

#2016-009

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December 18, 2017

VIA EMAIL

Joshua L. Gordon, Esq.
75 South Main Street # 7
Concord, NH 03301

RE: ACR – Rules of Professional Conduct ("Rules") – Proposed Rule 8.4(g)

Dear Joshua:

Thank you for taking the time to talk to me by phone recently regarding the status of the consideration of proposed Rule 8.4(g) by the Advisory Committee on Rules ("ACR").

During our conversation, you identified seven issues or questions that had arisen to date during your investigations and the ACR's discussion of the proposed Rule. On behalf of the New Hampshire Bar Association Ethics Committee's Rule 8.4(g) Subcommittee, I will offer our comments and responses with respect to each of them below. However, before I do so, I would like to share the underlying rationale for our responses.

As our news media headlines remind us every day, for far too long people in power have abused their authority by engaging in discrimination and harassment of those subordinate to them. For an equally long time, the victims of this behavior have been powerless to do anything about it, and society did little to help them. As a society, we are now coming to grips with this pervasive problem, and the Bar Association feels that it is long past time that we follow the lead of other professions and take steps to eliminate this type of behavior among lawyers.

Our Rules already provide that dishonesty, fraud, deceit and misrepresentation are incompatible with being a lawyer (Rule 8.4(c)), and that New Hampshire attorneys have a duty to report violations of the Rules that raise "a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects". Rule 8.3(a). Since harassment and discrimination are the outward manifestations of an inner disrespect for and abusive attitude toward the victims, it is clear to the Subcommittee that harassment and discrimination are equally reprehensible behaviors and are incompatible with holding a license to practice law.

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If the Rules are to have any meaning at all, they should include a "no tolerance" prohibition against harassment or discrimination by members of the Bar.

We will now address each of the issues that you mentioned to me:

1. *Is the non-client focus of the proposed Rule in keeping with the client-focus of the Rules?*

The underlying premise of this question appears to arise from a mischaracterization of the focus of our Rules. While many of the Rules do deal with the attorney-client relationship, numerous Rules impose restrictions on how attorneys behave toward or interact with non-clients, whether potential clients, past clients, or third parties.

These "non-client" Rules include:

- 1.9 Conflict of Interest: Former Client
- 1.11A Conduct of Lawyer Officials
- 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral
- 1.15 Safekeeping Property
- 1.18 Duties to Prospective Client
- 2.4 Lawyer Serving as Third-Party Neutral
- 3.4 Fairness to Opposing Party and Counsel
- 3.8 Special Responsibilities of a Prosecutor
- 3.9 Advocate in Nonadjudicative Proceedings
- 4.1 Truthfulness in Statements to Others
- 4.2 Communication With Person Represented by Counsel
- 4.3 Dealing with Unrepresented Person
- 4.4 Respect for Rights of Third Persons
- 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law
- 5.7 Responsibilities Regarding Law-Related Services
- 7.1 Communications Concerning a Lawyer's Services
- 7.2 Advertising
- 7.3 Direct Contact with Prospective Clients
- 7.4 Communications of Fields of Practice
- 7.5 Firm Names and Letterheads

It is clear that the proposed Rule is entirely in keeping with the significant body of our Rules that already regulate attorney conduct with persons who are not clients.

2. Are the PCC/ADO the right bodies to police this kind of behavior? Is punishing this type of behavior the role of the discipline system?

Existing Rule 8.4(c) identifies several types of behaviors that are so antithetical to being a lawyer, that engaging in those activities will result in sanctions. They include: dishonesty, fraud, deceit and misrepresentation. The agencies and bodies involved in the disciplinary process already handle complaints relating to these behaviors. They perform their own fact-finding and analyze the results of these investigations without requiring an adjudication of the issue by third parties. We see no reason why they would not be equally adept at performing similar functions with respect to claims of harassment or discrimination.

We further believe that, because these behaviors are incompatible with how we expect lawyers to behave, our disciplinary bodies should welcome the opportunity to discipline those who behave in this way.

