

From: Robert L. Kehr [<mailto:rlkehr@kscllp.com>]
Sent: Wednesday, January 20, 2016 4:57 PM
To: Difuntorum, Randall; Cardona, George S. (USACAC); Clopton, Karen; 'Carol M Langford'; 'Toby Rothschild'; 'Howard Kornberg'; 'Dean J. Zipser (DZipser@umbergzipser.com)'
Cc: Tuft, Andrew; Andresen, Carissa; McCurdy, Lauren; Kevin Mohr
Subject: RE: Rules Revision Commission - Rule 2-400 [8.4.1]

Randy and all: While I'm not concerned about the constitutionality of the Rule, given that it only requires a lawyer to obey standards that echo those judges adopted for themselves, I do like the way in which Randy's suggestion shows that the judicial and lawyer standards are complementary in this respect. The fact that judges have this duty should serve to heighten a lawyer's sense of the importance of the Rule and make it easier for one lawyer in a firm to motivate another to meet the desired standards of conduct.

However, I would move the commas in the following portion: "...Code of Judicial Ethics, providing, in part, that"

Randy's suggestion also caused me to focus on what would be the balance of Comment [2], and I caught another drafting nit. The sentence after Randy's insertion has lawyer in the singular, but the sentence after that switches to the plural. I would edit the penultimate sentence in the Comment as follows:

It is also not a violation of paragraph (a) for a lawyers to limit ~~their~~ a law practices to clients from underserved populations as defined by any protected characteristic, or for a lawyers to decline to represent clients who cannot pay for legal ~~their~~ services. [the "s" in "lawyers" in the second line is struck through, but that is hard to see]

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From: Difuntorum, Randall [<mailto:Randall.Difuntorum@calbar.ca.gov>]
Sent: Wednesday, January 20, 2016 11:15 AM
To: Cardona, George S. (USACAC); Clopton, Karen; Robert L. Kehr; 'Carol M Langford'; 'Toby Rothschild'; 'Howard Kornberg'; 'Dean J. Zipser (DZipser@umbergzipser.com)'
Cc: Tuft, Andrew; Andresen, Carissa; McCurdy, Lauren; Kevin Mohr
Subject: Rules Revision Commission - Rule 2-400 [8.4.1]

Rule 8.4.1 Drafting Team:

In prepping for the discussion of proposed rule 8.4.1, I've noted that the provision of the [Code of Judicial Ethics](#) concerning bias in the courtroom has been mentioned on several occasions. In the event that this comes up again, below is possible language to add a reference to the Code of Judicial Ethics in Comment [2]. While this is not a necessary change, adding comment language along these lines would be beneficial for two reasons: (1) it might help with the constitutionality of paragraph (a) as a prohibition that encompasses lawyer speech; and (2) it underscores the concept that a prohibition against manifesting bias is an existing professional standard expected of lawyers when appearing before a judicial officer. –Randy D.

[2] [The conduct prohibited by paragraph \(a\) includes the conduct of a lawyer in a proceeding before a judicial officer, such as conduct unbecoming a lawyer in the courtroom. \(See](#)

Canon 3(B)6 of the Code of Judicial Ethics providing, in part, that: “A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation against parties, witnesses, counsel, or others.”) 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).

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