The Trends in California Ethics, Civility and The Future of DEI

Holland & Knight and Association of Corporate Counsel (ACC) Southern California Chapter

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ACC Association of Corporate Counsel SOUTHERN CALIFORNIA

DEI on the Ropes? Employment Law in 2025

Best Practices and What to Avoid

By: O'Kelly E. McWilliams III

Agenda

- ✓ **Recent DEI Developments**
- ✓ **Impact of Executive Orders**
- ✓ **Looking Ahead**

Recent DEI Developments

Overview of Where We Are

- ***Students for Fair Admissions***
- **January 20 Executive Order**
  - **Wholly eliminated all DEI programs throughout the federal government**, including "Chief Diversity Officer" positions, as well as equity-related grants and contracts
- **January 21 Executive Order**
  - **Revoked previous administration's EOs** that promoted DEI, affirmative action and equal opportunity programs
  - **Eliminated** historic DEI requirements from **federal contracting**
- **February 5 Department of Justice Memo**
  - "[T]he Department of Justice's Civil Rights Division will **investigate, eliminate, and penalize** illegal DEI and **DEIA preferences, mandates, policies, programs, and activities in the private sector** and in **educational institutions** that receive federal funds"
  - Potential DOJ targets specifically calls out **"large non-profit corporations"**
- **February 21 Injunction* / March 14 Lifted Injunction**
  - On Feb. 21, Judge Abelson issues a nationwide preliminary injunction in *Nat'l Ass'n of Diversity Officers in Higher Education v. Trump*, barring enforcement of specific provisions of the EOs. On Mar. 14, the U.S. Court of Appeals for the Fourth Circuit lifted the injunction, allowing for enforcement of the Eos.
- **EEOC and DOJ Joint Document**

Students for Fair Admissions

- On June 29, 2023, the United States Supreme Court ruled that race-conscious admissions practices violate the Fourteenth Amendment's Equal Protection Clause.
- Since, the Supreme Court's decision in *Students for Fair Admissions* (SFFA), the impact on corporate America has become increasingly evident. Although the decision's legal applicability was primarily confined to educational institutions and federal fund recipients**, its rationale and stringent application of the strict scrutiny standard have cast doubt on the legality of race-conscious programs beyond college admissions.**
- Since the decisions we have seen:

A notable increase in workplace discrimination charges filed with the Equal Employment Opportunity Commission (EEOC), rising by over 10% in 2023.

Job postings with "DEI" in the title or description have declined by 23% on platforms like Indeed.

A surge in "reverse discrimination" claims, where individuals from majority groups allege discrimination in favor of minority candidates. Employers must navigate these challenges carefully, ensuring their DEI initiatives do not inadvertently lead to legal risks or perceptions of bias.

EO: "Ending Illegal Discrimination and Restoring Merit-Based Opportunity"

- **Revocation of DEI-Related Orders**: Eliminates various executive orders, including Executive Order 11246, which mandated nondiscrimination and equal opportunity in federal contracting.

> **"I therefore order all executive departments and agencies (agencies) to terminate all discriminatory and illegal preferences, mandates, policies, programs, activities, guidance, regulations, enforcement actions, consent orders, and requirements. I further order all agencies to enforce our longstanding civil-rights laws and to combat illegal private-sector DEI preferences, mandates, policies, programs, and activities."**

- AG within 120 days of this order, in consultation with the heads of relevant agencies and in coordination with the Director of OMB, will submits a report that "contains a proposed strategic enforcement plan identifying:
  - (i) Key sectors of concern within each agency's jurisdiction;
  - (ii) The most egregious and discriminatory DEI practitioners in each sector of concern;
  - (iii) A plan of specific steps or measures to deter DEI programs or principles"

EO: "Ending Radical and Wasteful Government DEI Programs and Preferencing"

