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

Re: New Hampshire Supreme Court Advisory Committee on Rules

To Whom It May Concern:

I write to present my personal comment that the three alternative proposals for adopting the 2016 ABA amendment to Rule of Professional Conduct 8.4(g) should be rejected. Although I have limited knowledge of which states have adopted and which have not, I am aware that the South Carolina Supreme Court has declined to adopt ABA Model Rule 8.4(g) in part based on public comment that the amended rule would likely be used to "chill lawyers expression of disfavored political, social and religious viewpoints on a multitude of issues." The Montana Legislature has also rejected Rule 8.4(g) and the Texas Atty. Gen. has observed that the rule infringes on First Amendment free-speech, free exercise of religion and freedom of association rights.

The Rule is legitimately criticized because it fails to require that the harassment or discrimination be severe or pervasive, which is a requirement of federal and state anti-discrimination laws. This opens the door to a single harassing comment resulting in discipline. The Rule would chill, and possibly punish, a wide range of speech on important topics and turn ordinary employment disputes into disciplinary matters. The Rule goes far beyond restricting discrimination and harassment in the conduct of litigation and pushes the court into regulating the social interactions of attorneys at events only remotely related to lawyering, such as continuing legal education events, law firm gatherings, and bar association dinners.

The Rule is also an unconstitutional infringement of lawyers' speech rights and it creates a trap for any lawyer wanting to engage on issues that might be considered controversial. Lawyers should not be required to give up their First Amendment rights for the privilege of practicing law.

The ramifications of adopting Rule 8.4(g) will be far reaching and the impacts mostly negative. It will allow for complaints to the Attorney Discipline Office based on nothing more than a lawyer's careless, off-hand comment at the workplace or social function, or based on an allegation of discovery abuse in a contentious litigation.

The potential interplay between Rule 8.4(g) and Rule 8.3 causes further concern. If an employee of a law firm reports perceived harassment to a firm's human resources department and the firm conducts an internal investigation (that largely remains confidential, at least to anyone outside the firm), must the firm make public the matter by reporting it to the Attorney Discipline Office pursuant to Rule 8.3? The attorney discipline process is neither designed for nor equipped to litigate allegations of harassment.

There exists already a robust body of state and federal law prohibiting the very practices at which Rule 8.4(g) is aimed. It is unnecessary to heap the attorney discipline process and professional sanctions on top of the remedies available under state and federal laws. While the impetus to curb harassing and discriminatory behavior in the profession is laudable, the attorney discipline process is not the proper venue to do so.

The Rule also lacks any requirement that a complaining party first pursue his or her statutory remedies before proceeding with a professional complaint. It seems that the advocates who pushed Rule 8.4(g) through the ABA House of Delegates may have failed to consider how it is that the individual states enforce their Rules of Professional Conduct. If any of the proposed amendments to the NH rules are adopted, an accused lawyer will not have the due process protections of a jury trial, but rather will be shunted to an administrative process that starts with the Attorney Discipline Office, proceeds to a subcommittee of the Professional Conduct Committee, then to the PCC itself and ultimately to the Supreme Court. The resulting remedy in such a process is potentially much more severe than any of the available statutory remedies, i.e., loss of the ability to pursue one's livelihood. When one considers that an allegation of an ill-considered remark to a client, colleague, social acquaintance or staff member in a setting tenuously related to law practice can lead to sanctions, suspension or loss of license, one can appreciate that the Rule, if amended, is highly susceptible to misuse as a weapon rather than a tool for redress. The change would be particularly pernicious as applied to small office or solo practice where the lawyer's attention in the event of a complaint would be necessarily diverted to a prolonged administrative process simply for the purpose of professional survival. Moreover, it is likely that such an administrative process would be outside normal liability insurance protections.

My comments here are necessarily circumscribed and do not, I suspect, begin to scratch the surface of the ramifications of the proposed rule change. For example, when one considers that each state has its own process for enforcing ethical rules and that each adopting state may enact its own variant of Rule 8.4(g), one can appreciate that confusion about what conduct or speech is prohibited will reign, particularly for firms engaged in multi-state practice. What does

seem likely in the event that the various states fall in line with the ABA's version of 8.4, or some variant thereof, lawyers will become the among the most beleaguered of citizens.

Very truly yours,

James Q. Shirley

JQS/kd