



*Seeking Justice with the Love of God*

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**Re: Comments of the Christian Legal Society in Opposition to Proposed Changes to Rule 2-400 of the California Rules of Professional Conduct and Comments regarding Proposed Rule 8.4.1**

Dear Sir or Madam:

The Christian Legal Society (“CLS”) is a non-profit, interdenominational association of Christian attorneys, law students, and law professors, networking thousands of lawyers and law students in all 50 states since its founding in 1961. Among its many activities, CLS engages in two nationwide public ministries through its Christian Legal Aid ministry and its Center for Law & Religious Freedom.

Demonstrating its commitment to helping economically disadvantaged persons, the goal of CLS’s Christian Legal Aid program is to meet urgent legal needs of the most vulnerable members of our society. CLS provides resources and training to help sustain approximately 60 local legal aid clinics nationwide. This network increases access to legal aid services for the poor, marginalized, and victims of injustice in America. Based on its belief that the Bible commands Christians to plead the cause of the poor and needy, CLS encourages and equips individual attorneys to volunteer their time and resources to help those in need in their communities. Legal issues addressed include: avoiding eviction or foreclosure; maintaining employment; negotiating debt-reduction plans; petitioning for asylum for those persecuted abroad; confronting employers or landlords who take advantage of immigrants; helping battered mothers obtain restraining orders; and advocating on behalf of victims of sex trafficking.

Demonstrating its commitment to pluralism and the First Amendment, for forty years, CLS has worked, through its Center for Law & Religious Freedom, to protect the right of all citizens to be free from discriminatory treatment based on their religious expression and religious exercise. CLS was instrumental in passage of the federal Equal Access Act of 1984 that protects the right of both religious and LGBT student groups to meet on public secondary school campuses. Equal Access Act (“EAA”), 20 U.S.C. §§ 4071-74. *See* 128 Cong. Rec. 11784-85 (1982) (Senator Hatfield statement) (recognizing CLS’s role in drafting the EAA). *See, e.g., Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (EAA protects religious student groups’ meetings); *Straights and Gays for Equality v. Osseo Area Sch. No. 279*, 540 F.3d 911 (8<sup>th</sup> Cir. 2008) (EAA protects LGBT student groups’ meetings).

For forty years, CLS has protected free speech, religious exercise, assembly, and expressive association rights for all citizens, regardless of their race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, or socioeconomic status. The motivation for these comments regarding the proposed changes to Rule 2-400 and Proposed Rule 8.4.1 is rooted in CLS's deep concern that the proposed rule will have a detrimental impact and a chilling effect on attorneys' ability to continue to engage in free speech and religious exercise in the workplace and the broader public square. Moreover, the proposed rule contradicts longstanding ethical considerations woven throughout the Rules of Professional Conduct.

**I. Rule 2-400 should be preserved as written because, for over two decades, it has done an excellent job of protecting the public and the legal profession.**

**A. Rule 2-400 works.**

Since its adoption in 1994, Rule 2-400 of the California Rules of Professional Conduct, as currently written, has served both the public and the legal profession well. It provides a carefully crafted balance between the need to prevent unlawful discrimination with the need to respect attorneys' constitutional rights.

Rule 2-400 prohibits a lawyer, in the operation of a law practice, from unlawfully discriminating on the basis of race, national origin, sex, sexual orientation, religion, age or disability in employment practices or in accepting or terminating representation of a client. Discrimination must be otherwise unlawful under "applicable state or federal statutes or decisions making unlawful discrimination in employment and in offering goods and services to the public."

Before "a disciplinary investigation or proceeding may be initiated by the State Bar," an "appropriate civil administrative or judicial tribunal" must first have "found that unlawful conduct occurred." According to the Discussion accompanying Rule 2-400, a complaint may be filed with the State Bar while the case is on appeal, but an order for discipline cannot be imposed until after any appeal is final which leaves standing the adverse finding. A disciplinary proceeding, however, may be initiated for conduct that otherwise warrants discipline under California Business and Professions Code § 6106, which provides for discipline for acts of moral turpitude, dishonesty, or corruption, and § 6068, which lists various duties of an attorney and imposes a duty upon an attorney to report lawsuits or judicial sanctions for failure to fulfill those duties.

