

February 22, 2023

Board of Trustees  
The State Bar of California  
180 Howard Street  
San Francisco, CA 94105

Re: Proposed Amendments to the Rules of Professional Conduct Addressing Incivility

Dear Trustees of the State Bar of California:

The California Lawyers Association (CLA) submits these comments in response to the proposed amendments to the Rules of Professional Conduct addressing incivility.

As an initial matter, CLA commends the work of the California Civility Task Force (CCTF), the Committee on Professional Responsibility and Conduct (COPRAC), the Office of Chief Trial Counsel (OCTC), State Bar staff, and the Board of Trustees for all the time and effort spent on this proposal. CLA supports the overarching goal of this and related proposals aimed at improving civility in the legal profession and appreciates being part of the CCTF process.<sup>1</sup> We remain concerned, however, with some of the language in the proposed amendments to the Rules of Professional Conduct.

We note that COPRAC, in its October 25, 2022 transmittal memo to the Board of Trustees, expressed concerns that “CCTF’s proposed amendments would pose interpretation issues, be difficult to enforce as disciplinary standards, and chill a lawyer’s protected activities” under the under the First Amendment of the United States Constitution.<sup>2</sup> The November 17, 2022 memo from Office of Professional Competence staff to the Board of Trustees also notes that OCTC shared COPRAC’s concerns about potential interpretation issues with the proposed amendments and that the rule changes may be difficult to enforce as disciplinary standards given the ambiguity inherent in CCTF’s proposed definition of incivility. We appreciate the revisions that have been made to help alleviate these concerns, resulting in the current proposal.

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<sup>1</sup> CLA is submitting separate comments on the pending proposal to add at least one hour of education addressing civility in the legal profession as part of the existing MCLE requirements (which CLA supports) and to amend the requirement that attorneys complete the annual civility pledge (which CLA supports, with one recommended modification).

<sup>2</sup> CLA raised similar concerns in its November 29, 2021 letter sent in response to the Initial Report of the CCTF.

Notwithstanding the refinements, CLA still has a general concern about a Rule of Professional Conduct regulating civility to the extent it could be fairly amorphous in providing guidance for a lawyer to know precisely what conduct is and is not prohibited. Ultimately, the purpose and function of the Rules of Professional Conduct will only be served if there is a clear warning about what conduct is to be performed or avoided. Otherwise, a rule will be relegated to a reactive, rather than a preventative role.

We recognize that words in rules can always be subject to interpretation and are not suggesting that the inability to define “incivility” with absolute precision means there should be nothing addressing incivility in the Rules of Professional Conduct. However, we do have suggestions for improving definitional clarity.

Proposed rule 8.4.2(b) provides as follows: “For purposes of this rule, ‘incivility’ means significantly unprofessional conduct that is abusive or harassing and shall be determined on the basis of all the facts and circumstances surrounding the conduct.” Proposed Comment [2] provides: “A lawyer does not violate this rule by standing firm in the position of the client, protecting the record for subsequent review, or preserving professional integrity.” Proposed Comment [6] to rule 8.4 contains the same language about when a lawyer does *not* violate the rule. Although we understand the intent behind providing clarifying language in a Comment concerning conduct that does “not violate” a particular Rule of Professional Conduct (as included in Comments to several existing rules), we believe the language proposed in this case potentially creates more confusion than it resolves.

We find it difficult at best to envision a circumstance under which a lawyer standing firm in the position of the client, protecting the record for subsequent review, or preserving professional integrity—without more—would constitute conduct violating a rule prohibiting incivility. It is therefore not clear why these need to be called out as three examples of conduct that would not violate the rule. These examples do not appear to be close to the line of a violation, or even in a gray area. Providing these examples also raises the question of whether other conduct of a similar nature that is not specifically identified would somehow violate the rule. For these reasons, we suggest deleting the language in the two Comments discussed above, or possibly modifying the Comments to clarify the general category of conduct that would not violate the rule, potentially providing some non-exclusive examples that are noted as such within that context, along with the reasoning.

We also suggest one potential refinement to further sharpen the focus of the proposed rule. As presented to the Board of Trustees, proposed Rule 8.4.2 contained paragraph (b), which provided as follows:

(b) In appearing as a lawyer before a tribunal, a lawyer shall not engage in incivility by conduct solely intended to:

- (1) disrupt the tribunal; or
- (2) degrade a witness or other person.

Although paragraph (b) was not ultimately included in the proposal that the Board of Trustees voted to release for public comment, we believe inclusion of the word “solely” in that paragraph was significant. Code of Civil Procedure section 128.5 contains this same qualifier in connection with sanctions that a court may order under that statute. Subdivision (a) provides in part that a “trial court may order a party, the party’s attorney, or both, to pay the reasonable expenses, including attorney’s fees, incurred by another party as a result of actions or tactics, made in bad faith, that are frivolous or *solely* intended to cause unnecessary delay.” (emphasis added). Subdivision (b)(2) similarly provides that “frivolous” under the statute “means totally and completely without merit or for the *sole* purpose of harassing an opposing party.” (emphasis added).

