

**RE: Rule 2-400
6/10/05 Commission Meeting
Open Session Item III.B.**

**RE: Rule [9.1] 2-400
4/1-2/05 Commission Meeting
Open Session Item III.K**

**PROPOSED [9.1¹] RULE 2-400. PROHIBITED DISCRIMINATORY CONDUCT IN
LAW PRACTICE**

(A) For purposes of this rule:²

- ~~———— (1) "law practice" includes sole practices, law partnerships, law corporations, corporate and governmental legal departments, and other entities which employ members to practice law;³~~
- ~~———— (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.⁴~~

~~(B) [Alternative 1]⁵ In the management or operation of a law practice or in the practice of law,⁶ 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, except when the conduct is legitimate advocacy because race, sex, religion, national origin, disability, age, or sexual orientation is an issue in the representation⁷m.⁸~~

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

~~[Alternative 2]⁹ In the practice of law,¹⁰ a lawyer shall not violate a Federal or State law that prohibits discrimination based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status¹¹ except when the conduct is legitimate advocacy because race, sex, religion, national origin, disability, age, or sexual orientation is an issue in the representation.¹²~~

~~(C)(B) 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.¹³

Discussion:

- [1] The legal profession should support efforts to eradicate invidious or illegal discrimination. Discrimination based on race, national origin, sex, sexual orientation, religion, age, or disability, in connection with the practice of law, has no place in a licensed profession, which advocates that society be regulated by the rule of law. Violation of federal and state laws prohibiting discrimination in connection with the practice of law, in addition to other civil penalties, warrants professional discipline.
- [2] This rule prohibits a lawyer, in the management or operation of a law practice, from unlawfully discriminating or knowingly permitting unlawful discrimination not only in employment matters but also in the acceptance or termination of representation of any client.
- [3] While discipline under this rule cannot be commenced unless the conditions in subpart (C) above, lawyers should note that they may be disciplined for a violation of federal or state law prohibiting discrimination on the basis of race, national origin, sex, sexual orientation, religion, age or disability under the authority of Business and Professions Code section 6068(a).
- [4] 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.
- [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] 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.
- [7] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.¹⁵

DRAFTER'S NOTES

1. Since there is no direct corollary for this rule in the ABA Model Rules of Professional Conduct, this would be a stand alone rule. Alternatively, it could be set forth as new 8.4(g), consistent with other states placement as set forth in the comparison chart. A new stand alone rule 9.1 is recommended to highlight the importance of the subject matter of the rule and so that it is not lost. This is consistent with Chair Harry Sondheim's comments at the November 19, 2004 meeting.
2. The definitions are being deleted from the first sub-part of the rule, pending a Commission decision as to whether the definitions should be placed in one rule; whether there are some specific definitions that are needed to clarify this rule and if some definitions are needed, where they should be placed.
3. The definition of "law firm" is the subject of a separate rule/definition. If "law practice" was really intended to mean "law firm" the definition developed by the drafting team should take this rule into account. Alternatively, a separate definition, specifically tailored to this rule, may be appropriate.
4. Pending the Commission's decision on the foregoing, the current definitions will be placed in the comments as a placeholder.
5. Alternative 1 retains the introductory language of present rule 2-400(B) but adds additional language at the suggestion of some Commission members.
6. This addition expands the scope of the rule beyond the "management" or "operation" of a law firm to unlawful discriminatory conduct in the practice of law. A number of Commission members commented that the duty should apply not just to manager-lawyers but all lawyers while practicing law. The scope of the prohibition remains limited to conduct in the practice of law rather than in a lawyer's "personal" life.
7. This language has been added to address a number of First Amendment concerns raised by several members that legitimate advocacy involving discrimination or potentially discriminatory conduct should not be disciplined. The language is modeled after North Dakota rule 8.4 and Nebraska DR 1-102.
8. The subcommittee had recommended the deletions of the limiting language of subparts (B)(1) and (2). Since current California law, specifically addressed to lawyers, is broader than the limitations of (B)(1) and (2), the deletion serves to update the duties which exist under California law. (See 2-400 Report for 11-19-04 Meeting.)

Although no straw poll was taken, it appeared that a majority of members present spoke in favor of deletion of subparts (B)(1) and (2). (See 11/19.04 KEM Meeting Notes) However, the issue is still open.

The Office of Chief Trial Counsel, through Mary Yen, stated that it is not opposed to deleting (B)(1) and (2):

OCTC thinks there is no problem deleting (B) (1) and (2). Discrimination at any point should come within the rule. (12/27/04 E-mail from Mary Yen through Felicia Soria.)

For example, sexual harassment may not be covered by rule 2-400(B)(1). Yet, a law firm and a partner may violate FEHA statutes prohibiting sexual harassment. (See e.g., *Weeks v. Baker McKenzie* (1998) 63 Cal.App.4th 1128, 1146, 74 Cal.Rptr.2d 510, 520-521 which stated, in discussing law firm liability for sexual harassment:

“The FEHA makes unlawful the sexual harassment of an employee by any person. (Gov.Code, § 12940, subd. (h)(1).) [FN2] Under Government Code section 12940, subdivision (h)(1), an employer is strictly liable for acts of sexual harassment committed by an agent or supervisor. (*Kelly-Zurian v. Wohl Shoe Co.* (1994) 22 Cal.App.4th 397, 415, 27 Cal.Rptr.2d 457.) [FN3] In addition, Government Code section 12940, subdivision (i) makes it unlawful “[f]or an employer ... to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring.” Sexual harassment is defined as including “[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.” (Fisher v. San Pedro Peninsula Hospital (1989) 214 Cal.App.3d 590, 607, 262 Cal.Rptr. 842.) It typically is viewed as taking one or both of two forms: (1) quid pro quo harassment, where submission to sexual conduct is made a condition of concrete employment benefits, and (2) hostile work environment, defined as conduct having the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. (Ibid.)”]

