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Devon Chaffee  
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VIA EMAIL ([rulescomment@courts.state.nh.us](mailto:rulescomment@courts.state.nh.us))

Advisory Committee on Rules  
New Hampshire Supreme Court  
One Charles Doe Drive  
Concord, NH 03301

**Re: Proposed New Hampshire Rule of Professional Conduct 8.4(g)**

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

I write on behalf of the American Civil Liberties Union of New Hampshire (ACLU-NH) concerning the proposed New Hampshire Rule of Professional Conduct 8.4(g). As explained below, though the goal of proposed Rule 8.4(g) attached at Appendix K is both critical and compelling, the ACLU-NH has free speech concerns with its provisions. Of the remaining two options—Appendix L and Appendix M—Appendix M would be a better, narrower option. Appendix M best captures the twin concerns of extending civil rights protections to those with whom lawyers deal in the course of their practice of law, and at the same time provides the most cabined definition of “harassment” and “discrimination” to avoid free speech concerns that are raised by the less clearly defined Appendix K.

The ACLU-NH applauds the efforts of the New Hampshire Bar Association’s Ethics Committee through this proposed rule to protect from harassment and discrimination marginalized communities that have historically been discriminated against, including women, religious minorities, the LGBTQ community, and communities of color. Through litigation, advocacy, and public education, the ACLU-NH pushes for change and systemic reform in institutions that perpetuate discrimination, focusing its work in the areas of employment, housing, public accommodations, and education. The ACLU brought its first LGBTQ rights case in 1936 and founded the LGBT Project in 1986. Recently, the ACLU-NH was one of the chief proponents of HB1319, which will protect transgender persons in employment, housing, and public accommodations in New Hampshire. The ACLU-NH is also dedicated to upholding gender and racial equality and combating sexism and racism in all forms through litigation, community organizing and training, legislative initiatives, and public education to address the broad spectrum of issues that disproportionately harm women and people of color.

Our right to peaceful free speech under Part I, Article 22 of the New Hampshire Constitution and the First Amendment is also critical. Since its founding in 1920, the ACLU has vigorously defended the right to free speech, and has appeared before the U.S. and New Hampshire Supreme Courts on numerous occasions in support of that principle.

Under proposed rule 8.4(g) at Appendix K, 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 ...” (emphasis added). This provision is modeled after ABA Model Rule 8.4(f) approved by the ABA in 2016, though Appendix K’s text omits the categories “gender identity” and “socioeconomic status” that exist in the ABA Model Rule. The text of

the proposed rule in Appendix K also does not include the following sentence that exists in the text of the ABA Model Rule: "This paragraph does not preclude legitimate advice or advocacy consistent with these Rules." However, Appendix K does similarly state in Comment 6 that "[t]his 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."

Neither the proposed rule at Appendix K nor its associated comments define "harassment" or "discrimination," nor do they formally adopt Comment 3 to the ABA Model Rule, which defines "harassment" and "discrimination." The absence of specific definitions is potentially problematic, as these terms can have very broad meanings. Moreover, in the absence of an express definition, lawyers, judges, and ethics committees may well look to Comment 3 to the ABA Model Rule in interpreting Appendix K. That comment defines the terms "harassment" and "discrimination" in vastly overbroad ways. The Model Rule's Comment 3 states: "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)." See ABA Model Rule of Prof. Conduct 8.4(g), Comment 3 (emphasis added).<sup>1</sup> Under this comment, even a stray comment that inadvertently "manifests bias or prejudice" could be an ethics violation.

The extension of the proposed rule to social settings and public discussions also raises concerns. Comment 4 to the proposed rule at Appendix K expressly incorporates Comment 4 to the ABA's Model Rule, which defines conduct "related to the practice of law." Under Comment 4 to the ABA Model Rule: "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." (emphasis added).

The purpose behind the proposed rule at Appendix K is laudable. However, the proposed rule, as currently drafted, is overbroad and could capture within its scope speech that is protected under the First Amendment and Part I, Article 22 of the New Hampshire Constitution, especially to the extent that Comment 3 to the ABA Model Rule is looked to as a guide to interpreting the terms "discrimination" and "harassment." For example, Appendix K could potentially sweep within its scope a panelist at a state bar function or CLE conference engaging in "verbal . . . conduct" that "manifests bias or prejudice" toward LGBTQ individuals, Christians, women, or men. The statement need not be directed to one person in particular, nor does it have to be severe or pervasive; it can be an isolated comment that merely "manifests bias." Given the pervasiveness of bias and its often implicit or unconscious nature, this is a potentially sweeping prohibition. As written, the rule could also implicate advocacy by lawyers who represent religious organizations and who are giving advice based on that organization's faith, as one person's religious tenet could be another person's manifestation of bias. The subjective nature of the terms "harassment" and "discrimination" also creates the possibility for arbitrary and discriminatory enforcement. See *Montenegro v. N.H. DMV*, 166 N.H. 215, 224 (2014) (striking down DMV vanity

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<sup>1</sup> This is available at [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_8\\_4\\_misconduct/comment\\_on\\_rule\\_8\\_4.html](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_4_misconduct/comment_on_rule_8_4.html).

license plate regulation on its face as vague because it encouraged “arbitrary and discriminatory enforcement”).

