Appendix

1. California Rules of Court, Standard 10.20
2. California Rules of Professional Conduct, State Bar of California, Ethics Rule 8.4.1
3. California Business & Professions Code Section 6070.5
4. CACI 5030: Judicial Council of California Civil Jury Instructions
5. San Mateo 2.13(c)

Resources Referenced:

- Harvard Implicit Association Tests (IAT)
- California Civil Jury Instructions (CACI)
- California Criminal Jury Instructions (CALCRIM)
- Judicial Ethics Guidelines
- California Rules of Professional Conduct

Standard 10.20. Court's duty to prevent bias

(a) Statement of purpose

The California judicial branch is committed to ensuring the integrity and impartiality of the judicial system and to court interactions free of bias and the appearance of bias. Consistent with this commitment, each court should work within its community to improve dialogue and engagement with members of various cultures, backgrounds, and groups to learn, understand, and appreciate the unique qualities and needs of each group.

(Subd (a) amended effective January 1, 2022; previously amended effective January 1, 1994, January 1, 1998, and January 1, 2007.)

(b) Duty to ensure integrity and impartiality of the judicial system

Each court, its judicial officers, and its employees have the duty to ensure the integrity and impartiality of the judicial system.

(1) *Refrain from and prevent biased conduct*

In all court interactions, each court, its judicial officers, and its employees should refrain from engaging in conduct and should take action to prevent others from engaging in conduct that exhibits bias, including but not limited to bias based on age, ancestry, color, ethnicity, gender, gender expression, gender identity, genetic information, marital status, medical condition, military or veteran status, national origin, physical or mental disability, political affiliation, race, religion, sex, sexual orientation, socioeconomic status, and any other classification protected by federal or state law, including Government Code section 12940(a) and Code of Judicial Ethics, canon 3(B)(5), whether that bias is directed toward counsel, court staff, witnesses, parties, jurors, or any other person. The court, judicial officers, and court employees may consider such classifications only if necessary or relevant to the proper exercise of their adjudicatory or administrative functions.

(2) *Ensure fairness*

Each judicial officer should ensure that courtroom interactions are conducted in a manner that is fair and impartial to all persons.

(3) *Ensure unbiased decisions*

Each judicial officer should ensure that all orders, rulings, and decisions are based on the sound exercise of judicial discretion and the balancing of competing rights and interests and are not influenced by stereotypes or biases.

(Subd (b) adopted effective January 1, 2022.)

(c) Creation of local or regional committees on bias

To assist in providing court interactions free of bias and the appearance of bias, courts should collaborate with local bar associations to establish a local or regional committee. Trial courts may choose to form a regional committee. Appellate courts may choose to form separate or joint appellate court committees or join a trial court committee or regional committee formed by or composed of trial courts within the appellate courts' districts. Each committee should:

(1) Be composed of representative members of the court community, including but not limited to judicial officers, lawyers, court administrators, and individuals who interact with the court and reflect and represent the diverse and various needs and viewpoints of court users;

(2) Sponsor or support educational programs designed to eliminate unconscious and explicit biases within the court and legal communities. Education is critical to developing an awareness of the origins of bias and the impact of bias on individuals, culture, and society. Education should include:

(A) Information as to bias based on the protected classifications listed in (b)(1);

(B) Information regarding how unconscious and explicit biases based on these classifications develop, how to recognize unconscious and explicit biases, and how to address and eliminate unconscious and explicit biases; and

(C) Other topics on bias relevant to the local community informed by the committee's independent assessment of the unique educational needs in that community.

(3) Engage in regular outreach to the local community to learn about issues of importance to court users. Specifically, committee members should be encouraged to:

(A) Inform local community groups regarding the committee's activities; and

(B) Seek information from the local community regarding concerns as to bias in court interactions and how the court can address those concerns.

(Subd (c) amended and relettered effective Janaury 1, 2022; adopted as Subd (b) effective January 1, 1994; previously amended effective January 1, 1998, and January 1, 2007.)

(d) Information regarding complaint procedures

Each court should effectively communicate to its court users regarding existing procedures to submit complaints of bias in court interactions based on protected classifications, as listed in (b)(1). This should include information regarding how to submit complaints about court employees directly to the court and how to submit complaints about judicial officers either directly to the court or to the Commission on Judicial Performance. Possible methods of communication include providing this information on the court website, including the information in the court's local rules, displaying the information in courthouses, or any other similar method to ensure that courts are providing complaint procedure information to court users in a meaningful and accessible manner.

(Subd (d) amended and relettered effective January 1, 2022; adopted as Subd (c) effective January 1, 1994; previously amended effective January 1, 2007.)

(e) Application of local rules

The existence of the local committee, and its purpose should be memorialized in the applicable local rules of court.

(Subd (e) amended and relettered effective January 1, 2022; adopted as Subd (d) effective January 1, 1994; previously amended effective January 1, 2007.)

(f) Implementation

All courts should implement the recommendations of this standard as soon as possible.

(Subd (f) adopted effective January 1, 2022.)

Standard 10.20 amended effective January 1, 2022; adopted as sec. 1 effective January 1, 1987; previously amended effective January 1, 1994, and January 1, 1998; amended and renumbered effective January 1, 2007.

Advisory Committee Comment

The judicial officer duties stated in this subdivision are consistent with the California Code of Judicial Ethics, which addresses judicial officer responsibilities for performing judicial duties without bias, prejudice, or harassment (canon 3(B)(5)); for requiring attorneys in proceedings before the judicial officer to refrain from manifesting bias, prejudice, or harassment (canon 3(B)(6)); for discharging judicial administrative duties without bias or prejudice (canon 3(C)(1)); and for requiring staff and court personnel under the judicial officer's control to refrain from manifesting bias, prejudice, or harassment in the performance of their duties (canon 3(C)(3)).

An earlier version of this standard applied solely to judges and referred to "courtroom proceedings." "Judge" has been expanded to "judicial officers," which includes all judges as defined by California Rules of Court, rule 1.6, and all appellate and Supreme Court justices. The expanded phrase broadly covers any judge, justice, subordinate judicial officer, or temporary judge who might conduct a courtroom proceeding. Additionally, in subdivision (b)(1), "courtroom proceedings" has been changed to "court interactions" to

expand the scope of proceedings and actions covered by this standard to include not only proceedings occurring in courtrooms but also interactions in other areas of the court, including in the clerk's office and at public counters.

Subdivision (d). An earlier version of this standard encouraged local bias committees to create informal complaint procedures for court users and members of the public to submit complaints regarding bias in court proceedings. The recommendation that local bias committees create informal complaint procedures has been eliminated in large part because of the many existing and updated avenues for making complaints regarding bias in court interactions, and to avoid creating conflicts between those procedures. For example, the authority and procedures for addressing complaints concerning judicial officers and subordinate judicial officers are outlined in rules 10.603 and 10.703 of the California Rules of Court and canon 3(D) of the California Code of Judicial Ethics. Similarly, rules 10.351 and 10.610 of the California Rules of Court, as well as Government Code section 71650 et seq., include authority and complaint resolution processes for addressing complaints against court employees. In practice, courts have developed robust procedures for addressing such complaints against judicial officers, subordinate judicial officers, and court employees, and the Commission on Judicial Performance provides detailed information on its website at *cjp.ca.gov* about how to file complaints and the procedures it employs for addressing such complaints.

In addition to the concerns regarding duplicative and conflicting complaint procedures, the recommendation that local bias committees adopt informal complaint procedures created additional concerns. For example, the earlier version of the standard envisioned using informal complaint procedures to resolve incidents that do not warrant formal discipline; however, it is often difficult to determine at the outset if a complaint is disciplinary in nature or can be ameliorated by education. Other due process concerns were raised that local committees were not necessarily resourced to make these determinations, and may not have had the expertise to investigate and resolve these complaints. Additional concerns were raised that having local committees oversee complaints against judicial officers and court employees created privacy and confidentiality concerns for both complainants and respondents because any inquiry by a local bias committee would be known and resolved by a group of local attorneys, judicial officers, and other committee members who would necessarily need to know the particular facts of the complaint, thereby significantly expanding the number of local individuals who were aware of the existence or details of the complaint. Ethical concerns were also raised for judicial officers who were members of the local bias committees because judicial officers who become aware of complaints against other judicial officers may have ethical obligations that require them to take appropriate corrective action, which may include reporting the information to the presiding judge or justice or the Commission on Judicial Performance. Finally, there were concerns that local bias committee complaint procedures would conflict with existing personnel policies and labor relations agreements if the local committee attempted to resolve complaints against court employees outside of the procedures outlined in these policy documents.

This standard does not prevent courts and local or regional bias committees from choosing to create informal complaint resolution procedures. Some local bias committees have established effective informal complaint resolution procedures for resolving complaints against judicial officers, and each local court and local or regional bias committee should work to find solutions that work best for that local community. If so, they should fully consider how best to address the above concerns. Because of the specific labor and employment laws governing courts and court employees, including the direction provided in rule 10.351 of the California Rules of Court, and the fact that courts already have personnel policies and memorandums of understanding that govern complaints against court employees, having local or regional bias committees resolve complaints against court employees is not recommended.

Rule 8.4.1 Prohibited Discrimination, Harassment and Retaliation
(Proposed Rule Adopted by the Board on March 9, 2017)

(a) In representing a client, or in terminating or refusing to accept the representation of any client, a lawyer shall not:

(1) unlawfully harass or unlawfully discriminate against persons* on the basis of any protected characteristic; or

(2) unlawfully retaliate against persons.

(b) In relation to a law firm's operations, a lawyer shall not:

(1) on the basis of any protected characteristic,

(i) unlawfully discriminate or knowingly* permit unlawful discrimination;

(ii) unlawfully harass or knowingly* permit the unlawful harassment of an employee, an applicant, an unpaid intern or volunteer, or a person* providing services pursuant to a contract; or

(iii) unlawfully 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; or

(2) unlawfully retaliate against persons.

(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 (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) "retaliate" means to take adverse action against a person* because that person* has (i) opposed, or (ii) pursued, participated in, or assisted any action alleging, any conduct prohibited by paragraphs (a)(1) or (b)(1) of 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 being issued a notice of a disciplinary charge under this rule, a lawyer shall:

(1) if the notice is of a disciplinary charge under paragraph (a) of this rule, 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; or

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

(f) This rule shall not preclude a lawyer from:

(1) representing a client alleged to have engaged in unlawful discrimination, harassment, or retaliation;

(2) declining or withdrawing from a representation as required or permitted by rule 1.16; or

(3) providing advice and engaging in advocacy as otherwise required or permitted by these rules and the State Bar Act.

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). In relation to a law firm's operations, this rule imposes on all law firm* lawyers the responsibility to advocate corrective action to address known* harassing or discriminatory conduct by the firm* or any of its other lawyers or nonlawyer personnel. Law firm* management and supervisorial 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] The conduct prohibited by paragraph (a) includes the conduct of a lawyer in a proceeding before a judicial officer. (See Canon 3B(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. While both the parties and the court retain discretion to refer such conduct to the State Bar, a court's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (a).

[3] A lawyer does not violate this rule by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations. A lawyer also does not violate this rule by otherwise restricting who will be accepted as clients for advocacy-based reasons, as required or permitted by these rules or other law.

[4] This rule does not apply to conduct protected by the First Amendment to the United States Constitution or by Article I, § 2 of the California Constitution.

[5] 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-supervisorial 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.

[6] 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.

[7] 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.

[8] This rule permits the imposition of discipline for conduct that would not necessarily result in the award of a remedy in a civil or administrative proceeding if such proceeding were filed.

[9] A disciplinary investigation or proceeding for conduct coming within this rule may also be initiated and maintained if such conduct warrants discipline under California Business and Professions Code §§ 6106 and 6068, the California Supreme Court's inherent authority to impose discipline, or other disciplinary standard.

PROPOSED RULE OF PROFESSIONAL CONDUCT 8.4.1
(Current Rule 2-400)
Prohibited Discrimination, Harassment and Retaliation

EXECUTIVE SUMMARY

The Commission has evaluated current rule 2-400 (Prohibited Discriminatory Conduct in a Law Practice) in accordance with the Commission Charter. Current rule 2-400 was first adopted effective March 1, 1994. There is no counterpart to rule 2-400 in the ABA Model Rules. However, ABA Model Rule 8.4(d) addresses discrimination by individual lawyers while representing a client.[1] The result of the Commission's evaluation is proposed rule 8.4.1 (Prohibiting Discrimination, Harassment and Retaliation).