- **Elimination of DEI Positions in the Federal Government**: Federal agencies must terminate all DEI positions, equity action plans, and related performance requirements for employees, contractors, and grantees
- **Private Sector Oversight**: The Attorney General will explore legal mechanisms to investigate and address potential illegal discrimination in private sector DEI practices.
- "Each agency, department, or commission head, in consultation with the Attorney General, the Director of OMB, and the Director of OPM, as appropriate, shall take the following actions within sixty days of this order:
- (ii) **provide the Director of the OMB with a list of all**:
  - (B) **Federal contractors** who have provided DEI training or DEI training materials to agency or department employees"

EO: “Defending Women From Gender Ideology Extremism And Restoring Biological Truth To The Federal Government”

The EO explicitly declares that:

The United States government will recognize only two sexes: male and female. It asserts that the ideological shift surrounding gender has “depriv[ed] [women] of their dignity, safety, and well-being,” particularly by enabling individuals to self-identify as women and gain access to spaces intended for women.

The EO emphasizes that the distinction between sexes is based on immutable biological factors such as reproductive anatomy.

Under the EO, the Executive Branch will enforce laws seeking to promoting the recognition of two sexes.

What *Was* Said and *Not* Said

January 20 EO	January 21 EO	Use of the phrase: "programs promoting DEI that violate any applicable Federal anti-discrimination laws"	DOJ Memo
• Eliminate DEI-related offices and positions • Terminate equity-related action plans, programs and contracts • Remove DEI-related performance requirements	• Takes direct steps relating to **federal contractors, subcontractors and grantees** • Creates an **investigative framework for other actors** (e.g., private companies, certain nonprofits)	**What does this mean?** • "[A]pplicable Federal discrimination laws" • "[C]ivil investigations" – including false claims act cases	• **Programs, initiatives, or policies that discriminate, exclude, or divide individuals** based on **race or sex**

AG Pam Bondi's Memorandum

- On February 5, 2025, U.S. Attorney General Pamela Bondi issued a Memorandum to DOJ employees titled **"Ending Illegal DEI and DEIA Discrimination and Preferences."** This document is grounded in President Trump's Executive Order 14173, which critiques DEI and DEIA policies as violations of federal civil rights laws and detrimental to national unity. The Memorandum **directs the DOJ Civil Rights Division to investigate and penalize illegal DEI and DEIA practices in the private sector and federally funded educational institutions.**

- The Memorandum outlines two key actions: First, by March 1, 2025, the DOJ Civil Rights Division and the Office of Legal Policy must submit a joint report with recommendations for enforcing civil rights laws and encouraging the private sector to end illegal discrimination and preferences. This report should address the most egregious DEI and DEIA practitioners and propose measures for compliance investigations and litigation. Second, **the DOJ is tasked with collaborating with the Department of Education to ensure educational institutions comply with the Supreme Court's decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll*. 600 U.S. 181, 206 (2023), directing actions to align with this initiative.**

Fourth Circuit Lifts Nationwide Preliminary Injunction on DEI EOs

- Judge Abelson issued a nationwide preliminary injunction in *Nat'l Ass'n of Diversity Officers in Higher Education v. Trump*, barring enforcement of specific provisions in President Trump's executive orders (EOs) related to diversity, equity, and inclusion (DEI). The injunction targeted provisions that:

    1. Directed termination of "equity-related" grants or contracts.
    2. Required certifications from contractors and grantees, enforceable under the False Claims Act, to ensure no DEI programs violate federal anti-discrimination laws.
    3. Directed the U.S. Attorney General to encourage the private sector to end illegal discrimination and preferences, including DEI, and identify potential civil compliance investigations.

- **On March 14, 2025, the U.S. Court of Appeals for the Fourth Circuit lifted the nationwide injunction, allowing enforcement of the EOs to proceed while legal challenges continue**. The court held that the EOs were not unconstitutional on their face, although actions taken by federal agencies under these orders could potentially be unconstitutional. This decision temporarily reverses the injunction, impacting jurisdictions in Maryland, North Carolina, South Carolina, Virginia, and West Virginia. The EOs include provisions to terminate "equity-related" grants, require compliance certifications, and encourage the private sector to end illegal discrimination and preferences.

