



- (1) discriminate or knowingly permit unlawful discrimination;*
  - (2) 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*
  - (3) refuse to hire or employ a person, or refuse to select a person for a training program leading to employment, or bar or discharge a person from employment or from a training program leading to employment, or discriminate against a person in compensation or in terms, conditions, or privileges of employment.*
- (c) For purposes of this rule:*
  - (1) “protected characteristic” means race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, sexual orientation, age, military and veteran status, or other category of discrimination prohibited by applicable law, whether the category is actual or perceived;*
  - (2) “knowingly permit” means to fail to advocate corrective action where the lawyer knows of a discriminatory policy or practice that results in the unlawful discrimination or harassment prohibited by paragraph (b);*
  - (3) “unlawfully” and “unlawful” shall be determined by reference to applicable state and federal statutes and decisions making unlawful discrimination or harassment in employment and in offering goods and services to the public; and*
  - (4) “retaliation” means to take adverse action because a person has (i) opposed, or (ii) pursued, participated in, or assisted any action alleging, any conduct prohibited by this Rule.*
- (d) A lawyer who is the subject of a State Bar investigation or State Bar Court proceeding alleging a violation of this Rule shall promptly notify the State Bar of any criminal, civil, or administrative action premised, whether in whole or part, on the same conduct that is the subject of the state Bar investigation or State Bar Court proceeding.*
- (e) Upon issuing a notice of a disciplinary charge under this Rule:*
  - (1) If the notice is of a disciplinary charge under paragraph (a) of this Rule, the State Bar shall provide a copy of the notice to the California Department of Fair Employment and Housing and the United States Department of Justice, Coordination and Review Section.*
  - (2) If the notice is of a disciplinary charge under paragraph (b) of this Rule, the State Bar shall provide a copy of the notice to the California Department of Fair Employment and Housing and the United States Equal Employment Opportunity Commission.*
- (f) This Rule shall not prevent a lawyer from representing a client alleged to have engaged in unlawful discrimination, harassment, or retaliation.*

*Comment*

*[1] Conduct that violates this Rule undermines confidence in the legal profession and our legal system and is contrary to the fundamental principle that all people are created equal. A lawyer may not engage in such conduct through the acts of another. See Rule 8.4(a). 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 Rule 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 proceeding 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. 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. While both the parties and the court retain discretion to refer such conduct to the State Bar, a court's finding that preemptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (a).*

*[3] What constitutes a failure to advocate corrective action under paragraph (c)(2) will depend on the nature and seriousness of the discriminatory policy or practice, the extent to which the lawyer knows of unlawful discrimination or harassment resulting from that policy or practice, and the nature of the lawyer's relationship to the lawyer or law firm implementing that policy or practice. For example, a law firm non-management and non-supervisory lawyer who becomes aware that the law firm is engaging in a discriminatory hiring practice may advocate corrective action by bringing that discriminatory practice to the attention of a law firm management lawyer who would have responsibility under Rule 5.1 or 5.3 to take reasonable remedial action upon becoming aware of a violation of this Rule.*

*[4] Paragraph (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.*

*[5] 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.*

*[6] 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.*

## **B. Alternative 2**

The second version of the proposed Rule 8.4.1 provides as follows:

- (a) *In representing a client, or in terminating or refusing to accept the representation of any client, a lawyer shall not unlawfully harass or unlawfully discriminate against persons on the basis of any protected characteristic or for the purpose of retaliation.*
- (b) *In relation to a law firm's operations, a lawyer shall not, on the basis of any protected characteristic or for the purpose of retaliation, unlawfully:*
  - (1) *discriminate or knowingly permit unlawful discrimination;*
  - (2) *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*
  - (3) *refuse to hire or employ a person, or refuse to select a person for a training program leading to employment, or bar or discharge a person from employment or from a training program leading to employment, or discriminate against a person in compensation or in terms, conditions, or privileges of employment.*
- (c) *For purposes of this rule:*
  - (1) *“protected characteristic” means race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, sexual orientation, age, military and veteran status, or other category of discrimination prohibited by applicable law, whether the category is actual or perceived;*
  - (2) *“knowingly permit” means to fail to advocate corrective action where the lawyer knows of a discriminatory policy or practice that results in the unlawful discrimination or harassment prohibited by paragraph (b);*
  - (3) *“unlawfully” and “unlawful” shall be determined by reference to applicable state and federal statutes and decisions making unlawful discrimination or harassment in employment and in offering goods and services to the public; and*
  - (4) *“retaliation” means to take adverse action because a person has (i) opposed, or (ii) pursued, participated in, or assisted any action alleging, any conduct prohibited by this Rule.*
- (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.*

- (e) This Rule shall not prevent a lawyer from representing a client alleged to have engaged in unlawful discrimination, harassment, or retaliation.*

