#2016-009

WADLEIGH, STARR & PETERS, P.L.L.C.

WILLIAM C. TUCKER
EUGENE M. VAN LOAN III, Of Counsel
JOHN E. FRIBERG, Sr.
JAMES C. WHEAT
RONALD J. LAJOIE
KATHLEEN N. SULLIVAN, Of Counsel
JEFFREY H. KARLIN
MARC R. SCHEER
GREGORY G. PETERS
ROBERT E. MURPHY, Jr.
FRANK P. SPINELLA, Jr.
DEAN B. EGGERT
MICHAEL R. MORTIMER
KATHLEEN C. PEAHL
RICHARD THORNER
CHARLES F. CLEARY
CHRISTINE GORDON

Attorneys At Law
95 Market Street
Manchester, New Hampshire 03101
Telephone (603) 669-4140
Facsimile (603) 669-6018

WWW.WADLEIGHLAW.COM

Serving New Hampshire since 1899

TODD J. HATHAWAY
STEPHEN J. JUDGE
ALISON M. MINUTELLI
MICHAEL J. TIERNEY
PIERRE A. CHABOT
DONNA J. BROWN
JOSEPH G. MATTSON
CHRISTOPHER P. MCGOWN
ABBY TUCKER
STEPHEN M. BENNETT, Of Counsel
ALLISON M. FUSCO
STEPHEN N. ZAHARIAS
ALYSIA M. CASSOTIS
ELIZABETH E. EWING
ROBIN D. MELONE
DANIEL M. COURTER
JOSHUA P. LANZETTA

Direct Dial: (603) 206-7239
mtierney@wadleighlaw.com

September 5, 2018

Carolyn A. Koegler, Advisory Committee on Rules
New Hampshire Supreme Court
One Charles Doe Drive
Concord, N.H. 03301
Via email: rulescomment@courts.state.nh.us & CKoegler@courts.state.nh.us

Re: Proposed NH Rule of Professional Conduct 8.4(g), #2016-009

Dear Ms. Koegler:

I am writing to object to the Ethics Committee's most recently proposed language[1] to add a new Rule 8.4(g) to the N.H. Rules of Professional Conduct. I served on a working group committee with the proponents of the proposed new rule to see if there was a compromise that could be achieved. We met several times over the course of the summer including on June 12th, July 23rd and August 28th. Unfortunately, the working group was unable to reach an agreement.[2]

I. Narrower Language is Both Possible and Constitutional

If the only purpose of a proposed rule was to make sexual harassment discrimination unprofessional conduct, regardless of whether such conduct occurred in the employment context,

[1] The Ethics Committee's proposal of September 4, 2018 would add a new 8.4(g) providing for discipline of attorneys who: "(g) engage in conduct while acting as a lawyer in any context that is harassment or discrimination under state or federal law on the basis of race, sex, religion, national origin, ethnicity, physical or mental disability, age, sexual orientation, marital status, or gender identity; however, statutory or regulatory exemptions, based upon the number of personnel in a law firm, shall not relieve a lawyer of the requirement to comply with this Rule. This paragraph shall not limit the ability of the lawyer to accept, decline or withdraw from representation consistent with other Rules, nor does it infringe on any Constitutional right of a lawyer, including advocacy on matters of public policy, the exercise of religion, or a lawyer's right to advocate for a client."

[2] In addition to myself, several individual and institutional members of the working group also objected to the Ethics Committee's proposed language.

then such a rule could likely be adopted. In fact, I had proposed taking the language from RSA 354-A and using it for a simple rule to make sexual harassment prohibited by Rule 8.4(g). See attached as Exhibit A. This would apply to sexual harassment between co-counsel, between an attorney and court staff, or in any other interaction an attorney may have in his capacity as a lawyer that should be subject to discipline but cannot be prosecuted under current law. This would accomplish most of what the proponents are wishing to accomplish without the host of problems the currently proposed language entails.

Alternatively, several states, including Illinois and others, have a Rule 8.4(g)[3] where attorneys could be subject to discipline only if the attorney had been adjudicated of violating an anti-discrimination law. New Hampshire could adopt a rule similar to Illinois, where prior to any discipline by the ADO, the facts would be first found by the appropriate body which would typically handle allegations of discrimination. See attached as Exhibit B. This would both allow the rules to incorporate the substantive law and avoid overburdening the ADO as Janet DeVito suggested might occur at the June 1, 2018 public hearing.

While several members of the working group support such a narrow rule, the Ethics Committee opposed a narrow rule. Instead, the language being submitted by the Ethics Committee is much broader, ambiguous, unnecessary, and unconstitutional.

II. The Ethics Committee's Proposed Language Will Have a Disproportionate Effect on Solo Practitioners and Small Firms

Many discrimination statutes have a minimum number of employees before the provisions become applicable. The proposed rule will make lawful conduct subject to discipline. For example, the Americans with Disabilities Act applies to employers with 15 or more employees. Nevertheless, pursuant to the proposed new Rule 8.4(g), a solo practitioner operating his law office out of his home would need to comply with the same ADA requirements as McLane Middleton. Similarly, under current law, a solo practitioner can lawfully discriminate in hiring decisions and make the decision to hire one's own spouse without violating RSA 354-A as that statute does not apply to employers with fewer than 6 employees. Nevertheless, if the proposed language is adopted, then such hiring decision would be unprofessional conduct. The Advisory Committee on Rules should not recommend the adoption of any proposed 8.4(g) until the implications on solo practitioners and small firms is thoroughly understood.[4]

---

[3] Illinois's anti-discrimination provision is actually codified at 8.4(j) though it is accomplishing purposes similar to what is codified as 8.4(g) in other states.

