

McCurdy, Lauren

From: Kevin Mohr [kemohr@charter.net]
Sent: Thursday, October 01, 2009 10:30 PM
To: McCurdy, Lauren; Difuntorum, Randall; Lee, Mimi
Cc: Kevin Mohr G
Subject: RRC - 2-400 [8.4.1] - Ill.GG. October 16-17, 2009 Meeting Materials
Attachments: RRC - 2-400 [8-4-1] - Public Comment Chart - By Commenter - DFT2 (09-30-09)ERP-KEM.doc; RRC - 2-400 [8-4-1] - Compare - Rule & Comment Explanation - DFT2 (010-01-09)ERP-KEM.doc; RRC - 2-400 [8-4-1] - Dashboard - ADOPT - DFT2 (10-01-09-09)ERP-KEM.doc; RRC - 2-400 [8-4-1] - Compare - Introduction - DFT2 (10-01-09)ERP-KEM.doc; RRC - 2-400 [8-4-1] - Dash, Intro, Rule, Comment, PubCom - COMBO - DFT2 (10-01-09-09)ERP-KEM.pdf

Greetings Lauren:

To make your job a little easier, I've attached all the materials you need for 8.4.1 in a single, scaled PDF file. The ingredients of the attached file are also attached, in Word.

I reviewed what Ellen submitted and found a few nits and other slight problems that might slow down the process of our BOG submission. Therefore I made the changes to the attached. Please substitute the attached if you still have time to do so. In the long run, I think it will be to our benefit.

In addition to the combination PDF file, here is what I've attached, all in Word:

1. Dashboard, Draft 2 (10/1/09)-ERP-KEM. Shortened Summary and removed the reference to stakeholders. We are not treating folks who simply submitted a public comment as a stakeholder.
2. Introduction, Draft 2 10/1/09)-ERP-KEM. I added a minority to reflect a dissent Jerry submitted last year.
3. Rule & Comment Chart, 10/1/09)-ERP-KEM. A number of nits and also a more detailed explanation of Jerry's dissent in relation to paragraph (c).
4. Public Comment Chart, Draft 2 (9/30/09)-ERP-KEM. Just resorted the commenters alphabetically.

Please let me know if you have any questions. Thanks,

Kevin

--
Kevin E. Mohr
Professor
Western State University College of Law

Proposed Rule 8.4.1 [4-200]

“Prohibited Discrimination in Law Practice Management and Operation”

(Draft #8, 10/1/09)

Summary: Proposed Rule 8.4.1 is based on current rule 2-400 which prohibits unlawful discrimination in the management or operation of a law firm. There is no Model Rule counterpart (Model Rule 8.4 and proposed Rule 8.4(e) deal with discrimination by individual lawyers while representing a client).

Proposed Rule 8.4.1 expands the scope of present rule 2-400, which is limited to unlawful discrimination in employment and offering goods and services, while the proposed Rule includes any unlawful discrimination in the management and operation of a law practice. See Introduction.

Comparison with ABA Counterpart

Rule	Comment
<input type="checkbox"/> ABA Model Rule substantially adopted	<input type="checkbox"/> ABA Model Rule substantially adopted
<input type="checkbox"/> ABA Model Rule substantially rejected	<input type="checkbox"/> ABA Model Rule substantially rejected
<input type="checkbox"/> Some material additions to ABA Model Rule	<input type="checkbox"/> Some material additions to ABA Model Rule
<input type="checkbox"/> Some material deletions from ABA Model Rule	<input type="checkbox"/> Some material deletions from ABA Model Rule
<input checked="" type="checkbox"/> No ABA Model Rule counterpart	<input checked="" type="checkbox"/> No ABA Model Rule counterpart

Primary Factors Considered

Existing California Law

Rules

Statute

Case law

State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(14 Members Total – votes recorded may be less than 14 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Public Comment Distribution

Vote (see tally below) [to be determined at Oct. mtng.]

Favor Rule as Recommended for Adoption _____

Opposed Rule as Recommended for Adoption _____

Abstain _____

Approved on Consent Calendar

Approved by consensus

Minority/Position Included on Model Rule Comparison Chart: Yes No

Stakeholders and Level of Controversy

No Known Stakeholders

The Following Stakeholders Are Known:

Very Controversial – Explanation:

Moderately Controversial – Explanation:

The scope of enforcement of laws against discrimination are always somewhat controversial and this rule is no different. The commenters' views on policy ranged from having no rule at all (Santa Clara County Bar Association) to removing the prior adjudication requirement and to extending the scope of the rule to lawyer ancillary business services (Simmons Firm ALC).

Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 8.4.1* Prohibited Discrimination in Law Practice Management and Operation

October 2009

(Draft rule following consideration of public comment.)

INTRODUCTION:

1. Proposed Rule 8.4.1 prohibits unlawful discrimination, based upon race, national origin, sex, gender, sexual orientation, religion, age or disability, in the management and operation of a law firm.
2. Proposed Rule 8.4.1 is based on current rule 2-400, which prohibits unlawful discrimination in the management or operation of a law firm. There is no Model Rule counterpart (although ABA Model Rule 8.4 and proposed rule 8.4(e) deal with discrimination by individual lawyers while representing a client).
3. Proposed Rule 8.4.1 expands and narrows the scope of rule 2-400:
 - a. Expanded scope: The current rule is limited to unlawful discrimination in employment and offering goods and services; the proposed rule includes any unlawful discrimination in the management and operation of a law practice based upon race, national origin, sex, gender, sexual orientation, religion, age or disability.
 - b. Narrowed scope: Based upon commenter suggestions, the proposed rule was narrowed to apply only to managerial and supervisory lawyers within the law firm. With regard to discriminatory conduct of lawyers while representing clients, see Rule 8.4(e).
4. *Minority.* A minority of the Commission argues that the Rule provides no meaningful relief for victims of discrimination by lawyers and creates no rational risk of discipline for even blatant discriminatory conduct. See Explanation of Changes for paragraph (c).

* Proposed Rule 8.4.1, Draft #8 (10/1/09).

<p align="center"><u>ABA Model Rule</u> No Comparable ABA Model Rule</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 8.4.1 Prohibited Discrimination in Law Practice Management and Operation</p>	<p align="center"><u>Explanation of Changes to the California Rule 2-400</u></p>
	<p>(Aa) For purposes of this ruleRule:</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>This Rule carries forward current rule 2-400's prohibitions against unlawful discrimination in the operation or management of a law firm. While comment [3] to Model Rule 8.4 prohibits a lawyer from knowingly manifesting bias or prejudice by words or conduct, when such actions are prejudicial to the administration of justice and when representing a client, no Model Rule prohibits discrimination in the operation and management of a law firm.</p> <p>Amendments show the variations from current rule 2-400.</p> <p>Proposed paragraph (a) contains definitions which are applicable to this Rule only. Comment [2] clarifies that the definition of "law practice" means the same as "law firm," which is defined in proposed Rule 1.0.1. Therefore, no additional definition of "law practice" is necessary and the definition from current rule 2-400 has been deleted.</p>
	<p>(21) "knowingly permit" means a failure to advocate corrective action where the member<u>managerial or supervisory lawyer</u> knows of a discriminatory policy or practice which<u>that</u> results in the unlawful discrimination prohibited in paragraph (Bb); and</p>	<p>Subparagraph (a)(1) has been narrowed and clarified, at the suggestion of commenters (COPRAC, Simmons Firm ALC and Orange County Bar Association), so that culpability is limited to those lawyers who have the authority to change the discriminatory practice. (See also Public Commenter's Chart.)</p>

* Proposed Rule 8.4.1, Draft 8 (10/1/09). Redline/strikeout showing changes to the current California rule as there is no ABA Model Rule counterpart.