**B. Both alternative versions of Proposed Rule 8.4.1 would drastically and needlessly change Rule 2-400.**

For over two decades, Rule 2-400 has protected the public from unlawful discrimination while simultaneously allowing individual attorneys to practice law free from the fear of false accusations of discrimination that would threaten their license to practice law. The Commission has failed to demonstrate any empirical need for the drastic changes proposed to Rule 2-400 through the two alternative versions of Proposed Rule 8.4.1.

**Expanded scope:** The Board of Trustees of the California State Bar has authorized the circulation of two alternative versions of Proposed Rule 8.4.1, each of which would significantly change Rule 2-400. As the executive summary accompanying Proposed Rule 8.4.1 notes, both alternatives would greatly expand the scope of the rule. The application of Rule 2-400 is limited to “the management or operation of a law practice.” But both alternative versions of Proposed Rule 8.4.1 would also apply to unlawful harassment or unlawful discrimination “[i]n representing a client.” It also would regulate the attorney’s conduct not only in relation to the client but also in relation to persons other than the client.<sup>1</sup>

**Expanded list of protected characteristics:** Both alternatives would expand the list of protected characteristics to include 20 protected characteristics as well as a “catchall provision.” The protected characteristics would be: “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.*” (Emphasis added.)

**Addition of retaliation:** Both alternatives attempt to cover retaliation as well as unlawful harassment and unlawful discrimination. As explained below, the inclusion of “for the purpose of retaliation” is done in a way that renders the proposed rule unconstitutionally vague.

**Elimination of requirement that unlawful discrimination first be found by a court before disciplinary charges can be brought:** But most importantly, Alternative I would make two portentous changes to Rule 2-400. Troublingly, it would eliminate Rule 2-400’s requirement that a disciplinary charge cannot be brought until 1) a court has found that unlawful discrimination has occurred and 2) appeal rights have been exhausted. This change would give the State Bar Court “original jurisdiction to adjudicate discrimination claims against attorneys

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<sup>1</sup> Executive Summary, “*Proposed Rule of Professional Conduct 8.4.1 (Current Rule 2-400) Prohibited Discrimination, Harassment and Retaliation,*” at 1, [http://ethics.calbar.ca.gov/Portals/9/documents/2d\\_RRC/Public%20Comment%20X/RRC2%20-%208.4.1%20\[2-400\]%20-%20Rule%20-%20DFT5%20\(02-19-16\)%20w-ES-PR.pdf](http://ethics.calbar.ca.gov/Portals/9/documents/2d_RRC/Public%20Comment%20X/RRC2%20-%208.4.1%20[2-400]%20-%20Rule%20-%20DFT5%20(02-19-16)%20w-ES-PR.pdf).

under the current procedures of the disciplinary system.”<sup>2</sup> Alternative 2 would “largely retain[] the jurisdictional limitation in current Rule 2-400(C).”<sup>3</sup>

According to Justice Edmon, the Chair of the State Bar’s Second Commission for the revision of the Rules of Professional Conduct, which proposed Alternative 1: “The proposed elimination of current Rule 2-400(C)’s pre-discipline adjudication requirement has raised concerns among some members of the commission and the Board of Trustees concerning due process, the increased demands on State Bar resources that may result, and questions regarding any evidentiary or preclusive effects a State Bar Court decision may have in other proceedings.”<sup>4</sup> For that reason, she explained, Alternative 2 is being circulated because it would leave in place Rule 2-400(C)’s requirement that an attorney cannot be disciplined for unlawful discrimination unless a court, other than the State Bar Court, has found that the attorney engaged in unlawful discrimination under state or federal law and any appeal is final and leaves the finding of unlawful discrimination standing.

