of conduct.
11. Carryover to the Comments (proposed Comment [9]) the current Rule Discussion making clear that disciplinary proceedings for conduct coming within this Rule may also be commenced under applicable provisions of the State Bar Act, the California Supreme Court’s inherent authority, or other disciplinary standards.
- Pros: Consistent with the current California Rule. Provides important notice to lawyers of alternative sources of disciplinary authority.
  - Cons: Implicit in the Rules and State Bar Act so any such Comment is unnecessary.

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

1. Expand the current Rule by including conduct unrelated to the practice of law.
  - Pros: This additional requirement could improve lawyer conduct.
  - Cons: This requirement would be inconsistent with current ABA Model Rule 8.4(d), Comment [3], and new ABA Model Rule 8.4(g) and accompanying Comments [3], [4], and [5], all of which limit themselves to conduct related to the practice of law. Extending the rule beyond such conduct also increases the risk of impinging on First Amendment rights.
2. Expand the current rule or add a new rule to educate lawyers on promoting diversity in the legal profession.
  - Pros: This additional rule could improve lawyer conduct.
  - Cons: This would be an aspirational rule that would conflict with the Commission's Charter to adhere to rules written narrowly for disciplinary purposes. Any deficiency in lawyers' continuing education could be addressed through mandatory continuing education requirements.
3. Recommend rejection of the rule as interfering with the lawyer-client relationship..
  - Pros: The proposed Rule interferes with the lawyer-client relationship by requiring lawyers to accept clients that they otherwise do not wish to represent.
  - Cons: Lawyers, no less than any other citizens, have an obligation to obey applicable anti-discrimination laws and regulations. The limitations in the Rule to conduct that is unlawful by reference to applicable federal and state statutes and decisions, the exceptions set forth in paragraph (f), and Comment [5] all address the ability of lawyers to choose their clients.
4. Restrict the current rule so that it applies only to managerial and supervisory lawyers within a law firm.
  - Pros: The first Commission recommended this change, apparently under the theory that proposed Rule 5.1 would not require subordinate lawyers to advocate for improvement in law firm conduct because proposed Rule 5.2 would permit a subordinate lawyer to accept a senior lawyer's reasonable directions. This Rule should be consistent with those Rules.
  - Cons: There is no compelling reason why this Rule must be consistent with proposed Rules 5.1 and 5.2. In fact, under proposed Rule 5.2(a), each lawyer has an affirmative obligation to comply with non-discrimination law by virtue of their professional obligations under the Rules and the State Bar Act. Further, the anti-retaliation provision will protect junior lawyers who advocate

for correction of discriminatory conduct involving a senior lawyer.

5. Remove from the Comments (proposed Comment [2]) the language stating that a finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (a).

- Pros: This would address the concern that this language could be read as limiting a court's discretion on whether to refer conduct for discipline.
- Cons: Including the language is consistent with Comment [5] to new ABA Model Rule 8.4(g). Removing the language might pose a risk of deterring parties from raising, or judges from finding, violations of Batson/Wheeler out of concern that such a finding would automatically subject an attorney to discipline. The concern that the language could be read as limiting a trial judge's discretion on whether to refer conduct for discipline seems highly speculative. Moreover, this concern is addressed by the addition to the Comment of language making clear that both the court and the parties retain the discretion to refer Batson/Wheeler violations for discipline.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables..

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

1. Expands the Rule to prohibit unlawful discriminatory or harassing conduct generally in the course of representing a client.
2. Expands the Rule to prohibit unlawful discriminatory or harassing conduct on the basis of protected characteristics beyond those referenced in the current Rule.
3. Expands the Rule to prohibit unlawful retaliation.
4. Expands the Rule by eliminating the requirement that there be a final civil determination of wrongful discrimination before a disciplinary investigation can commence or discipline can be imposed. This change would give OCTC original jurisdiction to investigate and prosecute any claim of discrimination that is described as coming within the scope of this Rule under the current procedures of the disciplinary system.