<p align="center"><u>ABA Model Rule</u> No Comparable ABA Model Rule</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 8.4.1 Prohibited Discrimination in Law Practice Management and Operation</p>	<p align="center"><u>Explanation of Changes to the California Rule 2-400</u></p>
	<p>(32) "unlawfully" and "unlawful" shall be determined by reference to applicable state or federal statutes or decisions making unlawful <u>prohibiting</u> discrimination in employment and in offering goods and services to <u>on the public basis of race, national origin, sex, gender, sexual orientation, religion, age or disability, and as interpreted by case law or administrative regulations.</u></p>	<p>Subparagraph (a)(2) definitions have been streamlined and clarified.</p> <p>The words "decisions making unlawful" were stricken for imprecision since court decisions do not inherently make conduct unlawful, but rather interpret the meaning of the words of a statute concerning the affected conduct. Accordingly, the words "as interpreted by case law" were substituted to clarify the definition. Also, because administrative bodies are often empowered to develop administrative regulations to enforce and regulate discriminatory conduct, the words "or administrative regulations" was added to clarify the definition.</p> <p>The scope of the Rule has been expanded beyond employment and offering goods and services. (See paragraph (b).) Therefore the words "in employment and in offering goods and services to" were stricken and the words "basis of race, national origin, sex, gender, sexual orientation, religion, age or disability" were added consistent with the expansion of the subject matter of prohibited conduct. See Explanation of Changes for paragraph (b).</p>
	<p>(Bb) In the management or operation of a law practice , a member <u>lawyer</u> shall not unlawfully discriminate or knowingly permit unlawful discrimination on the basis of race, national origin, sex, <u>gender</u>, sexual orientation, religion, age or disability in:</p> <p>(1) hiring, promoting, discharging, or otherwise determining the conditions of</p>	<p>Paragraph (b)'s scope has been expanded from unlawful discrimination in employment and in selling goods and services to any unlawful discrimination in the operation and management of a law practice on the basis of race, national origin, sex, gender, sexual orientation, religion, age or disability. The expanded scope includes for example, unlawful conduct in leasing, violations of the Americans with Disabilities Act, or sexual harassment.</p> <p>The word "gender" was added at the suggestion of the Bar</p>

<p align="center"><u>ABA Model Rule</u> No Comparable ABA Model Rule</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 8.4.1 Prohibited Discrimination in Law Practice Management and Operation</p>	<p align="center"><u>Explanation of Changes to the California Rule 2-400</u></p>
	<p>employment of any person; or</p> <p>(2) accepting or terminating representation of any client.</p>	<p>Association of California to conform to the wording of discrimination statutes.</p> <p>Consistent with the expanded scope of the Rule, and as requested by the Santa Clara County Bar Association, the limitations of subparagraphs (b)(1) and (b)(2) have been deleted.</p>
	<p>(C) No disciplinary investigation or proceeding may be initiated by the State Bar against a member under this ruleRule 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 ruleRule. In order for discipline to be imposed under this ruleRule, 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>Paragraph (c) has not been changed except tofor minor style changes.</p> <p>Paragraph (c) continues to prohibit any disciplinary investigation unless and until there is an appropriate adjudication that unlawful discriminatory misconduct has occurred. This policy recognizes that the State Bar disciplinary process has limited resources to investigate and prosecute all alleged unprofessional conduct and that a State Bar disciplinary process should not be the initial or primary remedy for complaints about law practice discrimination when the law provides other specialized administrative agencies to enforce and regulate all alleged discriminatory conduct and provides for specialized remedies.</p> <p><i>Minority Position.</i> A minority of the Commission has dissented from this provision on the ground that its inclusion renders the Rule unenforceable because it provides no meaningful relief for victims of discrimination by lawyers and creates no rational risk of discipline for even blatant discriminatory conduct.</p>

<p align="center"><u>ABA Model Rule</u> No Comparable ABA Model Rule Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 8.4.1 Prohibited Discrimination in Law Practice Management and Operation Comment</p>	<p align="center"><u>Explanation of Changes to the California Rule 2-400</u></p>
	<p>[1] Consistent with lawyers' duties to support the federal and state constitution and laws, lawyers should support efforts to eradicate illegal discrimination in the operation or management of any law practice in which they participate. Violations of federal or state anti-discrimination laws in connection with the operation of a law practice warrant professional discipline in addition to statutory penalties.</p>	<p>The comparison is to current rule 2-400, Discussion. Comment [1] is new and explains the policy supporting this Rule.</p>
	<p>[2] This Rule applies to all managerial or supervisory lawyers, whether or not they have any formal role in the management of the law firm in which they practice. (See Rule 5.1. But see also Rule 8.4(g).) "Law practice" in this Rule means "law firm," as defined in Rule 1.0.1, a term that includes sole practices. It does not apply to lawyers while engaged in providing non-legal services that are not connected with or related to law practice, although lawyers always have a duty to uphold state and federal law, a breach of which may be cause for discipline. (See Business and Professions Code section 6068(a).)</p>	<p>Comment [2] is new and explains the changed scope of the Rule:</p> <ol style="list-style-type: none"> 1. The scope of the rule is limited to managerial or supervisory lawyers. (See explanation under paragraph (a)(2) above.) 2 "Law practice" means the same as law firm and includes sole practices. (See Explanation for subparagraph (a)(1), above.) 3. The scope of the Rule does not include non-legal services not connected to or related to the law practice. The Commission did not adopt this because the State Bar has no authority to regulate ancillary businesses, which may be managed or operated by non-lawyer personnel, where the non-legal businesses are not engaged in the practice of law. While a lawyer engaged in ancillary business activities may be disciplined for some conduct, as defined by case law, not all ancillary business conduct, unconnected with the provision of legal services, is the subject of discipline if- it is authorized- by other law.

