

In addition to the sixty-eight proposed rules prepared by the Commission, the Board authorized public comment on an alternate version of the Commission's proposed rule 8.4.1 (Prohibited Discrimination, Harassment and Retaliation) drafted by staff in accordance with the Board's discussion. This proposed rule is designated as alternative draft 2 (ALT2) of proposed rule 8.4.1.

- Clean Version of Proposed Rule 8.4.1–Alternative 2 (“ALT2”)
- Redline comparison of Staff's Proposed Rule 8.4.1 ALT2 to Current California Rule of Professional Conduct 2-400
- Redline comparison of Staff's Proposed Rule 8.4.1 ALT2 to the Commission's Proposed Rule 8.4.1 ALT1

Rule 8.4.1 [2-400] Prohibited Discrimination, Harassment and Retaliation

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

(d) No disciplinary investigation or proceeding may be initiated by the State Bar against a lawyer under this Rule unless and until a tribunal of competent jurisdiction, other than a disciplinary tribunal, shall have first:

(1) adjudicated a complaint of alleged harassment or discrimination and found that unlawful conduct occurred; or

(2) has entered an order sanctioning a lawyer for such unlawful conduct.

Upon adjudication or entry of order, the tribunal's finding, verdict or order shall then be admissible evidence of the occurrence or non-occurrence of the harassment or discrimination alleged in any disciplinary proceeding initiated under this Rule.

(e) This Rule shall not prevent a lawyer from representing a client alleged to have engaged in unlawful discrimination, harassment, or retaliation.

Comment

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

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

[3] What constitutes a failure to advocate corrective action under paragraph (c)(2) will depend on the nature and seriousness of the discriminatory policy or practice, the

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

[4] In order for harassment or discriminatory conduct to be actionable under this rule, it must first be found to be unlawful by an appropriate civil administrative or judicial tribunal under applicable state or federal law.

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

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

Rule 8.4.1 [2-400] Prohibited ~~Discriminatory Conduct in a Law-Practice~~ Discrimination, Harassment and Retaliation
(Redline Comparison of the Proposed Rule to Current California Rule)

- (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.
- (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 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~~
- (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:~~

(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.

~~(1) hiring, promoting, discharging, or otherwise determining the conditions of employment of any person; or~~

~~(2) accepting or terminating representation of any client.~~

~~(C)~~ (d) No disciplinary investigation or proceeding may be initiated by the State Bar against a ~~member~~lawyer under this ~~rule~~Rule unless and until a tribunal of competent jurisdiction, other than a disciplinary tribunal, shall have first:

(1) adjudicated a complaint of alleged ~~harassment or~~ discrimination and found that unlawful conduct occurred; or

(2) has entered an order sanctioning a lawyer for such unlawful conduct.

Upon ~~such~~ adjudication or entry of order, the ~~tribunal~~tribunal’s finding ~~or~~, verdict or order shall then be admissible evidence of the occurrence or non-occurrence of the ~~alleged~~harassment or discrimination alleged 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.~~Rule.

(e) This Rule shall not prevent a lawyer from representing a client alleged to have engaged in unlawful discrimination, harassment, or retaliation.

DiscussionComment

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

[2] The conduct prohibited by paragraph (a) includes the conduct of a lawyer in a proceeding before a judicial officer. (See Canon 3B(6) of the Code of Judicial Ethics providing, in part, that: “A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation against parties, witnesses, counsel,

or others.”) A lawyer does not violate paragraph (a) by referring to any particular status or group when the reference is relevant to factual or legal issues or arguments in the representation. This Rule does not apply to conduct protected by the First Amendment to the United States Constitution or by Article I, § 2 of the California Constitution. While both the parties and the court retain discretion to refer such conduct to the State Bar, a court’s finding that preemptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (a).

[3] What constitutes a failure to advocate corrective action under paragraph (c)(2) will depend on the nature and seriousness of the discriminatory policy or practice, the extent to which the lawyer knows* of unlawful discrimination or harassment resulting from that policy or practice, and the nature of the lawyer’s relationship to the lawyer or law firm* implementing that policy or practice. For example, a law firm* non-management and non-supervisory lawyer who becomes aware that the law firm* is engaging in a discriminatory hiring practice may advocate corrective action by bringing that discriminatory practice to the attention of a law firm* management lawyer who would have responsibility under Rule 5.1 or 5.3 to take reasonable* remedial action upon becoming aware of a violation of this Rule.

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

[5] A complaint of misconduct based on this ~~rule~~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.~~

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

**Rule 8.4.1 [2-400] Prohibited Discrimination, Harassment and Retaliation
(Redline Comparison of Staff's Proposed Rule 8.4.1 ALT2
to the Commission's Proposed Rule 8.4.1 ALT1)**

- (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.~~

(d) No disciplinary investigation or proceeding may be initiated by the State Bar against a lawyer under this Rule unless and until a tribunal of competent jurisdiction, other than a disciplinary tribunal, shall have first:

(1) adjudicated a complaint of alleged harassment or discrimination and found that unlawful conduct occurred; or

~~(e2) Upon issuing a notice of a disciplinary charge under this Rule:~~has entered an order sanctioning a lawyer for such unlawful conduct.

~~(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.~~

Upon adjudication or entry of order, the tribunal's finding, verdict or order shall then be admissible evidence of the occurrence or non-occurrence of the harassment or discrimination alleged in any disciplinary proceeding initiated under this Rule.

~~(fe)~~ 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

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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.~~

[4] In order for harassment or discriminatory conduct to be actionable under this rule, it must first be found to be unlawful by an appropriate civil administrative or judicial tribunal under applicable state or federal law.

~~[5] 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.~~

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

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

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