DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 2-400

Lead Drafter: Cardona
Co-Drafters: Clopton, Kehr, Kornberg, Langford, Rothschild, Zipser
Meeting Date: January 22 – 23, 2016

I. CURRENT CALIFORNIA 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.

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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.

II. DRAFTING TEAM'S RECOMMENDATION AND VOTE

There was consensus among the drafting team members to recommend a proposed amended Rule 8.4.1 having sections (a), (b), and (c) and Comments [1] through [4] as set forth below in Section III. The vote was unanimous in favor of making this recommendation. As discussed in detail below, however, with respect to section (d) and Comment [5], while the majority of the drafting team favored the proposal set forth below in Section III, there were widely differing views as to the substantive approach that should be reflected in section (d) and Comment [5].

III. PROPOSED RULE (CLEAN)

Rule 8.4.1 Prohibited Discrimination

(a) In representing a client, or in terminating or refusing to accept the representation of any client, a lawyer shall not unlawfully harass or knowingly permit the harassment of, or unlawfully discriminate or knowingly permit discrimination against, persons on the basis of any protected characteristic or for the purpose of retaliation.

(b) In the management or operation of a law firm, a lawyer shall not, on the basis of any protected characteristic or for the purpose of retaliation:

(1) unlawfully discriminate or knowingly permit unlawful discrimination;

(2) unlawfully harass or knowingly permit the harassment of an employee, an applicant, an unpaid intern or volunteer, or a person providing services pursuant to a contract; or

(3) refuse to hire or employ a person, or refuse to select a person for a training program leading to employment, or bar or discharge a person from employment or from a training program leading to employment, or discriminate against a person in compensation or in terms, conditions, or privileges of employment.

(c) For purposes of this rule:

(1) "protected characteristic" means 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,

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whether the category is actual or perceived;

(2) “knowingly permit” means to fail to advocate corrective action where the lawyer knows of a discriminatory policy or practice that results in the unlawful discrimination or harassment prohibited by paragraph (a) or (b);

(3) “unlawfully” and “unlawful” shall be determined by reference to applicable state and federal statutes and decisions making unlawful discrimination or harassment in employment and in offering goods and services to the public; and

(4) “retaliation” means to take action because a person has opposed, or pursued, participated in, or assisted any action alleging, any conduct prohibited by this Rule.

(d) A lawyer who is the subject of a State Bar investigation or State Bar Court proceeding alleging a violation of this Rule shall promptly notify the State Bar of any criminal, civil, or administrative action premised, whether in whole or part, on the same conduct that is the subject of the State Bar investigation or State Bar Court proceeding.

Comment:

[1] Conduct that violates this Rule undermines confidence in the legal profession and our legal system and is contrary to the fundamental principle that all people are created equal. A lawyer may not engage in such conduct through the acts of another. See Rule 8.4(a). This Rule also imposes on all law firm non-management and non-supervisorial lawyers the responsibility to advocate corrective action to address known harassing or discriminatory conduct by the firm or any of its other lawyers or non-lawyer personnel. Law firm management and supervisorial lawyers retain their separate responsibility under Rules 5.1 and 5.3. Neither this Rule nor Rule 5.1 or 5.3 imposes on the alleged victim of any conduct prohibited by this Rule any responsibility to advocate corrective action.

[2] A lawyer does not violate paragraph (a) by referring to any particular status or group when the reference is relevant to factual or legal issues or arguments in the representation. It is also not a violation of paragraph (a) for lawyers to limit their practices to clients from underserved populations as defined by any protected characteristic, or for lawyers to decline to represent clients who cannot pay for their services. A trial judge’s finding that preemptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (a).

[3] What constitutes a failure to advocate corrective action under paragraph (c)(2) will depend on the nature and seriousness of the discriminatory policy or practice, the extent to which the lawyer knows of unlawful discrimination or harassment resulting from that policy or practice, and the nature of the lawyer’s relationship to the lawyer or law firm implementing that policy or practice. For example, a law firm non-management and non-supervisorial lawyer who becomes aware that the law firm is engaging in a discriminatory hiring practice may advocate corrective action by bringing that discriminatory practice to the attention of a law firm management lawyer who would have responsibility under Rule 5.1 or 5.3 to take reasonable remedial action upon

becoming aware of a violation of this Rule.

[4] Paragraph (c)(3) incorporates by reference, with respect to both paragraphs (a) and (b), relevant holdings by applicable courts and administrative agencies.

[5] The State Bar has discretion to hold investigations in abeyance pending related proceedings. The State Bar Court also has discretion to abate State Bar Court proceedings based on the pendency of related proceedings. See State Bar Rule of Procedure 5.50 Abatement. Paragraph (d) ensures that the State Bar and the State Bar Court will be provided with information regarding related proceedings that may be relevant in determining whether a State Bar investigation or a State Bar Court proceeding relating to a violation of this Rule should be abated.

IV. PROPOSED RULE (REDLINE TO CURRENT CALIFORNIA RULE 2-400)

Rule 8.4.1~~2-400~~ Prohibited Discrimination~~Prohibited Discriminatory Conduct in a Law Practice~~

(a) In representing a client, or in terminating or refusing to accept the representation of any client, a lawyer shall not unlawfully harass or knowingly permit the harassment of, or unlawfully discriminate or knowingly permit discrimination against, persons on the basis of any protected characteristic or for the purpose of retaliation.

(b) In the management or operation of a law firm, a lawyer shall not, on the basis of any protected characteristic or for the purpose of retaliation:

(1) unlawfully discriminate or knowingly permit unlawful discrimination;

(2) unlawfully harass or knowingly permit the harassment of an employee, an applicant, an unpaid intern or volunteer, or a person providing services pursuant to a contract; or

(3) refuse to hire or employ a person, or refuse to select a person for a training program leading to employment, or bar or discharge a person from employment or from a training program leading to employment, or discriminate against a person in compensation or in terms, conditions, or privileges of employment.

(~~A~~c) 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;~~ protected characteristic" means 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 the category is actual or perceived;

(2) "knowingly permit" means ~~a failure~~to fail to advocate corrective action where the ~~member~~lawyer knows of a discriminatory policy or practice ~~which~~that results in the unlawful discrimination or harassment prohibited ~~in~~by paragraph (a) or (b); ~~and~~

(3) "unlawfully" and "unlawful" shall be determined by reference to applicable state ~~or~~and federal statutes ~~or~~and decisions making unlawful discrimination or harassment in employment and in offering goods and services to the public~~.~~; and

~~(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.~~

(4) "retaliation" means to take action because a person has opposed, or pursued, participated in, or assisted any action alleging, any conduct prohibited by this Rule.

(d) A lawyer who is the subject of a State Bar investigation or State Bar Court proceeding alleging a violation of this Rule shall promptly notify the State Bar of any criminal, civil, or administrative action premised, whether in whole or part, on the same conduct that is the subject of the State Bar investigation or State Bar Court proceeding.

~~(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.~~

Comment: ~~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.~~

[1] Conduct that violates this Rule undermines confidence in the legal profession and our legal system and is contrary to the fundamental principle that all people are created equal. A lawyer may not engage in such conduct through the acts of another. See Rule 8.4(a). This Rule also imposes on all law firm non-management and non-supervisorial lawyers the responsibility to advocate corrective action to address known harassing or discriminatory conduct by the firm or any of its other lawyers or non-lawyer personnel. Law firm management and supervisorial lawyers retain their separate responsibility under Rules 5.1 and 5.3. Neither this Rule nor Rule 5.1 or 5.3 imposes on the alleged victim of any conduct prohibited by this Rule any responsibility to advocate corrective action.

[2] A lawyer does not violate paragraph (a) by referring to any particular status or group when the reference is relevant to factual or legal issues or arguments in the representation. It is also not a violation of paragraph (a) for lawyers to limit their practices to clients from underserved populations as defined by any protected characteristic, or for lawyers to decline to represent clients who cannot pay for their services. A trial judge's finding that preemptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (a).

[3] What constitutes a failure to advocate corrective action under paragraph (c)(2) will depend on the nature and seriousness of the discriminatory policy or practice, the extent to which the lawyer knows of unlawful discrimination or harassment resulting from that policy or practice, and the nature of the lawyer's relationship to the lawyer or law firm implementing that policy or practice. For example, a law firm non-management and non-supervisorial lawyer who becomes aware that the law firm is engaging in a discriminatory hiring practice may advocate corrective action by bringing that discriminatory practice to the attention of a law firm management lawyer who would have responsibility under Rule 5.1 or 5.3 to take reasonable remedial action upon becoming aware of a violation of this Rule.

[4] Paragraph (c)(3) incorporates by reference, with respect to both paragraphs (a) and (b), relevant holdings by applicable courts and administrative agencies.

