#2016-009

June 1, 2018

The Honorable Robert J. Lynn, Chair
Advisory Committee on Rules
Attention: Carolyn A. Koegler, Secretary
New Hampshire Supreme Court
One Charles Doe Drive
Concord, NH 03301

Re: **Comments on Proposed Amendment to New Hampshire Rule of Professional Conduct 8.4(g) and Ethics Committee Comment (#2016-009)**

Dear Chief Justice Lynn and the Members of the Advisory Committee on Rules,

In our role as attorneys licensed to practice in New Hampshire and employed as in-house counsel by the Roman Catholic Bishop of Manchester, a corporation sole (the "Diocese"), we write to urge the Committee not to adopt proposed New Hampshire Rule of Professional Conduct 8.4(g). As lawyers experienced in practicing employment law and in accordance with our Catholic faith, we are committed to opposing all forms of unlawful harassment and discrimination. However, for the reasons set forth below, we are concerned that some applications of the proposed Rule would treat as professional misconduct actions by lawyers, including the two of us, that not only are *lawful* but in many instances *required* in the zealous representation of a client.

1. **Lawyers employed by or representing a religious organization should not be covered by a rule forbidding employment discrimination on the basis of religion.**

State and federal laws exempt religious organizations from claims of employment discrimination based upon religion.[1] This protection has both a common law and constitutional dimension. From an early date, the United States Supreme Court recognized that a person who voluntarily associates with a religious organization, whether as an employee or otherwise, implicitly consents to the religious and moral convictions that animate and underlie the organization's work.[2] Later cases make clear that the right of church autonomy, which includes the right of a religious organization to use religious criteria in making employment decisions, is

[1] 42 U.S.C. § 2000e1(a); 42 U.S.C. § 2000e-2(e)(2); N.H. RSA 354-A:2, VII.

[2] *Watson v. Jones*, 80 U.S. 679, 729 (1872) ("All who unite themselves to [voluntarily religious associations] do so with an implied consent" to ecclesiastical governance).

protected under the Religion Clauses of the First Amendment.[3] This right is an essential component of the freedom such organizations enjoy to profess, teach, and practice their religion.[4]

While not all employees of the Diocese are Roman Catholic, membership in the Church is required or preferred for certain employed positions. For example, our job descriptions as in-house counsel and as Chancellor and Vice-Chancellor for the Diocese require that we be practicing Roman Catholics who are registered and active in a parochial or religious community. This requirement for the Chancellor and Vice-Chancellor to be Catholic is prescribed by the Code of Canon Law (Church law) and is consistent with both federal and state law. However, under the proposed rule, it would be professional misconduct for us to give preference to Catholics when hiring other legal staff and to advise parishes and Catholic schools about their rights to give preference in hiring to Catholics.

Appendix K of the proposed rule states that it would be "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 . . . religion." Appendix M sets forth similar language, but Appendix L limits the prohibited conduct to harassment or discrimination against a client. The proposed Comment 4 for all three versions refers to the ABA Comment 4 related to the intended scope of the phrase "related to the practice of law." The ABA Comment construes this phrase broadly to include interactions with coworkers.

Draft Comment 3 of versions K and L of the proposed Rule provides:

> The substantive state and federal law of anti-discrimination and anti-harassment statutes and related case law is intended to guide the application of subsection (g), however, 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 proposed rule and the accompanying comments neglect to acknowledge the rights of religious organizations under the United States and New Hampshire Constitutions.[5] Moreover,

---

[3] *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94 (1952); *Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190 (1960); *Serbian Eastern Orthodox Diocese v. Milvojevich*, 426 U.S. 696 (1976). *Presbyterian Church v. Mary E.B. Hull Mem. Presbyterian Church*, 393 U.S. 440 (1969).

[4] *E.g.*, Douglas Laycock, *Towards a General Theory of Religion Clauses: the Case of Church Labor Relations and the Right to Church Autonomy*, 81 COL. L. REV. 1373, 1408-09 (1981) ("[C]hurches are entitled to insist on undivided loyalty from [their] employees. The employee accepts responsibility to carry out part of the religious mission . . . [C]hurches rely on employees to do the work of the church and to do it in accord with church teaching. When an employee agrees to do the work of the church, he must be held to submit to church authority in much the same way as a member.").