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

1. The proposal conforms to the Commission's decision to adopt the Model Rules' use of "lawyer" in place of "member" and to replace capital with lower case letters in the numbering subparagraphs.

2. The proposal also replaces “law practice” with “law firm” because the latter phrase is a defined term used throughout the Rules.

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

1. Former ABA Model Rule 8.4(d), Comment [3].

For many of the same reasons discussed in the ABA Memo, the Commission concluded that the prohibition against unlawful discrimination and harassment in connection with representing clients should be incorporated in the blackletter text of the Rule itself, rather than in a Comment interpreting the Rule prohibiting “conduct prejudicial to the administration of justice.”

2. The first Commission’s proposed Rule 8.4(d), Comment [3] and Rule 8.4.1 with accompanying comments.

For many of the same reasons discussed in the ABA Memo, the Commission concluded that the prohibition against unlawful discrimination and harassment in connection with representing clients should be in the Rule itself, rather than in a Comment interpreting the rule prohibiting conduct prejudicial to the administration of justice. As discussed in Section IX.A.1, above, the Commission has agreed with the first Commission in limiting the application of paragraph (a) to conduct “in representing a client.” Further, consistent with current California rule 2-400, the Commission recommends retaining separate provisions addressing conduct in the management or operation of law firm.

3. New ABA Model Rule 8.4(g) and accompanying Comments [3], [4], [5].

The Commission agrees with the reasoning of the ABA Memo in proposing paragraph (a), which moves into the blackletter text of the Rule itself the bar on discrimination and harassment. As discussed in Section IX.A.1, above, the Commission has agreed with the first Commission in limiting paragraph (a) to conduct “in representing a client.” Further, consistent with current California Rule 2-400, the Commission recommends retaining separate provisions addressing conduct in the management or operation of law firm.

4. With respect to the elimination of the current requirement that there be a final civil determination of wrongful discrimination before a disciplinary investigation can commence or discipline can be imposed, the Commission supports as an alternative what is set out in paragraph (d) and comment [6]. The Commission believes that this approach provides an appropriate mechanism for addressing various concerns regarding State Bar original jurisdiction over claims of discriminatory conduct and avoiding the potential that the State Bar’s determination on such a claim might conflict with the determination of the same claim by another tribunal. These concerns are reflected in the comments from OCTC and the State Bar Court, and were the subject of lengthy discussion by the Commission. Some of these concerns are specifically flagged in item (e) below. Countervailing concerns include that no other rule has a similar limitation on

State Bar original jurisdiction, and that including any such limitation may be viewed as inappropriately detracting from the intended message of the proposed rule that unlawful discriminatory conduct should provide a basis for discipline. Given the lengthy debate around this issue, the significant change from the current California rule that proposed section (d) and comment [6] would implement, and the recognition that there are legitimate pros and cons for the varying positions, set out below are the various options considered by the Commission in arriving at the current proposal, listed in an order based on their restriction of State Bar original jurisdiction over claims of discrimination, from least to most restrictive, with notes regarding some of the pros and cons of each alternative:

(a) Nothing in the Rule or Comments addressing this issue, with the understanding that the current State Bar Rules of procedure already provide the State Bar with the ability to hold proceedings in abeyance. This would be consistent with the fact that no other Rule has a provision limiting State Bar original jurisdiction or highlighting State Bar procedures for holding disciplinary actions in abeyance. It would also be consistent with the policy goal of deterring discriminatory, harassing, or retaliatory conduct, by emphasizing the absence of limitations on the State Bar's ability to discipline such conduct regardless of whether other civil or administrative remedies are pursued. On the other hand, by saying nothing about parallel proceedings, it poses the greatest risk of potential conflicts between State Bar determinations and those of other tribunals.

(b) Require notice to the State Bar of any parallel administrative or judicial proceeding, and leave it to the State Bar to determine whether or not to hold the disciplinary proceeding in abeyance pending the outcome of the related proceeding. This is the approach taken by paragraph (d) and comment [6]. It reflects a compromise between alternative (a) above, and the more restrictive alternatives set out below, and as such, is viewed as most appropriately balancing the relative pros and cons of the various alternatives.