*Comment*

*[1] Conduct that violates this Rule undermines confidence in the legal profession and our legal system and is contrary to the fundamental principle that all people are created equal. A lawyer may not engage in such conduct through the acts of another. See Rule 8.4(a). 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 Rule 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 proceeding 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. 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. While both the parties and the court retain discretion to refer such conduct to the State Bar, a court's finding that preemptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (a).*

*[3] What constitutes a failure to advocate corrective action under paragraph (c)(2) will depend on the nature and seriousness of the discriminatory policy or practice, the extent to which the lawyer knows of unlawful discrimination or harassment resulting from that policy or practice, and the nature of the lawyer's relationship to the lawyer or law firm implementing that policy or practice. For example, a law firm non-management and non-supervisory lawyer who becomes aware that the law firm is engaging in a discriminatory hiring practice may advocate corrective action by bringing that discriminatory practice to the attention of a law firm management lawyer who would have responsibility under Rule 5.1 or 5.3 to take reasonable remedial action upon becoming aware of a violation of this Rule.*

*[4] In order for harassment or 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.*

*[5] 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.*

*[6] 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 is such proceeding were filed.*

The signers of this Comment have objections to both versions of the Committee's proposed Rule 8.4.1. These objections are discussed below. For these reasons, we submit that the Commission should reject the proposed amendments.

## **II. The Objections**

### **A. Proposed Rule 8.4.1 Will Invade The Historically Recognized Right Of Attorneys To Exercise Moral and Professional Autonomy In Choosing Whether To Engage In Legal Representation And Undermines Other Fundamental Ethical Duties.**

Some of the most important and sensitive ethical choices for any attorney – perhaps the greatest expression of a lawyer's professional judgment, moral autonomy, self-determination and freedom of conscience – are the decisions regarding whether to take a case, whether to decline a case, and whether to withdraw from representation once undertaken. Proposed Rule 8.4.1 destroys this freedom and undermines these independent choices. It also forces attorneys to violate other fundamental ethical conduct rules such as the obligations to zealously represent clients and avoid conflicts of interest with clients.

#### **1. Proposed Rule 8.4.1 Fails to Respect Attorneys' Consciences & Professional Judgments.**

Contrary to historical precedent, proposed Rule 8.4.1 will subject attorneys to professional discipline simply for acting in accordance with personal principles of professional and moral judgment when making decisions about whether to accept, reject, or withdraw from certain cases. This is because, under the proposed rule, attorneys who would decline a particular case or client because of their conscience (whether informed by religion, secular philosophy, culture, tradition or other influences) will fear being brought up on professional charges, tarred with the moniker of "discrimination," and will fear being subject to discipline, simply because

they exercised their freedom to choose. Attorneys will, in other words, be “ethically” coerced by proposed Rule 8.4.1 to take cases or clients they might have otherwise declined. And, furthermore, they will likewise refrain from terminating clients with whom they would have otherwise severed relations, out of concern that their motivations will be misjudged and ethically condemned.

This is a grave departure from the professional principles historically enshrined in the Model Rules of Professional Conduct and its predecessors, which have until recently, always respected the attorney’s conscience, professional autonomy, and freedom of choice when it comes to selecting who to represent, or not, and what cases to accept or decline. See, for example, Wolfram, *Modern Legal Ethics* (1986 ed.) p. 573 (“*a lawyer may refuse to represent a client for any reason at all – because the client cannot pay the lawyer’s demanded fee; because the client is not of the lawyer’s race or socioeconomic status; because the client is weird or not, tall or short, thin or fat, moral or immoral.*”).

There are, of course, many good reasons why the legal profession has left to the attorney the professional decision as to which cases the attorney will accept and which the attorney will decline and which clients the attorney will or will not represent. The reasons underlying this historically longstanding respect for attorneys’ professional autonomy are twofold.

The ABA Model Rules<sup>1</sup> explicitly respect an attorney’s personal ethics and moral conscience. See, for example, Model Rules Preamble [7] (“*Many of a lawyer’s professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience*”)(emphasis ours), and [9] (“*Virtually all difficult ethical problems arise from conflict between a lawyer’s*

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<sup>1</sup> Cal Rules of Prof’l Conduct, prop. rule 1.0, cmt [4], states that “rules and standards promulgated by other jurisdictions and bar associations may also be considered” “for guidance on proper professional conduct.”

