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Expert Analysis

Is Law Firm Discrimination Unethical?

On April 6, 2010, the New York Law Journal reported on a lawsuit filed by the U.S. Equal Employment Opportunity Commission (EEOC) against Kelley Drye & Warren contending that the venerable firm had violated the Federal Age Discrimination in Employment Act by stripping a 79-year-old partner of his equity share and reducing his bonus.¹ The EEOC contended that Eugene D'Ablemont and other septuagenarian partners had been improperly demoted upon reaching the age of 70. Like all good stories, this one has two sides, and Kelley Drye fired back, contending that Mr. D'Ablemont's demotion had nothing to do with age and everything to do with productivity, citing annual billings of 200 to 300 hours.² Nonetheless, Kelley Drye dropped its mandatory retirement age for partners and re-quitized Mr. D'Ablemont.

The Kelley Drye story recalls the EEOC's recent suit against Chicago's Sidley Austin Brown & Wood.³ Sidley Austin had demoted 32 equity partners to positions as "Senior Counsel," and opposed an EEOC enforcement proceeding on the ground that the demoted partners had been management, not employees, a position that was rejected by the U.S. Court of Appeals for the Seventh Circuit. Following this judicial rejection of the firm's first line of defense, Sidley Austin settled for \$27 million.⁴

Many large law firms have structures which require partners to retire upon reaching a certain age, often 65 years old. These rules are defended by law firms as promoting orderly transition of client matters to junior partners, permitting the younger lawyers to grow their practices, and maintaining the health and productivity of the firm. On the other hand, senior lawyers contend that they are unfairly being forced out when they

have many years of abundant productivity ahead of them.

Much has been written about the graying of the baby boomers, the post-war generation born between 1946 and 1964. In large part due to advances in medical technology and nutrition, the boomers are healthier than their parents' generation, often enjoying good health and productivity well into their 70s and beyond. A recent series in The New York Times chronicled the career paths of several senior partners at major law firms who were forced to find new jobs at a time when they were professionally

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productive in many different ways.⁵ The New York State Bar Association Special Committee on Age Discrimination in the Profession has gone on record in opposition to the mandatory retirement of law firm partners.⁶

Rules of Professional Conduct

Against this backdrop, it is interesting to consider a new perspective as the legal profession continues graying and struggling with mandatory retirement issues. Unbeknownst to many lawyers, the 2009 New York Rules of Professional Conduct specifically address unlawful discrimination as a potential ethics violation, subject to professional discipline. New York's Rules of Professional

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Conduct provide that a lawyer or law firm shall not "unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment on the basis of age, race, creed, color, national origin, sex, disability, marital status or sexual orientation."⁷ New York RPC 8.4(g) is, by definition, a disciplinary rule. Thus, the New York rule places additional pressure upon law firms to avoid unlawful discrimination. Now a law firm has to worry about more than just writing a check to resolve a claim of unlawful discrimination; the respondent may also have to contend with professional discipline.

A few comments about RPC 8.4(g) are in order. In the first instance, New York's rule is not universal. Although some other states have similar provisions, the American Bar Association (ABA) Model Rules of Professional Conduct contain no analogous rule. Second, the New York Rule is not new. Rather, it is similar to the anti-discrimination provisions in the predecessor Code of Professional Responsibility, which date back to 1990.⁸

RPC 8.4(g) is the only ethics rule in New York which at least sometimes requires a complainant to exhaust administrative remedies, so to speak, before filing a complaint with the appropriate attorney grievance or disciplinary committee. New York RPC 8.4(g) provides:

Where there is a tribunal with jurisdiction to hear a complaint, if timely brought, other than a Departmental Disciplinary Committee, a complaint based on unlawful discrimination shall be brought before such a tribunal in the first instance. A certified copy of a determination by such a tribunal, which has been final and enforceable and as to which the right to judicial or appellate review has been exhausted, finding that the lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding...⁹

Thus, a finding of unlawful discrimination by the EEOC or New York State Division of Human

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Rights can support a disciplinary prosecution of a lawyer or law firm. The Rule does not indicate whether a finding of discrimination in a private suit would have preclusive effect.

A charge of unlawful discrimination by a lawyer or law firm may be brought, in the first instance, by a civil rights law enforcement agency. A finding of discrimination is prima facie evidence of discrimination. But the text of the rule does not explicitly state that a complainant must necessarily wait until final adjudication of the EEOC (or other agency) investigation in order to bring a disciplinary claim.

Rather the rule, by its terms, specifically states that “a complaint based on unlawful discrimination shall be brought before such a tribunal in the first instance.” While a judicial finding of unlawful discrimination is prima facie evidence of unethical conduct, does this mean that the complainant must await final adjudication of the discrimination and grievance claim and exhaustion of all appeals, or does this mean, rather, that the aggrieved complainant may file with the EEOC on Monday and file with the department disciplinary committee on Tuesday?

This question is more theoretical than practical. As a practical matter, the departmental disciplinary and grievance committees, given their limited resources, are unlikely to commence a prosecution for unlawful discrimination under RPC 8.4(g) until court adjudication of the underlying complaint concludes. This is true for a number of reasons. In the first instance, RPC 8.4(g), by its terms, does not proscribe all discrimination, but only states that it is unethical for a law firm or a lawyer to “unlawfully discriminate in the practice of law....”¹⁰

Thus, the rule’s structure seems to anticipate, in most circumstances, an investigation and interpretation of the respondent’s conduct by an agency endowed with expertise and resources for investigating and prosecuting fact specific allegations of discrimination. The departmental disciplinary committees, and the Appellate Divisions of which they are an arm, are not looking to substitute their own judgment and interpretation of the federal antidiscrimination laws or their state counterparts, particularly while an EEOC investigation is underway. Attorney grievance committees lack the institutional expertise or resources to evaluate, investigate, and adjudicate claims of unlawful discrimination.

