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May 30, 2018

Chief Justice Robert J. Lynn, Chairperson
New Hampshire Supreme Court
Advisory Committee on Rules
One Charles Doe Drive
Concord, NH 03301
Attn: Ms. Carolyn Koegler, Secretary

By email: rulescomment@courts.state.nh.us

Dear Chief Justice Lynn and members of the Advisory Committee on Rules:

I am writing this to urge you to reject the proposed amendments to Rule of Professional Conduct 8.4. The version of the proposed rule in Appendix K (which this submission will focus on) would (1) violate the First Amendment, and (2) unnecessarily turn ordinary employment law disputes into bar discipline matters. (The versions in Appendix L and M are likewise flawed, for reasons well explained in the Christian Legal Society's comments, pp. 15-17).

1. The proposal would violate the First Amendment

a. The proposal would punish and chill a wide range of speech on important topics

The proposal says (emphasis added),

> It is professional misconduct for a lawyer to . . . 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.

ABA comment 4, which the proposal expressly endorses, elaborates:

> 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.

And while the proposal does not expressly endorse ABA comment 3, that comment captures well how many interpret the meaning of the term "harassment":

> Discrimination and harassment . . . 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).

(For instance, N.H. Rev. Stat. Ann. 14-B:1 defines "sexual harassment," in the context of the state legislature, as including "verbal . . . conduct," such as material that is viewed as "degrading" or "demeaning.")

Say, then, that some lawyers put on a Continuing Legal Education event that includes a debate on same-sex marriage, or on whether there should be limits on immigration from Muslim countries, or on whether people should be allowed to use the bathrooms that correspond to their gender identity rather than their biological sex. In the process, unsurprisingly, the debater on one side says something critical of gays, Muslims or transgender people. Under the Rule, the debater could well be disciplined by the state bar:

1. He has engaged in "verbal . . . conduct" that "manifests bias or prejudice" toward gays, Muslims, or transgender people.

2. Some people view such statements as "harmful"; those people may well include bar authorities.

3. This was done in an activity "in connection with the practice of law," a Continuing Legal Education event. (The event could also be a bar activity, if it's organized through a local bar association, or a business activity.)

4. The statement is not about one person in particular (though it could be—say the debater says something critical about a specific political activist or religious figure based on that person's sexual orientation, religion or gender identity). But "anti-harassment . . . case law" has read "harassment" as potentially covering statements that are offensive to a group generally, even when they are not said to or about a particular offended person. *See, e.g.*, *Sherman K. v. Brennan*, EEOC DOC 0120142089, 2016 WL 3662608 (EEOC) (coworkers' wearing Confederate flag T-shirts on occasion constituted racial harassment); *Shelton D. v. Brennan*, EEOC DOC 0520140441, 2016 WL 3361228 (EEOC) (remanding for fact-finding on whether coworker's repeatedly wearing cap with "Do not Tread On Me" flag constituted racial harassment); *Doe v. City of New York*, 583 F. Supp. 2d 444 (S.D.N.Y. 2008) (concluding that e-mails condemning Muslims and Arabs as supporters of terrorism constituted religious and racial harassment); *Pakizegi v. First Nat'l Bank*, 831 F. Supp. 901, 908 (D. Mass. 1993) (describing an employee's posting a photograph of the Ayatollah Khomeni and another "of an American flag burning in Iran" in his own cubicle as potentially "national-origin harassment" of coworkers who see the photographs). And the rule is broad enough to cover statements about "others" as groups and not just as individuals.

Indeed, one of the comments to the ABA rule originally read "Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct *towards a person who is, or is perceived to be, a member of one of the groups.*"[1] But the italicized text was deleted, further reaffirming that the statement does not have to be focused on any particular person.

Or say that you are at a lawyer social activity, such as a local bar dinner, and say that you get into a discussion with people around the table about such matters—Islam, evangelical Christianity, black-on-black crime, illegal immigration, differences between the sexes, same-sex marriage, restrictions on the use of bathrooms, the alleged misdeeds of the 1 percent, the cultural causes of poverty in many households, and so on. One of the people is offended and files a bar complaint.

