

**RE: Rule 2-400
8/27-28/04 Commission Meeting
Open Session Item III.K.**

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(August 2, 2004)

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

1. Rule Amendment History

NOTE: Refer to comment no. 2002-18 (John Kresse) and no. 2002-20 (Ernestine Foster) included in the clear public comment binder.

RULE AMENDMENT HISTORY (2004)

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

Current Rule

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:

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

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

A disciplinary investigation or proceeding for conduct coming within this rule may be initiated and maintained, however, if such conduct warrants discipline under California Business and Professions Code sections 6106 and 6068, the California Supreme Court's inherent authority to impose discipline, or other disciplinary standard. (Added by order of Supreme Court, effective March 1, 1994.)

RULE AMENDMENT HISTORY (2004)

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.]