Indeed, an official for the State Bar Court noted that the Commission should seriously weigh several differences between the State Bar Court’s adjudicatory process and the state civil courts’ adjudicatory processes.<sup>5</sup> In the words of the State Bar Court official, “the unique nature of the State Bar Court and its own Rules of Procedure differ significantly from Superior Court civil proceedings.”<sup>6</sup> First, discovery is much more limited in State Bar Court proceedings. Second, the rules of evidence are different. “State Bar Court proceedings are not conducted according to the Evidence Code as applied in civil cases.”<sup>7</sup> Any relevant evidence must be admitted and hearsay evidence may be used. Third, of course, “[i]n disciplinary proceedings, attorneys are not entitled to a jury trial.”<sup>8</sup>

In addition, the Commission Provisional Report noted other concerns raised by removing the pre-discipline adjudication requirement. It described the “cons” of the requirement’s deletion as follows:

Eliminating current rule 2-400’s threshold requirement that a court of competent jurisdiction has found that the alleged unlawful conduct had occurred raises substantial concerns, including due process, . . . lack of OCTC resources and expertise to prosecute the

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<sup>2</sup> Justice Lee Smalley Edmon, “*Wanted: Input on Proposed Changes to the Rules of Professional Conduct*,” California Bar Journal, August 2016, <http://calbarjournal.com/August2016/Opinion/LeeSmalleyEdmon.aspx>.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Commission Provisional Report and Recommendation: Rule 8.4.1 [2-400], at 9, [http://ethics.calbar.ca.gov/Portals/9/documents/2d\\_RRC/Public%20Comment%20X/RRC2%20-%208.4.1%20\[2-400\]%20-%20Rule%20-%20DFT5%20\(02-19-16\)%20w-ES-PR.pdf](http://ethics.calbar.ca.gov/Portals/9/documents/2d_RRC/Public%20Comment%20X/RRC2%20-%208.4.1%20[2-400]%20-%20Rule%20-%20DFT5%20(02-19-16)%20w-ES-PR.pdf).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

charge effectively, and the potential that disciplinary proceedings would be used as the testing ground for new theories of discrimination, or as leverage in otherwise unrelated civil disputes between lawyers and former clients.<sup>9</sup>

Of course, it is near certain that State Bar Court proceedings will be “the testing ground for new theories of discrimination,” particularly in light of the 20 protected characteristics that the proposed rule would enforce, as well as the addition of a “catch-all provision” that includes yet-to-be-determined protected characteristics. Equally certain, the threat of disciplinary charges will become “leverage in otherwise unrelated civil disputes between lawyers and former clients.” The reasons to reject Alternative 1 seem irrefutable.

But according to the Commission’s executive summary, “a majority of the Commission believes current Rule 2-400(C) renders the rule difficult to enforce” and, therefore, the pre-discipline adjudication requirement should be eliminated. But one would certainly hope that a rule that has the potential to deny an attorney the ability to practice law *would be* appropriately “difficult to enforce.” As the Commission’s executive summary also notes, “[t]his will give the State Bar’s Office of Chief Trial Counsel” the ability “to investigate and prosecute . . . any claim of discrimination that comes within the scope of the Rule.” Given that the Proposed Rule 8.4.1 covers 20 protected characteristics – and includes a “catch-all provision” to include additional, yet-to-be-specified characteristics – a little difficulty in enforcement is important to balance the attorneys’ constitutional rights with the numerous potential claims and potential claimants that Proposed Rule 8.4.1 would create. The threat of losing one’s license to practice law is a heavy penalty and demands a stringent process, one in which the standards for enforcement are rigorous and respectful of the attorneys’ rights as well as the rights of others.

**Required notice to federal Department of Justice or federal EEOC when any disciplinary charge is brought:** Alternative I would make a second disturbing change by requiring the State Bar to send notice of any disciplinary charge to the United States Department of Justice, for charges of discrimination or harassment that occur in the course of representing a client (Proposed Rule 8.4.1 (a)). Note, however, that the charge may involve any person, not just a client. If the charge of harassment or discrimination is in relation to a law firm’s operations, the State Bar must send notice of any disciplinary charge to the United States Equal Employment Opportunity Commission. Note that this requirement is triggered at the time a disciplinary charge is brought, rather than after a disciplinary charge is adjudicated. Quite literally, a disciplinary charge becomes a federal matter even if the charge is later dismissed or found to lack merit.