Rule As Issued For 90-day Public Comment

The main issue considered when drafting proposed rule 8.4.1 was whether to expand the rule by eliminating the requirement that there be a final civil determination of wrongful discrimination before a disciplinary investigation can commence or discipline can be imposed, which is found in current rule 2-400(C).[2] A majority of the Commission believes current rule 2-400(C) renders the rule difficult to enforce. Eliminating the requirement would give the Office of Chief Trial Counsel ("OCTC") original jurisdiction to investigate and prosecute under the current procedures of the disciplinary system any claim of discrimination that comes within the scope of the rule. See the discussion of the constitutional and operational concerns provided after this executive summary.

In addition to changes to address the main issue identified above, the Commission proposes the following substantive changes to the current rule:

(1) Expanding the proposed rule beyond the management or operation of a law firm to also encompass discrimination or harassment more generally in "representing a client, or in terminating or refusing to accept representation of any client." Current Rule 2-400 already applies to discrimination in the management or operation of a law

---

[1] Model Rule 8.4(d) provides it is misconduct for a lawyer to: "(d) engage in conduct that is prejudicial to the administration of justice." A Model Rule comment clarifies the application of paragraph (d):

> "[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule."

[2] Current Rule 2-400(C) provides:

> "No disciplinary investigation or proceeding may be initiated by the State Bar against a member under this rule unless and until a tribunal of competent jurisdiction, other than a disciplinary tribunal, shall have first 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. In order for discipline to be imposed under this 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."

firm in "accepting or terminating representation of any client." The Commission believes the rule's prohibition should not be limited to law firm management. Adopting a rule that generally prohibits unlawful discrimination or harassment while engaged in representing a client is consistent with current ABA Model Rule 8.4(d), Comment [3] to that rule, and proposed ABA Model Rule 8.4(g)[3] and several other professions that prohibit this same behavior in their codes of conduct.[4]

(2) Expanding the proposed rule to cover additional protected categories. Current rule 2-400's list of protected characteristics is substantially narrower than current California law. Because the identity of protected characteristics protected under anti-discrimination law is not static, the Commission added paragraph (c)(1) to delimit the scope of "protected characteristics" for purposes of the rule that not only is consistent with current California law but also includes a catchall provision for any "other category of discrimination prohibited by applicable law." This latter addition would authorize professional discipline pursuant to whatever applicable anti-discrimination laws might exist in the future without the need to amend the rule.

(3) Expanding the proposed rule to encompass unlawful discrimination and harassment engaged in for the purpose of retaliation. This addition would permit professional discipline where a lawyer, in representing a client or in relation to a law firm's operations, unlawfully discriminates against or harasses a person for the purpose of retaliating against that person because the person has taken action to oppose unlawful discrimination or harassment. This provision is intended to provide protection for lawyers obligated under the rule (e.g., lower level lawyers within a law firm) to advocate corrective action where they know of unlawful discrimination or harassment within the firm, even when the unlawful conduct is being committed by higher level lawyers within the firm.

(4) Adoption of paragraph (d),[5] which requires a lawyer who has been charged with, or is being investigated for, a violation of the Rule, to give notice to the State Bar of any parallel administrative or judicial proceeding, such as an EEOC or DFEH

---

[3] Proposed ABA Model Rule 8.4(g) would provide it is professional misconduct for a lawyer to:

"(g) in conduct related to the practice of law, harass or knowingly discriminate against persons on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status."

[4] Examples include: (1) American Dental Association, Code of Conduct, Section 4.A. "Patient Selection" (dentist shall not refuse to accept patients because of the patient's race, creed, color, sex or national origin); and (2) American Psychological Association, Ethical Standard 1.12 "Other Harassment" (prohibition against behavior that is harassing or demeaning based on factors such as a person's age, gender, race, ethnicity, national origin, religion, sexual orientation, disability, language, or socioeconomic status).

[5] Proposed Rule 8.4.1(d) states:

"(d) A lawyer who is the subject of a State Bar investigation ~~of~~ 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."

See also, Business & Professions Code section 6068(i) [re duty of an attorney to cooperate and participate in any disciplinary investigation or proceeding].

investigation. In part, this notice is intended to provide the OCTC with information necessary to determine whether or not to hold in abeyance the State Bar investigation or disciplinary proceeding pending the outcome of a related proceeding.

(5) Adoption of paragraph (e)(1), which requires the State Bar to provide a copy of the notice of a disciplinary charge for a charge arising under paragraph (a) of the proposed rule to the California Department of Fair Employment and Housing and the United States Department of Justice, Coordination and Review. Paragraph (e)(2) requires the State Bar to provide a copy of the notice of a disciplinary charge for a charge arising under paragraph (b) to the California Department of Fair Employment and Housing and the United State Equal Employment Opportunity Commission. The purpose of these provisions is to provide to the relevant government agencies an opportunity to become involved in the matter so that they may implement and advance the broad legislative policies with which they have been charged.

(6) Adoption of paragraph (f), which is intended to clarify that the proposed rule does not prevent a lawyer from representing another person alleged to have engaged in unlawful discrimination, harassment, or retaliation.

Finally, non-substantive changes to the current rule include rule numbering to track the Commission's general proposal to use the Model Rule numbering system and the substitution of the term "lawyer" for "member."

Proposed rule 8.4.1 contains six comments all of which provide interpretive guidance or clarify how the rule is to be applied. Of particular note is Comment [2] which, among other things, has been added to clarify that the rule does not apply to constitutionally-protected conduct. Comment [4] has been added to clarify that paragraph (d) permits the State Bar to use discretion in abating a disciplinary investigation or proceeding when the State Bar is made aware of a parallel administrative or judicial proceeding premised on the same conduct. Comment [5] clarifies that paragraph (e) is intended to recognize the important public policy served by enforcing the laws and regulations prohibiting unlawful discrimination.

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission edited paragraphs (a), (b), and (c)(4) for clarity. The Commission modified paragraph (e) to impose the reporting obligation on the lawyer receiving the notice of disciplinary charge rather than on the State Bar. The Commission also modified paragraph (f) to state the rule does not preclude a lawyer from declining or withdrawing from a representation as required or permitted by the proposed rule 1.16 [Declining or Terminating Representation], nor does the rule preclude a lawyer from providing advice and engaging in advocacy as required or permitted by the rules or the State Bar Act.

In addition, the Commission added three new Comments. New Comment [3] states that a lawyer does not violate the rule by "limiting the scope or subject matter of the lawyer's practice," "limiting the lawyer's practice to members of underserved populations," or "otherwise restricting who will be accepted as clients for advocacy-based reasons, as required or permitted by these Rules or other law." The Commission believes that this eliminates any potential conflict with other Rules relating to competence and conflicts, and makes clear that the Rule does not improperly interfere with a lawyer's selection of clients. New Comment [4] states that the rule does not apply to conduct protected by the First Amendment to the United States Constitution or

by Article I, § 2 of the California Constitution. Finally, the Commission added Comment [9] which is taken from the Discussion section to current rule 2-400. This Comment is intended to make clear that conduct falling within this Rule may also be subject to discipline under other applicable provisions.

With these changes, the Board authorized an additional 45-day public comment period on the revised proposed rule.

Final Commission Action on the Proposed Rule Following 45-Day Public Comment Period

After consideration of comments received in response to the additional 45-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule. A member of the Commission submitted a dissent to this rule that can be found following the Report and Recommendation.

Board's Consideration of the Commission's Proposed Rule on March 9, 2017

At its meeting on March 9, 2017, the Board considered but did not adopt the following revision to the Commission's final version of the proposed rule. The Board considered adding a new paragraph (d) providing that:

> (d) No disciplinary investigation or proceeding may be initiated by the State Bar against a lawyer under this rule unless and until a tribunal of competent jurisdiction, other than a disciplinary tribunal, shall have first:
>
> (1) adjudicated a complaint of alleged harassment or discrimination and found that unlawful conduct occurred; or
>
> (2) has entered an order sanctioning a lawyer for such unlawful conduct.
>
> Upon adjudication or entry of order, the tribunal's finding, verdict or order shall then be admissible evidence of the occurrence or non-occurrence of the harassment or discrimination alleged in any disciplinary proceeding initiated under this rule.

In discussing this revision, questions were raised whether the Commission's proposed rule would effectively accomplish the goal of improving public protection in this area of lawyer misconduct. It was observed that the Commission's recommended deletion of current rule 2-400(C)'s prerequisite for a finding of unlawful discrimination by a "tribunal of competent jurisdiction" might lead to unfulfilled expectations of victims of discrimination because: (1) limited disciplinary resources and a lack of expertise would create investigative and enforcement burdens in such cases which are often complex and require specialized knowledge of employment law and other areas of discrimination law; (2) the State Bar's already complicated and expansive structure and the management challenges thus created are under study and review, counseling caution in expanding the scope of work for OCTC and the State Bar Court; (3) the State Bar Court has identified institutional issues to be considered in connection with this proposed change, a former Chief Trial Counsel has expressed concern and a member of the Commission issued a detailed dissent; (4) the prospect of lawyer discipline would create a disincentive for lawyers and law firms to settle discrimination cases brought by civil plaintiffs, in part, because a Bar complainant and respondent cannot agree to have the complainant

withdraw a complaint or agree to not cooperate in a disciplinary proceeding (Bus. & Prof. Code §6090.5(a)(2); (5) unresolved legal issues of collateral estoppel and res judicata (among disciplinary and non-disciplinary enforcement proceedings) would unnecessarily add a new layer of complexity to both State Bar litigation and litigation by other enforcement agencies; (6) victims who are reluctant to bring claims through other agencies because of fears of retaliation, stigma or other detriment would be disappointed to discover that a State Bar disciplinary proceeding could not grant anonymity because public participation as a complaining witness likely would be needed for any successful disciplinary prosecution; (7) even if the State Bar were successful at the trial level in obtaining culpability findings, those cases would inevitably lead to appellate challenge on due process grounds as State Bar proceedings do not afford the same procedures used in other enforcement settings (e.g., there is limited discovery and the usual rules of evidence do not apply); (8) similar to the Bar's experience in enforcing unauthorized practice of law violations against non-lawyers, stakeholder criticism could arise from any perceived lack of zealous enforcement activity; and (9) intake of complaints would likely increase the overall backlog of the discipline system.

Arguments in favor of the Commission's proposed rule including some points that respond to the above concerns and are found in the report and recommendation, the public comments received, and in the Commission's response to the dissent submitted by one of the Commission members. All of these materials are provided with this executive summary. Some of the key points made in favor of the rule are set forth below.

First, the rule prohibiting discrimination should not be singled out for different treatment, and effectively diminished, by being the only rule over which OCTC and the State Bar Court do not have original jurisdiction. By analogy to the State Bar's existing jurisdiction over misconduct involving moral turpitude, Business & Professions Code § 6106, provides that a lawyer may be disciplined for ***any*** act involving "moral turpitude, dishonesty or corruption." (Emphasis added.) Even if that act "constitutes a felony or misdemeanor, conviction thereof in a criminal proceeding is not a condition precedent" to discipline. Thus, for criminal acts, the State Bar retains original jurisdiction, even though the procedural requirements for a criminal conviction vary even more widely from those in State Bar Court than do the procedures for civil discrimination actions. The Commission believes the same is true of allegations of unlawful discrimination and harassment, and accordingly believes it appropriate that, as with allegations of criminal conduct involving moral turpitude, the State Bar should have jurisdiction to impose discipline without requiring as a condition precedent the pursuit of civil or administrative proceedings.

Second, during the Commission's process the proposed rule was revised to include the following two provisions that are intended to address some of the practical enforcement concerns while not diminishing the rule's efficacy by depriving OCTC and the State Bar Court of original jurisdiction: (1) paragraph (d) requires that a lawyer who is the subject of an OCTC investigation or State Bar Court proceeding alleging a violation of the Rule "promptly notify the State Bar of any criminal, civil, or administrative action premised, whether in whole or part, on the same conduct" and this helps ensure that OCTC and the State Bar Court are 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; and (2) Comment [6] recognizes that while OCTC and the State Bar Court have original jurisdiction, they also retain the ability, should they determine it appropriate, whether for resource reasons or because of the complexity of the issues raised, to defer to a related criminal, civil, or administrative proceeding.

Third, paragraph (e) requires a lawyer who receives a notice of a disciplinary charge under the Rule to provide a copy of the notice to the State and Federal agencies tasked with primary responsibility for coordinating enforcement of laws and regulations prohibiting unlawful discrimination. This will provide those agencies with the information necessary, should they determine it appropriate, to initiate their own proceedings. If they do, OCTC and the State Bar Court retain the ability to defer to those proceedings. In addition, as a general matter, nothing in the proposed rule impairs the State Bar's discretion in evaluating complaints received to reject non-meritorious claims, including non-meritorious clams that may be filed for strategic or tactical reasons.