[5] The State Bar has discretion to hold investigations in abeyance pending related proceedings. The State Bar Court also has discretion to abate State Bar Court proceedings based on the pendency of related proceedings. See State Bar Rule of Procedure 5.50 Abatement. Paragraph (d) ensures that the State Bar and the State Bar Court will be provided with information regarding related proceedings that may be relevant in determining whether a State Bar investigation or a State Bar Court proceeding relating to a violation of this Rule should be abated.

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V. PUBLIC COMMENTS SUMMARY

- **David Wolf, Bar Association of San Francisco (June 17, 2015)**

  Concerned that current rule has too many restrictions on discipline. Recommend revising rule to make it more meaningful.

- **Karen Clopton, State Bar Council on Access and Fairness (June 16, 2015)**

  Recommends updates to the current rule to reflect current discrimination protections under existing law. Recommends new rule or rule language to educate lawyers on promoting diversity in the legal profession. *[Comment letter includes proposed language]*

- **Tom Hudson (June 16, 2015)**

  Recommends this rule not be retained as it interferes with the attorney-client relationship and requires attorneys to accept clients that they otherwise do not wish to represent.

VI. OCTC / STATE BAR COURT COMMENTS

- **JAYNE KIM, OCTC, DATE: OCTC (SEPTEMBER 2, 2015) WROTE AS FOLLOWS:**

  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.

  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.

- **State Bar Court:** In a November 2, 2015 letter to the Commission, the State Bar Court (Colin P. Wong, Chief Administrative Officer) stated:

  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 fmal 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:

<u>Limited Discovery in State Bar Court Proceedings</u>

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)].)

<u>Burden of Proof in State Bar Court Proceedings</u>

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.)

<u>Evidence Code Not Applicable in State Bar Court Proceedings</u>

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(1).)

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.

VII. COMPARISON OF PROPOSED RULE TO APPROACHES IN OTHER JURISDICTIONS (NATIONAL BACKDROP)

- There is no current Model Rule counterpart for 2-400 (although, as discussed below, Comment [3] to ABA Model Rule 8.4(d) specifies that it addresses discrimination by individual lawyers while representing a client). Twenty-three jurisdictions have adopted rules of professional conduct that prohibit discrimination.[1] Sixteen of those jurisdictions have rules that specifically prohibit discrimination in conduct that occurs by a lawyer in a professional capacity.[2] Four jurisdictions have rules that prohibit discrimination in representing a client.[3] Two jurisdictions have rules that prohibit discrimination in connection with a proceeding before a tribunal.[4] Michigan Rule 6.5 requires lawyers to treat all persons involved in the legal process with courtesy and respect. A comment to Michigan rule 6.5 provides that "a supervisory lawyer should make reasonable efforts to ensure that the firm has in effect policies and procedures that do not discriminate against members or employees of the firm."

[1] The twenty-three jurisdictions are: Colorado, District of Columbia, Florida, Illinois, Indiana, Iowa, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Rhode Island, Texas, Vermont, Washington, and Wisconsin.

[2] The sixteen jurisdictions are: District of Columbia, Florida, Illinois, Indiana, Iowa, Maryland, Massachusetts, Minnesota, Nebraska, New Jersey, New York, Ohio, Rhode Island, Vermont, Washington, and Wisconsin.

[3] The four jurisdictions are: Colorado, Missouri, North Dakota, and Oregon.

[4] The two jurisdictions are: New Mexico and Texas.

- Comment [3] to Model Rule 8.4(d) is related and prohibits lawyers, in the course of representing a client, from knowingly manifesting, by words or conduct, bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, when such actions are prejudicial to the administration of justice. Of the jurisdictions with no black letter rule on discrimination, thirteen have adopted Commentary with language identical or substantially similar to Comment [3]. Similar language was also included in proposed Comment [3] to the first Commission's proposed rule 8.4. Fourteen jurisdictions do not have a rule or commentary addressing these issues. The ABA State Adoption Chart, entitled "Variations of the ABA Model Rules of Professional Conduct, Rule 8.4: Misconduct, Comment [3]," revised June 15, 2015, is available at:

  http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_8_4_cmt_3.authcheckdam.pdf

- On or about December 22, 2015, the ABA Standing Committee on Ethics and Professional Responsibility issued a draft proposal to amend Model Rule 8.4 to add a new section (g) and Comment [3] that would make it professional misconduct for a lawyer to:

  > (g) in conduct related to the practice of law, harass or knowingly discriminate against persons on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status.
  >
  > **Comment**
  >
  > * * *
  >
  > [3] Paragraph (g) applies to conduct related to a lawyer's practice of law, including the operation and management of a law firm or law practice. It does not apply to conduct unrelated to the practice of law or conduct protected by the First Amendment. Harassment or discrimination that violates paragraph (g) undermines confidence in the legal profession and our legal system. Paragraph (g) does not prohibit lawyers from referring to any particular status or group when such references are material and relevant to factual or legal issues or arguments in a representation. Although lawyers should be mindful of their professional obligations under Rule 6.1 to provide legal services to those unable to pay, as well as the obligations attendant to accepting a court appointment under Rule 6.2, a lawyer is usually not required to represent any specific person or entity. Paragraph (g) does not alter the circumstances stated in Rule 1.16 under which a lawyer is required or permitted to withdraw from or decline to accept a representation.

  The ABA Standing Committee on Ethics and Professional Responsibility also issued a memorandum (the "ABA Memo") setting out the reasoning for its proposal. Because much of this reasoning applies as well to the drafting team's proposal for this rule, a copy of the ABA Memo is attached to this Report & Recommendation for reference. (See page 31 of this agenda item.)

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VIII. CONCEPTS ACCEPTED/REJECTED; CHANGES IN DUTIES; NON-SUBSTANTIVE CHANGES; ALTERNATIVES CONSIDERED

A. Concepts Accepted (Pros and Cons):

1. Expand the Rule beyond management or operation of a law firm to also encompass discrimination or harassment more generally in "representing a client, or in terminating or refusing to accept the representation of any client"
   - Pros: The current rule already applies to discrimination in the management or operation of a law firm in "accepting or terminating representation of any client," and there seems no justification for not extending this prohibition outside the arena of law firm management. Adopting a rule prohibiting unlawful discrimination or harassment generally while engaged in representing a client is consistent with current ABA Model Rule 3.8(d), Comment [3], and, as noted in the ABA Memo, will be consistent with proposed ABA Model Rule 3.8(g) and many other professions that prohibit this same behavior in their codes of conduct. Finally, particularly for a profession that is dedicated to enforcing the rule of law, it seems appropriate to impose a professional obligation that requires lawyers not to unlawfully discriminate or harass while engaged in the core conduct of that profession, representing clients. Proposed paragraph (a) applies to conduct "in representing a client" rather than using the language of the ABA's proposed Rule 3.8(g) "conduct related to the practice of law" because, consistent with current California Rule 2-400, we have retained separate section (b) addressing conduct "in the management or operation of a law firm" rather than trying to have a single provision apply to all conduct. Any concern that the expansion of the Rule may pose First Amendment issues could be addressed with a comment making clear that paragraph (a) does not apply to conduct permitted by the First Amendment. (See discussion of Comment [2] in "Open Issues" below.)
   - Cons: None Identified

2. Expand the Rule to cover other protected categories.
   - Pros: The current rule's limited list of protected characteristics on the basis of which discrimination is unlawful is narrower than current California law. Moreover, identification of protected characteristics is not static. We therefore have added in section (c)(1) a definition of "protected characteristic" that is consistent with current California law and that also includes a catchall for any "other category of discrimination prohibited by applicable law". Lawyers are obligated to obey the law as are nonlawyers, and this addition would permit professional discipline whatever applicable anti-discrimination laws might exist in the future without the need to amend this Rule.
   - Cons: None Identified

3. Expand the Rule to encompass unlawful discrimination and harassment engaged in for the purpose of retaliation, as well as unlawful discrimination and harassment based on a protected characteristic.
   - Pros: Lawyers are obligated to obey the law as are nonlawyers, and this

addition would permit professional discipline where a lawyer, in representing a client or in the management or operation of a law firm, unlawfully discriminates against or harasses a person for the purpose of retaliating against that person because the person has taken action to oppose unlawful discrimination or harassment. Serves as additional protection for those obligated by the Rule itself, which includes lower level lawyers within a law firm, to advocate corrective action where they know of unlawful discrimination or harassment within the firm, even if by higher level lawyers within the firm.
- Cons: None identified.

4. Expand the current rule by removing the requirement that there be a final civil determination of wrongful discrimination before a disciplinary investigation can commence or discipline can be imposed.
   - Pros: See discussion under "Open Issues"
   - Cons: See discussion under "Open Issues"

B. Concepts Rejected (Pros and Cons):

1. Expand the current Rule by including conduct unrelated to the practice of law.
   - Pros: This could improve lawyer conduct.
   - Cons: This would be inconsistent with both current ABA Model Rule 3.8(d), Comment [3], and proposed ABA Model Rule 3.8(g), both of which limit themselves to conduct related to the practice of law. Extending beyond such conduct also increases the risk of impinging on First Amendment rights.