Here is a partial list of federal and state discrimination statutes that are most frequently arise in the practice of law:

TITLE 42 - CIVIL RIGHTS

42 USC §2000e-2: Unlawful employment practices.

42 USC §2000e-7: Effect on State laws.

CALIFORNIA CIVIL CODE:

§ 51. Civil rights of persons in business establishments.

§ 51.5. Discrimination by business establishment prohibited.

§ 51.9. Sexual harassment.

§ 52. Actions for damages and other relief for denial of rights.

CALIFORNIA GOVERNMENT CODE

§ 12940. Unlawful employment practices.

29 CODE OF FEDERAL REGULATION § 1604.11. Sexual harassment.

9. The scope of this rule does not include lawyer conduct involving of invidious discrimination that is not currently a violation of statute. In an appropriate case, that type of conduct could be the subject of discipline under Bus. & Prof. Code section 6068(a) for failure to support the United States or California constitutions. It is not included here because of the difficulty of developing language broad enough to cover all types of invidious discrimination but specific enough to put a lawyer on notice of the prohibition, while not stepping on First Amendment advocacy concerns.

10. The phrase “in the practice of law” has been used to limit the scope of discipline to the lawyers’ conduct in the practice of law rather than in a lawyer’s personal capacity.

11. This language has been based upon Illinois Rule 8.4(a)(9)(a). Its clarity and directness about what is prohibited merits consideration as an alternative.

The language does not contain a second level of misconduct “knowingly permit unlawful discrimination on the basis of . . .” because Federal and State statutes vary as to what conduct will be a violation of the law even if the lawyer is not the actual perpetrator of the unlawful discriminatory act. (See e.g.

12. Same comment as note 7.

13. At the November 19, 2004 meeting, a straw vote was taken concerning whether to keep (C). Of the members present, 7 voted to keep (C); 2 voted against keeping (C) and 1 abstained.

The Office of Chief Trial Counsel reported, through Mary Yen, that it favored keeping (C), as follows:

OCTC thinks deleting section (C) would be a very big problem. Not because they don't have or couldn't develop the expertise or ability to do handle these cases, but because, except in the most obvious case where there is "smoking gun" type evidence, these cases are difficult and resource intensive cases to investigate and prove. Just to investigate a case that may end up closing because of a finding of no violation could be an enormous resource drain. Numerous witness interviews and large document productions are often involved in these cases. Witness credibility can be a big factor in these cases too, so getting culpable after trial may be less certain than OCTC normally expects when it files charges. There can be levels of subtlety in these cases that may make them difficult to investigate in the time frame OCTC normally investigate cases, including cases designated as complex (i.e.. 12 months.) These subtleties also make them difficult to prove. It may be difficult to sustain OCTC's burden of proof by clear

and convincing evidence without a "smoking gun", yet OCTC will have to investigate all such complaints made. Very few will be easy to close without a full and lengthy investigation. OCTC may receive a lot of these cases if the requirements of section (C) are removed.

OCTC thinks the reason section (C) was added to the rule originally is that these cases are too easy to allege and often too hard to investigate and prove in the ordinary case.

(December 27, 2004 E-mail from Mary Yen to Commission members through Felicia Soria.)

14. This comment would be deleted if some version of alternative 2 is chosen.
15. This comment has been added to protect what may be "legitimate" advocacy.

**PROPOSED [9.1] RULE 2-400. PROHIBITED DISCRIMINATORY CONDUCT IN
LAW PRACTICE**

CLEAN VERSION

- (A) **[Alternative 1]** In the management or operation of a law practice or in the practice of law, 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, except when the conduct is legitimate advocacy because race, sex, religion, national origin, disability, age, or sexual orientation is an issue in the representation.

[Alternative 2] In the practice of law, a lawyer shall not violate a Federal or State law that prohibits discrimination based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, except when the conduct is legitimate advocacy because race, sex, religion, national origin, disability, age, or sexual orientation is an issue in the representation.

- (B) 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.

CLEAN VERSION

[9.1¹] 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.
- (C) No disciplinary investigation or proceeding may be initiated by the State Bar against a member under this rule unless and until a tribunal of competent jurisdiction, other than a disciplinary tribunal, shall have first adjudicated a complaint of alleged discrimination and found that unlawful conduct occurred. Upon such adjudication, the tribunal finding or verdict shall then be admissible evidence of the occurrence or non-occurrence of the alleged discrimination in any disciplinary proceeding initiated under this rule. In order for discipline to be imposed under this rule, however, the finding of unlawfulness must be upheld and final after appeal, the time for filing an appeal must have expired, or the appeal must have been dismissed.

Discussion:

¹ Since there is no direct corollary for this rule in the ABA Model Rules of Professional Conduct, this would be a stand alone rule. Alternatively, it could be set forth as new 8.4(g), consistent with other states placement as set froth in the comparison chart. A new stand alone rule 9.1 is recommended to highlight the importance of the subject matter of the rule and so that it is not lost.

- [1] The legal profession should support efforts to eradicate invidious or illegal discrimination. Discrimination based on race, national origin, sex, sexual orientation, religion, age, or disability, in connection with the practice of law, has no place in a licensed profession, which advocates that society be regulated by the rule of law. Violation of federal and state laws prohibiting discrimination in connection with the practice of law, in addition to other civil penalties, warrants professional discipline.
- [2] This rule prohibits a lawyer, in the management or operation of a law practice, from unlawfully discriminating or knowingly permitting unlawful discrimination not only in employment matters but also in the acceptance or termination of representation of any client.
- [3] While discipline under this rule cannot be commenced unless the conditions in subpart (C) above, lawyers should note that they may be disciplined for a violation of federal or state law prohibiting discrimination on the basis of race, national origin, sex, sexual orientation, religion, age or disability under the authority of Business and Professions Code section 6068(a).
- [4] 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.
- [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] 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.

