



# The State Bar of California

## OFFICE OF PROFESSIONAL COMPETENCE

D.1. Civility Rules  
6-03-22 Meeting  
Open Session

Date: May 3, 2022

To: Committee on Professional Responsibility

From: Mimi Lee, Lead Program Analyst

Subject: D.1. Proposed Amendments to the Rules of Professional Conduct by the Civility Task Force

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The Board of Trustees met on Thursday March 24, 2022 and approved the following resolution:

**RESOLVED**, that the Board of Trustees accepts for evaluation the September 2021 report of the California Civility Task Force with appreciation to the taskforce members for its work developing proposals for improving civility in California's legal profession; and it is 5

**FURTHER RESOLVED**, that the Board of Trustees adopts the staff's recommended action plan for evaluating the California Civility Task Force proposals as follows: (i) staff will review the proposal to add a new civility training requirement for minimum continuing legal education; (ii) COPRAC will review the proposal to amend the California Rules of Professional Conduct to address lawyer conduct that constitutes repeated incivility and to clarify that civility is not inconsistent with a lawyer's zealous representation of a client; and (iii) staff will review the proposal to add a requirement that each lawyer annually affirm or reaffirm their commitment as an officer of the court to conduct themselves with dignity, courtesy, and integrity.

This board agenda item can be found [here](#) and includes the full Initial Report of the California Civility Task Force as Attachment B. Please review the proposed Rules of Professional Conduct (attached) in advance of the meeting and be prepared to discuss the proposed changes.

## Appendix 8: Proposed Civility Revisions to the California Rules of Professional Conduct

### PROPOSED CHANGES TO RULES OF PROFESSIONAL CONDUCT

#### Rule 1.0.1 Terminology

*Add the following definition:*

**(\*) “Incivility” means discourteous, abusive, harassing, or other significantly unprofessional conduct.**

#### Rule 1.2 Scope of Representation and Allocation of Authority

- (a) Subject to rule 1.2.1, a lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by rule 1.4, shall reasonably\* consult with the client as to the means by which they are to be pursued. Subject to Business and Professions Code section 6068, subdivision (e)(1) and rule 1.6, a lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client’s decision whether to settle a matter. Except as otherwise provided by law in a criminal case, the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify. **A lawyer does not violate this rule by acceding to requests of opposing counsel that do not prejudice the rights of the client, being punctual in fulfilling all professional commitments, avoiding offensive tactics, and treating with courtesy and consideration all persons involved in the legal process.**<sup>255</sup>

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<sup>255</sup> Numerous other states have similar language in their equivalent version of California’s Rule 1.2. See, e.g., *Massachusetts* (“A lawyer does not violate this Rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his or her client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.”); *Michigan* (“A lawyer does not violate this rule by acceding to reasonable requests of opposing counsel that do not prejudice the

- (b) A lawyer may limit the scope of the representation if the limitation is reasonable\* under the circumstances, is not otherwise prohibited by law, and the client gives informed consent.\*

### **Rule 1.3 Diligence**

- (a) A lawyer shall not intentionally, repeatedly, recklessly or with gross negligence fail to act with reasonable diligence in representing a client.
- (b) For purposes of this rule, “reasonable diligence” shall mean that a lawyer acts with commitment and dedication to the interests of the client and does not neglect or disregard, or unduly delay a legal matter entrusted to the lawyer.

### **Comment**

[1] This rule addresses only a lawyer’s responsibility for his or her own professional diligence. See rules 5.1 and 5.3 with respect to a lawyer’s disciplinary responsibility for supervising subordinate lawyers and nonlawyers.

[2] See rule 1.1 with respect to a lawyer’s duty to perform legal services with competence.

