

#2016-009  
Submitted 9/5/18

**Feltes-Herrick Subcommittee Proposed Rule 8.4(g)**

(g) engage in conduct while acting as a lawyer in any context that is harassment or discrimination 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.

**Comments:**

1. Section (d) of the ABA Model Rule is deleted. 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 not representing a client. The deletion of section (d) was not intended to permit a lawyer, while representing a client, to disrupt a tribunal or prejudice the administration of justice, no matter how well intentioned nor how noble the purpose may be for the unruly behavior.
2. ABA Model Rule section (e) is split into New Hampshire sections (d) and (e).
3. As used in this Rule, discrimination and harassment based upon "sex" and "sexual orientation" are intended to encompass same-sex discrimination and harassment.

Dear Working Group Members,

Thank you for inviting me to participate in the review of proposed Rule 8.4(g) and for the effort everyone has made in listening to concerns and incorporating suggested revisions over the course of this summer.

I have examined but cannot support the language of the proposed Rule as set forth in the August 28, 2018 email from Senator Feltes primarily on the ground that the proposal fails to define discrimination and harassment. One of the concerns repeated in the comments submitted to the Advisory Committee on Rules was the failure to define these terms in version K and the constitutional and other implications, and this most recent proposal also lacks those definitions.

While I object to this most recent language, I continue to support efforts to adopt a rule to address unlawful harassment and will submit further comment to the Advisory Committee on Rules in advance of the next hearing.

Meredith

**Meredith P. Cook, Esq.**

*Vice Chancellor*

Diocese of Manchester

153 Ash Street

Manchester, NH 03104

[www.catholicnh.org](http://www.catholicnh.org)

(603) 663-0148

Folks- I echo what Meredith says in this email.

Thanks for working on this, and thanks especially to Senator Feltes and Attorney Herrick for convening the group (and to Jessica Bourque for her assistance).

Bob

Robert E. Dunn Jr. Esquire  
Devine, Millimet & Branch  
15 North Main Street, Suite 300  
Concord, NH 03301  
603.410.1704  
[rdunn@devinemillimet.com](mailto:rdunn@devinemillimet.com)

I also want to thank everyone for their hard work on this important issue. We particularly feel that addressing sexual harassment in the legal profession – which is real – is an important goal. We would not oppose the proposed language if there was added language simply defining harassment or discrimination under state or federal law. Here's what it would look like:

(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.

As we discussed in our May 31, 2018 comment, we believe that using this "state or federal law" definition is a helpful approach because it expressly borrows the substantive legal definitions of harassment and discrimination that exist in other contexts and simply applies them to lawyers acting in that capacity. 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, we believe that this added language better ensures that the ethics rule will not negatively impact First Amendment rights.

Thank you again to everyone for their participation in this important discussion.

Best,  
Gilles Bissonnette

On behalf of the subcommittee of the New Hampshire Bar Association Ethics Committee, it is worth saying that this effort has been quite worthwhile. We think the draft below represents a significant improvement over the ABA version of Rule 8.4(g) and can be a model for other states. Thank you very much for your leadership, and thanks very much to the working group for a good discussion. No one got everything they want, but everyone should be pleased with their contribution to the version below. If adopted this rule will address an important problem for the New Hampshire legal system in a quite positive way.

Rolf Goodwin

All,

Those of us on the Ethics Committee Subcommittee agree that, with the removal of the proposed new third sentence regarding the definition of harassment and discrimination, it is appropriate to reinsert the incorporation of substantive law language back into the first sentence of the proposed rule. We would have no objection to adding the language proposed by Gilles below. As we have noted previously, since the proposed rule, as amended, will specifically incorporate the definitions that have been developed under substantive law, all arguments regarding vagueness fall by the wayside.

We also note the recent news stories from Arizona. It is important to keep in mind that, due to material improvements to the NH proposal, what is being proposed in NH is no longer the ABA's proposed Rule 8.4(g) and is not what Arizona considered. The NH proposal differs from the ABA model and the Arizona proposal in many material respects, including:

- the "knows or reasonably knows" language has been removed, at the request of the working group;
- the list of protected classes of persons tracks the protected classes under NH law;
- the "conduct related to the practice of law" has been replaced with "conduct while acting as a lawyer", at the request of the working group;
- existing First Amendment protections for public policy advocacy, the exercise of religion and client advocacy are explicitly recognized, at the request of the working group;
- a lawyer's right to accept, decline or withdraw from representation under the other Rules has been clarified and preserved, at the request of the working group;
- what constitutes harassment and discrimination under the proposal will be determined with respect to state and federal law; and
- the ABA Comments are not part of the NH proposal nor are they incorporated into the NH Ethics Committee Comments, at the request of the working group.