Impact of Executive Orders

DEI Executive Orders: Impact on Private Employers

- January 20: The **"Ending Radical and Wasteful Government DEI Programs and Preferencing" EO** wholly eliminated all DEI programs throughout the federal government, including "Chief Diversity Officer" positions and equity-related grants and contracts.
- January 21: The **"Ending Illegal Discrimination and Restoring Merit-Based Opportunity" EO** revoked the previous administration's EOs that promoted DEI, affirmative action and equal opportunity programs.
- The **"Defending Women From Gender Ideology Extremism and Restoring Biological Truth To The Federal Government" EO** is reshaping the Federal Government's stance on sex and gender.

Impact of EOs on EEOC Enforcement

April 2024

The **EEOC** issued **new enforcement guidance** to clarify the types of harassment that violate **Title VII** protections following the ***Bostock v. Clayton County*** decision.

The guidance outlined specific behaviors that are became recognized as unlawful harassment for LGBTQ+ employees.

January 20, 2025

President Trump issued an executive order, that emphasized that it is **now the U.S. policy to "recognize two sexes, male and female."**

The order defines the male and female sexes based on an "individual's immutable biological classification" and directs the Assistant to the President for Legislative Affairs to provide President Trump with proposed bill text codifying the order's definitions within 30 days. Therefore, reliance on this guidance is not advised, as the Commission is undergoing leadership changed and will likely pass new guidance.

Impact of EOs on EEOC Enforcement cont'd

No Changes to the Civil Rights Act

The Executive Order (EO) does not revoke, alter, or amend the Civil Rights Act. Instead, it directs federal agencies, including the Department of Justice, Department of Labor, and Department of Education, to enforce the Act in line with Trump's policy priorities.

Shift in Enforcement Focus

Under the Trump administration, the enforcement of civil rights laws is expected to shift. Andrea Lucas, acting chair of the Equal Employment Opportunity Commission, has expressed intentions to **"reject identity politics…by rooting out unlawful DEI-motivated race and sex discrimination… defending the biological and binary reality of sex… and remedying other areas that have been historically under-enforced."**

Post SFFA

Andrea Lucas explained, "[u]nlike the old rules for university admissions prior to *SFFA*, race or sex cannot be even a plus factor, a tiebreaker, or a tipping point in the employment context…If race or sex was all or part of an employer's motivation, that violates federal employment law."

Impact of EOs on Employment Litigation

- **The Rise of Reverse Discrimination Cases:** A prominent example of the concept of reverse discrimination comes from the 2023 *Students for Fair Admission* ("SFFA") Supreme Court cases, which found affirmative action policies discriminated against some groups of students based on their race.
- **Legal Framework:** Reverse discrimination claims are often evaluated under Title VII of the Civil Rights Act, which prohibits employment discrimination based on race, color, religion, sex, or national origin.

Duvall v. Novant Health, Inc.: The plaintiff won a $10 million verdict after a jury found that his race and sex were motivating factors in his termination. The jury found that the plaintiff was one of several white men who were replaced by underrepresented minorities and women as part of a promotional tactic to increase diversity.

***Johnston v. School District of Philadelphia*:** Plaintiffs alleged that they were dismissed by an African-American manager who expressed concerns about there being too many white male managers in their departments. The Jury found in favor of the plaintiffs, awarding them $2.9 millions in damages. None of the plaintiffs had ever been written up for performance issues.

