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## A Tangled Situation of Gender Discrimination: In the Face of an Ineffective Antidiscrimination Rule and Challenges for Women in Law Firms--What is the Next Step to Promote Gender Diversity in the Legal Profession?

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**A TANGLED SITUATION OF GENDER DISCRIMINATION: IN THE  
FACE OF AN INEFFECTIVE ANTIDISCRIMINATION RULE AND  
CHALLENGES FOR WOMEN IN LAW FIRMS—  
WHAT IS THE NEXT STEP TO PROMOTE GENDER  
DIVERSITY IN THE LEGAL PROFESSION?**

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Every step away from a tangled situation, in which moves and counter-moves have been made over centuries, is a painful step, itself inevitably imperfect. Here is a vicious circle . . . Those who would break the circle are themselves a product of it, . . . [and] may be only strong enough to challenge it, not able actually to break it. Yet once identified, once analyzed, it should be possible to create a climate of opinion in which others . . . may in turn take the next step.

*Margaret Mead*<sup>1</sup>

## I. INTRODUCTION

Margaret Mead’s 1949 image of discrimination’s tangled web still rings true as the battle to assimilate women into society continues. The stunted growth of gender diversity in the legal profession is caused not only by society’s grip on traditional views of women, but also, ironically, by a rule which claims to increase that growth. This rule is like that inevitably-imperfect step whose effect has tightened discrimination’s hold on the legal profession, rather than loosened it. But, just as Mead suggests, the need for gender diversity has been identified; therefore, the legal profession is now better prepared to take further steps to undo gender discrimination’s grasp.

Increased gender diversity in the legal profession is an aspiration of both the American Bar Association (ABA) and the State Bar of California (State Bar).<sup>2</sup> The ABA includes in its mission statement the

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1. MARGARET MEAD, *MALE AND FEMALE: A STUDY OF THE SEXES IN A CHANGING WORLD* 384 (1949).

2. Although both the ABA and the State Bar express a desire to increase various forms of diversity, this comment solely examines gender discrimination,

goal “[of] promot[ing] full and equal participation in the legal profession by minorities, *women* and persons with disabilities.”<sup>3</sup> The State Bar mirrors the ABA in its strategy to “[e]ncourage individuals of *diverse* populations to seek and qualify for admission to the practice of law in California, and once admitted, *to remain in active practice.*”<sup>4</sup> Unfortunately, these goals have been inhibited by the ineffectiveness of current antidiscrimination rules and the struggles that women face in the legal workplace.

The plight of professionally employed women is currently a hotly debated topic in our society.<sup>5</sup> More women in today’s society have sought higher levels of education in order to build professional careers.<sup>6</sup> This results in a struggle to balance the pressures of work and the responsibilities of home.<sup>7</sup> In the last few years, the legal profession has suffered the highest levels of associate attrition ever documented, with over three-quarters of private law firm associates leaving within their first five years.<sup>8</sup> Female associates were found to be almost twice as likely as males to leave law firms because of their choice to pursue a better work-life balance.<sup>9</sup> Couple this with the fact

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specifically against women in the legal workplace. *See infra* notes 3-4 and accompanying text. Thus, where this comment uses the term *diversity*, it refers specifically to gender diversity.

3. ABA, MISSION AND ASSOCIATION GOALS, <http://www.abanet.org/about/goals.html> (last visited Oct. 2, 2007) [hereinafter ABA MISSION] (emphasis added).

4. STATE BAR OF CAL., LONG-RANGE STRATEGIC PLAN 18 (2004), available at [http://calbar.ca.gov/calbar/pdfs/reports/2004\\_Rev-Strategic-Plan.pdf](http://calbar.ca.gov/calbar/pdfs/reports/2004_Rev-Strategic-Plan.pdf) [hereinafter STRATEGIC PLAN] (emphasis added).

5. *See generally* Malaika Costello-Dougherty, *We’re Outta Here: Why Women are Leaving Big Firms*, CAL. LAW., Feb. 2007, at 20 (discussing the difficulties that female attorneys face in attempting to balance working in large law firms with their personal lives).

6. *See* ELAINE L. CHAO, U.S. DEP’T OF LABOR, WOMEN IN THE LABOR FORCE: A DATABOOK 1 (2006), available at <http://www.bls.gov/cps/wlf-databook-2006.pdf> (“The movement of women into the labor force and into higher-paying occupations has gone hand in hand with their pursuit of higher education.”).

7. *See* ARLIE RUSSELL HOCHSCHILD & ANNE MACHUNG, THE SECOND SHIFT 8-9 (1989) (“Indeed, woman more often juggle three spheres—job, children, and housework—while most men juggle two—job and children. For women, two activities compete with their time with children, not just one.”).

8. Costello-Dougherty, *supra* note 5, at 22.

9. *Id.*

that, in the last twenty-five years, the legal profession has had an unprecedented growth of female law school graduates—rising from nearly 33% in 1981 to nearly 49% in 2005<sup>10</sup>—and it is clear that these numbers foreshadow problems for the legal profession’s future.<sup>11</sup> Should these trends continue, they will reflect a failure by the State Bar and the ABA to achieve their goals for gender diversity within the legal profession.

Rule 2-400 of the California Rules of Professional Conduct (CRPC 2-400)<sup>12</sup> is meant to address one of the main obstacles in a woman’s career development: discrimination in the legal workplace.<sup>13</sup> However, CRPC 2-400 is flawed because reports of blatant gender discrimination will not be worthy of disciplinary investigation until the victim successfully litigates under federal or state law, and an

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10. ABA, JD. AND LLB DEGREES AWARDED: 1981-2004, <http://www.abanet.org/legaled/statistics/charts/stats%20-%207.pdf> (last visited Oct. 3, 2007) [hereinafter JD AND LLB DEGREES]; see also ABA, ENROLLMENT AND DEGREES AWARDED: 1963-2005 ACADEMIC YEARS, <http://www.abanet.org/legaled/statistics/charts/stats%20-%201.pdf> (last visited Oct. 3, 2007) [hereinafter ABA ENROLLMENT AND DEGREES].

11. See Wendy Werner, *Where Have the Women Attorneys Gone?*, LAW PRAC. TODAY, May 2004, available at <http://www.abanet.org/lpm/lpt/articles/mgt05041.html> (discussing the problems associated with the attrition rate among female attorneys at private law firms).

12. CAL. RULES OF PROF’L CONDUCT R. 2-400 (1994). CRPC 2-400 is an ethical rule which allows for State Bar discipline of lawyers who commit discriminatory acts because of another person’s race, gender, national origin, or sex. See *id.*

13. See *id.*; see also COMM’N FOR THE REVISION OF THE RULES OF PROF’L CONDUCT, STATE BAR OF CAL., ENCLOSURE 6: REPORT AND RECOMMENDATION REGARDING PROPOSED NEW RULES OF PROFESSIONAL CONDUCT ON BIAS AND EMPLOYMENT DISCRIMINATION (1991) [hereinafter ENCLOSURE 6: REPORT AND RECOMMENDATION], in OFFICE OF PROF’L COMPETENCE, PLANNING AND DEV., STATE BAR OF CAL., REQUEST THAT THE SUPREME COURT OF CALIFORNIA APPROVE PROPOSED RULE 2-400 OF THE RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA AND MEMORANDUM AND SUPPORTING DOCUMENTS IN EXPLANATION (1993) [hereinafter MEMO TO REQUEST APPROVAL OF 2-400] (stating that the Commission supported an anti-discrimination rule based on their belief that “employment discrimination may exist within the legal profession based upon persistent reports detailing the lack of women . . . employed by law firms and the low percentage of women . . . who enjoy partnership status”) (on file with author).

administrative or judicial tribunal finds the discriminatory conduct unlawful.<sup>14</sup>

The construction of this rule conflicts with the State Bar's and the ABA's goal to increase diversity in the legal profession. In the face of this inefficiency, CRPC 2-400 must be amended so that State Bar investigations for disciplinary action will be immediately available to women who suffer from discrimination in the legal workplace, irrespective of an official finding. These changes will not only signal to law firms that discipline is a real possibility for discriminatory conduct,<sup>15</sup> but will also align CRPC 2-400 with the State Bar's and the ABA's goal to increase gender diversity in the legal profession.

This Comment will explore the challenges faced by professional women, the worthiness of legislation to protect women from legal workplace discrimination, and the changes that will render CRPC 2-400 more effective in promoting gender diversity. Part II provides a brief overview of the legal practice landscape for women. The history of CRPC 2-400 is considered in Part III, along with views of critics and proponents for change of the rule. Proposed legislative language is discussed in Part IV.

Part V concludes by stressing the importance of amending California's current legal ethics rule against discrimination in the legal workplace. It acknowledges that although these suggested amendments cast a wider net for disciplinary investigations, these changes are not without imperfections, particularly because other forms of discrimination may be missed. This Comment comes to terms with the reality that ethical rules may not be enough to change

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14. CAL. RULES OF PROF'L CONDUCT R. 2-400(C) (1994); see Ernest Schall, *The State Bar's Role and Elimination of Bias in the Legal Profession*, THE BOTTOM LINE, Aug. 2002, at 5 ("[I]f bias in the legal profession doesn't rise to the level of being unlawful under state or federal law, then there is nothing to prevent such bias under Rule 2-400.").