Disciplinary Prosecutions

There are some interstices in the rule. The EEOC does not have jurisdiction over every claim of discrimination, and not all discrimination takes place in the context of employment, housing, or other areas reached by civil rights laws. Rule 8.4(g) broadly proscribes discrimination “in the practice

of law,” and is not limited to workplace bias. Lawyer disciplinary authorities have prosecuted unlawful discrimination under the rubric of other disciplinary rules, in many instances without waiting for a formal judicial adjudication of unlawful discrimination.¹¹

Geoffrey Peters, Dean of William Mitchell College of Law in Minnesota, was prosecuted for repeated unwanted touching of female law students.¹² Dean Peters, who was referred to by his own lawyer as “the Tactile Dean,” repeatedly groped young female law students.

At the time, Minnesota lacked an ethics rule specifically proscribing unlawful discrimination and there had been no adverse finding by a civil rights agency or court. Nonetheless, the Minnesota court concluded that the respondent had engaged in “conduct that adversely reflects on a lawyer’s fitness to practice law” in violation of Minnesota Disciplinary Rule 1-102, a general, catch-all provision which did not specifically reference discrimination:

A formal adjudication that conduct is illegal is not prerequisite for a determination that conduct adversely reflects any lawyer’s fitness to practice law. DR 1-102 (A)(3) expressly proscribes certain kinds of illegal conduct—illegal conduct involving moral turpitude. DR 1-102 (A)(6) prohibits any other conduct that adversely reflects on [a lawyer’s] fitness to practice law.¹³

Another sexual harassment prosecution without a prior adjudication of unlawful discrimination was *In Re Kahn*.¹⁴ The respondent engaged in a pattern of sexual harassment of females, none of whom were his employees. The respondent handed hard candies to female adversary counsel while sarcastically asking, “Do you want to suck one of my balls?”¹⁵ Further, the respondent “invited a female adversary to guess the bra size of a fourteen-year-old client.”¹⁶ For these and other acts of jarringly unprofessional conduct, the 67-year-old respondent was suspended for three months.¹⁷

At the time of Mr. Robert Kahn’s prosecution, the New York Code of Professional Responsibility contained an explicit provision that proscribed unlawful discrimination in the practice of law and required that a complaint must be “brought before [a civil rights] tribunal in the first instance.”¹⁸ Nonetheless, the departmental disciplinary committee prosecuted Mr. Kahn under that section, but instead invoked its catch-all provision, which more generally proscribed “conduct that adversely reflects on the respondent’s fitness as a lawyer.”¹⁹

It appeared that Mr. Kahn’s harassment was not directed at employees within the meaning of the federal antidiscrimination law such that the EEOC would have had jurisdiction in

the first instance. To the contrary, Mr. Kahn’s discrimination was directed at fellow attorneys whom he encountered in the court room. Thus, the DDC could have prosecuted Mr. Kahn under the predecessor to current RPC 8.4(g) without awaiting the outcome of an administrative investigation by civil rights agency.

Conclusion

New York’s Rules of Professional Conduct proscribe unlawful discrimination in the practice of law, adding an additional weapon in the hands of disciplinary authorities. This increases the stakes involved in civil rights investigations and prosecutions of law firms, which now face more than mere money damages and professional disgrace as a result of a finding of unlawful discrimination. Now, lawyers and law firms found guilty of unlawful discrimination may also face professional discipline.



1. Nate Raymond, “‘Life Partner’ Not Subject to Federal Age Bias Law, Kelley Drye Argues” NYLJ, April 6, 2010.

2. Id.

3. *EEOC v. Sidley Austin Brown and Wood*, 315 F.3d 696 (7th Cir. 2002).

4. Nate Raymond, “Firms Cling to Retirement Policies Despite Continuing Criticism,” NYLJ, April 8, 2010.

5. See Julie Cresell and Karen Donovan, “Happy Birthday. Vacate Your Office.” N.Y. TIMES, Dec. 8, 2006, available at <http://query.nytimes.com/gst/fullpage.html?res=9E01EEDA1731F93BA35751C1A9609C8B63&sec=&spn=&pagewanted=2>.

6. See “Report and Recommendations on Mandatory Retirement Practices in the Profession,” New York State Bar Association, Special Committee on Age Discrimination in the Profession, January, 2007 (NYSBA Report).

7. 22 N.Y.C.R.R. § 1200 (2009), New York Rules of Professional Conduct 8.4(g).

8. See Roy Simon, Simon’s New York Code of Professional Responsibility Annotated 59-60 (2007).

9. N.Y.R.P.C. 8.4(g), supra note 5.

10. Id. (emphasis added).

11. See NYSBA Report at 13 (“There does not appear to be any case law treatment of the discrimination prohibitions of DR 1-102(a)(6)...”).

12. *In re Peters*, 428 N.W.2d 375 (Minn. 1988).

13. Lisa G. Lerman and Phillip G. Schrag, Ethical Problems in The Practice of Law 89 (Aspen 2008).

14. *In re Kahn*, 16 A.D.3d 7 (1st Dep’t 2005).

15. 791 N.Y.S.2d at 37.

16. Id. at 38.

17. Id.

18. Disciplinary Rule 1-102(a)(6), 22 N.Y.C.R.R. § 1200.3(a)(6).

19. 791 N.Y.S.2d at 37 (referring to DR 1-102(a)(7)).