**[3] A lawyer’s duty to act with reasonable diligence does not eliminate a lawyer’s other professional obligations and lawyers**

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rights of the client, by being punctual in fulfilling all professional commitments, or by avoiding offensive tactics.”); *New York* (“A lawyer does not violate these Rules by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, and by treating with courtesy and consideration all persons involved in the legal process.”); *Ohio* (“A lawyer does not violate this rule by acceding to requests of opposing counsel that do not prejudice the rights of the client, being punctual in fulfilling all professional commitments, avoiding offensive tactics, and treating with courtesy and consideration all persons involved in the legal process.”).

**should strive to treat all persons involved in the legal process with courtesy and respect.**<sup>256</sup>

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256 Numerous other states have similar language in their equivalent version of California's Rule 1.3. See, e.g., *Alaska* ("The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect."); *Arizona* ("The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect."); *Colorado* ("The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect."); *Delaware* ("The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect."); *District of Columbia* ("The duty of a lawyer to represent the client with zeal does not militate against the concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm. Thus, the lawyer's duty to pursue a client's lawful objectives zealously does not prevent the lawyer from acceding to reasonable requests of opposing counsel that do not prejudice the client's rights, being punctual in fulfilling all professional commitments, avoiding offensive tactics, or treating all persons involved in the legal process with courtesy and consideration."); *Florida* ("The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect."); *Hawaii* ("The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect."); *Illinois* ("The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect."); *Massachusetts* ("The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect."); *Minnesota* ("The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect."); *New Mexico* ("The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and

### Rule 3.3 Candor Toward the Tribunal

(a) A lawyer shall not:

- (1) knowingly\* make a false statement of fact or law to a tribunal\* or fail to correct a false statement of material fact or law previously made to the tribunal\* by the lawyer;
- (2) fail to disclose to the tribunal\* legal authority in the controlling jurisdiction known\* to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel, or knowingly\* misquote to a tribunal\* the language of a book, statute, decision or other authority; or
- (3) offer evidence that the lawyer knows\* to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence, and the lawyer comes to know\* of its falsity, the lawyer shall take reasonable\* remedial measures, including, if necessary, disclosure to the tribunal,\* unless disclosure is prohibited by Business and Professions Code section 6068, subdivision (e) and rule 1.6. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes\* is false.

(b) A lawyer who represents a client in a proceeding before a tribunal\* and who knows\* that a person\* intends to engage, is engaging or has

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respect."); *New York* ("Notwithstanding the foregoing, the lawyer should not use offensive tactics or fail to treat all persons involved in the legal process with courtesy and respect."); *South Carolina* ("The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect."); *Utah* ("The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect."); *Washington* ("The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect."); *Wyoming* ("The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect."); *ABA Model Rules* ("The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.").

engaged in criminal or fraudulent\* conduct related to the proceeding shall take reasonable\* remedial measures to the extent permitted by Business and Professions Code section 6068, subdivision (e) and rule 1.6.

- (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding.
- (d) In an ex parte proceeding where notice to the opposing party in the proceeding is not required or given and the opposing party is not present, a lawyer shall inform the tribunal\* of all material facts known\* to the lawyer that will enable the tribunal\* to make an informed decision, whether or not the facts are adverse to the position of the client.
- (e) In appearing as a lawyer before a tribunal,\* a lawyer shall not:**
  - (1) engage in a pattern of incivility;**
  - (2) intentionally or habitually violate any established rule of procedure or of evidence; or**
  - (3) engage in conduct intended to disrupt the tribunal.\*** <sup>257</sup>

### **Rule 3.4 Fairness to Opposing Party and Counsel**

A lawyer shall not:

- (a) unlawfully obstruct another party's access to evidence, including a witness, or unlawfully alter, destroy or conceal a document or other

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<sup>257</sup> At least one other state has similar language in its equivalent version of California's Rule 3.3. See, e.g., *New York* ("In appearing as a lawyer before a tribunal, a lawyer shall not: (1) fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of the intent not to comply; (2) engage in undignified or discourteous conduct; (3) intentionally or habitually violate any established rule of procedure or of evidence; or (4) engage in conduct intended to disrupt the tribunal.").