15. FRED D. BUTLER, ENCLOSURE 3: 1989, 1991 AND 1992 STATE BAR OF CALIFORNIA CONFERENCE OF DELEGATES' RESOLUTIONS REGARDING NEW CALIFORNIA RULE OF PROFESSIONAL CONDUCT ON EMPLOYMENT DISCRIMINATION (1992) [hereinafter ENCLOSURE 3], in MEMO TO REQUEST APPROVAL OF 2-400, *supra* note 13 ("This resolution does not expand existing employment discrimination law but instead puts attorneys on notice regarding the disciplinary consequences of their violation of such laws and sends a strong signal to the profession and the public that attorneys are committed to the elimination of discrimination within the legal profession.").

discrimination against women and that, in order to increase gender diversity, there must be an overall push to encourage a change of attitude in the minds of those within the legal profession.

## II. A TANGLED SITUATION: GENDER DISCRIMINATION IN THE LEGAL PROFESSION

### A. *Challenges for Women in the Legal Profession*

#### 1. *Professional Development*

Traditionally, most partners in law firms are male.<sup>16</sup> This leads to three significant hardships for women. First, because it began as a man's profession, the study and practice of law was set from a male perspective.<sup>17</sup> Second, with more men than women in the upper echelons, men have a greater ability to form relationships with those who can promote them.<sup>18</sup> Third, men in these ranks tend to surround themselves with people who look, act, and think like them, which means they will be more inclined to promote other male associates to partnership.<sup>19</sup>

With these barriers to partnership, many female attorneys leave their firms, which results in fewer women in the applicant pool for

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16. See Seth Stern, *Women are Still Second-Class Citizens in the Legal Profession What Can be Done About it?*, HARV. LAW BULL., Fall 2006, at 28 (“Women still account for only 17 percent of law firm partners, 20 percent of federal judges and 14 percent of Fortune 500 general counsels.”).

17. ABA, COMM'N ON WOMEN IN THE PROFESSION, ELUSIVE EQUALITY: THE EXPERIENCES OF WOMEN IN LEGAL EDUCATION 21 (1996) (“The law has developed and continues to develop in the United States with a bias toward the male perspective. Those who testified to the Commission on this subject, including law school deans, agreed with this premise.”).

18. Cynthia Grant Bowman, *Bibliographical Essay: Women and the Legal Profession*, 7 AM. U.J. GENDER SOC. POL'Y & L. 149, 157 (1999) (“The law has to do largely with property and business and both are at present managed chiefly by men. Men lawyers naturally meet more men than women do, in business, in politics, and socially; in the give and take of casual and informal association woman is [sic] at a disadvantage.” (quoting BEATRICE DOERSCHUK, THE BUREAU OF VOCATIONAL INFORMATION, WOMEN IN LAW (Bulletin No. 3 1920))).

19. See SUZANNE NOSSEL & ELIZABETH WESTFALL, PRESUMED EQUAL: WHAT AMERICA'S TOP WOMEN LAWYERS REALLY THINK ABOUT THEIR FIRMS 138 (1998).

partnership.<sup>20</sup> With significantly fewer women partners, there are fewer mentors for women attorneys.<sup>21</sup> Mentoring provides an opportunity for a close relationship, which helps build a woman's professional career.<sup>22</sup> Without this vital support, a woman in a law firm may have a difficult and possibly non-existent path to partnership.<sup>23</sup>

With more men who are partners, it is not surprising that male lawyers earn substantially more than female lawyers.<sup>24</sup> In 2006, the median compensation for women equity partners was \$429,000, while male equity partners earned a median compensation of \$510,000—an astounding \$81,000 difference.<sup>25</sup> This can be attributed to the fact that substantially more male attorneys choose to work at demanding law firms and are in the most senior levels, while more female lawyers choose government positions or smaller firms, which pay relatively

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20. See Lisa H. Nicholson, *Making In-Roads to Corporate General Counsel Positions: It's Only a Matter of Time?*, 65 MD. L. REV. 625, 647 (2006) (“Regrettably, too many others have found themselves particularly stymied by the lack of mentoring relationships, lack of informal networking opportunities, and the lack of an adequate work-life balance . . .”).

21. Elizabeth K. McManus, *Intimidation and the Culture of Avoidance: Gender Issues and Mentoring in Law Firm Practice*, 33 FORDHAM URB. L.J. 217, 219 (2005) (“The fewer women who are mentored, the fewer of them there are to rise to the top to act as mentors to new women associates.”).

22. *Id.* (“Mentoring opportunities are a necessary part of adequate career development. A good mentor acts as an advisor, teacher, exemplar, and career advocate. A good mentor can also acquaint a new associate with firm culture and client relations, and can help groom the associate for partnership.”). See also Nicholson, *supra* note 20, at 647 (stating that the women in law practice who overcame gender stereotyping were typically those that “had the support and encouragement of mentors who helped them steer their career paths and take measured risks”).

23. See NOSSEL & WESTFALL, *supra* note 19, at xviii (stating that mentoring is always central to advancement).

24. NAT’L ASS’N OF WOMEN LAWYERS, NATIONAL SURVEY ON RETENTION AND PROMOTION OF WOMEN IN LAW FIRMS 10 (2006), [http://www.abanet.org/nawl/docs/NAWL\\_SURVEY\\_REPORT\\_RE-PRINT.pdf](http://www.abanet.org/nawl/docs/NAWL_SURVEY_REPORT_RE-PRINT.pdf) [hereinafter NAWL]; Joni Hersch, *The New Labor Market for Lawyers: Will Female Lawyers Still Earn Less?*, 10 CARDOZO WOMEN’S L.J. 1, 18 (2003) (“It is clear that male lawyers earn considerably more than female lawyers no matter how earnings are measured.”).

25. NAWL, *supra* note 24, at 10.



less.<sup>26</sup> Also, because women are burdened by family responsibilities, many choose to take part-time or flexible schedules.<sup>27</sup> With less time in the paid labor market, within three years, women can lose about 37% of their earning capacity compared to men.<sup>28</sup> Unfortunately for many women, 85% of whom will become mothers during their working lives,<sup>29</sup> devoting time to children may make them unqualified candidates in the eyes of a hiring attorney because it is assumed that they are unable to meet the firm's billable hour requirement.<sup>30</sup>

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26. Nancy J. Reichman & Joyce S. Sterling, *Recasting the Brass Ring: Deconstructing and Reconstructing Workplace Opportunities for Women Lawyers*, 29 CAP. U. L. REV. 923, 932 (2002). Reichman and Sterling elaborate on this point:

Men were more likely than women to move from small firms to large law firms while women were more likely to move in the opposite direction from large to small firms. Similar patterns of difference were found in the movement between public and private law. Men were more likely to move from public law to private law practice. More women moved from private practice to government employment. Women who moved to the public arena were less likely than men to move back to the private arena.

*Id.*

27. See COMM'N ON WOMEN IN THE PROFESSION, ABA, CHARTING OUR PROGRESS: THE STATUS OF WOMEN IN THE PROFESSION TODAY 6 (2003) (discussing how many female attorneys who choose to take part-time or flexible schedules at their firms are concerned that their commitment is questioned).

28. Kristen Dobson, *Happy Mother's Day! 'MomsRising' and the Struggle for Rights*, PARENT TRAP MAG., May 2007, available at [http://www.wilpf.org/pv\\_moms\\_rising](http://www.wilpf.org/pv_moms_rising).

29. Joan C. Williams, *Canaries in the Mine: Work/Family Conflict and the Law*, 70 FORDHAM L. REV. 2221, 2223 (2002).

30. See JOHN J. DONOHUE III, FOUNDATIONS OF EMPLOYMENT DISCRIMINATION LAW 327 (2d ed. 2003) (“[R]estrictions on the employment of women were frequently imposed for productivity or profitability reasons relating to pregnancy and child rearing.”); Lee Hoffman & Natalie D. Jaquez, *Working Moms: A Balancing Act*, ABC NEWS, Nov. 10, 2006, available at <http://abcnews.go.com/2020/print?id=2641859> (quoting a woman who hires on a corporate level as stating that “[they] actually don’t hire women that [they] think are going to have children”). See also ENCLOSURE 6: REPORT AND RECOMMENDATION, *supra* note 13, at Attachment B (“[T]here are two kinds of discrimination—a bad kind . . . and a good kind. . . . [A]t times you want to discriminate in employment practices in an affirmative way that I think is valid . . .”). This suggests that women can be discriminated in a way that employers may feel is appropriate due to their perception of lack of productivity caused by motherhood. It further suggests that employers may discriminate in a manner that appears to negate the wrongfulness of the discrimination.

## 2. *Work and Life Balance*

There are two conflicting challenges to a female attorney's work-life balance.<sup>31</sup> The first is the idea that successful attorneys with high numbers of billable hours cannot raise children if they are never home with them.<sup>32</sup> The second is the perception that a good mother cannot rise to partnership if her priority is her home.<sup>33</sup> In either case, she will lose. For some women, these roles demand a large amount of time, spreading them too thin to feel successful at either.<sup>34</sup> The life of a professional woman is demanding; she must deal with the extreme pressures of work, only to come home to a "second shift" of caring for

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31. See Nicole Buonocore Porter, *Re-Defining Superwoman: An Essay on Overcoming the "Maternal Wall" in the Legal Workplace*, 13 DUKE J. GENDER L. & POL'Y 55, 79-80 (2006) ("[W]omen with children will always be torn between two conflicting roles: 'mother of the year' and 'superstar attorney.'").