<p align="center"><u>ABA Model Rule</u> No Comparable ABA Model Rule Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 8.4.1 Prohibited Discrimination in Law Practice Management and Operation Comment</p>	<p align="center"><u>Explanation of Changes to the California Rule 2-400</u></p>
	<p>[3] In order for discriminatory conduct to be actionable under this ruleRule, it must first <u>must</u> 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 ruleRule.</p>	<p>Comment [3] is the same as rule 2-400 Discussion, paragraph 1, with stylistic editorial changes only.</p>
	<p>[4] A complaint of misconduct based on this ruleRule may be filed with the State Bar following a finding of unlawfulness in the first instance even though that finding is thereafter <u>is</u> appealed.</p>	<p>Comment [4] is the same as rule 2-400 Discussion, paragraph 2, with stylistic editorial changes only.</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. (Added by order of Supreme Court, effective March 1, 1994.)</p>	<p>Rule 2-400 Discussion, paragraph 3, was deleted as unnecessary. The proposed Rule does not otherwise limit the State Bar's prosecutorial authority to investigate and prosecute alleged attorney misconduct coming within the ambit of California Business and Professions Code sections 6106 or 6068 where the conduct may arguably be a violation of this rule. Nor does the promulgation of this Rule pursuant to Business and Professions Code section 6007 limit in any way the California Supreme Court's inherent authority to impose discipline or another disciplinary standard. (Bus. & Prof. C., §6087.)</p>
	<p>[5] <u>This Rule addresses the internal management and operation of a law firm. With regard to discriminatory conduct of lawyers while representing clients, see Rule 8.4(g).</u></p>	<p>Comment [5] is new and provides a cross reference to rule 8.4(g) concerning lawyer's discriminatory conduct while representing clients.</p>

<u>ABA Model Rule</u> No Comparable ABA Model Rule Comment	<u>Commission's Proposed Rule</u> Rule 8.4.1 Prohibited Discrimination in Law Practice Management and Operation Comment	<u>Explanation of Changes to the California Rule 2-400</u>

**Rule 8.4.1 Prohibited Discrimination in Law Practice Management and Operation.
[Sorted by Commenter]**

TOTAL = 6 Agree = 1
Disagree = 2
Modify = 3
NI = ___

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
2	COPRAC (Dennis Maio)	M			<p>Subpart (b) is ambiguous. The first phrase, “in the management or operation of a law practice” creates a limitation that is arguably eliminated by the last clause, “whether or not the lawyer is a partner or shareholder or serves in a management role.”</p> <p>Concerned that a lawyer who is not a manager, shareholder, or partner would be subject to discipline under subpart (b) of this rule for “knowingly permitting” unlawful discrimination as defined in subpart (a)(1) because “knowingly permitting” is broadly defined to include failing to advocate corrective action. Non-managing lawyers should be subject to discipline for unlawful discrimination but not for failing to advocate corrective action.</p> <p>As such, rewrite (b) to read: “a lawyer shall not: (1) unlawfully discriminate on the basis of race, national origin, sex, sexual orientation, religion, age or disability, whether or not the lawyer is a partner or shareholder or serves in a management role; (2) in the management of a law practice, knowingly permit unlawful discrimination on the basis of race, national</p>	<p>Commission removed the phrase “whether or not the lawyer is a partner or shareholder or serves in a management role.”</p> <p>Commission narrowed the scope of the definition for “knowingly permit” in paragraph (a)(1) to limit it to managerial and supervisory lawyers in light of this comment.</p> <p>Commission did not make the requested revision, in part, because the Commission’s rule has deleted the phrase “whether or not the lawyer is a partner or shareholder or serves in a management role.”</p>