Again, you've engaged in "verbal . . . conduct" that the bar may see as "manifest[ing] bias or prejudice" and thus as "harmful." This was at a "social activit[y] in connection with the practice of law." The State Bar, if this Rule is adopted, might thus discipline you for your "harassment." And, of course, the speech restrictions are overtly viewpoint-based: If you express pro-equality viewpoints, you are fine; if you express the contrary viewpoints, you are risking disciplinary action.

b. There is no First Amendment exception for "hate speech" or advocacy that some may deem "harassing"

Yet such speech is constitutionally protected, when said by lawyers (again, outside the courtroom and similar contexts) or by others. Recent opinions from several state Attorneys General have expressly concluded that the ABA Model Rule is likely unconstitutionally overbroad, see Op. to Warren L. Montgomery, La. A.G. Op. No. 17-0114 (Sept. 8, 2017); Op. to John R. McCravy III, S.C. A.G. Op. (May 1, 2017); Tenn. A.G. Op. No 18-11 (Mar. 16, 2018); Op. to Charles Perry, Tex. A.G. Op. No. KP-0123 (Dec. 20, 2016). And the Supreme Court has repeatedly made clear that even much more offensive speech than the above is constitutionally protected.

As four Justices of the Supreme Court noted in *Matal v. Tam*, 137 S. Ct. 1744 (2017), "Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'" *Id.* at 1764 (Alito, J., lead opinion). Four other Justices in the same case agreed, stressing that "A law that can be directed against speech found offensive to some portion of the public can be turned against minority and dissenting views to the detriment of all. The First Amendment does not entrust that power to the government's benevolence." *Id.* at 1769 (Kennedy, J., concur-

[1] *See* https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/draft_redline_04_12_2016.authcheckdam.pdf .

ring in part and concurring in the judgment). Similarly, in *Christian Legal Society v. Martinez*, 561 U.S. 661, 696 n.26 (2010), the Supreme Court stressed the First Amendment's tradition of "protect[ing] the freedom to express 'the thought that we hate'" includes the right to express even "discriminatory" viewpoints. Nor can any proposed "hate speech" exception, rejected by the Supreme Court, be rescued by labeling it a ban on "harassment." As then-Judge Alito noted, "There is no categorical 'harassment exception' to the First Amendment's free speech clause." *Saxe v. State Coll. Area School Dist.*, 240 F.3d 200, 204 (3d Cir 2001).

And the Court said all this in reaffirming speakers' viewpoint-neutral right of access even to relatively modest benefits (certain programs available to university student groups, and certain forms of trademark enforcement available to registered trademark owners). The First Amendment protection should be even clearer when it comes to freedom to speak without jeopardy to one's license to practice a profession.

To be sure the Rule states that it "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." But the drafters of the Rule apparently view some supposedly "harass[ing]" speech, even in "bar association . . . or social activities in connection with the practice of law," as not within the "rights of free speech." New Hampshire lawyers would thus be left to guess what enforcement authorities view as unprotected "harass[ing]" speech and what is protected "free speech."

c. The proposed rule goes far beyond most existing professional conduct rules

The proposed rule goes well beyond many states' existing versions of Rule 8.4(d), which generally bar "conduct" "that is prejudicial to the administration of justice," including certain kinds of speech "in the course of representing a client" (e.g., comment to Ariz. R. Prof. Cond. 8.4). The Ethics Committee Comment to N.H. Rule Prof. Cond. 8.4 likewise notes that a lawyer may not "disrupt a tribunal or prejudice the administration of justice." Courts can legitimately protect the administration of justice from interference, even by, for instance, restricting the speech of lawyers in the courtroom or in depositions. But the proposal deliberately goes vastly beyond such narrow restrictions, to apply even to "social activities."