*responsibilities to clients, to the legal system, and to **the lawyer's own interest in remaining an ethical person***”(emphasis ours), and [16](“*The Rules do not . . . exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules.*”); see also Cal. Rules of Prof’l Conduct, prop. rule 1.9, cmt [5](“*The disciplinary standards created by these Rules are not intended to address all aspects of a lawyer's professional obligations.*”); Cal. Rules of Prof’l Conduct, prop. rule 1.7, cmt [1](“*Loyalty and independent judgment are essential elements in the lawyer’s relationship to a client.*”)

In the same vein ABA Model Rule 1.16(b)(4) recognizes that a lawyer may withdraw from representing a client (which, of course, would also mean a lawyer may decline in the first instance to accept a client) if the client insists “upon taking action that **the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.**” (emphasis ours). The proposed California version of this rule (current California Rule 3-700(C)(1)(d)) states that a lawyer may withdraw if “the client by other conduct renders it **unreasonably difficult for the lawyer to carry out the employment effectively.**” (emphasis ours). And ABA Model Rule 6.2, although prohibiting attorneys from seeking to avoid accepting cases that are appointed to them by judicial tribunals, explicitly recognizes that good cause to refuse such appointments includes the situation where “**the client or cause is so repugnant to the lawyer** as to be likely to **impair** the client-lawyer relationship or the lawyer’s ability to represent the client” (see Model Rule 6.2(c)(emphasis ours)) – an acknowledgement in the Model Rules that a lawyer’s personal view of a client or a case can be expected to adversely affect the attorney’s ability to provide zealous and effective representation. See also Model Comment [1] to Model Rule 6.2 (“A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as

repugnant”). And note that Model Rule 6.2 does not concern itself with *why* the attorney finds the client or cause repugnant – because that’s irrelevant. The only relevant issue is whether the attorney – for whatever reason – cannot provide the client with zealous representation. If not, the attorney should not – for the client’s sake – take the case. Clients deserve better. In this regard, Proposed California Rule of Professional Conduct 8.4.1 would contradict and undermine other important rules such as Model Rules 1.16 and 6.2, and in so doing, undermine both the attorney’s freedom of conscience and the client’s right to effective representation.

If a lawyer is required to accept a client or a case to which the attorney has an ethical concern or a moral objection, both alternatives of Proposed California Rule 8.4.1 will have the effect of forcing the attorney to violate his or her personal conscience, impairing the client-lawyer relationship and the lawyer’s ability to effectively, with diligence and zeal, represent the client. With the notable exception of California Rule of Professional Conduct 2-400, which has no analog in the ABA Model Rules and remains in the minority, the Rules have never – until perhaps now – done so.

Specifically, the Model Rules also impose upon attorneys an affirmative professional duty to represent their clients diligently and zealously, while scrupulously avoiding conflicts of interest. Model Rule 1.16(a)(1) which addresses “Declining or Terminating Representation,” provides that: “(a) . . . a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (1) the representation will result in the violation of the rules of professional conduct or other law” (emphasis ours). Proposed California Rule 1.16(a)(2), and Current California Rule 3-700(B)(2), provide the same: “a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: . . . the lawyer knows or reasonably should know that the

*representation will result in violation of these Rules or of the State Bar Act.”* Proposed Rule 8.4.1’s coercion of attorneys to accept unwanted cases and clients will result in the violation of other rules of Professional Conduct.

## **2. Proposed Rule 8.4.1 Undermines Attorneys’ Duties of Diligence and Zealous Client Representation.**

Model Rule 1.3 provides that “*A lawyer shall act with reasonable diligence and promptness in representing a client.*” Proposed Rule 1.3(a) states the same: “*A lawyer shall not . . . fail to act with reasonable diligence in representing a client.*” See also Cal. Rules of Professional Conduct, rule 3-110(A)-(B) (providing the same). Comment [1] to Model Rule 1.3 provides that “*A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.*” “Zeal” means “*a strong feeling of interest and enthusiasm that makes someone very eager or determined to do something.*” Synonyms are “passion” and “fervor”. To be sure, to be zealous as an attorney is to be ardent and passionate on behalf of one’s client and the client’s cause. And we should note here that a lawyer is supposed to exhibit authentic or actual zeal, not pretended or fake zeal. Otherwise, a judge, jury, or even opposing counsel would be able to see through such a disingenuous ruse, which could certainly damage the outcome of a legal matter. Indeed, a lawyer’s ability to be and act zealous, however, would be compromised should the lawyer have deep personal or moral objections to a client or a client’s case.

How would an attorney be able to, with integrity and authenticity, zealously represent a client whose case runs counter to the attorney’s deeply held, philosophical, political, religious, or public policy beliefs? Proposed Rule 8.4.1 attempts to force the impossible. The attorney is coerced to accept a case that, due to the attorney’s deeply held personal beliefs, may run counter to everything the attorney believes is good and right and true—and then the attorney must also

represent that client zealously with passion and fervor, enthusiastically and in an eager and determined manner. Is that humanly possible? We would submit it is not. Which is precisely why the Model Rules provide that, if a lawyer cannot do that – for whatever reason – they should not take the case. Yet, out of fear of being reported to the state bar for “discrimination,” the attorney would very likely conceal his or her true feelings from the client. And what client would knowingly retain an attorney who is experiencing such an inner conflict – due to the attorney’s deeply held beliefs – to be their advocate and champion?