Impact of EOs on Employment Litigation cont'd

The EEOC and the DOJ released a joint one-page technical assistance document titled: "What To Do If You Experience Discrimination Related to DEI at Work." The Document Explains:

"Diversity, Equity, and Inclusion (DEI) is a broad term that is not defined in the statute. Under Title VII, DEI policies, programs, or practices may be unlawful if they involve an employer or other covered entity taking an employment action motivated—in whole or in part—by an employee's race, sex, or another protected characteristic. In addition to unlawfully using quotas or otherwise "balancing" a workforce by race, sex, or other protected traits, DEI-related discrimination in your workplace might include the following"

Prohibited conduct may include: limited membership in workplace groups, such as ERGs or other employee affinity groups to certain protected groups; separating employees into groups based on race, sex, or another protected characteristic when administering DEI or other trainings, or other privileges of employment, even if the separate groups receive the same programming content or amount of employer resources.

Looking Ahead

Organizations' Responses to EOs Targeting DEI Programs

Range of Responses across Organizations to the January EOs and the Attorney General's Memo

Retreat	Wait and See	Proactive Changes	Double Down
Abandon DEI by **scrubbing references** to DEI from websites, policies and other communications and eliminating any Affinity or Employee Resource Groups	**Lower the tone** on DEI publicly but **make no changes** to practices, policies or communications because it is believed internally that organization has a **lawful DEI plan**	Assess practices, policies and communications to ensure a lawful DEI plan; make needed changes to minimize risk of litigation while balancing stakeholder interests and reputational damage	**Be vocal** about continued commitment to DEI and **actively defend** policies of lawful DEI programs

Risk Mitigation Strategies

What presents the litigation risk?	Employment practices, programs, policies and related communications
What is our risk tolerance?	What degree of litigation risk is the organization willing and prepared to accept?
What is our strategy going forward?	Determine strategy for the organization's response – where does our risk tolerance put us on the range of responses?
How to communicate?	Leverage legal counsel with Board experience to assist with strategy execution and communicate to stakeholders

DEI Moving Forward

The DEI Executive Orders do not prevent private employers from maintaining lawful DEI strategies.

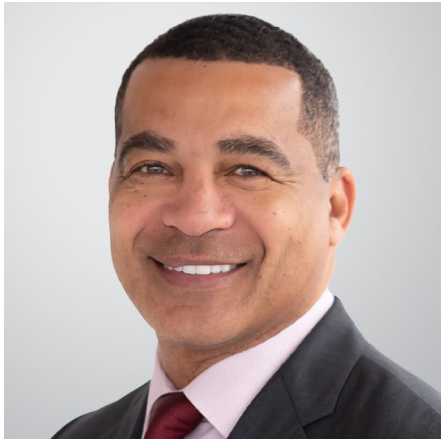
Under Title VII of the Civil Rights Act of 1964, employers are still required to uphold fair workplace practices.

Embedding DEI within core business values that align with business performance and employee engagement – such as corporate social responsibility, leadership development, and workforce optimization – remains prudent.

The Business Case for DEI remains strong.

Concepts such as inclusive leadership and interrupting bias remain best practices.

Today’s Presenter



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Mr. McWilliams currently serves as the firmwide Diversity Partner. In this role, he leads Holland & Knight's Diversity Council and serves on the firm's Practice & Operations Committee and Firmwide Partner Compensation Committee.

Updates in California Legal Ethics

By: Anne Redcross Beehler

Updates in California Legal Ethics

- We will cover **two developments** in California legal ethics:

1) Artificial Intelligence

- New “guidance” on the use of generative AI in rendering legal advice.

2) Conflicts of interest rules affecting in-house lawyers

- New ethics opinions provide further guidance on pre-existing rules.

Artificial Intelligence

- The California state bar has recently issued guidance to remind lawyers of their pre-existing obligations, which become applicable when using generative AI.