(c) Require notice to the State Bar of any parallel administrative or judicial proceeding and mandate that the State Bar hold the disciplinary proceeding in abeyance pending a tribunal's ruling in the related proceeding. An earlier draft of paragraph (d) considered by the Commission included a paragraph along these lines which read as follows: "If a person who is the subject of an alleged violation of paragraph (b) files an administrative or civil action premised on the same discriminatory conduct, the State Bar shall hold disciplinary proceedings regarding the alleged violation in abeyance pending an adjudication by a tribunal of competent jurisdiction finding that the alleged unlawful conduct occurred. Upon such adjudication, the State Bar may resume the disciplinary proceeding, and the tribunal finding or verdict shall be admissible evidence of the occurrence or non-occurrence of the alleged discrimination in that disciplinary proceeding. If the State Bar elects to continue to hold the disciplinary proceeding in abeyance pending the adjudication becoming final, whether as the result of the time for appeal expiring or judgment on appeal, the State Bar may impose conditions

requiring the lawyer subject to the disciplinary proceeding [TBD].” This approach too would reflect a compromise between alternative (a) above and the more restrictive alternatives set out below, but it was rejected both because it is more restrictive in terms of permitting State Bar action and because of concerns that the Rules should not serve as a mechanism for directing OCTC or the State Bar Court to apply their procedures differently for purposes of one particular Rule.

(d) Limit State Bar original jurisdiction to address claims of discriminatory conduct to those circumstances "where there is a clear 'per se' act of discrimination witnessed by an independent witness or corroborated by clear and convincing evidence." This would result in a modified form of current rule 2-400(c) that would require the State Bar to wait on some triggering determination by another tribunal before pursuing an action against all but the clearest instances of discrimination. This was rejected both because it was viewed as overly restrictive of State Bar action and because of difficulties in defining the limitation.

(e) Eliminate State Bar original jurisdiction to address claims of discriminatory conduct by permitting it to address such claims only after a triggering determination by another tribunal, but a triggering determination less than that required by current rule 2-400(c) (which requires a finding of unlawfulness upheld and final after appeal or rendered final because the time for filing an appeal has expired or the appeal has been dismissed). The pros of this approach include that it guarantees lawyers accused of discriminatory, harassing, or retaliatory conduct the increased due process rights (particularly discovery) accorded in other tribunals, avoids creating new obligations on OCTC that it may be unable to satisfy due to lack of OCTC resources and expertise, and avoids the potential that disciplinary proceedings would be used as the testing ground for new theories of discrimination or as leverage in otherwise unrelated civil disputes between lawyers and former clients. The cons that led to this alternative's rejection are that it is too similar to the current rule's restriction, which is viewed as unduly restrictive of State Bar efforts to address discriminatory, harassing, or retaliatory conduct, and discipline, and inconsistent with the desired emphasis that lawyers in particular must refrain from such conduct.

## **X. COMMISSION RECOMMENDATION FOR BOARD ACTION**

### **Recommendation:**

The Commission recommends adoption of proposed Rule 8.4.1 [2-400] in the form attached to this Report and Recommendation.

### **Proposed Resolution:**

RESOLVED: That the Board of Trustees of the State Bar of California adopt proposed Rule 8.4.1 in the form attached to this Report and Recommendation.





Robert L. Kehr  
Commission Member  
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M E M O

To: Randall Difuntorum  
Kevin Mohr

From: Robert L. Kehr

Date: January 29, 2017

Re: Dissent to proposed Rule 8.4.1

This message states my dissent from proposed Rule 8.4.1(d), with the request that it be included with the Commission's submission to the Board of Trustees, and if needed then to the Supreme Court.