32. Billable hours at a law firm are the primary factor in deciding who becomes a partner. See Carol M. Langford & Nathaniel L. Nicoll, *A View from the Top of the Law Firm Ladder: Excerpts from the Diary of a Certain Mr. Charles Bigglesworth III, Esq.*, THE BOTTOM LINE, Oct. 2004, at 3. Some women in law firms have reported that they feel they have an equal opportunity to be made partner along with their male counterparts "provided they are willing and able to put in the long hours and enormous energy." NOSSEL & WESTFALL, *supra* note 19, at xvii-xviii. Although it appears to be an objective and neutral factor, when this system is coupled with expectations based on traditional American values of women handling responsibilities in the home, a billable hour requirement undeniably precludes women from partnership. See Langford & Nicoll, *supra*, at 3. Even if a woman were able to meet the demanding requirements of billable hours for their firms, family responsibilities may make them unavailable to take advantage of non-billable events. These include after-work dinners with firm partners for the purposes of mentoring or an afternoon of golf with valuable clients. Men are left to gain professionally from these non-billable events because they do not have the social burden of family responsibilities weighing on them. See McManus, *supra* note 21, at 219-20 (discussing how informal interaction with mentors and clients is crucial for career development, but how women suffer from the lack of such interaction).

33. See Porter, *supra* note 31, at 79 (stating that it is not possible to be an outstanding mother and an outstanding attorney).

34. *Id.*; see also HOCHSCHILD, *supra* note 7, at 8 ("[M]ore women felt torn between one sense of urgency and another, between the need to soothe a child's fear of being left at daycare, and the need to show the boss she's 'serious' at work."); see generally Elizabeth Vargas, *Can Working Mothers Have It All?*, ABC NEWS, Nov. 9, 2006, available at <http://abcnews.go.com/2020/print?id=2641588> (discussing how one corporate woman felt that it was impossible to do her job well and be a good mother to her young children at the same time).

children and doing housework—activities in which most men fail to take their proportionate share.<sup>35</sup>

This lack of balance leaves many women trapped into feeling guilty for their professional success because of their failure to stay home and raise their children.<sup>36</sup> Because of this tension, many women who can financially afford to quit have chosen to sacrifice this fast-paced lifestyle for their families.<sup>37</sup> Recent statistics show that within ten years of legal employment, about half of all female attorneys will be working part-time or will have left the profession altogether.<sup>38</sup> This attrition leaves firms questioning whether they should continue to invest in training women associates when statistics show that they will leave within a few years.<sup>39</sup>

### *B. Workplace Gender Discrimination Cases*

Discrimination in the legal workplace is very damaging to the victimized individual, as well as to the profession.<sup>40</sup> Female attorneys

35. See HOCHSCHILD, *supra* note 7, at 4, 8; Katharine K. Baker, *Supporting Children, Balancing Lives*, 34 PEPP. L. REV. 359, 370 (2007) (“Marriage increases the amount of domestic work that women perform, but it decreases the amount of domestic work that men perform. . . . Women employed full-time spend 20-30 hours per week on housework, while their spouses spend half, or less than that.”).

36. Porter, *supra* note 31, at 79-80; see BETTY FRIEDAN, *THE FEMININE MYSTIQUE* 67 (1983) (noting the mystery behind why American women, with the education and ability to further their careers, decide to remain housewives and rear children).

37. See Claudia Wallis, *The Case for Staying Home*, TIME, Mar. 22, 2004, at 2, available at <http://www.time.com/time/magazine/article/0,9171,993641,00.html> (“But in the professional and managerial classes, where higher incomes permit more choices, a reluctant revolt is under way. Today’s women execs are less willing to play the juggler’s game, especially in its current high-speed mode, and more willing to sacrifice paychecks and prestige for time with their family.”). See also *Professional Moms Quit Work for Motherhood*, ABC NEWS, available at <http://abcnews.go.com/story?id=127965> (last visited Oct. 19, 2007) (discussing how more professional women who can afford to do so are leaving their careers and moving toward old-fashioned motherhood).

38. Linda Hirshman, *Women in the Profession: Staying on the Job*, NAT’L L.J., Sept. 4, 2006 (“[I]n 10 years, half of [women], mostly the married ones with children, will have strayed from the profession, working either part-time or no time at all.”).

39. NOSSEL & WESTFALL, *supra* note 19, at xix.

40. STATE BAR OF CAL. ANTI-BIAS RULE COMM., ENCLOSURE 7: REPORT AND

are told to prepare for and to deal with the sad reality of gender discrimination.<sup>41</sup> Because women make up a small percentage of law firms, they must go to great lengths to prove their ability to the firm and are forced to endure various forms of workplace discrimination.<sup>42</sup>

### 1. *Sexual Harassment*

Sexual harassment is defined as “[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.”<sup>43</sup> This form of blatant discrimination not only has a devastating impact on law firms,<sup>44</sup> but also debilitates a woman’s fight for gender diversity in the legal workplace. In a 1998 California Court of Appeal case, *Rena Weeks*, a secretary at the law firm of Baker & McKenzie, brought an action for sexual harassment against the firm and one of its partners, Martin Greenstein.<sup>45</sup> Over a span of five years,

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RECOMMENDATION REGARDING PROPOSED NEW RULES OF PROFESSIONAL CONDUCT ON BIAS AND EMPLOYMENT/CLIENT DISCRIMINATION 2 (1992) [hereinafter ENCLOSURE 7], in MEMO TO REQUEST APPROVAL OF 2-400, *supra* note 13 (“Based upon its research, the Committee . . . believes strongly that acts of bias and discrimination . . . in the course of the practice of law, are morally wrong and negatively impact on the administration of justice and on the public’s confidence in the integrity of the profession.”).

41. See, e.g., Tracy L. Wareing, *Issues Facing Women Lawyers Entering the Legal Profession*, ARIZ. ATT’Y, Nov. 1999, at 42-43.

42. See DEBORAH L. RHODE, WHAT’S SEX GOT TO DO WITH IT?: DIVERSITY IN THE LEGAL PROFESSION 17-18 (2006) (discussing how women are not perceived to be as competent as men and how women must work worker harder than their male counterparts in order to achieve results equivalent to theirs); Bowman, *supra* note 18, at 157.

43. 29 C.F.R. § 1604.11(a) (1985), cited in *Fisher v. San Pedro Peninsula Hosp.*, 262 Cal. Rptr. 842, 851 (Cal. Ct. App. 1989).

44. Beth A. Quinn, *The Paradox of Complaining: Law, Humor, and Harassment in the Everyday Work World*, 25 LAW & SOC. INQUIRY 1151, 1154 (2000) (“It is clear that sexual harassment is prevalent, expensive to employers, and costly and painful to victims.”); Johnny Darnell Griggs, *Sexual Harassment in Law Firms: The Cobbler’s Children Revisited*, N.J. LAW., Aug. 2001, at 37 (“[T]he impact on law firms of sexual harassment incidents and claims is devastating. In addition to the obvious costs of time-consuming investigations, legal defenses, settlements and adverse verdicts, claims and incidents of sexual harassment are destructive to the morale, productivity, recruiting and the professional reputation of law firms.”).

45. *Weeks v. Baker & McKenzie*, 74 Cal. Rptr. 2d 510, 519-20 (Cal. Ct. App.

Greenstein had several documented reports of sexual harassment filed against him by numerous secretaries.<sup>46</sup> Greenstein's conduct included sending vulgar notes to these women, inappropriately touching them, discussing their attire in a sexually suggestive manner, and even inviting them to join him in a hot tub.<sup>47</sup> Although some of the women reported these incidents to the firm's upper management, no assertive action was taken by the firm to stop the discrimination.<sup>48</sup> Many of these women left because of their frustration with Greenstein and the firm's conduct.<sup>49</sup> Weeks suffered as a result of similar conduct, but she decided to take legal action by suing for her mistreatment.<sup>50</sup>

If jury verdicts could accurately reflect the magnitude of the discrimination problem in law firms, this case would be exemplary. The trial court ruled in Weeks' favor and awarded "\$225,000 in punitive damages from Greenstein and \$6.9 million from Baker & Mackenzie."<sup>51</sup> While this case is an example of blatant discrimination through sexual harassment, the fact that there are no published reports by the State Bar concerning an investigation indicates that no such investigation was ever made under CRPC 2-400.

## 2. *Family Responsibility Discrimination*

Family responsibility and pregnancy bias are more recently recognized forms of workplace discrimination, and are making an increasingly significant impact as causes of action in discrimination litigation.<sup>52</sup> Because a woman has the inherent ability to bear children,

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1998).

46. *See id.* at 515-18.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 520.

51. *Id.* at 514.

52. *See* J. Scott Tiedemann, *Pregnancy Bias Cases on the Rise*, NAT'L L.J., May 22, 2006, available at [http://www.lcwlegal.com/newspublications/Articles/NLJ\\_0506\\_Tiedemann\\_PreganancyBias.pdf](http://www.lcwlegal.com/newspublications/Articles/NLJ_0506_Tiedemann_PreganancyBias.pdf) (discussing how pregnancy discrimination claims have significantly increased and how employers paid \$22.9 million in 2004 and 2005 for these types of claims); *see also* Joan C. Williams & Cynthia Thomas Calvert, *Family Responsibilities Discrimination: What Plaintiffs' Attorneys, Management Attorneys and Employees Need to Know*, 91 WOMEN LAW. J. 24, 25 (2006) ("More than 600 [family responsibility discrimination] cases have

she becomes the target of this discrimination,<sup>53</sup> which can be detrimental to her career.