These points and other support for the adoption of the proposed rule are found in the materials that follow this executive summary.

Following discussion of the foregoing concerns, the Board vote on a motion to recommend proposed Rule 8.4.1 as modified resulted in a tie vote (6 yes, 6 no), with the State Bar President breaking the tie by voting no. Subsequently a motion to recommend the rule as proposed by the Commission also resulted in a tie vote (6 yes, 6 no), with the State Bar President breaking the tie by voting yes.

The Board adopted proposed rule 8.4.1 at its March 9, 2017 meeting.

COMMISSION REPORT AND RECOMMENDATION: RULE 8.4.1 [2-400]

Commission Drafting Team Information

Lead Drafter: George Cardona
Co-Drafters: Judge Karen Clopton, Robert Kehr, Howard Kornberg, Carol Langford, Toby Rothschild, Dean Zipser

I. CURRENT CALIFORNIA RULE

Rule 2-400 Prohibited Discriminatory Conduct in a Law Practice

(A) For purposes of this rule:

(1) "law practice" includes sole practices, law partnerships, law corporations, corporate and governmental legal departments, and other entities which employ members to practice law;

(2) "knowingly permit" means a failure to advocate corrective action where the member knows of a discriminatory policy or practice which results in the unlawful discrimination prohibited in paragraph (B); and

(3) "unlawfully" and "unlawful" shall be determined by reference to applicable state or federal statutes or decisions making unlawful discrimination in employment and in offering goods and services to the public.

(B) In the management or operation of a law practice, a member shall not unlawfully discriminate or knowingly permit unlawful discrimination on the basis of race, national origin, sex, sexual orientation, religion, age or disability in:

(1) hiring, promoting, discharging, or otherwise determining the conditions of employment of any person; or

(2) accepting or terminating representation of any client.

(C) No disciplinary investigation or proceeding may be initiated by the State Bar against a member under this rule unless and until a tribunal of competent jurisdiction, other than a disciplinary tribunal, shall have first 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. In order for discipline to be imposed under this 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.

Discussion:

In order for discriminatory conduct to be actionable under this rule, it must first be found to be unlawful by an appropriate civil administrative or judicial tribunal under applicable state or federal law. Until there is a finding of civil unlawfulness, there is no basis for disciplinary action under this rule.

A complaint of misconduct based on this rule may be filed with the State Bar following a finding of unlawfulness in the first instance even though that finding is thereafter appealed.

A disciplinary investigation or proceeding for conduct coming within this rule may be initiated and maintained, however, if such conduct warrants discipline under California Business and Professions Code sections 6106 and 6068, the California Supreme Court's inherent authority to impose discipline, or other disciplinary standard.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: January 20 & 21, 2017
Action: Recommend Board Adoption of Proposed Rule 8.4.1 [2-400]
Vote: 13 (yes) – 1 (no) – 1 (abstain)

Board:

Date of Vote: March 9, 2017
Action: Board Adoption of Proposed Rule 8.4.1 [2-400]
Vote: 7 (yes) – 6 (no) – 0 (abstain) (See executive summary for more information.)

III. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 8.4.1 Prohibited Discrimination, Harassment and Retaliation

(a) In representing a client, or in terminating or refusing to accept the representation of any client, a lawyer shall not:

(1) unlawfully harass or unlawfully discriminate against persons* on the basis of any protected characteristic; or

(2) unlawfully retaliate against persons.

(b) In relation to a law firm's operations, a lawyer shall not:

(1) on the basis of any protected characteristic,

(i) unlawfully discriminate or knowingly* permit unlawful discrimination;

(ii) unlawfully harass or knowingly* permit the unlawful harassment of an employee, an applicant, an unpaid intern or volunteer, or a person* providing services pursuant to a contract; or

(iii) unlawfully 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; or

(2) unlawfully retaliate against persons.

(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 (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) "retaliate" means to take adverse action against a person* because that person* has (i) opposed, or (ii) pursued, participated in, or assisted any action alleging, any conduct prohibited by paragraphs (a)(1) or (b)(1) of 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 being issued a notice of a disciplinary charge under this rule, a lawyer shall:

(1) if the notice is of a disciplinary charge under paragraph (a) of this rule, 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; or

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

(f) This rule shall not preclude a lawyer from:

(1) representing a client alleged to have engaged in unlawful discrimination, harassment, or retaliation;

(2) declining or withdrawing from a representation as required or permitted by rule 1.16; or

(3) providing advice and engaging in advocacy as otherwise required or permitted by these rules and the State Bar Act.

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). In relation to a law firm's operations, this rule imposes on all law firm* lawyers the responsibility to advocate corrective action to address known* harassing or discriminatory conduct by the firm* or any of its other lawyers or nonlawyer personnel. Law firm* management and supervisorial 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] The conduct prohibited by paragraph (a) includes the conduct of a lawyer in a proceeding before a judicial officer. (See Canon 3B(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. While both the parties and the court retain discretion to refer such conduct to the State Bar, a court's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (a).

[3] A lawyer does not violate this rule by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations. A lawyer also does not violate this rule by otherwise restricting who will be

accepted as clients for advocacy-based reasons, as required or permitted by these rules or other law.

[4] This rule does not apply to conduct protected by the First Amendment to the United States Constitution or by Article I, § 2 of the California Constitution.

[5] 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-supervisorial 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.

[6] 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.

[7] 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.

[8] This rule permits the imposition of discipline for conduct that would not necessarily result in the award of a remedy in a civil or administrative proceeding if such proceeding were filed.

[9] A disciplinary investigation or proceeding for conduct coming within this rule may also be initiated and maintained if such conduct warrants discipline under California Business and Professions Code §§ 6106 and 6068, the California Supreme Court's inherent authority to impose discipline, or other disciplinary standard.

IV. COMMISSION'S PROPOSED RULE (REDLINE TO CURRENT CALIFORNIA RULE 2-400)

Rule 8.4.1 [~~2-400~~] Prohibited ~~Discriminatory Conduct in a Law Practice~~Discrimination, Harassment and Retaliation

(a) In representing a client, or in terminating or refusing to accept the representation of any client, a lawyer shall not:

(1) unlawfully harass or unlawfully discriminate against persons* on the basis of any protected characteristic; or

(2) unlawfully retaliate against persons.

(b) In relation to a law firm's operations, a lawyer shall not:

(1) on the basis of any protected characteristic,

(i) unlawfully discriminate or knowingly* permit unlawful discrimination;

(ii) unlawfully harass or knowingly* permit the unlawful harassment of an employee, an applicant, an unpaid intern or volunteer, or a person* providing services pursuant to a contract; or

(iii) unlawfully 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; or

(2) unlawfully retaliate against persons.

(~~A~~c) For purposes of this rule:

(1) "~~law practice" includes sole practices, law partnerships, law corporations, corporate and governmental legal departments, and other entities which employ members to practice law;~~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 ~~a failure~~to fail to advocate corrective action where the ~~member~~lawyer knows* of a discriminatory policy or practice ~~which~~that results in the unlawful discrimination or harassment prohibited ~~in~~by paragraph (~~B~~b); ~~and~~

(3) "unlawfully" and "unlawful" shall be determined by reference to applicable state ~~or~~and federal statutes ~~or~~and decisions making unlawful discrimination or harassment in employment and in offering goods and services to the public~~.~~; and

(4) "retaliate" means to take adverse action against a person* because that person* has (i) opposed, or (ii) pursued, participated in, or assisted any

action alleging, any conduct prohibited by paragraphs (a)(1) or (b)(1) of 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 being issued a notice of a disciplinary charge under this rule, a lawyer shall:

(1) if the notice is of a disciplinary charge under paragraph (a) of this rule, 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; or

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

(f) This rule shall not preclude a lawyer from:

~~(B) In the management or operation of a law practice, a member shall not unlawfully discriminate or knowingly permit unlawful discrimination on the basis of race, national origin, sex, sexual orientation, religion, age or disability in:~~

(1) ~~hiring, promoting, discharging, or otherwise determining the conditions of employment of any person; or~~representing a client alleged to have engaged in unlawful discrimination, harassment, or retaliation;

(2) ~~accepting or terminating~~declining or withdrawing from a representation ~~of any client.~~as required or permitted by rule 1.16; or

(3) providing advice and engaging in advocacy as otherwise required or permitted by these rules and the State Bar Act.

~~(C) No disciplinary investigation or proceeding may be initiated by the State Bar against a member under this rule unless and until a tribunal of competent jurisdiction, other than a disciplinary tribunal, shall have first 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. In order for discipline to be imposed under this 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.~~

Comment~~Discussion~~

~~In order for discriminatory conduct to be actionable under this rule, it must first be found to be unlawful by an appropriate civil administrative or judicial tribunal under applicable state or federal law. Until there is a finding of civil unlawfulness, there is no basis for disciplinary action under this rule.~~

~~A complaint of misconduct based on this rule may be filed with the State Bar following a finding of unlawfulness in the first instance even though that finding is thereafter appealed.~~

[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). In relation to a law firm's operations, this rule imposes on all law firm* lawyers the responsibility to advocate corrective action to address known* harassing or discriminatory conduct by the firm* or any of its other lawyers or nonlawyer personnel. Law firm* management and supervisorial 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] The conduct prohibited by paragraph (a) includes the conduct of a lawyer in a proceeding before a judicial officer. (See Canon 3B(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. While both the parties and the court retain discretion to refer such conduct to the State Bar, a court's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (a).

[3] A lawyer does not violate this rule by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations. A lawyer also does not violate this rule by otherwise restricting who will be accepted as clients for advocacy-based reasons, as required or permitted by these rules or other law.

[4] This rule does not apply to conduct protected by the First Amendment to the United States Constitution or by Article I, § 2 of the California Constitution.

[5] 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-supervisorial 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.

[6] 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.

[7] 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.

[8] This rule permits the imposition of discipline for conduct that would not necessarily result in the award of a remedy in a civil or administrative proceeding if such proceeding were filed.

[9] A disciplinary investigation or proceeding for conduct coming within this rule may also be initiated and maintained~~, however,~~ if such conduct warrants discipline under California Business and Professions Code ~~sections~~§§ 6106 and 6068, the California Supreme Court's inherent authority to impose discipline, or other disciplinary standard.

V. RULE HISTORY

In 1990, the Judicial Council's Subcommittee on Gender Bias in the Courts recommended promulgation of a Rule of Professional Conduct prohibiting employment discrimination. In addition, in 1989, 1991 and 1992, the Conference of Delegates of the State Bar approved resolutions recommending State Bar promulgation of a new Rule of Professional Conduct that would subject attorneys to discipline for discrimination, including discrimination in the acceptance and termination of clients. In response, the State Bar prepared a new rule 2-400 that was adopted by the Board on March 6, 1993, and approved by the Supreme Court, effective March 1, 1994. (The foregoing origin of current rule 2-400, including studies by the Commission and a specially formed State Bar Anti-Bias Rule Committee, is discussed fully in the State Bar's "Request that the Supreme Court of California Approve Proposed Rule 2-400 of the Rules of Professional Conduct of the State Bar of California and Memorandum and Supporting Documents in Explanation," July 1993, Supreme Court case number S034144.)

VI. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016 (In response to 90-day public comment circulation):**

1. OCTC supports subsections (a) and (d) of this rule.

   Commission Response: No response required.

2. OCTC supports the general concepts in subsections (b) and (c), but is concerned that subsections (b)(1) and (2) and (c)(2) require "knowingly" for the same reasons expressed regarding that term in proposed Rule 1.9, proposed Rules 3.3 and 4.1, and the General Comments section of this letter. The rules should not encourage willful blindness or a failure to investigate. (See *Butler v. State Bar* (1986) 42 Cal.3d 323, 328-329 [circumstances known to the attorney may require an investigation].)

   Commission Response: The definition of "knowingly" in Rule 1.0.1(f) makes clear that knowledge can be inferred from the circumstances. With this definition, the Commission believes that the "knowingly" standard is appropriately used in (b) and (c).

3. OCTC is concerned that subsection (e) and Comment [4] places requirements on the State Bar and is not a disciplinable offense. The purpose of the Rules of Professional Conduct is to regulate the practice of law, not to regulate the State Bar. This is beyond the direction and the authority the Supreme Court provided the Commission. Moreover, subsection (e) is vague as to which division of the State Bar is required to provide this information, the State Bar Court, OCTC, General Counsel, or some other unit.

   Commission Response: The Commission has modified subsection (e) to impose the reporting obligation on the lawyer receiving the notice of disciplinary charge rather than on the State Bar.

4. OCTC supports Comments [2].

   Commission Response: No response required.

5. OCTC is concerned that Comments [1] and [5] are more appropriate for treatises, law review articles, and ethics opinions. They are merely a philosophical discussion of the reasons for the rule.

