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December 9, 2021

New Hampshire Supreme Court
Advisory Committee on Rules
Attn: Lorrie Platt, Secretary to the Committee
1 Charles Doe Drive
Concord, NH 03301
Via Email: rulescomment@courts.state.nh.us

Re: Review of New Hampshire Rule of Professional Conduct 8.4(g)

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

I am writing in response to the December 1, 2021 letter from the New Hampshire Women's Bar Association regarding their request that the Advisory Committee propose amending Rule 8.4(g) and reverting to the language proposed by the Advisory Committee in 2019 that was ultimately not adopted by the Supreme Court. I served on the Working Group that met several times during the summer of 2018 regarding the language of 8.4(g) and attach for your reference my letter of April 9, 2019 regarding the various problems with the rule amendment advocated by NHWBA.

Rule 8.4(g), as adopted by the New Hampshire Supreme Court in 2019, does not need any amendments.

Please do not hesitate to contact me should I be able to be of assistance.

Very truly yours,

Michael J. Tierney

MJT/bag
Attachment

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April 9, 2019

New Hampshire Supreme Court
One Charles Doe Drive
Concord, NH 03301
Attn: Eileen Fox, Clerk of Court
By email: rulescomment@courts.state.nh.us

In re: Opposition to Proposed Rule 8.4(g)

Dear Chief Justice Lynn, Justice Hicks, Justice Basset,
Justice Hantz Marconi and Justice Donovan:

Please accept this letter in opposition to the Proposed Rule 8.4(g) that will be considered by the Supreme Court on April 12, 2019. I have previously submitted comments to the Advisory Committee on Rules on May 29, 2018, as well as on September 5, 2018, and incorporate those comments by reference without repeating them herein. I also served on the Working Group that met over the summer of 2018 but, as indicated in the minutes of September 7, 2018, the Working Group was unable to come to any consensus as to the necessity or the language of a proposed rule. Although a narrowly drafted rule is possible and will accomplish a majority of the rule proponent's goals, the proposed broad and undefined rule currently before the Court for consideration is unnecessary and unconstitutional.

I. Professional Speech is Entitled to Full First Amendment Protection

"The government may not regulate [speech] based on hostility—or favoritism—towards the underlying message expressed." *R.A.V. v. City of St. Paul,*

Minn., 505 U.S. 377, 386 (1992). The proposed Rule 8.4(g) is an unconstitutional limitation on an attorneys' speech. As currently worded, it is intended to broadly cover an attorneys' speech in "any context that the lawyer knew or reasonably should have known 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." There is no requirement that such speech be prejudicial to the administration of justice or otherwise be necessary to protect clients. All that is necessary to fall within the ambit of the rule is for the speech to be such that the lawyer "reasonably should have known is harassment or discrimination."

The proponents of this rule argue professional speech can be more stringently regulated when the lawyer is acting as a lawyer. This is not true. The professional speech of attorneys is entitled to the full protection of the First Amendment, regardless of whether one is acting as a lawyer or acting in a personal non-lawyer capacity. The Rules of Professional Conduct cannot restrict an attorney's speech more stringently simply because it is professional speech. The United States Supreme Court has recognized the constitutional protection of professional speech in the recent decision of *National Institute of Family and Life Advocates v. Becerra*, 138 S.Ct. 2361 (U.S. June 26, 2018) ("*NIFLA*"). While some federal courts of appeals had previously held that professional speech could be regulated and was less protected by the First Amendment, the Supreme Court rejected these holdings. "[T]his court has not recognized 'professional speech' as a separate category of speech. Speech is not unprotected merely because it is uttered by 'professionals.'" *NIFLA* at 2371-72.

II. Proposed Rule 8.4(g) is a Presumptively Unconstitutional Speech Restriction

The proposed rule punishes speech precisely because of the content of that speech. It is therefore subject to strict scrutiny. A rule "that is content based on its face is subject to strict scrutiny regardless of the government's benign motive." *Reed v. Town of Gilbert*, 135 S.Ct. 2218, 2228 (2015). Furthermore, the proposed rule discriminates against protected speech by punishing the content of speech deemed discriminatory. "Discrimination against speech because of its message is presumed to be unconstitutional." *Rosenberger v. Rector & Visitors of Univ. of Virginia,* 515 U.S. 819, 828 (1995).

