The proposed change to Model Rule 8.4 is fraught with problems and, likely, is unconstitutional.


“Gender identity” -- One’s innermost concept of self as male, female, a blend of both or neither – how individuals perceive themselves and what they call themselves. One’s gender identity can be the same or different from their sex assigned at birth.

Gender identity is completely subjective and can mean male, female, both, nothing or a blend of male and female.

Fixing discrimination on a subjective mutable characteristic that means something—or nothing—places those who are external to the person in a position of being unable to know or discern a person’s gender identity. By definition, then, the potential discriminator is not able to know how the discriminatee is “identifying” at the moment—and could be adjudged “guilty” of discrimination or harassment and, thereby, subject to discipline.

The notion that gender identity can be “male, female, a blend of both or neither . . .” renders the definition nonsensical. To make it “attorney misconduct” for a lawyer to “discriminate” against something that is nonsensical . . . is itself nonsensical.

Further the rule states it is misconduct to harass or knowingly discriminate. Harassment is not defined and is completely severed from intent. As the committee surely knows, in employment discrimination law intent is the key. Here, anything an aggrieved party perceives as harassment is harassment—regardless of intent--and the attorney is subject to discipline.

Expanding “misconduct” to conduct “related to the practice of law rather” rather than “in the course of representation” means that all kinds of speech, association, activity and thought (things specifically protected by the First Amendment) are open to prosecution by the disciplinary authorities that regulate the bar.

For these reasons, I would respectfully request that the proposed changes to 8.4 NOT be adopted.

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