### **3. Proposed Rule 8.4.1 Creates Unacceptable Conflicts of Interest Between the Attorney and Client.**

Rather than creating an open and honest relationship between attorney and client, the proposed rule will foment harmful secrecy, hypocrisy, and deception by creating powerful and hidden conflicts of interest – ones that an attorney cannot reveal, lest he or she be subjected to professional discipline. Not only will attorneys be forced to take on clients and causes they personally believe are morally objectionable, but they will be forced to conceal these very real and influential conflicts of interests from the court, other attorneys, and their clients. This will undermine confidence in the legal profession and subvert justice. Model Rule 1.7 provides that: “(a) . . . a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: . . . (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer” (emphasis ours); see also Cal. Rules of Prof’l Conduct, prop. rule 1.7(b)(“A lawyer shall not . . . represent a client if there is a significant risk the lawyer’s representation of the client will be materially limited by . . . the lawyer’s own interests”). Restatement (Third) of the Law Governing Lawyers §125 (2000) clarifies that: “A conflict under this Section need not be created

*by a financial interest. . . Such a conflict may also result from a lawyer's deeply held religious, philosophical, political, or public-policy beliefs"* (emphasis ours).

So – on the one hand the Proposed California Rule 8.4.1 will require an attorney to accept clients and cases, despite the fact that these clients or cases run counter to the attorney's deeply held religious, philosophical, political, or public-policy beliefs, while at the same time the Model and California Rules provide that accepting a client or a case – for the very reason that the client or case runs counter to the attorney's deeply held religious and moral principles – violates their Conflict of Interest prohibitions, because the attorney has conflicting personal beliefs and interests.

To coerce an attorney to accept a client or case the attorney does not want, and then require the attorney to provide zealous representation to that client, is both unfair to the attorney – because doing so places profound conflicting obligations upon the lawyer – and to the client. This is true for two reasons. First, attorneys are not amoral computers or robots. They are real human beings with deep-seated personal thoughts, emotions, feelings, biases, prejudices, and principles. It is a fool's errand to expect that an attorney can be somehow transformed into a zealous automaton by the mere stroke of a Rule of professional conduct – that an attorney will not be influenced, whether overtly or subtly, religious, philosophical, political, or public-policy beliefs and that their actions will not be guided by their consciences. Second, every client deserves an unbiased attorney who is not subject to or influenced by any interests which may, directly or indirectly, conflict with or adversely impact and undermine the lawyer's ability to diligently, zealously, impartially, and devotedly represent the client's best interests.

It must be admitted that human nature is such that an attorney who – for whatever reason – has an aversion to a client or a case will not be able to represent that client or case as well as

could an attorney who has no such aversion. And only the self-examining attorney, aware of his or her own strengths and weakness, can even begin to determine whether the prospective client and case is a good fit for him or her. For that reason, recognizing an attorney's unfettered freedom to choose which clients and cases to accept and which to decline serves the best interests of the client, the legal profession, and justice.

This is not only a self-evident principle, in conformance with universal human experience, but is also well attested in the lives of some of our greatest lawyers. For example, it was well known that Abraham Lincoln was not an effective lawyer unless he had a personal belief in the justice of the case he was representing. "Fellow lawyers testified that Mr. Lincoln needed to believe in a case to be effective." Steiner, *An Honest Calling: The Law Practice of Abraham Lincoln* (2006). Indeed, as noted above, the Model Rules themselves recognize this principle in that Model Rule 6.2(c) confirms that a client or cause that is repugnant to the attorney may impair the lawyer's ability to effectively represent the client.

The fact that Proposed California Rule 8.4.1 will conflict with other Rules of Professional Conduct highlights why the indiscriminate application of non-discrimination rules to attorneys is a deeply flawed model. Applying the general anti-discrimination model to attorneys ignores the very essence of what lawyers do, as well as the intimate and personal nature of the attorney-client relationship.

Attorneys are advocates. That is what they do. It is fundamental to an attorney's purpose. Unlike judges, who need to avoid even the appearance of prejudice or favoritism because of the very nature of what *they* do, attorneys – by the very nature of what they do – show favoritism to their clients and their client's cases all the time. In fact, they are expected and required to do so. In that sense, attorneys are by nature discriminatory. And, again unlike judges

who must be careful about every word they utter for fear they may compromise their appearance of objectivity and fairness, attorneys do not concern themselves with fairness in that sense, other than as a method of advocacy. By the very nature of what they do, attorneys must be free to speak freely on their client's behalf without constantly worrying whether they are going to offend someone or appear unfair. Indeed, in a sense, attorneys are always offending someone. If they have to worry about whether the offense they cause might appear to be discriminatory, it will chill attorney speech and compromise their advocacy.

