

[date], 2016

Ms. Audrey Hollins
Office of Professional Competence, Planning and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

Re: Proposed Rule of Professional Conduct 8.4.1 [2-400]
Prohibited Discrimination, Harassment and Retaliation

Dear Ms. Hollins:

The Professional Responsibility and Ethics Committee of the Los Angeles County Bar Association (“PREC”) appreciates the opportunity to comment on the draft rules of conduct (the “Proposed Rules”) proposed by the State Bar’s Commission for the Revision of the Rules of Professional Conduct (the “Rules Revision Commission”). Please see our letter dated [date], 2016, describing PREC and praising the efforts of the Rules Revision Commission.

PREC supports Proposed Rule 8.4.1 [Prohibited Discrimination, Harassment and Retaliation (current Rule 2-400), [ALT 1]], which eliminates the language contained in subpart (C) of current Rule 2-400 requiring that a non-disciplinary tribunal must have first fully adjudicated a complaint of alleged discrimination and found that unlawful conduct occurred before a disciplinary investigation or proceeding may be initiated.

PREC also recommends the addition of a comment from current Rule 2-400, which provides that a disciplinary investigation or proceeding for conduct coming within the rule may 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. PREC opposes [ALT 2] of the Proposed Rule, which moderates, but does not eliminate, the 2-400(C) precondition.

Because of controversy surrounding this Proposed Rule, in the discussion below PREC addresses some of the concerns most commonly raised regarding Proposed Rule 8.4.1:

Current Rule 2-400, Prohibited Discriminatory Conduct in a Law Practice, requires application of state and federal law to support a finding of “unlawful” discriminatory misconduct, and the rule has been in effect since 1994. Since Proposed Rule 8.4.1 has the same requirement, its enforcement remains well within the competence and jurisdiction of the State Bar Court.

There is no evidence that the disciplinary system would be inundated with meritless claims of discriminatory conduct under Proposed Rule 8.4.1, based upon the state bar’s long experience with current Rule 2-400.

No other California Rule of Professional Conduct has the prior adjudication requirement contained in 2-400 (C), which provides that 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. Proposed Rule 8.4.1 [ALT 2] would not cure the defect, as it also requires prior adjudication that results in a finding of unlawful conduct or an order sanctioning the lawyer. In contrast, the state bar routinely prosecutes other unlawful conduct, including criminal conduct, for which there is no requirement of a prior adjudication.

The prior adjudication requirement renders current Rule 2-400 ineffective as a vehicle for protecting the public against unlawful discrimination by lawyers. Proposed Rule 8.4.1 [ALT 1] would enhance public protection by providing access to the disciplinary system that is now procedurally denied. Effective enforcement could also check on ongoing discriminatory conduct where it occurs.

Finally, any action taken, or not taken, by the state bar to prevent a known risk to the public from discrimination has implications beyond the technical revision of Rule 2-400. The recent global incidents of violence directed toward specific communities are not only the effects of discrimination but are also precipitating new discriminatory behaviors. As a matter of public policy, any high-profile institution such as the state bar that has recently examined its own practices in discrimination and has an opportunity to publicly correct its conduct should lead by example.

Thank you again for the opportunity to comment on the Proposed Rules.

Very Truly Yours,