We urge that the revised proposal, with Gille's proposed amendment, be submitted to the full ACR with a positive recommendation for adoption and referral to the Court.

Peter.

Peter F. Imse, Esq.  
Sulloway & Hollis, PLLC  
9 Capitol Street  
Concord, NH 03301  
Voice 603-224-2341  
Fax 603-223-2991  
[pimse@sulloway.com](mailto:pimse@sulloway.com)  
[www.sulloway.com](http://www.sulloway.com)

**NHWBA**  
NEW HAMPSHIRE WOMEN'S BAR  
ASSOCIATION

September 4, 2018

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

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

Dear Members of the New Hampshire Supreme Court Advisory Committee on Rules:

On behalf of the New Hampshire Women's Bar Association (NHWBA)'s Board of Directors, I hereby respectfully submit the following comments regarding revisions to the Proposed New Hampshire Rule of Professional Conduct 8.4(g), which the members of the Working Group have been discussing over these past few months.

As you may recall, on June 17, 2018, the NHWBA supported the adoption of Appendix K. Please note that the NHWBA's support, and the written and public comments that it made at that time with regard to Appendix K, echoed an earlier letter of support that the NHWBA submitted to the Advisory Committee on Rules on or about March 5, 2018.

The reasons for the NHWBA's support of Appendix K were varied; however, one of the biggest reasons the NHWBA supported this version of the Proposed New Hampshire Rule of Professional Conduct 8.4(g) was because it did not include in its language a definition of the terms "harassment" and "discrimination" that strictly referred to state and federal anti-discrimination and anti-harassment statutes and related case law. Instead, Appendix K referred to the role of state and federal law in a comment to the Proposed Rule, and there, it stated that such law "is intended to guide the application of subsection (g) . . . ." This is an important point and one that, in the NHWBA's view, should not be forgotten or abandoned as this Proposed Rule goes through cycles of proposed revisions in an effort to have some version of the Proposed Rule eventually put into place.

After much consideration of the potential revisions that have been proposed by members of the Working Group, and after soliciting the input of several senior NHWBA members who are well-versed in employment law and cases involving harassment and discrimination of all types, not just gender- or sex-based, including, but not limited to, the now retired Executive Director of the New Hampshire Commission for Human Rights, the NHWBA's position regarding the proposed revisions to the Proposed Rule is as follows.

Regarding the latest proposed revisions, the NHWBA's remaining concern is that the Proposed Rule defines "harassment or discrimination" as "conduct prohibited under

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substantive federal or state law . . .” The NHWBA understands that a concern has been raised by certain members of the Working Group that the prohibited conduct should be precisely defined. However, the NHWBA firmly believes that prohibited conduct under this Rule should not be so stringently defined so as to exclude reprehensible harassing or discriminatory behavior that may not rise to unlawful discrimination or harassment, as defined by federal and state law, which sets a high threshold and many doctrinal hurdles to be met, but that should nonetheless be prohibited in our legal profession and addressed by our profession’s regulatory authority. These are the microaggressions and the covert harassing and discriminating behavior that occur every day; explicit behavior is still an issue to be sure, but it is overshadowed by the camouflaged behavior described herein that occurs much more frequently. Examples include, but are not limited to, the same behavior that was widely reported in the New Hampshire Bar Association’s 2017 Draft Gender Equality Survey Results: sexist or racist jokes, use of gendered or coded language, use of terms of endearment, such as “sweetie” or “dear,” condescending treatment, comments on apparel and appearance, comments on pregnancy and “mommy brain”, comments regarding female attorneys’ “emotions”, and automatically being mistaken for court reporters and support staff simply on the basis of one’s gender. “One off” and single instances of such harassing and discriminating behavior must be addressed under the Proposed Rule because we, as legal professionals, must act on a higher ethical level and should demand it of ourselves. Otherwise, this Proposed Rule will have little to no practical effect on the irrefutable, pervasive problem of harassment and discrimination in our profession.

