

#2016-009

September 6, 2018

Via email only rulescomment@courts.state.nh.us & CKoegler@courts.state.nh.us

The Honorable Patrick E. Donovan, 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) #2016-009

Dear Justice Donovan and Members of the Advisory Committee on Rules:

In my role as an attorney licensed to practice in New Hampshire and employed as in-house counsel by the Roman Catholic Bishop of Manchester, a corporation sole (the "Diocese"), I write concerning the proposed amendment to New Hampshire Rule of Professional Conduct 8.4(g). In advance of and at its June 1, 2018 hearing on the Proposed Rule, the Advisory Committee on Rules received several comments from members of the New Hampshire Bar with concerns. After the June 1 hearing, a Working Group was tasked with seeking a compromise to address the issues raised, and I appreciate the opportunity to have been a part of that Working Group. We met several times over the course of the summer and modified the Proposed Rule in some respects, but we ultimately could not reach an agreement on the full text to submit to the Committee.

For the reasons set forth below, I cannot support the proposal before you. One of the concerns repeated in the comments submitted to the Committee in June was the constitutional implications of the failure to define key terms, and the proposal before you is no different in that regard. All members of the New Hampshire Bar Association should be committed to workplaces and courthouses free from unlawful harassment and discrimination, however. And as a Catholic, it is fundamental to my faith that we are called to treat every human person with dignity and respect. For these reasons, I support an alternate proposal to address these important issues and balance the constitutional concerns that have been raised.

- 1. 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 an in-house counsel, I am concerned that even the most recent version of the Proposed Rule submitted for your consideration will have a chilling effect on the ability of the Diocese to retain the services of outside counsel. My client has the right to obtain the advice of outside counsel, even when the advice concerns categories specified in the Proposed Rule. Organizations

committed to education and advocacy on the basis of gender, disabilities, age, and other protected classes have the similar rights.

For example, when a protected category is a *bona fide* occupational qualification¹ or, in a religious workplace, when consideration of a protected category is permissible because of the ministerial exception, the lawyer should be able to advise the client accordingly without risk of being charged with professional misconduct. 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 while acting as a lawyer in any context that is harassment or discrimination on the basis of several protected classes, making it unclear whether this advice will subject an attorney to discipline.

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.² 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 because “discrimination” is not defined and the “protections” described in the final clause of the Proposed Rule are insufficient in this instance to include a lawyer’s duty to advise a client.

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 discipline if she gives advice that could be construed as discrimination on the basis of religion because “discrimination” is not defined and the “protections” described in the final clause of the Proposed Rule are insufficient in this instance to include a lawyer’s duty to advise a client.

¹ See 42 USC § 2000e-2(e) (“it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise”); see also NH RSA 354-A:7, I.

² 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).

2. The Proposed Rule is unconstitutionally vague.

Many of those who submitted comments submitted to the Committee in June expressed that all three versions under consideration failed to define “harassment” and “discrimination” and that the omission of definitions renders such rules unconstitutionally vague and overbroad. Several individuals expressed that unlawful discrimination harassment and discrimination must be addressed, but that the vague language could be used against members of the Bar taking positions in good faith.

The Working Group met several times this summer and addressed the definitions. After these efforts, the version that has been submitted continues to lack definitions of the terms “harassment” or “discrimination.” Based upon comments of other members of the Working Group, the omission of definitions is intentional and seeks the broadest possible discipline of conduct utilizing these terms. It remains unclear what conduct is prohibited by this Proposed Rule.

3. The Committee is urged to adopt a Rule that defines the prohibited conduct.

While there are constitutional concerns with the proposal before you, it is important to address unprofessional conduct that should not be permitted to continue. As a member of the New Hampshire Bar Association, I believe every person should be treated equally under the law. And as a Catholic, it is my fundamental belief that every person has been created in the image and likeness of God and that we are called to treat everyone with dignity and respect. For these reasons, unlawful harassment and discrimination should not be tolerated in our profession, and I support the proposal submitted by Attorney Michael Tierney to define the prohibited conduct utilizing the language of RSA 354-A.³ I urge the Committee to adopt this proposal that applies to any interaction an attorney may have in his or her capacity as a lawyer and provides a clear definition of the prohibited conduct.

4. Conclusion

For the reasons set forth above, I cannot support the Working Group proposal because the lack of definitions raise constitutional concerns. But I urge the Committee to adopt the proposal submitted by Attorney Tierney as a solution to address conduct that should not be permitted to continue in the New Hampshire Bar Association while protecting the constitutional rights of our members.

Very truly yours,



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

³ See Letter and Attachment from Attorney Tierney to the Advisory Committee on Rules of September 5, 2018 at Exhibit A.