

#2016-009

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