



May 30, 2018

Carolyn A. Koegler, Advisory Committee on Rules
New Hampshire Supreme Court
One Charles Doe Drive
Concord, NH 03301
Via email: CKoegler@courts.state.nh.us

Re: Proposed New Hampshire Rule of Professional Conduct 8.4, #2016-009

Dear Ms. Koegler:

We write to voice our opposition to the proposed amendment to the New Hampshire Rules of Professional Conduct modeled on ABA Model Rule 8.4(g). The proposed rule states that attorneys shall not "engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination." Model Rules of Prof'l Conduct r. 8.4(g) (Am. Bar Ass'n). We are concerned that this rule is vague and overboard, thus unconstitutional under the First Amendment. This proposed rule, if applied broadly, would force lawyers into silence on matters of opinion during any discussion with clients or other attorneys. Although Model Rule 8.4(g) attempts to protect individuals from harassment, the proposed rule is unnecessary, as harassment can be curtailed by enforcing existing statutes. As such, passage of this proposed rule is likely to have a deleterious impact on free speech rights, as members of the legal community are forced to silence their opinions, and no impact on the harassment and discrimination it is purportedly designed to address.

Most importantly, we are concerned that the adoption of this Model Rule would lead to lawful legal advice, which may be required as part of the zealous representation of clients, being treated as professional misconduct.

I. The Model Rule is Unconstitutional Under the First Amendment

All proposals being considered in New Hampshire seek to adopt Model Rule 8.4(g). When considering amendments that similarly attempted to adopt Model Rule 8.4(g), the Attorney Generals of five States—Texas, South Carolina, Louisiana, Tennessee, and Arizona—have issued official opinions that ABA Model Rule 8.4(g) is unconstitutionally vague and overbroad, and violates the free speech, free exercise, and free association rights of attorneys.

The vagueness of ABA Model Rule 8.4(g) is most evident in its use of the phrase "reasonably should know," which leaves it unclear to the practitioner what specific conduct might fall under this rule. The ambiguity and potential for broad application of Model Rule 8.4(g) is also shown in official comment 4, which states this rule would be enforced, not just during interactions with clients, but during Bar Association events and social activities related to the practice of law.



Model Rules of Prof'l Conduct r. 8.4(g) cmt. 4 (Am. Bar Ass'n). Thus, because of the rule's vague nature and potential for broad application, lawyers would likely silence their opinions out of fear that any conduct could fall under the proposed rule, preventing a robust discussion of issues pertinent to the bar, pending legislation, and society at large.

In light of the foregoing, , New Hampshire, like the aforementioned State Attorney Generals, should find that the rule is unconstitutionally vague and overbroad, and violates the free speech, free exercise, and free association rights of attorneys.

II. Even if the Model Rule is Constitutional, the Model Rule Should not be Adopted Because it Unnecessarily Harms Speech Where Harassment can be Curtailed Under Existing New Hampshire Statutes

New Hampshire has statutes that prohibit discrimination and harassment. RSA 354-A (prohibiting discrimination); RSA 644:4 (prohibiting harassment). Unlawful discrimination and harassment can be remedied by enforcing these existing laws. Thus, adopting Model Rule 8.4(g) is both unnecessary and unconstitutional. *See Rideout v. Gardner*, 838 F.3d 65 (1st Cir. 2016) (statute restricting speech is unconstitutional where state failed to show existing statutes could not be enforced to address the problem). As such, adopting Rule 8.4(g) is unnecessary; the only impact that the rule will have is a deleterious effect on free speech rights.

Conclusion

For the aforementioned reasons, we urge the Committee to reject the proposed amendments to New Hampshire's Rules of Professional Conduct.

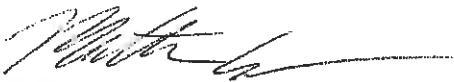
Respectfully yours,



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