We certainly do not condone “significantly unprofessional conduct that is abusive or harassing” (as prohibited under the language of the proposed rule). At the same time, we believe further definitional clarity would assist in minimizing interpretation issues, potential difficulties of enforcement as a disciplinary standards, and potential use of a well-intentioned rule in a manner that could undermine its purpose. We therefore recommend that consideration be given to modifying the proposed rule so it applies to significantly unprofessional conduct that is “solely” or “primarily” intended to abuse or harass.<sup>3</sup>

We anticipate that any Rule of Professional Conduct addressing incivility will most likely be invoked in the context of discovery and other routine out-of-court matters. It is not uncommon, in the context of discovery disputes for example, for a lawyer to accuse opposing counsel of “harassing” the lawyer, which could also be viewed by that lawyer as “significantly unprofessional.” It is relatively easy to file a complaint with the State

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<sup>3</sup> We recognize that the words “harass” and “harassment” currently exist in other Rules of Professional Conduct. In fact, COPRAC recommended that if the Board of Trustees believed the text of the rules, not only the comments, should be revised in connection with this proposal, the Board consider a standalone rule addressing civility that would be similar to rule 8.4.1 of the Rules of Professional Conduct that covers prohibited discrimination, harassment and retaliation. But that rule states a lawyer shall not “unlawfully” harass or knowingly permit “unlawful” harassment, adding an important modifier.

Bar and trigger an investigation. Defending against an accusation can cost a significant amount of time and money, even for a successful exoneration. To the extent possible, any Rule of Professional Conduct should be crafted in a manner that clearly draws a line between acceptable conduct under the rules that might occur during a “garden-variety” dispute or negotiation between lawyers and misconduct that is subject to State Bar discipline.

With respect to enforcement as a disciplinary standard, we note the following from COPRAC’s October 25, 2022 transmittal memo to the Board of Trustees:

COPRAC is concerned that CCTF’s proposed amendments would pose interpretation issues, be difficult to enforce as disciplinary standards, and chill a lawyer’s protected activities. In addition, COPRAC does not believe that many of CCTF’s proposed amendments fall within the scope and intended purpose of the rules. As such, COPRAC does not recommend that all of CCTF’s proposed amendments be further considered or presented for public comment. Instead, COPRAC recommends that CCTF’s proposed amendments to rules 1.0.1, 1.3, 3.3, 3.4, and 3.5 be incorporated conceptually into new rule 8.4, comment [6]. COPRAC also recommends that the Board adopt CCTF’s proposed amendment to rule 1.2, comment [1], with modifications. COPRAC’s proposed amendments to rules 1.2, comment [1], and 8.4, comment [6], as well as suggested edits to CCTF’s proposed amendments to the other rules, which COPRAC does not recommend, are provided below.

State Bar staff recommended that two *options* for proposed amendments be issued for public comment: (1) COPRAC’s recommended proposed amendments to certain comments; and (2) a staff-drafted proposed standalone rule and an amendment to rule 8.4 Comment [4] that provides a cross-reference to the standalone rule. The Board of Trustees ultimately voted to release the current proposal, which includes *both* proposed amendments to comments *and* a proposed new standalone rule. CLA believes the adoption of amendments to comments only is worthy of further consideration.

We have a related concern about the potential impact of a definition of incivility—along with complaints and enforcement that would follow—on lawyers that the rule would otherwise be aimed at protecting. The Initial Report of the CCTF and the attached material repeatedly mention bias and prejudice with the goal of reducing or eliminating both. We share this goal and do not dispute, as that report notes, that “young lawyers, women lawyers, lawyers of color, and lawyers from other marginalized groups are disproportionately on the receiving end” of incivility. At the same time, the identical rule could have a disproportionate impact on these same lawyers when used against them by others making claims of incivility. Although not the intended outcome of this

proposed Rule of Professional Conduct (or any other Rule of Professional Conduct) the State Bar's own 2019 study demonstrated racial disparities in attorney discipline, with the largest gender/race disparities found between black male attorneys and their white male counterparts.<sup>4</sup> This further underscores the need for definitional clarity in the rule itself in order to minimize the possibility of unintended consequences.

Finally, we support inclusion of the following language in Comment [5] to proposed rule 8.4.2: "Incivility" as used in the rule does not apply to conduct protected by the First Amendment to the United States Constitution or by Article I, section 2 of the California Constitution." This proposed Comment differs from the Comments discussed above because it provides a clear statement of intent in what could become a gray area as actual cases arise, insofar as enforcing a rule consistent with the First Amendment may raise issues that are the subject of ongoing discussion.<sup>5</sup>

We appreciate your consideration of our comments.

Sincerely,

A handwritten signature in black ink, appearing to read 'Jeremy M. Evans', written in a cursive style.

Jeremy M. Evans  
President

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<sup>4</sup> See State Bar Conducts First of Its Kind Study on Racial Disparities in Attorney Discipline (<https://www.calbar.ca.gov/Portals/0/documents/factSheets/Racial-Disparities-in-Attorney-Discipline-Fact-Sheet.pdf>) and November 14, 2019 Agenda Item, Report on Disparities in the Discipline System (<https://board.calbar.ca.gov/docs/agendaitem/Public/agendaitem1000025090.pdf>).

<sup>5</sup> See, e.g., Green, Bruce and Roiphe, Rebecca, *ABA Model Rule 8.4(g), Discriminatory Speech, and the First Amendment* (2022). Articles & Chapters. 1506. [https://digitalcommons.nyls.edu/cgi/viewcontent.cgi?article=2510&context=fac\\_articles\\_chapters](https://digitalcommons.nyls.edu/cgi/viewcontent.cgi?article=2510&context=fac_articles_chapters); Rebecca Aviel, *Rule 8.4(g) and the First Amendment: Distinguishing Between Discrimination and Free Speech*, 31 GEO. J. LEGAL ETHICS 31, 32 (2018), <https://www.law.georgetown.edu/legal-ethics-journal/wp-content/uploads/sites/24/2019/01/GT-GJLE180002.pdf> ("The extent to which lawyer speech is protected by the First Amendment has troubled courts, scholars, and regulators for decades.")