- material having potential evidentiary value. A lawyer shall not counsel or assist another person\* to do any such act;
- (b) suppress any evidence that the lawyer or the lawyer's client has a legal obligation to reveal or to produce;
  - (c) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
  - (d) directly or indirectly pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the case. Except where prohibited by law, a lawyer may advance, guarantee, or acquiesce in the payment of:
    - (1) expenses reasonably\* incurred by a witness in attending or testifying;
    - (2) reasonable\* compensation to a witness for loss of time in attending or testifying; or
    - (3) a reasonable\* fee for the professional services of an expert witness;
  - (e) advise or directly or indirectly cause a person\* to secrete himself or herself or to leave the jurisdiction of a tribunal\* for the purpose of making that person\* unavailable as a witness therein;
  - (f) A lawyer shall not ask any question intended to degrade a witness or other person except where the lawyer reasonably\* believes that the question will lead to relevant and admissible evidence;<sup>258</sup>**

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258 Numerous other states have similar language in their equivalent version of California's Rule 3.4. See, e.g., *Texas* ("A lawyer shall not ... ask any question intended to degrade a witness or other person except where the lawyer reasonably believes that the question will lead to relevant and admissible evidence; or (5) engage in conduct intended to disrupt the proceedings."); *Virginia* ("A lawyer shall not ... assert a position, conduct a defense, delay a trial, or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another."). See, also, *Delaware*, in its Notes to Decision for Rule 3.4, citing to a particular case where a lawyer's behavior

- (g) knowingly\* disobey an obligation under the rules of a tribunal\* except for an open refusal based on an assertion that no valid obligation exists; or
- (h) in trial, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the guilt or innocence of an accused.

### **Rule 3.5 Contact with Judges, Officials, Employees, and Jurors**

- (a) Except as permitted by statute, an applicable code of judicial ethics or code of judicial conduct, or standards governing employees of a tribunal,\* a lawyer shall not directly or indirectly give or lend anything of value to a judge, official, or employee of a tribunal.\* This rule does not prohibit a lawyer from contributing to the campaign fund of a judge or judicial officer running for election or confirmation pursuant to applicable law pertaining to such contributions.
- (b) Unless permitted to do so by law, an applicable code of judicial ethics or code of judicial conduct, a rule or ruling of a tribunal,\* or a court order, a lawyer shall not directly or indirectly communicate with or argue to a judge or judicial officer upon the merits of a contested matter pending before the judge or judicial officer, except:
  - (1) in open court;
  - (2) with the consent of all other counsel and any unrepresented parties in the matter;
  - (3) in the presence of all other counsel and any unrepresented parties in the matter;
  - (4) in writing\* with a copy thereof furnished to all other counsel and any unrepresented parties in the matter; or
  - (5) in ex parte matters.

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was uncivil (“New trial was granted where defense counsel’s comments to jury included an unjustified attack on the integrity of opposing counsel.”).



**(c) A lawyer shall not engage in a pattern of incivility that is degrading to a tribunal.\***<sup>259</sup>

- (d)** As used in this rule, “judge” and “judicial officer” shall also include: (i) administrative law judges; (ii) neutral arbitrators; (iii) State Bar Court judges; (iv) members of an administrative body acting in an adjudicative capacity; and (v) law clerks, research attorneys, or other court personnel who participate in the decision-making process, including referees, special masters, or other persons\* to whom a court refers one or more issues and whose decision or recommendation can be binding on the parties if approved by the court.
- (e)** A lawyer connected with a case shall not communicate directly or indirectly with anyone the lawyer knows\* to be a member of the venire from which the jury will be selected for trial of that case.
- (f)** During trial, a lawyer connected with the case shall not communicate directly or indirectly with any juror.
- (g)** During trial, a lawyer who is not connected with the case shall not communicate directly or indirectly concerning the case with anyone the lawyer knows\* is a juror in the case.

