

Bias and Prejudice in the Practice of Law

1

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Agenda

1. California Rule 8.4.1
2. Applying Rule 8.4.1
3. 8.4.1 as a Value Statement

2

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Rule 8.4.1

Prohibited Discrimination, Harassment and Retaliation

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Rule 8.4.1(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.*

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Rule 8.4.1, Comment [2]

- Applies to the conduct during court proceedings.
- Relevant references are a safe harbor.
- Peremptory challenges based on race do not per se violate Rule 8.4.1

Cal. Code Jud. Ethics, canon 3B(6)

“A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation against parties, witnesses, counsel, or others.”

Rule 8.4.1(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;
- ii. 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
- iii. 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(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; or**
- (3) providing advice and engaging in advocacy as otherwise required or permitted by these rules and the State Bar Act.**

Role of Supervising Lawyer

- Rule 5.1 – Responsibilities of Managerial and Supervisory Lawyers
- Rule 5.3 – Responsibilities Regarding Nonlawyer Assistants

Case Law

Martinez v. O'Hara, 32 Cal. App. 5th 853 (2019)

Excerpt from Notice of Appeal:

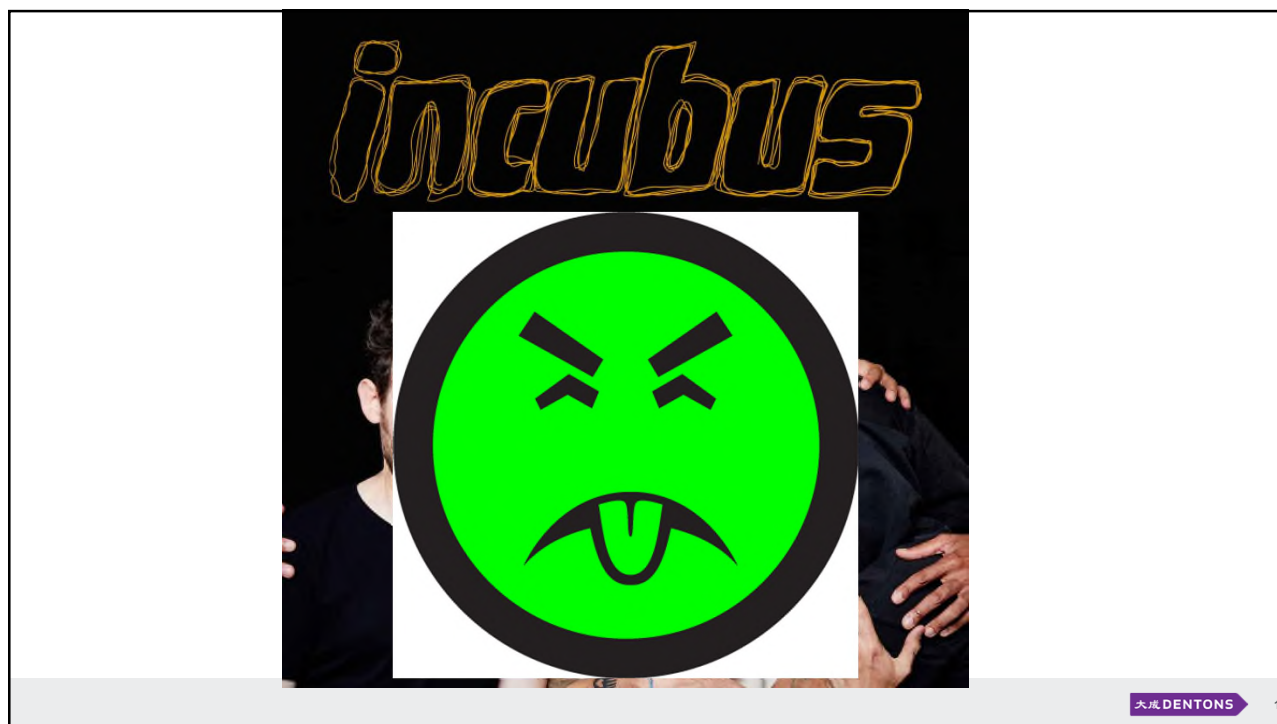
“Plaintiff [] appeals from the lower court's disgraceful order . . . The ruling's **succubustic** adoption of the defense position, and resulting validation of the defendant's pseudohermaphroditic misconduct, prompt one to entertain reverse peristalsis unto its four corners.”