RED-LINE VERSION

[9.1] Rule 2-400. Prohibited Discriminatory Conduct in a Law Practice

(A) For purposes of this rule:

- (1) "law practice" includes sole practices, law partnerships, law corporations, corporate and governmental legal departments, and other entities which employ members to practice law;
- (2) "knowingly permit" means a failure to advocate corrective action where the member knows of a discriminatory policy or practice which results in the unlawful discrimination prohibited in paragraph (B); and
- (3) "unlawfully" and "unlawful" shall be determined by reference to applicable state or federal statutes or decisions making unlawful discrimination in employment and in offering goods and services to the public.

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

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

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

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

Discussion:

[1] The legal profession should support efforts to eradicate invidious or illegal discrimination. Discrimination based on race, national origin, sex, sexual orientation, religion, age, or disability, in connection with the practice of law, has no place in a licensed profession, which advocates that society be regulated by the rule of law. Violation of federal and state laws prohibiting discrimination in connection with the practice of law, in addition to other civil

penalties, warrants professional discipline.

- [2] This rule prohibits a lawyer, in the management or operation of a law practice, from unlawfully discriminating or knowingly permitting unlawful discrimination not only in employment matters but also in the acceptance or termination of representation of any client.
- [3] While discipline under this rule cannot be commenced unless the conditions in subpart (C) above, lawyers should note that they may be disciplined for a violation of federal or state law prohibiting discrimination on the basis of race, national origin, sex, sexual orientation, religion, age or disability under the authority of Business and Professions Code section 6068(a).
- [4] 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.
- [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] 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.

RULE COMPARISON CHART

CALIFORNIA RULE OR STATUTE	2003 ABA MODEL RULE COUNTERPART	OTHER STATES RULES
<p>CAL. RULE 2-400. PROHIBITED DISCRIMINATORY CONDUCT IN A LAW PRACTICE</p> <p>(A) For purpose of this rule:</p> <p>(1) “law practice” includes sole practices, law partnerships, law corporations, corporate and governmental legal departments and other entities which employ members to practice law;</p> <p>(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</p> <p>(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.</p> <p>(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:</p> <p>(1) hiring, promoting, discharging or otherwise determining the conditions of employment of any person; or</p> <p>(2) accepting or terminating representation of any client.</p> <p>(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</p>	<p>No corresponding Model Rule or Discussion, but see MR 8.4(d), which provides it is professional misconduct for a lawyer to “(d) engage in conduct that is prejudicial to the administration of justice.” Some states that have adopted the Model Rules interpret “conduct that is prejudicial to the administration of justice” to encompass bias. See, e.g., rule 8.4 as adopted in Florida, Illinois, North Dakota, and Rhode Island. To similar effect, see the Nebraska Code of Professional Responsibility, DR 1-102(A)(5).</p>	<p>Illinois Rule 8.4. Misconduct</p> <p>(a) A lawyer shall not:</p> <p>(9)(A) violate a Federal, State or local statute or ordinances that prohibits discrimination based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status by conduct that reflects adversely on the lawyer's fitness as a lawyer. Whether a discriminatory act reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of all the circumstances, including (1) the seriousness of the act, (2) whether the lawyer knew that it was prohibited by statute or ordinance, (3) whether it was part of a pattern of prohibited conduct, and (4) whether it was committed in connection with the lawyer's professional activities.</p> <p>(B) No complaint of professional misconduct based on an unlawfully discriminatory act, pursuant to paragraph (9)(A) of this rule, may be brought until a court or administrative agency of competent jurisdiction has found that the lawyer has engaged in an unlawfully discriminatory act, and that the determination of the court or administrative agency has become final and enforceable and the right of judicial review of the determination has been exhausted.</p> <p>NOTE: The Illinois Ethics 2000 Review Committee did not recommend any changes to the above provisions.</p> <p>Florida Rule 4-8.4. Misconduct</p> <p>A lawyer shall not:</p> <p>.....</p> <p>(d) engage in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, but not</p>

CALIFORNIA RULE OR STATUTE	2003 ABA MODEL RULE COUNTERPART	OTHER STATES RULES
<p>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.</p>		<p>limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic;</p> <p>.....</p> <p><i>Comment</i></p> <p>.....</p> <p>[4] Subdivision (d) of this rule proscribes conduct that is prejudicial to the administration of justice. Such proscription includes the prohibition against discriminatory conduct committed by a lawyer while performing duties in connection with the practice of law. The proscription extends to any characteristic or status that is not relevant to the proof of any legal or factual issue in dispute. Such conduct, when directed towards litigants, jurors, witnesses, court personnel, or other lawyers, whether based on race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, physical characteristic, or any other basis, subverts the administration of justice and undermines the public's confidence in our system of justice, as well as notions of equality. This subdivision does not prohibit a lawyer from representing a client as may be permitted by applicable law, such as, by way of example, representing a client accused of committing discriminatory conduct.</p> <p>NOTE: Florida's Ethics 2000 Review Committee did not recommend any changes to the above provisions.</p>

CALIFORNIA RULE OR STATUTE	2003 ABA MODEL RULE COUNTERPART	OTHER STATES RULES
<p>CAL. RULE 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.</p> <p>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.</p> <p>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.</p>		<p>North Dakota Rule 8.4 Misconduct</p> <p>It is professional misconduct for a lawyer to:</p> <p>.....</p> <p>(d) engage in conduct that is prejudicial to the administration of justice, including to knowingly manifest through words or conduct in the course of representing a client, bias or prejudice based upon race, sex, religion, national origin, disability, age, or sexual orientation, against parties, witnesses, counsel or others, except when those words or conduct are legitimate advocacy because race, sex, religion, national origin, disability, age, or sexual orientation is an issue in the proceeding;</p> <p>Rhode Island Rule 8.4 Misconduct</p> <p>It is professional misconduct for a lawyer to:</p> <p>.....</p> <p>(d) engage in conduct that is prejudicial to the administration of justice, including but not limited to harmful or discriminatory treatment of litigants, jurors, witnesses, lawyers, and others based on race, nationality, or sex;</p> <p>Nebraska DR 1-102 Misconduct.</p> <p>(A) A lawyer shall not:</p> <p>.....</p> <p>(5) Engage in conduct that is prejudicial to the administration of justice. Once a lawyer is employed in a professional capacity, the lawyer should not, in the course of such employment, engage in adverse discriminatory treatment of litigants, witnesses, lawyers, judges, judicial officers, or court personnel on the basis of the person's race, national origin, gender, or religion. This subsection does not preclude legitimate advocacy when these factors are issues in a proceeding.</p>

