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September 2, 2015 McCurdy Email to Drafting Team, cc Chair, Difuntorum, Mohr, Marlaud & Lee:

The State Bar Office of Chief Trial Counsel (OCTC) memo providing comments on Rule 2-400 [8.4.1] was received and is attached. Please consider these comments prior to the September meeting.

Attached:
RRC2 - [1.1][1.3][1.4][1.5][1.5.1][5.1][5.2][5.3][5.4][8.4.1] - 09-02-15 OCTC Memo to RRC2.docx
RRC2 - [1.1][1.3][1.4][1.5][1.5.1][5.1][5.2][5.3][5.4][8.4.1] - 09-02-15 OCTC Memo to RRC2.pdf

September 2, 2015 OCTC Memo to Commission:

* * *

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

1. OCTC supports a rule prohibiting discriminatory conduct. Current rule 2-400, for example, provides clarity by requiring that a court of competent jurisdiction find conduct discriminatory before the State Bar may seek discipline. As written, the rule prohibits discriminatory conduct while allowing the criminal and civil courts, with their expertise, to maintain initial responsibility for addressing the unlawful conduct. Many of these cases are handled by government agencies that are specifically authorized and funded to investigate and prosecute such conduct. These agencies have a high level of expertise in these areas. Additionally, the current rule discourages frivolous complaints of discrimination against attorneys while protecting the public from serious complaints of discrimination.

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

September 17, 2015 Tuft Email to Drafting Team, cc Difuntorum, Mohr & A. Tuft:

I offer several observations in regard to the report and recommendation on Rule 2-400 [8.4.1]

1. One aspect of Rule 2-400 that has bothered me is the inconsistency between paragraph (b)(2) and Business and Professions Code §125.6 (Discrimination in the Performance of Licensed Activity) that subjects a lawyer to discipline if, because of a prospective client's "race, color, sex, religion, ancestry, disability, marital status, or national origin, the lawyer "refuses to perform the licensed activity", or "makes any discrimination, or restriction in the performance of the licensed activity." Lawyers are not subject to discipline under the statute for discrimination as an employer with regard to employees or prospective employees. §126.6(a)(3).

2. We should consider adding gender identity to paragraph (b)(1)

September 17, 2015 Rothschild Email to Drafting Team, Difuntorum, Mohr & A. Tuft:

Here are my responses to Mark's comments:

1. I know we discussed this issue, but I don't see a reference to our conclusion in the report among the pros and cons. I would be willing to reconsider our decision to leave in (b)(2).

2. It appears that Mark missed our addition of the catch-all phrase. When I relooked at our report, I noticed that it is included in the redline version, but is not included in the clean version of the proposed rule. I think we covered Mark's concern.

September 18, 2015 Mohr Email to Drafting Team, cc Difuntorum & A. Tuft:

I've raised the issue that the comment [2] statement that the rule "addresses the internal management and operation of a law firm" is confusing and unnecessary. Again, I repeat my criticism of the sentence:

First, in an 8/23/15 email I inquired:

> b. Isn't discriminatory rejection or termination also (or more likely) "other discrimination while representing clients." Wouldn't "terminating representation of [a] client" for a discriminatory reason be "discrimination while representing [a] client[]"?"

Then, in an 8/30/15 email, in response to Bob's statement (in an 8/30/15 email) that perhaps he failed to catch my point in the foregoing, I stated:

> Let me try to explain my concern again by asking a question:
>
> > How is "accepting or terminating representation of any client," (paragraph (b)(2) of proposed rule) the "internal management and operation of a law firm"? (my emphasis added).
>
> All lawyer-client relationships are based on contract, whether express or implied. It takes two to contract, the lawyer and the client. Except by operation of law (e.g., the lawyer dies), both the acceptance of the relationship and the termination of the relationship require the communication of that fact to the client. I don't see how those events are "internal" to law firm management and operation, but are not "discriminatory conduct of lawyers while representing clients," (proposed Comment [2].) Maybe you can except acceptance from the "discriminatory conduct while representing clients," but given that the discriminatory decision to terminate the relationship would have to occur before the termination, how can it not be discrimination "while representing clients"?

Toby in his email has stated a willingness to revisit retaining in the proposed rule (b)(2) (current rule 2-400(B)(2).) Deleting (b)(2) would remove my concerns with comment [2]. Thanks,

September 19, 2015 Kehr Email to Drafting Team, cc Tuft, Difuntorum, Mohr & A. Tuft:

Here are my thoughts on the prior messages from Mark, Toby, and Kevin ---

- Mark, I'm not certain what you are focusing on in your concern about a possible inconsistency between paragraph (b)(2) and Bus. and Prof. C. § 125.6 and in your reference to § 125.6(a)(3) [you cited 126.6, but there seems to be no such section]. Proposed paragraph (b)(2) addresses discrimination in accepting or terminating a representation, which is the same topic addressed by § 125.6. Yes, § 125.6(a)(3) exempts hiring practices from the scope of that statutory scheme, but hiring practices are covered by paragraph (b)(1), not (b)(2). If your concern is that (b)(1) covers something not covered by § 125.6, then I don't see a conflict but only a wider scope to the Rule 8.4.1 and current rule 2-100. I

don't know why § 125.6 does not apply to hiring practices - perhaps because the statute is part of Division 1, which is titled: Department of Consumer Affairs - but all that Rule 8.4.1(b)(1) would do is to create professional discipline for lawyers who engage in hiring practices that violate state or federal anti-discrimination standards. If, for example, it would be illegal to fire any employee because she is pregnant, even if that standard is not stated in § 125.6, then in my view that conduct should be a basis for professional discipline.