   Commission Response: Comment [1] explains the application of the rule in relation to Rule 8.4(a) and the supervision rules. Rule 8.4 and the supervision rules are new rules and the discrimination rule should facilitate compliance with these related rules. Regarding "knowingly" see the response to point #2, above.

6. OCTC is concerned that Comment [3] is unnecessary. Further, OCTC is concerned with the use of the term "knowingly" in this Comment for the same reasons expressed regarding that term in proposed Rule 1.9, proposed Rules 3.3 and 4.1, and the General Comments section of this letter. The rules should not encourage willful blindness or a failure to investigate. (See *Butler v. State Bar* (1986) 42 Cal.3d 323, 328-329 [circumstances known to the attorney may require an investigation].)

   Commission Response: Both Comments provide appropriate information. Comment [3] describes the application of proposed Rule 8.4.1 in limited scope representations. Comment [6] explains paragraph (d) and highlights that the rule would be subject to the usual State Bar Court abatement policies.

- **Gregory Dresser, Office of Chief Trial Counsel, 1/9/2017 (In response to 45-day public comment circulation):**

  1. OCTC supports subsections (a) and (d) of this rule.

     Commission Response: No response required.

  2. OCTC supports the general concepts in subsections (b) and (c), but is concerned that subsections (b)(1) and (2) and (c)(2) require "knowingly" for the same reasons expressed regarding that term in proposed Rules 1.9 and 3.3 of this letter and the General Comments section of OCTC's September 27, 2106 letter. The rules should not encourage willful blindness, gross negligence, recklessness, or a failure to investigate. (See *Butler v. State Bar* (1986) 42 Cal.3d 323, 328-329 [circumstances known to the attorney may require an investigation].)

     Commission Response: The definition of "knowingly" in Rule 1.0.1(f) makes clear that knowledge can be inferred from the circumstances. With this definition, the Commission believes that the "knowingly" standard is appropriately used in (b) and (c).

  3. OCTC supports Comments [2], [7], [8], and [9].

     Commission Response: No response required.

  4. Comments [1] and [5] are more appropriate for treatises, law review articles, and ethics opinions. They are merely a philosophical discussion of the reasons for the rule. Further, OCTC is concerned with the use of the term "knowingly" in Comment [5] for the same reasons expressed regarding that term in proposed Rules 1.9 and 3.3 in this letter, and the General Comments section of OCTC's September 27, 2016 letter.

     Commission Response: Comment [1] explains the application of the rule in relation to rule 8.4(a) and the supervision rules. Rule 8.4 and the supervision rules are new rules and the discrimination rule should facilitate compliance

with these related rules. Regarding "knowingly" see the response to point #2, above.

5. Comments [3] and [6] are unnecessary.

   Commission Response: Both Comments provide appropriate information. Comment [3] describes the application rule 8.4.1 in limited scope representations. Comment [6] explains paragraph (d) and highlights that the rule would be subject to the usual State Bar Court abatement policies.

- **Colin Wong, State Bar Court, 11/02/2015:**

The State Bar Court appreciates the opportunity to respond to the proposed revisions to rule 2-400 of the Rules of Professional Conduct, regarding prohibiting discriminatory conduct in a law practice. Specifically, the Court wishes to comment on the proposed revisions by the Committee on Access and Fairness.

The current proposal seeks to delete subsection (c) which provides that:

> "No disciplinary investigation or proceeding may be initiated by the State Bar against a member under this rule unless and until a tribunal of competent jurisdiction, other than a disciplinary tribunal, shall have first 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. In order for discipline to be imposed under this 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."

We believe that the deletion of 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. While the State Bar Court makes no comment on the desirability or feasibility of such a possibility, the Court would like the Commission to consider the following:

Limited Discovery in State Bar Court Proceedings

Discovery in State Bar Court proceedings is generally limited and permitted only upon Court order. (Rules of Proc. of State Bar, rule 5.65) [No discovery subpoenas without prior Court order (Rule 5.61(A)); Depositions allowed only upon court order (Rule 5.61(C)); Additional discovery only upon motion and showing of good cause (Rule 5.66(A)).]

Burden of Proof in State Bar Court Proceedings

Unlike in civil proceedings, in a disciplinary proceeding, the State Bar must prove culpability by clear and convincing evidence. Clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind. *(Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)

Evidence Code Not Applicable in State Bar Court Proceedings

State Bar Court proceedings are not conducted according to the Evidence Code as applied in civil cases. Instead, 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. (Rule 5.104(C).) In addition, hearsay evidence may be used for the purpose of supplementing or explaining other evidence. (Rule 5.104(D).)

No Jury Trials

In disciplinary proceedings, attorneys are not entitled to a jury trial. *(Johnson v. State Bar of Cal.* (1935) 4 Cal.2d 744, 758. Instead, all trials are conducted by a Hearing Department Judge. (Bus. & Prof. Code, § 6079.1(1).)

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.

Note: State Bar Court's comment was provided as a preliminary comment prior the formal 90-day public comment period. The Commission took into consideration the State Bar Court's comment when developing the proposed rule.

VII. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, forty-nine public comments were received. Eleven comments agreed with the proposed Rule, thirty comments disagreed, six comments agreed only if modified, and two comments did not indicate a position. During the 45-day public comment period, three public comments were received. Two comments agreed with the proposed Rule, and one comment agreed only if modified. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

One speaker appeared at the public hearing whose testimony was not in support of the proposed rule. That testimony and the Commission's response is also in the public comment synopsis table

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Former California Law Encompassing Bias

Currently, California does not have a rule or commentary prohibiting conduct prejudicial to the administration of justice or prohibiting bias or prejudice where that conduct is prejudicial to the administration of justice. (See ABA Model Rule 8.4 and Comment [3].) However, former Business and Professions Code § 6068, subdivision (f) prohibited in part "offensive personality." (See also, Code of Civ. Proc. § 282(6), discussed in *Peters v. State Bar* (1933) 219 Cal. 218.) In *U.S. v. Wunsch* (9th Cir. 1996) 84 F.3d 1110, that part of § 6068(f) was found unconstitutionally vague and a regulation against personality rather than speech or conduct. The following case law demonstrates how this provision was applied prior to invalidation and demonstrates what type of conduct was considered to reflect an "offensive personality."

- Attorney described a judge as under a "political obligation" to opposing counsel. *Peters v. State Bar* (1933) 219 Cal. 218.
- Attorney charged the presiding judge with acting as a prosecutor and attorney for the plaintiff and being prejudiced against certain witnesses because of their religion. *Hogan v. State Bar* (1951) 36 Cal.2d 807.
- Defense attorney referred to prosecutor as a "high-priced lawyer." *Hawk v. Superior Court* (1974) 42 Cal.App.3d 108.
- In a dispute with a former client, attorney disclosed the irrelevant fact that client's sister was having an affair. *Dixon v. State Bar* (1982) 32 Cal.3d 728.
- Attorney described a judge as having a "boudoir." *Maltaman v. State Bar* (1987) 43 Cal.3d 924.
- Attorney referred to the court as "dirty," characterized judges as "the four stooges," and told a court clerk that a judge is a "swine." *Lebbos v. State Bar* (1991) 53 Cal.3d 37.
- Attorney called opposing counsel "a slob." *People v. Brown* (1992) 7 Cal.Rptr.2d 370 (ordered not published, previously published at: 5 Cal.App.4th 950).

B. California Law Related to Sexual Harassment of Clients

Issues relating to preventing discrimination and bias in the legal profession overlap with issues concerning sexual harassment. In addition to current rule 3-120, which prohibits attorneys from demanding sexual relations with clients, or from using coercion, intimidation, or undue influence in entering into a sexual relationship with a client, California case law also addresses sexual harassment and sexual offenses by attorneys. For example, the Court of Appeal held that an attorney engaging in sexual harassment of a client, and withholding legal services where sexual favors were not granted, could constitute outrageous conduct for purposes of intentional infliction of emotional distress. *McDaniel v. Gile* (1991) 230 Cal.App.3d 363, 373. Additionally, the

State Bar has imposed discipline against attorneys for sexual harassment and other sexual offenses under Business and Professions Code § 6106, which subjects attorneys to discipline for acts involving moral turpitude. In one instance, an attorney was disciplined for sexual harassment of a client and intentional infliction of emotional distress. *In the Matter of Torres* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 138. In other cases, attorneys have been disciplined for sexual crimes involving moral turpitude. *In re Lesansky* (2001) 25 Cal.4th 11 [104 Cal.Rptr.2d 409] (lewd act on a child); *In re Safran* (1976) 18 Cal.3d 134 [133 Cal.Rptr. 9] (annoying or molesting a child under 18); *In the Matter of Meza* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 608 (three or more acts of sexual conduct with a child under age 14).

C. Incentives for Diversity.

Related to the elimination of bias and prejudice in the workplace, various California statutes offer incentives to minority and women business enterprises. For contracts awarded by state entities, Public Contract Code §§ 10115 et. seq. sets participation goals for minority, women, and disabled veteran business enterprises, and requires that the awarding entity consider the efforts of the bidders to meet the diversity goals set forth in the statute. Similar participation goals are included for state agencies awarding contracts for professional bond services. Government Code § 16850 et. seq. Similar to the goals behind rule 2-400, these incentives seek to encourage diversity in the workplace as well as the elimination of bias and discrimination.

D. Attorney Oath.

Recent amendments to California Rule of Court 9.4 added new language to the oath taken by attorneys upon admission to practice law. The additional language states: "As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity." Similar to the policies and concepts behind current rule 2-400 of preventing discrimination, promoting diversity, and eliminating bias in the legal profession, the attorney oath provision seeks to ensure the legal profession displays respect and courtesy to other lawyers, clients, and the public.

E. ABA Model Rule Adoptions.

Prior to August 8, 2016, there was no Model Rule counterpart for 2-400 (although, as discussed below, Comment [3] to ABA Model Rule 8.4(d) specified that it addressed discrimination by individual lawyers while representing a client). Twenty-three jurisdictions have adopted rules of professional conduct that prohibit discrimination.[1] Sixteen of those jurisdictions have rules that specifically prohibit discrimination in

[1] The twenty-three jurisdictions are: Colorado, District of Columbia, Florida, Illinois, Indiana, Iowa, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Rhode Island, Texas, Vermont, Washington, and Wisconsin.

conduct that occurs by a lawyer in a professional capacity.[2] Four jurisdictions have rules that prohibit discrimination in representing a client.[3] Two jurisdictions have rules that prohibit discrimination in connection with a proceeding before a tribunal.[4] Michigan Rule 6.5 requires lawyers to treat all persons involved in the legal process with courtesy and respect. A Comment to Michigan Rule 6.5 provides that "a supervisory lawyer should make reasonable efforts to ensure that the firm has in effect policies and procedures that do not discriminate against members or employees of the firm."

Prior to August 8, 2016, Comment [3] to Model Rule 8.4(d) was related and prohibited lawyers, in the course of representing a client, from knowingly manifesting, by words or conduct, bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, when such actions are prejudicial to the administration of justice. Of the jurisdictions with no black letter rule on discrimination, thirteen have adopted Commentary with language identical or substantially similar to Comment [3]. Similar language was also included in proposed Comment [3] to the first Commission's proposed Rule 8.4. Fourteen jurisdictions do not have a rule or commentary addressing these issues. The ABA State Adoption Chart, entitled "Variations of the ABA Model Rules of Professional Conduct, Rule 8.4: Misconduct, Comment [3]," revised September 15, 2016, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_8_4_cmt_3.authcheckdam.pdf [Last visited 2/6/17]

On or about August 8, 2016, the ABA House of Delegates adopted amendments to Model Rule 8.4 to add a new section (g) and accompanying Comments [3], [4], and [5] that would make it professional misconduct for a lawyer to:

> (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This Rule does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16.
>
> **Comment**
>
> * * *
>
> [3] Discrimination and harassment by lawyers in violation of paragraph (g) undermines confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or

[2] The sixteen jurisdictions are: District of Columbia, Florida, Illinois, Indiana, Iowa, Maryland, Massachusetts, Minnesota, Nebraska, New Jersey, New York, Ohio, Rhode Island, Vermont, Washington, and Wisconsin.

[3] The four jurisdictions are: Colorado, Missouri, North Dakota, and Oregon.

[4] The two jurisdictions are: New Mexico and Texas.

prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).

[4] Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.

[5] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance with these Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. See Rule 6.2(a), (b) and (c). A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. See Rule 1.2(b).