Current rule 2-400 prohibits lawyers from unlawfully discriminating in hiring and other employment actions or in accepting or terminating the representation of a client. Its paragraph (C) prohibits any investigation or discipline under the rule until there has been a final judgment by another tribunal. Apparently due to paragraph (C), there apparently has been no reported discipline imposed for violation of this rule. The lack of reported discipline is the essential criticism by the proponents of an expanded anti-discrimination rule.

The result is proposed 8.4.1, a proposal with universally-supported aims. The reason for my dissent is the practical consequences of proposed paragraph (d), which would grant to the Bar the initial authority to investigate and prosecute allegations of discriminatory conduct by lawyers. As explained by Jayne Kim, then Chief Trial Counsel, in her letter dated September 2, 2015, to the Commission on this (I am quoting from the drafting team's report):

As written, the [current] rule prohibits discriminatory conduct while allowing the criminal and civil courts, with their expertise, to maintain initial responsibility for addressing the unlawful conduct. Many of these cases are handled by government agencies that are specifically authorized and funded to investigate and prosecute such conduct. These agencies have a high level of expertise in these areas. Additionally, the current rule discourages frivolous complaints of discrimination against attorneys while protecting the public from serious complaints of discrimination.

Ms. Kim's letter questions OCTC's expertise, and its ability to handle the volume of complaints that could be expected. The State Bar Court also wrote about this to the Commission. In a letter dated November 2, 2015 from Colin P. Wong, Chief Administrative Officer (again, I am

quoting from the drafting team's report), the State Bar Court made an observation that echoes the Jayne Kim letter:

We believe that the deletion of [current] subsection (c) could allow the initiation of discipline charges based on alleged discriminatory conduct to be filed in the State Bar Court in the first instance, thereby bypassing other government agencies that are specifically authorized to investigate and prosecute such conduct.

I will return later to the question of expertise, but I first want to identify the equally important issue of due process. Mr. Wong's letter also described how the State Bar Court's procedures differ from those of the civil courts. There are three particular aspects of these differences that have due process implications: *First*, there is only limited discovery in the State Bar Court, which generally is permitted only on Court order. See Rules of Proc. of State Bar, Rule 5.65 and: Rule 5.61(a) (no discovery subpoenas without prior Court order); Rule 5.61(c) (depositions allowed only on court order); and Rule 5.66(A)(additional discovery only upon motion and showing of good cause). *Second*, State Bar Court proceedings are not conducted according to the Evidence Code. Any relevant evidence *must* be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions. See Rule 5.104(C). This means, among other things, that hearsay evidence may be used for the purpose of supplementing or explaining other evidence. See Rule 5.104(D). *Third*, there are no jury trials in the State Bar Court. Following his discussion of the differences between State Bar Court and civil standards and procedures, Mr. Wong stated:

As described above, the unique nature of the State Bar Court and its own Rules of Procedure differ significantly from Superior Court civil proceedings. The State Bar Court respectfully requests that these differences be evaluated by the Commission when determining whether the proposed amendments to rule 2-400 should be adopted.

As their positions required, Ms. Kim and Mr. Wong dutifully said in their letters that OCTC and the State Bar Court would deal with any Rule issued by the Supreme Court, but their concerns about the practical consequences should be evident.

By comparison with civil litigation, State Bar proceedings are simplified and expedited. The logic of this can be understood in the context of the usual subjects of discipline. These include such things as: trust fund misappropriation and the comingling of trust and non-trust funds; failure to report receipt of trust funds; failure to refund unearned fees; failure to obey court orders; failure to report sanctions to the State Bar; client abandonment; failure to report significant developments to a client; reciprocal discipline after discipline in another jurisdiction; conviction of a crime; failure to comply with terms of disciplinary probation; and practicing while under suspension.

To a significant degree, the factual bases for possible discipline in situations of this sort are within the personal knowledge of the lawyer, demonstrated by the lawyer's own files and financial records, and shown by the records of a civil or criminal court or the disciplinary records

of another jurisdiction. No doubt there are instances in which a respondent lawyer would like to have a greater discovery opportunity, but for the most part that would seem unnecessary.

