

**RRC2 – Rule 2-400 [8.4.1]
E-mails, etc. – Revised (February 4, 2016)**

**Cardona (Lead), Langford, Zipser; [2-400][8.4.1]: Kehr, Clopton, Kornberg, Rothschild
For February 19-20, 2016 Meeting**

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January 20, 2016 Difuntorum Email re 8.4.1 to Drafting Team, cc Mohr, A. Tuft, Andresen & McCurdy:

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).

January 20, 2016 Kehr Email re 8.4.1 to Difuntorum, cc Drafting Team, Mohr, A. Tuft, Andresen & McCurdy:

Thank you for this. I will be sure to dig into it before Friday.

January 20, 2016 Kehr Email re 8.4.1 to Drafting Team, cc Difuntorum, Mohr, A. Tuft, Andresen & McCurdy:

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

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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]

February 1, 2016 Kehr Email to Drafting Team, cc Difuntorum, Mohr, McCurdy & Lee:

The purpose of this message is to more fully state my views about proposed Rule 8.4.1(d). My concern about that paragraph is that it would grant to the Bar the initial authority to investigate and prosecute allegations of discriminatory conduct by lawyers. Current rule 2-400 leaves that authority to others. As Jayne Kim said in her letter dated September 2, 2015, to the Commission on this (I am quoting from the drafting team's report):

As written, the [current] 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.

Any grant of initial authority to the Bar raises significant due process issues. The State Bar Court wrote about this to the Commission. In a letter dated November 2, 2015 from Colin P. Wong, Chief Administrative Officer (again, I am quoting from the drafting team's report), the State Bar Court made an observation that echoes the Jayne Kim letter:

We believe that the deletion of [current] 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.

Mr. Wong's letter then described the how the Court's procedures differ from those of the civil courts. There are three particular aspects of these differences that have due process implications: First, there is only limited discovery in the State Bar Court, which generally is permitted only on Court order. See Rules of Proc. of State Bar, Rule 5.65 and: Rule 5.61(a) (no discovery subpoenas without prior Court order; Rule 5.61(c) (depositions allowed only on court order; and Rule 5.66(A)(additional discovery only upon motion and showing of good cause). Second, State Bar Court proceedings are not conducted according to the Evidence Code. 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. See Rule 5.104(C). This means, among other things, that hearsay evidence may be used for the purpose of supplementing or explaining other evidence. See Rule 5.104(D). Third, there are no jury trials in the State Bar Court. Following his discussion of the differences between State Bar Court and civil standards and procedures, Mr. Wong stated:

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.

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Ms. Kim and Mr. Wong dutifully said in their letters that OCTC and the State Bar Court would deal with any Rule issued by the Supreme Court, as their positions required them to say, but their apprehension should be evident.

By comparison with civil litigation, State Bar proceedings are simplified and expedited. The logic of this can be understood in the context of the usual subjects of discipline. These include such things as trust fund misappropriation, comingling of trust and non-trust funds, failure to report receipt of trust funds, failure to refund unearned fees, failure to obey court orders, failure to report sanctions to the State Bar, client abandonment and failure to report significant developments to a client, reciprocal discipline after discipline in another jurisdiction, conviction of a crime, and failure to comply with terms of disciplinary probation.

To a significant degree, the factual bases for possible discipline of these sorts are within the personal knowledge of the lawyer, demonstrated by the lawyer's own files and financial records, and shown by the records of a civil or criminal court or the disciplinary records of another jurisdiction. No doubt there are instances in which an accused lawyer would like to have a greater discovery opportunity, but for the most part that would seem unnecessary.

