

TO: ADVISORY COMMITTEE ON RULES

FROM: N.H. BAR ASSOCIATION ETHICS COMMITTEE

SUBJECT: PROPOSED ADOPTION OF NEW SECTION 8.4(g)
OF THE N.H. RULES OF PROFESSIONAL CONDUCT

DATE: FEBRUARY 23, 2018

INTRODUCTION

As we have previously discussed with the Advisory Committee on Rules, in August 2016, the American Bar Association House of Delegates unanimously voted to amend the Model Rules of Professional Conduct to adopt a new Model Rule 8.4(g). The new rule bans lawyers from discrimination and harassment in the practice of law based on race, sex and other protected classes.

In response to the new model rule, the Ethics Committee voted to recommend that a modified version of Model Rule 8.4(g) be incorporated into the New Hampshire Rules of Professional Conduct. The Board of Governors approved the Ethics Committee draft on March 9, 2017, and the approved proposal was submitted to the NH Supreme Court's Advisory Committee on Rules ("Advisory Committee") by letter dated March 23, 2017.

The Advisory Committee has considered adopting the rule prohibiting discrimination and harassment following the ABA's action. Most recently, on February 2, 2018, a proposal was submitted to limit the prohibition against discrimination or harassment by lawyers to actions "against a client".

Attached to this memorandum for your reference are the "clients-only" proposal (Attachment "A") and the "practice of law" proposal submitted by the New Hampshire Bar Association ("NHBA") (Attachment "B").

RECOMMENDED ACTION

The Ethics Committee has reviewed the "clients only" proposal and voted to recommend to the Advisory Committee that a "clients only" rule should not be proposed for adoption because it is too narrowly crafted and would be ineffective. The Ethics Committee recommends that the Advisory Committee move forward the Rule 8.4(g) language recommended by the NHBA Ethics Committee and approved by the NHBA Board of Governors in March 2017.

To the extent that the Advisory Committee is concerned that such a rule would open a floodgate of frivolous complaints against lawyers, there is simply no evidence to show that this would occur, even in light of comparable rules having been in force in more than half the states. Even assuming that some frivolous complaints would be filed, the Supreme Court's disciplinary

system is well equipped to handle them. At the same time, the gap in our current rules is problematic and should be filled to reflect the core values that the legal profession is sworn to uphold, as set forth in our previous correspondence and summarized below.

SUPPORTING POINTS AND AUTHORITIES

1. Lawyers are not as likely to harass or discriminate against their own clients, who can fire them. Misconduct is more likely against non-clients, opposing parties and others, including associates, corporate and government attorneys, office personnel, and others.
2. The current rules do not encompass the conduct covered by Model Rule 8.4(g) and the NHBA proposal. For example, Rule 4.4 (respect for rights of third persons) is limited to purposeful efforts to embarrass or delay. Rule 3.4 (fairness to opposing parties and counsel) does not address behavior towards other persons. Rule 8.4 has no general “catch all” prohibition against plainly unacceptable lawyer misconduct in part because New Hampshire chose not to adopt the prior ABA Model Rules’ “administration of justice” language in 8.4.
3. Anti-discrimination laws dealing with employment disputes do not apply to many New Hampshire lawyers. Firms with fewer than six employees are exempt from coverage under both state and federal anti-discrimination laws.
4. Sexual harassment policies do not always have sanctions that would discourage internal behaviors. Experience shows that many lawyers and others who are the victims of harassment and discrimination are reluctant to file formal charges against their employers with state and federal agencies, such as the Commission for Human Rights and, where unprivileged touching is present, with the police.
5. “The supreme courts of the jurisdictions that have black letter rules with anti-discrimination and anti-harassment provisions have not seen a surge in complaints based on these provisions. Where appropriate, they are disciplining lawyers for discriminatory and harassing conduct.” AMERICAN BAR ASSOCIATION [REVISED RESOLUTION 109] ADOPTED BY THE HOUSE OF DELEGATES AUGUST 8-9, 2016, at 6. Decisions issued under other states’ rules are collected at *id.*, n. 15.¹
6. Narrowing the rule to cover “clients only” sends the wrong message to the public by suggesting that lawyers care only about their clients, and that other persons with whom they interact are undeserving of the protections in the ABA Model Rule and the NHBA-approved rule language. A client-only rule would not prohibit lawyers from harassing or discriminating against other parties, witnesses, court personnel, employees, opposing lawyers and lawyers within the firm. A “client only” rule would also target misconduct

¹Available at:

https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/final_revised_resolution_and_report_109.authcheckdam.pdf (Last accessed February 20, 1018)

already addressed under existing rules that protect clients from sexually inappropriate conduct.