- Available here: https://www.calbar.ca.gov/Portals/0/documents/ethics/Generative-AI-Practical-Guidance.pdf

- The Ethics Hotline in California: **1-800-238-4427**

Artificial Intelligence

- State Bar guidance concentrates on **three** key areas:

  1. Confidentiality Obligations
  2. Competence and diligence
  3. Charging for use of AI

- Notably, the ABA has similar guidance. Available here: https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/ethics-opinions/aba-formal-opinion-512.pdf

Artificial Intelligence

Duty of Confidentiality:

- **Relevant law**: Business and Professions Code section 6068(e); RPC Rule 1.6; RPC 1.8.2.
- AI raises **two concerns** with respect to confidentiality:

  (1) the inputted information is used to train and change the AI product; and

  (2) the product itself may not be secure.
- The State Bar recommends anonymizing data and having IT check security of the AI you are using. Further, the lawyer should check the terms of service to see how the data is later used.

Artificial Intelligence

- **Duty of Competence and Diligence**
  - RPC Rule 1.1: “A lawyer shall not intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal services with competence.”
  - RPC Rule 1.3: “(a) A lawyer shall not intentionally, repeatedly, recklessly or with gross negligence fail to act with reasonable diligence in representing a client. (b) For purposes of this rule, “reasonable diligence” shall mean that a lawyer acts with commitment and dedication to the interests of the client and does not neglect or disregard, or unduly delay a legal matter entrusted to the lawyer.”

Artificial Intelligence

- **Duty of Competence and Diligence**
  - The guidance makes clear that a senior lawyer must supervise a junior lawyer's use of AI to ensure it complies with the above duties.
  - Best practice for any company and law firm: establish internal rules for use of AI, train on AI, and discuss with team when AI is used and how.

- **Case Studies:**
  - **Fake case law**: *Park v. Kim*, 2nd U.S. Circuit Court of Appeals, No. 22-2057.
  - **Exclusion of expert reports**: *In Re Celsius Network LLC* (SDNY BR).
  - See https://law.stanford.edu/wp-content/uploads/2024/07/Rule-11-and-Gen-AI_Publication_Version.pdf

Artificial Intelligence

- **Duty of Competence and Diligence**
  - **Bottom line**: AI cannot replace attorney because attorney is still obligated under ethical rules to exercise independent review and thought. Rule 11 requires that contentions are researched and vetted. You are **certifying** that you have exercised diligence.
  - AI can make our jobs faster, but we have ethical obligations to vet the materials.
  - "Open Source" AI is simply not as safe for lawyers to use as the paid subscription services (WestLaw AI for example or Bloomberg AI).

Artificial Intelligence

- **Billing for AI work** (RPC Rule 1.5; BPC section 6148)
  - "A lawyer may use generative AI to more efficiently create work product and may charge for actual time spent (e.g., crafting or refining generative AI inputs and prompts, or reviewing and editing generative AI outputs). A lawyer must not charge hourly fees for the time saved by using generative AI. Costs associated with generative AI may be charged to the clients in compliance with applicable law. A fee agreement should explain the basis for all fees and costs, including those associated with the use of generative AI."

Artificial Intelligence

- Notably, California guidance further states:
  - Some generative AI is trained **on biased information**, and a lawyer should be aware of possible biases and the risks they may create when using generative AI (e.g., to screen potential clients or employees). Lawyers should engage in continuous learning about AI biases and their implications in legal practice, and firms should establish policies and mechanisms to identify, report, and address potential AI biases.

  - For lawyers, most often this will come up if company is using AI to screen job applicants.

    - Articles:
      - https://time.com/5520558/artificial-intelligence-racial-gender-bias/ (race bias study in facial recognition software by MIT student)
      - https://www.forbes.com/sites/jeffraikes/2023/04/21/ai-can-be-racist-lets-make-sure-it-works-for-everyone/
      - https://hbr.org/2019/10/what-do-we-do-about-the-biases-in-ai

Conflicts of Interest for In-House Lawyers

- The same conflicts of interest rules apply to in-house lawyers, whether they are fully licensed or registered in-house counsel.