Anti-discrimination laws are designed to apply primarily to merchants of goods and impersonal services – people who have only a fleeting contact with a customer as they sell them a product or provide an impersonal service, more often than not, never to see them again. But attorneys are not simply merchants. Nor are the legal services they provide impersonal. The attorney-client relationship is a fiduciary and relational one. Attorneys must be unwaveringly loyal to their clients and take no action that will compromise their clients or their clients' cases. The attorney-client relationship is intimate. Clients share their deepest and most confidential secrets with their attorneys, and attorneys are required to keep all such information confidential. And the attorney-client relationship is often a long-term relationship, not infrequently lasting months or even years. It is because of these peculiar characteristics of the attorney-client relationship that attorneys should not be treated like mere merchants. They should not be forced into attorney-client relationships that the attorney – for whatever reason, even a discriminatory one – cannot abide or does not want. To require an attorney to accept a case or client the attorney does not want is unfair to the attorney, but even more importantly, is detrimental to the client. Every client deserves an attorney who will represent them without reservation. So if there is any reason – even a discriminatory one – why the attorney cannot provide that sort of

undivided representation, the client deserves to know that and must be given the opportunity to seek other counsel who can provide that.

Should a gay attorney be forced to represent the Westboro Baptist Church, or be forced to represent someone he knows is adamantly opposed to the homosexual lifestyle? Should an African American attorney be forced to represent a member of the KKK? Should a Jewish lawyer be forced to represent a neo-Nazi, or be forced to represent someone he knows hates Jews and everyone else who is not an Arian? And, if so, would these attorneys in good conscience with complete integrity be able to diligently provide zealous representation to their clients? Is it fair to the client, indeed, is it in the best interest of the client in such a case, to be represented by an attorney who not only finds their lifestyle and/or beliefs repugnant, but who has agreed to represent said client only out of a concern of being disciplined by the State Bar? Would not the client be far better served by continuing his/her search for an attorney until one is found who can “zealously” represent them, rather than half-heartedly, indeed even resentfully? To pose these questions is sufficient to answer them, in the negative. And yet that is exactly what the proposed amendments would do. For these reasons, proposed Rule 8.4.1 should be rejected.

**B. Proposed Rule 8.4.1 Is Unconstitutional.**

As noted above, the proposed rule tramples on attorneys’ rights of conscience, creates profound conflicts of interest with clients, and undermines zealous advocacy. In addition to radically departing from the historic principles of ethical conduct, these changes raise serious First Amendment issues because the new Rule would infringe upon attorneys’ free speech rights.

**1. Proposed Rule 8.4.1 Unconstitutionally Chills and Compels Speech.**

The Supreme Court of the United States has recognized that compelled-speech violations occur when the government forces an individual or entity to “host or accommodate” another’s

expression or punishes an individual for refusing to facilitate another's speech. *Rumsfeld v. FAIR* (2006) 547 U.S. 47, 61-65. Yet, this is precisely what Proposed Rule 8.4.1 does.

Core American values will be violated if this freedom-decimating proposed rule is enacted. “[A]t the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one’s beliefs should be shaped by his mind and his conscience rather than coerced by the State. And the freedom of belief is no incidental or secondary aspect of the First Amendment’s protections.” *Abouod v. Detroit Bd. of Educ.* (1977) 431 U.S. 209, 235 (citations omitted); cf. *Ashcroft v. Free Speech Coal.* (2002) 535 U.S. 234, 253. At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving expression, consideration and adherence. Model Rule 8.4.1 violates the First Amendment by creating a regime of government compelled speech—forcing counsel to become the mouthpieces of and zealously advocate for ideas with which they may fundamentally disagree or find repugnant. This is something the rules of ethics should not be permitted to do in a free society.

This problem has drawn academic attention. For example, a recent article in the *Georgetown Journal of Legal Ethics* discusses the free speech issues raised when Comment [3] to Model Rule 8.4 is elevated into Model Rule 8.4 itself. The author – after pointing out the fact that lawyers retain free speech rights even when engaging in professional activities – concludes that there is no reason or justification to censure a lawyer’s speech unless such speech, if not limited, will have a concrete prejudicial effect on the administration of justice, and that infringing on lawyers’ free speech rights when the prohibited speech does not have such a prejudicial effect on the administration of justice raises serious First Amendment issues. Keiser, *Lawyers Lack Liberty: State Codifications Of Comment 3 Of Rule 8.4 Impinge On Lawyers’*

*First Amendment Rights* (Summer 2015) 28 Geo. J. Legal Ethics 629. See also, Williams, *Attorney Association: Balancing Autonomy and Anti-Discrimination* (Spring 2016) 40 J. Legal Prof. 271 (Anti-discrimination Rules of Professional Conduct violate attorney free association rights).

## **2. Proposed Rule 8.4.1 is Void for Vagueness.**

The Supreme Court of the United States has repeatedly found that a statute is void for vagueness and is unenforceable if it is too vague for the average citizen to understand what persons are regulated, what conduct is prohibited, or what punishment may be imposed. As Justice Sutherland wrote in *Connally v. General Construction Co.* (1926) 269 U.S. 385, 391:

“[T]he terms of a penal statute [...] must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties... and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.”