MEMORANDUM

DATE: November 1, 2004

TO: COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

FROM: ELLEN PECK, ED GEORGE AND RAUL MARTINEZ

SUBJECT: PROPOSED REVISIONS TO RULE 2-400: PROHIBITED DISCRIMINATORY CONDUCT IN A LAW PRACTICE

INTRODUCTION

Current rule 2-400 was adopted in 1993, effective January 1, 1994. The rule prohibits a member, in the management or operation of a law practice, from unlawfully discriminating or knowingly permitting unlawful discrimination in: 1) hiring, promoting, discharging or otherwise determining the conditions of employment of any person; or 2) accepting or terminating representation of any client.

No Published Disciplinary Decisions: In the ten years of the rule's history, there have been no published decisions disciplining any lawyer for a violation. [There may have been investigations and/or non-published or published dispositions on which more needs to be developed.]

Comparison to Other Jurisdictions: California is one of six states to have a disciplinary rule which prohibits lawyers from engaging in discriminatory conduct. The American Bar Association does not have an express rule covering this subject matter. [See above "COMPARISON CHART"]

Three public comments have been received to date: Two commenters (including Commissioner Jerry Sapiro) suggest that the rule's scope be expanded and one recommends that the rule stay the same. (See Attachment 2.)

Impact of Commission's Work- To-Date : In as much as this rule contains a definition of "law practice" it should be harmonized with "definition of the practice of law" (in connection with rule 1-300 discussion section) and the "law firm" definition (that has emerged from rule 1-310X and 2-200).

1.
Believed to be negligible.

DISCUSSION

I. SHOULD THE RULE BE ELIMINATED?

Drafting team recommendation: NO

A. Arguments in favor of eliminating the rule:

1. **Conformity with the vast majority of jurisdictions:** As noted above in the comparison chart, the American Bar Association Model Rules of Professional Conduct and a majority of states and U.S. jurisdictions do not have a corresponding rule. In order to facilitate multi jurisdictional legal education and law practice, the rule could be eliminated. This is especially so, since there are other means of adequately regulating lawyers concerning unlawful discriminatory conduct and there are alternative means of disciplining lawyers for the same conduct.
2. **There are other adequate regulations for unlawful lawyer discrimination for which discipline may be imposed:**

Business and Professions Code section 6068, subdivision (a) provides that it is a member's duty to support the Constitution and laws of the United States and of this State. State Bar discipline may be imposed for violation of *any* state or federal law. [*In re Brimberry* (Rev.Dept. 1995) 3 Cal. State Bar Ct.Rptr. 390, 397, fn. 9.] This may include violations of the State Bar Act which are not themselves disciplinable offenses. [*Matter of Harney* (Rev.Dept. 1995) 3 Cal. State Bar Ct.Rptr. 266, 277--violation of § 6147 (requiring written fee agreement) held disciplinable in some circumstances under § 6068(a).

In addition to a number of federal statutes prohibiting discrimination (e.g., 42 USC §2000e-2 [Unlawful employment practices]), California has also adopted a number of anti-discrimination statutes (e.g., California Civil Code section 51 et seq.). A number of these statutes specifically regulate attorneys in the conduct of their law practice. For example:

Sexual Harassment: An attorney is subject to civil liability for sexual harassment of a person with whom the attorney or law firm has a business or professional relationship. [See Civ.C. §§ 51.9, 51.9(2) (defining 'sexual harassment' as sexual advances, solicitation, sexual requests, demands for sexual compliance by a victim, or other verbal, visual or physical conduct of a sexual or hostile nature based on gender, that are unwelcome, pervasive and severe)]

Sexual harassment in employment may also violate the California Fair Employment and Housing Act. [See Gov.C. § 12940(a),(h) & (I)]

Refusal to Perform Legal Services; Discriminatory Legal Services Restrictions: An attorney is subject to discipline for refusing to perform legal services, aiding or inciting the refusal to perform legal services, or making any discrimination or restriction in the performance of legal services, on the basis of the client's or prospective client's race, color,

sex, religion, ancestry, disability, marital status or national origin. [Bus. & Prof.C. § 125.6]²

Another example is Civil Code section 51.5. Although lawyers are not expressly listed, section 51.5 prohibits all business establishments of any kind from discriminating against, boycotting, blacklisting, refusing to engage in business and other similar conduct against any person in this state because of the race, creed, religion, color, national origin, sex, disability, or medical condition of the person or of the person's partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers, or customers, because the person is perceived to have one or more of those characteristics, or because the person is associated with a person who has, or is perceived to have, any of those characteristics.

Arguably, the rule is unnecessary, because all of the discriminatory conduct prohibited by the rule, and more, is the subject of California and Federal law, a violation of which may be disciplined under Business and Professions Code section 6068(a).

B. Arguments Against Elimination of the Rule: California's culture is rich because of its racial, ethnic, sexual orientation, gender, religious, and disable diversity in its residents. California residents have had the benefits of an express rule prohibiting members of the State Bar of California from engaging in unlawful discriminatory conduct for a decade. Even if there is currently adequate protection for the consumers of legal services, law office employees and others because a lawyer may be prosecuted for violating Business and Professions Code section 6068(a), eliminating the rule may send the wrong message.

Elimination of the rule could signal to some that the legal profession does not support disciplining its own for engaging in discriminatory conduct or that the legal profession believes that it does not have a "problem" with discrimination.