Martinez v. O'Hara, 32 Cal. App. 5th 853 (2019)

Succubus, *noun*

- 1: a demon assuming female form to have sexual intercourse with men in their sleep—compare incubus
- 2: demon, fiend
- 3: strumpet, whore

Webster's Third New International Dictionary (2002) at page 2282, column 3



Martinez v. O'Hara, 32 Cal. App. 5th 853 (2019)

- “Rule 8.4.1 [] prohibits an attorney, in his or her representation of a client, from unlawfully harassing or unlawfully discriminating against persons on the basis of protected characteristics including gender.”
- “Had rule 8.4.1 been in effect at the time the notice of appeal was filed, Pavone’s reference to the judicial officer’s ruling as ‘succubustic’ would have constituted a violation of that rule as well as misconduct under section 6068 of the Business and Professions Code.”

***Martinez v. O'Hara*, 32 Cal. App. 5th 853 (2019)**

“A succubus is defined as a demon assuming female form which has sexual intercourse with men in their sleep. We publish this portion of the opinion to make the point that gender bias by an attorney appearing before us will not be tolerated, period.”

Legitimate Advocacy (or Not)

In the Matter of Thomsen, 837 N.E.2d 1011 (Ind. 2005)

- A lawyer's repeated references to opposing party's African-American companion lacked relevance to custody proceedings.
- The Court explained that irrelevant comments about race:
 - “were unnecessary and inappropriate”
 - “meet the standards for good manners and common courtesy, much less the professional behavior we expect from those admitted to the bar. **Interjecting race into proceedings where it is not relevant is offensive, unprofessional and tarnishes the image of the profession as a whole.**”
 - “serve to fester wounds caused by past discrimination and encourage future intolerance”
 - “there is no place for such conduct in our courts”

Legitimate Advocacy (or Not)

In re Farmer, Docket No. DRB 18-276, 2 (N.J. Jan. 15, 2019)

- Attorney represented plaintiff in malpractice action against optometrist
- Attorney sent an e-mail to optometrist: "I have read your letter. The only thing I can suggest is that you are either: delusional, a pathological liar, in denial, a psychopath, or all of the above."
- Letter to defense counsel asserting that alleged misconduct was due to his Chinese heritage
 - Cited internet "articles" in support of his demeaning and derogatory claim that Dr. Huang was lying because of his race, national origin, and Chinese culture.
 - "It is so obvious that Dr. Huang wrote the letter (as it is written in broken English)."
 - "I did not/cannot comprehend how someone who worked so hard to achieve what he has achieved in his life would risk it all by lying and attempting to cover up his misdoing. However, I am/was not a student of Chinese culture. So I did a little research and found that 'In fact, lying to achieve some business or social aim, and getting away with it, is considered to be a sign of intelligence and social skill among many Chinese.'"
 - "[In Chinese culture,] lying has become a means to an end."

17

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Professional Capacity - Negotiations

In the Matter of Barker, 993 N.E.2d 1138 (Ind. 2013)

- Attorney sent letter to opposing counsel in a dissolution proceeding
- Referred to mother as an "illegal alien"

18

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Professional Capacity – Correspondence

Matter of McCarthy, 938 N.E.2d 698 (Ind. 2010)

- Attorney sent an email to a secretary, using the n-word.
- The n-word “is a derogatory racist insult, that Respondent’s use of the term was not simply a historical reference to slavery but rather manifested racial bias, that he was acting as an attorney when he sent the email, and that his use of the term was not connected to legitimate advocacy.”

Judge’s Role in Controlling Misconduct

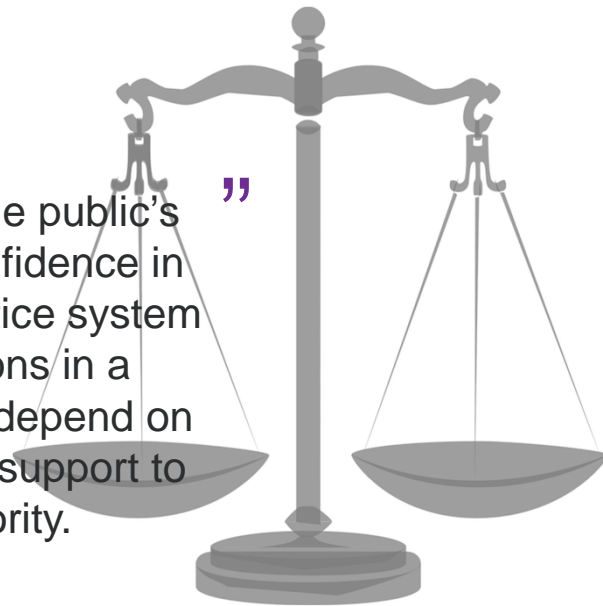
Vitko v. Vitko, 524 N.W.2d 102, 105 (N.D. 1994)

- A separate concurring opinion from the North Dakota Supreme Court rebuked an attorney’s gender bias and racism in open court (noting that “gender-bias and racism interfere with the administration of justice and impugn the integrity of the judiciary”)
- Also admonished the trial court judge for his failure to put an end to the attorney’s conduct.