**Subjecting an attorney to discipline for refusing to represent a client is a new idea, one that flies in the face of longstanding deference to professional autonomy and freedom of conscience.** In fact, ABA Model Rule 6.2(c) recognizes that when a lawyer is forced to take

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<sup>9</sup> *Id.* at 13.

on a cause that is “repugnant” to the lawyer, it may impair the lawyer’s ability to represent the client. The proposed rule also conflicts with Model Rules 1.7(a)(2), 1.10(a)(1), and 1.10 cmt. [3], which specifically reference how “personal” and “political” beliefs of a lawyer can result in that lawyer’s having a personal conflict of interest that renders her unable to represent the client.

The Rules of Professional Conduct should encourage lawyers to practice law according to conscience, in order to increase the number of lawyers, encourage zealous representation, enhance client choice, and expand access to justice for all. The proposed rule moves the profession in the opposite direction while infringing on professional autonomy and freedom of conscience without good cause.

**A cardinal principle is to avoid new disciplinary rules or rule amendments that will do decidedly more harm than good.** The proposed rule almost certainly will create a substantial imbalance between comparatively few instances where the rule punishes misconduct as intended, and numerous instances where the rule is wielded as a weapon against lawyers by disgruntled job applicants, rejected clients, opposing parties, or opposing counsel. The Commission does not provide any real documentation of the need for the proposed rule, which suggests that there currently are relatively few instances when it has been necessary to punish a lawyer who truly is abusing her license in a manner to cause harm to others through harassment or discrimination. It is completely foreseeable that the proposed rule will trigger thousands of complaints against lawyers by job applicants, rejected clients, and opposing parties, all claiming that a lawyer's conduct constituted harassment or discrimination in one or more of the prohibited categories. Even if frivolous, these cases will be difficult and expensive to defend.

## **II. Proposed Rule 8.4.1 would have a negative impact on attorneys’ First Amendment rights.**

### **A. The First Amendment protects lawyers’ freedom of speech and free exercise of religion.**

The First Amendment actually places real limits on the government’s ability to limit a lawyer’s speech and conduct through bar rules. See *Shapero v. Ky. Bar Ass’n*, 486 U.S. 466, 469 (1988) (First Amendment applied to state bar disciplinary actions through the Fourteenth Amendment). A lawyer does not relinquish her right to speak freely when she receives her license to practice law. To the extent any restrictions are allowed, they are the same as applied to other individuals, except when they are appropriately tailored to the needs of the practice of the profession itself. Even when commercial speech such as attorney advertising is involved, restrictions “may be no broader than necessary to prevent . . . deception.” *In re R.M.J.*, 455 U.S. 191, 203 (1982). Moreover, the “State must assert a substantial interest and the interference of speech must be in proportion to the interest served. Restrictions must be narrowly drawn, and the State lawfully may regulate only to the extent regulation furthers the State’s substantial interest.” *Id.*; see also *Bates v. State Bar of Ariz.*, 433 U.S. 350, 383 (1977) (lawyer’s commercial speech

“may not be subjected to blanket suppression”). Of course, the proposed rule is not limited to commercial speech, and so the full protections of the First Amendment apply. But if lawyers’ commercial speech has been protected, how much more should their religious and political speech be protected as it relates to the practice of law?

Reinforcing and undergirding the free speech protection is the additional First Amendment right to be free of regulation of the free exercise of religion. The free exercise of religion protects not only group exercises; it also reaches to individual actions and choices. This is at least implicitly acknowledged in the current ABA Model Rules, which repeatedly recognize that a lawyer’s decision whether to accept a representation is often a complex calculus involving moral and ethical judgments, and enjoin attorneys to apply their moral judgments and consciences. For instance, the ABA Model Rules’ Preamble provides as follows:

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 . . . .* [¶ 7 (emphasis added).]

. . . .

Virtually all difficult ethical problems arise from conflict between a lawyer’s responsibilities to clients, to the legal system and to *the lawyer’s own interest in remaining an ethical person . . . .* Such issues must be resolved through the exercise of sensitive professional and *moral* judgment . . . [¶ 9 (emphasis added).]

. . . .

The Rules [of Professional Conduct] do not, however, exhaust the *moral and ethical considerations that should inform a lawyer*, for no worthwhile human activity can be competently defined by legal rules. The Rules simply provide a framework for the *ethical* practice of law. [¶ 16 (emphasis added).]

