



STATE BAR COURT OF CALIFORNIA

180 HOWARD STREET, 6th FLOOR, SAN FRANCISCO, CA 94105

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Chief Administrative Officer

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November 2, 2015

The Honorable Lee Edmon, Chair
Members of the Commission for the
Revision of the Rules of Professional Conduct
180 Howard Street
San Francisco, California 94105

Re: Proposed Revisions of Rules of Professional Conduct
Proposed Revisions to Rule 2-400 by the Committee on Access and
Fairness

Dear Justice Edmon and Members of the Commission:

The State Bar Court appreciates the opportunity to respond to the proposed revisions to rule 2-400 of the Rules of Professional Conduct, regarding prohibiting discriminatory conduct in a law practice. Specifically, the Court wishes to comment on the proposed revisions by the Committee on Access and Fairness.

The current proposal seeks to delete subsection (c) which provides that:

“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.”

We believe that the deletion of subsection (c) could allow the initiation of discipline charges based on alleged discriminatory conduct to be filed in the State Bar Court in the first instance, thereby bypassing other government agencies that are specifically authorized to investigate and prosecute such conduct. While the State Bar Court makes no comment on the desirability or feasibility of such a possibility, the Court would like the Commission to consider the following:

Limited Discovery in State Bar Court Proceedings

Discovery in State Bar Court proceedings is generally limited and permitted only upon Court order. (Rules of Proc. of State Bar, rule 5.65) [No discovery subpoenas without prior Court order (Rule 5.61(A)); Depositions allowed only upon court order (Rule 5.61(C)); Additional discovery only upon motion and showing of good cause (Rule 5.66(A)).]

Burden of Proof in State Bar Court Proceedings

Unlike in civil proceedings, in a disciplinary proceeding, the State Bar must prove culpability by clear and convincing evidence. Clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)

Evidence Code Not Applicable in State Bar Court Proceedings

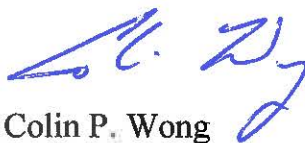
State Bar Court proceedings are not conducted according to the Evidence Code as applied in civil cases. Instead, any relevant evidence must be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions. (Rule 5.104(C).) In addition, hearsay evidence may be used for the purpose of supplementing or explaining other evidence. (Rule 5.104(D).)

No Jury Trials

In disciplinary proceedings, attorneys are not entitled to a jury trial. (*Johnson v. State Bar of Cal.* (1935) 4 Cal.2d 744, 758. Instead, all trials are conducted by a Hearing Department Judge. (Bus. & Prof. Code, §6079.1(f).)

As described above, the unique nature of the State Bar Court and its own Rules of Procedure differ significantly from Superior Court civil proceedings. The State Bar Court respectfully requests that these differences be evaluated by the Commission when determining whether the proposed amendments to rule 2-400 should be adopted.

Respectfully submitted,



Colin P. Wong