Appendix K (in the comments), like the ABA rule (in its text), attempts to address some of these concerns by stating that “[t]his 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.”<sup>2</sup> However, the presence of such boilerplate “savings clauses” generally cannot save a speech restriction that is overbroad under the First Amendment.<sup>3</sup> This is because persons are not presumed to be able to understand what the First Amendment does and does not protect to the degree of certainty required to provide adequate notice. The same can be said for attorneys, most of whom do not specialize in First Amendment law.<sup>4</sup>

The ACLU-NH believes that Appendix M, which more narrowly covers “harassment or discrimination, as defined by substantive state or federal law,” is the better approach. Appendix M may be the best way forward because it expressly borrows the substantive legal definitions of harassment and discrimination that exist in other contexts and simply applies them to lawyers “in the practice of law.” By expressly tying the definitions of harassment and discrimination to the existing legal definitions, which in turn have generally been interpreted narrowly to avoid punishing protected speech, Appendix M better ensures that the ethics rule will not negatively impact First Amendment rights. (The comment to Appendix K providing that substantive state and federal law “is intended to guide application of subsection (g),” by contrast, is ambiguous as to whether it requires adoption of that law or merely that it be looked to for guidance.)

The ACLU-NH also suggests including a provision in the Comments to Appendix M stating that “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.” The ACLU-NH does not believe that Appendix L is satisfactory, as its provisions limit the prohibition to lawyer-client relations, and would therefore not cover, for example, lawyer-to-lawyer, lawyer-to-staff, and lawyer-to-court personnel interactions. In addition, we agree it sends the wrong message to say that New Hampshire cares about unlawful discrimination and harassment only when clients are the victims.

Finally, while the proposed rule does state in Comment 5 that “‘sex’ and ‘sexual orientation’ are intended to encompass ...discrimination and harassment based upon gender identity,” this Committee should place “gender identity” in the rule itself in recognition of HB1319. This year, the New Hampshire legislature overwhelmingly passed and the Governor promised to sign HB1319, which updates the state’s laws prohibiting discrimination in employment, housing, and public accommodations to explicitly include

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<sup>2</sup> The ABA Model Rule 8.4(g) states that: “This paragraph does not preclude *legitimate* advice or advocacy consistent with these Rules.” (emphasis added). The term “legitimate,” however, is far from precise.

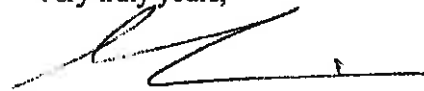
<sup>3</sup> See, e.g., *Waste Management Holdings, Inc. v. Gilmore*, 252 F.3d 316, 333 (4th Cir. 2001) (savings clause could not save regulatory statutes from a constitutional challenge because it was “repugnant to the straightforward, limiting language of the respective statutory provisions” (citing *Looney v. Com.*, 133 S.E. 753, 755 (Va. 1926)); *Fisher v. King*, 232 F.3d 391, 395 (4th Cir. 2000) (savings clause is disregarded as void when it is inconsistent with the body of the statute, citing Sutherland on Statutory Construction treatise); *State v. Machholz*, 574 N.W. 2d 415, 421 n.4 (Minn. 1998) (same); *Long v. State*, 931 S.W. 2d 285, 295 (Tex. Crim. App. 1996) (same).

<sup>4</sup> See, e.g., *Long v. State*, 931 S.W. 2d 285, 295 (Tex. Crim. App. 1996) (an affirmative defense approach to protecting First Amendment rights “would relegate the First Amendment issue to a ‘case-by-case adjudication,’ creating [a] vagueness problem” because it “would require people of ordinary intelligence—and law enforcement officials—to be First Amendment scholars”); *id.* (“Because First Amendment doctrines are often intricate and/or amorphous, people should not be charged with notice of First Amendment jurisprudence, and a First Amendment defense cannot by itself provide adequate guidelines for law enforcement”); *id.* (“an attempt to charge people with notice of First Amendment caselaw would undoubtedly serve to chill free expression”).

New Hampshire's transgender residents. With this bill, New Hampshire has recognized the urgent need to ensure equal protection for transgender people so they can live and work on equal terms with their neighbors. Any changes to the text of Rule 8.4(g) should specifically include these critical civil rights protections for the transgender community.

Thank you for your time and consideration.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Gilles Bissonnette', with a long horizontal stroke extending to the right.

Gilles Bissonnette  
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