In a 2003 United States Court of Appeals case, a woman, considered a “top performer” at work, was discriminated against by her female supervisor because of her recent pregnancy.<sup>54</sup> Shireen Walsh was taunted at work, criticized for absence due to family responsibilities, and told to “make up every minute” that she spent away from the office for her sick child.<sup>55</sup> At one point, Walsh’s supervisor even threw a phone book on her desk and demanded that she find a new pediatrician.<sup>56</sup> Walsh’s child was deemed “the sickling,” and when Walsh had to miss work for him, her supervisor would post signs on her cubicle saying, “Out—Sick Child.”<sup>57</sup> One day, Walsh fainted at work due to stress and was sent to the hospital.<sup>58</sup> The following day, her supervisor said to her, “[Y]ou better not be pregnant again.”<sup>59</sup> Walsh left her job and sued National Computer Systems asserting, among other things, Title VII violations.<sup>60</sup> She received a judgment of over \$430,000 against her employer for the discrimination she endured while working there.<sup>61</sup>

### 3. *Disparate Treatment and Gender Stereotyping*

If a woman attempts to prove herself as a competent employee by taking an aggressive approach to work, she puts herself at risk of

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been filed, most in the last 10 years, and at least 67 of those cases have resulted in a verdict or settlement in excess of \$100,000.”).

53. See Joan C. Williams, *Beyond the Glass Ceiling: The Maternal Wall as a Barrier to Gender Equality*, 26 T. JEFFERSON L. REV. 1, 5 (2004) (“[M]others encounter statements that track documented comments of gender stereotyping, which employers evidently consider no more than ‘hard truths’ or ‘tough love’ rather than gender bias. The result is hostile prescriptive stereotyping, in the forms of statements that prescribe traditionalist roles for both men and women.”).

54. See *Walsh v. Nat’l Computer Sys., Inc.*, 332 F.3d 1150, 1154-55 (8th Cir. 2003).

55. *Id.* at 1155.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 1156.

61. *Id.*

criticism and loss of promotion, just as Ann Hopkins did.<sup>62</sup> Hopkins was a successful female attorney who was on the partner track.<sup>63</sup> Although she had made a multi-million dollar deal for her firm, male partners looked past her success and called her aggressive work style “macho.”<sup>64</sup> They further criticized her as “overcompensat[ing] for being a woman.”<sup>65</sup> They advised her to walk, talk, and dress more femininely.<sup>66</sup> Hopkin’s experiences are reflected in reports from female associates at law firms who feel that, in the legal workplace, assertive women are often shunned and quiet women are labeled as lacking in intellect.<sup>67</sup> Clearly, female attorneys must be careful in how they portray themselves at work; otherwise, they place themselves at risk of negative perceptions which could be debilitating to their careers.

#### 4. Hostile Work Environment

Another form of workplace discrimination that women must endure is having to cope with a hostile work environment. A hostile work environment has an objective and a subjective standard; both the specific victim and an objectively reasonable person must perceive the environment as hostile and abusive.<sup>68</sup> The Supreme Court permitted Kimberly Ellerth, an Illinois saleswoman, to pursue her Title VII hostile work environment claim against her former employer after her male supervisor made sexual advances and threatened acts of retaliation if she did not comply with his sexual requests.<sup>69</sup> In one

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62. See *Hopkins v. Price Waterhouse*, 920 F.2d 967, 970 (D.C. Cir. 1990).

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 970-71.

67. NOSSEL & WESTFALL, *supra* note 19, at xx; RHODE, *supra* note 42, at 17 (discussing how female lawyers are subjected to a double standard between appearing too meek and not appearing aggressive enough and how, unlike in men, assertiveness in women is considered abrasive).

68. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993) (“Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment . . . is beyond Title VII’s purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, . . . there is no Title VII violation.”).

69. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 747-49, 766 (1998).

instance, Ellerth's supervisor made lewd remarks about Ellerth's breasts, and when Ellerth did not welcome his comments, "he told her to 'loosen up' and warned, 'you know, Kim, I could make your life very hard or very easy at Burlington.'"<sup>70</sup> Later, when Ellerth was promoted, her supervisor told her that she would be working with men who "certainly like women with pretty butts [and] legs."<sup>71</sup> Further, when Ellerth needed his approval for a project, he told her, "I don't have time for you right now, Kim . . .—unless you want to tell me what you're wearing."<sup>72</sup> The Supreme Court affirmed the Seventh Circuit's reversal of summary judgment against Ellerth, holding that Ellerth could allege a hostile work environment claim even though she had not alleged that her supervisor subjected her to any tangible adverse employment action.<sup>73</sup>

### C. Reporting Discrimination

Reporting discrimination is a difficult task that many women feel is not worth the burden or cost.<sup>74</sup> The above cases are examples of discrimination that was successfully reported by female employees, but they do not represent the norm. Often, the mental, emotional, and financial cost of reporting discrimination, the risks of damage to reputation, the loss of job stability, or the stress of litigation will outweigh the offensiveness of the conduct.<sup>75</sup> This fear of damage to

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70. *Id.* at 748.

71. *Id.*

72. *Id.*

73. *Id.* at 766.

74. Cheryl R. Kaiser & Brenda Major, *A Social Psychological Perspective on Perceiving and Reporting Discrimination*, 31 *LAW & SOC. INQUIRY* 801, 818 (2006) (discussing that the reluctance to report discrimination arises from the fear that the costs of doing so may be too severe); *see also* Quinn, *supra* note 44, at 1154 (stating that sexual harassment is "expensive to employers, and costly and painful to victims").

75. *See* Kaiser & Major, *supra* note 74, at 818; *see also* Quinn, *supra* note 44, at 1154 ("[T]he most common way victims deal with harassment is not to complain, but rather, to avoid or dismiss it. These passive strategies run from simply ignoring the harassment to transferring or quitting one's job. Faced with harassing behavior, the least common tactic appears to be direct confrontation."); *see also* Enclosure 10: Letter from Kate Yavenditti, Gender Bias Committee of the Lawyers Club of San Diego, to State Bar Staff, Office of Professional Competence, Planning and



reputation and risk of hardship, which one commentator deems “professional suicide,” explains why so many women in the legal practice fail to take action against discriminatory conduct.<sup>76</sup>

This nation’s first discrimination case against a law firm or professional partnership is exemplary of the difficult choice to report discrimination. In a 1990 federal district court case, a female associate, who thought she was on the partnership track, sued her law firm for discrimination under Title VII.<sup>77</sup> When Nancy Ezold was first hired, she was told that because she was a woman, not the product of an Ivy League law school, or a member of Law Review, she would have a difficult time at the firm.<sup>78</sup> At trial, she successfully proved discrimination, presenting evidence of negative partner evaluations for male associates who were promoted over her.<sup>79</sup> However, the Third Circuit Court of Appeals reversed, holding that there was not enough evidence to show that Ezold was denied partnership on account of gender discrimination because these same male associates were also given positive evaluations and Ezold had also received negative evaluations.<sup>80</sup> Regardless of whether the Third Circuit’s holding was

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Development, State Bar of California (Dec. 8, 1992) [hereinafter Letter from Kate Yavenditti], in MEMO TO REQUEST APPROVAL OF 2-400, *supra* note 13 (“[I]t is well known that most victims of discrimination do not file complaints or lawsuits. This is true for economic, personal and other reasons.”).

76. See RHODE, *supra* note 42, at 19-20. Rhode elaborates:

[L]itigation of this type is extraordinarily expensive for all concerned. Given the difficulties of prevailing under current standards, few professionals who believe that they are targets of discrimination will be willing to incur the financial and psychological costs of attempting to prove it. Even those who manage to win in court may lose in life. They risk being branded as troublemakers and having all of their personal deficiencies aired; “[P]rofessional [sic] suicide is a common description.”

*Id.*

77. *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 751 F. Supp. 1175, 1176 (E.D. Pa. 1990), *rev’d*, 983 F.2d 509 (3d Cir. 1993), *and cert. denied*, 510 U.S. 826 (1993).

78. *Id.* at 1177.

79. *Id.* at 1184, 1189. For example, one male associate was recommended for partnership over Ezold even though an evaluation of him stated, “[I]f you dig under the surface you find a lack of professionalism, both in terms of legal analysis and research. . . . I believe his intellectual laziness will someday embarrass us.” *Id.* at 1184-85.

80. *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 983 F.2d 509, 512-13 (3d

correct, this case exemplifies the turbulent path of reporting workplace discrimination and highlights the financial and psychological risks a workplace discrimination litigant may endure.<sup>81</sup>

#### D. Current Antidiscrimination Law

As it stands, current antidiscrimination law is ineffective in dealing with the problems discussed in the previous sections because it does not directly address the specific issues that women face in the workplace.<sup>82</sup> However, present laws<sup>83</sup> can be built upon to provide a foundation for legislation that can have a true impact on discrimination and gender diversity.

Title VII of the Civil Rights Act of 1964 (Title VII) is the main federal employment law addressing discrimination against women.<sup>84</sup> Enacted in 1965, Title VII prohibits employers from discriminating in any aspect of the employment relationship on the basis of race, color, religion, sex, or national origin.<sup>85</sup> Federal antidiscrimination law does not preempt similar state or local statutes.<sup>86</sup> Therefore, state laws may

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Cir. 1993). Examples of negative comments in Ezold's evaluations include: "I think that due to the nature of our practice Nancy's future here is limited"; and, "I think Nancy tries hard and can handle relatively straight-forward matters with a degree of maturity and judgment, but when she gets into more complicated areas she lacks real analytical skill and just does what she is told in a mechanical way. She is not up to our minimal . . . standards." *Id.* at 516-17.

81. See RHODE, *supra* note 42, at 19.

82. See Alexandra Kalev & Frank Dobbin, *Enforcement of Civil Rights Law in Private Workplaces: The Effects of Compliance Reviews and Lawsuits Over Time*, 31 LAW & SOC. INQUIRY 855, 855 (2006) (suggesting that federal antidiscrimination law has not recently been effective or "improved the employment status of women"); see also RHODE, *supra* note 42, at 17 ("[C]urrent legal doctrine and procedures are a highly imperfect means of addressing workplace bias.").