Compare the relatively narrow scope of possible professional discipline with the expanse and complexity of the many state and federal statutory and regulatory prohibitions on discrimination. In particular, consider the unpredictability of where discrimination laws might lead. As an example, here is a link to a magazine article that asks whether websites must make ADA accommodations. <http://www.theatlantic.com/technology/archive/2015/04/does-the-ada-apply-to-online-spaces-too/390654/><sup>1</sup>

I have no opinion on the ADA issue and no knowledge of the area of law, but this is an indication of just how unpredictable the reach and application of anti-discrimination laws might be as creative minds search for new solutions to old problems, or perceive new ones. It also shows how important it would be for a litigant in a claim of that sort to take advantage of civil litigation discovery standards and the rules of evidence. For another example, see *Weber v. Eash*, 2015 U.S. Dist. LEXIS 168367 (E.D. Wash. 2015) (client unsuccessfully sued her lawyer and others, alleging that she had an allergic reaction to something in the courthouse but nevertheless was forced to return to the courthouse without reasonable accommodation having been made).

Claims of these kinds are not appropriate for the simplified procedures of the State Bar Court. It also should be apparent that they are beyond the knowledge and experience of the Office of Chief Trial Counsel and the State Bar Court. They also can be expected to be beyond the knowledge of those lawyers who defend State Bar prosecutions, which in turn would require a respondent lawyer to hire a second law firm that has expertise in the legal issues raised.

Returning to the due process and expertise issues, here are examples of the sort of claims with which OCTC can be expected to be faced:

- A lawyer claims to have been discriminated against in compensation, in the kind of assignments given to the lawyer, or in promotion or being offered a partnership. Under State Bar Court procedures, this claim could be supported by hearsay testimony (perhaps from dozens of witnesses) and other forms of evidence that has not been tested through depositions or other forms of discovery. Because of the absence of discovery, the accused lawyer will not have a fair opportunity to identify key factual issues and obtain rebutting evidence. I don't believe that OCTC, the State Bar Court, or lawyers who represent accused lawyers have the expertise to investigate or analyze a claim of this sort.
- One of the protected classes under the Unruh Act, Civ. C. § 51(b), as amended this past year by SB 600, is "primary language". This, for example, would prevent a criminal lawyer from hiring a native speaker despite a good-faith belief that a native speaker's language facility would be crucial to gaining foreign born clients' trust and confidence, to

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<sup>1</sup> As another example, I noticed a January 4, 2017 Daily Journal article discussing the difficulty of proving intent under the Unruh Civil Rights Act.

obtaining from these clients all of the information needed to provide effective defenses, and to obtain that information with all of the nuances only available to a native speaker. Much the same would be true of immigration lawyers and others who represent foreign-born clients.

- It is easy to imagine a client defending a discrimination claim to want to have a member of the same protected group as part of the defense team. The client's lawyer would have to refuse this client request, and that would interfere with the client's trust in the lawyer and the legal system. The same prohibition would apply to a corporation's general counsel, who might in good faith believe that a minority lawyer or law firm would be the best choice for defending discrimination claims but who apparently would be prohibited from acting on that opinion or recommending to the corporation that it act on that opinion.
- New California Labor Code § 1197.5, effective January 1, 2016, addresses pay distinctions based on employees' sex. There are aspects of this new statute that are pertinent to proposed Rule 8.4.1. *First*, it contains a two or three-year statute of limitations on claims for recovery of wages (the longer one for willful violations) and a one-year statute of limitations on claims for discrimination or retaliation against an employee who attempts to obtain the benefits of the statute. The limitations period for lawyer discipline is five years. See Rule 5.21(A). Statutes of limitation are vital to the administration of the law. Among other things, they prevent courts and defendants from having to deal with matters for which evidence has become unavailable and prevent a claimant from sitting on rights and causing surprise to a defendant. See, e.g., Tyler T. Ochoa and Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 Pac. L.J. 453 (1997). This is a due process issue and would impose a greater burden on OCTC and the State Bar Court than does the statute, and it is a particular concern because of the factual complexity inherent in disparate wage claims. The § 1197.5 limitations period is only one example. It appears there also is a two-year statute of limitations for wage claims under the Americans with Disabilities Act, 42 USCS § 2000e-5(e)(3)(B) (I did not attempt to find my way through the numbing complexities of that statutory scheme). *Second*, the use of the lawyer discipline limitations period would conflict with the state and federal legislatures' determinations by effectively increasing the limitations period. Each of the innumerable other anti-discrimination statutes and ordinances has a limitations period, legislatively determined as appropriate in its context. *Third*, § 1197.5(c) states in full: "The Division of Labor Standards Enforcement shall administer and enforce this section. Acceptance of payment in full made by an employer and approved by the division shall constitute a waiver on the part of the employee of the employee's cause of action under subdivision (g)." This means that the threat of professional discipline for a violation of this statute would give OCTC an enforcement role in place of the administrative agency chosen by the legislature, would give that authority to an agency that lacks the necessary expertise, would allow a claimant to threaten a lawyer even after the Division of Labor Standards Enforcement (DLSE) or a court has determined there is no right of action and, where the DLSE and a court have