In adopting these amendments, the ABA House of Delegates had before it a memorandum issued by the ABA Standing Committee on Ethics and Professional Responsibility (the "ABA Memo") setting out the reasoning for the amendments. Because much of this reasoning applies as well to the Commission's proposal for this rule, a copy of the ABA Memo is attached to this Report & Recommendation for reference.

IX. CONCEPTS ACCEPTED/REJECTED; CHANGES IN DUTIES; NON-SUBSTANTIVE CHANGES; ALTERNATIVES CONSIDERED

A. Concepts Accepted (Pros and Cons):

1. Expand the Rule beyond management or operation of a law firm to also encompass discrimination or harassment more generally in "representing a client, or in terminating or refusing to accept the representation of any client".

    - Pros: The current rule already applies to discrimination in the management or operation of a law firm in "accepting or terminating representation of any

client," and there seems no justification for not extending this prohibition outside the arena of law firm management. Adopting a rule prohibiting unlawful discrimination or harassment generally while engaged in representing a client is consistent with former ABA Model Rule 3.8(d), Comment [3], and, as noted in the ABA Memo, with new ABA Model Rule 3.8(g) and many other professions that prohibit this same behavior in their codes of conduct. Finally, particularly for a profession that is dedicated to enforcing the rule of law, it seems appropriate to impose a professional obligation that requires lawyers not to unlawfully discriminate or harass while engaged in the core conduct of that profession, representing clients. Proposed paragraph (a) applies to conduct "in representing a client" rather than using the language of the ABA's new Rule 3.8(g) "conduct related to the practice of law" because, consistent with current California rule 2-400, we have retained separate section (b) addressing conduct "in the management or operation of a law firm" rather than trying to have a single provision apply to all conduct, and rather than extending the rule's prohibitions (as does the ABA's new Rule 3.8(g) to bar association, business or social activities in connection with the practice of law. Any concern that the expansion of the Rule may pose First Amendment issues is addressed by the requirement in the Rule itself that conduct be "unlawful" by reference to applicable federal and state statutes and decisions and by inclusion of proposed Comment [4] that makes clear that the Rule does not apply to conduct permitted by the First Amendment or Article 1.

- Cons: None identified.

2. Expand the Rule to cover protected categories other than those listed in current Rule 2-400.

   - Pros: Current rule 2-400's limited list of protected characteristics on the basis of which discrimination is unlawful is narrower than current California law. Moreover, identification of protected characteristics is not static. he Commission therefore recommends adding in section (c)(1) a definition of "protected characteristic" that is consistent with current California law and that also includes a catchall for any "other category of discrimination prohibited by applicable law". Lawyers are obligated to obey the law as are nonlawyers, and this addition would permit professional discipline whatever applicable anti-discrimination laws might exist in the future without the need to amend this Rule.

   - Cons: None Identified.

3. Expand the Rule to encompass unlawful retaliation, as well as unlawful discrimination and harassment based on a protected characteristic.

   - Pros: Lawyers are obligated to obey the law as are nonlawyers, and this addition would permit professional discipline where a lawyer, in representing a client or in the management or operation of a law firm, unlawfully retaliates against a person because the person has taken action to oppose unlawful

discrimination or harassment. The addition of this prohibited conduct serves as additional protection for those obligated by the Rule itself, which includes lower level lawyers within a law firm, to advocate corrective action where they know of unlawful discrimination or harassment within the firm, even if by higher level lawyers within the firm.

- Cons: None identified.

4. Expand the current rule by removing the requirement that there be a final civil determination of wrongful discrimination before a disciplinary investigation can commence or discipline can be imposed.

   - Pros: No other rule in the California Rules of Professional Conduct contains a similar limitation on State Bar original jurisdiction. It is not clear why such a limitation should be placed on a rule that is intended to prevent discrimination in the legal profession. In fact, including any such limitation may be viewed as inappropriately detracting from the intended message of the proposed rule that unlawful discriminatory conduct should provide a basis for discipline.

   - Cons: Eliminating current rule 2-400's threshold requirement that a court of competent jurisdiction has found that the alleged unlawful conduct had occurred raises substantial concerns, including due process, (see comment from State Bar Court, above), lack of OCTC resources and expertise to prosecute the charge effectively, and the potential that disciplinary proceedings would be used as the testing ground for new theories of discrimination, or as leverage in otherwise unrelated civil disputes between lawyers and former clients.

5. Add a new requirement (see proposed paragraph (d) and Comment [6]) of notice to the State Bar of any parallel administrative or judicial proceeding, and leave it to the State Bar to determine whether or not to hold the disciplinary proceeding in abeyance pending the outcome of the related proceeding.

   - Pros: See discussion under Section IX.E, "Alternatives Considered."

   - Cons: See discussion under Section IX.E, "Alternatives Considered."

6. Add a new requirement (see proposed paragraph (e) and Comment [7]) that, upon receiving a notice of disciplinary charge under the Rule, a lawyer is required to provide notice of the charge to the State and/or Federal agencies tasked with investigating and addressing the type of conduct that underlies the notice of disciplinary charge.

   - Pros: This provision 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.

- Cons: Such notice should be left to the discretion of the State Bar. With respect to proposed Comment [7], the language of the proposed Rule addition is clear, and the Comment is unnecessary.

7. Add to the Comments (proposed Comment [2]) a sentence making clear that the conduct prohibited by paragraph (a) of the Rule includes the conduct of a lawyer in a proceeding before a judicial officer.

   - Pros: As noted in proposed Comment [2], this is consistent with Canon 3B(6) of the Code of Judicial Ethics. The addition of this language to the Comment, with a citation to this Canon, provides interpretive guidance that will be of assistance to lawyers in understanding the Rule.

   - Cons: The language of paragraph (a) of the Rule is already clear and does not contain any limitation that would exclude prohibited conduct occurring in a proceeding before a judicial officer. As a result, the addition of this language to the Comments is unnecessary.

8. Add to the Comments (proposed Comment [3]) explicit statements that the rule is not violated by limitations on the scope or subject matter of the lawyer's practice or for restricting who will be accepted as clients for advocacy-based reasons.

   - Pros: This avoids any possible conflict with other rules requiring lawyers to accept only clients who they can competently and diligently represent. It also avoids issues and clarifies the intent not to impinge on a lawyer's associational rights derived from either the constitution or other sources that might be implicated by a lawyer's lawful selection of clients. The recognition that this conduct is outside the Rule's intended scope is consistent with the Rule's limitation to conduct that is unlawful as defined by reference to applicable federal and state statutes and decisions, as well as with the exceptions to the Rule set forth in paragraph (f). The addition of this language is consistent with Comment [5] to new ABA Model Rule 8.4(g).

   - Cons: Given that the proposed Rule applies only to "unlawful" discriminatory, harassing, or retaliatory conduct, as well as the exceptions in paragraph (f), this seems implicit, rendering such a statement not strictly necessary.

9. Add to the Comments (proposed Comment [4]) an explicit statement that the Rule does not apply to conduct protected by the First Amendment.

   - Pros: To the extent it avoids issues and clarifies the intent not to impinge on First Amendment activities, there would appear to be no harm in adding such an explicit statement to the Comments.

- Cons: Given that the proposed Rule applies only to "unlawful" discriminatory or harassing conduct, this seems implicit, rendering such a statement not strictly necessary.

10. Add to the Comments (proposed Comment [8]) language clarifying that discipline can be imposed for conduct that is a violation of this Rule, that is discriminatory, harassing, or retaliatory conduct that is unlawful as determined by reference to applicable state and federal law, even if certain additional elements over and above the unlawful conduct itself (for example, severity and pervasiveness in the context of sexually harassing conduct) would have to be established for that conduct to result in the award of a civil or administrative remedy in a civil or administrative proceeding.

    - Pros: Holds lawyers to a higher standard, focusing on their conduct in the particular instance(s) at issue, rather than requiring proof of additional elements that, while held necessary for civil or administrative remedies, do not negate the unlawfulness of the conduct.

    - Cons: Additional elements have been developed in civil and administrative proceedings for a reason, and permitting discipline in their absence removes a level of clarity and leaves too much discretion with the State Bar to seek discipline for single instances of conduct.

11. Carryover to the Comments (proposed Comment [9]) the current rule 2-400 Discussion making clear that disciplinary proceedings for conduct coming within this Rule may also be commenced under applicable provisions of the State Bar Act, the California Supreme Court's inherent authority, or other disciplinary standards.

    - Pros: Consistent with the current California Rule. Provides important notice to lawyers of alternative sources of disciplinary authority.

    - Cons: Implicit in the Rules and State Bar Act so any such Comment is unnecessary.

B. Concepts Rejected (Pros and Cons):

1. Expand the current Rule by including conduct unrelated to the practice of law.

    - Pros: This additional requirement could improve lawyer conduct.

    - Cons: This requirement would be inconsistent with current ABA Model Rule 8.4(d), Comment [3], and new ABA Model Rule 8.4(g) and accompanying Comments [3], [4], and [5], all of which limit themselves to conduct related to the practice of law. Extending the rule beyond such conduct also increases the risk of impinging on First Amendment rights.

2. Expand the current rule or add a new rule to educate lawyers on promoting diversity in the legal profession.

    - Pros: This additional rule could improve lawyer conduct.

    - Cons: This would be an aspirational rule that would conflict with the Commission's Charter to adhere to rules written narrowly for disciplinary purposes. Any deficiency in lawyers' continuing education could be addressed through mandatory continuing education requirements.

3. Recommend rejection of the rule as interfering with the lawyer-client relationship..

    - Pros: The proposed Rule interferes with the lawyer-client relationship by requiring lawyers to accept clients that they otherwise do not wish to represent.

    - Cons: Lawyers, no less than any other citizens, have an obligation to obey applicable anti-discrimination laws and regulations. The limitations in the Rule to conduct that is unlawful by reference to applicable federal and state statutes and decisions, the exceptions set forth in paragraph (f), and Comment [5] all address the ability of lawyers to choose their clients.

4. Restrict the current rule so that it applies only to managerial and supervisory lawyers within a law firm.

    - Pros: The first Commission recommended this change, apparently under the theory that proposed Rule 5.1 would not require subordinate lawyers to advocate for improvement in law firm conduct because proposed Rule 5.2 would permit a subordinate lawyer to accept a senior lawyer's reasonable directions. This Rule should be consistent with those Rules.

    - Cons: There is no compelling reason why this Rule must be consistent with proposed Rules 5.1 and 5.2. In fact, under proposed Rule 5.2(a), each lawyer has an affirmative obligation to comply with non-discrimination law by virtue of their professional obligations under the Rules and the State Bar Act. Further, the anti-retaliation provision will protect junior lawyers who advocate for correction of discriminatory conduct involving a senior lawyer.

5. Remove from the Comments (proposed Comment [2]) the language stating that a finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (a).

    - Pros: This would address the concern that this language could be read as limiting a court's discretion on whether to refer conduct for discipline.

    - Cons: Including the language is consistent with Comment [5] to new ABA Model Rule 8.4(g). Removing the language might pose a risk of deterring parties from raising, or judges from finding, violations of Batson/Wheeler out

of concern that such a finding would automatically subject an attorney to discipline. The concern that the language could be read as limiting a trial judge's discretion on whether to refer conduct for discipline seems highly speculative. Moreover, this concern is addressed by the addition to the Comment of language making clear that both the court and the parties retain the discretion to refer Batson/Wheeler violations for discipline.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables..

C. Changes in Duties/Substantive Changes to the Current Rule:

1. Expands the Rule to prohibit unlawful discriminatory or harassing conduct generally in the course of representing a client.

2. Expands the Rule to prohibit unlawful discriminatory or harassing conduct on the basis of protected characteristics beyond those referenced in the current Rule.

3. Expands the Rule to prohibit unlawful retaliation.

4. Expands the Rule by eliminating the requirement that there be a final civil determination of wrongful discrimination before a disciplinary investigation can commence or discipline can be imposed. This change would give OCTC original jurisdiction to investigate and prosecute any claim of discrimination that is described as coming within the scope of this Rule under the current procedures of the disciplinary system.

D. Non-Substantive Changes to the Current Rule:

1. Changing the rule number to correspond to the ABA Model Rules numbering and formatting (e.g., lower case letters)

    - Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized to practice in California (see current rule 1-100(D)(1), which recognizes that reality, and rules such as the rule for *pro hac vice* admission, Rule of Court 9.40) to find the California rule corresponding to their jurisdiction's rule, thus permitting them more easily to determine whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the "Con" that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.

- Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.

2. Substituting the term "lawyer" for "member".

   - Pros: The current Rules' use of "member" departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice pro hac vice or as military counsel. (See, e.g., rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)

   - Cons: Retaining "member" would carry forward a term that has been in use in the California Rules for decades.