83. See generally Enclosure 6: Memorandum from Nelson Dong and Monica Mucchetti to Commission to Revise the Rules of Professional Conduct (June 7, 1991), in MEMO TO REQUEST APPROVAL OF 2-400, *supra* note 13 (providing an overview of federal and state laws pertaining to employment discrimination).

84. See 42 U.S.C. § 2000e-2 (2000).

85. *Id.*

86. See 42 U.S.C. § 2000e-7 (2000); see, e.g., *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 280 (1987) (holding that Title VII did not preempt a California equal employment statute because it was "neither inconsistent with, nor unlawful under, Title VII").

address other classes of discrimination that are not discussed on a federal level, which may expand the scope of protection to additional classes.<sup>87</sup>

California has many state discrimination laws, but there are few that frequently arise with respect to the practice of law. Government Code section 12940 is California's main antidiscrimination law.<sup>88</sup> Under the Fair Employment and Housing Act (FEHA),<sup>89</sup> this statute declares that it is unlawful to refuse to hire or employ a person due to his or her sex.<sup>90</sup> Additionally, the Unruh Civil Rights Act protects the civil rights of persons in business establishments and prohibits discrimination by all business establishments.<sup>91</sup> Under these statutes, California should be able to treat law firms just like any other service-providing business with respect to discriminatory acts.<sup>92</sup>

### *E. Ethics and Diversity*

Both the ABA and the State Bar have plans to further diversify the legal profession. Part of the ABA's diversity plan is to "foster an atmosphere of inclusion *to assist in retaining . . . women lawyers.*"<sup>93</sup> Similarly, one of the State Bar's long-range goals is to increase diversity of bar membership.<sup>94</sup>

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87. *See, e.g.*, Cal. Fed. Sav. & Loan Ass'n, 479 U.S. at 280 (expanding the scope of protection for pregnant women under a California statute).

88. *See* CAL. GOV'T CODE § 12940 (West 2005) (prohibiting employment and housing discrimination).

89. CAL. GOV'T CODE § 12900 (West 2005).

90. CAL. GOV'T CODE § 12940(a) (West 2005).

91. CAL. CIV. CODE § 51(a)-(b) (West 2005).

92. *See* Memorandum from Ellen Peck, Ed George, & Raul Martinez to Comm'n for the Revision of the Rules of Prof'l Conduct (Nov. 1, 2004) [hereinafter Peck Memorandum], *in* Comm'n for the Revision of the Rules of Prof'l Conduct, Commission Meeting Regarding Rule 2-400: Open Session Item III.F., at 10 (Nov. 19, 2004) [hereinafter Comm'n Mtg. 11/04], *available at* <http://calbar.ca.gov/calbar/pdfs/ethics/CRRPC/IIIB.pdf> (suggesting that lawyers are included within the term "all business establishments" for purposes of the Unruh Civil Rights Act).

93. ABA, SECTION OF LABOR & EMPLOYMENT LAW, DIVERSITY PLAN (2007), *available at* <http://www.abanet.org/labor/eolpcomm/divplan.shtml> [hereinafter ABA DIVERSITY PLAN] (emphasis added).

94. STRATEGIC PLAN, *supra* note 4, at 18.

Currently, the 2006 U.S. Census Bureau's figures reveal that California is one of the most diverse states in the nation.<sup>95</sup> One Census report shows that women make up more than half of the population, both in California and in the United States overall.<sup>96</sup> Yet, women only comprise 32% of the nation's lawyers,<sup>97</sup> and 34% of the California State Bar's membership.<sup>98</sup> These statistics, which reflect the disproportionality between the percentage of women in our population and the percentage of women who practice law, do not reflect the ABA's and the State Bar's diversity aspirations. Regardless of this sobering fact, both organizations realize the value of a diverse legal profession.<sup>99</sup> The State Bar recognizes that "as the population of California continues to become more diverse, public trust and confidence in the justice system is often tied to whether members of the profession reflect the diversity of the people served."<sup>100</sup> The ABA also acknowledges that member diversity brings a variety of valuable perspectives and the organization plans to do more to recruit newer lawyers of both genders.<sup>101</sup>

Law firms also benefit from employee diversity.<sup>102</sup> Because women have different types of social and interpersonal styles than men, they can be more flexible problem solvers.<sup>103</sup> Also, women may "enhance productivity and profitability by generating new ideas or by

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95. See U.S. CENSUS BUREAU, R0201: PERCENT OF THE TOTAL POPULATION WHO ARE WHITE ALONE: 2006, [http://factfinder.census.gov/servlet/GRTTable?\\_bm=y&\\_box\\_head\\_nbr=R0201&-ds\\_name=ACS\\_2006\\_EST\\_G00\\_&-\\_lang=en&-format=US-30&-CONTEXT=grt](http://factfinder.census.gov/servlet/GRTTable?_bm=y&_box_head_nbr=R0201&-ds_name=ACS_2006_EST_G00_&-_lang=en&-format=US-30&-CONTEXT=grt) (last visited Oct. 24, 2007).

96. U.S. CENSUS BUREAU, STATE & COUNTY QUICKFACTS: CALIFORNIA, <http://quickfacts.census.gov/qfd/states/06000.html> (last visited Nov. 18, 2007).

97. U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, HOUSEHOLD DATA ANNUAL AVERAGES: EMPLOYED PERSONS BY DETAILED OCCUPATION, SEX, RACE, AND HISPANIC OR LATINO ETHNICITY (2006), available at <http://www.bls.gov/cps/cpsaat11.pdf>.

98. STATE BAR OF CAL., FINAL REPORT OF RESULTS: MEMBER SERVICES SURVEY 12 (2006), available at [http://calbar.ca.gov/calbar/pdfs/reports/2006\\_State-Bar-Survey.pdf](http://calbar.ca.gov/calbar/pdfs/reports/2006_State-Bar-Survey.pdf).

99. See *supra* notes 93-94 and accompanying text.

100. STRATEGIC PLAN, *supra* note 4, at 6.

101. See ABA MISSION, *supra* note 3; ABA DIVERSITY PLAN, *supra* note 93.

102. See Nicholson, *supra* note 20, at 638-43 (discussing some of the benefits of a gender-diverse workforce).

103. *Id.* at 639-40.

causing the corporation to be more responsive to diverse markets.”<sup>104</sup> However, when women are driven out of law firms, the firms can suffer financially. The costs to a law firm in recruiting and training female associates, added to the financial losses a firm suffers when a female associate leaves (due to the firm’s losing the knowledge, experience, and work product of that associate) are enormous.<sup>105</sup> A recent study found that every time an associate leaves her law firm, the average minimum loss is between \$200,000 and \$500,000.<sup>106</sup> Law firms cannot remedy the situation by hiring only men because of the simple fact that there are not enough men to do all of the work.<sup>107</sup> This rings particularly true for the future, since women already comprise almost half of all graduating law students.<sup>108</sup> Although most law firms acknowledge there is a problem with the lack of diversity in their practices, they also admit there is little they feel they can do about it internally.<sup>109</sup>

Ethics are “accepted rules of conduct” that deal with individuals’ “principles of honor and morality.”<sup>110</sup> Some commentators feel that in order to effectively address and curb discrimination in the legal profession, professional ethics codes should be utilized rather than litigation.<sup>111</sup> They believe that “[l]egal ethics could be used to

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104. *Id.* at 643.

105. Williams, *supra* note 29, at 2227.

106. JOAN WILLIAMS & CYNTHIA THOMAS CALVERT, *BALANCED HOURS: EFFECTIVE PART-TIME POLICIES FOR WASHINGTON LAW FIRMS: FINAL REPORT 7* (2001), available at <http://www.pardc.org/Publications/BalancedHours1st.pdf>; Williams, *supra* note 29, at 2227.

107. See Williams, *supra* note 29, at 2227.

108. See ABA ENROLLMENT AND DEGREES, *supra* note 10.

109. John M. Conley, *Tales of Diversity: Lawyers’ Narratives of Racial Equity in Private Firms*, 31 *LAW & SOC. INQUIRY* 831, 837 (2006) (discussing how most attorneys in law firms “claim[] sensitivity to [diversity] issues and a concern for the diversification of their organizations,” but also admit that they are unsatisfied with “how effective they have been in putting their concern into practice”).

110. THE NEW AMERICAN WEBSTER HANDY COLLEGE DICTIONARY 241 (Philip D. Morehead ed., 3d ed. 1995).

111. Akshat Tewary, *Legal Ethics as a Means to Address the Problem of Elite Law Firm Non-Diversity*, 12 *ASIAN L.J.* 1, 28 (2005); see Kittie D. Warshawsky, *The Judicial Canons: A First Step in Addressing Gender Bias in the Courtroom*, 7 *GEO. J. LEGAL ETHICS* 1047, 1050 (1994) (discussing how the ABA Model Rules of Professional Conduct address gender discrimination).

accomplish internal[] and organic[]” integration in law firms.<sup>112</sup> Others feel that ethical rules do not have the power to address discrimination issues.<sup>113</sup> Despite this debate, it appears both the ABA and the State Bar agree, through their adoption of the Model Rules and Rules of Professional Conduct respectively, that implementing ethical rules of professional responsibility is currently the best way to address moral conduct in the legal profession.