Assuming the speech in question is in fact discriminatory, it still entitled to First Amendment protection. The United States Supreme Court has held a statute prohibiting trademarks that disparage people on the basis of race or ethnicity is unconstitutional under the First Amendment. *Matal v. Tam*, 137 S. Ct. 1744 (June 19, 2017) (holding statute that prohibited the registration of the trademark "The Slants" as disparagement of a racial or ethnic group to be unconstitutional). It has also held unconstitutional a statute banning "violent" video games including violence based on ethnic or racial hate. This is because determining "the precise danger posed by the California Act: that the *ideas* expressed by speech—whether it be violence, or gore, or racism" are simply unacceptable is not a permissible justification under the First Amendment. *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 799 (2011). Similarly, speech restrictions because of disagreement with the content of the speech would also violate the New Hampshire Constitution. *Doyle v. Commissioner, NH Dept. of Resources & Economic Development*, 163 N.H. 215, 220 (2012). ("Only narrow categories of speech, such as defamation, incitement and pornography produced with real children, fall outside the ambit of the right to free speech" under Part I, Article 22 of the New Hampshire Constitution.)

Proposed Rule 8.4(g) would be unconstitutional under both the federal and New Hampshire Constitutions as it makes a moral judgment as to what speech is and is not acceptable. See *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 791 (2011)("new categories of unprotected speech may not be added to the list [of unprotected speech – such as obscenity, incitement, and fighting words] by a legislature that concludes certain speech is *too harmful* to be tolerated")(emphasis added); See also *Snyder v. Phelps*, 562 U.S. 443, 458 (2011)(the government cannot restrict discriminatory speech simply because the speech is upsetting or arouses contempt); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 574 (1995)(the point of all speech protection is to shield just those choices of content that in someone's eyes are misguided, or even hurtful); *Texas v. Johnson*, 491 U.S. 397, 408-09 (1989)(an interest in protecting bystanders from feeling offended or angry is not sufficient to justify a ban on expression); *Boos v. Barry*, 485 U.S. 312, 321 (1988)(striking down a ban on picketing near embassies where the purpose was to protect the emotions of those who reacted to the picket signs' message).

III. The Proposed Rule Fails to Define Discrimination or Harassment

As stated above, a proposed rule that explicitly defined discrimination and harassment would be unconstitutional content-based discrimination. Nevertheless, this proposed rule 8.4(g) is doubly unconstitutional as it does not even define discrimination or harassment making the rule both violative of the First Amendment as well as unconstitutionally vague.

A rule of professional conduct which does not clearly define the prescribed conduct unconstitutionally chills protected speech. *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991) (holding Nevada's Bar rule unconstitutional). Rules broadly infringing on First Amendment freedoms without narrowly and specifically defining the prohibited conduct are unconstitutional. *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 807 (2011).[1] Vague rules will cause lawyers to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly defined. *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972).

In *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), the Supreme Court was faced with a rule that prohibited pre-trial publicity with vague exceptions. In particular, there was an exception for stating "without elaboration ... the general nature of the ... defense." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1048 (1991). Gentile, a criminal defense attorney, believed his statement fit within the "general nature of the defense" but the bar disciplinary authorities disagreed. The Court held the vague exception made the entire rule unconstitutional as a lawyer could not know what statements may or may not be permissible.

Similarly, the Proposed Rule 8.4(g) vaguely prohibits "discrimination" on the basis of race, sex, religion, national origin, ethnicity, physical or mental

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[1] In a concurring opinion, Justice Alito and the Chief Justice noted "Due process requires that laws give people of ordinary intelligence fair notice of what is prohibited." *Grayned v. City of Rockford,* 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). The lack of such notice in a law that regulates expression "raises special First Amendment concerns because of its obvious chilling effect on free speech." *Reno v. American Civil Liberties Union,* 521 U.S. 844, 871–872, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997). Vague laws force potential speakers to " 'steer far wider of the unlawful zone' ... than if the boundaries of the forbidden areas were clearly marked." *Baggett v. Bullitt,* 377 U.S. 360, 372, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964) (quoting *Speiser v. Randall,* 357 U.S. 513, 526, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958)). While "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity," *Ward v. Rock Against Racism,* 491 U.S. 781, 794, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989), "government may regulate in the area" of First Amendment freedoms "only with narrow specificity." *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 807 (2011).

disability, age, sexual orientation, marital status, or gender identity and then vaguely proclaims "[t]his 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." But where both discrimination and the various exemptions from discrimination are vague and undefined, it leaves lawyers guessing as to what conduct is and is not permissible.

a. Discrimination is Not Defined

First, "'discrimination' is not a self-defining term." *Smith v. NH. Dept. of Revenue Administration*, 141 N.H. 681, 693 (1997). As the NHCLU pointed out in their May 31, 2018 Letter to the Advisory Committee on Rules, "one person's religious tenet could be another person's manifestation of bias." Existing discrimination statutes apply only to specific conduct in specific contexts. As the United States Supreme Court has recognized in applying employment discrimination statutes "Context matters." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 69 (2006). Identical words or actions in one context may constitute unlawful discrimination but not constitute unlawful discrimination in a different context. By adopting a broad rule that applies by its text "in any context," the proposed rule will result in conflicting rights. Reasonable attorneys can differ on what is and is not discrimination in various contexts making it difficult, if not impossible, to know the reach of the proposed rule.