3. The proposal also replaces "law practice" with "law firm" because the latter phrase is a defined term used throughout the Rules.

E. Alternatives Considered:

1. Alternative Discussed by the Board.

   Refer to the rule 8.4.1 executive summary for a discussion of an alternative for revising the Commission's proposed rule that was considered by the Board at its meeting on March 9, 2017 but not adopted.

2. Former ABA Model Rule 8.4(d), Comment [3].

   For many of the same reasons discussed in the ABA Memo, the Commission concluded that the prohibition against unlawful discrimination and harassment in connection with representing clients should be incorporated in the blackletter text of the Rule itself, rather than in a Comment interpreting the Rule prohibiting "conduct prejudicial to the administration of justice."

3. The first Commission's proposed Rule 8.4(d), Comment [3] and Rule 8.4.1 with accompanying Comments.

   For many of the same reasons discussed in the ABA Memo, the Commission concluded that the prohibition against unlawful discrimination and harassment in connection with representing clients should be in the Rule itself, rather than in a Comment interpreting the rule prohibiting conduct prejudicial to the administration of justice. As discussed in Section IX.A.1, above, the Commission has agreed with the first Commission in limiting the application of paragraph (a) to conduct "in representing a client." Further, consistent with current California rule 2-400, the Commission recommends retaining separate provisions addressing conduct in the management or operation of law firm.

4. New ABA Model Rule 8.4(g) and accompanying Comments [3], [4], [5].

   The Commission agrees with the reasoning of the ABA Memo in proposing paragraph (a), which moves into the blackletter text of the Rule itself the bar on discrimination and harassment. As discussed in Section IX.A.1, above, the Commission has agreed with the first Commission in limiting paragraph (a) to conduct "in representing a client." Further, consistent with current California rule 2-400, the Commission recommends retaining separate provisions addressing conduct in the management or operation of law firm.

5. With respect to the elimination of the current requirement that requirement that there be a final civil determination of wrongful discrimination before a disciplinary investigation can commence or discipline can be imposed, the Commission supports as an alternative what is set out in paragraph (d) and Comment [6]. The Commission believes that this approach provides an appropriate mechanism for addressing various concerns regarding State Bar original jurisdiction over claims of discriminatory conduct and avoiding the potential that the State Bar's determination on such a claim might conflict with the determination of the same claim by another tribunal. These concerns are reflected in the comments from OCTC and the State Bar Court, and were the subject of lengthy discussion by the Commission. Some of these concerns are specifically flagged in item (e) below. Countervailing concerns include that no other rule has a similar limitation on State Bar original jurisdiction, and that including any such limitation may be viewed as inappropriately detracting from the intended message of the proposed rule that unlawful discriminatory conduct should provide a basis for discipline. Given the lengthy debate around this issue, the significant change from the current California rule that proposed section (d) and Comment [6] would implement, and the recognition that there are legitimate pros and cons for the varying positions, set out below are the various options considered by the Commission in arriving at the current proposal, listed in an order based on their restriction of State Bar original jurisdiction over claims of discrimination, from least to most restrictive, with notes regarding some of the pros and cons of each alternative:

   (a) Nothing in the Rule or Comments addressing this issue, with the understanding that the current State Bar Rules of procedure already provide the State Bar with the ability to hold proceedings in abeyance. This would be consistent with the fact that no other Rule has a provision limiting State Bar original jurisdiction or highlighting State Bar procedures for holding disciplinary actions in abeyance. It would also be consistent with the policy goal of deterring discriminatory, harassing, or retaliatory conduct, by emphasizing the absence of limitations on the State Bar's ability to discipline such conduct regardless of whether other civil or administrative remedies are pursued. On the other hand, by saying nothing about parallel proceedings, it poses the greatest risk of potential conflicts between State Bar determinations and those of other tribunals.

(b) Require notice to the State Bar of any parallel administrative or judicial proceeding, and leave it to the State Bar to determine whether or not to hold the disciplinary proceeding in abeyance pending the outcome of the related proceeding. This is the approach taken by paragraph (d) and Comment [6]. It reflects a compromise between alternative (a) above, and the more restrictive alternatives set out below, and as such, is viewed as most appropriately balancing the relative pros and cons of the various alternatives.

(c) Require notice to the State Bar of any parallel administrative or judicial proceeding and mandate that the State Bar hold the disciplinary proceeding in abeyance pending a tribunal's ruling in the related proceeding. An earlier draft of paragraph (d) considered by the Commission included a paragraph along these lines which read as follows: “If a person who is the subject of an alleged violation of paragraph (b) files an administrative or civil action premised on the same discriminatory conduct, the State Bar shall hold disciplinary proceedings regarding the alleged violation in abeyance pending an adjudication by a tribunal of competent jurisdiction finding that the alleged unlawful conduct occurred. Upon such adjudication, the State Bar may resume the disciplinary proceeding, and the tribunal finding or verdict shall be admissible evidence of the occurrence or non-occurrence of the alleged discrimination in that disciplinary proceeding. If the State Bar elects to continue to hold the disciplinary proceeding in abeyance pending the adjudication becoming final, whether as the result of the time for appeal expiring or judgment on appeal, the State Bar may impose conditions requiring the lawyer subject to the disciplinary proceeding [TBD].” This approach too would reflect a compromise between alternative (a) above and the more restrictive alternatives set out below, but it was rejected both because it is more restrictive in terms of permitting State Bar action and because of concerns that the Rules should not serve as a mechanism for directing OCTC or the State Bar Court to apply their procedures differently for purposes of one particular Rule.

(d) Limit State Bar original jurisdiction to address claims of discriminatory conduct to those circumstances "where there is a clear 'per se' act of discrimination witnessed by an independent witness or corroborated by clear and convincing evidence." This would result in a modified form of current rule 2-400(c) that would require the State Bar to wait on some triggering determination by another tribunal before pursuing an action against all but the clearest instances of discrimination. This was rejected both because it was viewed as overly restrictive of State Bar action and because of difficulties in defining the limitation.

(e) Eliminate State Bar original jurisdiction to address claims of discriminatory conduct by permitting it to address such claims only after a triggering determination by another tribunal, but a triggering determination less than that required by current rule 2-400(c) (which requires a finding of unlawfulness upheld and final after appeal or rendered final because the time for filing an appeal has expired or the appeal has been dismissed). The pros of this approach include that it guarantees lawyers accused of discriminatory, harassing, or retaliatory conduct the increased due process rights (particularly discovery) accorded in

other tribunals, avoids creating new obligations on OCTC that it may be unable to satisfy due to lack of OCTC resources and expertise, and avoids the potential that disciplinary proceedings would be used as the testing ground for new theories of discrimination or as leverage in otherwise unrelated civil disputes between lawyers and former clients. The cons that led to this alternative's rejection are that it is too similar to the current rule's restriction, which is viewed as unduly restrictive of State Bar efforts to address discriminatory, harassing, or retaliatory conduct, and discipline, and inconsistent with the desired emphasis that lawyers in particular must refrain from such conduct.

X. DISSENT/MINORITY STATEMENTS SUBMITTED BY COMMISSION MEMBERS

Mr. Kehr submitted a written dissent. See attached for the full text of the dissent and the Commission's response to the dissent.

XI. COMMISSION RECOMMENDATION FOR BOARD ACTION

Recommendation:

The Commission recommends adoption of proposed Rule 8.4.1 [2-400] in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 8.4.1 [2-400] in the form attached to this Report and Recommendation.

Commission Member Dissent, Submitted by Robert Kehr,
on the Recommended Adoption of Proposed Rule 8.4.1

This message states my dissent from proposed Rule 8.4.1(d), with the request that it be included with the Commission's submission to the Board of Trustees, and if needed then to the Supreme Court.

Current rule 2-400 prohibits lawyers from unlawfully discriminating in hiring and other employment actions or in accepting or terminating the representation of a client. Its paragraph (C) prohibits any investigation or discipline under the rule until there has been a final judgment by another tribunal. Apparently due to paragraph (C), there apparently has been no reported discipline imposed for violation of this rule. The lack of reported discipline is the essential criticism by the proponents of an expanded anti-discrimination rule.

The result is proposed Rule 8.4.1, a proposal with universally-supported aims. The reason for my dissent is the practical consequences of proposed paragraph (d), which would grant to the Bar the initial authority to investigate and prosecute allegations of discriminatory conduct by lawyers. As explained by Jayne Kim, then Chief Trial Counsel, 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.

Ms. Kim's letter questions OCTC's expertise, and its ability to handle the volume of complaints that could be expected. The State Bar Court also 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.

I will return later to the question of expertise, but I first want to identify the equally important issue of due process. Mr. Wong's letter also described how the State Bar 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.

As their positions required, 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, but their concerns about the practical consequences 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 and the 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; failure to report significant developments to a client; reciprocal discipline after discipline in another jurisdiction; conviction of a crime; failure to comply with terms of disciplinary probation; and practicing while under suspension.

To a significant degree, the factual bases for possible discipline in situations of this sort 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 a respondent 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. As an example, here is a link to a magazine article that asks whether websites must make ADA accommodations. See link:

http://www.theatlantic.com/technology/archive/2015/04/does-the-ada-apply-to-online-spaces-too/390654/[1]

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 would require a respondent lawyer to hire a second law firm that has expertise in the legal issues raised.

Returning to the due process and expertise issues, here are examples of the sort of claims with which OCTC can be expected to be faced:

- A lawyer claims to have been discriminated against in compensation, in the kind of assignments given to the lawyer, or in promotion or being offered a partnership. Under State Bar Court procedures, this claim could be supported by hearsay testimony (perhaps from dozens of witnesses) and other forms of evidence that has not been tested through depositions or other forms of discovery. Because of the absence of discovery, the accused lawyer will not have a fair opportunity to identify key factual issues and obtain rebutting evidence. I don't believe that OCTC, the State Bar Court, or lawyers who represent accused lawyers have the expertise to investigate or analyze a claim of this sort.

- One of the protected classes under the Unruh Act, Civ. C. § 51(b), as amended this past year by SB 600, is "primary language". This, for example, would prevent a criminal lawyer from hiring a native speaker despite a good-faith belief that a native speaker's language facility would be crucial to gaining foreign born clients' trust and confidence, to obtaining from these clients all of the information needed to provide effective defenses, and to obtain that information with all of the nuances only available to a native speaker. Much the same would be true of immigration lawyers and others who represent foreign-born clients.

[1] As another example, I noticed a January 4, 2017 Daily Journal article discussing the difficulty of proving intent under the Unruh Civil Rights Act.

- It is easy to imagine a client defending a discrimination claim to want to have a member of the same protected group as part of the defense team. The client's lawyer would have to refuse this client request, and that would interfere with the client's trust in the lawyer and the legal system. The same prohibition would apply to a corporation's general counsel, who might in good faith believe that a minority lawyer or law firm would be the best choice for defending discrimination claims but who apparently would be prohibited from acting on that opinion or recommending to the corporation that it act on that opinion.

- New California Labor Code § 1197.5, effective January 1, 2016, addresses pay distinctions based on employees' sex. There are aspects of this new statute that are pertinent to proposed Rule 8.4.1. *First*, it contains a two or three-year statute of limitations on claims for recovery of wages (the longer one for willful violations) and a one-year statute of limitations on claims for discrimination or retaliation against an employee who attempts to obtain the benefits of the statute. The limitations period for lawyer discipline is five years. See Rule 5.21(A). Statutes of limitation are vital to the administration of the law. Among other things, they prevent courts and defendants from having to deal with matters for which evidence has become unavailable and prevent a claimant from sitting on rights and causing surprise to a defendant. See, *e.g.*, Tyler T. Ochoa and Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 Pac. L.J. 453 (1997). This is a due process issue and would impose a greater burden on OCTC and the State Bar Court than does the statute, and it is a particular concern because of the factual complexity inherent in disparate wage claims. The § 1197.5 limitations period is only one example. It appears there also is a two-year statute of limitations for wage claims under the Americans with Disabilities Act, 42 USCS § 2000e-5(e)(3)(B) (I did not attempt to find my way through the numbing complexities of that statutory scheme). *Second,* the use of the lawyer discipline limitations period would conflict with the state and federal legislatures' determinations by effectively increasing the limitations period. Each of the innumerable other anti-discrimination statutes and ordinances has a limitations period, legislatively determined as appropriate in its context. *Third,* § 1197.5(c) states in full: "The Division of Labor Standards Enforcement shall administer and enforce this section. Acceptance of payment in full made by an employer and approved by the division shall constitute a waiver on the part of the employee of the employee's cause of action under subdivision (g)." This means that the threat of professional discipline for a violation of this statute would give OCTC an enforcement role in place of the administrative agency chosen by the legislature, would give that authority to an agency that lacks the necessary expertise, would allow a claimant to threaten a lawyer even after the Division of Labor Standards Enforcement (DLSE) or a court has determined there is no right of action and, where the DLSE and a court have determined there is a valid claim, would permit the claimant to use the threat of professional discipline to attempt to obtain a greater recovery. *Fourth,* the determination of wage disparities requires wide-ranging investigation for which OCTC lacks the necessary resources. I am concerned not just about the number of complaints and investigations but also their complexity. How, I wonder, would OCTC

respond to a single complaint that a 1,000-lawyer law firm with, say, 1,000 non-lawyer employees, discriminates unlawfully in staff compensation (leaving aside the choice of law issues if the law firm has offices and employees in multiple states and multiple countries).