The First Amendment protects both a lawyer’s conscience and her putting it into operation in the practice of law. A lawyer should not be compelled to undertake a representation that would require her to advocate viewpoints or facilitate activities that violate her religious convictions. Any new rule should make clear that a lawyer’s individual choices based on her sincerely held religious beliefs are protected by the First Amendment and may not be punished

by the government, acting through the State Bar. A lawyer's objections based on moral or ethical considerations should likewise be protected.

**B. Proposed Rule 8.4.1 unconstitutionally chills attorneys' First Amendment rights.**

Proposed Rule 8.4.1 imposes an overwhelming chill on attorneys' freedom of speech and free exercise of religion by its requirement that the State Bar notify the federal Department of Justice or federal Equal Employment Opportunity Commission every time it determines that a disciplinary charge should be brought against an attorney.

The proposed rule creates a cloud of doubt that will inevitably chill lawyers' public speech on one side of various current political and social issues, while simultaneously creating no disincentive for lawyers who speak on the opposing side of these controversies. The proposed rule institutionalizes viewpoint discrimination for lawyers' public speech on some of the most important current political and social issues. "Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995). Again, the proposed rule's chilling effect on lawyers' free speech will be unacceptably high.

Proposed Rule 8.4.1 should not be adopted in either of its iterations. But if it is, the following sentence should be moved from Comment 2 of the Proposed Rule 8.4.1 to the black-letter rule itself as a new section (g): "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." The protection of constitutional rights should be included in the rule itself rather than relegated to the comment.

**C. Attorneys' service on boards of religious institutions may be subject to discipline if the proposed rule were adopted.**

Many lawyers represent churches, religious schools and colleges, and other religious non-profits. These ministries provide incalculable good to people in their local communities, as well as nationally and internationally. But they also face innumerable legal questions and regularly turn to the lawyers serving on their boards for guidance. Is a lawyer subject to discipline if she helps craft her church's policy regarding whether its clergy will perform same-sex marriages or whether it will allow receptions for same-sex marriages in its facilities? Is a lawyer subject to discipline for crafting a housing policy or a student conduct code for a religious college that conforms to the college's religious beliefs? Is a lawyer subject to discipline for testimony before a legislative committee that is considering legislation like AB 1888 or SB 1146? Is the lawyer only subject to discipline if she testifies against the legislation, but not if she testifies in support of the legislation?

Because the proposed rule is not absolutely clear that a lawyer's free exercise of religion and speech are protected when serving religious institutions, the chilling effect on the lawyer's exercise of First Amendment rights is unacceptably high.

**D. Proposed Rule 8.4.1 fails to define “harass” and, therefore, does not pass constitutional muster.**

Of grave concern is Point 9 in the Commission Provisional Report to the effect that Proposed Rule 8.4.1 would allow the imposition of discipline on an attorney for harassment that would not be harassment if the proceedings were being held in state civil courts rather than the State Bar Court. The Report states:

Add proposed Comment [6] to make clear that discipline can be imposed for conduct that is a violation of this Rule, that is discriminatory, harassing, or retaliatory conduct that is unlawful as determined by reference to applicable state and federal law, even if certain additional elements over and above the unlawful conduct itself (for example, severity and pervasiveness in the context of sexually harassing conduct) would have to be established for that conduct to result in the award of a civil or administrative remedy in a civil or administrative proceeding.

- Pros: Holds lawyers to a higher standard, focusing on their conduct in the particular instance(s) at issue, rather than requiring proof of additional elements that, while held necessary for civil or administrative remedies, do not negate the unlawfulness of the conduct.
- Cons: Additional elements have been developed in civil and administrative proceedings for a reason, and permitting discipline in their absence removes a level of clarity and leaves too much discretion with the State Bar to seek discipline for single instances of conduct.<sup>10</sup>

The elasticity of the term “harass” must be addressed if the proposed rule is to have any hope of surviving either a facial or an as applied challenge to the proposed rule's unconstitutional vagueness and its infringement on free speech. To ameliorate the constitutional problems created by the term “harass,” the proposed rule must adopt the United States Supreme Court's definition of “harassment” in the Title IX context, which is “harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit.” *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 633 (1999).