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

**Rule 8.4.1 Prohibited Discrimination in Law Practice Management and Operation.
[Sorted by Commenter]**

TOTAL = 6 **Agree = 1**
Disagree = 2
Modify = 3
NI = ___

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					origin, sex, sexual orientation, religion age, or disability.	
6	Orange County Bar Association (Trudy C. Levindofske)	M			Rule's requirement of a prior adjudication of discrimination is appropriate. Associate lawyers who commit unlawful discrimination should be subject to discipline but an associate's failure to advocate corrective action should not result in discipline.	No change necessary. The Commission agreed. Rules 8.4, comment [7] and 5.2 cover discriminatory conduct by a non-managerial or non-supervisory lawyer. The scope of this rule was narrowed to managerial and supervisory personnel.
4	San Diego County Bar Association (Simmons. Ross)	A			none	No response necessary.
3	San Francisco, Bar Association of (Philip Humphreys)	M			The term "advocate corrective action" in (a)(1) should be replaced with "formally notify the law practice." (b) and (c) should include the word "gender" between "sex" and "sexual orientation."	Commission did not make the requested revision, in part, because notification may not be the sole means of taking corrective action. Commission agreed and implemented a responsive revision.
1	Santa Clara County Bar Association (Christine Burdick)	D			Delete the rule in its entirety: Such conduct is illegal under a number of state and federal statutes and is best governed by the civil judicial system and the administrative enforcement mechanisms (e.g. EEOC) in place. The circumstances necessitating this rule in	Commission disagreed with the recommendation to delete the rule or pursue an alternative approach, in part, because the rule is intended to continue important client protection afforded by the existing rule.

**Rule 8.4.1 Prohibited Discrimination in Law Practice Management and Operation.
[Sorted by Commenter]**

TOTAL = 6 Agree = 1
Disagree = 2
Modify = 3
NI = ___

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>1994 do not exist today and this is not the kind of conduct that disciplinary rules have traditionally been intended to address.</p> <p>In the alternative:</p> <p>Delete current Rule 2-100(b)(2) which reads: "accepting or terminating representation of any client";</p> <p>Delete last line of current Rule 2-100 (b)(2) which reads: "whether or not the lawyer is a partner or shareholder or serves in a management role;"</p> <p>Delete proposed Rule 8.4.1 Comments [1] and [2]; and in proposed Comment [5], change the last line reference from "8.4(d)" to "8.4(e)."</p>	<p>The Commission took both actions with respect to rule 2-400 (b)(2) and deleted both.</p> <p>Commission changed Comment [5] to reference "8.4(e)."</p>
5	Simmons Firm ALC (Simmons, Ross)	D			<p>The prohibited conduct involves "moral turpitude, dishonesty or corruption" that is already governed by B&P code 6106.</p> <p>The threshold adjudication requirement of (c) creates a gaping loophole because the majority of claims based on unlawful discrimination can be resolved by settlement in advance of adjudication.</p> <p>Rule should not extend to non-managerial attorneys. To place this attorney in a position of taking a stand against his or her superiors</p>	<p>Commission did not make the requested revisions, in part, because the commenter is advocating for a different policy for State Bar involvement in policing discrimination. The Commission's rule reflects the policy that a State Bar disciplinary proceeding should not be the initial or primary remedy for discrimination when the law provides for other specialized remedies.</p> <p>The Commission agreed and narrowed the scope of the rule.</p>

**Rule 8.4.1 Prohibited Discrimination in Law Practice Management and Operation.
[Sorted by Commenter]**

TOTAL = 6 **Agree = 1**
Disagree = 2
Modify = 3
NI = ___

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>over conduct in which the attorney plays no part puts the attorney in a dilemma between the economics of his or her employment and policing the legal profession.</p> <p>The Comment limiting the scope of activity to unlawful discrimination inside the practice of law should be removed. The comment provides in part that "it does not apply to lawyers while engaged in providing non-legal services that are not connected with or related to law practice." This is superfluous because nothing in the rule would suggest otherwise.</p>	<p>The Commission did not adopt this because the State Bar has no authority to regulate ancillary businesses, which may be managed or operated by non-lawyer personnel, where the non-legal businesses are not engaged in the practice of law. While a lawyer engaged in ancillary business activities may be disciplined for some conduct, as defined by case law, no all ancillary business conduct, unconnected with the provision of legal services, is the subject of discipline if it is authorized by other law.</p>

