

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

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

the same conduct that is the subject of the State Bar investigation or State Bar Court proceeding.

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

Comment

[1] Conduct that violates this Rule undermines confidence in the legal profession and our legal system and is contrary to the fundamental principle that all people are created equal. A lawyer may not engage in such conduct through the acts of another. See Rule 8.4(a). In relation to a law firm's operations, this Rule imposes on all law firm* lawyers the responsibility to advocate corrective action to address known* harassing or discriminatory conduct by the firm* or any of its other lawyers or nonlawyer personnel. Law firm* management and supervisory lawyers retain their separate responsibility under Rules 5.1 and 5.3. Neither this Rule nor Rule 5.1 or 5.3 imposes on the alleged victim of any conduct prohibited by this Rule any responsibility to advocate corrective action.

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

[3] What constitutes a failure to advocate corrective action under paragraph (c)(2) will depend on the nature and seriousness of the discriminatory policy or practice, the extent to which the lawyer knows* of unlawful discrimination or harassment resulting

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

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

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

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