Dear Model Rule Committee,

I have included my comments to the proposed amendment to Rule 8.4 of the Model Rules of Professional Conduct below.

First, the proposed rule’s operative phrase, “harass or knowingly discriminate,” poses significant threats to attorneys’ freedoms of speech, expressive association, assembly, and free exercise of religion. To begin, “knowingly” should modify both “harass” and “discriminate.” Just as a lawyer should not be disciplined for unintentional discrimination, neither should she be disciplined for unintentional harassment. For that reason, in the proposed rule, “knowingly” should be added to modify “harass,” as well as “discriminate.”

Second, the current comment’s language “when such actions are prejudicial to the administration of justice” should be incorporated into the proposed rule. The Committee proposes deleting from the current comment that a lawyer violates the rule only when conduct is “prejudicial to the administration of justice.” It admits that the text of the proposed revision is broader, encompassing all activity “related to the practice of law.” This longstanding limitation should not be eliminated but instead should be included in the proposed rule itself. The “prejudicial to the administration of justice” language recognizes that, in almost every conceivable case when an individual might be denied service by one attorney (e.g., refusal to author an amicus brief advocating social policy with which the attorney disagrees for religious reasons), another attorney is ready, willing, and able to take on that representation. In such situations, the administration of justice is in no way prejudiced.

Third, by expanding its coverage to include all “conduct related to the practice of law,” the proposed rule encompasses nearly everything a lawyer does, including conduct and speech protected by the First Amendment. As a result, the proposal should be limited to include only conduct performed in the course of representing a client. By limiting the rule to ‘conduct performed in the course of representing a client’, the proposed rule is less likely to unjustly restrict words and conduct that are protected by the First Amendment and unrelated to an attorney’s representation of her client.

Thank you for considering these comments as you consider revising the proposal.

Sincerely,

Randall Miller
ABA Member