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<sup>10</sup> *Id.* at 9.

The proposed rule should state that: “The term ‘harass’ includes only conduct that is so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to the administration of justice.” This language makes clear that “harassment” has an objective, rather than a subjective, standard. The consequences of disciplinary action against an attorney are too great to leave the definition of “harass” open-ended or subjective. “Harassment” should not be “in the eye of the beholder,” whether that be the attorney or the alleged victim of harassment, but instead should be determined by an objective standard, as provided by the Supreme Court’s definition of “harassment.”

The need for such an objective definition of “harass” is apparent when one considers the courts’ uniform rejection of university speech codes over the past two decades. The courts have found that speech codes violate freedom of speech because of the overbreadth of “harassment” proscriptions and the potential for selective viewpoint enforcement.<sup>11</sup> For example, after noting the Supreme Court’s application of the overbreadth doctrine to prevent a “chilling effect on protected expression,” *DeJohn v. Temple Univ.*, 537 F.3d 301, 313-314 (3d Cir. 2008) (citing *Broadrick v. Okla.*, 413 U.S. 601, 630 (1973)), the Third Circuit quoted then-Judge Alito’s words in *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200 (3d Cir. 2001):

“Harassing” or discriminatory speech, although evil and offensive, may be used to communicate ideas or emotions that nevertheless implicate First Amendment protections. As the Supreme Court has emphatically declared, “[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable.”

*DeJohn*, 537 F.3d at 314 (quoting *Saxe*, 240 F.3d at 209, (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989)). The *DeJohn* court went on to explain, “[b]ecause overbroad harassment policies can suppress or even chill core protected speech, and are susceptible to selective application amounting to content-based or viewpoint discrimination, the overbreadth doctrine may be invoked in student free speech cases.” *Id.* A lawyer’s free speech should be no less protected than that of a student.

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<sup>11</sup> See, e.g., *McCauley v. Univ. of V.I.*, 618 F.3d 232, 250, 252 (3d Cir. 2010); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1185 (6th Cir. 1995); *Coll. Republicans v. Reed*, 523 F. Supp. 2d 1005, 1021 (N.D. Cal. 2007); *Roberts v. Haragan*, 346 F. Supp. 2d 853, 872 (N.D. Tex. 2004); *Blair v. Shippensburg Univ.*, 280 F. Supp. 2d 357, 370-71 (M.D. Pa. 2003); *Pro-Life Cougars v. Univ. of Houston*, 259 F. Supp. 2d 575, 584 (S.D. Tex. 2003); *Booher v. Bd. of Regents, N. Ky. Univ.*, 1998 WL 35867183 (E.D. Ky. 1998); *UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163, 1177 (E.D. Wis. 1991); *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 866 (E.D. Mich. 1989).

### **III. Proposed Rule 8.4.1 would have a negative impact on attorneys' Fourteenth Amendment rights.**

Disciplinary proceedings by State bars are state actions that affect the property and reputational/liberty interests of the attorney involved. *See In re R.M.J.*, 455 U.S. 191, 203-204 (1982); *Greene v. McElroy*, 360 U.S. 474, 492 (1959); *Schware v. Bd. of Bar Examiners of N.M.*, 353 U.S. 232, 238-39 (1957); *Doe v. DOJ*, 753 F.2d 1092, 1111-12 (D.C. Cir. 1985). Thus, the due process protections of the Fourteenth Amendment of the U.S. Constitution adhere to such proceedings, including the disciplinary rules themselves. *See* U.S. Const. amend. XIV § 1.

A disciplinary rule that “either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.” *Cramp v. Bd. of Pub. Instruction of Orange Cnty., Fla.*, 368 U.S. 278, 287 (1961). As the Supreme Court recently summarized:

Even when speech is not at issue, the void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way. *See Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972). When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech.

*FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317-18 (2012); *see also Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1082 (1991) (reasoning that a “vague” disciplinary rule “offends the Constitution because it fails to give fair notice to those it is intended to deter and creates the possibility of discriminatory enforcement”) (O’Connor, J., concurring).