This Court has, just this year, had difficulty defining and deciding what is and is not discrimination on the basis of gender. In *State v. Lilley*, Docket No. 2017-0116 (February 8, 2019), this Court was presented with an ordinance that criminalized public nudity but defined nudity differently depending on whether one was male or female. In a 3-2 decision, the majority held that the ordinance did not discriminate while two dissenting justices wrote that it did discriminate on the basis of gender. If the five members of this Court cannot agree what gender discrimination means, how can it reasonably expect members of the bar to comply with the Proposed Rule 8.4(g) without defining "discrimination?"

Discrimination on the basis of religion may be even more difficult to define. Is it discrimination for a religious entity to hire an attorney based, in part, on the

attorney's religious denomination? Can a church's attorney provide advice and draft correspondence regarding the hiring or terminating of ministers on the basis of religion? Or is this impermissible discrimination? Can an attorney assist in drafting a church's bylaws that provide that marriages will only be performed when it is between church members or between a man and a woman or would this be religious and/or sexual orientation discrimination? Is membership in a legal organization that defines itself by religious tenets such as the New Hampshire Catholic Lawyers Guild or the Christian Legal Society discrimination in violation of the proposed rule?

b. The Exceptions are Not Defined

Second, the vague exemptions also make it difficult for attorneys to know the contours of the rule. If the prohibition on discrimination is a content based speech restriction and the rule provides that it cannot be applied to "infringe on any Constitutional right of a lawyer," does that mean that it does not actually prohibit any speech at all? If not, what Constitutional rights are exempted from the general prohibition? What is the extent of the exemption for free speech? What is the extent of the exception for religious exercise? Can a lawyer testify regarding Biblical teachings on marriage? Or does that violate 8.4(g)? Can a lawyer rely on the exceptions to counsel a religious body client about hiring practices where the religious body discriminates on the basis of religion in hiring? Or on gender in only hiring male priests? Can an immigration attorney specialize in assisting clients from one country or region or would this be discriminatory? What is the extent of the exception for "matters of public policy?" Can a lawyer ever violate this general prohibition while testifying at the State House or at an administrative or municipal legislative body? What is the extent of "a lawyer's right to advocate for a client?" Can a lawyer ever violate this rule while advocating for a client as long it pertains to a case or a dispute in which the attorney is representing a client? Will one's speech with opposing counsel ever violate this rule where that lawyer is advocating for a client? And when does exercise of religion permit discrimination on the basis of religion or other categories?

c. Harassment is Not Defined

In addition, "harassment" is also not defined. Federal Title VII prohibits sexual harassment in *employment*, as does RSA 354-A:1, et seq. Nevertheless, the Proposed Rule 8.4(g) explicitly provides that harassment is prohibited in "any

context." Outside the employment context, it is unclear what harassment actually means. Some courts have explicitly held the term "harass" – in and of itself – is unconstitutionally vague. *Kansas v. Bryan*, 910 P.2d 212 (Kan. 1996)(holding that the term "harasses," without any sort of definition or objective standard by which to measure the prohibited conduct, was unconstitutionally vague). This Court has held two statutory definitions of harassment unconstitutional. See *State v. Brobst*, 151 N.H. 420 (2004) and *State v. Pierce*, 152 N.H. 790 (2005). And it is unclear what it means to engage in "harassment . . . on the basis of . . . religion." Does proclaiming religious truths or handing out religious texts door to door constitute harassment on the basis of religion? Or is it religious exercise which is excluded from harassment?

d. A Proposed Rule With Three Levels of Vagueness is Unconstitutional

Because the terms "discrimination" as well as "harassment" as used in the new Rule are vague, and the exceptions are also vague, it presents all three problems presented by unconstitutionally vague laws – (1) it does not provide attorneys with sufficient notice as to what behavior is proscribed;[2] (2) it allows those charged with enforcing the Rules of Professional Conduct to enforce the Rule arbitrarily and selectively; and (3) its vagueness will chill the speech of attorneys who, not knowing where harassment or discrimination begins and ends, will be forced to censor their free speech rights in an effort to avoid violating the Rule. Therefore, the proposed rule is unconstitutionally vague.