[5] Interestingly, the draft proposal to amend Rule 8.4 issued by the American Bar Association ("ABA") on December 22, 2015 stated that paragraph (g) "does not apply to conduct unrelated to the practice of law or conduct protected by the First Amendment." We would object, however, even if New Hampshire adopted the ABA's language because the right of religious organizations to consider religion in employment is not confined to the First

draft Comment 3 of versions K and L provides that state and federal laws are intended to "guide" application of the rule, but it also allows for exemptions in the statutes and case law to be ignored. This is particularly troubling, as attorneys may be subjected to discipline for conduct that committee members may view as "discrimination," even if the conduct otherwise is lawful. For example:

> Maria is general counsel of a religious organization. The organization has an opening for the position of Associate General Legal Counsel and prefers a member of its own denomination for the position. Consistent with federal and state law, it may act on such a preference. But draft Comment 3 suggests that Maria could be subjected to discipline for discrimination on the basis of religion, as the Professional Conduct Committee could ignore the case law and statutes that make it clear that such conduct is not unlawful discrimination.

2. Lawyers employed by or representing a religious organization should not be covered by a rule that, in its application, would impede the organization's right to adopt and enforce employee conduct standards based upon religion.

A religious organization may insist that persons it selects to further its mission and work – including its lawyers – share and live out the religious views of that organization. That is, religious organizations lawfully may insist not only that their employees *profess* a set of beliefs, but that they actually *practice* them. Otherwise, the religious organization would be compelled to retain employees who undermine its religious mission by their conduct.[6]

Although we take the position that the United States and New Hampshire Constitutions protect the right of religious organizations to adopt and enforce standards of conduct based upon religion, the proposed Rule 8.4(g) prohibiting discrimination could create confusion with respect to the rules of professional conduct. For example:

> Michelle is employed by a religious denomination in an advocacy support position. Michelle's duties include presentations for groups on the denomination's teachings on social issues. Michelle collaborates with interest groups as the representative of the denomination on legislative issues and may be called upon to testify before the New Hampshire Legislature on behalf of the denomination. The denomination learns that in her free time, Michelle publicly advocates in support of a right to abortion notwithstanding the denomination's religious objection to abortion. The denomination asks Elizabeth, its lawyer, whether it may lawfully terminate Michelle's employment based upon her advocacy. Elizabeth does not engage in professional misconduct when she

---

Amendment. It also is grounded in state constitutional provisions and is permitted as an exemption under the New Hampshire Law Against Discrimination, RSA 354-A:18.

[6] *See*, 42 U.S.C. § 2000e(j) (defining "religion" to include both beliefs and practices). *See also*, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (New Jersey law forbidding discrimination based on sexual orientation was an unconstitutional infringement of the Boy Scouts' right of expressive association).

advises the denomination of legal authority in support of its position that it may lawfully terminate Michelle's employment.[7] But under the proposed Rule, Elizabeth may be uncertain whether she will be subject to discipline for engaging in conduct related to the practice of law that will be considered to be discrimination on the basis of religion.

3. **Lawyers do not engage in professional misconduct when they advise a client about otherwise protected categories that are lawfully considered in making employment and other decisions.**

As in-house counsel, we are concerned the proposed Rule will have a chilling effect on our ability to retain the services of outside counsel on behalf of our client. Our client has the right to obtain the advice of outside counsel, even when the advice concerns categories specified in the proposed Rule. For example, when a protected category is a *bona fide* occupational qualification or, in a religious workplace, when consideration of a protected category is permissible because of the ministerial exception, the lawyer may, without risk of being charged with professional misconduct, advise the client accordingly. Indeed, under these circumstances, the lawyer may have a professional and ethical duty to do so. But the proposed Rule prohibits a lawyer from engaging in conduct related to the practice of law the lawyer knows or reasonably should know is discrimination on the basis of several protected classes, making this area unclear.

Example: Anne is counsel to a church. The church has an opening for an ordained pastor. The denomination with which the church is affiliated ordains only men. The church asks Anne if its decision not to allow female applicants for the position violates the law. Anne does not engage in professional misconduct when she correctly advises the church of legal authority allowing it to consider only male applicants.[8] Anne has a professional and ethical duty to give the church correct legal advice. In addition, if Anne serves on the search committee for the position, she does not engage in professional misconduct by not interviewing female applicants. But under the proposed Rule, Anne may be concerned she will be the subject of discipline if she gives advice that could be construed as discrimination on the basis of gender.

Example: Anne is counsel to a church. The church has learned that a federal agency has proposed rules that will modify current employee exemptions. The church asks Anne to review its job positions under the existing and proposed rules, including employees classified and eligible for the ministerial exception. Anne has a professional and ethical duty to give the church correct legal advice. But under the proposed Rule, Anne may be concerned she will be the subject of

[7] *See Curay-Cramer v. Ursuline Academy of Wilmington*, 450 F.3d 130 (3rd Cir. 2006) (school did not engage in unlawful sex discrimination or retaliation when it fired teacher for abortion-related advocacy)

[8] *See Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694 (2012) (ministerial exception, grounded in the Religion Clauses of the First Amendment, bars application of employment discrimination law to minister).

discipline if she gives advice that could be construed as discrimination on the basis of religion.

