

**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.

PROPOSED RULE OF PROFESSIONAL CONDUCT 8.4.1
(Current Rule 2-400)
Prohibited Discrimination, Harassment and Retaliation

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has evaluated current rule 2-400 (Prohibited Discriminatory Conduct in a Law Practice) in accordance with the Commission Charter, with a focus on the function of the rule as a disciplinary standard, and with the understanding that the rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. Current Rule 2-400 was first adopted effective March 1, 1994. There is no counterpart to rule 2-400 in the American Bar Association (“ABA”) model rules. However, ABA Model Rule 8.4(d) addresses discrimination by individual lawyers while representing a client.¹ The result of the Commission’s evaluation is proposed rule 8.4.1 (Prohibiting Discrimination, Harassment and Retaliation). This proposed rule has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

The main issue considered when drafting proposed Rule 8.4.1 was whether to expand 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, which is found in current Rule 2-400(C).² A majority of the Commission believes current Rule 2-400(C) renders the rule difficult to enforce. Eliminating the requirement would give the Office of Chief Trial Counsel original jurisdiction to investigate and prosecute under the current procedures of the disciplinary system any claim of discrimination that comes within the scope of the Rule.

In addition to changes to address the main issue identified above, the Commission proposes the following substantive changes to the current rule:

- (1) Expanding the proposed rule beyond the 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 representation of any client.” Current

¹ Model Rule 8.4(d) provides it is misconduct for a lawyer to: “(d) engage in conduct that is prejudicial to the administration of justice.” A Model Rule comment clarifies the application of paragraph (d):

“[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.”

² Current Rule 2-400(C) provides:

“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.”

Rule 2-400 already applies to discrimination in the management or operation of a law firm in “accepting or terminating representation of any client.” The Commission believes the rule’s prohibition should not be limited to law firm management. Adopting a rule that generally prohibits unlawful discrimination or harassment while engaged in representing a client is consistent with current ABA Model Rule 8.4(d), Comment [3] to that rule, and proposed ABA Model Rule 8.4(g)³ and several other professions that prohibit this same behavior in their codes of conduct.⁴

- (2) Expanding the proposed rule to cover additional protected categories. Current Rule 2-400’s list of protected characteristics is substantially narrower than current California law. Because the identity of protected characteristics protected under anti-discrimination law is not static, the Commission added paragraph (c)(1) to delimit the scope of “protected characteristics” for purposes of the rule that not only is consistent with current California law but also includes a catchall provision for any “other category of discrimination prohibited by applicable law.” This latter addition would authorize professional discipline pursuant to whatever applicable anti-discrimination laws might exist in the future without the need to amend the rule.
- (3) Expanding the proposed rule to encompass unlawful discrimination and harassment engaged in for the purpose of retaliation. This addition would permit professional discipline where a lawyer, in representing a client or in relation to a law firm’s operations, unlawfully discriminates against or harasses a person for the purpose of retaliating against that person because the person has taken action to oppose unlawful discrimination or harassment. This provision is intended to provide protection for lawyers obligated under the rule (e.g., lower level lawyers within a law firm) to advocate corrective action where they know of unlawful discrimination or harassment within the firm, even when the unlawful conduct is being committed by higher level lawyers within the firm.
- (4) Adoption of paragraph (d),⁵ which requires a lawyer who has been charged with, or is being investigated for, a violation of the Rule, to give notice to the State Bar of any

³ Proposed ABA Model Rule 8.4(g) would provide it is professional misconduct for a lawyer to:

“(g) in conduct related to the practice of law, harass or knowingly discriminate against persons on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status.”

⁴ Examples include: (1) American Dental Association, Code of Conduct, Section 4.A. “Patient Selection” (dentist shall not refuse to accept patients because of the patient’s race, creed, color, sex or national origin); and (2) American Psychological Association, Ethical Standard 1.12 “Other Harassment” (prohibition against behavior that is harassing or demeaning based on factors such as a person’s age, gender, race, ethnicity, national origin, religion, sexual orientation, disability, language, or socioeconomic status).

⁵ Proposed Rule 8.4.1(d) states:

“(d) A lawyer who is the subject of a State Bar investigation of 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.”

See also, Business & Professions Code section 6068(i) [re duty of an attorney to cooperate and participate in any disciplinary investigation or proceeding].

parallel administrative or judicial proceeding, such as an EEOC or DFEH investigation. In part, this notice is intended to provide the Office of Chief Trial Counsel with information necessary to determine whether or not to hold in abeyance the State Bar investigation or disciplinary proceeding pending the outcome of a related proceeding.