- Cal. Gov. C. § 12926(d) defines an "Employer" for purposes of the FEHA as including: "… any person regularly employing five or more persons, or any person acting as an agent of an employer, directly or indirectly, the state or any political or civil subdivision of the state, and cities, except as follows: 'Employer' does not include a religious association or corporation not organized for private profit." The proposed Rule therefore would conflict with the legislature's determinations in failing to recognize that FEHA does not apply to any lawyer who does not regularly employ at least five persons. It arguably would apply to a nonprofit religious institution's legal department, and that result would conflict with FEHA and expose the religious institution to risk and cost not imposed by the legislature.

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* (referred to above), 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 having the effect of protecting the courts from a flood of litigation. Giving original jurisdiction to the State Bar would save the possibly injured person (or his or her lawyer) from shouldering the cost of pursuing the claim, shifting that burden to the State Bar because it is responsible for investigation and prosecution, 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 legal or no factual 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, malpractice, or other matters.

Multiple newspaper stories have reported that the disciplinary system is underfunded and that the State Bar is taking steps to attempt to free up funds to support this essential Bar function. I think it is important in considering the foreseeable burden on the disciplinary system to know that one of the proponents of this expanded rule has

stated in a Commission meeting that a lawyer should be subject to professional discipline for a single use of an offensive expression in referring to a member of a protected class and also has said (in reference to a man's dealings with a woman) that leering and flirtatious behavior should be disciplinable.[2] This of course goes far beyond any nondiscrimination statute and would create the threat of professional discipline for any *faux pas.* Surely there is a difference between bad manners or even rude behavior and the sort of conduct that calls into question a lawyer's fitness to practice.[3] This consequence is encouraged by the proposed paragraph (c)(3) definition of "unlawfully" and "unlawful", which is to be determined "by reference to applicable state and federal statutes and decisions". This means that it would not be necessary for all of the elements of the civil standard to be present, leaving an indefinite standard for discipline.[4] The tightening of (c)(3) would not resolve the problem but only reduce it to a degree.[5]

Given the predictable burden on the system and the other concerns expressed in this Dissent, it is important to consider other ways to address the subject of discrimination. The Commission already has taken one important 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 firm management into the role of seeing that the firm and its lawyer comply with all anti-discrimination laws. Another possible step would be an increased and specific MCLE requirement, a topic not within the Commission's brief.

---

[2] There also was a comment at a Commission meeting about the lack of minority representation in the ranks of law firm partners. I believe from these comments that the effect of the proposed new Rule is being oversold and that, if OCTC and the State Bar Court were to adopt practices to discriminate among complaints in order to preserve their own ability to function, they will be condemned for failing to solve all problems and the State Bar's reputation will be injured further.

[3] "We have said on a number of occasions that the purpose of a disciplinary proceeding is not punitive but to inquire into the fitness of the attorney to continue in that capacity to the end that the public, the courts and the legal profession itself will be protected." In re Kreamer, 14 Cal.3d 524 (1975).

[4] The "by reference to" language is in current rule 2-400, but its expansiveness has the effect of an alert to lawyers, given that lawyers are not disciplined under the current rule. The same language In proposed Rule 8.4.1 would open the doors to disciplinary claims, investigations, and prosecutions.

[5] On December 2, 2016, The Disciplinary Board of the Supreme Court of Pennsylvania issued a proposed anti-discrimination rule for public comment (its Rules of Professional Conduct having no Rule on the topic). It contains language similar to current rule 2-400(C) requiring prior adjudication elsewhere, and explained this based on the burdens that otherwise would be imposed on the disciplinary system. I am not aware that Pennsylvania has issued any new Rule. http://www.padisciplinaryboard.org/attorneys/newsletter/ Note that Pennsylvania expressed its concerns although its proposed Rule would require a violation of law and not merely conduct judged by reference to law.

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). There might be other ways of tempering the current version of the rule.

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 these 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 it should not be forced to use their limited time and resources for other purposes. The topics now covered by the disciplinary system are fundamental to the protection of clients and to the operation of the legal system and the profession.

The proposed Rule also raises significant First Amendment issues. The drafting of the Rule arguably would permit discipline for hateful words, and in fact at least two voices were raised during the Commission's deliberations in support of that result. The Commission made an effort to temper the Rule through proposed Comment [4], stating: "This Rule does not apply to conduct protected by the First Amendment to the United States Constitution or by Article I, § 2 of the California Constitution." This quite obviously creates a tension in the Rule that will lead to attempts to use the Rule in unpredictable ways, will lead to unpredictable results, and will cause the additional burden on all involved in becoming constitutional scholars. The variety of possible constitutional viewpoints can be seen for example, in Carla D. Pratt, *Should Klansman Be Lawyers?: Racism as an Ethical Barrier to the Legal,* 30 Fla. St. U.L. Rev. 857 (2003).[6] A LEXIS search shows that the Pratt article has been cited in many subsequent articles published in the intervening fourteen years, suggesting the diversity of opinions and complexity of issues involved.

[6] Prof. Pratt takes the position that a white supremacist should not be granted Bar admission, but this is contrary to the views of some other commentators. The Pratt article focuses on that narrow subject. 30 Fla. St. U.L. Rev. at 861, n. 17. Her references to contrary First Amendment views can be found, *e.g.*, at 862, n. 19. The constitutional issues are subtle and nuanced.

Proposed Rule 8.4.1 raises another and distinct issue. Congress and the California legislature have created administrative agencies to interpret and enforce anti-discrimination laws. Giving the State Bar original jurisdiction over employment discrimination claims would seem to conflict with the legislative policy by creating the possibility of non-uniform standards and by denying the regulatory agencies (EEOC and DEFH) the raw information it would have if complaints were filed with them. An independent forum for complaints against lawyers might create a judicial conflict with the legislatively mandated investigatory, dispute resolution (mediation), prosecutorial, and other functions of the administrative agencies. I don't have the expertise to clarify this conflict issue, but that of course is part of the problem. I don't know, and the Commission to the best of my recollection didn't dig into the possible conflict.[7]

Proposed Rule 8.4.1 has a number of drafting problems. Some already have been mentioned. It also has been pointed out that the Rule might be read as unclear about whether, for example, an in-house lawyer can advise and assist a defendant client employer in pre-litigation investigations of claims of unlawful discrimination, harassment or retaliation. Proposed Comment [2] states 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." It is not certain that this language clarifies the broader issue.

Drafting issues such as this one, and as another example the question of whether it might be possible to draft a Rule that would provide for effective OCTC interaction with the EEOC and DEFH, I consider secondary. There is fundamental issue of whether we should have a Rule that could be seen as a cure-all for discrimination by lawyers, and whether we want to burden the disciplinary system with a radically expanded scope of responsibility. The information available to me is that the system will not stand the burden, that the State Bar as a result will be seen as having failed in its mission, and that any end run around the federal and California statutory schemes will cause judicial – legislative conflict.

For these reasons, I respectfully dissent from proposed Rule 8.4.1.

---

[7] It has been suggested that State Bar report be required to report unlawful discrimination, harassment, or retaliation to the DEFH or EEOC even if the complainant does not wish to do so. If the procedural trigger for reporting were OCTC's issuance of, or decision to issue, a notice of disciplinary charges, the lawyer's confidentiality would be protected under Bus. & Prof. Code sec. 6086.1(b). There are at least three problems with this. *First*, OCTC would be left with all the burdens of investigation, and in a field outside its experience. *Second*, the Commission has no authority to create OCTC rules of procedure. *Third*, if there were an internal State Bar rule requiring referral to the applicable administrative agency at some point along the continuum, that rule would be relatively unknown and would leave the State Bar as the target of criticism for failing to solve the problems proponents of Rule 8.4.1 tout that it would solve.

Commission's Response to Dissent Submitted by Robert Kehr on the Recommended Adoption of Proposed Rule 1.8.5

Proposed Rule 8.4.1 would make a number of changes to current Rule 2-400, including expanding its scope: beyond management or operation of a law firm to also encompass unlawful discrimination or harassment in representing a client, or in terminating or refusing to accept the representation of a client; to cover protected categories other than those specifically listed in the current Rule; and to encompass unlawful retaliation. The Kehr dissent does not take issue with these changes.[8]

The change to which the Kehr dissent objects is the proposed elimination of the current Rule's paragraph (C), which precludes the State Bar from initiating any disciplinary investigation or proceeding under the Rule unless and until the conduct at issue has been "found to be unlawful by an appropriate civil administrative or judicial tribunal under applicable state or federal law." Rule 2-400, Discussion paragraph 1. No other current Rule has a similar provision requiring that civil or administrative relief be obtained before the State Bar can exercise disciplinary authority. The elimination of paragraph (C), therefore, would provide the State Bar with respect to the anti-discrimination rule the same initial authority to investigate and prosecute violations that it currently has with respect to every other rule.

The Kehr dissent objects to the State Bar having original jurisdiction over allegations of discrimination and harassment because of its "practical consequences." In support, the Kehr dissent cites: (1) the relative lack of expertise on the part of OCTC and the State Bar Court in handling complaints of discrimination; (2) the additional resources needed by OCTC and the State Bar Court to "handle the volume of complaints that could be expected"; and (3) the differences between the State Bar Court's procedures and those of civil courts, including more limited discovery, the inapplicability of the rules of evidence, and the absence of jury trials. The Kehr dissent asserts that discrimination claims are "not appropriate for the simplified procedures of the State Bar Court" and "beyond the knowledge and experience of [OCTC] and the State Bar Court." The Kehr dissent concludes: "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 it should not be forced to use their limited time and resources for other purposes. The topics now covered by the disciplinary system are fundamental to the protection of clients and to the operation of the legal system and the profession."

---

[8] The Kehr dissent does argue that the proposed Rule "raises significant First Amendment issues." As the dissent notes, however, proposed Comment [4] explicitly excludes from the Rule's application "conduct protected by the First Amendment to the United States Constitution or by Article I, § 2 of the California Constitution." In addition, the proposed Rule applies only to "unlawful" discrimination, harassment, or retaliation, with "unlawful" defined by reference to applicable state and federal statutes and decisions. *See* proposed Rule 8.4.1(C)(3). As a result, First Amendment protected activities are excluded from the proposed Rule's scope.

The Commission's difference with the Kehr dissent rests on the Commission's view that, like the other topics now covered by the disciplinary system, preventing discrimination and harassment is also fundamental to the protection of clients and the public, and the operation of the legal system and profession. This same view underlies the ABA's recent adoption of a broad anti-discrimination provision in ABA Model Rule 8.4(g). And this same view leads the Commission to believe that the anti-discrimination rule should not be singled out for different treatment, and effectively diminished, by being the sole rule over which OCTC and the State Bar Court are denied original jurisdiction.

The practical concerns raised by the Kehr dissent were the subject of extensive discussion and debate by the Commission, particularly given comments from OCTC and the State Bar Court regarding their current relative lack of expertise and potential need for additional resources. To address these practical concerns, the Commission considered a number of alternatives that are discussed in detail in pages 21-23 of its Report and Recommendation. The result was the inclusion of two provisions in proposed Rule 8.4.1 that the Commission believes appropriately address the practical concerns while not diminishing the Rule's force by depriving OCTC and the State Bar Court of original jurisdiction.

First, proposed paragraph (d) requires that a lawyer who is the subject of an OCTC investigation or State Bar Court proceeding alleging a violation of the Rule "promptly notify the State Bar of any criminal, civil, or administrative action premised, whether in whole or part, on the same conduct." This will ensure that OCTC and the State Bar Court are "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." Proposed Comment [6]. As this recognizes, while OCTC and the State Bar Court retain original jurisdiction, they also retain the ability, should they determine it appropriate, whether for resource reasons or because of the complexity of the issues raised, to defer to a related criminal, civil, or administrative proceeding.