3. Is the definition of "related to the practice of law" too broad?

We think not. Any activity by an attorney, as an attorney, is and should be subject to the Rules. As noted above, our Committee believes that an attorney who engages in harassment and discrimination in his/her capacity as an attorney shows such a lack of respect for and abusive attitude toward the target of such behavior that the attorney is simply not suited to practice law in New Hampshire.

The opponents of the proposed Rule postulate all sorts of extreme scenarios where someone "could" or "might" feel harassed or discriminated against and file inappropriate claims against lawyers, causing "innocent" attorneys to have to defend themselves. However, the same argument could be made against every one of the existing Rules. As a safeguard, our disciplinary bodies have adequate systems in place to weed out unfounded claims against attorneys on a regular basis, and there is no reason to think that the system would not just as efficiently evaluate and manage claims made under the proposed Rule.

Finally, the Ethics Committee is aware of prior decisions of our Supreme Court that have held that New Hampshire attorneys must comply with the Rules, even when they are not actively engaged in the practice of law. These decisions would support an argument that proposed 8.4(g) should apply to attorneys without limitation as to time and place. Nevertheless, the Bar Association's proposed Rule 8.4(g) would retain the restrictive language of the ABA Model Rule that limits the scope of the Rule to activities related to the practice of law.

4. Will the proposed Rule complicate employment relations within a law firm?

To this, we reply with an emphatic "No!". If an individual within a law firm is the subject of harassment and discrimination, then the employment relationship has already been "complicated" in a very negative fashion for the victim, and there is little about the employment relationship that should be protected. The proposed Rule will give victims who are being subjected to such inappropriate behavior, especially those in smaller firms, the opportunity to report the offender's behavior for evaluation as a professional conduct matter, in addition or in lieu of other civil rights or employment-related claims that might be asserted. Both employers and employees would benefit from the proposed Rule because it would deter such behavior.

5. Won't required reporting by other members of a firm disempower firms from dealing with such issues internally? Will an attorney who observes another attorney engaging in harassment or discrimination be required to report that lawyer?

We think that the proposed Rule will actually empower firms to deal with harassment and discrimination issues internally because firm members will be motivated and responsible to ensure Rule compliance by other members. See NHRPC R. 5.1. Whether observing such conduct would require reporting depends upon whether the circumstances lead to a conclusion that the conduct "raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." See R. 8.3(a). Therefore, not every observation will result in reporting. Moreover, it is important to note that lawyers now and often do self-report Rules violations by themselves and other members of their firms. We see no reason why harassment and discrimination should be subject to different reporting requirements.

6. Should we be tying a lawyer's license to practice with the lawyer's behavior? Can't a person be a good lawyer, even if a terrible person?

All of the Rules regulate lawyer behavior. This Rule would be no different.

As noted above, we believe that harassment and discrimination are fundamentally inconsistent with what it means to be an attorney. Therefore, if the reason that an individual is a "terrible person" is that he or she engages in harassment or discrimination, then our answer is that such a "terrible person" should not be permitted to practice law, no matter how proficient a legal advisor or advocate he or she might be.

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7. Have we found any records of disciplinary proceedings or decisions under Rule 8.4(g) in States where it has been adopted?

No, we have not identified any such proceedings to date.

Finally, as a footnote to our recent letter to Mr. Hudson and the *ABA Journal*, I should note that, despite the fact that over 30 states adopted ABA Model Rule 8.4(d), New Hampshire never did so. Therefore, New Hampshire victims do not even enjoy the protections of Model Rule 8.4(d) and ABA Comment [3] which together are read to prohibit "bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status" in connection with the "administration of justice."

I trust that these responses will be helpful to you and the Committee as you consider your examination of this proposed Rule. Of course, should you have any additional questions, or need more information, we would be happy to assist you.

When you have a moment, would you also please confirm whether the Committee will be holding a hearing on the proposed Rule at the March 9, 2018 meeting, or whether that will simply be another general discussion?

Very truly yours,



Peter F. Imse

PFI:dss

Cc: Elizabeth LaRochelle, Chair, NHBA Ethics Committee
NHBA Ethics Committee Subcommittee on Rule 8.4(g): Maureen Smith, Esq.,
Rolf Goodwin, Esq., James Allmendinger, Esq.