Additionally, the rule serves as a reminder to lawyers of the public policy goal of the elimination of bias in the conduct of a practice of law.

II. SHOULD THE RULE BE AMENDED?

A. EXPANDING THE RULE BEYOND ITS CURRENT SCOPE

1. Arguments for expanding the rule to include other practice-related discrimination.

Mr. Kesse suggested that rule 2-400(B)(2) should be more expansive so that it is not restricted to discrimination relating to the acceptance or termination of representation. This would be consistent with the other states' discrimination rules which prohibit discrimination in other law

² Discipline will not be imposed under § 125.6 for the following: (1) discrimination by employers with regard to employees or prospective employees; (2) the presence of architectural barriers to an individual with physical disabilities which conform to applicable state or local building codes; or (3) refusing to perform legal services for individuals posing a direct threat to the health or safety of others.

practice contexts, particularly in contacts with litigants, witnesses, lawyers, judges, judicial officers, or court personnel.

Expanding the scope of lawyer prohibited disciplinary conduct would

There are many methods of expanding the rule. The following methods exemplify methods already in use:

First, the rule could be amended to mirror the Illinois rule by disciplining a lawyer for a violation of federal or state discrimination law which is committed which reflects adversely on the practice of law.

Second, like other states which describe discriminatory conduct, as prejudicial to the administration of justice, the rule could prohibit conduct towards litigants, parties, jurors, witnesses, judges, court personnel, or other lawyers. Some of these rules add the following exception: “ except when those words or conduct are legitimate advocacy because race, sex, religion, national origin, disability, age, or sexual orientation is an issue in the proceeding.”

Third, the current rule could be expanded by simply deleting the qualifying language in rule 2-400(B)(1) and (2).

The third method appears to be the simplest and the most direct. However, an explanatory comment would be important to explain the expansion of the scope of the rule and to put California lawyers on notice that they could be subject to discipline for violating Federal or state discrimination laws.

If you agree with this approach, consider the following draft language to subdivision (B) and the addition of new comment [1]:

(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.~~

.....
[#] The legal profession should be in the forefront of efforts to eradicate invidious or illegal discrimination. Discrimination based on race, national origin, sex, sexual orientation, religion, age, or disability, in connection with the practice of law, has no place in a licensed profession. Violation of federal and state laws prohibiting discrimination in connection with the practice of law, in addition to other civil penalties, warrants professional discipline.

2. Arguments against expanding the rule to include other practice-related discrimination.

While expansion of the scope of the rule has laudable goals, in the ten years of operation of the current rule, it has not been found to be defective, inadequate nor have there been substantial complaints about the narrowness of its scope. Additionally, there has not been a ground swell of complaints that existing federal and state statutes have been inadequate to apprehend lawyer violations of discrimination laws which are outside the scope of current rule 2-400.

Drafting team recommendation: At least to obtain further public comment, the rule should be expanded along the lines suggested above. The above draft encompasses the scope of other states which have adopted anti-discrimination rules, except where those rules may run afoul of competing constitutional rights or when words or conduct are legitimate advocacy because race, sex, religion, national origin, disability, age, or sexual orientation is an issue in the proceeding of litigants.

B. EXPANSION OF THE SCOPE OF DISCIPLINE INVESTIGATION BY ELIMINATING SUB-SECTION (C).

1. Arguments for expansion of the scope of disciplinary investigation.

Jerry Sapiro has recommended the deletion of sub-section (C), which would effectively expand the scope of the rule, because the State Bar would be authorized to investigate claims of discrimination which had not been proven through a prior adjudication.

His compelling arguments are set forth in appendix B and will not be repeated here.

2. Arguments against expansion of the scope of disciplinary investigation.

The principles expressed by Jerry Sapiro are compelling and laudable. However, subpart (C) should be retained for the following reasons:

- a. While the Office of Chief Trial Counsel are learned in the law of lawyers and conscientious, they do not have the special expertise in discrimination law to be able to investigate and prosecute complaints about lawyer unlawful discrimination, without the assistance of a prior record of a tribunal. Moreover, since that Office is challenged to manage current levels of investigations, it is unlikely that the Office could obtain additional resources to build the needed expertise.
- b. Eliminating subpart (C) may involve the State Bar in jurisdictional disputes with federal and state agencies which have purview over various discrimination investigations.
- c. Opening the State Bar disciplinary process to claims of lawyer discrimination, even if narrowed to employment and declining and terminating representation, is likely to be a significant increase in complaints on an annual basis. Even if the State Bar could obtain the human resources necessary to effectively investigate such claims, it is also unlikely that it will be able to obtain the fiscal resources for this effort.
- d. If the State Bar is unable to obtain the resources to effectively investigate claims of discrimination, having a rule which does not require the action of a prior tribunal

may create expectations of action that can never be fulfilled. If the rule were changed, thereby creating such expectations and the State Bar were unable to meet the challenge, there would be a corresponding lack of public trust and confidence in the disciplinary system.

- e. This challenge need not be taken on, since there has been no significant complaint about the inadequacy of civil and administrative remedies to handle lawyer discrimination.

Drafting team recommendation: Although in principle, sub-part (C) could be deleted, for other policy reasons stated above, no change to sub-part (C) is recommended.

C. THE RULE SHOULD NOT BE AMENDED BUT THE DISCUSSION SHOULD BE CLARIFIED

Many of the arguments set forth above are also arguments in favor of the rule's status quo. Absent substantive changes to the black letter of the rule, it is nevertheless recommended that the discussion section be clarified.

The vast majority of lawyers believe that the rule is limited in scope to discrimination in law practice employment matters and does not encompass discrimination in acceptance and termination of client representation. Moreover, because the rule's scope of conduct and "trigger" for an investigation is limited, lawyers may not understand that they may be subject to discipline for other discriminatory conduct.

The foregoing principles should be highlighted in a discussion paragraph to put lawyers on notice of these important matters.