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<sup>259</sup> Numerous other states have similar language in their equivalent version of California’s Rule 3.5. See, e.g., *Alaska* (“A lawyer shall not ... engage in conduct intended to disrupt a tribunal.”); *Delaware* (“A lawyer shall not ... engage in conduct intended to disrupt a tribunal or engage in undignified or discourteous conduct that is degrading to a tribunal.”); *Hawaii* (“A lawyer shall not harass a judge, juror, prospective juror, discharged juror, or other decision maker or embarrass such person in such capacity.”); *Kansas* (“A lawyer shall not ... engage in undignified or discourteous conduct degrading to a tribunal.”); *Michigan* (“A lawyer shall not ... engage in undignified or discourteous conduct toward the tribunal.”); *Ohio* (“a lawyer shall not ... engage in undignified or discourteous conduct that is degrading to a tribunal.”); *South Carolina* (“A lawyer shall not ... engage in conduct intended to disrupt a tribunal.”); *ABA Model Rules* (“A lawyer shall not ... engage in conduct intended to disrupt a tribunal.”).

- (h)** After discharge of the jury from further consideration of a case a lawyer shall not communicate directly or indirectly with a juror if:
- (1) the communication is prohibited by law or court order;
  - (2) the juror has made known\* to the lawyer a desire not to communicate; or
  - (3) the communication involves misrepresentation, coercion, or duress, or is intended to harass or embarrass the juror or to influence the juror's actions in future jury service.
- (i)** A lawyer shall not directly or indirectly conduct an out of court investigation of a person\* who is either a member of a venire or a juror in a manner likely to influence the state of mind of such person\* in connection with present or future jury service.
- (j)** All restrictions imposed by this rule also apply to communications with, or investigations of, members of the family of a person\* who is either a member of a venire or a juror.
- (k)** A lawyer shall reveal promptly to the court improper conduct by a person\* who is either a member of a venire or a juror, or by another toward a person\* who is either a member of a venire or a juror or a member of his or her family, of which the lawyer has knowledge.
- (l)** This rule does not prohibit a lawyer from communicating with persons\* who are members of a venire or jurors as a part of the official proceedings.
- (m)** For purposes of this rule, "juror" means any empaneled, discharged, or excused juror.

### **Comment**

[1] An applicable code of judicial ethics or code of judicial conduct under this rule includes the California Code of Judicial Ethics and the Code of Conduct for United States Judges. Regarding employees of a tribunal\* not subject to judicial ethics or conduct codes, applicable standards include the Code of Ethics for the Court Employees of California and 5 United States Code section 7353 (Gifts to Federal employees). The statutes applicable to

adjudicatory proceedings of state agencies generally are contained in the Administrative Procedure Act (Gov. Code, § 11340 et seq.; see Gov. Code, § 11370 [listing statutes with the act].) State and local agencies also may adopt their own regulations and rules governing communications with members or employees of a tribunal.\*

[2] For guidance on permissible communications with a juror in a criminal action after discharge of the jury, see Code of Civil Procedure section 206.

[3] It is improper for a lawyer to communicate with a juror who has been removed, discharged, or excused from an empaneled jury, regardless of whether notice is given to other counsel, until such time as the entire jury has been discharged from further service or unless the communication is part of the official proceedings of the case.

**[4] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. In the event that any judicial officer is impatient, undignified, or discourteous, the lawyer may continue to advocate on behalf of the client and stand firm in the position of the client, but this shall not provide justification for the lawyer engaging in any violations of this rule.**<sup>260</sup>

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260 Numerous other states have similar language in their equivalent version of California's Rule 3.5. See, e.g., *Alaska* ("Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics."); *Colorado* ("Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is

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**[5] The duty to refrain from incivility applies to any proceeding of a tribunal,\* including a deposition.<sup>261</sup>**

**Rule 8.4 Misconduct**

It is professional misconduct for a lawyer to:

- (a) violate these rules or the State Bar Act, knowingly\* assist, solicit, or induce another to do so, or do so through the acts of another;

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subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.”); *Wyoming* (“Refraining from abusive or obstreperous conduct is a corollary of the advocate’s right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge’s default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.”); *ABA Model Rules* (“Refraining from abusive or obstreperous conduct is a corollary of the advocate’s right to speak on behalf of litigants. ... An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.”).

