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SDCBA BAR REPORT

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Ethics for the Discriminating Lawyer

A little known rule governing the conduct of California lawyers is that which prohibits unlawful discrimination. California Rule of Professional Conduct ("CRPC") 2-400 mandates that, in the management or operation of a law practice, a lawyer shall not unlawfully discriminate, or knowingly permit unlawful discrimination on the basis of race, national origin, sex, sexual orientation, religion, age or disability. CRPC 2-400(B).

There would seem little controversy about such a proposition. Certainly, one can easily find culpability in unlawful conduct arising in "hiring, promoting, discharging or otherwise determining the conditions of employment of any person." CRPC 2-400(B)(1). Unlawful conduct in all forms has long been a discipline trigger, not only because it evidences a lack of respect for the judicial process [Cal. Bus. & Prof. Code §6068(a)-(b)], but depending on its magnitude, perhaps also its proximity to outright "moral turpitude" [Cal. Bus. & Prof. Code §§6101, 6106].

On closer inspection, however, the rule also prohibits unlawful discrimination in "accepting or terminating representation of any client." CRPC 2-400(B)(2). The notion that a lawyer's motives in accepting or declining a given engagement are capable of being second guessed is not particularly comforting. Indeed, in law school most of us learned that subject to limited exceptions, this was an area of great discretion, and that common law and common sense notion is well-documented. "The client-lawyer relationship ordinarily is a consensual one.... Lawyers generally are as free as other persons to decide with whom to deal.... A lawyer, for example, may decline to undertake a representation that the lawyer finds inconvenient or repugnant." Restatement (Third) of the Law Governing Lawyers §14, comment (b) (2000).

In selecting the clients we wish to zealously represent, why not discriminate, and

discriminate on any grounds we choose to?

Confined to the terms of CRPC 2-400, this has not been a proscription that most practitioners...even those who discriminate unlawfully...have found foreboding, which is likely why the rule suffers from such unfortunate obscurity. Unlike any other rule of professional conduct, the State Bar of California is expressly prohibited from even initiating an investigation, much less commencing a disciplinary proceeding under CRPC 2-400 until after an actual finding of unlawfulness by "a tribunal of competent jurisdiction." CRPC 2-400(C). That finding must be upheld and final after appeal, the time for filing an appeal must have expired, or the appeal must have been dismissed. *Id.*

Hence, in practice, discipline under CRPC 2-400

of discipline in this aspect of California practice is likely found in a more formidable and less tentative California statute being cited with increasing frequency. Apart from CRPC 2-400, and indeed, outside of both the California Rules of Professional Conduct and the State Bar Act, an attorney (as with any California occupational licensee) is subject to discipline for refusing to perform legal services, aiding or inciting the refusal to perform legal services, or making any discrimination or restriction in the performance of legal services on the basis of a client's or prospective client's sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation. Cal. Bus. & Prof. Code §125.6. Thus, while CRPC 2-400 may appear to provide little more than marquee-value to the

topic, it would not be prudent to proceed so pacified. The historical deference given to counsel in deciding whether or not to accept a client engagement, even

though not obviously impacted by CRPC 2-400, has clearly been narrowed in this state.

Yes, this is another instance of California's redundant and conflicting, and sometime absent regulation of our profession. That circumstance will long prompt frustration in many contexts of our practices. It prompts little frustration here, however. If it is difficult to locate, and then decipher the California authorities applicable to discrimination in the practice of law, appreciate that the endeavor is mooted merely by opting not to discriminate against protected classes at all.

The information in this column is intended to be informational only and does not constitute legal advice. Shepardize all codes and case law before using.

This month's EIB was submitted by Ross G. Simmons, principal of The Simmons Firm, ALC. The views expressed are his own.



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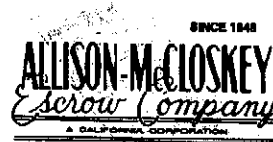
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