

2021-008



December 1, 2021

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

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

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 respectfully submit the following comments regarding the New Hampshire Supreme Court Advisory Committee on Rules's review of New Hampshire Rule of Professional Conduct 8.4(g) and Comment ("Rule 8.4(g)"), which took effect on August 1, 2019.

As a threshold matter, consistent with our position stated during the pendency of this Committee's and the Court's deliberations with regard to proposals for this Rule in 2018 and 2019, the NHWBA strongly supports the continued inclusion of Rule 8.4(g) within the New Hampshire Rules of Professional Conduct to deter conduct related to the practice of law that harasses and discriminates those who are members of diverse categories. We would urge this Committee and the Court to reject any argument for the removal of Rule 8.4(g) because of non-use, indicated by a low number of disciplinary cases based on the Rule to date, or for any other reason.

Since August 2019, when Rule 8.4(g) took effect, much has changed, primarily due to the COVID-19 pandemic that ensued less than a year thereafter; yet, the fact that harassment and discrimination, manifesting explicitly and implicitly, continue to be irrefutable, pervasive problems in our profession has not changed. While the pandemic has significantly affected all segments of our profession, it has disproportionately affected women attorneys and attorneys of color and for many related reasons, the negative impact of bias in the work environment has been exacerbated. It has been reported that as the pandemic persists, women attorneys and attorneys of color often feel additional stress and experience more difficulties at work than their white, male colleagues simply because of their gender, race, or ethnicity, for example. Reports about such issues are not new due to the pandemic, however, and are not just anecdotal - the 2021 ABA Profile of the Legal Profession, released on July 19, 2021, is rife with statistics that prove the point, and that is just one example of a comprehensive reporting by the ABA since 2020 of reliable statistics regarding such issues and the glacial pace of advancement of women attorneys and attorneys of color in the profession as a result.¹

¹ A summary of such reports and their results here would be impractical. The NHWBA respectfully urges the Committee to review the following reports and their results during the course of its consideration of Rule 8.4(g):

While the NHWBA has been unsuccessful in learning exactly how many reports of conduct have been made to the Attorney Discipline Office under Rule 8.4(g) since August 1, 2019, our understanding is that the number of such reports has been very low. This alone, however, does not, and should not, equate to a conclusion that Rule 8.4(g) is unnecessary and should be removed. Such a conclusion would be faulty and short-sighted, as many Rules of Professional Conduct are not frequently invoked in complaints made to the Attorney Discipline Office, or in disciplinary decisions issued. By analogy, laws that do not generate frequent prosecutions are not automatically abolished because of the deterrent effect they have, not the number of cases prosecuted under them. Rule 8.4(g) is necessary to include in our profession's code of conduct. In addition, as explained further below, the present language of Rule 8.4(g) likely discourages reports of conduct, and we should take this opportunity to improve it as a tool to combat harassment and discrimination in our profession.

Our Rules of Professional Conduct establish a standard of conduct for attorneys, but these Rules, and our profession's enforcement of them, also serve as a means for ensuring access to justice for all and public confidence in our legal system. While the NHWBA appreciates the time that the Committee and the Court has given to this issue, and the Court's effort in crafting and enacting the Rule 8.4(g) that is in place, for the reasons the NHWBA stated in 2019 prior to the current Rule's enactment, the language of Rule 8.4(g) improperly protects those who may be accused of harassment and discrimination over and to the detriment of those who are the recipients of such unethical behavior and

2021 ABA Profile of the Legal Profession, released on July 19, 2021, available at:
<https://www.americanbar.org/news/abanews/aba-news-archives/2021/07/2021-aba-profile-of-the-legal-profession-highlights-how-the-pand/>;

2020 NALP Report on Diversity in U.S. Law firms, released in February 2021, available at:
https://www.nalp.org/uploads/2020_NALP_Diversity_Report.pdf;

In Their Own Words, Experienced Women Lawyers Explain Why They Are Leaving Their Law Firms and the Profession, released by the ABA Commission on Women in the Profession on April 19, 2021, available at:
<https://www.americanbar.org/content/dam/aba/administrative/women/intheirownwords-f-4-19-21-final.pdf>;

Left Out and Left Behind, the Hurdles, Hassles, and Heartaches of Achieving Long-Term Legal Careers for Women of Color, released by the ABA Commission on Women in the Profession on June 10, 2020, available at:
<https://www.americanbar.org/content/dam/aba/administrative/women/leftoutleftbehind-int-f-web-061020-003.pdf>; and

Walking Out The Door, The Facts, Figures, and Future of Experienced Women Lawyers in Private Practice, released by the ABA Commission on Women in the Profession on April 23, 2020, available at:
https://www.americanbar.org/content/dam/aba/administrative/women/walkoutdoor_online_042320.pdf.