2. Expand the current rule or add a new rule to educate lawyers on promoting diversity in the legal profession.
   - Pros: This could improve lawyer conduct.
   - Cons: This would be an aspirational rule that would conflict with the Commission's charter to adhere to rules written narrowly for disciplinary purposes. Any deficiency in lawyers' continuing education could be addressed through mandatory continuing education requirements based on consideration by others who have expertise in that field.

3. Delete this rule under the theory that it interferes with the lawyer-client relationship by requiring lawyers to accept clients that they otherwise do not wish to represent.
   - Pros: None identified.
   - Cons: Lawyers, no less than any other citizens, have an obligation to obey applicable anti-discrimination laws and regulations. Comment [2] addresses the ability of lawyers to choose their clients.
   - See also Discussion of proposed Comment [2] under open issues.

4. Restrict the current rule so that it applies only to managerial and supervisory lawyers within a law firm.
   - Pros: RRC-1 made this change, apparently under the theory that Rule 5.1 does

not require subordinate lawyers to advocate for improvement in law firm conduct and Rule 5.2 permits a subordinate lawyer to accept a senior lawyer's reasonable directions, and that this Rule should be consistent with those Rules.

- Cons: We do not see any reason why this Rule must be consistent with Rules 5.1 and 5.2. Each lawyer has an affirmative obligation to comply with non-discrimination law. The anti-retaliation provision will protect more junior lawyers who advocate for correction of discriminatory conduct involving a senior lawyer.

C. Changes in Duties/Substantive Changes to the Current Rule:

1. Expands the Rule to prohibit discriminatory or harassing conduct generally in the course of representing a client.
2. Expands the Rule to prohibit discriminatory or harassing conduct on the basis of protected characteristics beyond those referenced in the current Rule.
3. Expands the Rule to prohibit retaliation.
4. Expands the Rule by eliminating the requirement that there be a final civil determination of wrongful discrimination before a disciplinary investigation can commence or discipline can be imposed. This change would give OCTC original jurisdiction to investigate and prosecute any claim of discrimination that is described as coming within the scope of this Rule under the current procedures of the disciplinary system.

D. Non-Substantive Changes to the Current Rule:

1. The proposal conforms to the Commission's decision to adopt the Model Rule use of "lawyer" in place of "member" and to replace capital with lower case letters in the numbering subparagraphs.
2. The proposal also replaces "law practice" with "law firm" because the latter phrase is expected to be a defined term used throughout the Rules.

E. Alternatives Considered:

1. Current ABA Model Rule 8.4(d), Comment [3].

   For many of the same reasons discussed in the ABA Memo, we believe the prohibition on unlawful discrimination and harassment in connection with representing clients should be in the rule itself, rather than in a comment interpreting the rule prohibiting conduct prejudicial to the administration of justice.

2. RRC-1's proposed Rule 8.4(d), Comment [3] and Rule 8.4.1 with accompanying comments. (A copy of these provisions is attached to this agenda item at pages 41 and 42, respectively.)

   For many of the same reasons discussed in the ABA Memo, we believe the prohibition on unlawful discrimination and harassment in connection with representing clients should be in the rule itself, rather than in a comment interpreting the rule prohibiting conduct prejudicial to the administration of justice. As discussed in (A)(1) above, we have followed RRC-1 in limiting the application of paragraph (a) to conduct "in representing a client" while (consistent with current California Rule 2-400) retaining separate provisions addressing conduct in the management or

operation of law firm.

3. Proposed ABA Model Rule 8.4(g) and accompanying Comment [3].
   We have followed the ABA in proposing paragraph (a), which moves into the rules themselves (as opposed to having simply a comment) the bar on discrimination and harassment. As discussed in (A)(1) above, we have followed RRC-1 in limiting paragraph (a) to conduct "in representing a client" while (consistent with current California Rule 2-400) retaining separate provisions addressing conduct in the management or operation of law firm.

4. With respect to section (d) and accompanying Comment [5] of the proposed rule, see discussion under Open Issues below.

IX. OPEN ISSUES/CONCEPTS FOR THE COMMISSION TO CONSIDER

1. **Comment [2]**
   As discussed in the ABA Memo on pages 5-6 (a copy of the ABA Memo is attached for reference), under the headings "Constitutionally Protected Activities," "Peremptory Challenges," and "New Language," the ABA has proposed three modifications to the language in its proposed comment to its proposed Rule 8.4(g). Current Comment [2] in the proposed rule does not reflect these modifications, each of which we believe should be the subject of discussion by the Commission.[5] In particular:

   (a) Should the Comment include an explicit statement that the Rule does not apply to conduct protected by the First Amendment? Given that the proposed Rule applies only to "unlawful" discriminatory or harassing conduct, this seems implicit, rendering such a statement not strictly necessary. On the other hand, to the extent it avoids issues and clarifies the intent not to impinge on First Amendment activities, there would appear to be no harm in adding such an explicit statement to the Comment, perhaps as follows: "The Rule does not apply to conduct protected by the First Amendment to the United States Constitution or by Article I, section 2 of the California Constitution."

   (b) Should the language relating to peremptory challenges be removed as the ABA proposes? The ABA concern that this could be read as limiting a trial judge's discretion on whether to refer conduct for discipline seems highly speculative. Moreover, removing the language might pose a risk of deterring parties from raising, or judges from finding, violations of Batson out of concern that such a finding would automatically subject an attorney to discipline. One compromise might be to reword the relevant sentence to read, "While both the parties and the trial judge retain discretion to refer such conduct for discipline, a trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (a)."

[5] A fourth proposed modification to the comment, discussed in the ABA Memo iunder the heading "Advocacy Exception," is reflected in current Comment [2] in the proposed Rule.

(c) Should the sentence addressing examples of permissible decisions to represent or not represent clients be modified to include cross-references to other Rules, including in particular Rule 1.16?

2. Section (d) and Comment [5]
With respect to section (d) and comment [5], a majority of the drafting team supports the version set out in the current proposal as a mechanism for addressing various concerns regarding State Bar original jurisdiction over claims of discriminatory conduct and avoiding the potential that the State Bar's determination on such a claim might conflict with the determination of the same claim by another tribunal. These concerns are reflected in the comments from OCTC and the State Bar Court, and were the subject of lengthy discussion at the Commissions November 2015 meeting. Some of these concerns are specifically flagged in item (e) below. Countervailing concerns include that no other rule has a similar limitation on State Bar original jurisdiction, and that including any such limitation may be viewed as inappropriately detracting from the intended message of the proposed rule that unlawful discriminatory conduct should provide a basis for discipline. Given the lengthy debate around this issue, the significant change from the current California rule that proposed section (d) and comment [5] would implement, the presence of conflicting views within the drafting team and within the Commission as a whole (based on the last meeting), and the recognition that there are legitimate pros and cons for the varying positions, we believe that the various options considered by the drafting team in the course of the majority of that team arriving at the current proposal should be the subject of discussion and consideration by the Commission as a whole, with additional input from OCTC and State Bar Court representatives. These options are the following, listed in an order based on their restriction of State Bar original jurisdiction over claims of discrimination, from least to most restrictive, with notes regarding the positions of the drafting team members:

(a) Nothing in the rule or comments addressing this issue, with the understanding that the current State Bar Rules of procedure already provide the State Bar with the ability to hold proceedings in abeyance. (Supported by one member of the drafting team, in part because no other Rule has a provision limiting State Bar original jurisdiction or highlighting State Bar procedures for holding disciplinary actions in abeyance.)

(b) Require notice to the State Bar of any parallel administrative or judicial proceeding, and leave it to the State Bar to determine whether or not to hold the disciplinary proceeding in abeyance pending the outcome of the related proceeding. This is the approach taken by paragraph (d) and comment [5] of draft 4.2. (Supported by the majority of the drafting team, and viewed as an acceptable compromise by the one member of the drafting team who supports option (a).) (In connection with this approach, the drafting team is seeking from OCTC and the State Bar Court additional information as to how they determine whether to hold matters in abeyance, and under what circumstances the pendency of a parallel administrative or judicial proceeding

would likely lead them to hold a disciplinary proceeding under this Rule in abeyance.)

