

# 2016-009



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March 23, 2017

**Via Electronic Mail**

Carolyn A. Koegler, Secretary  
New Hampshire Supreme Court Advisory  
Committee on Rules

**Re: Rules of Professional Conduct: ABA Model Rule 8.4(g)**

Dear Carolyn:

I am pleased to report that the Ethics Committee of the New Hampshire Bar Association has completed its review of the revision to Model Rule of Professional Conduct 8.4 as approved by the American Bar Association on August 8, 2016, adding a subsection (g). The ABA's account of this process may be seen at

<http://www.americanbar.org/publications/youraba/2016/september-2016/aba-adopts-anti-discrimination-rule-8-4-g--at-annual-meeting-in-.html>. A number of states have adopted variations on Model Rule 8.4(g). Considerable opposition has also arisen; see, e.g. <https://www.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2016/kp0123.pdf>.

The changes to the ABA Comments are effective without action by the Advisory Committee on Rules or the Supreme Court; the Supreme Court website version of the ABA Comments should be updated. As is our practice, the Ethics Committee endeavors to provide Ethics Committee Comments to flag matters in which the ABA Comments raise issues specific to New Hampshire, or in which the Rules of Professional Conduct as adopted in New Hampshire differ from the ABA Model Rules.

**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. Clean version of revised 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. Section 8.4(g) differs from the ABA Model Rule. 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, such as those based upon the number of personnel in a law office, 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 otherwise consistent with these Rules.

**C. Proposed NH Rule 8.4(g) Blacklined 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.~~

**D. Ethics Committee Comments blacklined to show proposed changes:**

Ethics Committee Comments

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3. Section 8.4(g) differs from the ABA Model Rule. 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, such as those based upon the number of personnel in a law office, 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 otherwise consistent with these Rules.

**E. ABA Comments [3], [4] and [5] to Rule 8.4:**

[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).

Please do not hesitate to get in touch with any questions or comments on this matter.

Very truly yours,



Rolf Goodwin

RG:ds