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**RRC – Rule 8.4.1 [2-400]
E-mails, etc. – Revised (10/13/2009)**

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August 27, 2009 McCurdy E-mail to Peck, cc Chair, Vapnek, Tuft & Staff:

Given the recent measures taken to expedite the completion of the rule revision project, the purpose of this letter is to lay out the assignments for which you are a lead drafter that are scheduled to be discussed during the Commission's upcoming September, October and November meetings. A "rolling assignments agenda" is enclosed that covers all of the matters that must be completed at those meetings. This agenda format is being used due to the short turnaround time between these meetings and the interest of many Commission members in working on assignments for future meetings when they have an opportunity to do so. The assignments are considered "rolling" because, for example, any rule that is not completed at the September meeting should be treated as automatically re-assigned and carried forward to the October meeting. Accordingly, the Commission is facing a significant challenge to complete fully each assigned rule in order to avoid a domino effect of rules that are not finished.

Because the Commission has been given a mandate to meet a rigorous schedule of deliverables to the Board for action, it is very important that all assignments be submitted by the assignment due dates. As emphasized by the Chair, if a lead drafter anticipates a conflict, or a conflict unexpectedly arises, that interferes with the ability to complete an assignment, the lead drafter must take the initiative to make alternate arrangements with the codrafters so that the assignment can be submitted by the due date.

Below is a list of your lead draft assignments for the next meeting, September 11, 2009, to be held at the San Diego State Bar Annual Meeting. Enclosed are materials for those assignments. Below that list is a list of assignments for the subsequent meetings in November and October. Materials for those assignments will be distributed soon. If you need any those materials immediately, then please send me an email with a copy to Randy and Kevin. Codrafter responsibilities are not listed. Please refer to the rolling agenda document which identifies the drafting team for each rule assignment. In addition staff will prepare an updated chart listing all rule assignments by Commission member.

Your continued hard work and dedication to this important project is appreciated, and don't forget that staff and the Commission Consultant are here to help so please feel free to contact us for assistance.

ASSIGNMENTS FOR SEPTEMBER MEETING

September 11, 2009 Meeting

Assignments Due: Wed., 9/2/09

- 1. III.S. Rule 5.5 Unauthorized Practice of Law; MJP [1-300] (Dec. 2008 Comparison Chart – Post Public Comment Rule Draft #8 dated 6/27/09)
Codrafters: Martinez, Tuft**

Assignment: (1) a chart comparing proposed Rule 5.5 to MR 5.5; (2) a "dashboard" cover sheet; and (3) a chart summarizing the public comment received and the Commission's response.

ASSIGNMENTS FOR OCTOBER MEETING

October 16 & 17, 2009 Meeting

Assignments Due: Wed., 9/30/09

**1. III.BB. Rule 8.4 Misconduct [1-120] (Dec. 2008 Comparison Chart)
Codrafters: VAPNEK (Co-Lead), Tuft**

Assignment: (1) a chart comparing proposed Rule 8.4 to MR 8.4; (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.

**2. III.GG. Rule 8.4.1 Prohibited Discrimination in Law Practice [2-400]
(Post Public Comment Draft #7.1 dated 6/27/08) Codrafters: Martinez**

Assignment: (1) a chart comparing proposed Rule 8.4.1 to RPC 2-400; (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.

3. III.NN. Rule 3.4 Fairness to Opposing Party/Counsel [5-200(E)][5-220][5-310] (Post Public Comment Draft #5.1 dated 10/15/08 to be revised following the October 2008 meeting) Codrafters: Martinez, Voogd

Assignment: (1) a chart comparing proposed Rule 3.4 to MR 3.4; (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.

(NOTE: This is in addition to any assigned rule not completed at the September meeting.)

ASSIGNMENTS FOR NOVEMBER MEETING

November 6 & 7, 2009 Meeting

Assignments Due: Wed., 11/28/09

No lead drafter assignments.

