

MEMORANDUM

To: Advisory Committee on Rules
From: Carolyn Koegler
Re: # 2016-009. NH Rule of Prof. Conduct 8.4
Date: March 6, 2018

Attached please find Justice Lynn's proposal to amend the proposal set forth in attachment B of the N.H. Bar Association Ethics Committee's February 23, 2018 memorandum to the Committee. The language in **[bold and in brackets]** shows the Ethics Committee's proposed changes to the existing rule. The language in **[bold and in brackets and in red]** shows Justice Lynn's proposed change.

Justice Lynn's proposal draws from the Ethic' Committee's proposed comment [3] and makes clear in the rule itself that the misconduct identified in proposed subsection (g) is harassment or discrimination that is prohibited by law. He believes that it is important to include this language in the rule itself to make clear that misconduct under this rule does not encompass behavior that would not otherwise be actionable under state or federal law.

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) state or imply an ability to influence improperly a government agency or official;
- (e) state or imply an ability to achieve results by means that violate the Rules of Professional Conduct or other law; or
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; **or**
- (g) engage in conduct related to the practice of law that the lawyer knows or reasonably should know is harassment or discrimination[, as defined by substantive state or federal law,] 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.]**

Ethics Committee Comment

[1.] ABA] S[s]ection (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 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.] 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.]