Compare the relatively narrow scope of possible professional discipline with the expanse and complexity of the many state and federal statutory and regulatory prohibitions on discrimination. In particular, consider the unpredictability of where discrimination laws might lead. Here is a link to a magazine article that asks whether websites must make ADA accommodations.
<http://www.theatlantic.com/technology/archive/2015/04/does-the-ada-apply-to-online-spaces-too/390654/>

I have no opinion on the ADA issue and no knowledge of the area of law, but this is an indication of just how unpredictable the reach and application of anti-discrimination laws might be as creative minds search for new solutions to old problems or perceive new ones. It also shows how important it would be for a litigant in a claim of that sort to take advantage of civil litigation discovery standards and the rules of evidence. For another example, see *Weber v. Eash*, 2015 U.S. Dist. LEXIS 168367 (E.D. Wash. 2015) (client unsuccessfully sued her lawyer and others, alleging that she had an allergic reaction to something in the courthouse but nevertheless was forced to return to the courthouse without reasonable accommodation having been made).

Claims of these kinds are not appropriate for the simplified procedures of the State Bar Court. It also should be apparent that they are beyond the knowledge and experience of the Office of Chief Trial Counsel and the State Bar Court. They also can be expected to be beyond the knowledge of those lawyers who defend State Bar prosecutions, which in turn will require the accused lawyer to hire a second law firm that has expertise in the legal issues raised. The mere fact of an OCTC discrimination investigation would materially increase the financial burden on the lawyer who is its subject.

Those in favor of giving original jurisdiction over discrimination claims to the State Bar and the State Bar Court correctly point out that not all claims of discrimination result in civil proceedings. However, this is not entirely a bad thing. Except when a plaintiff appears in pro per, as happened in *Weber v. Eash*, a civil action will be filed only when it appears possible to prove and collect sufficient damages to support the cost of litigation. The reason is that no anti-discrimination law of which I am aware provides for minimum damages. The consequence of this legislative policy decision is that many possible discrimination claims are filtered out, no doubt including some with merit, but protecting the courts from a flood of litigation. Giving original jurisdiction to the State Bar would free the possibly injured (or his or her lawyer) from

shouldering the cost of pursuing the claim, shifting that burden to the State Bar and eliminating the filtering process.

Because the claimant will have no expense in making a claim, it is predictable that the Bar will receive a large number of claims, and that they will include:

- claims that have no merit,
- claims that are trivial,
- claims brought for strategic purposes in order to use the disciplinary system as a proving ground for new theories, and
- claims brought for tactical reasons for use as leverage in disputes with lawyers over fees or other matters.

The Commission's need to make a decision on this issue comes at a time when multiple newspaper stories have reported that the disciplinary system is underfunded and that the State Bar is taking steps to attempt free up funds to support this essential Bar function. Given the predictable burden on the system, it is important to consider other ways to address the subject of discrimination. The Commission already has taken one step, which is its approval of Rules 5.1 and 5.3. These Rules will impose on law firm managers and supervisors the duty to help assure compliance with the Rules of Professional Conduct and the State Bar Act, and among other things that would bring into firm management the obligation to comply with Rule 8.4.1. Another possible step would be an increased and specific MCLE requirement.

I do have one suggestion for broadening paragraph (D) of current rule 2-400. This is to permit investigation and discipline of a lawyer who has been sanctioned by a court for discriminatory conduct. See, e.g., *Claypole v. County of Monterey*, 2016 U.S. Dist. LEXIS 4389 (N.D. Cal. 2016) (lawyer sanctioned for making sexist remarks) and *Cruz-Aponte v. Caribbean Petroleum Corp.*, 2015 U.S. Dist. LEXIS 109646 (D.P.R. 2015) (to the same effect).

The court's opinion in *Cruz-Aponte v. Caribbean Petroleum Corp.* says what I expect all of us think:

Discriminatory conduct on the part of an attorney is "palpably adverse to the goals of justice and the legal profession." (citation omitted) When an attorney engages in discriminatory behavior, it reflects not only on the attorney's lack of professionalism, but also tarnishes the image of the entire legal profession and disgraces our system of justice. *Id.* at *38

Nevertheless, granting original jurisdiction to the State Bar to investigate and prosecute alleged discriminatory words and conduct, and giving the State Bar Court original jurisdiction to hear such claims, would be acting mainly from the heart. The disciplinary system should be permitted to deal with the range of matters that is within the expertise of State Bar investigators and prosecutors, the State Bar Court and defense lawyers, and should be allowed to utilize their limited time and resources for those purposes. These involve the handling of client funds and other matters that are fundamental to the protection of clients and to the operation of the legal system and the profession.