(NOTE: This is in addition to any assigned rule not completed at the October meeting.)

September 18, 2009 McCurdy E-mail to Drafters (Peck & Martinez), cc RRC:

Nace & Codrafters (Paul & JoElla):

This message provides the assignment background materials for Rule 8.4.1 on the October agenda. **The assignment deadline is Wednesday, September 30, 2009.**

As previously indicated, the materials provided are templates or drafts. Please don't hesitate to ask for further assistance or additional materials.

Attachments:

- Dashboard, Draft Template (9/18/09)
- Introduction, Template (9/18/09)
- Rule & Comment Chart, Template (9/18/09)
- Public Comment Chart, Draft 1 (9/18/09)

September 30, 2009 Peck E-mail to Kehr & KEM:

In preparing the agenda item for the discrimination rule (8.4.1 aka CRPC 2-400), the rule uses "law practice". We deleted the special definition of "law practice" for the rule to use whatever global definition was developed. However, I thought we were using "law firm" in 1.0. Can either of you confirm so that I can make the change in the agenda materials by replacing "practice" with "firm"?

September 30, 2009 Kehr E-mail to Peck & KEM:

I can confirm that the defined term is "law firm".

September 30, 2009 Peck E-mail Drafters, cc Chair, Vapnek, Tuft & Staff:

Here is my belated draft of all the pieces of the agenda, with apologies to Raul who has not had an opportunity to review this.

I may not have gotten all of the headers and footers right or missed something. Send it back if I have left something incomplete. However, if you have time to correct any stylistic matter, you have my permission to do so in the interests of time.

October 1, 2009 KEM E-mail to Staff:

I've attached all the materials you need for 8.4.1 in a single, scaled PDF file. The ingredients of the attached file are also attached, in Word.

I reviewed what Ellen submitted and found a few nits and other slight problems that might slow down the process of our BOG submission. Therefore I made the changes to the attached.

Please substitute the attached if you still have time to do so. In the long run. I think it will be to our benefit.

In addition to the combination PDF file, here is what I've attached, all in Word:

1. Dashboard, Draft 2 (10/1/09)-ERP-KEM. Shortened Summary and removed the reference to stakeholders. We are not treating folks who simply submitted a public comment as a stakeholder.
2. Introduction, Draft 2 10/1/09)-ERP-KEM. I added a minority to reflect a dissent Jerry submitted last year.
3. Rule & Comment Chart, 10/1/09)-ERP-KEM. A number of nits and also a more detailed explanation of Jerry's dissent in relation to paragraph (c).
4. Public Comment Chart, Draft 2 (9/30/09)-ERP-KEM. Just resorted the commenters alphabetically.

Please let me know if you have any questions.

October 3, 2009 Kehr E-mail to RRC:

Here are my comments on these materials:

1. In the last line of the first paragraph of the dashboard Summary, I would insert "only" between "lawyers" and "while".
2. The paragraph (b) explanation refers to a comment from the "Bar Association of California". From the Commenter chart, it seems the reference should be to the Bar Assoc. of S.F.
3. The first line of the paragraph (c) explanation has a lined out word that should be removed.

I otherwise vote to send these materials on to the Board.

October 3, 2009 Peck E-mail to RRC:

Thanks Bob. This is very helpful indeed.

October 5, 2009 Sondheim E-mail to RRC:

A nit. The Dashboard indicates there is no minority position on the Comparison Chart, but clearly there is.

Unless someone objects, Bob's comments will be deemed nits.

October 7, 2009 Sapiro E-mail to RRC List:

I request that the statement of a minority position be expanded to state the following.

Lawyers ought to be in the forefront of ethics to eradicate invidious or illegal discrimination. Such discrimination has no place in a licensed profession. By immunizing from disciplinary investigation or proceedings lawyers who unlawfully discriminate unless an administrative tribunal or court has previously adjudicated a complaint of alleged discrimination and has found that the unlawful conduct occurred, the rule acquiesces in unlawful discrimination in the practice of law and in the administration of law firms. 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 have filed administrative complaints; must either wait until the sometimes interminable investigations by the administrative agency 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. 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 Chief Trial Counsel is not even permitted to investigate the misconduct. This is true, even if the attorney's firm publishes an advertisement saying that it refuses to accept clients on the basis of race, national origin, sex, sexual orientation, or the like. This is true even if the lawyer or law firm publicly refuses to hire a lawyer who does not meet preconceived notions of race or other characteristics. The administrative, legal, and expense burdens on a person who has suffered improper discrimination make it almost impossible for this rule to be enforced. Paragraph (c) eviscerates the rule.