- (5) Adoption of paragraph (e)(1), which requires the State Bar to provide a copy of the notice of a disciplinary charge for a charge arising under paragraph (a) of the proposed rule to the California Department of Fair Employment and Housing and the United States Department of Justice, Coordination and Review. Paragraph (e)(2) requires the State Bar to provide a copy of the notice of a disciplinary charge for a charge arising under paragraph (b) to the California Department of Fair Employment and Housing and the United State Equal Employment Opportunity Commission. The purpose of these provisions is to provide to the relevant government agencies an opportunity to become involved in the matter so that they may implement and advance the broad legislative policies with which they have been charged.
- (6) Adoption of paragraph (f), which is intended to clarify that the proposed rule does not prevent a lawyer from representing another person alleged to have engaged in unlawful discrimination, harassment, or retaliation.

Finally, non-substantive changes to the current rule include rule numbering to track the Commission's general proposal to use the Model Rule numbering system and the substitution of the term "lawyer" for "member."

Proposed Rule 8.4.1 contains six comments all of which provide interpretive guidance or clarify how the rule is to be applied. Of particular note is Comment [2] which, among other things, has been added to clarify that the rule does not apply to constitutionally-protected conduct. Comment [4] has been added to clarify that paragraph (d) permits the State Bar to use discretion in abating a disciplinary investigation or proceeding when the State Bar is made aware of a parallel administrative or judicial proceeding premised on the same conduct. Comment [5] clarifies that paragraph (e) is intended to recognize the important public policy served by enforcing the laws and regulations prohibiting unlawful discrimination.

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~~
 - (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.

- ~~(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:~~
- (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.
- ~~(1) hiring, promoting, discharging, or otherwise determining the conditions of employment of any person; or~~
- (2e) accepting or terminating representation of any client. 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.
- ~~(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.~~

DiscussionComment

~~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.~~

[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

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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.

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

Commission Drafting Team Information

Lead Drafter: George Cardona

Co-Drafters: Judge Karen Clopton, Robert Kehr, Howard Kornberg, Carol Langford, Toby Rothschild, Dean Zipser

Meeting Dates at which the Rule was discussed: September 25-26, 2015, November 13-14, 2015, January 22-23, 2016 and February 19 – 20, 2016

Action Summary Approval Date: March 31 – April 1, 2016

I. CURRENT CALIFORNIA RULE 2-400

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.

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

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. COMMISSION'S RECOMMENDATION AND VOTE

The Commission voted to recommend a proposed amended rule as set forth below in Section III.

At the Commission's February 19 – 20, 2016 meeting, all members present voted yes on the black letter text of the proposed Rule with the exception of Mr. Kehr who voted no and Mr. Ham and Mr. Martinez who abstained.

At the Commission's February 19 – 20, 2016 meeting, all members present voted yes on the comments to the proposed Rule with the exception of Mr. Ham, Mr. Kehr and Mr. Martinez who abstained.

III. PROPOSED RULE 8.4.1 (CLEAN)

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

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

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

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

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.

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

**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 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 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) “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.
- (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~~

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~~origin, sex, sexual orientation, religion, age or disability in:~~

(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.

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

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

~~(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.~~

Discussion Comment

~~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~~

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~~Professions Code sections 6106 and 6068, the California Supreme Court's inherent authority to impose discipline, or other disciplinary standard.~~

[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

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[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.](#)

V. OCTC / STATE BAR COURT COMMENTS

- **Jayne Kim, OCTC, 09/02/15:**

OCTC supports a rule prohibiting discriminatory conduct. Current rule 2-400, for example, provides clarity by requiring that a court of competent jurisdiction find conduct discriminatory before the State Bar may seek discipline. As written, the 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.

The Commission inquired of OCTC whether it could develop the necessary expertise to enforce a broader anti-discrimination rule and whether it would allocate sufficient resources to such investigations and prosecutions. As with any new or amended rule, OCTC would allocate the needed resources (including expertise development) to enforce the new rule as it does with all of the Rules of Professional Conduct and statutes of the State Bar Act.

- **Colin Wong, State Bar Court, 11/02/15:**

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.”

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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.

VI. COMPARISON OF PROPOSED RULE TO APPROACHES IN OTHER JURISDICTIONS (NATIONAL BACKDROP)

- There is no current Model Rule counterpart for 2-400 (although, as discussed below, Comment [3] to ABA Model Rule 8.4(d) specifies that it addresses discrimination by individual lawyers while representing a client). Twenty-three jurisdictions have adopted rules

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of professional conduct that prohibit discrimination.¹ Sixteen of those jurisdictions have rules that specifically prohibit discrimination in conduct that occurs by a lawyer in a professional capacity.² Four jurisdictions have rules that prohibit discrimination in representing a client.³ Two jurisdictions have rules that prohibit discrimination in connection with a proceeding before a tribunal.⁴ 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.”

- Comment [3] to Model Rule 8.4(d) is related and prohibits 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
- On or about December 22, 2015, the ABA Standing Committee on Ethics and Professional Responsibility issued a draft proposal to amend Model Rule 8.4 to add a new section (g) and Comment [3] that would make it professional misconduct for a lawyer to:

(g) in conduct related to the practice of law, harass or knowingly discriminate against persons on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status.

¹ 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.

² 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.

³ The four jurisdictions are: Colorado, Missouri, North Dakota, and Oregon.