### III. AN IMPERFECT STEP: CALIFORNIA’S INEFFECTIVE ANTIDISCRIMINATION RULE

#### A. *Background of CRPC 2-400*

CRPC 2-400 is the California legal ethics rule intended to address discrimination and the elimination of bias in law practices.<sup>114</sup> The flaw of this rule is that it does not allow for immediate disciplinary investigations for *all* discriminatory conduct by attorneys. Because CRPC 2-400 does not effectively help to eliminate discrimination against women, this rule does not help the State Bar of California or the ABA attain their goal of diversifying membership. Because of this shortcoming, the context behind the debate on how to improve CRPC 2-400 can be better understood.

#### 1. *The State Bar of California*

The State Bar of California was founded in 1927 and has grown in membership to over 200,000 members, making it “the largest unified bar in the United States.”<sup>115</sup> This organization acknowledges the desirability of attracting a “more diverse membership population to

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112. Tewary, *supra* note 111, at 28 (discussing how legal ethics could be used to diversify law firms).

113. See Kandis Koustenis, *Sexual Trial Tactics: The Ability of the Model Code and Model Rules to Discipline Discriminatory Conflicts Between Adversaries*, 4 GEO. J. LEGAL ETHICS 153, 159 (1991) (discussing the failure of the ABA Model Rules of Professional Conduct to address discrimination).

114. CAL. RULES OF PROF’L CONDUCT R. 2-400(B) (1994).

115. STATE BAR OF CAL., THE STATE BAR OF CALIFORNIA: WHAT DOES IT DO? HOW DOES IT WORK? 1 (2006) [hereinafter WHAT DOES IT DO?]; STRATEGIC PLAN, *supra* note 4, at 17.

serve the needs of the wider community.”<sup>116</sup> Binding on all members of the State Bar, the California Rules of Professional Conduct were adopted “to protect the public and to promote respect and confidence in the legal profession.”<sup>117</sup> These rules were not intended to be new civil causes of action; instead, they allow for State Bar disciplinary investigations of its members.<sup>118</sup> These disciplinary measures can be applied to address discrimination in a law practice. If there is a possible violation of a Rule of Professional Conduct, it is forwarded for disciplinary investigation.<sup>119</sup> If a charge has provable misconduct, “the Office of Trials files formal charges and assumes responsibility for prosecuting [the offending attorney] in State Bar Court.”<sup>120</sup> Of all the state bars in the nation, only California employs independent professional judges to rule on attorney discipline cases.<sup>121</sup> The State Bar Court has the ability to recommend that the California Supreme Court suspend or disbar attorneys who commit professional misconduct.<sup>122</sup>

## 2. History of CRPC 2-400

In 1986, the Committee on Women in the Law introduced a proposal to the Board Committee on Professional Standards to add a Rule of Professional Conduct which would prohibit discriminatory acts by attorneys in the handling of any legal proceeding.<sup>123</sup> Early proponents of this rule urged the State Bar to “act on its commitment

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116. STRATEGIC PLAN, *supra* note 4, at 2.

117. CAL. RULES OF PROF’L CONDUCT R. 1-100(A) (1992).

118. *Id.*; see CAL. RULES OF PROF’L CONDUCT R. 2-400(C) (1994).

119. WHAT DOES IT DO?, *supra* note 115, at 3.

120. *Id.*

121. *Id.*

122. *Id.*

123. See ENCLOSURE 4: RECOMMENDATION OF THE JUDICIAL COUNCIL OF CALIFORNIA SUBCOMMITTEE ON GENDER BIAS IN THE COURTS REGARDING NEW CALIFORNIA RULE OF PROFESSIONAL ON EMPLOYMENT DISCRIMINATION, in MEMO TO REQUEST APPROVAL OF 2-400, *supra* note 13 (recommending that the State Bar and all applicable committees “vigorously support and take immediate steps to adopt” an anti-discrimination rule); ENCLOSURE 6: REPORT AND RECOMMENDATION, *supra* note 13, at 1 (stating that, in July 1986, the Committee on Women in the Law proposed a rule that would later become CRPC 2-400).

to provide minorities and women with full and meaningful employment opportunities” by passing an antidiscrimination rule of professional conduct.<sup>124</sup> For the next eight years, the rule was discussed through public comment, denied, re-drafted, and re-submitted.<sup>125</sup> Finally, in 1993, the rule was adopted and took effect January 1, 1994.<sup>126</sup>

Unfortunately, to date, there have been no published reports of any investigation or disciplinary action by the State Bar for gender discrimination in the legal workplace.<sup>127</sup> Given that many women in law firms report experiencing some form of discrimination during employment, the absence of such reports indicates that gender discrimination in the legal workplace is going unchecked.

### 3. Analysis of CRPC 2-400

CRPC 2-400 is a unique antidiscrimination rule when compared to the ABA Model Rules because the Model Rules do not include any rule specifically addressing workplace discrimination.<sup>128</sup> Only six states, including California, have enacted a disciplinary rule which prohibits discriminatory conduct by attorneys.<sup>129</sup> California’s rule,

124. See RAYMOND C. MARSHALL, 1991 STATE BAR OF CALIFORNIA CONFERENCE OF DELEGATES’ RESOLUTION (1991), in ENCLOSURE 3, *supra* note 15.

125. See ENCLOSURE 6: REPORT AND RECOMMENDATION, *supra* note 13, at 1-4. See generally MEMO TO REQUEST APPROVAL OF 2-400, *supra* note 13 (providing a brief history of the formulation and development of CRPC 2-400).

126. Enclosure 2: Resolution Adopted by the State Bar Board of Governors at Its March 6, 1993 Meeting (Mar. 6, 1993), in MEMO TO REQUEST APPROVAL OF 2-400, *supra* note 13; Peck Memorandum, in Comm’n Mtg. 11/04, *supra* note 92, at 8.

127. See Peck Memorandum, in Comm’n Mtg. 11/04, *supra* note 92, at 8 (“In the ten years of the rule’s history, there have been no published decisions disciplining any lawyer for a violation [of 2-400]. [There may have been investigations and/or non-published or published dispositions on which more needs to be developed.]”). Further, from 2005 to present, there has been only one instance of public discipline involving a violation of CRPC 2-400; however, that case involved a fraudulent transfer of assets and not gender discrimination. See *In re Merrick Scott Rayle*, No. 07-J-10237 (filed Mar. 29, 2007), available at <http://members.calbar.ca.gov/courtDocs/07-J-10237.pdf>.

128. Although ABA Model Rule 8.4(d) broadly addresses “conduct that is prejudicial to the administration of justice,” it does not specifically address workplace discrimination. See MODEL RULES OF PROF’L CONDUCT R. 8.4 (1983).

129. See Comm’n Mtg. 11/04, *supra* note 92, at 5-7 (comparing CRPC 2-400



however, is distinctive in two ways. First, CRPC 2-400 is the only rule of professional conduct that specifically focuses on disciplinary action for members of the bar who discriminate against others in *California's legal workplaces*.<sup>130</sup> Second, where violations of other ethical rules trigger immediate eligibility for State Bar disciplinary investigation, CRPC 2-400 is the *only* rule that requires an affirmative legal finding of discrimination before investigation can begin.<sup>131</sup>

Key definitions are provided in section A of CRPC 2-400,<sup>132</sup> while section B focuses on discrimination in the management and operation of a law practice.<sup>133</sup> Through section B, a law firm can be disciplined if it knowingly permits unlawful discrimination against a woman with respect to promotion, discharge, or conditions of employment.<sup>134</sup> Further, the fact section B prohibits members from "otherwise determining the conditions of [a women's] employment"<sup>135</sup> suggests the rule was intended to have a broad

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with the ABA Model Rules and other state rules that discuss discrimination in the context of attorney misconduct, including Illinois Rule 8.4, Florida Rule 4-8.4, North Dakota Rule 8.4, Rhode Island Rule 8.4, and Nebraska DR 1-102). See generally ENCLOSURE F: BIAS/DISCRIMINATION RULES OPERATIVE IN OTHER STATES (1992) [hereinafter ENCLOSURE 7F], in ENCLOSURE 7, *supra* note 40 (providing an overview of the various state rules addressing discriminatory conduct by attorneys).

130. See CAL. RULES OF PROF'L CONDUCT R. 2-400(B) (1994); see also Comm'n Mtg. 11/04, *supra* note 92, at 5-7; ENCLOSURE 7F, *supra* note 129.

131. Letter from Kate Yavenditti, *supra* note 75 ("Why should the State Bar require an adjudication of discrimination before it can discipline its members based on its own independent finding? This is not required for any other kind of disciplinary procedure."). As an illustration, Yavenditti notes that, "for a State Bar member to be disciplined because of commingling funds, no civil or criminal adjudication is required." *Id.*

132. CAL. RULES OF PROF'L CONDUCT R. 2-400(A) (1994). A "law practice" includes sole practices, law partnerships, law corporations, corporate and governmental legal departments, and other entities which employ members to practice law." *Id.* § 2-400(A)(1). Additionally, to "knowingly permit" is to "fail[] to advocate corrective action where a member knows of a discriminatory policy or practice which results in unlawful discrimination." *Id.* § 2-400(A)(2). Finally, "unlawfully" and "unlawful" are "determined by reference to applicable state or federal statutes or decisions making unlawful discrimination in employment and in offering goods and services to the public." *Id.* § 2-400(A)(3).

133. See *id.* § 2-400(B).

134. See *id.*

135. *Id.* § 2-400(B)(1).

application and reach various forms of discrimination, including sexual harassment, family responsibility, and pregnancy bias. These are forms of discrimination that may not fit neatly in the categorical box of “hiring, promoting, or discharging.”<sup>136</sup> Also, “of any person”<sup>137</sup> suggests that the rule can apply to attorneys as well as to any other law firm employee, including secretaries, paralegals, and administrators.