See also the American Journal of Law and Medicine's study of discrimination and bias reported by lawyers with disabilities and lawyers who identify as LGBTQ+, released in March 2021, available at: <https://www.cambridge.org/core/journals/american-journal-of-law-and-medicine/issue/8EC8382F8489FADEE245BEDAEA4BDF3A>

who may need to report such behavior under the Rule. As a result, it falls short of serving as an explicit and firm denouncement of discrimination and harassment based on the protected classes that is absolutely necessary to combat such endemic issues in the legal profession and to promote the administration of equal justice.

Even though there has been increased focus on diversity, equity, and inclusion in the legal profession, including in New Hampshire, since 2019, the need for meaningful measures to be taken to actually achieve increased diversity, equity, and inclusion in our Bar and to advance the rule of law and access to justice has never been more critical. Ensuring that Rule 8.4(g) is as effective as possible as an accountability tool is one such meaningful measure for us to now take as a Bar, especially as the change that we still need to achieve in the legal profession requires time and effort and over two years have already passed since the Rule's effective date.

While there should be balance in any Rule of Professional Conduct implemented, including, but not limited to, Rule 8.4(g), the balance is skewed in Rule 8.4(g)'s inclusion of "primary purpose" as an intent-based evidentiary hurdle to be surmounted before an attorney's harassing conduct² may be held accountable. Use of the term, "primary purpose", in the Rule suggests that the commission of harassment as a less than primary purpose is permissible without consequence. See N.H. Prof'l Cond. R., Statement of Purpose (stating that the purpose of our Rules of Professional Conduct is to "establish the boundaries of permissible and impermissible lawyer conduct."). It is not difficult to conceive of explanations that an accused may put forth to argue that the "primary purpose" of his, her, or their conduct was not to harass on the basis of gender or race, for example. Unless there is direct evidence of the accused attorney's intent, such as that the accused attorney said to the person he, she, or they harassed that he, she, or they was doing it because of that person's protected class, it will be very difficult, if not impossible, to prove "primary purpose" under Rule 8.4(g) as written.

The NHWBA notes that the "primary purpose" requirement is not explicitly included in any other New Hampshire Rule of Professional Conduct, which further sends the message that much of the conduct that is currently the problem for diverse attorneys in the legal profession is permissible. There are numerous examples in our Rules of Professional Conduct where an attorney's intent is not an explicit threshold that must be met before an attorney may be held accountable for professional misconduct. As to the inevitable argument being raised that an attorney should not be wrongly "punished" for conduct that he, she, or they did not or could not know was harassment or discrimination, to be frank, we do know, or, at the very least, should know, better by now. To the extent members of our profession claim that they cannot yet discern the bounds of impermissible harassment and discrimination in the practice of law, training and educational opportunities as to these matters are abundantly available and it is our duty to educate ourselves accordingly.

It is our obligation as officers of the Court and protectors of the rule of law that we send a message to all members of our profession through our Rules of Professional

² The NHWBA notes that the word, "discrimination", is not included in Rule 8.4(g), and that "harassment" and "discrimination" are distinct concepts under federal and state law. The terms, "embarrass", "harass", and "burden" included in Rule 8.4(g) are distinct from the term, "discriminate", and those terms do not by their plain meanings apply to instances of discrimination that should be prohibited under our Rules.

Conduct that such harassing conduct is not acceptable at any level and that we as a profession hold ourselves to a higher standard³. The NHWBA advocates for the language of Rule 8.4(g) to be amended to include the standard of “knew or reasonably should have known” instead of the standard of “primary purpose”. This standard, “knew or reasonably should have known,” was the standard that this Committee recommended, 12-3, in 2019 prior to the Court’s enactment of Rule 8.4(g) and mirrors the standard imposed by the ABA’s Model Rule of Professional Conduct 8.4(g)⁴. This standard still requires evidence of intent, but is more balanced to achieve a more meaningful purpose of the Rule.

