

**CALIFORNIA LAWYERS ASSOCIATION
ETHICS COMMITTEE**

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IMPORTANCE OF DIVERSITY IN THE LEGAL PROFESSION

- State Bar of California's advancement of diversity, equity and inclusion in the legal profession
 - State Bar's Five-Year Strategic Plan for 2022-2027 includes several steps to diversify the legal profession
 - Pipeline into the legal profession
 - Retention and career advancement
 - Judicial diversity – access to justice
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RECENT ATTACKS ON THE PROMOTION OF DIVERSITY AND INCLUSION IN THE LEGAL PROFESSION

- *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College; Students for Fair Admissions, Inc. v. University of North Carolina (U.S. 2023)*
 - *Judicial activism? Ideology?*
- *Departure from decades of legal precedent identifying diversity as a compelling interest in having a diverse student body (University of California v. Bakke (1978))*
- *“Nothing in this opinion should be construed as prohibiting universities from considering an applicant’s discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise.”*
- *Justice Sotomayor’s dissent describing affirmative action as furthering the constitutional guarantee of equal protection*
- *Expected to result in a dramatic change in admissions decisions and harm to students of color*
- *The California experience: Prop 209 and its impact on diversification of California’s legal industry*
- *Recent attacks on law firm diversity fellowships (Perkins Coie, Morrison & Foerster)*

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

- (a) In representing a client, or in terminating or refusing to accept the representation of any client, a lawyer shall not:
- (1) unlawfully harass or unlawfully discriminate against persons* on the basis of any protected characteristic; or
 - (2) unlawfully retaliate against persons.*

*Person has the meaning stated in Evidence Code 175 (natural person, partnership, corporation, LLC, public entity, etc.)

*Knowingly means actual knowledge of the fact in question and may be inferred from circumstances.

Rule 8.4.1 Prohibited Discrimination, Harassment and Retaliation

- (b) In relation to a law firm's operations, a lawyer shall not:
- (1) on the basis of any protected characteristic,
 - (i) unlawfully discriminate or knowingly* permit unlawful discrimination;
 - (i) unlawfully harass or knowingly* permit the unlawful harassment of an employee, an applicant, an unpaid intern or volunteer, or a person* providing services pursuant to a contract; or
 - (ii) unlawfully refuse to hire or employ a person*, or refuse to select a person* for a training program leading to employment, or bar or discharge a person* from employment or from a training program leading to employment, or discriminate against a person* in compensation or in terms, conditions, or privileges of employment; or
 - (2) unlawfully retaliate against persons.*

Rule 8.4.1 Prohibited Discrimination, Harassment and Retaliation

(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);

Rule 8.4.1 Prohibited Discrimination, Harassment and Retaliation

(c) For purposes of this rule (cont'd):

(3) “unlawfully” and “unlawful” shall be determined by reference to applicable state and federal statutes and decisions making unlawful discrimination or harassment in employment and in offering goods and services to the public; and

(4) “retaliate” means to take adverse action against a person* because that person* has (i) opposed, or (ii) pursued, participated in, or assisted any action alleging, any conduct prohibited by paragraphs (a)(1) or (b)(1) of this rule.

Rule 8.4.1 Prohibited Discrimination, Harassment and Retaliation

(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.

Rule 8.4.1 Prohibited Discrimination, Harassment and Retaliation

(e) Upon being issued a notice of a disciplinary charge under this rule, a lawyer shall:

- (1) if the notice is of a disciplinary charge under paragraph (a) of this rule, provide a copy of the notice to the California Department of Fair Employment and Housing and the United States Department of Justice, Coordination and Review Section; or
- (2) if the notice is of a disciplinary charge under paragraph (b) of this rule, provide a copy of the notice to the California Department of Fair Employment and Housing and the United States Equal Employment Opportunity Commission.

Rule 8.4.1 Prohibited Discrimination, Harassment and Retaliation

- (f) This rule shall not preclude a lawyer from:
- (1) representing a client alleged to have engaged in unlawful discrimination, harassment, or retaliation;
 - (2) declining or withdrawing from a representation as required or permitted by rule 1.16 (Declining or Terminating Representation); or
 - (3) providing advice and engaging in advocacy as otherwise required or permitted by these rules and the State Bar Act.