February 1, 2016 Langford Email to Drafting Team, cc Difuntorum, Mohr, McCurdy & Lee:

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The State Bar would do what it always does - abate. They let others go first usually or coordinate with them.

February 1, 2016 Clopton Email to Drafting Team, cc Difuntorum, Mohr, McCurdy & Lee:

I remain disappointed in this discussion and the references to "the obvious" which frankly do not exist and are insulting. This rule should be treated the same way all rules are treated. Discrimination, sexual harassment, fraud, malfeasance of all kinds should be treated in a consistent manner. Unlawful discrimination is no more complicated than any other aspect of attorney misconduct. Let's stop the doubletalk and move forward into the 21st century where the state of California's 39.1 million residents are protected and the legal profession not only represents everyone regardless of race; national origin; gender identification or sexual orientation; disability, real or perceived; or ethnicity, but reflects the mosaic that comprises our state. Stand up, stand firm, and make the changes that will protect the public.

February 1, 2016 Kornberg Email to Drafting Team, cc Difuntorum, Mohr, McCurdy & Lee:

I think it would be helpful for all of us if you could suggest the language or "fix" to address your concerns. It is quite difficult to find that mechanism to implement all of our desires to get this Rule to be fair, and effective to deter and discipline any violation.

February 1, 2016 Kehr Email to Drafting Team, cc Difuntorum, Mohr, McCurdy & Lee:

Here is a suggestion, with new language underlined and language that might be removed bracketed.

No disciplinary investigation or proceeding may be initiated by the State Bar against a ~~member~~ lawyer under this ~~rule~~ Rule unless and until a ~~tribunal~~ court of competent jurisdiction, other than a disciplinary tribunal, ~~shall have first~~ has:

- (i) 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~~ rule. [In order for discipline to be imposed under this ~~Rule~~ 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]; or
- (ii) has entered an order sanctioning a lawyer for discriminatory conduct.

I've done this in some haste b/c I'm immersed in a client project, but I hope this is helpful.

February 1, 2016 Cardona Email to Drafting Team, cc Difuntorum, Mohr, McCurdy & Lee:

This would be language to implement option (e), discussed in the concepts for the Commission to consider on page 16 of the report and recommendation. In our prior discussions, this option was supported by Robert Kehr (but not any other member of the drafting team) for reasons briefly summarized in the report and recommendation. The letters from Jayne Kim and Colin Wong cited in Robert Kehr's email were before the drafting team at the time of our prior discussions and are similarly quoted in the report and recommendation. As noted below, however, Robert Kehr's email lays out the support for his position in more detail. I am inclined not to schedule another conference call, since I believe this is an issue that has been well-

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framed and will require discussion and a determination by the full Commission. If anyone feels strongly that a conference call is needed, however, please let me know. Thanks.

February 1, 2016 Kehr Email to Drafting Team, cc Difuntorum, Mohr, McCurdy & Lee:

I agree with your recommendation.

February 1, 2016 Kornberg Email to Kehr, cc Drafting Team, cc Difuntorum, Mohr, McCurdy & Lee:

I think this is a good suggestion. Protects due process and appears to have more clarity.

February 1, 2016 Rothschild Email to Drafting Team, cc Difuntorum, Mohr, McCurdy & Lee:

I think the key issues are teed up for the commission. No call needed.

February 2, 2016 Clopton Email to Drafting Team, cc Difuntorum, Mohr, McCurdy & Lee:

I stand firm against this discriminatory clause, it is only protective of lawyers who engage in discrimination to the detriment of both the public and the legal profession. It is shameful that you continue to act to bring this offensive adjudication clause back into the rule solely regarding discrimination.