#2016-009

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From: JAMES SHIRLEY <shirleyfarm@comcast.net>
Sent: Thursday, May 31, 2018 12:29 PM
To: RulesComment
Subject: Proposed Amendments to N. H. Rules Prof. Conduct 8.4(g)

To: New Hampshire Supreme Court Advisory Committee on Rules

From: Sara B. Shirley, N.H.B.A. #4044

Re: Comment on Proposed Amendments to N.H. Rules of Professional Conduct, Rule 8.4(g)

Date: May 31, 2018

All three alternative proposals for amending N. H. Rule of Professional Conduct 8.4(g) should be rejected for the following reasons:

1. **The proposed amendments do not sufficiently inform lawyers what conduct on their part will result in discipline and/or penalties.** Lawyers subject to discipline under the Rules of Professional Conduct should be able to look at the **rules themselves** to determine what is a violation. The substance of the proposed amendments – expansive definitions of "harassment and discrimination" as well as what conduct is deemed "related to the practice of law" - should be explicitly set forth in the "Definitions" section of New Hampshire's Rules of Professional Conduct, not buried in the "Comments" of a separate ABA publication that is incorporated solely by reference.
2. **The proposed amendments incorporate contradictory comments.** Comment 3 purports to require the committee to use "substantive state and federal law of anti-discrimination and anti-harassment statutes and related case law" to guide the application of the proposed rule. This federal and state law provides specific definitions of harassment and discrimination that limit liability to circumstances involving employment and/or public accommodation and require repeated comments or behavior to be actionable. Comment 4, which incorporates ABA Comment 4, contains no such limitations. It extends liability far beyond conduct proscribed by state and federal law, i.e., to a single "derogatory or demeaning" or "harmful" comment made by a lawyer in a wide variety of contexts. The proposed amendments seem to allow the committee to choose between contradictory definitions in enforcement proceedings, thus opening the door to claims of arbitrariness.
3. **The proposed amendments are unconstitutionally vague.** The U.S. Supreme Court has long held that professional licenses are property rights subject to constitutional due process protections. One of those due process protections is the vagueness doctrine that requires statutes and regulations to sufficiently inform those persons subject to them what conduct on their part will result in discipline and/or penalties. ABA Comment 4, which is expressly incorporated into the proposed amendments, contains vague and undefined words such as "derogatory," "harmful," "demeaning," "business," and "social" that do not allow lawyers to determine exactly what conduct the proposed rules seek to prohibit. For example, is swearing at another lawyer or name-calling during an argument at a summer bar meeting professional "misconduct"? The committee is barred from using a vague conduct rule to deny lawyers' basic constitutional rights (such as trial by jury) in proceedings that could infringe on their abilities to practice their professions.

4. **The proposed amendments impermissibly infringe on the First Amendment rights of lawyers.** Several jurisdictions, including South Carolina, Montana, and Texas have declined to amend Rule 8.4(g) on First Amendment grounds. The overbroad language of the amendments opens the door for disciplinary proceedings against lawyers solely because they express disfavored political, social or religious viewpoints on an issue. The proposed amendments include no limitations or guidance on the Professional Conduct Committee's power to police lawyers' speech, a flaw that leaves the proposed amendments open to challenge on First Amendment grounds.
5. **The proposed amendments subject law office disputes to Professional Conduct Committee Review under circumstances where federal and state anti-discrimination and anti-harassment laws would not apply.** The proposed amendments fail to require that the harassment or discrimination be severe or pervasive, which is a requirement of federal and state anti-discrimination laws. As written, the proposed amendments provide that a single "derogatory," "harmful," or "demeaning" comment could result in discipline. The effect of the proposed amendments would be to punish and chill a wide range of speech on important topics and turn non-actionable disputes into disciplinary matters.
6. **The proposed amendments create confusion regarding compliance with Rule 8.3.** Upon notification of an incident qualifying as discrimination or harassment under federal and state law, law firms conduct internal investigations that are confidential and not subject to disclosure. The proposed amendments, as written, appear to abrogate this confidentiality and require law firms to disclose the matter by reporting it to the Attorney Discipline Office pursuant to Rule 8.3. The human resources departments of law firms should not be forced to relinquish their statutory rights to confidentiality to comply with rules of professional conduct.

In sum, the result of adopting Rule 8.4(g) will include a flood of complaints to the Attorney Discipline Office that are not otherwise actionable under the current state and federal anti-discrimination and anti-harassment laws – complaints such as careless comments by lawyers at work or social gatherings, as well as words exchanged between lawyers in the throes of contentious litigation or negotiations. The proposed amendments are too far-reaching and vague, and the committee's procedure for resolving complaints under them is insufficient, to be used as grounds for disciplinary decisions – decisions which could severely infringe the constitutionally protected right of a lawyer to practice his or her profession.