Discussion:

- [#] The legal profession should support efforts to eradicate invidious or illegal discrimination. Discrimination based on race, national origin, sex, sexual orientation, religion, age, or disability, in connection with the practice of law, has no place in a licensed profession, which advocates that society be regulated by the rule of law. Violation of federal and state laws prohibiting discrimination in connection with the practice of law, in addition to other civil penalties, warrants professional discipline.
- [#] While discipline under this rule cannot be commenced unless the conditions in subpart (C) above, lawyers should note that they may be disciplined for a violation of federal or state law prohibiting discrimination on the basis of race, national origin, sex, sexual orientation, religion, age or disability under the authority of Business and Professions Code section 6068(a).

ATTACHMENT 1

HISTORY OF CURRENT RULE 2-400

Summary of new Rule as Proposed in July 1993

Proposed new rule 2-400 would prohibit a member, in the management or operation of a law practice, from unlawfully discriminating or knowingly permitting unlawful discrimination in: 1) hiring, promoting, discharging or otherwise determining the conditions of employment of any person; or 2) accepting or terminating representation of any client. The rule would provide that no disciplinary investigation or proceeding may be initiated by the State Bar against a member under the 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. In order for discriminatory conduct to be actionable under rule 2-400, it must first be found to be unlawful by an appropriate civil administrative or judicial tribunal under applicable state or federal law.

Subparagraph (A)(1) would define the term "law practice" to mean sole practices, law partnerships, law corporations, corporate and governmental legal departments, and other entities which employ members to practice law.

Subparagraph (A)(2) would define the term "knowingly permit" to mean a failure to advocate corrective action where a member knows of a discriminatory policy or practice which results in the unlawful discrimination prohibited in paragraph (B) of the rule.

Subparagraph (A)(3) would define the terms "unlawfully" and "unlawful" to mean violation of applicable state or federal statutes or decisions making unlawful discrimination in employment and in offering goods and services to the public.

Subparagraph (B)(1) would prohibit a member, in the management or operation of a law practice, from unlawfully discriminating or knowingly permitting unlawful discrimination on the basis of race, national origin, sex, sexual orientation, religion, age or disability in hiring, promoting, discharging or otherwise determining the conditions of employment of any person.

Subparagraph (B)(2) would prohibit a member, in the management or operation of a law practice, from unlawfully discriminating or knowingly permitting unlawful discrimination on the basis of race, national origin, sex, sexual orientation, religion, age or disability in accepting or terminating representation of any client.

Paragraph (C) would provide that no disciplinary investigation or proceeding may be initiated by the State Bar against a member under rule 2-400 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. Paragraph (C) would provide that, 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. Paragraph (C) would also provide that in order for discipline to be imposed under this rule, 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.

Paragraph one of the Discussion section would clarify that 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. It would clarify that until there is a finding of civil unlawfulness, there is no basis for disciplinary action under rule 2-400.

Paragraph two of the Discussion section would clarify that a complaint of misconduct based on rule 2-400 may be filed with the State Bar following a finding of unlawfulness in the first instance even though that finding is thereafter appealed.

Paragraph three of the Discussion section would clarify that 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.

[July, 1993 red bound rule filing at pg. 8.]

ATTACHMENT 2 — RELEVANT PUBLIC COMMENTS

April 5, 2002 Letter from John Kendrick Kesse, California Center for Law and the Deaf (Pub. Comm. No. 2002-18):

[SUMMARY] Discrimination: Rule 2-400(B)(2) should be more expansive so that it is not restricted to discrimination relating to the acceptance or termination of representation.

April 5, 2002 Letter from Ernestine Forrest, Chair, Diversity in Profession Committee (LACBA) (Pub. Comm. No. 2002-20):

[SUMMARY] Discrimination: Rule 2-400 should be maintained.

August 24, 2004 Sapiro E-mail to RRC:

Dear Friends:

This is another comment delayed by my illness. I apologize to all of you.

1. Rule 2-400 was a step in the right direction. However, it did not go far enough.
2. Lawyers ought to be in the forefront of efforts to eradicate invidious or illegal discrimination. Discrimination based on race, national origin, sex, sexual orientation, religion, age, or disability has no place in a licensed profession. However, this Commission acquiesced in unlawful discrimination in the practice of law by immunizing from disciplinary investigation or proceedings lawyers who unlawfully discriminate unless first “a tribunal of competent jurisdiction” has adjudicated a complaint of alleged discrimination and has found that the unlawful conduct occurred.
3. This means that, before an aggrieved person may complain to the State Bar and can expect the State Bar even to investigate an obvious case of improper discrimination, that person must first have filed administrative complaints (for example with the California Department of Fair Employment and Housing or the Federal Equal Employment Opportunities Commission); must either wait until the sometimes interminable investigations by the administrative agencies have been concluded or must waive the investigation by the agencies and obtain immediate right to sue letters; must then file suit; and must prosecute that lawsuit to judgment in his or her favor. If he or she has the temerity to accept a settlement with attorneys who unlawfully discriminated, there will be no discipline of the lawyers, even if they publicly admit wrongdoing. The Office of Trial Counsel may not even investigate the misconduct. This is true, even if the attorney publishes an advertisement saying that he or she refuses to accept clients on the basis of race, national origin, sex, sexual orientation, religion, age, or disability. This is true even if the lawyer or law firm publicly refuses to hire a lawyer who does not meet preconceived notions of race, national origin, sex, sexual orientation, or the like.

4. Except in very unusual cases, the administrative, legal and expense burdens on a person who has suffered improper discrimination make it almost impossible for Rule 2-400 to be enforced. Paragraph (C) of Rule 2-400 eviscerates the rule.
5. The Office of Chief Trial Counsel could easily investigate many forms of discrimination. For example, one law firm in San Francisco's East Bay openly advertised that it would only represent men in domestic relations cases. Would we also accept advertising by a law firm that said it would only represent Caucasians? If a restaurant cannot discriminate on such basis, why should a lawyer be allowed to discriminate on that basis?
6. Certainly, the Office of Chief Trial Counsel would be just as competent to investigate such public advertising. No unique qualifications to evaluate it are needed.
7. I recommend that we delete paragraph (C). It is an embarrassment.