The primary focus of this Comment is on subsection C of CRPC 2-400,<sup>138</sup> which is intended to prevent unwarranted claims of discrimination, but instead creates a very difficult burden for women to meet. The phrase “unless and until a tribunal of competent jurisdiction” refers to the fact that either an administrative or judicial tribunal must “first adjudicate” and have “found that unlawful [discriminatory] conduct occurred” before investigation can begin.<sup>139</sup> Thus, if a woman wants the State Bar to investigate her law firm’s discriminatory acts, she must first initiate and successfully litigate a legal action wherein a finding of unlawful discriminatory conduct is made. The rule further states that, “[i]n order for discipline to be imposed . . . the finding of unlawfulness must be upheld and final after appeal.”<sup>140</sup> This implies that if conduct is found not to be discriminatory, the finding is reversed on appeal, or settlement occurs, then even if the act constituted blatant discrimination, the law firm can escape investigation for purposes of State Bar discipline. In other words, under subsection C, if the conduct is not found unlawful, then there is nothing the State Bar can do for a woman who has suffered discrimination while working in a law practice. In short, the effect of subsection C is to make CRPC 2-400 ineffective.<sup>141</sup>

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136. *Id.*

137. *Id.*

138. Subsection C states, in relevant part:

No disciplinary investigation or proceeding may be initiated by the State Bar against a member under this rule unless and until a tribunal of competent jurisdiction, other than a disciplinary tribunal, shall have first adjudicated a complaint of alleged discrimination and found that unlawful conduct occurred.

*Id.* § 2-400(C).

139. *Id.*

140. *Id.*

141. Letter from Kate Yavenditti, *supra* note 75 (“We feel that the requirements set out in Section (C) are so onerous that the rule is worthless.”).

CRPC 2-400 is followed by a discussion section that essentially reiterates the rule, but includes a *subtle* fall-back provision.<sup>142</sup> In the event that the conduct is not found unlawful, a woman can use California Business and Professions Code (CBPC) sections 6068 and 6106 to begin immediate disciplinary investigations for *other* attorney misconduct that is in addition to the discriminatory conduct, but not for the discriminatory conduct itself.<sup>143</sup> CBPC section 6068(a) applies when an attorney violates the Constitution, the laws of the United States, or the laws of California, while CBPC section 6106 addresses attorney misconduct in general.<sup>144</sup>

### *B. The Debate to Eliminate 2-400(C)*

This debate addresses whether subsection C of CRPC 2-400 should be eliminated from the rule altogether, or whether the rule should be preserved in its original form. Opponents of change, such as individual attorneys and some law firms, want to keep the rule in its original form to protect against unwarranted discrimination claims.<sup>145</sup>

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142. See CAL. RULES OF PROF'L CONDUCT R. 2-400 (1994).

143. *Id.*; see also Telephone Interview with Nancy Kendrick, Office of Trial Counsel, in Sacramento, Cal. (Feb. 10, 2007) [hereinafter Kendrick Interview] (discussing how state bar agents advise complainants to use sections 6106 and 6068 as a vehicle for alleging other improper acts if there is no legal finding of discrimination).

144. California Business and Professions Code section 6106 states:

The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension. If the act constitutes a felony or misdemeanor, conviction thereof in a criminal proceeding is not a condition precedent to disbarment or suspension from practice therefore.

CAL. BUS. & PROF. CODE § 6106 (2002). Section 6068(a) of the code states that “[i]t is the duty of an attorney to . . . support the Constitution and laws of the United States and of this state.” *Id.* § 6068(a) (2002).

145. See, e.g., Comm'n Mtg. 11/04, *supra* 92, at 16 (stating that Ernestine Forrest, Chair of the Diversity in Profession Committee believes that CRPC 2-400(C) should be maintained); cf. Enclosure 10: Letter from David R. Fertig, Attorney, to Michael Simon, Office of Professional Competence, Planning and Development, State Bar of California (Dec. 7, 1992) [hereinafter Letter from David Fertig], in MEMO TO REQUEST APPROVAL OF 2-400, *supra* note 13 (expressing his opinion that the proposed CRPC 2-400 was “at best, a misdirected piece of self-

Proponents for change, such as women's and gay rights groups, want female victims of discrimination in a law practice to have an opportunity to report acts to the State Bar for investigation without the obstacle of a prior finding of discriminatory conduct by a tribunal.<sup>146</sup>

### *1. Lack of Special Expertise*

Opponents of eliminating CRPC 2-400(C) argue that, while the Office of Chief Trial Counsel (OCTC)<sup>147</sup> is capable of investigating certain cases in other areas of the law, it lacks the special expertise in discrimination law to effectively investigate unlawful discriminatory conduct without the assistance of prior findings.<sup>148</sup> Therefore, if the OCTC is already burdened with current levels of investigation and the costs associated with them, further resources to acquire the needed expertise are unlikely to be extended.<sup>149</sup>

However, it must be noted that the OCTC investigates various types of cases involving conduct that has both criminal and civil implications.<sup>150</sup> Therefore, an argument can be made that if the OCTC

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righteous, patronizing and redundant overlegislation on the part of lawyers with too much time on their hands").

146. See Enclosure 10: Letter from Nancy Smith and Eric Webber, Co-Presidents of Lawyers for Human Rights: The Lesbian and Gay Bar Association of Los Angeles, to Michael Simon, Office of Professional Competence, Planning and Development, State Bar of California (Oct. 12, 1992) [hereinafter Letter from Nancy Smith and Eric Weber], in MEMO TO REQUEST APPROVAL OF 2-400, *supra* note 13 (discussing how their organization questions subsection C and considers it an "additional obstacle[] to potential complainants"); Letter from Kate Yavenditti, *supra* note 75 (stating that subsection C renders 2-400 "almost worthless"); Comm'n Mtg. 11/04, *supra* note 92, at 17 (stating Jerry Sapiro's opinion that subsection C should be deleted because "[i]t is an embarrassment").

147. The Office of the Chief Trial Counsel is a department of the State Bar that reviews charges of misconduct and investigates complaints against attorneys. WHAT DOES IT DO?, *supra* note 115, at 3.

148. Peck Memorandum, in Comm'n Mtg. 11/04, *supra* note 92, at 12.

149. *Id.*; see also Letter from Robert J. Jackson, Attorney, to Frank A. Iwana, Governor, State Bar of California (Aug. 17, 1992) [hereinafter Letter from Robert Jackson], in MEMO TO REQUEST APPROVAL OF 2-400, *supra* note 13 (expressing his concern over the expenses associated with the training of staff, investigators, prosecutors, and judges to handle complex employment discrimination cases and questioning who will bear these expenses).

150. See, e.g., Letter from Kate Yavenditti, *supra* note 75 (stating that no civil

is equipped to handle cases in other specialized areas of the law, it is able to handle gender discrimination cases competently and without the requisite prior adjudication.<sup>151</sup> Further, if CRPC 2-400(C) were amended to allow for the investigation of misconduct that is indisputably discriminatory on its face, then specialized expertise in discrimination law would be unnecessary.

## 2. *Unwanted Increase in Unwarranted Complaints*

There is fear that if State Bar disciplinary investigations are opened to cases that do not have an official finding of discriminatory conduct, complaints will significantly increase and the costs of investigation will diminish financial resources.<sup>152</sup> Because many of these cases are easy to allege but difficult to prove, an investigation that results in no finding of discrimination could be a waste of the state's resources.<sup>153</sup>

However, the fear that complaints will increase is unwarranted. Since 1994, when CRPC 2-400 became effective, there have been no published decisions disciplining a lawyer for gender discrimination.<sup>154</sup> The reason no decisions exist is that women are faced with the insurmountable obstacle that CRPC 2-400(C) presents, and they may not feel comfortable or confident in going forward with the expensive and stressful litigation that the rule requires.<sup>155</sup> But, if a woman knew

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or criminal adjudication is required before the State Bar can begin disciplinary procedure against an attorney accused of commingling funds).

151. *See id.*

152. Peck Memorandum, in Comm'n Mtg. 11/04, *supra* note 92, at 12; *see also* Letter from Kate Yavenditti, *supra* note 75 (stating that the Gender Bias Committee of the Lawyers Club of San Diego, an organization that seeks to advance women in law, could "understand that the State Bar may be concerned with a 'flood of complaints' concerning unlawful discrimination or harassment in a law practice").

153. *See* Comm'n for the Revision of the Rules of Prof'l Conduct, Commission Meeting Regarding Rule 2-400: Open Session Item III.B. (June 10, 2005) [hereinafter Comm'n Mtg. 6/05], *available at* <http://calbar.ca.gov/calbar/pdfs/ethics/CRRPC/IIIB.pdf>.

154. *See supra* note 127 and accompanying text.

155. *See* RHODE, *supra* note 42, at 19-20 (stating that "few professionals who believe that they are targets of discrimination will be willing to incur the financial and psychological costs of attempting to prove it"); *see also* Quinn, *supra* note 44, at 1154 (stating that victims rarely complain about sexual harassment; rather, they

that the specific type of discrimination she encountered was considered blatant under the rule, and was therefore worthy of disciplinary investigation, then there would be an increase in warranted complaints. For the sake of its goal of enhancing diversity in the legal workplace, the State should welcome, not fear, an increase in warranted discriminatory complaints.

