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Editor’s Note: The post-agenda email compilations for rules 8.4 [1-120] and 8.4.1 [2-400] are identical, so only one is provided.

January 12, 2016 McCurdy Email to Commission, Advisors, Liaisons & Staff:

The Office of Chief Trial Counsel's comments on the rules under consideration at the January meeting are attached. Please review them in preparation for the discussion at the January meeting.

Attached:

RRC2 - [1-100(B)][1-120][1-400][2-300][2-400][3-120][3-200][1.14] - 01-12-16 OCTC Memo to RRC2.docx

RRC2 - [1-100(B)][1-120][1-400][2-300][2-400][3-120][3-200][1.14] - 01-12-16 OCTC Memo to RRC2.pdf

January 12, 2016 OCTC Memo to RRC2:

* * *

B. Rule 1-120: Assisting, Soliciting, Or Inducing Violations

OCTC's April 2015 comment stated that it did not recommend any revisions to this rule and reserved comment on the related issues of attempts to violate the rules and reporting violations.

OCTC agrees that revised Rules of Professional Conduct should expressly prohibit attempts to violate the rules. Separately, a rule requiring members to report serious misconduct would enhance public protection and confidence in the profession. (OCTC notes that California judges have reporting duties regarding judge and attorney misconduct. See Canon 3D of the Code of Judicial Ethics; Business and Professions Code, sections 6086.7 and 6086.8; Rothman, "California Judicial Conduct Handbook," sections 5.65-5.68; and *Dodds v. Comm. on Judicial Performance* (1995) 12 Cal.4th 163.)

January 12, 2016 Cardona Email to McCurdy, cc Difuntorum & Mohr:

For my team (1-120/8.4 and 2-400/8.4.1), I do not believe we need a conference call. The current OCTC comments appear to be consistent with prior comments that I believe we have already considered and addressed in arriving at our report and recommendation.

January 13, 2016 McCurdy Email to Commission, Advisors, Liaisons & Staff:

This provides the current complete set of materials for agenda item III.F. re Rule 1-120 [8.4] and 2-400 [8.4.1], including the following additional materials, previously omitted from the combined agenda materials circulated by way of my message below, and those materials posted online:

1. Rule 1-120
 - a. 1st Commission's Proposed Rule 8.4
2. Rule 2-400
 - a. Proposed Amended ABA Model Rule 8.4 (12-22-15) Compared to Current ABA Model Rule 8.4
 - b. ABA Committee on Ethics & Professional Responsibility Proposal to Amend Model Rule 8.4 (12-22-15)
 - c. 1st Commission's Proposed Rule 8.4
 - d. 1st Commission's Proposed Rule 8.4.1

Please review these materials in preparation for your upcoming meeting.

Attached:

RRC2 - [1-120] & [2-400] - 01-22 & 01-23-16 Meeting Materials - COMBO - REV2 (01-13-16)

January 14, 2016 Difuntorum Email re 8.4 & 8.4.1 to Drafting Team, cc Mohr, A. Tuft, C. Andresen, McCurdy & Lee:

FYI, see article below. The order and ABA report are attached. –Randy D.

Judge Sanctions Lawyer for Sexist Comment

[Ross Todd](#), The Recorder

January 13, 2016 | [1 Comments](#)

SAN FRANCISCO — A federal judge in San Jose has ordered a Southern California attorney to pay up for making a sexist remark to a female attorney during a deposition.

Peter Bertling of Santa Barbara's Bertling & Clausen told opposing counsel that it wasn't "becoming of a woman" to raise her voice at him during a contentious expert deposition in October in a wrongful death suit.

The utterance didn't sit well with U.S. Magistrate Judge Paul Grewal, who sanctioned Bertling and ordered him to donate \$250 to the Women Lawyers Association of Los Angeles Foundation.

"A sexist remark is not just a professional discourtesy, although that in itself is regrettable and all too common," Grewal [wrote in an order](#) issued Tuesday. "The bigger issue is that comments like Bertling's reflect and reinforce the male-dominated attitude of our profession."

Grewal also forced Bertling's clients to pay the plaintiffs' costs for the deposition, finding that Bertling had "repeatedly and unapologetically flout[ed] guideline after guideline" during discovery.

Bertling didn't respond to an email and voice message seeking comment.

Oakland solo Lori Rifkin, who sought the sanctions against Bertling, said that based on conversations she's had with lawyers across the country "this is something that almost every woman attorney has experienced again and again over their careers." Rifkin, who was a lawyer in the Department of Justice's Civil Rights Division from 2010 to 2013 before going into private practice, said that many women don't make an issue of comments like Bertling's for fear of being labelled "whiners."

"This is reflective of the usual course of business which needs to change," she said.

The discovery sanctions spring from a wrongful death lawsuit filed after the jailhouse suicide of Joshua Claypole. The 20-year-old stabbed and killed a taxi

driver in Monterey in May 2013, then hanged himself with a bed sheet three days later at the Monterey County Jail. Lawyers for his mother, including Rifkin, sued California municipalities, law enforcement agencies, hospitals and doctors that interacted with Claypole claiming that if standard protocols had been followed "they would have identified Claypole's acute mental health crisis and risk factors, and intervened to protect him and the public."

Bertling, who according to [his firm's website](#) regularly defends health care providers from malpractice claims, is representing California Forensic Medical Group, the private company that provides medical services to the Monterey County Jail, and its founder, Dr. Taylor Fithian, a psychiatrist who evaluated Claypole.

Grewal's sanction order detailed a string of problems with Bertling's conduct in discovery, including a propensity toward coaching witnesses, cutting them off and answering for them in depositions. Grewal found that Bertling repeatedly failed to hand over relevant documents, including a medical expert's notes from jail visits which were delivered to plaintiffs' counsel the day after an important brief was due.

"Discovery is hard enough, even without conduct like that," Grewal wrote. Beyond awarding plaintiffs their costs for three depositions and for briefing on the sanctions order, the judge ordered that the expert hired by Bertling's client be made available for another four-hour deposition to be paid for by the defense.

It was during the expert's earlier deposition that Bertling asked Rifkin to lower her voice. When Rifkin asked him to stop interrupting her, Bertling said, "[D]on't raise your voice at me. It's not becoming of a woman or an attorney."

In a brief declaration filed in response to the motion for sanctions, Bertling wrote, "In retrospect, the proper term for me to have used in this context would have been 'attorney.' I apologize to Ms. Rifkin if I offended her by referring to her as a 'woman' instead of as an 'attorney.'" Bertling wrote that his remarks were made "in the context of Ms. Rifkin literally yelling at my client and creating a hostile environment during the deposition."

Attached:

RRC2 - [1-210][8.4] - ABA Report on Litigation Diversity (2015).pdf

RRC2 - [1-210][8.4] - Claypole v. County of Monterey - ORDER (Sexist Sanction).pdf

January 19, 2016 Tuft Email re 8.4 to Drafting Team, cc Difuntorum, Mohr & A. Tuft:

I just noticed there is an error in section IX.A.7 on page 15 of the drafting team's Report and Recommendation. The 9th Circuit in *U.S. v. Wunsch*, a case in which I was co-counsel for the State Bar, held that the first clause in California State Bar §6068(f) – not Washington State's lawyer oath – was void on vagueness grounds. The court reversed the sanctions order under the Central District Court Local Rule 2.5.2 prohibiting interference with the administration of justice not on vagueness grounds but, instead, on the ground that there has been no showing that Swan's action adversely affected the administration of justice within the meaning of the rule.