

## **Rule 2-400 Prohibited Discrimination in Law Practice Management and Operation [clean]**

(a) For purposes of this rule:

- (1) “knowingly permit” means a failure to take or advocate immediate and appropriate corrective action where the lawyer knows or reasonably should know of a discriminatory policy or practice that results in the unlawful discrimination prohibited by paragraph (b); and
- (2) “unlawfully” and “unlawful” shall be determined by reference to applicable state and 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 firm, a lawyer shall not unlawfully discriminate or knowingly permit unlawful discrimination or harassment of an employee, an applicant for employment, an unpaid intern or volunteer or a person providing services pursuant to a contract, on the basis of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, sexual orientation, age, military and veteran status or other category of discrimination prohibited by applicable law, whether actual or perceived, in:

- (1) hiring, promoting, discharging, or otherwise determining the conditions of employment of any person, including but not limited to, compensation and selection of a person for a training program or other privileges of employment; or
- (2) accepting or terminating representation of any client.

(c) No disciplinary investigation or proceeding may be initiated by the State Bar against a lawyer under this Rule unless and until a tribunal of competent jurisdiction, other than a disciplinary tribunal, first has adjudicated a complaint of alleged discrimination and found that unlawful conduct occurred. A tribunal finding or verdict regarding unlawful conduct shall be admissible evidence of the occurrence or non-occurrence of the alleged discrimination in any disciplinary proceeding initiated under this Rule.

### **Comment**

[1] This Rule applies to all lawyers, whether or not they have any formal role in the management of the law firm in which they practice. This Rule does not apply to lawyers while engaged in providing non-legal services that are not connected with or related to the management or operation of a law firm, although lawyers always have a duty to uphold state and federal law, a breach of which can be cause for discipline. See Business and Professions Code § 6068(a).

[2] 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(d).

[3] As used in paragraph (b)(1), “employment” is not limited persons who are regular full-time employees of a law firm but includes part-time employees and independent contractors providing services to a law firm, applicants for employment, and unpaid interns and volunteers.

**Rule 2-400 Prohibited ~~Discriminatory Conduct~~ Discrimination in a Law Practice  
Management and Operation [clean]  
[Revised Proposal of Drafting Team]**

(a) For purposes of this rule:

- (1) “knowingly permit” means a failure to take or<sup>1</sup> advocate immediate and appropriate corrective action where the lawyer knows or reasonably should know<sup>2</sup> of a discriminatory policy or practice that results in the unlawful discrimination prohibited by paragraph (b); and
- (2) “unlawfully” and “unlawful” shall be determined by reference to applicable state ~~or~~ and<sup>3</sup> 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 firm, a lawyer shall not unlawfully discriminate or knowingly permit unlawful discrimination or harassment of an employee, an applicant for employment, an unpaid intern or volunteer or a person providing services pursuant to a contract, on the basis of race, religious creed, color, national origin, ~~sex~~ ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, sexual orientation, ~~religion~~, age, ~~disability~~, military and veteran status or other category of discrimination prohibited by applicable law, whether actual or perceived, in:<sup>4</sup>

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<sup>1</sup> The State Bar’s Council on Access & Fairness (all references to COAF are to its letter dated October 26, 2015) has recommended that this paragraph require a lawyer “to take immediate and appropriate corrective action”, citing Gov. C. § 12940(j)(1): “Harassment of an employee, an applicant, an unpaid intern or volunteer, or a person providing services pursuant to a contract by an employee, other than an agent or supervisor, shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action.” We agree with COAF’s suggestion but have edited its wording for reasons of economy and to recognize that an individual lawyer might have no management authority and no ability to alter the law firm’s conduct. COAF also cited: § 12940(j)(3): “An employee of an entity subject to this subdivision is personally liable for any harassment prohibited by this section that is perpetrated by the employee, regardless of whether the employer or covered entity knows or should have known of the conduct and fails to take immediate and appropriate corrective action.” We believe that (j)(3) already is covered by the recommendation and that no additional editing is required by it.

<sup>2</sup> COAF has recommended the insertion of “should know” at this point. We recommend “reasonably should know” instead under the assumption that the Rules will include this as a defined term, as did the first Commission.

<sup>3</sup> COAF recommended changing “or” to “and/or”, but we think the correct statement would be that a lawyer should comply with all state “and” all federal antidiscrimination laws.

<sup>4</sup> COAF suggested and we recommend these wording changes. They do not alter the substance of paragraph (b) but might have a prophylactic effect by alerting lawyers to the range of conduct covered by anti-discrimination laws.

(1) hiring, promoting, discharging, or otherwise determining the conditions of employment of any person, including but not limited to, compensation and selection of a person for a training program or other privileges of employment;<sup>5</sup> or

(2) <sup>6</sup>accepting or terminating representation of any client.

(c)<sup>7</sup>No disciplinary investigation or proceeding may be initiated by the State Bar against a lawyer under this Rule unless and until a tribunal of competent jurisdiction, other than a

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<sup>5</sup> This is an edited version of a COAF suggestion.