Indeed, I have found only two states, Indiana and New Jersey, that forbid lawyer speech that "manifests bias or prejudice" or speech that is "derogatory or demeaning" outside the special context of speech in courtrooms, depositions, negotiations, and the like—interactions that are indeed likely to directly interfere with the administration of justice. *See* Ind. Rule Prof. Conduct 8.4(g); N.J. Rule Prof. Conduct 8.4 official comment. (Compare, e.g., Mass. R. Sup. Jud. Ct. 3.4(i) and Wash. R. Prof. Conduct 8.4(h), which forbid such speech only within such litigation or negotiation processes.) And even the Indiana and New Jersey rules do not go so far as to cover "social activities related to the practice of law."

The proposal also goes beyond existing hostile-work-environment harassment law under Title VII and similar state statutes. That law itself poses potential First Amendment problems if applied too broadly. *See, e.g., DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591 (5th Cir. 1995) ("Where pure expression is involved, Title VII steers into the territory of the First Amendment.") (dictum); *Rodriguez v. Maricopa County Comm. Coll. Dist.*, 605 F.3d 703 (9th Cir. 2010) ("There is no categorical 'harassment exception' to the First Amendment's free speech clause."). And in any event, it is substantially narrower than the proposed rule: For instance, harassment law generally does not cover social activities at which coworkers are not present—yet under the proposed rule, even a solo practitioner could face discipline because something that he said at a law-related function offended someone employed by some other law firm. (That "anti-discrimination and anti-harassment statutes and related case law is intended to guide the application" of the proposal, Comment 3, would likely not be seen as undermining the force of Comment 4, which expressly applies restrictions on "harassment" to social and bar association activities, and not just to speech among coworkers or by an employer to employees.)

Many people pointed out possible problems with this proposed rule, which is based on the ABA's new Model Rule, when the ABA was considering it—yet the ABA adopted it with only minor changes that do nothing to limit the rule's effect on speech. It seems that the ABA and the current New Hampshire proposal aim to do exactly what the text calls for: limit lawyers' expression of viewpoints that the ABA and some bar authorities dislike.

2. The proposal would turn ordinary employment disputes into disciplinary matters

Lawyers are rightly subjected to many special rules that have to do with the special power that they are granted, and the special relationships they enter into, with courts, with clients, with witnesses, and the like.

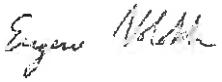
But lawyers can also wear many other hats: they can be drivers, they can be homeowners, they can be businesspeople, and they can be employers (including employers of nonlawyer staff). Of course, like all citizens, they ought to behave properly in those capacities: They should, for instance, be careful drivers; they should not play their music too loudly; they should comply with their contractual obligations. But we recognize that these matters should be left to the normal tort and contract law rules that apply to all people, lawyers or not (at least unless they involve outright criminality or fraud).

The same should apply to ordinary employment law disputes. If an accountant or an administrative assistant—or for that matter an associate—believes that he or she has been improperly fired or demoted, that person can sue, or file a charge with an administrative agency that deals with such matters, just as someone who works for a contractor or a dentist can do the same. There is no reason to also turn this into a matter of bar discipline.

Yet the proposal would likely do precisely this: After all, the employment of the employees of a law practice is "conduct related to the practice of law." Employees who feel themselves aggrieved by a lawyer-employer's decision could then retaliate by filing a bar complaint and not just a lawsuit, and indeed use the express or implied threat of a bar complaint as leverage to favorably settle even a meritless lawsuit. Many employers have comprehensive liability insurance policies that could be used to settle such a suit—but you cannot insure yourself against the possible loss of a license, or the public opprobrium that would accompany even a lesser sanction, such as a public reprimand.

Indeed, even some of the broadest professional conduct rules, which do cover employment discrimination by lawyers, try to mitigate this danger by limiting themselves to "employment discrimination . . . resulting in a final agency or judicial determination," *e.g.*, N.J. R. Prof. Conduct 8.4(g). But the proposal lacks such a limitation.

Sincerely Yours,



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