determined there is a valid claim, would permit the claimant to use the threat of professional discipline to attempt to obtain a greater recovery. *Fourth*, the determination of wage disparities requires wide-ranging investigation for which OCTC lacks the necessary resources. I am concerned not just about the number of complaints and investigations but also their complexity. How, I wonder, would OCTC respond to a single complaint that a 1,000-lawyer law firm with, say, 1,000 non-lawyer employees, discriminates unlawfully in staff compensation (leaving aside the choice of law issues if the law firm has offices and employees in multiple states and multiple countries).

- Cal. Gov. C. § 12926(d) defines an “Employer” for purposes of the FEHA as including: “... any person regularly employing five or more persons, or any person acting as an agent of an employer, directly or indirectly, the state or any political or civil subdivision of the state, and cities, except as follows: ‘Employer’ does not include a religious association or corporation not organized for private profit.” The proposed Rule therefore would conflict with the legislature’s determinations in failing to recognize that FEHA does not apply to any lawyer who does not regularly employ at least five persons. It arguably would apply to a nonprofit religious institution’s legal department, and that result would conflict with FEHA and expose the religious institution to risk and cost not imposed by the legislature.

Those in favor of giving original jurisdiction over discrimination claims to the State Bar and the State Bar Court correctly point out that not all claims of discrimination result in civil proceedings. However, this is not entirely a bad thing. Except when a plaintiff appears in *proper*, as happened in *Weber v. Eash* (referred to above), a civil action will be filed only when it appears possible to prove and collect sufficient damages to support the cost of litigation. The reason is that no anti-discrimination law of which I am aware provides for minimum damages. The consequence of this legislative policy decision is that many possible discrimination claims are filtered out, no doubt including some with merit, but having the effect of protecting the courts from a flood of litigation. Giving original jurisdiction to the State Bar would save the possibly injured person (or his or her lawyer) from shouldering the cost of pursuing the claim, shifting that burden to the State Bar because it is responsible for investigation and prosecution, and eliminating the filtering process.

Because the claimant will have no expense in making a claim, it is predictable that the Bar will receive a large number of claims, and that they will include:

- claims that have no legal or no factual merit,
- claims that are trivial,
- claims brought for strategic purposes in order to use the disciplinary system as a proving ground for new theories, and
- claims brought for tactical reasons for use as leverage in disputes with lawyers over fees, malpractice, or other matters.

