Dear Rule Committee,

I am a member of the American Bar Association and I am opposed to the proposed amendments to Model Rule of Professional Conduct 8.4. You need to be aware that there are many consequences that could result from the proposed amendments.

Therefore, because the Committee has not demonstrated an empirical need for the proposed changes to the Rule and comment, I strongly suggest that no changes be made.

However, if the proposed rule and comment are to be adopted, I would recommend the following, consistent with the recommendations of another organization of which I am also a member, the Christian Legal Society:

With regard to the draft Rule 8.4(g) and its associated draft comments:

• Add to the proposed rule explicit protection for lawyers’ right to freedom of speech, assembly, expressive association, and exercise of religion, by adding the following: “except when such conduct is undertaken because of the lawyer’s sincerely held religious beliefs, or is speech or conduct protected by the First Amendment or other applicable federal or state laws.”

• Add to the proposed comment the following language: “Consistent with longstanding principles behind the Rules of Professional Conduct, declining representation based on religious, moral, or ethical considerations is not proscribed by this rule.”

• Add to the proposed comment the following language to protect lawyers’ freedom of speech, assembly, expressive association, and exercise of religion: “This rule does not apply to speech or conduct undertaken by a lawyer because of his or her sincerely held religious beliefs, or speech or conduct otherwise protected by the First Amendment, including the rights of free speech, assembly, expressive association, press, and petition, or speech or conduct otherwise protected by applicable federal or state laws.”

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• Replace the proposed rule’s language “in conduct related to the practice of law” with the current comment’s language “in the course of representing a client.”

• Add “knowingly” before “harass.”

• Add to the proposed comment the following definition of the term “harass,” as defined in the context of Title IX by the United States Supreme Court in Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 633 (1999): “The term ‘harass’ includes only conduct that is so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to the administration of justice.”
• Add to the proposed rule that a lawyer violates the rule only “when such conduct is prejudicial to the administration of justice,” as the current comment states.

• Retain the current comment’s sentence, slightly modified to align with the proposed rule, “Legitimate advocacy respecting the listed factors in the rule does not violate paragraph (g),” while deleting from the proposed comment, for reasons explained in Part II.2.c. & e., supra, the sentence “Paragraph (g) does not prohibit lawyers from referring to any particular status or group when such references are material and relevant to factual or legal issues or arguments in a representation.”

• Retain the current comment’s use of the term “words and conduct,” modifying it to “speech and conduct,” as opposed to the proposed comment’s use of the term “conduct.”

With these changes, the proposed rule and comment would read as follows: “(g) in the course of representing a client, knowingly harass or knowingly discriminate against persons on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status, when such conduct is prejudicial to the administration of justice, except when such conduct is undertaken because of the lawyer’s sincerely held religious beliefs, or is speech or conduct protected by the First Amendment or other applicable federal or state laws.”

Regards,

Keith Brown

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