With best regards to all of you,

Jerry

-----Original Message-----

From: Soria, Felicia

Sent: Monday, December 27, 2004 8:23 AM

To: Ethics: Rules Revision Commission

Subject: [rrc] FW: RPC 2-400

Commission Members, Liaisons and Interested Persons:

The following is being forwarded at the request of Mary Yen.

Commission Leaders and Co-Drafters,

1. Per your instruction at the November meeting, I sent the following request to OCTC:

The Commission for the Revision of the RPCs worked on 2-400 at its meeting on November 12th. The Commission appears inclined to retain a rule of professional conduct in this area, possibly with modifications to expand its scope. Thoughts for modification have focused on provisions (B) and (C), with addition/change of comments in the Discussion portion.

For provision (B), the Commission is leaning toward deleting the qualifying language in current subparts (B) (1) and (2). By deleting the qualifying language in these 2 provisions, the scope of 2-400 would be expanded. A comment may be added to say that violation of federal and state laws prohibiting discrimination in connection with the practice of law, in addition to civil penalties, warrants professional discipline.

With this as background, the Commission requests OCTC comment re provision (C). If (C) were deleted, what would be the impact on OCTC's disciplinary investigations and proceedings? If OCTC receives complaints of 2-400 misconduct based on statutory violations, does OCTC have the resources and the expertise to handle these complaints through all phases of the discipline system? The thought here is that allegations of unlawful discrimination usually take special expertise to handle, and that without the assistance of a prior record of a tribunal OCTC may not have the special expertise and resources to investigate and prosecute complaints about attorney unlawful discrimination. There is a recollection on the Commission that (C) was included because of past concern that disciplinary staff did not have the expertise to conduct original investigation of these cases.

2. I received a reply from OCTC, as follows:

OCTC thinks there is no problem deleting (B) (1) and (2). Discrimination at any point should come within the rule.

OCTC thinks deleting section (C) would be a very big problem. Not because they don't have or couldn't develop the expertise or ability to do handle these cases, but because, except in the most obvious case where there is "smoking gun" type evidence, these cases are difficult and resource intensive cases to investigate and prove. Just to investigate a case that may end up closing because of a finding of no violation could be an enormous resource drain. Numerous witness interviews and large document productions are often involved in these cases. Witness credibility can be a big factor in these cases too, so getting culpable after trial may be less certain than OCTC normally expects when it files charges. There can be levels of subtlety in these cases that may make them difficult to investigate in the time frame OCTC normally investigate cases, including cases designated as complex (i.e., 12 months.) These subtleties also make them difficult to prove. It may be difficult to sustain OCTC's burden of proof by clear and convincing evidence without a "smoking gun", yet OCTC will have to investigate all such complaints made. Very few will be easy to close without a full and lengthy investigation. OCTC may receive a lot of these cases if the requirements of section (C) are removed.

OCTC thinks the reason section (C) was added to the rule originally is that these cases are too easy to allege and often too hard to investigate and prove in the ordinary case.

3. I'll forward this email to Randy's office to distribute to other Commissioners.

Mary Yen

*Peck
George
Martinez

F. Consideration of Rule 2-400. Prohibited Discriminatory Conduct in a Law Practice *[pages 127 – 144]*

(Co-drafters are assigned to review the current rule and previously distributed rule comparison charts (clear binder) and relevant public comments as indicated in the previously circulated revised public comment charts. Co-drafters are also assigned to consider whether any work- to- date by the Commission, especially rules that have been tentatively approved, impacts any aspect of the assigned rule. If so, then the co-drafters should address that impact. A proposed amended rule or report should be prepared and submitted to staff by 12:00 noon on **Monday, November 1st** for distribution with the November meeting agenda materials.)

From 11/1/04 Rule Draft prepared by Ellen Peck for 11/19/04 Meeting:

[9.1] 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.
- (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.

1. Ellen: One issue concerns the definition section (paragraph (A)). There are at least several issues in definition section:
 - a. Should there be a definition section?
 - b. “Law practice” issue

Let’s suspend that discussion and address the policy/substantive issues.
2. Ellen: A second issues concerns the scope of the rule. Consider the red-line version at page 129.
 - a. What should be the scope of the rule?
 - b. Drafting team has struck (B)(1) and (2).
 - c. The scope is a bit narrow as currently drafted.
 - d. There are other areas besides hiring, promotion, etc., that can be addressed by the rule (e.g., discrimination against vendors).
 - e. Drafting subcommittee felt that the rule should be broadened to include the laws/statutes re discrimination.
 - f. Should all come within “management or operation of a law firm”
3. Ellen: A third issue Jerry raised is whether (C) should be eliminated.
 - a. Drafting committee agrees in substance/concept but questions whether the bar has the resources to actually follow through on discrimination allegations, given the current level of funding, etc.
 - b. Question meaningful implementation of the rule if we remove (C).
4. Ellen: A fourth issue is how to expand the scope.
 - a. In a law practice,
 - b. The Illinois approach (except for advocacy).
 - c. Committee did not buy into the specifics of Rhode Island, etc., as much of what is addressed by the Rhode Island rule would be covered by statute.