Multiple newspaper stories have reported that the disciplinary system is underfunded and that the State Bar is taking steps to attempt to free up funds to support this essential Bar function. I think it is important in considering the foreseeable burden on the disciplinary system to know that one of the proponents of this expanded rule has stated in a Commission meeting that a lawyer should be subject to professional discipline for a single use of an offensive expression in referring to a member of a protected class and also has said (in reference to a man's dealings with a woman) that leering and flirtatious behavior should be disciplinable.<sup>2</sup> This of course goes far beyond any nondiscrimination statute and would create the threat of professional discipline for any *faux pas*. Surely there is a difference between bad manners or even rude behavior and the sort of conduct that calls into question a lawyer's fitness to practice.<sup>3</sup> This consequence is encouraged by the proposed paragraph (c)(3) definition of "unlawfully" and "unlawful", which is to be determined "by reference to applicable state and federal statutes and decisions". This means that it would not be necessary for all of the elements of the civil standard to be present, leaving an indefinite standard for discipline.<sup>4</sup> The tightening of (c)(3) would not resolve the problem but only reduce it to a degree.<sup>5</sup>

Given the predictable burden on the system and the other concerns expressed in this Dissent, it is important to consider other ways to address the subject of discrimination. The Commission already has taken one important step, which is its approval of Rules 5.1 and 5.3. These Rules will impose on law firm managers and supervisors the duty to help assure compliance with the Rules of Professional Conduct and the State Bar Act, and among other things that would bring firm management into the role of seeing that the firm and its lawyer comply with all anti-discrimination laws. Another possible step would be an increased and specific MCLE requirement, a topic not within the Commission's brief.

I do have one suggestion for broadening paragraph (D) of current rule 2-400. This is to permit investigation and discipline of a lawyer who has been sanctioned by a court for discriminatory conduct. See, e.g., *Claypole v. County of Monterey*, 2016 U.S. Dist. LEXIS 4389 (N.D. Cal. 2016) (lawyer sanctioned for making sexist remarks) and *Cruz-Aponte v. Caribbean Petroleum*

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<sup>2</sup> There also was a comment at a Commission meeting about the lack of minority representation in the ranks of law firm partners. I believe from these comments that the effect of the proposed new Rule is being oversold and that, if OCTC and the State Bar Court were to adopt practices to discriminate among complaints in order to preserve their own ability to function, they will be condemned for failing to solve all problems and the State Bar's reputation will be injured further.

<sup>3</sup> "We have said on a number of occasions that the purpose of a disciplinary proceeding is not punitive but to inquire into the fitness of the attorney to continue in that capacity to the end that the public, the courts and the legal profession itself will be protected." *In re Kreamer*, 14 Cal.3d 524 (1975).

<sup>4</sup> The "by reference to" language is in current rule 2-400, but its expansiveness has the effect of an alert to lawyers, given that lawyers are not disciplined under the current rule. The same language in proposed Rule 8.4.1 would open the doors to disciplinary claims, investigations, and prosecutions.

<sup>5</sup> On December 2, 2016, The Disciplinary Board of the Supreme Court of Pennsylvania issued a proposed anti-discrimination rule for public comment (its Rules of Professional Conduct having no Rule on the topic). It contains language similar to current rule 2-400(C) requiring prior adjudication elsewhere, and explained this based on the burdens that otherwise would be imposed on the disciplinary system. I am not aware that Pennsylvania has issued any new Rule.

<http://www.padisiplinaryboard.org/attorneys/newsletter/> Note that Pennsylvania expressed its concerns although its proposed Rule would require a violation of law and not merely conduct judged by reference to law.

*Corp.*, 2015 U.S. Dist. LEXIS 109646 (D.P.R. 2015) (to the same effect). There might be other ways of tempering the current version of the rule.

The court's opinion in *Cruz-Aponte v. Caribbean Petroleum Corp.* says what I expect all of us think:

Discriminatory conduct on the part of an attorney is "palpably adverse to the goals of justice and the legal profession." (citation omitted) When an attorney engages in discriminatory behavior, it reflects not only on the attorney's lack of professionalism, but also tarnishes the image of the entire legal profession and disgraces our system of justice. *Id.* at \*38

Nevertheless, granting original jurisdiction to the State Bar to investigate and prosecute alleged discriminatory words and conduct, and giving the State Bar Court original jurisdiction to hear these claims, would be acting mainly from the heart. The disciplinary system should be permitted to deal with the range of matters that is within the expertise of State Bar investigators and prosecutors, the State Bar Court and defense lawyers, and it should not be forced to use their limited time and resources for other purposes. The topics now covered by the disciplinary system are fundamental to the protection of clients and to the operation of the legal system and the profession.

