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February 9, 2016 Difuntorum Email to Drafting Team, cc Fortescue, Mohr, A. Tuft, McCurdy & Lee:

Rule 1-120 and 2-400 Joint Drafting Team:

In preparation for the February meeting, please consider the two issues described below. Kevin and I have framed the issues in part on personal observations from Greg Fortescue. That Greg has shared his thoughts now rather than waiting until the meeting affords the joint team time to consider and, if you so conclude, to address the issues in the rule. If you would like to schedule a teleconference to discuss the issues further, then please enlist the help of Angela Marlaud (Angela.Marlaud@calbar.ca.gov).

1) Should proposed Rule 8.4.1 be revised to include an express black letter exception for attorneys of defendants in discrimination, harassment, or retaliation cases?

The current draft includes Comment [2] that, in part, states: “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.” This language arguably does not provide sufficiently clear guidance on whether, for example, an in-house lawyer can advise and assist a defendant client employer in prelitigation investigations of claims of unlawful discrimination, harassment or retaliation.

There is analogous precedent in both the current California rules and the Model Rules, for including explicit statements on whether a rule provision applies to lawyers defending clients. Current [Rule 1-200\(C\)](#) is an exception to the general prohibition against a lawyer furthering the admissions application of a person who is not qualified. That language states: “(C) This rule shall not prevent a member from serving as counsel of record for an applicant for admission to practice in proceedings related to such admission.” [Model Rule 1.13\(d\)](#) is an exception to the permissive authorization given to a lawyer who is representing an organization to blow the whistle when reasonably necessary to prevent a substantial injury to the organization. That language states: “(d) Paragraph (c) shall not apply with respect to information relating to a lawyer’s representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.” In both of these examples, the explicit exception language appears in the black letter of the respective rules.

2) Should proposed Rule 8.4.1 be revised to require the State Bar to report unlawful discrimination, harassment, or retaliation to the DFEH or EEOC even if a State Bar complainant does not wish to do so?

Unlike the first question, this question is more of a policy issue that arises with the removal of current paragraph (C) from the rule and the potential impact its removal could have on the policy of public protection that both the Legislature and Congress have codified in their respective regulatory systems. Specifically, would allowing claims under proposed Rule 8.4.1 to go forward in State Bar Court potentially undermine the goals and public policy underpinnings of state and federal anti-discrimination statutes?

The goal of FEHA is “to protect and safeguard the right and opportunity of **all persons** to seek, obtain, and hold employment without discrimination or abridgement on account of race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, sex or age.” (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 100, emphasis added.) The underlying public policy “is plainly one that ‘inures to **the benefit of the**

public at large rather than to a particular employer or employee.’ [Citation.]” (*Ibid.*, emphasis added) This policy goal is crucial to an understanding why these statutory rights are not waivable. It is also fundamental in explaining why an administrative complainant cannot withdraw a DFEH or EEOC charge if the agency concludes there is good cause to conclude unlawful discrimination, harassment or retaliation has occurred – even if the complainant settled and has no plans to pursue litigation. Public policy favors enforcement of meritorious claims under these statutes in order vindicate a public right. However, the public protection at the heart of the regulatory regime can be frustrated if allegations are not reported to the proper state or federal agency and allowing the State Bar disciplinary process to be a court of first resort might inadvertently promote this undesirable result.

Put another way, given the strong public protection policy of state and federal anti-discrimination laws, should a Rule of Professional Conduct offer a completely independent, alternative forum for those claims without providing some mechanism for filtering them back into the carefully designed systems that the Legislature and Congress have established in order to vindicate the public right to a workplace free of unlawful discrimination, harassment, and retaliation? One response to this concern could be to consider revising the proposed rule to require that the State Bar report unlawful discrimination, harassment, or retaliation to the DFEH or EEOC even if the complainant does not wish to do so. The procedural trigger for reporting could be the point in time at which the State Bar issues a notice of disciplinary charges. This would protect the confidentiality of investigations that have not yet resulted in formal charges against an attorney. (See [Bus. & Prof. Code sec. 6086.1\(b\).](#))

Thank you, in advance, for considering these two issues. Your thoughtful evaluation of them now should help make the best use of the limited discussion time at the February meeting.

February 12, 2016 OCTC Memo to RRC2:

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A. Rule 2-400 and ABA Model Rule 8.4 [Discriminatory Conduct]

See OCTC’s September 2, 2015 and January 12, 2016 comments.

September 2, 2015 Comment:

* * *

G. Rule 2-400: Prohibited Discriminatory Conduct in a Law Practice

1. 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.

2. 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.

January 12, 2016 Comment:

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E. Rule 2-400 and ABA Model Rule 8.4 re discriminatory conduct

See OCTC's September 2015 comment regarding rule 2-400. If rule 2-400 is revised to eliminate the prerequisite finding of unlawful conduct by a tribunal, the rule should affirm that such a determination by a tribunal of competent jurisdiction may be used to prove a violation under this rule.

Additionally, OCTC supports those sections of ABA Model Rule 8.4 not directly related to rule 2-400.

February 16, 2016 Cardona Email to Drafting Team, cc Difuntorum, Mohr, A. Tuft, McCurdy, Marlaud & Lee:

Sorry for the delay in getting this to you, but in advance of the call I thought it might make sense to see what a rule would look like with the additions suggested by Greg Fortescue in the email chain below. Attached in both word and pdf (I have included the pdf because the redline is more easily viewed on a smart-phone in the pdf) is a revised draft of the rule (redline to the version in the report and recommendation, which I think was draft 4.3) that adds language (new paragraphs e and f of the rule and comment 6) attempting to implement the suggested additions. Look forward to talking with you today, 2/16 at 2:00 pm.

Attached:

RRC2 - [2-400][8.4.1] - Rule - DFT4.4 (02-16-16)GSC - Cf. to DFT4.3 (01-05-16).docx

February 16, 2016 Mohr Email to Difuntorum, McCurdy & Lee:

I've attached draft 4.5 (2/16/16), redline, compared to Draft 4.3 (1/5/16), the version originally prepared for the January meeting. The attached shows the changes agreed to by the drafting team during their telephone conference earlier this afternoon. Please let me know if you have any questions. Thanks,

Attached:

RRC2 - [2-400][8.4.1] - Rule - DFT4.5 (02-16-16) - Cf. to DFT4.3 (01-05-16).docx