The proposed Rule 8.4.1 would add 10 additional classes to the ever growing list of specially protected groups, including color, ancestry, mental disability, medical condition, genetic information, marital status, gender, gender identity, gender expression, military and veteran status, not to mention a catch all category. And specifically, Proposed Model Rule 8.4.1 includes classes of individuals that are subjectively determined and which are not objectively observable or definable. Indeed, this recent cultural process of the proliferation of identity groups has now reached the absurd point where the proliferating classes cannot even be rationally identified or objectively determined. For example, what is the difference between sex, gender, gender identity, gender expression, and sexual orientation? Further, none of these characteristics are objectively determinable. Sexual orientation is certainly not objectively observable. Indeed, if one were to assume another's sexual orientation by reference to their

public presentation and behavior one's assumption might, in and of itself, be considered discriminatory. And "gender identity" is, by definition, completely subjective, depending entirely upon a person's self-perception, which may have nothing to do with how they objectively appear to others. The concept is malleable and fluid and, as such, is subject to change. There is absolutely no requirement that someone have a temporally consistent "gender identity." In fact, proponents of gender identity protection admit that "gender identity" is not only indefinable and changeable over time but also that different "gender identities" may exist simultaneously and in different contexts. See, for example, Langley, *Self-Determination In A Gender Fundamental State: Toward Legal Liberation Of Transgender Identities* (2006) 12 Tex. J. on C.L. & C.R. 101, 104 ("*[I]ndividuals may identify as any combination of gender identity referents simultaneously or identify differently in different contexts or communities. Furthermore, two individuals may deploy the same signifier to identify themselves or their communities, but mean very different things by the descriptor they choose. And various individuals may view one person's gender differently and thus deploy different gender signifiers to refer to that individual.*")(our emphasis). The article is written by a proponent of a "right to gender self-determination" who posits "*the addition of infinite new classifications of individuals' genders within and outside of the gender categories society currently comprehends.*" (our emphasis).

Indeed, regarding gender identity, a client could show up for the initial client meeting objectively appearing, by biology and attire, to be a woman, while secretly believing she is a man—and the attorney would never know. And, because gender identity is fluid, the very same client could show up for a later deposition dressed as a man, but now secretly believing she is a woman. Furthermore, the same client could be subjectively feeling or experiencing multiple

gender identities simultaneously—on different days, and the attorney would never know. Yet, the attorney could be charged with “discrimination” or “harassment” merely for treating the client as the gender consistent with their objective presentation, but inconsistent with the client’s secret subjective unexpressed feelings. This is absurd, and puts the attorney in a no-win situation.

Consequently, under the proposed Rule 8.4.1, attorneys are being directed to refrain from “harassing” or “discriminating,” whatever those terms mean, against classes that no one can even objectively define, let alone objectively perceive or rely upon as having any objectively consistent existence. Any rule which subjects attorneys to discipline because they have purportedly “harassed” or “discriminated” against objectively undefinable individuals with subjectively defined characteristics, characteristics, which by their very nature are often concealed and undetectable, is fundamentally unreasonable and unenforceable and must be rejected as void because of its inherent and pervasive vagueness.

The broad nature of the prohibition being considered is illustrated in Comment [2] of the proposed Rule 8.4.1, which provides: “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.” The implication, of course, is that if the reference to a particular status or group when the reference is not relevant to factual or legal issues or arguments *does* violate the Rule. So, the mere irrelevant reference to a protected status or group *will* subject attorneys to discipline. This confusing carve out spotlights the unworkability of Rule 8.4.1., demonstrating its inherent vagueness and overbreadth.

Indeed, it is telling that the proposed Rule finds it necessary to state – in Comment [2] – that “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.” If the proposed Rule does not threaten attorneys’ First Amendment rights, why does the Rule have to have such a disclaimer? The disclaimer is an admission that the proposed Rule *will* violate such rights. The proposed Rule will have the negative impact on the attorney of both chilling free speech – speech that may be misunderstood as discriminatory – and coercing free speech by forcing the attorney to involuntarily advocate on behalf of a client whose case may be morally objectionable because of the attorney’s religious, philosophical, political, or public-policy beliefs. Due to the fact that proposed Rule 8.4.1 both chills and compels lawyers’ speech, and because the rule is unconstitutionally vague, it is subject to constitutional challenge. For these reasons, proposed Rule 8.4.1 should be rejected.