<sup>6</sup> COAF suggested that this subparagraph begin with the following: “to refuse to offer full and equal accommodations, advantages, facilities, privileges, or services to any client, including but not limited to,” We are unable to see how a lawyer or law firm could run afoul of the equal accommodation standard in accepting or terminating the representation of a client and therefore do not recommend its inclusion.

<sup>7</sup> COAF has asked that paragraph (c) be removed, as did one Commission member at our September 2015 meeting. As we understand it, there are two essential arguments in favor of that change. The first is that a law firm associate cannot seek redress in the courts without endangering his or her position in the law firm, but that concern would apply equally to an associate reporting the firm to the State Bar. The second argument is that the requirement of a final judgment means that there would be no professional discipline in any matter that is settled and, because most civil claims are settled, there is not likely to be any discipline under this Rule. This is a serious objection because a Rule that rarely if ever results in professional discipline has only limited value (but see COAF’s recommended changes to paragraph (b) and the informative and prophylactic value of the Rule).

On the other hand, it long as been a fundamental concern of the legal system to encourage settlement. See, e.g., *Bank of San Pedro v. Superior Court*, 3 Cal. 4th 797, 804 (1992). There is no doubt that lawyers have an obligation to follow the requirements of all anti-discrimination laws. See Bus. & Prof. C. §§ 6067 and 6068(a). There is a separate question as to whether the State Bar should be given the authority to investigate allegations of discipline and prosecute violations that OCTC perceives to have occurred.

We recommend that the current version of paragraph (c) be retained with the editing shown above. Our reasoning is as follows: *First*, the investigation, analysis, and prosecution of discrimination requires a high degree of expertise in a specialized area of law and involve matters that are not within the experience of OCTC’s investigators or lawyers. This expertise involves both the discrimination laws and their interplay with First Amendment concerns (regarding the constitutional issues, one of the examples given at our September 2015 meeting was of an apparently isolated use of hateful language to a member of a protected group). *Second*, we expect that adding the initial investigation of discrimination allegations to an already burdened department would compromise OCTC’s ability to address conduct that is within its expertise. *Third*, most disciplinary matters are based on the content of a lawyer’s file and trust account records. As a result, a lawyer who is subject to disciplinary proceedings has only a limited need for discovery, and the lawyer has only a limited right to discovery. See Rules 5.65 and 5.66 of the Bar’s Rules of Procedure, at [http://www.statebarcourt.ca.gov/Portals/2/documents/Rules%20of%20Procedure\\_rev%20%20for%202015\\_July\\_24Final.pdf](http://www.statebarcourt.ca.gov/Portals/2/documents/Rules%20of%20Procedure_rev%20%20for%202015_July_24Final.pdf). If the Bar were given original jurisdiction to investigate and prosecute claims of unlawful discrimination, the lawyer likely would be denied the right to take depositions and otherwise prepare as the lawyer would in civil proceedings. *Fourth*, a lawyer might be required to simultaneously defend both civil and disciplinary proceedings.

disciplinary tribunal, first has adjudicated a complaint of alleged discrimination and found that unlawful conduct occurred. A tribunal finding or verdict regarding unlawful conduct shall 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.~~<sup>8</sup>

**Comment:**

[1] This Rule applies to all lawyers, whether or not they have any formal role in the management of the law firm in which they practice. This Rule does not apply to lawyers while engaged in providing non-legal services that are not connected with or related to the management or operation of a law firm, although lawyers always have a duty to uphold state and federal law, a breach of which can be cause for discipline. See Business and Professions Code § 6068(a).

[2] 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(d).

[3] As used in paragraph (b)(1), “employment” is not limited persons who are regular full-time employees of a law firm but includes part-time employees and independent contractors providing services to a law firm, applicants for employment, and unpaid interns and volunteers.<sup>9</sup>

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It has been suggested that a compromise solution would be to remove paragraph (c) in recognition of the fact that the State Bar Court can abate proceedings under Rule 5.50 of the Rules of Procedure of the State Bar of California. See In the *Matter of Seltzer*, 5 Cal. State Bar Ct. Rptr. 263, 267 (Rev. Dept. 2013), 2013 Calif. Op. LEXIS 23 and *In re Rose*, 22 Cal.4th 430, 456-61 (2000). We do not recommend this compromise because it would be available only when there is a civil proceeding and because abatement is not automatic.

It also has been suggested that the relatively narrow scope of proposed Rule 8.4.1 and current rule 2-400, which addresses only discrimination in the management and operation of a law firm, should be supplemented by another Rule on bias that prejudices the administration of justice. We support consideration of such a Rule.

<sup>8</sup> We recommend removing the final sentence of paragraph (c) because most of the concerns we have about removing the entire paragraph do not apply once there has been a trial court proceeding.

<sup>9</sup> This is derived from COAF’s suggested inclusion of this concept in the Rule as a part of paragraph (b). COAF cited Gov. C. §12940 and California Code of Regulations, title 2, § 11035(q), 11036, 11039, and 11064. We recommend incorporating this concept as a Comment because the conduct described is encompassed in the general prohibition in paragraph (b), and the Comment therefore explains the Rule.