The proposed Rule also raises significant First Amendment issues. The drafting of the Rule arguably would permit discipline for hateful words, and in fact at least two voices were raised during the Commission's deliberations in support of that result. The Commission made an effort to temper the Rule through proposed Comment [4], stating: "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." This quite obviously creates a tension in the Rule that will lead to attempts to use the Rule in unpredictable ways, will lead to unpredictable results, and will cause the additional burden on all involved in becoming constitutional scholars. The variety of possible constitutional viewpoints can be seen for example, in Carla D. Pratt, *Should Klansman Be Lawyers?: Racism as an Ethical Barrier to the Legal*, 30 Fla. St. U.L. Rev. 857 (2003).<sup>6</sup> A LEXIS search shows that the Pratt article has been cited in many subsequent articles published in the intervening fourteen years, suggesting the diversity of opinions and complexity of issues involved.

Proposed Rule 8.4.1 raises another and distinct issue. Congress and the California legislature have created administrative agencies to interpret and enforce anti-discrimination laws. Giving the State Bar original jurisdiction over employment discrimination claims would seem to conflict with the legislative policy by creating the possibility of non-uniform standards and by denying the regulatory agencies (EEOC and DEFH) the raw information it would have if complaints were filed with them. An independent forum for complaints against lawyers might create a judicial conflict with the legislatively mandated investigatory, dispute resolution (mediation),

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<sup>6</sup> Prof. Pratt takes the position that a white supremacist should not be granted Bar admission, but this is contrary to the views of some other commentators. The Pratt article focuses on that narrow subject. 30 Fla. St. U.L. Rev. at 861, n. 17. Her references to contrary First Amendment views can be found, e.g., at 862, n. 19. The constitutional issues are subtle and nuanced.

prosecutorial, and other functions of the administrative agencies. I don't have the expertise to clarify this conflict issue, but that of course is part of the problem. I don't know, and the Commission to the best of my recollection didn't dig into the possible conflict.<sup>7</sup>

Proposed Rule 8.4.1 has a number of drafting problems. Some already have been mentioned. It also has been pointed out that the Rule might be read as unclear about whether, for example, an in-house lawyer can advise and assist a defendant client employer in pre-litigation investigations of claims of unlawful discrimination, harassment or retaliation. Proposed Comment [2] states in part states: "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." It is not certain that this language clarifies the broader issue.

Drafting issues such as this one, and as another example the question of whether it might be possible to draft a Rule that would provide for effective OCTC interaction with the EEOC and DEFH, I consider secondary. There is fundamental issue of whether we should have a Rule that could be seen as a cure-all for discrimination by lawyers, and whether we want to burden the disciplinary system with a radically expanded scope of responsibility. The information available to me is that the system will not stand the burden, that the State Bar as a result will be seen as having failed in its mission, and that any end run around the federal and California statutory schemes will cause judicial – legislative conflict.

For these reasons, I respectfully dissent from proposed Rule 8.4.1.

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<sup>7</sup> It has been suggested that State Bar report be required to report unlawful discrimination, harassment, or retaliation to the DEFH or EEOC even if the complainant does not wish to do so. If the procedural trigger for reporting were OCTC's issuance of, or decision to issue, a notice of disciplinary charges, the lawyer's confidentiality would be protected under Bus. & Prof. Code sec. 6086.1(b). There are at least three problems with this. *First*, OCTC would be left with all the burdens of investigation, and in a field outside its experience. *Second*, the Commission has no authority to create OCTC rules of procedure. *Third*, if there were an internal State Bar rule requiring referral to the applicable administrative agency at some point along the continuum, that rule would be relatively unknown and would leave the State Bar as the target of criticism for failing to solve the problems proponents of Rule 8.4.1 tout that it would solve.