4. **Lawyers do not engage in professional misconduct when they take a particular position in advocacy.**

Representing unpopular persons and causes is part of the historic heritage of the law and legal system of this country. No lawyer should be subject to a claim of professional misconduct because he or she represents an unpopular person or advances an unpopular cause. These basic beliefs are recognized in the New Hampshire Constitution as well as the rights of free speech, free association, and free exercise of religion guaranteed by the First Amendment to the United States Constitution.

During the course of a session of the New Hampshire Legislature, we take any number of positions that are viewed as unpopular. In recent years, we have supported repeal of the state death penalty, opposed the study of assisted suicide, opposed legislation that targeted non-citizen individuals lawfully present in the United States, sought the repeal of a law creating a "buffer zone" around abortion clinics, and joined with anti-human trafficking advocates to oppose a bill to legalize sex work. These issues are not "Catholic" or even "religious" in nature. But as Catholics, we participated on behalf of our client and have the right to raise our voices on such issues alongside others without fear of discipline for professional misconduct on the basis of the content of our speech.

The proposed Rule goes even further than restricting conduct with clients or employees or speech in the public square. All three versions of the proposed Rule refer to ABA Comment 4 for the intended scope of the phrase "related to the practice of law." Lawyers may be considered to engage in professional misconduct for conduct that takes place while participating in bar association, business, or social activities in connection with the practice of law.

Comment 1 notes that "A lawyer's individual right of free speech and assembly should not be infringed by the New Hampshire Rules of Professional Conduct when the lawyer is representing a client." Combined with the information above, this limitation is troubling. Lawyers may appear and speak on the protected classes in the public square, at state and local bar association social activities, or at bar association events such as continuing education courses. At these venues, a lawyer may not necessarily be speaking on behalf of a client. And yet, according to Comment 1, a lawyer's individual right of free speech and assembly will not be infringed by the rules when the lawyer is representing a client. If construed to pursue discipline against a lawyer for speech in any of the above scenarios when the lawyer is not representing a client, Comment 1 would violate the First Amendment of the United States Constitution and Part I, Article 22 of the New Hampshire Constitution. It is because the proposed Rule might be employed in a way that would hinder the participation of lawyers in the public square, as well as in state and local bar association and similar activities, that we urge the Committee not to adopt the proposed Rule.

Example: Meghan is a New Hampshire lawyer and citizen who supports HB 9999, a bill seeking to ban late-term abortions. Meghan does not engage in professional misconduct by testifying at the hearing in support of HB 9999, but the proposed Rule may allow someone present at the hearing to claim they have been harassed by Meghan's testimony on the basis of sex and claim that Meghan has engaged in conduct in violation of the Rule.

Example: At the hearing on HB 9999, Meghan is questioned by Representative Smith, a member of the Legislature and the New Hampshire Bar Association. In the course of questioning, Meghan responds that she has held her position on this issue for many years because she believes, as a Catholic, that all life begins at conception. Representative Smith refers to Meghan as one of "*those* Catholics" who has a cult-like devotion to the Pope and crucifixes and fails to care about the needs of women. Under the proposed Rule, Meghan may claim that Representative Smith has engaged in professional misconduct because Representative Smith has engaged in harassment on the basis of religion.

Example: Meghan attends a local bar association dinner after the hearing on HB 9999. Cindy, a fellow member of the New Hampshire Bar Association, tells Meghan she read about the hearing online and asks Meghan what happened. After Meghan explains what happened at the hearing, including her own views on abortion, Cindy is offended that a fellow member of the Bar would not support a woman's right to choose abortion and reports Meghan for a violation of Rule 8.4(g) because Cindy claims that she experienced harassment on the basis of sex.

Conclusion

As Catholics, it is our fundamental belief that every human person has been created in the image and likeness of God and that we are called to treat everyone with dignity and respect. We also believe that unlawful discrimination and harassment should not be tolerated and should be addressed through continuing efforts at training, education, and enforcement of civil and criminal laws. We oppose proposed Rule 8.4 (g), however, as all of its versions would put New Hampshire attorneys at risk of discipline for engaging in activity protected by the United States and New Hampshire Constitutions, including the most basic freedom to engage in free speech. For these reasons, we urge the Committee not to adopt the proposed Rule.

Very truly yours,

Diane Murphy Quinlan, Esq. (NH Bar 8213)

Meredith P. Cook, Esq. (NH Bar 12838)