In addition, paragraph (a)(1) immunizes a managerial or supervisory lawyer from discipline unless OCTC can prove that that lawyer knew about the discriminatory practice and permitted it to occur.

Conversely, individual lawyers who participate in the discrimination are immune under this rule. That immunity is not assuaged by the rationale that they may be disciplined under Rule 8.4(d). That rule would only discipline a lawyer who engages in conduct in connection with the practice of law that is prejudicial to the administration of justice. If the lawyer's misconduct is not in connection with a court proceeding, Rule 8.4(d) does not apply. Thus, sexual harassment of an employee, or other non-litigation misconduct, will not be covered by any rule.

Our rules should not immunize such misconduct.

Accordingly, I vote "no" on the rule but vote "yes" that we should send it to the Board.

October 10, 2009 Tuft E-mail to RRC List:

My comments of Proposed Rule 8.4.1:

1. **Minority Position:** Please add the following to the minority position in the Introduction:

Another minority of the Commission believes that the rule, although well intended, is ambiguous as drafted and that certain provisions are inconsistent

with the proposed Rule 5.1 on the responsibilities of partners, managers and supervisory lawyers. This minority also believes that the concerns raised by COPRAC have not been adequately addressed.

2. Paragraphs (a)(1) and (b): Limiting culpability to a "managerial or supervisory lawyer" in the definition section is not consistent with the scope of paragraph (b).

The phrase "failure to advocate corrective action" has no counterpart in the Model Rules. Partners and lawyers with comparable managerial authority and direct supervisors are required to take, not advocate, reasonable remedial action when they know of unlawful discrimination. Partners and lawyers with comparable managerial authority have a duty to take reasonable steps to have reasonable measures in place to ensure that lawyers abide by the rules and the State Bar Act. Section 6068(a) requires lawyers to uphold the law.

Paragraph (b) sweeps up any lawyer who is engaged in the management "or operation" of a law firm and who unlawfully discriminates (1) whether or not the lawyer is "knowingly permitting" unlawful discrimination (i.e., a "managerial or supervisory lawyer") and (2) regardless of whether the lawyer is herself a "managerial or supervisory" lawyer. This raises several questions:

Does the rule intend to apply to partners?

Does the rule intend to apply to intermediate supervisors who may not have authority to set law firm policy?

Is the rule intended to be limited to "advocating corrective action" rather than taking "reasonable remedial action" and is there an intended difference?

3. Comment [1]: Comment [1] seems to suggest the rule applies to all lawyers involved in the "operation of a law practice"
4. Comment [2]: Comment [2] says the rule applies to all managerial or supervisory lawyers "whether not they have any formal role in the management of the firm." Does they include all partners and lawyers who may serve on a committee or have an informal role in the operation of the firm?
5. Comment [3]: I don't think "actionable under this rule" is appropriate terminology. How about "sanctionable" (if that is a word) or "for discriminatory conduct to be governed by this rule"?
6. COPRAC's Comments: I don't believe we have adequately addressed COPRAC's concerns. The redraft of paragraph (b) does not take care of COPRAC's concern over ambiguity or scope and in view of the comments.

Lawyers need better notice of who is governed by this rule.

October 12, 2009 Melchior E-mail to RRC List:

Rule 8.4.1: P. 105, nit: it's either 2-400 or 4-200, not both
p. 106, explanation: nit, should be singular, not plural

p. 110, 1st 2 lines of explanation: **means what?**

p. 108, subpart (1): I disagree with this formulation since it allows discipline against a lawyer who has managerial or supervisory responsibilities **though that lawyer may not be in line of authority to take action.** For instance, assume the lawyer is a practice group leader and learns of what she sees as misconduct in a different practice group: the powers of that lawyer to act are basically as limited as those of a non-managerial lawyer.

We should add the phrase “and is in a position to act in the matter.”

Comment 2, p. 111, repeats the same error.