(c) Require notice to the State Bar of any parallel administrative or judicial proceeding and mandate that the State Bar hold the disciplinary proceeding in abeyance pending a tribunal's ruling in the related proceeding. An earlier draft of paragraph (d) considered by the drafting team included a paragraph along these lines which read as follows: "If a person who is the subject of an alleged violation of paragraph (b) files an administrative or civil action premised on the same discriminatory conduct, the State Bar shall hold disciplinary proceedings regarding the alleged violation in abeyance pending an adjudication by a tribunal of competent jurisdiction finding that the alleged unlawful conduct occurred. Upon such adjudication, the State Bar may resume the disciplinary proceeding, and the tribunal finding or verdict shall be admissible evidence of the occurrence or non-occurrence of the alleged discrimination in that disciplinary proceeding. If the State Bar elects to continue to hold the disciplinary proceeding in abeyance pending the adjudication becoming final, whether as the result of the time for appeal expiring or judgment on appeal, the State Bar may impose conditions requiring the lawyer subject to the disciplinary proceeding [TBD]." (Rejected by the majority of the drafting team in favor of option (b) based in part on concerns that the Rules should not serve as a mechanism for directing OCTC or the State Bar Court to apply their procedures differently for purposes of one particular Rule.)

(d) Limit State Bar original jurisdiction to address claims of discriminatory conduct to those circumstances "where there is a clear 'per se' act of discrimination witnessed by an independent witness or corroborated by clear and convincing evidence." This would result in a modified form of current Rule 2-400(c) that would require the State Bar to wait on some triggering determination by another tribunal before pursuing an action against all but the most clear instances of discrimination. (Rejected by the majority of the drafting team both because they favored option (b) and because of difficulties in defining the limitation.)

(e) Eliminate State Bar original jurisdiction to address claims of discriminatory conduct by permitting it to address such claims only after a triggering determination by another tribunal, but a triggering determination less than that required by current Rule 2-400(c) (which requires a finding of unlawfulness upheld and final after appeal or rendered final because the time for filing an appeal has expired or the appeal has been dismissed). (Supported by one member of the drafting team based in part on certain of the concerns discussed at the last Commission meeting in connection with the vote that rejected the option of keeping something equivalent to current Rule 2-400(c), including due process, lack of OCTC resources and expertise, and the potential that disciplinary proceedings would be used as the testing ground for new theories of discrimination or as leverage in otherwise unrelated civil disputes between lawyers and former clients.)

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 2-400

Lead Drafter: Cardona
Co-Drafters: Clopton, Kehr, Kornberg, Langford, Rothschild, Zipser
Meeting Date: January 22 – 23, 2016

X. COMMENTS FROM DRAFTING TEAM MEMBERS OR OTHER COMMISSION MEMBERS

Kehr

- [Date]: Email Comment
- [Date]: Email Comment

Clopton

- [Date]: Email Comment
- [Date]: Email Comment

Kornberg

- [Date]: Email Comment
- [Date]: Email Comment

Rothschild

- [Date]: Email Comment
- [Date]: Email Comment

XI. RECOMMENDATION AND PROPOSED COMMISSION RESOLUTION

Recommendation:

That the Commission recommend that the Board of Trustees of the State Bar of California adopt proposed amended Rule 8.4.1 in the form attached to this report and recommendation.

Proposed Resolution:

RESOLVED: That the Commission for the Revision of the Rules of Professional Conduct recommends that the Board of Trustees adopt proposed amended Rule 8.4.1 in the form attached to this Report and Recommendation.

XII. DISSENTING POSITION(S)

[Anticipated dissent(s) relating to section (d) and Comment [5] of the proposed rule.]

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 2-400

Lead Drafter: Cardona
Co-Drafters: Clopton, Kehr, Kornberg, Langford, Rothschild, Zipser
Meeting Date: January 22 – 23, 2016

XIII. FINAL COMMISSION VOTE/ACTION

Date of Vote:

Action:

Vote: X (yes) – X (no) – X (abstain)

CURRENT CALIFORNIA RULE 2-400
"Prohibited Discriminatory Conduct in a Law Practice"

I. Text of Current Rule:

(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.

II. Background/Purpose:

A. Rule History

In 1990, the Judicial Council's Subcommittee on Gender Bias in the Courts recommended promulgation of a Rule of Professional Conduct prohibiting employment discrimination. In addition, in 1989, 1991 and 1992, the Conference of Delegates of the State Bar approved resolutions recommending State Bar promulgation of a new Rule of Professional Conduct that would subject attorneys to discipline for discrimination, including discrimination in the acceptance and termination of clients. In response, the State Bar prepared a new rule 2-400 that was adopted by the Board on March 6, 1993, and approved by the Supreme Court, effective March 1, 1994. (The foregoing origin of current rule 2-400, including studies by the Commission and a specially formed State Bar Anti-Bias Rule Committee, is discussed fully in the State Bar's "Request that the Supreme Court of California Approve Proposed Rule 2-400 of the Rules of Professional Conduct of the State Bar of California and Memorandum and Supporting Documents in Explanation," July, 1993, Supreme Court case number S034144.)

B. The first Commission's Proposed Rule

The first Commission's proposed rule 8.4.1 carried forward current rule 2-400. Current rule 2-400 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 or in accepting or terminating the representation of any client. Proposed rule 8.4.1 has no ABA Model Rule counterpart; however, both ABA Model Rule 8.4(d)[1]

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[1] Model Rule 8.4(d) provides it is misconduct for a lawyer to: "(d) engage in conduct that is prejudicial to the administration of justice." A Model Rule comment clarifies the application of paragraph (d):

> "[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule."

and the first Commission's proposed rule 8.4(d)[2] addressed discrimination by individual lawyers while representing a client.

III. Input from the State Bar Office of the Chief Trial Counsel (OCTC):

A. 2015 Comment

In a __________, 2015 memorandum to the Commission, OCTC provided the following comment regarding rule 2-400:

> (Note: OCTC is expected to provide new comments on this rule. These comments will be distributed to the drafting team when they are received from OCTC.)

B. 2010 Comment

In a June 15, 2010 memorandum to the first Commission, OCTC provided the following comment on proposed rule 8.4.1:

> Some of the Comments are more appropriate for treatises, law review articles, and ethics opinions. We would support Comment 2.

C. 2001 Comment

None.

IV. Initial Public Comments Received:

At its April 24, 2015 meeting, the Board of Trustees Regulation and Discipline Committee authorized a 45-day public comment period to seek general input on possible amendments to the Rules of Professional Conduct that ought to be considered by the Commission. A synopsis of public comments received on rule 2-400 and the full text of those comments is enclosed with this assignment.

Three comments specific to current rule 2-400 were received. An individual commenter recommended deleting the rule as it interferes with the attorney-client relationship. The Bar Association of San Francisco recommended revisions to the rule to make it less restrictive and more meaningful. The State Bar Council on Access and Fairness (COAF) suggested modifications to the rule to incorporate language from current California statutes to better reflect current employment protections, and suggested additional language to promote diversity within the legal profession. COAF included suggested language in its comment.

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[2] The first Commission's proposed rule 8.4(d) provided it would be misconduct for a lawyer to: "(d) engage in conduct in connection with the practice of law, including when acting in propria persona, that is prejudicial to the administration of justice."

VI. Potential Deficiencies in the Current Rule:

A. See above input from OCTC.

B. The current rule contains ambiguities as to whether the rule applies only to managerial or supervisory lawyers. If so, the Rules do not contain any prohibitions on discriminatory conduct by a non-managerial lawyer.

C. The current rule language is outdated and does not reflect current statutory employment protections.

D. The current rule limits discipline to situations where there is a final judgment from a tribunal of final jurisdiction that has found discriminatory conduct has occurred. This limits the State Bar's ability to enforce prohibitions on discriminatory conduct in the operation or management of a law practice.

E. The current rule is limited to situations relating to the "the management or operation of a law practice," and does not reach conduct by lawyer in providing legal services to a client, except to the extent that the lawyer might discriminate in the acceptance or termination of a representation. (Compare Model Rule 8.4(d), which applies to any conduct by a lawyer that is prejudicial to the administration of justice, including discriminatory conduct.) (See section VII.A. and note 1; see also section VIII.B. concerning proposed Model Rule 8.4(g).)

VII. California Context:

A. <u>Former California Law Encompassing Bias</u>

Currently, California does not have a rule or commentary prohibiting conduct prejudicial to the administration of justice or prohibiting bias or prejudice where that conduct is prejudicial to the administration of justice. (See ABA Model Rule 8.4 and Comment [3].) However, former Business and Professions Code section 6068, subdivision (f) prohibited in part "offensive personality." (See also, Code of Civ. Proc. Sec. 282(6), discussed in *Peters v. State Bar* (1933) 219 Cal. 218.) In *U.S. v. Wunsch* (9th Cir. 1996) 84 F.3d 1110, that part of section 6068(f) was found unconstitutionally vague and a regulation against personality rather than speech or conduct. The following case law demonstrates how this provision was applied prior to invalidation and demonstrates what type of conduct was considered to reflect an "offensive personality."

