Comments on Draft Proposal to Amend Model Rule 8.4

I am a member of the American Bar Association and public co-chair of the Section of Labor and Employment Law Ethics & Professional Responsibility Committee. Please accept these comments, which I offer on my own behalf only. These comments are in response to the SPC’s request for advice on certain issues, and my comments are limited to questions c. and d.

c. What more, if anything, needs to be said about the term “knowingly”?  

I question why the term “knowingly” is used instead of “intentionally.” Although knowledge is the standard typically used throughout the model rules, it does not seem to fit well when describing discriminatory conduct. If the goal is to avoid culpability for unintentional discrimination, it seems to make more sense to prohibit intentional discrimination rather than knowing discrimination. One can knowingly discriminate without intentionally discriminating. For example, an attorney could refuse to take a client because of bad credit history with the knowledge that his or her policy of screening out potential credit history has a disparate impact on black individuals seeking legal representation. This would be knowing discrimination, although it is not the type of conduct the rule intends to encompass. Further, use of the term intentionally would be easier for disciplinary committees to apply given the large body of Title VII case law, and it would also provide more clarity for practitioners, who are likely to have at least passing familiarity with the concept of intentional discrimination under Title VII.

d. If the above issues need to be addressed, should that occur in the Rule itself, or is a Comment adequate?  

Assuming the term “knowingly” is retained, the comment should explain that knowing discrimination refers to intentional conduct that an attorney knows will result in a person being treated in a different and harmful way because of membership or perceived membership in a protected category.

Regarding the term “harass,” it would be helpful to explain in the comments whether it is intended to capture only harassing conduct that is covered under Title VII standards. It is not clear from the proposed rule or comments whether all incidents of harassment, however minor or infrequent, give rise to an ethical violation, or only harassment that is sufficiently severe or pervasive to create a hostile environment. Without further explanation, the rule contains the type of amorphous standard which the standing committee was trying to avoid. I think the rule should cover harassing conduct even if such conduct does not independently give rise to a legal violation of Title VII, but more clarity is needed to give fair notice to attorneys of what conduct might subject them to discipline.

Regarding the term “discriminate,” it would be helpful to explain in the comments whether it is intended to include the concept of reasonable accommodation for disabilities and religious beliefs and practices. The terms bias and prejudice, as used in the current version of the rule’s comment, do not suggest that a failure to accommodate would be an ethical violation, but the
term discriminate does because the ADA defines discrimination as including failure to accommodate and Title VII defines religion as encompassing all aspects of religious observance and practice. Use of the broader term discriminate, without any qualification, may suggest an intention to cover reasonable accommodation. This may be more than what can reasonably be handled in the context of a brief ethics rule, given the complexity in determining what constitutes a reasonable accommodation, undue hardship, and the question of the attorney’s control over accommodation.

Submitted by
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