[4] The working group contained members from the New Hampshire's largest law firms, including McLane Middleton, Devine Millimet, Wadleigh, Starr & Peters, Orr & Reno, Sulloway & Hollis, Sheehan Phinney, and Bernstein Shur. Nevertheless, there were no solo practitioners or representatives from small firms.

III. The Ethics Committee's Proposed Language is Unconstitutional

The proponents of this rule language suggest that professional speech can be more stringently regulated when the lawyer is acting as a lawyer. The professional speech of attorneys is entitled to the full protection of the First Amendment, regardless of whether one is acting as a lawyer or acting in a personal non-lawyer capacity. The Rules of Professional Conduct cannot restrict an attorney's speech more stringently because it is professional speech. The United States Supreme Court has recognized the constitutional protection of professional speech in the recent decision of *National Institute of Family and Life Advocates v. Becerra*, 138 S.Ct. 2361 (U.S. June 26, 2018) ("*NIFLA*"). While some federal courts of appeals had previously held that professional speech could be regulated and was less protected by the First Amendment, the Supreme Court rejected these holdings. "[T]his court has not recognized 'professional speech' as a separate category of speech. Speech is not unprotected merely because it is uttered by 'professionals.'" *NIFLA* at 2371-72.

The proposed language seeks to chill and curtail speech which may be deemed to be "discrimination or harassment under state or federal law."[5] "'Discrimination' is not a self-defining term." *Smith v. NH. Dept. of Revenue Administration*, 141 N.H. 681, 693 (1997). The proposed rule does not say which statutes are incorporated into the rule. Discrimination statutes are highly context dependent and an action that may constitute unlawful discrimination in one context may not constitute discrimination in a different context. The proposed rule is unclear as to which state or federal statutory definitions control.

In addition, while all three versions proposed on June 1, 2018 found unprofessional conduct only when "the lawyer knows or reasonably should know" that the conduct is harassment or discrimination, this scienter language has been removed from the current proposal. Therefore, we are left with language that makes it unprofessional conduct for a lawyer to engage in speech or conduct without knowing which state or federal statutory definitions even apply. A rule of professional conduct which does not clearly define the prescribed conduct unconstitutionally chills protected speech. *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991) (holding Nevada's Bar rule unconstitutional).

Finally, even if the rule was to clearly and unambiguously prohibit harassing or discriminatory speech of attorneys, such a rule would be still be unconstitutional. Just last year the U.S. Supreme Court struck down, on free speech grounds, a statute prohibiting trademarks that disparage people on the basis of race or ethnicity. *Matal v. Tam*, 137 S. Ct. 1744 (June 19, 2017) (holding statute that prohibited the registration of the trademark "The Slants" as disparagement of a racial or ethnic group to be unconstitutional); see also *Doyle v. Commissioner, NH Dept. of Resources & Economic Development*, 163 N.H. 215, 220 (2012). ("Only narrow categories of speech, such as defamation, incitement and pornography produced with real children, fall outside the ambit of the right to free speech" under Part I, Article 22 of

[5] The Women's Bar Association has objected to including the Ethics Committee language "under state or federal law" as too narrow.

the New Hampshire Constitution.) Proposed Rule 8.4(g) would be similarly unconstitutional under both the federal and New Hampshire Constitutions.

IV. Conclusion

For the reasons stated in this letter as well as in my previous letter of May 29, 2018 and its accompanying Memorandum of Law, as well as the statements made at the June 1, 2018 public hearing, I ask that the Advisory Committee on Rules reject proposed Rule 8.4(g).

Very truly yours,

Michael J. Tierney

G:\DATA\MJT\CLG Advisory Committee Rules\Koegler8.29.18.docx

Proposal based on Illinois 8.4(j)

It is professional misconduct for a lawyer to: . . . (g) knowingly engage in an unlawful discriminatory practice, as defined in RSA 354-A:2, XV, in a way that prejudices the administration of justice and reflects adversely on the lawyer's fitness as a lawyer. Whether a discriminatory practice reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of all the circumstances, including: the seriousness of the act; whether the lawyer knew that the act was prohibited by statute; whether the act was part of a pattern of prohibited conduct; and whether the act was committed in connection with the lawyer's professional activities. No charge of professional misconduct may be brought pursuant to this paragraph unless and until a court of competent jurisdiction has first made a judicial determination that the lawyer has engaged in an act that constitutes an unlawful discriminatory practice as defined in RSA 354-A:2, XV and the finding of the court has become final and enforceable and any right of judicial review has been exhausted. Notwithstanding anything herein to the contrary, this paragraph does not apply to a lawyer's client or case selection decisions. No act that a lawyer takes in accordance with the lawyer's sincerely held religious beliefs violates this paragraph.

Proposal to Incorporate Substantive Law Directly into Rule 8.4(g)

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

(g) In his or her capacity as a lawyer, make unwelcome sexual advances or requests for sexual favors, or engage in other unwelcome verbal, non-verbal or physical conduct of a sexual nature.