- Attorney described a judge as under a "political obligation" to opposing counsel. *Peters v. State Bar* (1933) 219 Cal. 218.
- Attorney charged the presiding judge with acting as a prosecutor and attorney for the plaintiff and being prejudiced against certain witnesses because of their religion. *Hogan v. State Bar* (1951) 36 Cal.2d 807.
- Defense attorney referred to prosecutor as a "high-priced lawyer." *Hawk v. Superior Court* (1974) 42 Cal.App.3d 108.

- In a dispute with a former client, attorney disclosed the irrelevant fact that client's sister was having an affair. *Dixon v. State Bar* (1982) 32 Cal.3d 728.
- Attorney described a judge as having a "boudoir." *Maltaman v. State Bar* (1987) 43 Cal.3d 924.
- Attorney referred to the court as "dirty," characterized judges as "the four stooges," and told a court clerk that a judge is a "swine." *Lebbos v. State Bar* (1991) 53 Cal.3d 37.
- Attorney called opposing counsel "a slob." *People v. Brown* (1992) 7 Cal.Rptr.2d 370 (ordered not published, previously published at: 5 Cal.App.4th 950).

B. <u>California Law Related to Sexual Harassment of Clients</u>

Issues relating to preventing discrimination and bias in the legal profession overlap with issues concerning sexual harassment. In addition to current rule 3-120, which prohibits attorneys from demanding sexual relations with clients, or from using coercion, intimidation, or undue influence in entering into a sexual relationship with a client, California case law also addresses sexual harassment and sexual offenses by attorneys. For example, the Court of Appeal held that an attorney engaging in sexual harassment of a client, and withholding legal services where sexual favors were not granted, could constitute outrageous conduct for purposes of intentional infliction of emotional distress. *McDaniel v. Gile* (1991) 230 Cal.App.3d 363, 373. Additionally, the State Bar has imposed discipline against attorneys for sexual harassment and other sexual offenses under Business and Professions Code section 6106, which subjects attorneys to discipline for acts involving moral turpitude. In one instance, an attorney was disciplined for sexual harassment of a client and intentional infliction of emotional distress. *In the Matter of Torres* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 138. In other cases, attorneys have been disciplined for sexual crimes involving moral turpitude. *In re Lesansky* (2001) 25 Cal.4th 11 [104 Cal.Rptr.2d 409] (lewd act on a child); *In re Safran* (1976) 18 Cal.3d 134 [133 Cal.Rptr. 9] (annoying or molesting a child under 18); *In the Matter of Meza* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 608 (three or more acts of sexual conduct with a child under age 14).

C. <u>Incentives for Diversity</u>.

Related to the elimination of bias and prejudice in the workplace, various California statutes offer incentives to minority and women business enterprises. For contracts awarded by state entities, Public Contract Code section 10115 et. seq. sets participation goals for minority, women, and disabled veteran business enterprises, and requires that the awarding entity consider the efforts of the bidders to meet the diversity goals set forth in the statute. Similar participation goals are included for state agencies awarding contracts for professional bond services. Government Code section 16850 et. seq. Similar to the goals behind rule 2-400, these incentives seek to encourage diversity in the workplace as well as the elimination of bias and discrimination.

D. Attorney Oath.

Recent amendments to California Rule of Court 9.4 added new language to the oath taken by attorneys upon admission to practice law. The additional language states: "As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity." Similar to the policies and concepts behind current rule 2-400 of preventing discrimination, promoting diversity, and eliminating bias in the legal profession, the attorney oath provision seeks to ensure the legal profession displays respect and courtesy to other lawyers, clients, and the public.

VIII. Approach In Other Jurisdictions (National Backdrop):

A. Variations on Rules Prohibiting Discrimination.

There is no ABA Model Rule counterpart to rule 2-400 that prohibits discrimination in the operation and management of a law firm. However, twenty-three jurisdictions have adopted rules of professional conduct that prohibit discrimination.[3] Sixteen of those jurisdictions have rules that specifically prohibit discrimination in conduct that occurs by a lawyer in a professional capacity.[4] Four jurisdictions have rules that prohibit discrimination in representing a client.[5] Two jurisdictions have rules that prohibit discrimination in connection with a proceeding before a tribunal.[6] Michigan Rule 6.5 requires lawyers to treat all persons involved in the legal process with courtesy and respect. A comment to Michigan rule 6.5 provides that "a supervisory lawyer should make reasonable efforts to ensure that the firm has in effect policies and procedures that do not discriminate against members or employees of the firm."

In addition, Comment [3] to Model Rule 8.4 is related and prohibits lawyers from knowingly manifesting bias or prejudice by words or conduct when such actions are prejudicial to the administration of justice. Of the jurisdictions with no black letter rule on discrimination, thirteen have adopted Commentary with language identical or substantially similar to Comment [3].[7] Similar language was also included in Comment [3] to the first Commission's proposed rule 8.4. Fourteen jurisdictions do not have a rule

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[3] The twenty-three jurisdictions are: Colorado, District of Columbia, Florida, Illinois, Indiana, Iowa, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Rhode Island, Texas, Vermont, Washington, and Wisconsin.

[4] The sixteen jurisdictions are: District of Columbia, Florida, Illinois, Indiana, Iowa, Maryland, Massachusetts, Minnesota, Nebraska, New Jersey, New York, Ohio, Rhode Island, Vermont, Washington, and Wisconsin.

[5] The four jurisdictions are: Colorado, Missouri, North Dakota, and Oregon.

[6] The two jurisdictions are: New Mexico and Texas.

[7] The thirteen jurisdictions are: Arizona, Arkansas, Connecticut, Delaware, Idaho, Maine, North Carolina, South Carolina, South Dakota, Tennessee, Utah, West Virginia, and Wyoming.

or commentary addressing these issues.[8] The ABA State Adoption Chart, entitled "Variations of the ABA Model Rules of Professional Conduct, Rule 8.4: Misconduct, Comment [3]," revised June 15, 2015, is available at:

http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_8_4_cmt_3.authcheckdam.pdf

B. ABA Revisions to Model Rule 8.4.

In response to the ABA's Goal III to eliminate bias and enhance diversity, the ABA Standing Committee on Ethics and Professional Responsibility is considering amendments to the black letter of Model Rule 8.4 to expressly address bias, prejudice, and harassment. See ABA Standing Committee on Ethics and Professional Responsibility Working Discussion Draft – Revisions to Model Rule 8.4 Language Choice Narrative, July 16, 2015, enclosed with this assignment. The working draft amendment to Model Rule 8.4 is as follows:

> It is professional misconduct for a lawyer to: . . .
>
> (g) knowingly harass or discriminate against persons, on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status, while engaged [in conduct related to] [in] the practice of law.

The ABA Committee has also drafted amendments to Model Rule 8.4, Comment [3].[9]

IX. Public Comment Received by the First Commission:

The first Commission received comments on current rule 2-400 and proposed rule 8.4.1 during separate public comment periods. During an initial public comment period, the Commission received public comments on current rule 2-400. The synopsis of the initial

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[8] The fourteen jurisdictions are: Alabama, Alaska, Georgia, Hawaii, Kansas, Kentucky, Louisiana, Mississippi, Montana, New Hampshire, Nevada, Oklahoma, Pennsylvania, and Virginia.

[9] The proposed amendment would replace current Comment [3] with the following:

> Conduct that violates paragraph (g) undermines confidence in the legal profession and our legal system and is contrary to the fundamental principle that all people are created equal. A lawyer may not engage in such conduct through the acts of another. See Rule 8.4(a). Legitimate advocacy respecting any of these factors when they are at issue in a representation does not violate paragraph (g). It is not a violation of paragraph (g) for lawyers to limit their practices to clients from underserved populations as defined by any of these factors, or for lawyers to decline to represent clients who cannot pay for their services. A trial judge's finding that preemptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). Paragraph (g) incorporates by reference relevant holdings by applicable courts and administrative agencies.

public comments received by the first Commission on rule 2-400 and the full text of those comments are enclosed with this assignment.

During the second public comment period, the Commission received public comments on proposed rule 8.4.1. The clean text of proposed rule 8.4.1 drafted by the first Commission and adopted by the Board to replace rule 2-400 is enclosed with this assignment, together with the synopsis of public comments received on that proposed rule and the full text of those comments. Although the proposed rule differs from current rule 2-400, the drafting team might consider to what extent, if any, the public comments received on the proposed rule provide helpful information in analyzing the current rule.

To facilitate the review and to appreciate the relevance of these public comments, a redline comparison of the proposed rule showing changes to rule 2-400 is also enclosed with the public comments received. However, given the Board's charge to engage in a comprehensive review of the current rules and to retain the historical nature of the California Rules as "a clear and enforceable articulation of disciplinary standards," a drafting team that considers amendments developed by the first Commission should not presume that the approach taken by the first Commission was appropriate to achieve those objectives.

