#2016-009

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New Hampshire Supreme Court
Advisory Committee on Rules
1 Charles Doe Drive
Concord, New Hampshire 03101

Re: Proposed Revision to the New Hampshire Rules of Professional Conduct 8.4(g)

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

As most of the comments submitted to the Advisory Committee on Rules in April and May demonstrate, there are many legitimate reasons to oppose all proposed versions of Rule 8.4(g). However, two important ones have received insufficient attention: 1) the so-called evidence supporting need for the rule is fatally flawed; and, 2) failing to include a "knew or should have known" standard in the rule not only violates the fundamental right of due process but also violates a fundamental principle of the N.H. Rules of Professional Conduct themselves: innocent conduct – that which is neither negligent nor intentional – is not sanctionable.

As a selling point, those favoring adoption of the amendment note that the proposed amendment tracks language in RSA 354-A which prohibits discrimination on the basis of "age, sex, sexual orientation, gender identity, race, creed, color, marital status, familial status, physical or mental disability or national origin." Despite this comprehensive list, proponents offer only a single document to support their request that the Supreme Court take immediate action to deem discrimination an act of professional misconduct: the Draft Report on the NHBA's 2017 Gender Equality Survey. No mention is made that New Hampshire has been found to be the "least sexist state" (*See,* "The Most Sexist Places in America," ***Washington Post,*** August 21, 2018) or that the Bar's Board of Governors failed to mention discrimination in "The New Hampshire Lawyer Professionalism Creed," passed on January 21, 2016, both of which undercut any claimed emergency. No evidence has been offered to show attempts at raising awareness that certain words can be perceived as "microagressions"[1] or that efforts to educate the bar on these matters have failed. As proved below, the only evidence supporting the amendment is the survey, a document devoid of evidentiary value and thus insufficient to justify the enactment of amendment 8.4(g).

[1] Word used by the representative of the New Hampshire Women's Bar Association – the "not-so-old girls' network" of uncertain number – to describe the type of conduct they believe should be considered professional misconduct.

This Committee should reject the Draft Report on the NHBA's 2017 Gender Equality Survey as evidence supporting passage of proposed amendment 8.4(g).

- *The percent of lawyers responding to the survey is low.* 83% of NH attorneys – including approximately 70% of female attorneys – did not respond to the survey. Had these non-respondents known a survey of 17% of the bar membership would be used as grounds to pass the sweeping new professional conduct rule known as amendment 8.4(g), the response rate might well have been significantly higher and the results far different.
- *A significant proportion of respondents spend little to none of their time practicing law in New Hampshire.* 10% of the male respondents and 9% of the female respondents do not practice law in NH. An additional 12% of the male respondents and 18% of the female respondents practice law in NH less than 25% of the time. Despite approximately one-quarter of the respondents practicing elsewhere most of the time, their responses to gender-related questions were included – improperly included – to provide evidence of sex discrimination by attorneys and judges in New Hampshire.
- *The survey respondents are not a random sample but rather a self-selected sample.* The use of the words, "gender equality," in the title assures participation by those attorneys most passionate about the issue of gender discrimination. Some of these respondents could have given biased or exaggerated answers hoping they would prompt exactly the corrective action now being contemplated. Two of several possible examples of exaggerated bias against women: 33% of female respondents consider women attorneys (themselves) to receive "too much deference," far more than male respondents do (11%). 22% of female attorneys marked themselves as "too emotional," almost double the number of male attorneys who do. Taken at face value, the survey suggests women believe more strongly in female stereotypes than men do. The result is that women's negative opinions of themselves inflated the averages – the type of overall percentages so often quoted in support of the rule.
- *The gender-related questions are vague.* One question asks whether respondents have witnessed "inappropriate use of titles, name references or terms of endearment toward female attorneys." The question does not explain what is meant by "inappropriate use of titles" or "inappropriate use of name references." Do they include addressing someone as "Miss" or "Mrs." rather than "Ms."? Failing to use the right gender pronoun? Mistaking a female attorney for a paralegal? Regardless, it is unreasonable to lump this type of mistake – usually innocent and easily corrected – together with "inappropriate use of terms of endearment," where discriminatory intent may be evident. As discussed above, combining innocuous incidents with more serious ones artificially inflates the overall average which is then used as evidence of wide-spread discrimination. The question regarding "condescending" treatment of female attorneys is equally vague. One person's "condescending treatment" is another person's "egomaniacal conduct" or "arrogance," none of which is in short supply in an association of lawyers, both sexes included. Condescension often happens when unequal or adversarial lawyers interact: old and

young; experienced and inexperienced; partner and associate; prosecution and defense. One shouldn't assume, as the survey does, that all "condescending treatment" towards women is based on their sex or that men do not suffer equal amounts of it.