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[2] Judge Delker had suggested at the September 7, 2018 meeting of the Advisory Committee on Rules that the addition of the scienter requirement of "knew or should have known" would ameliorate constitutional vagueness concerns. See Minutes of September 7, 2018 Meeting at https://www.courts.state.nh.us/committees/adviscommrules/sept-7-2018m.pdf
It is worth noting that this scienter requirement of "knew of should have known" was also present in the Nevada Rule of Professional Conduct that the United States Supreme Court held unconstitutional in *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991). Similarly, the scienter of "knows or should know will create anger, alarm or resentment based on racial, ethnic, gender or religious bias" did not ameliorate the unconstitutional ordinance in *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 413 (1992). In the present case, if it is unclear what the proposed rule 8.4(g) is prohibiting and it is also unclear when the exceptions apply then when any attorney will know or be expected to have should have known that certain speech violates the proposed rule is also unclear. Adding "should have known" does not lessen the constitutional infirmities but rather increases the confusion.

IV. The Proposed Rule Would Fail Strict or Even Intermediate Scrutiny

Where the proposed rule makes content-based judgments regarding whether an attorney's speech is or is not impermissible "harassment or discrimination," the rule is subject to strict scrutiny. A rule "that is content based on its face is subject to strict scrutiny regardless of the government's benign motive." *Reed v. Town of Gilbert*, 135 S.Ct. 2218, 2228 (2015). Where a rule would not even pass less rigorous scrutiny, court will typically apply the lower level of scrutiny. *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 199 (2014) In this case, Proposed Rule 8.4(g) is unconstitutional even if intermediate scrutiny is applied.

In order to survive intermediate scrutiny, the proposed Rule 8.4(g) must be "narrowly tailored to serve a significant governmental interest." *Rideout v. Gardner*, 838 F.3d 65, 72 (1st Cir. 2016). The Court may have an interest in preventing discrimination and harassment by members of the Bar but "intermediate scrutiny is not satisfied by the assertion of abstract interests. Broad prophylactic prohibitions that fail to 'respond[ ] precisely to the substantive problem which legitimately concerns' the State cannot withstand intermediate scrutiny." *Id.* quoting *Members of City Council of City of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 810 (1984). The language of Proposed Rule 8.4(g) does not respond precisely to any identified problem.

The language of Proposed Rule 8.4(g) intentionally fails to define what is prohibited and therefore fails to precisely respond to any problem. Based on the discussions at the ACR, the Working Group, and the written submissions, the primary concern appears to be that sexual harassment and discrimination that would be prohibited if done in the employment context is not unlawful either because the harassment and discrimination occurs in a firm with fewer than 6 employees or the discrimination is between opposing counsel or court staff and therefore employment discrimination laws are not applicable. See RSA 354-A:7; RSA 354-A:2 (VII). If the Court determines it is appropriate and necessary to prohibit in the legal profession that which the legislature determined not to prohibit generally, the Court should and must confine any rule precisely to the problem it seeks to address. "To meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is

easier." *McCullen v. Coakley*, 573 U.S. 464, 495 (2014)(holding anti-harassment law was not narrowly tailored).

V. Narrower Alternative Language is Available

There was substantial discussion at both the ACR and the Working Group regarding how to define the conduct Rule 8.4(g) was looking to prohibit. The Minutes of September 7, 2018 reflect "Representative Berch expressed concerns about a standard that is something along the lines of, "you know it when you see it," and inquired whether the Committee wants to provide some sort of definition. He noted that the lack of definition is a problem, not just for the ADO, but also for the reasonable practitioner." Although Justice Lynn and Attorney Bissonette of the ACLU-NH both suggested that the rule should prohibit harassment and discrimination "as defined by state and federal law" (or words to that effect), opponents were concerned that explicitly defining harassment and discrimination by incorporating state and federal law would also incorporate the requirement of the employment context, the exclusion for fewer than 6 employees, as well as the requirement that the harassment be sufficiently pervasive as to have the "effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." See RSA 354-A:7(V)(c). A simple reference to "as defined by state and federal law" also creates constitutional vagueness problems as it is unclear whether statutory and common law exceptions to the definitions apply, which body of law would apply when they are in conflict and what context would apply where the standards may be in conflict.

There is, however, a third and more narrow alternative. The Court could simply take the language from the statute at RSA 354-A:7(v) and put it directly into the proposed rule. See example at Exhibit A. This would result in a rule where the prohibited conduct was clearly stated and avoid the purported problems by just referencing law. Such an alternative rule was proposed to both the Working Group, as well as to the ACR.