X. Potential Issues Identified by Professional Competence Staff Following Review of the Proposed Rule Developed by the First Commission and Adopted by the Board:

Bearing in mind the Commission's Charter to engage in a comprehensive review of the current rules and to retain the historical nature of the California Rules as "a clear and enforceable articulation of disciplinary standards," Professional Competence staff identified the following rule amendment issues (in no particular order) that the drafting team might consider. The drafting team need not address any of the issues. For example, if after critically evaluating an issue addressed by a revision made by the first Commission, the drafting team determines that the revision does not address an actual (as opposed to theoretical) public protection deficiency in the current rule, then the drafting team should hesitate to recommend a change to the current rule despite the prior decision by the first Commission and the Board to address the issue. (Note: For the sake of completeness and ease of reference, some of the issues listed below may have already been mentioned in connection with other information provided above, such as in connection with the approaches taken in other jurisdictions or prior public comment. Multiple mentions of an issue do not necessarily warrant the drafting team taking action on an issue.)

1. Whether the rule should be amended to clarify that the prohibition on discriminatory conduct 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.

2. Whether a related new rule generally governing anti-bias speech/conduct by lawyers should be recommended for adoption by the Board. (See the former prohibition against "offensive personality" that was found to be unconstitutionally vague in *U.S. v. Wunsch* (9th Cir. 1996) 84 F.3d 1110.) (See also MR 8.4(d) prohibiting conduct prejudicial to the administration of justice.)

3. Whether current rule 2-400(C) should be deleted or modified to provide the State Bar with an opportunity to investigate and discipline lawyers without the requirement that there first be a final judgment by a tribunal that has found that discriminatory misconduct has occurred.

4. Whether current rule 2-400 should be amended or a new rule similar to proposed Model Rule 8.4(g) should be proposed that would prohibit a lawyer from "knowingly harass[ing] or discriminat[ing] against persons, on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status, while engaged [in conduct related to] [in] the practice of law." (See section VIII.B, above.)

XI. Research Resources:

- California Rules of Court, Appendix C, proposed guideline 5 (bias and prejudice)
- *U.S. v. Wunsch* (9th Cir. 1996) 84 F.3d 1110
- ABA Standing Committee on Ethics and Professional Responsibility Working Discussion Draft – Revisions to Model Rule 8.4 Language Choice Narrative, July 16, 2015

Rule 8.4: Misconduct

It is professional misconduct for a lawyer to:

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(g) in conduct related to the practice of law, harass or knowingly discriminate against persons on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status.

Comment

[3] Paragraph (g) applies to conduct related to a lawyer's practice of law, including the operation and management of a law firm or law practice. It does not apply to conduct unrelated to the practice of law or conduct protected by the First Amendment. Harassment or discrimination that violates paragraph (g) undermines confidence in the legal profession and our legal system. Paragraph (g) does not prohibit lawyers from referring to any particular status or group when such references are material and relevant to factual or legal issues or arguments in a representation. Although lawyers should be mindful of their professional obligations under Rule 6.1 to provide legal services to those unable to pay, as well as the obligations attendant to accepting a court appointment under Rule 6.2, a lawyer is usually not required to represent any specific person or entity. Paragraph (g) does not alter the circumstances stated in Rule 1.16 under which a lawyer is required or permitted to withdraw from or decline to accept a representation. ~~A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.~~

MEMORANDUM

Standing Committee on Ethics and Professional Responsibility
Draft Proposal to Amend Model Rule 8.4
December 22, 2015

INTRODUCTION

Seventeen years ago, the American Bar Association amended the ABA Model Rules of Professional Conduct ("the Model Rules") to address lawyers who discriminate against others. In 1998, the ABA House of Delegates decided to add a Comment to Model Rule 8.4 to provide that it would be professional misconduct, "prejudicial to the administration of justice," if a lawyer "knowingly manifests by words or conduct, bias or prejudice" against certain categories of persons, while "in the course of representing a client." This was a compromise result reached after six years of proposals and counterproposals.

By addressing this issue in a Comment, however, the compromise did not make manifestations of bias or prejudice such as discrimination or harassment a separate and direct violation of the Model Rules. This is because statements in the Comments are not authoritative. As noted in Paragraph [14] of the Preamble and Scope to the Model Rules: "Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules." In addition, paragraph [21] of the Preamble and Scope states: "The Comments are intended as guides to interpretation, but the text of each Rule is authoritative." Thus, for many, the ABA has not addressed this issue squarely, in the authoritative manner it would be if it were addressed in the text of a Model Rule.

The Standing Committee on Ethics and Professional Responsibility's proposal moves beyond the Comment to craft a distinct rule within the black letter of the Model Rules of Professional Conduct prohibiting lawyers from engaging in harassment and knowing discrimination in conduct related to the practice of law. By choosing to move the prohibition against discrimination and harassment into a black letter rule, the ABA will join many other professions that prohibit this same behavior in their codes of conduct.[1]

The draft proposal presented here is also a compromise that seeks to harmonize the different views of many individuals and entities. Recently representatives from the Oregon New Lawyers Division drafted a similar proposal for the ABA Young Lawyers Division Assembly to consider. The authors of that resolution explained the need for change eloquently. They wrote:

[1] See Appendix for information about other licensed professionals' anti-discrimination provisions in codes of conduct.

> There is a need for a cultural shift in understanding the inherent integrity of people regardless of their race, color, national origin, religion, age, sex, gender identity, gender expression, sexual orientation, marital status, or disability, to be captured in the rules of professional conduct.
>
> This is true because the Model Rules are supposed to ensure the integrity of the legal profession. Indeed, it is a rhetorical question to ask "what is more important to the integrity of the law than ensuring that those who seek out legal representation are not subject to discrimination, harassment, or intimidation simply because of the color of their skin, their gender or gender identity, having a disability or being lesbian, gay, or bisexual?"

RULE AMENDMENTS

Under current Model Rule of Professional Conduct 8.4(d), it is professional misconduct for a lawyer to engage in conduct that is "prejudicial to the administration of justice." Comment [3] to Model Rule 8.4 explains that when, "in the course of representing a client," a lawyer "knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status," such words or conduct violate paragraph (d), if they also are prejudicial to the administration of justice.

The draft proposal released for public comment reads:

Rule 8.4: Misconduct

It is professional misconduct for a lawyer to:

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(g) in conduct related to the practice of law, harass or knowingly discriminate against persons on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status.

Comment

[3] Paragraph (g) applies to conduct related to a lawyer's practice of law, including the operation and management of a law firm or law practice. It does not apply to conduct unrelated to the practice of law or conduct protected by the First Amendment. Harassment or discrimination that violates paragraph (g) undermines confidence in the legal profession and our legal system. Paragraph (g) does not prohibit lawyers from referring to any particular status or group when such references are material and relevant to factual or legal issues or arguments in a representation. Although lawyers should be mindful of their professional obligations under Rule

6.1 to provide legal services to those unable to pay, as well as the obligations attendant to accepting a court appointment under Rule 6.2, a lawyer is usually not required to represent any specific person or entity. Paragraph (g) does not alter the circumstances stated in Rule 1.16 under which a lawyer is required or permitted to withdraw from or decline to accept a representation. ~~A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.~~

Below is a discussion of the changes suggested in the draft proposal.

1. **Scope of the Rule**. The draft proposal establishes that it is professional misconduct for a lawyer to "harass or knowingly discriminate against persons" while engaged in "conduct related to the practice of law."

The draft proposal would expand the coverage of the rule from conduct performed "in the course of representing a client" to conduct that is "related to" the practice of law. "The practice of law" is the term used in the Preamble and Scope of the Model Rules to describe the focus and scope of the Rules.[2] The Preamble to the Model Rules explains that lawyers are representatives of clients, officers of the legal system, and public citizens "having special responsibility for the quality of justice."[3] Lawyers act as advisors, advocates, negotiators, and evaluators for clients. They also act as third-party neutrals. As officers of the legal system, they participate in activities related to the practice of law through court appointments, bar association activities and other, similar conduct.

In the draft proposal Comment, the Ethics Committee specifies one area of conduct that is "related to" the practice of law: the operation and management of a law firm or law practice. This would include conduct at activities such as law firm dinners and events at which the lawyers were present solely because of their association with the law firm. Nationally, there are states that both explicitly include and explicitly exclude those activities.[4] The Ethics Committee determined that the argument for exclusion of those activities was less compelling that for inclusion—one simply cannot demand one level of professional behavior for lawyers that is

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[2] *See* ABA Model Rules of Professional Conduct, Scope [16]: "The Rules simply provide a framework for the ethical practice of law."

[3] ABA Model Rules of Professional Conduct, Preamble [1].

[4] For an example of a jurisdiction that includes employment practices within its anti-discrimination rule of conduct see Washington DC Rule 9.1 Discrimination in Employment and California Rule 2-400 Prohibited Discriminatory Conduct in a Law Practice. New Jersey excludes employment law discrimination from the scope of its rule unless "it has resulted in either an agency or judicial determination of discriminatory conduct." See New Jersey Supreme Court Comment to Rule 8.4.

external to their own law practice while allowing a lesser standard of behavior inside one's own office.