- On Mark's second point, I agree with Toby that we don't need to search for other categories of discrimination as they are covered by the addition of "or other category of discrimination prohibited by applicable law" (which I recall as having been based on Toby's suggestion).

- Just this morning I received an email from a client who expressed his unhappiness with an opinion I had given him by saying that I was overthinking the question. Kevin: could you be overthinking this? A lawyer's acceptance or rejection of a representation based on a client's membership in a protected class is internal to a law firm b/c it implicates the firm's policies. Rule 5.1 will obligated firm managers and supervisors to pay attention to Rule 8.4.1.

- The first sentence of Comment [2] states what is in proposed paragraph (b) and already is in current paragraph (B) (except for the addition of "internal", which I would be glad to drop as surplusage). The second sentence refers to Rule 8.4(d), which is the MR provision barring conduct prejudicial to the administration of justice. That might include abusive conduct toward a judge, court staff, opposing lawyer, or witness based on the person's membership in a protected class. The second sentence is placeholder b/c the Commission has not yet taken up Rule 8.4. If we adopt a Rule 8.4(d), I would keep Comment [2] as helpful explanation.

September 19, 2015 Mohr Email to Drafting Team, cc Tuft, Difuntorum & A. Tuft:

My last words on the subject. I promise. I understand your rationale for believing that terminating a lawyer-client relationship is an internal decision of the law firm. In fact, I even suggested it in my 8/23/15 email. However, to get to the point where the point is understandable to an average lawyer not steeped in legal ethics requires "overthinking". Comments should not require overthinking on the part of the comment's audience -- the lawyer who is consulting the rule to determine his or her duties. I recommend that comment [2] be removed. Even if there were a provision addressing discrimination in a proposed rule 8.4 [1-120], the comment would be unnecessary at best. However, in light of the confusion it will otherwise generate, it should be removed. Thanks,

September 19, 2015 Rothschild Email to Drafting Team, cc Tuft, Difuntorum, Mohr & A. Tuft:

Let me try to suggest a compromise on (b)(2) and comment 2. One option is to delete (b)(2) and include a comment cross-referencing 125.6, which seems to address the same subject. Another would be to amend comment 2 to add, at the end of the first sentence, ", including the acceptance or termination of any client". We could then change the second sentence to "in the representation of clients" rather than "while representing clients", which moves it from a temporal analysis to a conduct-based analysis.

September 21, 2015 Tuft Email to Drafting Team, cc Difuntorum, Mohr & A. Tuft:

The reference to §126.6 in my September 17 e-mail was a typo. The citation should be §125.6.

The concern I raised is the inconsistency between §125.6(a)(1) and paragraph (b)(2) and not between §125.6(a)(3) and paragraph (b)(1). Paragraph (b)(2) requires a predicate finding of unlawful discrimination by a court of competent jurisdiction before a lawyer faces discipline, while §125.6 subjects lawyers to discipline for refusing to perform services, or aiding another lawyer in doing so, for clients who are protected under Civil Code § 51 or "he or she makes any discrimination, or restriction in the performance of the licensed activity."

I prefer Toby's solution which is to eliminate (b)(2) and add a cross reference to §125.6.

September 21, 2015 Kehr Email to Blumenthal, cc Drafting Team, Difuntorum, Mohr & Lee:

A question on this rule will come up at the next meeting, and I want to give you a heads-up.

Current paragraph (B)(2) prohibits discrimination in "accepting or terminating representation of any client", and the rule permits discipline for this only after a civil finding of prohibited discrimination. However, Bus. & Prof. C. §125.6(a)(1) states: "With regard to an applicant, every person who holds a license under the provisions of this code is subject to disciplinary action under the disciplinary provisions of this code applicable to that person if, because of any characteristic listed or defined in subdivision (b) or (e) of Section 51 of the Civil Code, he or she refuses to perform the licensed activity or aids or incites the refusal to perform that licensed activity by another licensee, or if, because of any characteristic listed or defined in subdivision (b) or (e) of Section 51 of the Civil Code, he or she makes any discrimination, or restriction in the performance of the licensed activity." Civil C. § 51 is the Unruh Civil Rights Act, and it prohibits discrimination based on sex, race, etc.

Thus, §125.6(a)(1) appears to authorize lawyer discipline as an initial matter while the current rule, added by the Supreme Court, permits discipline for much the same sort of conduct only after a prior civil determination. The question I want to be able to discuss at the next meeting is how OCTC has handled these discrimination issues during the ten years since the Court added rule 2-400?