8.4.1 as a Value Statement

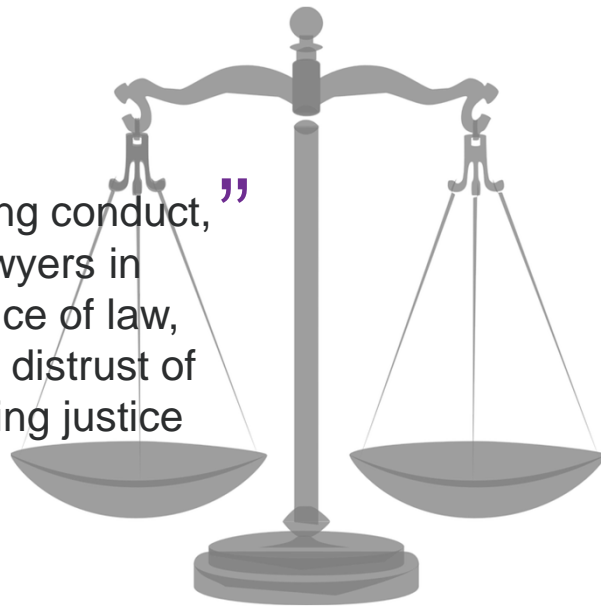
ABA Model Opinion 493

“ Lawyers should further the public’s understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.”



ABA Model Opinion 493

“ Discriminatory and harassing conduct, when engaged in by lawyers in connection with the practice of law, engenders skepticism and distrust of those charged with ensuring justice and fairness. ”

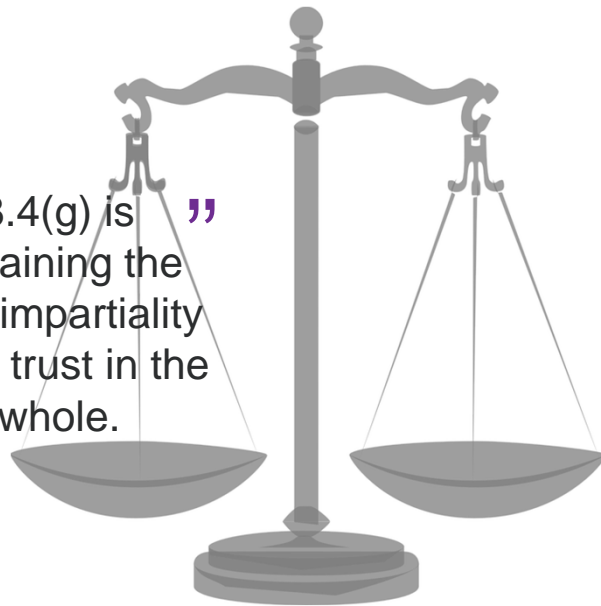


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23

ABA Model Opinion 493

“ Enforcement of Rule 8.4(g) is therefore critical to maintaining the public’s confidence in the impartiality of the legal system and its trust in the legal profession as a whole. ”



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24

ABA Model Opinion 493

Conduct Implicated by the Rule

- Conduct related to the practice of law that the lawyer knows or reasonably should know is harassing or discriminatory.
- Only conduct that is found harmful will be grounds for discipline.
- Conduct that occurs outside the representation of a client or beyond the confines of a courtroom
- Not restricted to conduct that is severe or pervasive, a standard utilized in the employment context.
- Intentional and typically targeted at a particular individual or group of individuals, such as directing a racist or sexist epithet towards others or engaging in unwelcome, nonconsensual physical conduct of a sexual nature.

ABA Model Opinion 493

Free Speech Concerns

- The Rule does not prevent a lawyer from freely expressing opinions and ideas on matters of public concern
- Does not limit in any way a lawyer's speech or conduct in settings unrelated to the practice of law.
- The fact that others may personally disagree with or be offended by a lawyer's expression does not establish a violation.

Creating a positive culture to avoid bias and discrimination

- Unintentional Discrimination
 - Training
 - Round tables
- Staffing a team
 - Is it discriminatory to pass a new mom over for a big case because there may be travel involved?
 - Is it discriminatory to intentionally staff a trial team with an associate because his or her race/ethnicity or other visually evident feature matches that of a party on the opposite side?
- Responding to occurrences
- Mentoring as a powerful tool for self-help

Conclusion/Q&A



Thank you

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