Substantive federal and state law should be a reference point instead of a bright-line definition. The NHWBA supports proposed language that uses “guided by” rather than “as defined by,” or language that states that the definition of the terms “harassment” or “discrimination” “shall include, but not be limited to”. By using this type of language, rather than “defined by,” if the conduct complained of is somehow unclear, then federal and state law can be a reference point for our profession’s regulatory authority, who, in the NHWBA’s opinion, is more than able to discern between actionable and non-actionable conduct, as evidenced by their ability to do so on a regular basis to date in many other scenarios.

The NHWBA agrees with the Ethics Committee’s Rule 8.4(g) Sub-Committee that if being inclusive of all members of the protected classes listed in the Proposed Rule is the goal, as it should be, that a legal definition of just gender- and sex-based harassment and discrimination should not be specifically included or highlighted in the Proposed Rule’s language. As the definitions for harassment and discrimination based on other protected classes, such as race and disability, are different, a particular focus on just the definition of gender- and sex-based harassment and discrimination runs the substantial risk of minimalizing or detracting from the very real issue of harassment and discrimination based on other protected classes.

To that end, the NHWBA respectfully proposes the following language for the Proposed Rule:

“(g) engage in conduct while acting as a lawyer that is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity,

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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 does not limit the ability of the lawyer to accept, decline or withdraw from a representation in accordance with these Rules nor does it infringe on either a lawyer's First Amendment rights, including advocacy on matters of public policy or a lawyer's right to advocate for a client in a manner consistent with these Rules. For purposes of this Rule, what constitutes "harassment" or "discrimination" shall be guided by substantive federal or state law without regard to statutory limitations that would otherwise limit the context or scope of the prohibition, other than limitations on speech related to religion."

In the alternative, the NHWBA respectfully proposes the following language for the Proposed Rule, which was first suggested by Senator Feltes:

"(g) engage in conduct while acting as a lawyer in any context that is harassment or discrimination 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."

The NHWBA understands, appreciates, and agrees that it is important to reach a consensus on the Proposed Rule so that it may move forward, and the NHWBA has worked diligently to reach such a consensus. Indeed, the NHWBA has no issue with the other revisions that the Ethics Committee's Rule 8.4(g) Sub-Committee most recently proposed. However, with regard to the issue of how "harassment" and "discrimination" is currently proposed to be defined, the NHWBA cannot support the Proposed Rule unless substantive federal and state law is described as a reference point for the definition of harassment and discrimination, as proposed above.

Thank you for your consideration.

Very truly yours,



Christina A. Ferrari, Esquire

President  
NHWBA Board of Directors

Dan,

Given that the upshot of yesterday's meeting was to remove the definitional language from the draft version of the rule that Maureen Smith circulated on August 14, I do not support this version, which should not be understood to imply that I support any of the other versions of the rule that have been proposed. The language removed read: "For purposes of this rule, 'harassment or discrimination' shall mean conduct prohibited under substantive federal or state law without regard to statutory limitations that would otherwise limit the context or scope of the prohibition, other than limitations on speech related to religion." This language was removed at the urging of the NHWBA presumably so that the conduct set forth in Christina Ferrari's June 1, 2018 submission to the Advisory Committee would be sanctionable under the proposed rule. Such sanctionable conduct would include sexist jokes, use of titles or terms of endearment, condescending treatment, comments on apparel or appearance, verbal advances and inappropriate touching. Even with a reference to state and federal discrimination law, the proposed rule would be impermissibly vague. To enable complaints based on the conduct cited in the June 1<sup>st</sup> submission would result in a rule that lacks any recognizable standard. Jim Shirley

I object to the language of the rule as stated in Senator Feltes' August 28, 2018 email. If we wanted to make sexual harassment and discrimination unprofessional conduct then we should take the language from the statute and incorporate it into the rule as I had proposed in my July 24, 2018 email. See attached. While it did not go as far as some had hoped, no one objected to what it accomplished. The language proposed yesterday goes too far in seeking to limit speech and conduct "that is harassment or discrimination" without properly defining these terms and limiting them to appropriate contexts. I had asked that we define exactly what we are proscribing by this rule and Attorney Smith acknowledged that the Working Group cannot determine all that may hereinafter be determined to be discrimination and harassment. If we, as the Working Group, cannot tell what is and is not proscribed by the proposed rule then it should not be adopted.

Michael

Michael J. Tierney, Esq.  
Wadleigh, Starr & Peters, PLLC  
95 Market Street  
Manchester, NH 03101  
603-669-4140  
603-206-7239 (Direct)  
603-669-6018 (Fax)

**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.