The Ethics Committee has heard from some in the bar that because legal remedies are available to persons who believe that a lawyer or law firm has harassed or discriminated against them in employment, such conduct by lawyers should not also be deemed to be professional misconduct. The Ethics Committee notes, however, that legal remedies are available for other conduct, such as that described in paragraph (c) to Rule 8.4 – fraud, deceit or misrepresentation – but such conduct also constitutes professional misconduct.

2. **Prohibited Activity**. The draft proposal prohibits "harassment and knowing discrimination." The term used in the current Comment -- "words or conduct manifesting bias or prejudice" -- is very broad. It arguably was appropriate when Rule 8.4(d) prohibited such words or conduct only "in the course of representing a client," and only when prejudicial to the administration of justice. However, when the scope of the Rule is refined to cover all conduct related to the practice of law, the Ethics Committee determined it appropriate to balance this broader scope with a more specific definition of the conduct to which the rule would apply.

The terms "harassment" and "discrimination" are defined terms under law; they refer to the adverse, negative consequences of conduct that manifests bias or prejudice. But to simply refer to any "conduct related to the practice of law" that manifests bias or prejudice without reference to whether such conduct constitutes harassment or discrimination, was considered amorphous a basis upon which to define professional misconduct.

The Ethics Committee therefore decided to use the terms "harassment" – which is understood to include the creation of a hostile work environment and is evaluated in terms of the reasonable perception of the victims of such conduct – and "knowing discrimination" – which is understood to include conduct that a person engaging in such conduct knows will result in a person or persons being treated in a different and harmful way because of their membership or perceived membership in one or more of the categories listed in the rule. The word "knowing" was retained when applied to discrimination because the Ethics Committee concluded that conduct which had a non-discriminatory intent, such as hiring decisions based on class rank or the willingness of the applicant to relocate to a particular jurisdiction, should not be a basis for a finding of professional misconduct. In addition, "knows" is a defined term in the Model Rules of Professional Conduct. The Rules define "knows" as "actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances."[5] Because this is the standard used throughout the Model Rules, it is appropriate to incorporate it here.

3. **Protected Groups**. The categories of protected groups now include "ethnicity", "gender identity", and "marital status." These additional categories reflect current concerns regarding discriminatory practices. For example, questions of "ethnicity" may reflect individuals who are

[5] ABA Model Rules of Professional Conduct, Rule 1.0(f).

of mixed national origins or races. "Gender identity" is relevant as a new societal awareness of the individuality of gender has changed the traditional binary concept of sexuality. And the Supreme Court's decision holding that marriage is a fundamental constitutional right regardless of sexual orientation,[6] and the rise in single parenthood in our society, makes the addition of "marital status" apt.

4. **Constitutionally Protected Activities.** To avoid ambiguity and to address the Constitutional concerns that were raised by some commentators, the new Comment explicitly states that the Rule does not apply to conduct that is unrelated to the practice of law or to conduct protected by the First Amendment. The Comment makes clear that a lawyer does retain a "private sphere" where personal opinion, freedom of association, religious expression, and political speech is protected by the First Amendment and not subject to the Rule. We believe this is a useful clarification. The Ethics Committee's research indicated that when state courts adopted similar black letter prohibitions, possible First Amendment challenges and issues were considered. Therefore, adding this language to the Comment would appropriately address this concern.

5. **Advocacy Exception**. The proposal retains but redrafts the advocacy exception contained in the current Comment [3] to Model Rule 8.4. Current Comment [3] includes the statement: "Legitimate advocacy respecting the foregoing factors does not violate paragraph (d)." The draft proposal reads: "Paragraph (g) does not prohibit lawyers from referring to any particular status or group when such references are material and relevant to factual or legal issues or arguments in a representation." The question of whether a person's status or group affiliation is material and relevant to factual or legal issues or arguments in a matter is a clearer standard than "legitimate advocacy" for disciplinary counsel and state courts to apply, as it incorporates concepts already known in the law — "material" and "relevant."

6. **Peremptory Challenges**. The proposal does not include the following statement currently in Comment [3]: "A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule." A concern was raised with the Ethics Committee that this sentence could be read as limiting a trial judge's discretion on whether to refer such conduct for discipline. The Ethics Committee concluded that the Comment to this Rule need not address or take a position, either way, on the weight of evidence in a disciplinary proceeding or pre-empt the disciplinary process.

7. **New Language**. The proposed new Comment includes the following new language: "Although lawyers should be mindful of their professional obligations under Rule 6.1 to provide legal services to those unable to pay, as well as the obligations attendant to accepting a court appointment under Rule 6.2, a lawyer is usually not required to represent any specific person or entity. Paragraph (g) does not alter the circumstances stated in Rule 1.16 under which a lawyer is required or permitted to withdraw from or decline to accept a representation." The Ethics

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[6] Obergefell v. Hodges, 576 U.S. ___(2015).

Committee concluded it was important in the context of this rule to remind lawyers of their pro bono and public service responsibilities under Model Rules 6.1 and 6.2, and also that Model Rule 1.16 allows lawyers to limit their practice, accept or decline representation, and withdraw from matters for many reasons. These include when there is a substantial risk that the representation will be materially limited by the lawyer's personal interest.

PROPOSAL HISTORY

This review of Model Rule 8.4(d) and Comment [3] was prompted by a May 2014 letter the ABA's Goal III Commissions (the Commission on Women in the Profession; Commission on Racial and Ethnic Diversity in the Profession; Commission on Disability Rights; and Commission on Sexual Orientation and Gender Identify) wrote to the Standing Committee on Ethics and Professional Responsibility asking it to consider amending the Model Rules to better address issues of harassment and discrimination by lawyers.

As noted above, the last time this issue was addressed in the Model Rules was 17 years ago in 1998 after several failed attempts over a six year period. The result was the adoption of Comment [3] to Rule 8.4. Since then, however, twenty-four jurisdictions have crafted rules of professional conduct that in the black letter of their rules address bias, discrimination, or harassing behavior by a lawyer. These rules vary – some addressing the issue very broadly, some more narrowly.

More recently, the ABA has adopted policy that directly addresses biased behavior and harassment by lawyers and judges. For example, the ABA Model Code of Judicial Conduct, revised and adopted by the House of Delegates in 2007, includes Rule 2.3, *Bias, Prejudice, and Harassment.* In the black letter of the Rule judges are prohibited from speaking or behaving in a way that manifests "bias or prejudice," and from engaging in harassment, "based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation." The Rule also calls upon judges to require lawyers to refrain from this same activity in proceedings before the court.[7]

Also, in February 2015, the ABA House of Delegates adopted revised *ABA Standards for Criminal Justice: Prosecution Function and Defense Function* which now include anti-bias provisions. These provisions are in Standards 3-1.6 and 4.16.[8] These Standards explain that prosecutors and defense counsel should not "manifest or exercise, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation,

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[7] ABA Model Code of Judicial Conduct, Rule 2.3 (C) ("A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited to race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, against parties, witnesses, lawyers, or others.")

[8] ABA Standards for Criminal Justice: Prosecution Function and Defense Function available at http://www.americanbar.org/groups/criminal_justice/standards.html

gender identity or socioeconomic status." This statement appears in the black letter of the Standards, not in a comment.

These developments, both within the ABA and within legal ethics circles nationally, illustrate the depth of concern about this issue. In the seventeen years since this subject was addressed in the Model Rules of Professional Conduct, perspectives continue to change in our society. Harassment, including sexual harassment, has been recognized for the serious problems that it is. To some, the phrase, "conduct that manifests bias of prejudice," seems outdated. Gender identity, not just sexual orientation, has been identified as a basis for discrimination. Debate has continued as to what ethical effect to give a trial judge's finding that preemptory challenges have been exercised on a discriminatory basis.

In developing this proposal to add a new paragraph (g) to Model Rule 8.4 and amend Comment [3] to MR 8.4, the Ethics Committee has benefitted from the many comments it received at the Roundtable Discussion it held at the 2015 ABA Annual Meeting on an earlier Working Discussion Draft, and from the written comments it received after that meeting, from different ABA Sections, Commissions, Committees and individual members. These comments were each and all carefully considered in the preparation of this revised proposal. The current proposal represents an effort to harmonize the sometimes divergent but always legitimate views we received. Many of the changes reflected in this proposal were prompted by the suggestions made and comments expressed in those communications. At the same time it is important to remember that no rule can capture all unethical or illegal conduct that may occur in this sphere, but this proposal does capture the egregious conduct that diminishes the profession.