- *The gender-related questions are biased.* As discussed, one of the questions asks about condescending treatment of female lawyers. Another asks about "inappropriate comments on the apparel or appearance of female attorneys." Neither of these questions is asked in reverse, an omission that suggests that women are never "condescending" and never make derogatory comments about other people's appearances. In addition to being vague regarding the location of the line between complimentary and "inappropriate," omitting a male version of these questions creates a distorted picture of so-called discriminatory conduct. Nor is it reasonable to treat the respondents' subjective beliefs that words are "inappropriate" as established fact or that the person uttering them has any discriminatory intent.
- *The survey results reveal nothing about the pervasiveness of the objectionable discriminatory behavior.* Some of the gender-related questions ask for subjective opinions whether certain vaguely-defined conduct has been witnessed "frequently," "occasionally," "once," or "never." Because no details are requested, there is no way of ascertaining the significance of the responses. For example, the reported instances of improper use of terms of endearment by court personnel could be the behavior a single deputy clerk. A single sexist joke could be overheard and reported by many. One boorish attorney could be responsible for many instances of perceived discrimination. In sum, without details of who did or said what where, no conclusion can be drawn on the scope of the alleged discrimination among members of the bar.

- *Because the survey does not satisfy the Daubert standard, it should not be relied upon as evidence of gender discrimination.*[2] The *Reference Manual on Scientific Evidence* states that surveys with response rates below 75% should receive "greater scrutiny," those with response rates lower than 50% should be regarded with "significant caution," and those with response rates between 5% and 20% are "very unlikely" to "provide any credible statistics of the population as a whole." The combination of the NHBA gender equality survey's 17% response rate, its self-interest bias, and its imprecise and biased questions supports a finding by this Committee that the survey is an unreliable means of measuring gender discrimination by New Hampshire attorneys. Without it, the proposed amendment 8.4(g) rests on thin air – a politically correct solution to an unproven problem – which alone justifies rejecting the amendment.

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[2] For further discussion of the applicable criteria, *see*, "Using 'Daubert' to Exclude Plaintiffs' Use of Flawed Surveys in Civil Litigation" by Evan M. Tager, September 28, 2016. https://wlflegalpulse.com/2016/09/28/using-daubert-to-exclude-plaintiffs-use-of-flawed-surveys-in-civil-litigation/

This Committee should not adopt any Rule of Professional Conduct that does not contain a scienter requirement.

Some have urged that "knew or should have known" be removed from the proposed amendment, the effect of which is to make unintentional, innocent behavior subject to a charge of professional misconduct. Such a rule would be, in essence, one of strict liability – uniquely out of sync with the rest of the rules.

Attorney competence is based on the "reasonable attorney" standard. Attorneys may not engage in fraud or misrepresentation, both of which require some level of scienter. In dealings with clients, findings of conflict rest on an attorney's "reasonable belief" and "reasonable efforts." Dealings with a tribunal may not be "knowingly" false or misleading, and an attorney may not "knowingly" violate a court order. In dealings with other counsel, attorneys may not "knowingly" disobey their obligations or allude to evidence they "reasonably" should know is irrelevant. The words "knowingly" and "reasonably" apply to trial publicity, special responsibilities of prosecutors, truthfulness in statements to others, contacting a person represented by counsel, and dealing with *pro se* litigants. Even supervising attorneys are protected by the negligence standard. Throughout, there is no provision proscribing conduct which is not predicated on at least a showing of "knew or should have known."

Given the above, this Committee cannot in good faith recommend a rule that does not contain, at a minimum, the "knew or should have known" standard, especially one where the sanctions are potentially severe and stigmatizing. By their nature, physical assaults and intentional harassment meet the "knew or should have known" standard. Mistaking a female attorney for a paralegal or noticing a new haircut usually doesn't. That the goal of some lawyers is to make innocent conduct – which by definition "microagressions" are – sanctionable is appalling. I suggest to you that any lawyer, man or woman, who is unable to deal on the spot with people using words they consider offensive is ill-equipped to represent clients whose problems are far more consequential. New Hampshire's Professional Conduct Committee should not be recast as a crew of hall monitors. "Knew or should have known" should be included in any adopted version of Rule 8.4(g).

Sincerely,

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