⁴ The two jurisdictions are: New Mexico and Texas.

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Comment

* * *

[3] Paragraph (g) applies to conduct related to a lawyer's practice of law, including the operation and management of a law firm or law practice. It does not apply to conduct unrelated to the practice of law or conduct protected by the First Amendment. Harassment or discrimination that violates paragraph (g) undermines confidence in the legal profession and our legal system. Paragraph (g) does not prohibit lawyers from referring to any particular status or group when such references are material and relevant to factual or legal issues or arguments in a representation. Although lawyers should be mindful of their professional obligations under Rule 6.1 to provide legal services to those unable to pay, as well as the obligations attendant to accepting a court appointment under Rule 6.2, a lawyer is usually not required to represent any specific person or entity. Paragraph (g) does not alter the circumstances stated in Rule 1.16 under which a lawyer is required or permitted to withdraw from or decline to accept a representation.

The ABA Standing Committee on Ethics and Professional Responsibility also issued a memorandum (the "ABA Memo") setting out the reasoning for its proposal. Because much of this reasoning applies as well to the drafting team's proposal for this rule, a copy of the ABA Memo is attached to this Report & Recommendation for reference.

- In April 2016, the ABA Standing Committee on Ethics and Professional Responsibility issued a revised draft proposal to amend Model Rule 8.4 to add a new section (g) and new Comments [3], [4] and [5] that would make it professional misconduct for a lawyer to:

(g) harass or discriminate 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 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 because of their membership or perceived membership in one or more of the groups listed in paragraph (g). Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct towards a person who is, or is perceived to be, a member of one of the groups. 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

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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. Paragraph (g) does not prohibit conduct undertaken to promote diversity.

[5] Paragraph (g) does not prohibit legitimate advocacy that is material and relevant to factual or legal issues or arguments in a representation. 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 78 Rule 1.2(b).

VII. 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 current ABA Model Rule 3.8(d), Comment [3], and, as noted in the ABA Memo, will be consistent with proposed 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 proposed 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. Any concern that the expansion of the Rule may pose First Amendment issues is addressed by the inclusion in proposed Comment [2] of the penultimate sentence 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

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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 discrimination and harassment engaged in for the purpose of 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 discriminates against or harasses a person for the purpose of retaliating against that person because the person has taken action to oppose unlawful discrimination or harassment. That 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. 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.
- Pros: See discussion under “Alternatives Considered”
 - Cons: See discussion under “Alternatives Considered”
6. Add a new requirement (see proposed paragraph (e) and Comment [5]) that, upon issuing a notice of disciplinary charge under the Rule, the State Bar is required to provide notice of the charge to the State and/or Federal agencies tasked with investigating and addressing the

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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 [5], the language of the proposed Rule addition is clear, and the comment is unnecessary.

7. Add to the Rule Comment (proposed Comment [2]) 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.

8. 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.

9. Add proposed Comment [6] to make clear 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.

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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 both current ABA Model Rule 8.4(d), Comment [3], and proposed ABA Model Rule 8.4(g), both 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 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. Comment [2] addresses 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 Rule 5.1 does not require subordinate lawyers to advocate for improvement in law firm conduct because Rule 5.2 permits 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 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 be consistent with proposed ABA Model Rule 3.8(g) and its proposed accompanying comment, and would address the ABA's expressed concern that this language could be read as limiting a court's discretion on whether to refer conduct for discipline.
 - Cons: 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 ABA 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

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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.

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

1. Expands the Rule to prohibit discriminatory or harassing conduct generally in the course of representing a client.
2. Expands the Rule to prohibit discriminatory or harassing conduct on the basis of protected characteristics beyond those referenced in the current Rule.
3. Expands the Rule to prohibit 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. Current ABA Model Rule 8.4(d), Comment [3].

For many of the same reasons discussed in the ABA Memo on proposed Rule 8.4(g), the Commission concluded that the prohibition against unlawful discrimination and harassment in connection with representing clients should be 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 on proposed Rule 8.4(g), 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 VII.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. Proposed ABA Model Rule 8.4(g) and accompanying Comment [3].

The Commission agrees with the reasoning of the ABA in its memo on proposed Model Rule 8.4(g) in proposing paragraph (a), which moves into the blackletter text of the rule itself the bar on discrimination and harassment. As discussed in Section VII.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

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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 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 [4]. 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 [4] 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 [4]. 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

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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.

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VIII. COMMISSION RECOMMENDATION FOR BOARD ACTION

Recommendation:

That the Board of Trustees of the State Bar of California adopt proposed amended Rule 8.4.1 [2-400] in the form stated above for purposes of public comment authorization as a part of the Commission's proposed comprehensive revisions to the Rule.

IX. FINAL COMMISSION VOTE/ACTION

Date of Vote: February 19 -20, 2016

Action: Approve Rule 8.4.1 [2-400] black letter as revised during the meeting

Vote: 12 (yes) – 0 (no) – 3 (abstain)