Alternatively, several states, including Illinois, New York and others, have a Rule 8.4(g) where attorneys could be subject to discipline only if the attorney had been adjudicated of violating an anti-discrimination law. New Hampshire could adopt a rule similar to Illinois, where prior to any discipline by the ADO, the facts would be first found by the appropriate body which would typically handle

allegations of discrimination. See attached as Exhibit B. This would both allow the rules to incorporate the substantive law and avoid overburdening the ADO as Janet DeVito suggested might occur at the June 1, 2018 public hearing. Again, such an alternative was proposed to both the Working Group and the ACR.

VI. Other States to Have Considered Similar Proposed Rules Have Rejected It

Proposed Rule 8.4(g) is based on the ABA's Model Rule 8.4(g). In the three years since the ABA first proposed this new rule, only Vermont has adopted it. Numerous states have considered rules similar to the rule proposed here in New Hampshire and have rejected it. For example, the Attorneys General of five States –Texas, South Carolina, Louisiana, Tennessee and Arizona – have all issued official opinions that ABA Model Rule 8.4(g) is unconstitutionally vague and overbroad, and violates the free speech, free exercise of religion, and free association rights of attorneys.[3] In addition, based on the constitutional concerns, the Supreme Courts of South Carolina, Tennessee. Idaho and Arizona have all expressly rejected proposed Rule 8.4(g).[4] Those states that do have anti-discrimination rules as part of their Rules of Professional Responsibility are generally limited and explicit in what they are prohibiting, only apply discipline when the conduct would violate a discrimination statute or, as in Illinois[5] and New

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[3] Opinion No. KP-0123, Attorney General of Texas, December 20, 2016; 14 SC AG Opinion, May 1, 2017; Opinion 17-0114, Attorney General of Louisiana, September 8, 2017; State of Tennessee Office of Attorney General, Opinion No. 18-11 (March 16, 2018); Attorney General of Arizona (May 21, 2018).

[4] See Re: Proposed Amendments to Rule 8.4 of the Rules of Professional Conduct, No. 2017-000498 (S.C. June 20, 2017); In Re Petition for Adoption of a New Tenn. Sup. Ct. R. 8, RPC 8.4(g), No. ADM2017-02244 (Tenn. April 23, 2018), Arizona Supreme Court No. R-17-0032 (Aug. 30, 2018); In re: Idaho Supreme Court Resolution 17-01 (Sept. 6, 2018).

[5] The Illinois rule provides: "It is professional misconduct for a lawyer to: . . . (j) violate a federal, state or local statute or ordinance that prohibits discrimination based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status by conduct that reflects adversely on the lawyer's fitness as a lawyer. Whether a discriminatory act reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of all the circumstances, including: the seriousness of the act; whether the lawyer knew that the act was prohibited by statute or ordinance; whether the act was part of a pattern of prohibited conduct; and whether the act was committed in connection with the lawyer's professional activities. No charge of professional misconduct may

York, first require adjudication of a discrimination statute prior to imposing professional discipline.

CONCLUSION

"[I]t is a fundamental principle of the First Amendment that the government may not punish or suppress speech based on disapproval of the ideas or perspectives the speech conveys." *Matal v. Tam,* 137 S. Ct. 1744, 1765 (2017)(holding a statute that prohibited ethnic disparagement to be unconstitutional). Nevertheless, that is exactly what this proposed Rule 8.4(g) proposes to do. The Proposed Rule does not even explicitly state which ideas or perspectives may lead to professional discipline but is intentionally vague in what constitutes discrimination or harassment and is vague again in the exceptions from prohibited discrimination or harassment. "Due process requires that laws give people of ordinary intelligence fair notice of what is prohibited. . . While perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity . . . government may regulate in the area of First Amendment freedoms only with narrow specificity." *Brown v. Entm't Merchants Ass'n,* 564 U.S. 786, 807 (2011)(internal citations omitted).

This Court could adopt a narrow rule explicitly prohibiting sexual harassment regardless of context. See attached as Exhibit A. Alternatively, this Court could adopt a rule similar to the rule in Illinois where professional discipline can only be imposed after an attorney is adjudicated of having violated an anti-discrimination statute. Nevertheless, this Court should not adopt the unconstitutional language proposed by the Advisory Committee on Rules.

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be brought pursuant to this paragraph until a court or administrative agency of competent jurisdiction has found that the lawyer has engaged in an unlawful discriminatory act, and the finding of the court or administrative agency has become final and enforceable and any right of judicial review has been exhausted." Ill. R. P. C. 8.4(j).

Very truly yours,

Michael J. Tierney

MJT/pad
Enclosures

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