



Rule 8.4.1 Prohibited Discrimination, Harassment and Retaliation (Rule Approved by the Supreme Court, Effective November 1, 2018)

- (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 supervisory lawyers retain their separate responsibility under rules 5.1 and 5.3. Neither this rule nor rule 5.1 or 5.3 imposes on the alleged victim of any conduct prohibited by this rule any responsibility to advocate corrective action.

[2] The conduct prohibited by paragraph (a) includes the conduct of a lawyer in a proceeding before a judicial officer. (See Cal. Code Jud. Ethics, canon 3B(6) [“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, section 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-supervisory lawyer who becomes aware that the law firm* is engaging in a discriminatory hiring practice may advocate corrective action by bringing that discriminatory practice to the attention of a law firm* management lawyer who would have responsibility under rule 5.1 or 5.3 to take reasonable* remedial action upon becoming aware of a violation of this rule.

[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 sections 6106 and 6068, the California Supreme Court's inherent authority to impose discipline, or other disciplinary standard.

NEW RULE OF PROFESSIONAL CONDUCT 8.4.1
(Former 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 claims 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.

Supreme Court Action (May 10, 2018)

The Supreme Court approved the rule as modified by the Court to be effective November 1, 2018. In Comment [2], citation style was revised to conform to the California Style Manual. Omitted asterisks for defined terms were added.

**Rule ~~2-400~~8.4.1 Prohibited ~~Discriminatory Conduct in a Law-
Practice~~Discrimination, Harassment and Retaliation**
(Redline Comparison to the California Rule Operative Until October 31, 2018)

- (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.*
- (Ac) 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 (Bb); ~~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.~~

CommentDiscussion

~~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 supervisory lawyers retain their separate responsibility under rules 5.1 and 5.3. Neither this rule nor rule 5.1 or 5.3 imposes on the alleged victim of any conduct prohibited by this rule any responsibility to advocate corrective action.

[2] The conduct prohibited by paragraph (a) includes the conduct of a lawyer in a proceeding before a judicial officer. (See Cal. Code Jud. Ethics, canon 3B(6) ["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, section 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-supervisory lawyer who becomes aware that the law firm* is engaging in a discriminatory hiring practice may advocate corrective action by bringing that discriminatory practice to the attention of a law firm* management lawyer who would have responsibility under rule 5.1 or 5.3 to take reasonable* remedial action upon becoming aware of a violation of this rule.

[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.