Second, proposed paragraph (e) requires a lawyer who receives a notice of a disciplinary charge under the Rule to provide a copy of the notice to the State and Federal agencies tasked with primary responsibility for coordinating enforcement of laws and regulations prohibiting unlawful discrimination. This will provide those agencies with the information necessary, should they determine it appropriate, to initiate their own proceedings. If they do, OCTC and the State Bar Court retain the ability to defer to those proceedings.[9]

[9] This provision also addresses the Kehr dissent's concern that, "Congress and the California legislature have created administrative agencies to interpret and enforce anti-discrimination laws. Giving the State Bar original jurisdiction over employment discrimination claims would seem to conflict with the legislative policy by creating the possibility of non-uniform standards and by denying the regulatory agencies (EEOC and DEFH) the raw information it would have if complaints were filed with them." Proposed paragraph (e) should ensure that the appropriate federal and state agencies are advised of any claim the State Bar determines to have merit sufficient to justify a notice of disciplinary charge.

The Kehr dissent argues that no longer requiring civil or administrative proceedings as a prerequisite to State Bar jurisdiction will eliminate the deterrent to frivolous discrimination claims posed by the costs of civil litigation -- "a civil action will be filed only when it appears possible to prove and collect sufficient damages to support the cost of litigation." As a result, the Kehr dissent argues, "it is predictable that the Bar will receive a large number of claims" that will include "claims that have no legal or no factual 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, malpractice, or other matters." The Commission does not believe these predictions justify depriving the State Bar of original jurisdiction. As the Kehr dissent notes, to the extent the current Rule implements a cost-based barrier to pursuing claims of discrimination, those not pursued "no doubt includ[e] some with merit." Eliminating a cost-based barrier by permitting original State Bar jurisdiction will allow these claims to be pursued, with the State Bar retaining discretion to reject non-meritorious claims that may be filed for strategic or tactical reasons.

The Commission believes this appropriately treats allegations of discrimination and harassment in the same manner as allegations of other types of conduct that may result in both State Bar discipline and other civil or criminal proceedings. For example, under Business & Professions Code § 6106, a lawyer may be disciplined for any act involving "moral turpitude, dishonesty or corruption." Even if that act "constitutes a felony or misdemeanor, conviction thereof in a criminal proceeding is not a condition precedent" to discipline. Thus, for criminal acts, the State Bar retains original jurisdiction, even though the procedural requirements for a criminal conviction vary even more widely from those in State Bar Court than do the procedures for civil discrimination actions, and even though all the policy concerns cited by the Kehr dissent regarding the potential for frivolous disciplinary claims apply equally to allegations of criminal and discriminatory conduct. The reason the State Bar retains original jurisdiction over allegations of criminal conduct involving moral turpitude, dishonesty or corruption is a recognition that conduct of this type goes directly to a lawyer's fitness. The Commission believes the same is true of allegations of unlawful discrimination and harassment, and accordingly believes it appropriate that, as with allegations of criminal conduct under § 6106, the State Bar should have jurisdiction to impose discipline without requiring as a condition precedent the pursuit of civil or administrative proceedings.

Cal. Bus. & Prof. Code § 6070.5

Section 6070.5 - Requirements for implicit bias training

(a) The State Bar shall adopt regulations to require, as of January 1, 2022, that the mandatory continuing legal education (MCLE) curriculum for all licensees under this chapter includes training on implicit bias and the promotion of bias-reducing strategies to address how unintended biases regarding race, ethnicity, gender identity, sexual orientation, socioeconomic status, or other characteristics undermine confidence in the legal system. A licensee shall meet the requirements of this section for each MCLE compliance period ending after January 31, 2022.

(b) When approving MCLE providers to offer the training required by subdivision (a), the State Bar shall require that the MCLE provider meets, at a minimum, all of the following requirements:

(1) The MCLE provider shall make reasonable efforts to recruit and hire trainers who are representative of the diversity of persons that California's legal system serves.

(2) The trainers shall have either academic training in implicit bias or experience educating legal professionals about implicit bias and its effects on people accessing and interacting with the legal system.

(3) The training shall include a component regarding the impact of implicit bias, explicit bias, and systemic bias on the legal system and the effect this can have on people accessing and interacting with the legal system.

(4) The training shall include actionable steps licensees can take to recognize and address their own implicit biases.

(c) As part of the certification, approval, or renewal process for MCLE-approved provider status, or more frequently if required by the State Bar, the MCLE provider shall attest to its compliance with the requirements of subdivision (b) and shall confirm that it will continue to comply with those requirements for the duration of the provider's approval period.

Ca. Bus. and Prof'l. Code § 6070.5

Amended by Stats 2020 ch 36 (AB 3364),s 1, eff. 1/1/2021.
Added by Stats 2019 ch 418 (AB 242),s 2, eff. 1/1/2020.

5030. Implicit or Unconscious Bias

In your role as a juror, you must not let bias influence your assessment of the evidence or your decisions.

I will now provide some information about how bias might affect decisionmaking. Our brains help us navigate and respond quickly to events by grouping and categorizing people, places, and things. We all do this. These mental shortcuts are helpful in some situations, but in the courtroom they may lead to biased decisionmaking.

Bias can affect what we notice and pay attention to, what we see and hear, what we remember, how we perceive people, and how we make decisions. We may favor or be more likely to believe people whom we see as similar to us or with whom we identify. Conversely, we may disfavor or be less likely to believe people whom we see as different from us.

Although we are aware of some of our biases, we may not be aware of all of them. We refer to biases that we are not aware of as "implicit" or "unconscious." They may be based on stereotypes we would reject if they were brought to our attention. Implicit or unconscious biases can affect how we perceive others and how we make decisions, without our being aware of the effect of these biases on those decisions.

To ensure that bias does not affect your decisions in this case, consider the following steps:

1. **Reflect carefully and thoughtfully about the evidence. Think about why you are making each decision and examine it for bias. Resist the urge to jump to conclusions or to make judgments based on personal likes or dislikes, generalizations, prejudices, stereotypes, or biases.**
2. **Consider your initial impressions of the people and the evidence in this case. Would your impressions be different if any of the people were, for example, of a different age, gender, race, religion, sexual orientation, ethnicity, or national origin? Was your opinion affected because a person has a disability or speaks in a language other than English or with an accent? Think about the people involved in this case as individuals. Focusing on individuals can help reduce the effect of biases or stereotypes on decisionmaking.**
3. **Listen to the other jurors. Their backgrounds, experiences, and insights may be different from yours. Hearing and sharing different perspectives may help identify and eliminate biased conclusions.**

The law demands that jurors make unbiased decisions, and these

strategies can help you fulfill this important responsibility. You must base your decisions solely on the evidence presented, your evaluation of that evidence, your common sense and experience, and these instructions.

New November 2023

Directions for Use

This instruction may be given on request or sua sponte.

Sources and Authority

- Duty to Prevent Bias and Ensure Fairness. Standard 10.20(b)(1), (2) of the California Standards of Judicial Administration.
- Judge Must Perform Duties Without Bias. Canon 3(B)(5) of the California Code of Judicial Ethics.
- "The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the Constitution." (*Weathers v. Kaiser Foundation Hospitals* (1971) 5 Cal.3d 98, 110 [95 Cal.Rptr. 516, 485 P.2d 1132].)

Secondary Sources

Witkin, California Procedure (5th ed. 2008) Trial, §§ 145–146

1 California Trial Guide, Unit 10, *Voir Dire Examination*, §§ 10.03[1], 10.21[2], 10.50, 10.80, 10.100, 10.110 (Matthew Bender)

1 Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 6, *Jury Selection*, § 6.21

5031–5089. Reserved for Future Use

court proceeding at any given time. If the parties cannot agree on a reporter, the Judicial Officer will make the selection.

(iii) The party arranging for an official reporter pro tempore is responsible for paying the reporter's fees (CRC rule 2.956(c)). All fees must be paid directly to the court reporter. These expenses may be recoverable as part of a party's costs as provided by law (Government Code § 68086(a)(4)).

(iv) If a party arranges and pays for the attendance of a certified shorthand court reporter at a hearing in a civil case because of the unavailability of the services of an official court reporter, none of the parties will be charged by the Court for the reporter's attendance fee provided for in Government Code sections 68086(a)(1) or (b)(1).

(f) Court Reporter Pro Tempore Requirements. By signing Local Form CV-68 (Appointment of Official Court Reporter Pro Tempore) and accepting the appointment as an Official Court Reporter Pro Tempore for that proceeding, the court reporter pro tempore shall take and subscribe to the Constitutional Oath of Office, and confirm and agree that he or she:

(i) Has a valid, current California Certified Shorthand Reporter License;

(ii) Is in good standing with the Court Reporters Board of California;

(iii) Will maintain current contact information with the Court;

(iv) Understands and acknowledges that all fees for reporting services, including appearance, transcript, and real-time fees, are the responsibility of the party(ies) who arranged for the reporter's services, and no such fees may be charged to the Court;

(v) Will comply with all statutes and rules applicable to an Official Reporters Pro Tempore, including the duty to prepare transcripts, both trial and appellate, timely, and in the required form; and

(vi) Will comply with the Court's requirements as stated in the Official Court Reporter Pro Tempore Policy (on the Court's website) regarding uploading electronic notes on a timely basis.

(Adopted, effective January 1, 2020; Amended, effective July 1, 2020; Amended, effective July 1, 2022; Amended, effective January 1, 2023; Amended, effective January 1, 2024.)

Rule 2.13 Policy Against Bias

(a) It is the policy of the Court to refrain from and prevent biased conduct. In all court interactions, it is the policy of the Court that its judicial officers and its employees should refrain from engaging in conduct and should take action to prevent others from engaging in conduct that exhibits bias, including but not limited to bias based on age, ancestry, color, ethnicity, gender, gender expression, gender identity, genetic information, marital status, medical condition, military or veteran status, national origin, physical or mental disability, political affiliation, race, religion, sex, sexual orientation, socioeconomic status, and any other classification protected by federal or state law, including Government Code section 12940(a) and Code of Judicial Ethics, canon 3(B)(5), whether that bias is directed toward counsel, court staff, witnesses, parties, jurors, or any other person. This policy does not preclude legitimate comment or advocacy when such classifications are issues in court proceeding, nor preclude the Court from considering such classifications when necessary or relevant to the proper exercise of adjudicatory or administrative functions.

(b) Any violation of the policy against bias committed by any judge or commissioner or judge pro tem or Court Executive Officer of this Court, should be reported in writing directly to the Presiding Judge or the Assistant Presiding Judge. Any violation of the policy against bias committed by any court-appointed referee should be reported in writing directly to the Presiding

Judge, the Assistant Presiding Judge, or the sitting judge who appointed that referee. Any violation of the policy against bias committed by any court employee or court administrator should be reported in writing directly to the Court Executive Officer. Any violation of the policy against bias committed by any persons appearing in Court, including but not limited to parties, attorneys, witnesses, or jurors, should be reported in writing directly to the judicial officer before whom the proceedings were conducted.

(c) Consistent with Standard 10.20(c) of the Standards of Judicial Administration, and in collaboration with the San Mateo County Bar Association, the Committee for Professional Equality is and was established, co-sponsored by this Court. The purpose of the Committee for Professional Equality is to increase awareness and educate members of the legal profession about issues of bias, including sponsoring and supporting educational programs designed to eliminate unconscious and explicit biases within the courts and legal communities. The members of the Committee shall include at least one active San Mateo County judge and one retired San Mateo County judge, one court administrator, one attorney member of the San Mateo County Bar Association, one non-attorney community member, and one attorney member of the San Mateo County Bar Association's Women Lawyers Section. The members shall sit for three years on rotating terms.

(Adopted effective July 1, 2022; Amended effective January 1, 2023.)

Rules 2.14 thru 2.19 (Reserved)

CHAPTER 6. CIVIL TRIAL RULES

Rule 2.20 Trial Motions, Briefs, Statements, and Witness Lists

Upon assignment to a trial department for trial by a jury, each party shall file with that department the following:

(1) Any in limine motions and response thereto;
(2) Any trial briefs;
(3) A concise non-argumentative statement of the case to be read to the jury; and
(4) A list of possible witness who may testify in the trial to be read to the jury panel by the court.

(Adopted, effective January 1, 2002)

Rule 2.21 In Limine Motions

Any in limine motions shall be served upon opposing counsel not less than five (5) days prior to trial. Any response shall be served upon the proponent of the motion not later than the first appearance in the Department of the Presiding Judge for trial assignment.

(Adopted, effective January 1, 2002)

Rule 2.22 Production of Exhibits

Any party intending to offer any exhibit at the time of trial shall be prepared, by the time of assignment to a trial department, with an original and sufficient copies of each such exhibit for all other parties and the court. The court may make, in its discretion, any orders it deems appropriate regarding the exchange and presentations of exhibits.

(Adopted, effective January 1, 2002)