261 Numerous other states have similar language in their equivalent version of California’s Rule 3.5. See, e.g., *Colorado* (“The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition.”); *Delaware* (“The duty to refrain from disruptive, undignified or discourteous conduct applies to any proceeding of a tribunal, including a deposition.”); *New Mexico* (“The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition.”); *South Carolina* (“The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition.”); *Utah* (“The duty to refrain from disruptive conduct applies to any proceedings of a tribunal, including a deposition.”); *Washington* (““The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition.”); *Wyoming* (“The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition.”); *ABA Model Rules* (“The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition.”).

- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud,\* deceit, or reckless or intentional misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official, or to achieve results by means that violate these rules, the State Bar Act, or other law; or
- (e) knowingly\* assist, solicit, or induce a judge or judicial officer in conduct that is a violation of an applicable code of judicial ethics or code of judicial conduct, or other law. For purposes of this rule, "judge" and "judicial officer" have the same meaning as in rule 3.5(c).

### **Comment**

[1] A violation of this rule can occur when a lawyer is acting in propria persona or when a lawyer is not practicing law or acting in a professional capacity.

[2] Paragraph (a) does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[3] A lawyer may be disciplined for criminal acts as set forth in Business and Professions Code sections 6101 et seq., or if the criminal act constitutes "other misconduct warranting discipline" as defined by California Supreme Court case law. (See *In re Kelley* (1990) 52 Cal.3d 487 [276 Cal.Rptr. 375].)

[4] A lawyer may be disciplined under Business and Professions Code section 6106 for acts involving moral turpitude, dishonesty, or corruption, whether intentional, reckless, or grossly negligent.

[5] Paragraph (c) does not apply where a lawyer advises clients or others about, or supervises, lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the

lawyer's conduct is otherwise in compliance with these rules and the State Bar Act.

**[6] A lawyer violates paragraph (d) by repeated incivility while engaged in the practice of law or related professional activities.**<sup>262</sup>

**[7]** This rule does not prohibit those activities of a particular lawyer that are protected by the First Amendment to the United States Constitution or by Article I, section 2 of the California Constitution.

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<sup>i</sup> The authors would like to acknowledge the significant contributions received from Megan S. Wilson, a Fellow at Horvitz & Levy LLP.

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262 Numerous other states have similar language in their equivalent version of California's Rule 8.4. See, e.g., *District of Columbia* ("A lawyer violates paragraph (d) by offensive, abusive, or harassing conduct that seriously interferes with the administration of justice. Such conduct may include words or actions that manifest bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status."); *Florida* ("Subdivision (d) of this rule proscribes conduct that is prejudicial to the administration of justice. Such proscription includes the prohibition against discriminatory conduct committed by a lawyer while performing duties in connection with the practice of law. The proscription extends to any characteristic or status that is not relevant to the proof of any legal or factual issue in dispute. Such conduct, when directed towards litigants, jurors, witnesses, court personnel, or other lawyers, whether based on race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, physical characteristic, or any other basis, subverts the administration of justice and undermines the public's confidence in our system of justice, as well as notions of equality. This subdivision does not prohibit a lawyer from representing a client as may be permitted by applicable law, such as, by way of example, representing a client accused of committing discriminatory conduct."); *Utah* ("The Standards of Professionalism and Civility approved by the Utah Supreme Court are intended to improve the administration of justice. An egregious violation or a pattern of repeated violations of the Standards of Professionalism and Civility may support a finding that the lawyer has violated paragraph (d).").