

By MARTIN COLE

Professional Ethics & Elimination of Bias

As I write this month's column, we are in the midst of the annual end-of-season blitz of Continuing Legal Education (CLE) seminars, just in time for those attorneys who need credits before their three-year reporting deadline arrives. Especially prominent and popular are seminars on legal ethics and elimination of bias (EOB). As I hope all of you know, lawyers in Minnesota must take at least three credit-hours of professional responsibility and two credit-hours of elimination of bias during each three-year reporting cycle. If somehow you weren't so aware, get moving; time's almost up.

Aspirational & Substantial

Programs on professional responsibility (legal ethics) and elimination of bias are offered as two distinct areas of study, and much of the time that is a reasonable distinction. Reviewing the list reveals a variety of available EOB courses, but a limited range of approaches to the topic. Recent year-end Minnesota CLE course offerings on EOB included programs on mental health and chemical dependency, the business case for diversity, the impact of culture and gender on negotiations and mediation, and a conversation about race. All no doubt are highly informative about an important topic worthy of exploration. Most deal with various interpersonal skills in recognizing and dealing with an area of potential bias, or strategies on how to overcome perceived biases.

Such programs are good at focusing on how attorneys may—perhaps unwittingly—retain biases and the harmful effect bias has on the judicial system, on a law firm, on an attorney's business, and on the public's perception of the law and the judicial system. They remind us that biases still exist and can provide guidelines for their eventual elimination. The focus of these courses is essentially aspirational (to eliminate bias).

What few EOB courses do is apply a more traditional CLE approach to a bias topic. By a "traditional" CLE approach, I mean one that deals with a substantive area of law by highlighting cases, statutes and rules, maybe recent changes to such sources; for after all, along with treatises and articles, these are what make up a substantive field of law. Such courses allow practitioners to easily keep up-to-date on an area that is of immediate need to their particular practice.

The Professional Responsibility Experience

There is one area of law that can apply a traditional approach to EOB—and that is professional responsibility. Ethics, or professional responsibility, is a separate and unique substantive topic, one that indeed has cases and

rules—cases and rules that apply to actual situations where bias has been displayed and where harm to the judicial system actually has occurred. In this setting, elimination of bias is not just an abstract, worthy goal to strive for, but a concrete objective to be achieved by placing definite limits on conduct that may violate a rule of professional conduct and may subject an attorney to discipline. Real consequences result when biases are not eliminated, so there are rules and cases to know, not just to discuss aspirationally.

The disciplinary rules that are most clearly on point are Rules 8.4(g) and (h), Minnesota Rules of Professional Conduct (MRPC). These state that it is professional misconduct for a lawyer to harass a person on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation or marital status in connection with lawyer's professional activities (Rule 8.4(g)), and to commit a discriminatory act prohibited by federal, state or local statute or ordinance that reflects adversely on the lawyer's fitness as a lawyer (Rule 8.4(h)).¹

There are certain aspects to each rule that are noteworthy. Harassment is prohibited against individuals in protected classes under the rule, but only if the conduct occurs in connection with the lawyer's professional activities. This is not limited to when an attorney is representing a client and can include a lawyer acting as an employer, for example. Violations of the antidiscrimination portion of the rule specifically require an act; thus, even though a lawyer may be in desperate need of an attitude adjustment, specific conduct is necessary before discipline will be imposed. Discrimination is prohibited in all of a lawyer's activities—for example as a landlord—not just the lawyer's professional activities. Whether the act was connected to the lawyer's professional activities is a factor to be considered, but not a requirement.

Applying the Rules

These two rules have rarely been applied in public discipline matters to date. In stipulated dispositions, one attorney was suspended in part for "making unwanted physical contact of a sexual nature with an applicant for employment in his law office, in violation of Rule 8.4(g), MRPC";² another attorney, as part of being transferred to disability inactive status, admitted she "made a series of statements that constituted harassment on the basis of religion and/or national origin, in violation of [Rule] 8.4(g)."³ A third attorney was publicly reprimanded for referring to a female attorney by an offensive gender-based term while in a courtroom in violation of Rule 8.4(g).⁴

Other disciplinary rules have been applied to instances that might seem, on first impression, likely to have fit into the Rule 8.4(h) prohibition on discriminatory acts. Two such matters resulted in the Minnesota Supreme Court issuing or affirming admonitions, albeit with full opinions included. In *In re Charges of Unprofessional Conduct in Panel File 98-26*,⁵ a prosecutor was admonished for making a motion *in limine* to exclude an African-American attorney from acting as cocounsel in a criminal prosecution. Even



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though the attorney's actions were characterized by the public defender as lacking malicious intent to discriminate, the court forcefully stated that, "racism, whether it takes the form of an individual's overt bigotry or an institution's subtle apathy, is, by its very nature, serious."⁶ The court found the attorney's conduct to have violated Rule 8.4(d), MRPC, as conduct prejudicial to the administration of justice and issued an admonition.

Likewise, in *In re Charges of Unprofessional Conduct in Panel Case No. 15976*,⁷ the court affirmed an admonition issued to an attorney who sought to exclude a judge's disabled law clerk from the courtroom. The lawyer apparently believed his own injured client's disabilities would not appear as serious to a jury compared to those of the law clerk. The judge complained to the Director's Office and the supreme

court again found this conduct to have violated Rule 8.4(d), MRPC. Discipline under the antidiscrimination section of the rule was not sought.

Conclusion

Elimination of bias is an important goal; requiring CLE courses to draw attention to the issues and help lawyers know how to eliminate bias is an appropriate method of pursuing that goal. But what the disciplinary rules and cases applying them show is that actual harassment and discrimination will not be tolerated by the court in the practice of law, and that real disciplinary consequences will be imposed for direct violation of the antiharassment or antidiscrimination rules and/or for the effect such conduct has on the administration of justice. ▲

¹ Rule 8.4(h), MRPC, goes on to state: "Whether a discriminatory act reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of all the circumstances, including: (1) the seriousness of the act, (2) whether the lawyer knew that the act was prohibited by statute or ordinance, (3) whether the act was part of a pattern of prohibited conduct, and (4) whether the act was committed in connection with the lawyer's professional activities."

² *In re Ward*, 726 N.W.2d 497 (Minn. 2007).

³ *In re Woroby*, 779 N.W.2d 825 (Minn. 2010).

⁴ *In re Starr*, 577 N.W.2d 210 (Minn. 1997). For an excellent discussion of this case, the 1st Amendment and the application of Rule 8.4(g) to the facts by the then-Director of Lawyers Professional Responsibility, see Cleary, "Free Speech, Civility and Harassment," *Bench & Bar of Minnesota*, February 1998.

⁵ 597 N.W.2d 563 (Minn. 1999).

⁶ 597 N.W.2d at 567.

⁷ 653 N.W.2d 452 (Minn. 2002).

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