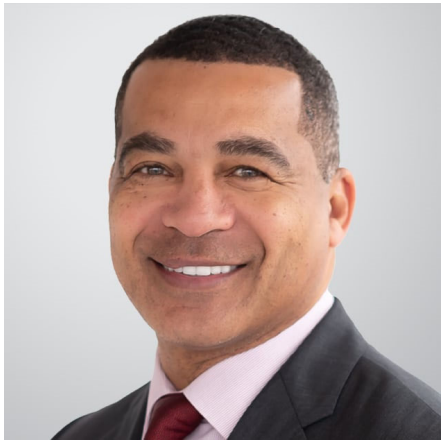
- **Joint Representation Rules:**
  - RPC Rule 1.13: an in-house lawyer may represent both the organization AND its constituents. However, if there is potential for a conflict then the lawyer must follow the provisions of RPC Rule 1.7, which includes advising of the potential conflict and providing informed consent, confirmed in writing.

  - Example: providing legal advice to the company AND the CEO.

Conflicts of Interest for In-House Lawyers

- Conflicts with former clients:
  - RPC Rule 1.9
  - Conflict may be imputed to the whole legal department.
    - See Rule 1.9(a)
    - “Firm” includes legal department
  - Creation of ethical screens
  - Ethics Opinion 21-003

Today's Presenter



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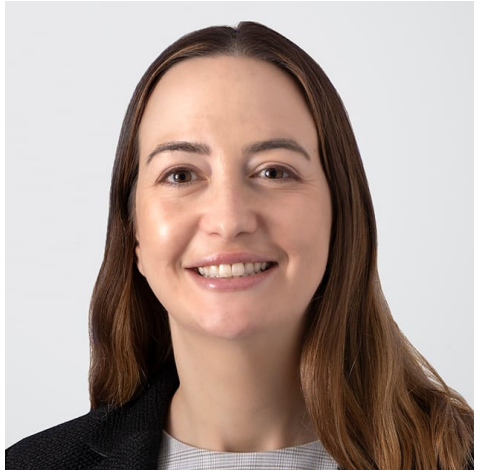

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Civility in the Profession

By: Eddie A. Jauregui

(In)Civility Among California Lawyers

- The problem . . .
- Existing rule(s) and expectations
- Proposed changes
- Consequences

Rule 9.7

CALIFORNIA RULES OF COURT | 2025

Rule 9.7. Oath required when admitted to practice law

"As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity."

California Civility Taskforce

- California Lawyers Association + California Judges Association
  - 2021 Initial Report
  - Revised Report and Recommendations

California Civility Taskforce

The timbre of our time has become unfortunately aggressive and disrespectful. Language addressed to opposing counsel and courts has lurched off the path of discourse and into the ditch of abuse. This isn't who we are.

--In re Mahoney (2021) 65 Cal.App.5th 376

California Civility Taskforce

We are professionals. We are officers of the court. We are governed by Rules of Professional Conduct, or in the case of judges, Canons of Ethics. We are not just vendors or suppliers who come into the court to do business; we are justice's lifeblood.

The judicial system is not a collection of buildings, it's a collection of people and principles. And we have been entrusted with its safekeeping. The problems and conflicts with which we deal—like those encountered by our fellow professionals in medicine and science and engineering—are too important to be obscured and marginalized by aggression and chicanery.

California Civility Taskforce

The perceived incivility between lawyers and between lawyers and judges, as often portrayed in the media, is a significant driver in the poor perception of lawyer honesty and professionalism. Why does this perception matter? Because a populace that does not perceive lawyers—who are the gateway to accessing justice—to be honest and ethical translates to a populace that does not trust its legal system. Lawyers are the last line of defense for the Rule of Law, the sine qua non of the freedoms we hold so dear. If we lose the trust of our colleagues and our fellow citizens, we put those freedoms at risk.

California Civility Taskforce (cont.)

- Proposals
  - Revisions to California Rules of Court rule 9.7, requiring lawyers to annually affirm their commitment to a civility oath.
  - Introduction of a new State Bar Rule 2.3 to implement changes to the oath.
  - Amendments to the Rules of Professional Conduct to make incivility a basis for disciplinary action.
  - A requirement for one hour of civility MCLE training during each three-year compliance period. (Accepted)

California Civility Taskforce (cont.)