CONCLUSION

While this proposal is being presented by the Standing Committee on Ethics and Professional Responsibility, the issue transcends the Model Rules of Professional Conduct. The Model Rules of Professional Conduct are both rules used by the states and courts to establish standards of conduct and professional discipline and, at the same time, they are a statement of the minimum expected by all lawyers. It is time that harassment and discriminatory conduct by a lawyer based on race, religion, sex, disability, LGBTQ status or other factors, be considered professional misconduct when such conduct is related to the practice of law. The question is not whether such conduct is or is not common in our profession. Any such conduct brings disrepute to the profession. Rather, the public has a right to know that as a largely self-governing profession we hold ourselves to normative standards of conduct in all our professional activities, in furtherance of the public's interest in respect for the rule of law and for those who interpret and apply the law, the legal profession.

American Association of University Professors – Statement on Professional Ethics

- 2. Professors make every reasonable effort to foster honest academic conduct and to ensure that their evaluations of students reflect each student's true merit. They respect the confidential nature of the relationship between professor and student. They avoid any exploitation, harassment, or discriminatory treatment of students.
- 3. As colleagues, professors have obligations that derive from common membership in the community of scholars. Professors do not discriminate against or harass colleagues.

American Counseling Association – Code of Ethics

- Section C, Professional Responsibility. Part 5. Nondiscrimination. Counselors do not condone or engage in discrimination against prospective or current clients, students, employees, supervisees, or research participants based on age, culture, disability, ethnicity, race, religion/spirituality, gender, gender identity, sexual orientation, marital/ partnership status, language preference, socioeconomic status, immigration status, or any basis proscribed by law.
- Section C, Part 6. Public Responsibility. Part a. Counselors do not engage in or condone sexual harassment. Sexual harassment can consist of a single intense or severe act, or multiple persistent or pervasive acts.

American Dental Association – Principles of Ethics and Code of Professional Conduct

- **Code of Professional Conduct, Section 4.A. Patient Selection**. While dentists, in serving the public, may exercise reasonable discretion in selecting patients for their practices, dentists shall not refuse to accept patients into their practice or deny dental service to patients because of the patient's race, creed, color, sex or national origin.

American Institute of Architects – Code of Ethics and Professional Conduct

- **Rule 1.401** Members shall not discriminate in their professional activities on the basis of race, religion, gender, national origin, age, disability, or sexual orientation.

American Institute of Certified Public Accountants – Code of Professional Conduct

- 1.400.010 Discrimination and Harassment in Employment Practices. A *member* would be presumed to have committed an act discreditable to the profession, in violation of the "Acts Discreditable Rule" [1.400.001] if a final determination, no longer subject to appeal, is made by a court or an administrative agency of competent jurisdiction that a *member* has violated any antidiscrimination laws of the United States, a state, or a municipality, including those related to sexual and other forms of harassment.

American Medical Association – Principles of Medical Ethics, Principles:

- I. A physician shall be dedicated to providing competent medical care, with compassion and respect for human dignity and rights.
- III. A physician shall respect the law and also recognize a responsibility to seek changes in those requirements which are contrary to the best interests of the patient.
- V. A physician shall continue to study, apply, and advance scientific knowledge, maintain a commitment to medical education, make relevant information available to patients, colleagues, and the public, obtain consultation, and use the talents of other health professionals when indicated.
- VI. A physician shall, in the provision of appropriate patient care, except in emergencies, be free to choose whom to serve, with whom to associate, and the environment in which to provide medical care.

Interpreted in **Opinion 9.12** to mean physicians who offer their services to the public may not decline to accept patients because of race, color, religion, national origin, sexual orientation, gender identity or any other basis that would constitute invidious discrimination.

Interpreted in **Opinion 10.05** to mean physicians cannot refuse to care for patients based on race, gender, sexual orientation, or any other criteria that would constitute invidious discrimination or refuse to provide a specific treatment sought by an individual that is incompatible with the physician's personal, religious, or moral beliefs.

American Nurses Association – Code of Ethics

- Provision 1. The nurse, in all professional relationships, practices with compassion and respect for the inherent dignity, worth, and uniqueness of every individual, unrestricted by considerations of social or economic status, personal attributes, or the nature of health problems.
- 1.1 Respect for human dignity. A fundamental principle that underlies all nursing practice is respect for the inherent worth, dignity, and human rights of every individual. Nurses take into account the needs and values of all persons in all professional relationships.
- 1.2 Relationships to patients. The need for health care is universal, transcending all individual differences. The nurse establishes relationships and delivers nursing services with respect for human needs and values, and without prejudice. An individual's lifestyle, value system and religious beliefs should be considered in planning health care with and for each patient. Such consideration does not suggest that the nurse necessarily agrees with or condones certain individual choices, but that the nurse respects the patient as a person.

American Psychological Association – Ethical Principles of Psychologists and Code of Conduct.

- **Ethical Standard 1.10 Nondiscrimination**. In their work-related activities, psychologists do not engage in unfair discrimination based on age, gender, race, ethnicity, national origin, religion, sexual orientation, disability, socio-economic status, or any basis proscribed by law.
- **Ethical Standard 1.11 Sexual harassment** (a) Psychologists do not engage in sexual harassment.
- **Ethical Standard 1.12 Other harassment.** Psychologists do not knowingly engage in behavior that is harassing or demeaning to persons with whom they interact in their work based on factors such as those persons' age, gender, race, ethnicity, national origin, religion, sexual orientation, disability, language, or socioeconomic status.

National Association of Social Workers – Code of Ethics

- Ethical Standards 4.02. Social workers should not practice, condone, facilitate, or collaborate with any form of discrimination on the basis of race, ethnicity, national origin, color, sex, sexual orientation, gender identity or expression, age, marital status, political belief, religion, immigration status, or mental or physical disability.

National Education Association – Code of Ethics

- Principle 1. The educator strives to help each student realize his or her potential as a worthy and effective member of society. The educator therefore works to stimulate the spirit of inquiry, the acquisition of knowledge and understanding, and the thoughtful formulation of worthy goals. In fulfillment of the obligation to the student, the educator . . . Shall not on the basis of race, color, creed, sex, national origin, marital status, political or religious beliefs, family, social or cultural background, or sexual orientation, unfairly: exclude any student from participation in any program; deny benefits to any student; grant any advantage to any student

National Realtors – Code of Ethics and Standards of Practice

- Article 10. Realtors® shall not deny equal professional services to any person for reasons of race, color, religion, sex, handicap, familial status, national origin, sexual orientation, or gender identity. Realtors® shall not be parties to any plan or agreement to discriminate against a person or persons on the basis of race, color, religion, sex, handicap, familial status, national origin, sexual orientation, or gender identity. Realtors®, in their real estate employment practices, shall not discriminate against any person or persons on the basis of race, color, religion, sex, handicap, familial status, national origin, sexual orientation, or gender identity.

Proposed Rules of Professional Conduct (v.24, 7-21-14) (resulting from First Commission)

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

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(d) engage in conduct in connection with the practice of law, including when acting in propria persona, that is prejudicial to the administration of justice;

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Comment

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Paragraph (d)

[2D] Paragraph (d) is not intended to prohibit activities of a lawyer that are protected by the First Amendment to the United States Constitution or by Article I, section 2 of the California Constitution. See, e.g., *Ramirez v. State Bar* (1980) 28 Cal. 3d 402, 411 [169 Cal. Rptr. 206] (a statement impugning the honesty or integrity of a judge will not result in discipline unless it is shown that the statement is false and was made knowingly or with reckless disregard for truth); *In the Matter of Anderson* (Rev. Dept 1997) 3 Cal. State Bar Ct. Rptr. 775 (disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment); *Standing Committee on Discipline of the United States District Court for the Central District of California v. Yagman* (9th Cir. 1995) 55 F.3d 1430, 1443 (a lawyer's statement unrelated to a matter pending before the court may be sanctioned only if the statement poses a clear and present danger to the administration of justice).

[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age or sexual orientation, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (d).

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Rule 8.4.1 Prohibited Discrimination in Law Practice Management and Operation

(a) For purposes of this Rule:

(1) "knowingly permit" means a failure to advocate corrective action where the managerial or supervisory lawyer knows of a discriminatory policy or practice that results in the unlawful discrimination prohibited in paragraph (b); and

(2) "unlawfully" and "unlawful" shall be determined by reference to applicable state or federal statutes prohibiting discrimination on the basis of race, national origin, sex, gender, sexual orientation, religion, age or disability, and as interpreted by case law or administrative regulations.

(b) In the management or operation of a law practice, a lawyer shall not unlawfully discriminate or knowingly permit unlawful discrimination on the basis of race, national origin, sex, gender, sexual orientation, religion, age or disability.

(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.

Comment

[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.

[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(d). "Law practice" in this Rule means "law firm," as defined in Rule 1.0.1(c), 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).

[3] In order for discriminatory conduct to be sanctionable under this Rule, it first must 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.

[4] 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 thereafter is appealed.

[5] 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).