7. Other examples of unprofessional behavior that would not be covered under the “clients only” limitation are disparaging remarks in court aimed at an opposing party or counsel and sexual harassment of female associates or staff. Such misconduct is plainly unprofessional but escapes coverage under “clients only” prohibitions.
8. To our knowledge, no other jurisdictions limit the scope of (g) or 8.4 generally in this manner. That may be because a client-only proposal would not even bring New Hampshire in line with the prior ABA Model Rules, in which ABA Rule 8.4(d) prohibited “conduct that is prejudicial to the administration of justice” and its accompanying comment, Cmt. 3, explicitly condemned discriminatory conduct. (As noted above, New Hampshire did not adopt that subsection.)
9. “Many firms have been reluctant to successfully implement effective anti-harassment programs. A lack of proper reporting protocols, confidentiality, and enforcement leads to discouragement of complaints, delays in investigations, and retaliation against the complainant. Firms fall short in investigating or punishing the perpetrators of this conduct, particularly if the offender is a ‘rainmaker’ or is in a firm’s leadership position.” *Sexual Harassment in the Legal Profession: It’s Time to Make It Stop*, by Wendi Lazar, Vol. 255 N.Y. Law Journal No. 42, March 4, 2016.
10. “The Florida Bar’s Young Lawyer’s Division reported this year that in a survey of its female members, 43% of respondents reported they had experienced gender bias in their career.” AMERICAN BAR ASSOCIATION [REVISED RESOLUTION 109] ADOPTED BY THE HOUSE OF DELEGATES AUGUST 8-9, 2016, at 6.
11. There is ample evidence from national news and the internet to show that problems with discrimination and harassment in the workplace are not unique to certain professions. In the view of the ABA, the NHBA Board of Governors and the NHBA Ethics Committee, the time has come for the legal profession to adopt a rule that reflects its core values.
12. Throughout U.S. history, the legal profession has played a key role in promoting *equality and inclusion*. But bad conduct can drive good lawyers out of the profession. Women and minorities can and do suffer in *silence*. Misconduct involving discrimination and harassment is not addressed in the current New Hampshire rule, making New Hampshire one of a handful of jurisdictions having no rule whatsoever governing attorney conduct. A new rule can make an impact, but not if it only protects a lawyer’s clients.

CONCLUSION

For these reasons, the Ethics Committee recommends that the Advisory Committee adopt the proposed draft Rule 8.4(g) submitted by the NHBA Ethics Committee and approved the Board of Governors in March 2017 and that the Advisory Committee reject revisions that would limit the scope of the rule to clients only.

ATTACHMENT "A"

(g) engage in conduct related to the practice of law that the lawyer knows or reasonably should know is harassment or discrimination *against a client* on the basis of race, sex, religion, national origin, ethnicity, physical or mental disability, age, sexual orientation, or marital status. This paragraph does not limit the ability of the lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16.

ATTACHMENT "B"

**Proposed NH Rule 8.4(g) and Ethics Committee Comments
(Approved by Ethics Committee 02/08/17)**

A. "Clean" Version of proposed NH Rule 8.4(g):

Rule 8.4. Misconduct.

It is professional misconduct for a lawyer to:

...

(g) engage in conduct related to the practice of law that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, physical or mental disability, age, sexual orientation, or marital status. This paragraph does not limit the ability of the lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16.

B. "Redlined" Proposed NH Rule 8.4(g) vs. ABA Model Rule:

Rule 8.4. Misconduct.

It is professional misconduct for a lawyer to:

...

(g) engage in conduct related to the practice of law that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, physical or mental disability, age, sexual orientation, gender identity, or marital status. ~~or socioeconomic status in conduct related to the practice of law.~~ This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. ~~This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.~~

C. "Redlined" Proposed Ethics Committee Comments to show proposed changes:

Ethics Committee Comments

1. Section (d) of the ABA Model Rule is deleted. A lawyer's individual right of free speech and assembly should not be infringed by the New Hampshire Rules of Professional Conduct when the lawyer is not representing a client. The deletion of section (d) was not intended to permit a lawyer, while representing a client, to disrupt a tribunal or prejudice the administration of justice, no matter how well intentioned nor how noble the purpose may be for the unruly behavior.
2. ABA Model Rule section (e) is split into New Hampshire sections (d) and (e).
3. The substantive state and federal law of anti-discrimination and anti-harassment statutes and related case law is intended to guide the application of subsection (g), however, statutory or

regulatory exemptions based upon the number of personnel in a law office, for example, shall not relieve a lawyer of the requirement to comply with this Rule.

4. See ABA Comment 4 related to the intended scope of the phrase "related to the practice of law".

5. As used in this Rule, discrimination and harassment based upon "sex" and "sexual orientation" are intended to encompass same-sex discrimination and harassment, as well as discrimination and harassment based upon gender identity.

6. This Rule is not intended to infringe on a lawyer's rights of free speech or a lawyer's right to advocate for a client in a manner that is consistent with these Rules.

D. For ease of reference, the ABA Comments [3], [4] and [5] to Rule 8.4 are reproduced below:

[Note: The ABA Comments are not part of the NH Rules or Ethics Committee Comments.]

[3] Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).

[4] Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.

[5] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance with these Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. See Rule 6.2(a), (b) and (c). A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. See Rule 1.2(b).