- Proposed Rule 8.4.2

Rule 8.4.2 Prohibited Incivility

(a) In representing a client, a lawyer shall not engage in incivility in the practice of law.

(b) 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.

California Civility Taskforce (cont.)

- Proposed Rule 8.4.2

Comment

[1] For guidance on conduct that may be significantly unprofessional that is abusive or harassing, a lawyer should consult the current California Attorney Guidelines of Civility and Professionalism and other relevant legal authorities, such as the local rules of court and bar associations' codes of civility.

[2] A lawyer does not violate this rule merely by, for example, standing firm in the position of the client, protecting the record for subsequent review, or preserving professional integrity.

[3] A lawyer's violation of this rule may also constitute a violation of rule 8.4(d).

[4] "Incivility" as used in this rule does not apply to speech or conduct protected by the First Amendment to the United States Constitution or by Article I, section 2 of the California Constitution. "Incivility" as used in this rule may include speech or conduct that violates an attorney's duties under Business and Professions Code section 6068, subdivisions (b) and (f). (See California Code of Judicial Ethics, Canon 3B, advisory commentary: Canon 3B(2) noting a judge's responsibility to require lawyers under the judge's direction and control to be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others.)

California Civility Taskforce (cont.)

- Proposed Rule 8.4.2

Comment

[5] A disciplinary investigation or proceeding for conduct coming within this rule may also be initiated and maintained if such conduct warrants discipline under California Business and Professions Code sections 6106 and 6068, the California Supreme Court's inherent authority to impose discipline, or other disciplinary standard.

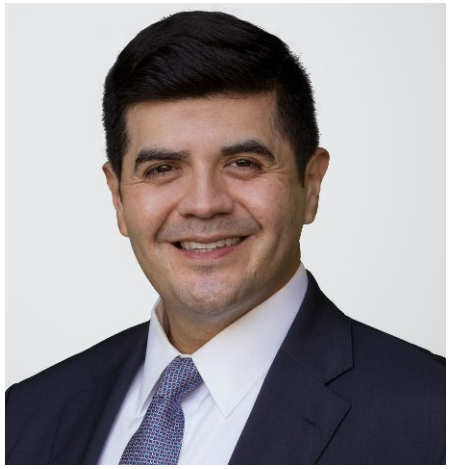
State, Bar and Court Expectations

- MCLE Requirements
  - At least 12.5 credit hours must be participatory credit hours;
  - **Legal Ethics**: At least four credit hours of legal ethics;
  - **Elimination of Bias:** At least two credit hours of dealing with the recognition and elimination of bias in the legal profession and society by reason of, but not limited to, sex, color, race, religion, ancestry, national origin, physical disability, age, or sexual orientation.
    - **Implicit Bias/Bias-Reducing Strategies**: One hour of this requirement must focus on implicit bias and the promotion of bias-reducing strategies to address how unintended biases regarding race, ethnicity, gender identity, sexual orientation, socioeconomic status, or other characteristics undermine confidence in the legal system;
  - **Competence**: At least two credit hours of education addressing competence, one hour of which must focus on prevention and detection;
  - **Technology**: At least one credit hour of education addressing technology in the practice of law; and
  - **Civility**: At least one hour of education addressing civility in the legal profession.

State, Bar and Court Expectations (cont.)

- Central District of California
  - Civility and Professionalism Guidelines
- California Superior Court, LA County
  - Guidelines for Civility in Litigation
- LACBA
  - Code of Civility Guidelines

Today's Presenter



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Mr. Jauregui presently serves as the Chair of the ABA White Collar Crime Committee of Southern California and as a member of the California Lawyers Association Criminal Law Section Executive Committee and Federal Courts Committee.

Questions?

Thank you for attending.