

*[Revised rule draft following drafting team conference call on 2/16/16
– refer to Mohr email dated 2/16/16]*

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, 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.

(e) Upon issuing a notice of a disciplinary charge under this Rule:

(1) If the notice is of a disciplinary charge under paragraph (a) of this Rule, the State Bar shall provide a copy of the notice to the California Department of Fair Employment and Housing and the United States Department of Justice, Coordination and Review Section.

(2) If the notice is of a disciplinary charge under paragraph (b) of this Rule, the State Bar shall provide a copy of the notice to the California Department of Fair Employment and Housing and the United States Equal Employment Opportunity Commission.

(f) Except as provided in paragraph (a) with regard to a lawyer's treatment of the lawyer's client, this Rule does not apply to a lawyer's representation of a client alleged to have engaged in unlawful discrimination, harassment, or retaliation.

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-supervisory 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 supervisory 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-supervisory 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.

[6] Paragraph (e) recognizes the public policy served by enforcement of laws and regulations prohibiting unlawful discrimination, by ensuring that the state and federal agencies with primary responsibility for coordinating the enforcement of those laws and regulations is provided with notice of any allegation of unlawful discrimination, harassment, or retaliation by a lawyer that the State Bar finds has sufficient merit to warrant issuance of a notice of a disciplinary charge.