### 3. *Expectations for Disciplinary Investigation Unfulfilled*

Commentators also argue that if the rule were changed to not require prior adjudication, this would create expectations of disciplinary action that may never be fulfilled, especially because of the difficulty in investigating these cases within a reasonable time frame.<sup>156</sup> They fear unfulfilled expectations for disciplinary investigation would result in a “corresponding lack of public trust and confidence in the disciplinary system.”<sup>157</sup>

But, if the State Bar refrains from investigating cases that involve undisputed discriminatory conduct simply because it fears being overburdened by weaker cases of discrimination, then this is a signal to the public that the State Bar is neglecting its responsibilities to the public and to the legal profession.<sup>158</sup> It is *this* neglect that will cause a loss of confidence in the disciplinary system as a whole. Further, if the rule limited the investigations to specific forms of blatant discrimination, then the OCTC would not be overburdened with numerous cases of ambiguous discrimination. Thus, they would be able to focus their resources on valid cases and decrease the likelihood of unfulfilled expectations.

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dismiss or avoid it).

156. Comm’n Mtg. 6/05, *supra* note 153 (“There can be levels of subtlety in these cases that may make them difficult to investigate in the time frame OCTC normally investigate cases . . .”).

157. Peck Memorandum, *in* Comm’n Mtg. 11/04, *supra* note 92, at 12-13.

158. Letter from Kate Yavenditti, *supra* note 75 (arguing that the State Bar’s concern about the “flood of complaints” that could ensue if CRPC 2-400(C) were amended or eliminated is false and “that this concern should not be given greater priority than that due the victims of unlawful discrimination or harassment”).

#### *4. No Significant Complaints Regarding Civil and Administrative Remedies*

Lastly, opponents believe that there is no need to change CRPC 2-400(C) because there have been no significant complaints regarding the civil and administrative remedies available to the victims of discriminatory conduct in the legal workplace.<sup>159</sup> However, the problem with this argument is it overlooks the realities women working in a law practice face. A woman has a hard enough time reporting the discrimination she suffers, let alone complaining that the civil and administrative remedies available to her are inadequate.<sup>160</sup> Thus, if the legal system has failed her and the State Bar's disciplinary system is too difficult, there is no reason for her to believe that complaining about civil and administrative remedies will help her situation.

#### IV. A BREAK IN THE VICIOUS CIRCLE: MAKING DISCRIMINATION AN ETHICS ISSUE

Because CRPC 2-400 approaches discrimination from an ethical standpoint, this rule should be amended to reflect the realities of discrimination that women face. Subsection C of CRPC 2-400 should not be eliminated altogether because it does serve the purpose of preventing unwarranted claims of discrimination.<sup>161</sup> However, CRPC 2-400 would be more effective if it were amended to ease the difficulty of initiating a disciplinary investigation. The following discussion provides some possible amendments to CRPC 2-400.

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159. Peck Memorandum, *in* Comm'n Mtg. 11/04, *supra* note 92, at 13.

160. *See, e.g.,* *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 751 F. Supp. 1175, 1176 (E.D. Pa. 1990), *rev'd*, 983 F.2d 509 (3d Cir. 1993), *and cert. denied*, 510 U.S. 826 (1993) (describing the difficult path one female attorney had in reporting the discrimination she faced at her law firm and how she ultimately lost her case). For a more detailed discussion of *Ezold*, see Part II.C of this Comment.

161. *See* ENCLOSURE 7, *supra* note 40, at 4 (stating that CRPC 2-400(c) is "intended to avoid the possibility of the State Bar and its disciplinary staff being called upon to overextend its finite resources to duplicate the investigative responsibilities of the California Department of Fair Employment and Housing, the United States Equal Employment Opportunity Commission and/or other agencies").

*A. Add “Smoking Gun” Discrimination Triggers*

To make this rule more effective, the rule’s discussion section could include specific types of conduct that would be considered “smoking gun” discrimination, which is undisputed and easily proven. “Smoking gun” discrimination would trigger an immediate investigation into the matter without a requisite prior finding of unlawfulness. To accomplish this, the following wording could be added to the bottom of the first paragraph of the discussion section:

Blatant discriminatory conduct may trigger immediate disciplinary investigation without a finding of unlawfulness. Such conduct may consist of:

1. statements that show an intent to discriminate; or
2. actions that show an intent to discriminate; or
3. admissions of discrimination.

This amendment would allow women who have suffered blatant discrimination the opportunity to, at a minimum, file for a State Bar disciplinary investigation of the conduct, thereby giving them an opportunity for relief. The format of this change remains broad so as to encompass various types of conduct, such as allegations of discrimination in hiring, family responsibility, promotion bias, pregnancy bias, sexual harassment, and other hostile work environment claims. This will also limit the number of cases the State Bar receives because only blatant forms of conduct could immediately trigger investigation. Discriminatory conduct that is ambiguous in form, which is difficult to investigate and easily fabricated, would still be impermissible under subsection C, and therefore continue to serve a purpose. Further, this change would help the State Bar in achieving its goal to increase gender diversity by providing a working environment in which women feel protected in the event of discrimination.

*B. Clarify Discussion Regarding California’s Business and Professions Code*

Also, the discussion section of CRPC 2-400 should be amended so female victims clearly understand that, even if they cannot get an investigation for discriminatory acts, they can still report other acts of



misconduct for immediate disciplinary investigation. To achieve this, wording such as the following could be added:

In cases where conduct does not amount to “smoking gun” discrimination, or is not found unlawful under state or federal law, an individual who alleges discrimination may initiate disciplinary investigations for *other* acts of misconduct in connection with discrimination under California Business and Professions Code sections 6106 and 6068.

This amendment improves the discussion section because it clarifies how CBPC sections 6068 and 6106 can be used to initiate proceedings against a violating attorney where CRPC 2-400 does not allow for such investigations. Because CBPC section 6068 addresses acts of moral turpitude, dishonesty and corruption, and because section 6106 sets forth an attorney’s constitutional duties,<sup>162</sup> the two statutes together address various forms of misconduct that usually go hand-in-hand with discriminatory acts.

### *C. Apply the Rule to Settlements or Failed Appeals*

CRPC 2-400 should also be changed so that discrimination cases that get settled or do not survive an appeal still have standing to be investigated by the State Bar. The following wording, added at the end of CRPC 2-400(C), would achieve this function:

But in cases where conduct constitutes undisputed discrimination:

- 1) a settlement, reached after formal filing and/or investigation,
- or
- 2) a finding of unlawfulness, which is reversed on appeal due solely to procedural or administrative error and where the basic discriminatory finding is conceded, shall not be a barrier to the State Bar’s disciplinary investigation.

This addition is rationalized through policy. In the event discriminatory allegations are settled or reversed on appeal, there may still have been a *clear violation* of a woman’s rights. Those acts may be in the form of misconduct or moral turpitude, which are deemed to

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162. See CAL. BUS. & PROF. CODE §§ 6068, 6106 (2002).

be violations of professional responsibility.<sup>163</sup> Even if a settlement is reached or a ruling is overturned, members who commit these unethical acts should be disciplined to prevent future misconduct and preserve California's goal of diversity.

In order to safeguard against unwarranted allegations, this amendment requires a couple of considerations. First, while settlements are not admissions of liability, they should not negate the possibility that unethical discriminatory conduct has occurred. There is a temporal matter that must be addressed for settlements, because if a settlement is reached prior to filing, then it may be difficult for the State Bar to investigate the claim. However, if the case is filed, there is a greater likelihood that discovery will yield egregious discriminatory conduct, which will, in turn, be the basis for further investigation. Second, for appeals, in order for there to be a disciplinary investigation, it is vital that the appeal address administrative or procedural error and that the facts of discriminatory conduct be conceded. In these situations, the disciplinary investigation can continue on this finding without question, regardless of the status of the appeal.

Although these suggested amendments are a first step to improve CRPC 2-400, they are by no means perfect. Even with these changes, there are forms of discrimination that will inevitably escape investigation. But, with these amendments, the State Bar is better equipped to tackle illegal workplace discrimination, which CRPC 2-400, in its current state, fails to do. Through these improvements, undisputed discriminatory conduct, even without a finding of unlawfulness, is rightfully within the disciplinary scope of the rule.

## V. CONCLUSION

Discrimination is a tangled situation, and the solutions to undo its web will be, as Mead predicted, inevitably imperfect.<sup>164</sup> This realization, however, should not stop the ABA and the State Bar of California from taking steps to attain its goals of diversity—goals that should and can be met. CRPC 2-400 is a rule that currently lacks the power to help women in their fight against discrimination in the legal

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163. See *id.*; see also MODEL RULES OF PROF'L CONDUCT R. 8.4 (1983).

164. See MEAD, *supra* note 1, at 384.

workplace. The State Bar must improve CRPC 2-400 if it is to give female victims of discrimination a chance to seek discipline against those members who do not exemplify the State Bar's standards. Law firms and lawyers who do not abide by ethical rules should be immediately investigated for potential discipline for their wrongful conduct, and the State Bar has the power to make that happen. This, in turn, will help to serve its ultimate goal of diversity in bar membership, and set a standard for other states to follow. The suggested amendments are by no means an absolute resolution, and further discussion will be needed to address other forms of discrimination that are still far from the rule's reach. Nonetheless, these amendments would be an improvement, and could be applied to better a woman's work environment in the legal profession.

Discrimination is a societal problem. It is a heavy burden for the legal profession to carry. But, this vicious cycle is one that must be addressed, not only for the sake of diversifying the profession, but also to further the overall goals of competence and morality. Socially embedded ideals of discrimination are slow to change, but that does not mean they can never change. The application of legal ethics rules may not be the end-all cure to a society-wide dilemma of discrimination, but it is a start, and those next steps can begin with the legal profession.

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