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- (1) Harry: how about jury selection that is not related to advocacy but is simply discriminatory? Ellen concedes probably not covered by statute.
 - d. Ellen: Does the Commission want us to go down that path with the next draft?
5. Raul: Echoes the comments that Ellen made. We would like comments as to how to broaden the rules, etc.
 - a. Looking for comments.
6. Mark: This is a law firm management rule. Not aimed at the Greensteins of the world (Baker & McKenzie)
 - a. It is aimed at the manager of a law firm.
 - b. Do we want to discipline those folks in the *Hishon* situation (e.g., where a lawyer claims she should have been partner). See *Hishon v. King & Spaulding* (1984) 467 U.S. 69, 104 S.Ct. 2229, 81 L.Ed.2d 59.
 - c. Do we want to reach the Sidley Austin case – i.e., where the non-equity partners have been demoted, etc.
 - (1) Those people are already subject to discipline under the current rule, etc.
 - (2) However, if I'm an associate and know sexual harassment is happening, I have no obligation.
 - d. Mark has concern that sophistication of employment law is such that it is problematic for law firm partners to prohibit discriminatory law firm practices.
 - e. Mark thinks Cal. Is a leader in this field but he wants an enforceable rule. If you take out (B)(1) and (2), you no longer have an employment discrimination rule and are falling over into rule 8.4.
 - f. Sum: Not in favor expanding (B) at this time. Keep (1) and (2).
7. Jerry: Restricts comments to (B).
 - a. Two things we should address. There was more than Judicial Council Report that precipitated this rule.
 - b. There were several resolutions by the Conference of Delegates, etc.
 - c. There were two additional rules that the BOG never forwarded to the Supreme Court.

- d. Rule 3-220 – prohibiting discrimination re advocacy discrimination, etc.
- e. Rule 5-200(f) – harassing or impugning conduct against witness, juror, lawyer, etc.
 - (1) The problem w/ 3-220 and 5-200 was drafting the rule without impairing advocacy.

(2) We need to have some way of getting at invidious discrimination (e.g., Oakland D.A. who had a policy to exclude Jews from death penalty cases).

- 8. Paul: Remembers the work on this rule.
 - a. The drive to get the rule adopted was that there were people who wanted to cover any discrimination by a lawyer, but decided to limit to (B) so it did not reach what lawyer did in his or her private life.
 - b. Not sure why taking out (B)(1) and (2) would change anything.
 - c. Management or operation of law practice might also reach a prosecutor who has violated Wheeler/Batson.

(1) **KEM Research:** Need to check whether there has been any discipline anywhere re this issue.

- 9. Tony: Is this a scheme for changing behavior.
 - a. The potential for civil liability has a real possibility.
 - b. But would the state bar proceedings add anything to that incentive not to discriminate?
 - c. Perhaps there are some really bad things lawyers do that we can identify and do something that would be effective.
- 10. Kurt: There are things that lawyers do in their incarnation as people rather than as lawyers.
 - a. So the rule is politically correct.
 - b. Once you decide you are going to put this in a Professional Conduct rule and use the disciplinary process to enforce social policies then they should not be limited by (1) or (2).
 - (1) Put the legal onus on the lawyers across the board.

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- c. “Management or operation”. Does the lawyer have to have some managerial function?
 - (1) Mark: There is better language in MR 5.1 – should be partners or other lawyers with comparable managerial authority.
 - (2) But the rule prohibits “discrimination” by itself or to “knowingly permit” (that would limit it to partners, etc.)
- 11. Joella: Wants to catch every fish in the net who is doing anything discriminatory that they should not be doing.
 - a. This rule should be written broadly.
 - b. Harry: Government lawyers are covered as government organizations come within “law practice.”
- 12. Stan: Agrees w/ Joella, but believes that we already can reach that conduct under the current federal and state statutes.
 - a. This reminds him of the “offensive personality” debate.
 - b. If we go too far, we begin impinging on free speech and legitimate advocacy.
 - c. E.g., speaking out against the State of Israel.
- 13. KEM: Pass
- 14. Randy: Pass.
- 15. Harry: There’s a title to this rule. It doesn’t belong in 5.1 or 8.4, so it should be a separate rule.
 - a. So, first point, the rule should be a stand-alone rule.
 - b. Then need to ask what should be the scope of the rule.
 - c. If you discriminate against potential renters of extra office space, your conduct should be covered by the rule, so drop (B)(1) and (2).
 - d. Perhaps can take some language out of 8.4 (e.g., Comment 3) and drop it into this rule.
 - (1) Perhaps drop the phrase “administration of justice,” i.e., use comment 3 to rule 8.4 without that phrase.
 - e. Also consider the last sentence of comment 3 re peremptories (“A trial judge's finding that peremptory challenges were

exercised on a discriminatory basis does not alone establish a violation of this rule.”)

- (1) Is it enough that a court has made a finding that the lawyer engaged in Batson/Wheeler situation? Should it be enough?
 - (2) Kurt asks whether you can make a challenge to a “class” because you believe that class of people is “cheap” or “generous,” etc., then is that O.K.?
- f. Jerry notes that without (B)(2), that conduct would fall outside “operation or management” of law office because it falls more into the representation of the client (advocacy).
 - g. Stan: You have to decide how much you trust the response you get to your voir dire questions.
 - (1) You’re drawing a line that is a bit fine.
 - (2) Harry: Courts do it all the time.
 - h. Mark: Can a law firm represent only men, or only women? Or may an immigration lawyer represent only Iranians?
16. Diane: Seldom is advocate for a rule.
- a. Except for this one. Should remain largely unchanged.
 - b. Should be a stand-alone rule.
 - c. Is more than about jobs.
 - d. Would probably eliminate (B)(1) and (2).
 - e. Be aware that this rule treads on CIVILITY and LAW FIRM DISCIPLINE.
 - (1) Diane: Agrees that lawyers should not be allowed to turn a blind eye, so maybe need law firm discipline.
 - f. There is also a REPORTING obligation (as part of corrective action).

17. Straw Vote (Harry): As to (C), how many want to keep (C).

YES: 7 NO: 2 ABSTAIN: 1

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1. Stan: (C) was included to keep bar staff out of original investigation where they did not have the expertise.
2. Kurt: abstains because it is a buffer between the aspirations stated in the rule and the reality.
3. Jerry: There are inconsistencies here.
 - a. Ellen's report notes that there are not many complaints under the rule, yet there's a claim that the Bar doesn't have the resources to handle the complaints.

b. Could the bar staff these cases?

18. Ellen: Many thanks for direction.