**C. Proposed Rule 8.4.1 Would Sever The Rules From Legitimate Interests Of The Legal Profession and Significantly Undermine These Interests.**

The legal profession has a legitimate interest in proscribing attorney conduct that – if not proscribed – would either adversely affect an attorney’s fitness to practice law or that would prejudice the administration of justice. Proposed Rule 8.4 (*Misconduct*) recognizes this principle by prohibiting attorneys from engaging in six types of conduct, all of which might either adversely impact an attorney’s fitness to practice law or would prejudice the administration of justice. Those types of conduct are:

- (1) Violating the Rules of Professional Conduct;
- (2) Committing criminal acts that reflect adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects;
- (3) Engaging in conduct involving dishonesty, fraud, deceit or intentional misrepresentation;
- (4) Engaging in conduct that is prejudicial to the administration of justice;

- (5) Stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; and
- (6) Knowingly assisting a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

It is worth noting that Rule 8.4(b) does not even conclude that all *criminal* conduct is a violation of the Rules of Professional Conduct. Instead, the Rule proscribes only criminal conduct “*that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.*” As the proposed Comment [2] to the proposed Rule 8.4 explains: “*A lawyer may be disciplined under paragraph (b) for a criminal act that reflects adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some offenses carry no such implication. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category*” (our emphasis).

The fourth type of proscribed conduct is conduct that would prove prejudicial to the administration of justice. Historically, conduct falling within the parameters of this proscription have been limited to misconduct that would seriously interfere with the proper and efficient functioning of the judicial system. For example, the Supreme Court of Oregon analyzed this provision and determined that prejudice to the administration of justice referred to actual harm or injury to judicial proceedings. See, for example, *In re Kluge* (2003) 335 Ore. 326, which held that to establish a violation of this Rule it must be shown that the accused lawyer’s conduct

occurred during the course of a judicial proceeding or a proceeding with the trappings of a judicial proceeding. And in *In re Complaint of Haws* (1990) 310 Ore. 741, 746, the court noted that the Rule encompasses attorney conduct such as failing to appear at trial; failing to appear at depositions; interfering with the orderly processing of court business, such as by bullying and threatening court personnel; filing appeals without client consent; repeated appearances in court while intoxicated; and permitting a non-lawyer to use a lawyer's name on pleadings. See also, *Iowa Supreme Court Attorney Disciplinary Board v. Wright* (Iowa 2008) 758 N.W.2d 227, 230 (Generally, acts that have been deemed prejudicial to the administration of justice have hampered the efficient and proper operation of the courts or of ancillary systems upon which the courts rely); *Rogers v. The Mississippi Bar* (Miss. 1999) 731 So.2d 1158, 1170 (For the most part this rule has been applied to those situations where an attorney's conduct has a prejudicial effect on a judicial proceeding or a matter directly related to a judicial proceeding); *In re Hopkins* (D.C.Ct.App. 1996) 677 A.2d 55, 60-61 (In order to be prejudicial to the administration of justice, an attorney's conduct must (a) be improper, (b) bear directly upon the judicial process with respect to an identifiable case or tribunal, and (c) must taint the judicial process in more than a *de minimus* way, that is, at least potentially impact upon the process to a serious and adverse degree); and *In re Karavidas* (Ill. 2013) 999 N.E.2d 296, 315 (In order for an attorney to be found guilty of having prejudiced the administration of justice, clear and convincing proof of actual prejudice to the administration of justice must be presented). Therefore, this provision, too, is directed at attorney conduct that exposes the judicial process itself to serious harm.

In short, proposed Rule 8.4 is solely concerned – as it should be – with attorney conduct that might adversely affect an attorney's fitness to practice law or that seriously interferes with the proper and efficient operation of the judicial system.

Proposed Rule 8.4.1, however, would take Rule 8.4 in a completely new and different direction because the new Rule would subject attorneys to discipline for engaging in conduct that may neither adversely affect the attorney's fitness to practice law nor seriously interfere with the proper and efficient operation of the judicial system. Indeed, because the proposed new Rule 8.4.1 would not require *any* showing that the proscribed conduct prejudiced the administration of justice or that such conduct adversely affected the offending attorney's fitness to practice law, the Rule will constitute a free-floating non-discrimination provision – the only restriction on which will be that the conduct be “unlawful”. One that essentially punishes attorneys, in a nakedly Orwellian fashion, for “thought crimes,” because the Bar has, not for any legitimate reason having to do with the efficient operation of the legal profession, very recently determined to enforce a new regime of political correctness, pressuring attorneys to either conceal or abandon their deeply held religious, philosophical, political, or public-policy beliefs.