The requirement that a law not be too vague is particularly important when First Amendment rights are involved. The Supreme Court has instructed that “perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. *If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply.*” *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95 (1982) (emphasis supplied). *See also, Reno v. ACLU*, 521 U.S. 844, 871-72 (1997). “Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.” *Edenfield v. Fane*, 507 U.S. 761, 777 (1993) (internal quotation marks omitted) (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

The Ninth Circuit held that Cal. Bus. & Prof. Code §6068(f), which imposed certain duties on attorneys, was unconstitutionally vague.<sup>12</sup> The particular subsection imposed a duty on an attorney “to abstain from all offensive personality.” Relying on the above Supreme Court precedents, the Ninth Circuit found the statute unconstitutionally vague because it “could refer to any number of behaviors that many attorneys regularly engage in” while representing clients. Moreover, the statute was “likely to have the effect of chilling some speech that is constitutionally protected for fear of violating the statute.”<sup>13</sup>

**A. Proposed Rule 8.4.1(c)(1) is unconstitutionally vague.**

At least two components of Proposed Rule 8.4.1 (c)(1) would violate attorneys’ due process rights because it is “written in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application.” *Cramp*, 368 U.S. at 287. Proposed Rule 8.4.1(c)(1) lists the protected characteristics as follows: “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.” First, the catch-all provision, “or other category of discrimination prohibited by applicable law,” is completely vague and leaves attorneys guessing as to what specific conduct the rule covers. Second, the phrase “whether the category is actual or perceived” is indecipherable: How is a category “actual?” How is a category “perceived”? By whom is a category “perceived?” Again, the vagueness of the terms in both parts of the rule render proposed Rule 8.4.1 unconstitutionally vague.

**B. Proposed Rule 8.4.1(a) & (b) are unconstitutionally vague.**

Proposed Rule 8.4.1(a) would provide in part that “a lawyer shall not unlawfully harass or unlawfully discriminate against persons . . . for the purpose of retaliation.” Proposed Rule 8.4.1 (b) would provide that “a lawyer shall not, . . . for the purpose of retaliation, unlawfully: 1) discriminate . . .; 2) harass . . . an employee; or 3) refuse to hire or employ a person.” Even though retaliation is defined in Proposed Rule 8.4.1(c)(4), neither section (a) or (b) makes sense even when the definition of “retaliation” is read back into them. One can guess at what the drafters are trying to accomplish, but the fact that an attorney must guess as to the meaning of the retaliation provisions because they are currently unintelligible makes the provisions unconstitutionally vague.

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<sup>12</sup> *United States v. Wunsch*, 84 F.3d 1110 (9<sup>th</sup> Cir. 1996).

<sup>13</sup> *Id.* at 1119.

### Conclusion

Because the Committee has not demonstrated an empirical need for the proposed changes to Rule 2-400, and for the reasons explained above, CLS opposes any changes to Rule 2-400. However, if Rule 2-400 is not retained, adoption of Alternative 2 is preferable to adoption of Alternative 1 of Proposed Rule 8.4.1.

CLS bases its opposition to Proposed Rule 8.4.1 on numerous grounds and shares the concerns voiced by several members of the Commission, as well as members of the Board of Trustees, who have grave reservations about eliminating Rule 2-400's requirement that unlawful discrimination be found by a court before disciplinary charges for discrimination may be brought by the State Bar against an attorney. These concerns include the effect of such a change on: 1) an attorney's due process rights under the Fourteenth Amendment; 2) the increased demands on State Bar resources that will result from the State Bar Court adjudicating claims of discrimination in the first instance rather than simply relying on a civil court's findings; and 3) the evidentiary or preclusive effects of such State Bar Court decisions on other courts' hearing claims of unlawful discrimination.<sup>14</sup> CLS also has grave concerns about the chilling effect of the proposed rule on attorneys' freedom of speech and free exercise of religion.

Since its adoption in 1994, Rule 2-400 of the California Rules of Professional Conduct, as currently written, has served both the public and the legal profession well. It provides a carefully crafted balance between the need to prevent unlawful discrimination with the need to respect attorneys' constitutional rights. CLS urges its retention as written.

Thank you for your consideration of our concerns.

Respectfully submitted,

/s/ David Nammo

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<sup>14</sup> *Id.*