Indeed, the very opposite is true. As pointed out above, Proposed Rule 8.4.1 will directly and negatively coerce multiple violations of Rule 8.4 and of other foundational ethical rules, by pressuring the attorney to dishonestly conceal from and deceive the client regarding his or her personal conflicts of interest, thereby diminishing counsel's diligence and zeal which directly harms an attorney's fitness to practice law, resulting in prejudicing the overall effectiveness of representation and the administration of justice. This is accomplished by forcing upon the legal profession profound and destructive violations of attorneys' freedom of thought, speech, and action, while simultaneously inducing conflicts of interest between the client's goals and the attorney's deeply held religious, philosophical, political, or public-policy beliefs – conflicts which will undermine the attorney's diligence and zealous advocacy. Perhaps a greater harm to

attorneys and the legal profession cannot be imagined.<sup>2</sup>

Such a dramatic departure from the historic *regulation* of attorney conduct towards *coercion* of attorney consciences and conduct should not be taken lightly. It would represent a precedent-setting intrusion on attorneys' freedom of thought/conscience, professional autonomy, freedom of speech, and freedom of association. This new regime of political correctness will certainly undermine the efficient administration of justice, will destroy the careers of scores of attorneys, and will work to the great detriment of clients. Because proposed Rule 8.4.1 constitutes an extreme and dangerous departure from the principles and purposes historically underlying the Rules and the legitimate interests of professional regulation, it should be rejected.

**D. A Competent Tribunal Should First Determine That the Alleged Discrimination Or Harassment Was Unlawful Before The State Bar Discipline Mechanism's Engages**

Although both versions of proposed Rule 8.4.1 are objectionable, problematic, and should be rejected as discussed above, Alternative 1 is much more so than Alternative 2. This is because Alternative 1 departs radically from the Current Rule 2-400 of the California Rules of Professional Conduct Rule by eliminating the requirement that, in order for disciplinary action to be taken against an attorney on account of alleged unlawful discrimination, a tribunal of competent jurisdiction, other than a disciplinary tribunal, must have first adjudicated a complaint of alleged discrimination and found that unlawful conduct occurred. Alternative 2 of proposed Rule 8.4.1 retains this requirement. The requirement that a non-disciplinary tribunal first find that unlawful conduct has occurred before disciplinary action can be taken serves two salutary

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<sup>2</sup> Strikingly, if the proposed new Rule 8.4.1 is adopted, an attorney could actually engage in *criminal* conduct without violating the Rules (see, for example, *Formal Opinion Number 124 (Revised) – A Lawyer's Use of Marijuana* (October 19, 2015)(a lawyer's use of marijuana, which would constitute a federal crime, does not necessarily violate Colo.R.P.C. 8.4(b))), but could be disciplined for unlawful, but pragmatically necessary, harassment or discrimination.

purposes.

First, it insures that – in accordance with the Rule’s language – only “unlawful” discrimination is, in fact, disciplined. Unless a judicial tribunal – after a full and fair hearing in which the defendant is provided all the procedural and evidentiary safeguards to which a defendant is entitled – determines that the defendant has, in fact and law, engaged in not just discrimination but “unlawful” discrimination, then the Rule is not violated and the attorney should not be punished. A disciplinary tribunal, however, is not competent to determine whether “unlawful” discrimination has occurred, and for that reason should be required to wait until a judicial tribunal, competent to do so, does so.

Second, this requirement will avoid inconsistent findings and unfounded disciplinary actions. Should a disciplinary tribunal determine that a lawyer has engaged in unlawful discrimination and, upon that basis, disciplines the attorney, after which a non-disciplinary tribunal finds the attorney did not unlawfully discriminate, the attorney will have suffered unwarranted professional discipline for conduct that did not violate the Rule.

In addition, Alternative 1 of proposed Rule 8.4.1 converts the State Bar into a policing agent of the state. Section (e) of Alternative 1 provides that, upon issuing a mere notice of a disciplinary charge under Rule 8.4.1, the State Bar must provide a copy of the charge to various state and federal enforcement agencies for possible prosecution. That is an inappropriate role of the State Bar. Alternative 2 of proposed Rule 8.4.1 avoids this inappropriate expansion of State Bar power.

## **E. Conclusion**

It is not surprising that the ABA Model Rules of Professional Conduct do not have an analog to Rule 2-400 or proposed Rule 8.4.1. Based on the foregoing, we submit that

California's minority approach is deeply flawed because it forces attorneys to violate other fundamental ethical duties, coerces First Amendment violations, and undermines the efficient administration of justice. Therefore, we believe the California Rules of Professional Conduct should be brought into conformity with national standards and the ABA Model Rules.

If Proposed Rule 8.4.1 is adopted and Rule 2-400 remains intact, esteemed members of the California Bar will be increasingly viewed and treated as essentially conscienceless, mindless drones whose education, training, and expressive talents may be conscripted through state coercion. Big Brother may have had that degree of oppressive control over the thoughts, words, and actions of people in Orwell's dystopian nightmare, but such bondage, even in the name of ending discrimination, must never be permitted in our constitutional republic, if we wish to remain truly free. For all the foregoing reasons, the signers of this Joint Comment respectfully request that the Commission reject both alternatives of Proposed Rule 8.4.1 and its Comments and, for similar reasons, suspend Rule 2-400.

Respectfully submitted,

NAME

CALIFORNIA BAR MEMBERSHIP #/ORGANIZATION