As our Rules of Professional Conduct are rules of reason to which numerous mitigating factors may be applied, there is no reasonable basis to believe that this standard of “knew or reasonably should have known” would not be applied fairly under Rule 8.4(g) to mete out what is actionable professional misconduct. N.H Prof’l Cond. R., Statement of Purpose. There are already sufficient protections in place within our attorney disciplinary system to ensure that Rule 8.4(g), as amended in accordance with this proposal, is balanced between the rights of the accused and the rights of the recipients of wrongful harassing behavior.

Accordingly, the NHWBA proposes that this Committee recommend to the Court the adoption of the following revised language for Rule 8.4(g) and its Comment:

(g) take any action, while acting as a lawyer in any context, if the lawyer knows or reasonably should know ~~or it is obvious that the action has the primary purpose to embarrass, harasses or burdens~~ another person, including conduct motivated by animus against the other person based upon the other person’s race, sex, religion, national origin, ethnicity, physical or mental disability, age, sexual orientation, marital status or gender identity. This

³ Arguably, under federal and state law regarding harassment and discrimination in the workplace, members of the public may be presently held to a higher standards than New Hampshire licensed attorneys, as there is no *mens rea* requirement under such laws for certain harassing and discriminating behaviors to result in liability.

⁴ The proposed draft of Rule 8.4(g) recommended 12-3 by this Committee in 2019 was as follows:

(g) engage in conduct while acting as a lawyer 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. 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.

In contrast the ABA’s Model Rule of Professional Conduct 8.4(g) states as follows:

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

paragraph shall not limit the ability of the lawyer to accept, decline, or withdraw from representation consistent with other Rules of Professional Conduct, nor does it preclude a lawyer from engaging in conduct or speech or from maintaining associations that are constitutionally protected, including advocacy on matters of public policy, the exercise of religion, or a lawyer's right to advocate for a client.

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Subsection (g) is intended to govern the conduct of lawyers in any context in which they are acting as lawyers. ~~The rule requires that the proscribed action be taken with the primary purpose of embarrassing, harassing or burdening another person, which includes an action motivated by animus against the other person based upon the other person's race, sex, religion, national origin, ethnicity, physical or mental disability, age, sexual orientation, marital status or gender identity. The rule does not prohibit conduct that lacks this primary purpose, even if the conduct incidentally produces, or has the effect or impact of producing, the described result.~~

The adoption of this revised language for Rule 8.4(g) and its Comment provides a more reasonable recourse or remedy to individuals who suffer harassment on the basis of their race, sex, religion, national origin, ethnicity, physical or mental disability, age, sexual orientation, marital status, or gender identity by a New Hampshire attorney, while acting as an attorney.

We can all agree that there is no room in our Bar and in our legal community for harassment or discrimination based on race, sex, religion, national origin, ethnicity, physical or mental disability, age, sexual orientation, marital status, or gender identity, and that we must meaningfully promote the diversity, equity, and inclusion in our Bar and equal access and justice for all in our legal system. Seizing this opportunity to review and revise Rule 8.4(g) and its Comment will be an important meaningful step in such promotion and will help to close the still existing gap within our present Rules that allows harmful, unethical harassment and discrimination to go unchecked. We respectfully urge this Committee to recommend such revised language to the Court for its adoption.

In the event that the Committee, and by extension the Court, is reluctant to recommend such a revision at this time, in the alternative, the NHWBA respectfully requests that a sub-committee of all of the interested stakeholders be formed to study potential revisions to the current language of Rule 8.4(g) for a reasonable duration, such as for six (6) months, and, after a consensus has been reached, to recommend a proposal for a revised version of Rule 8.4(g) to the Committee, for the Committee's review and if it agrees, for the Committee's recommendation to the Court for potential adoption. While the Court ultimately did not adopt the Committee's recommended proposal for Rule 8.4(g) in 2019, which upon information and belief was shaped in large part by such a sub-committee's work, that process was valuable and such a process could easily be implemented again as part of the Committee's and the Court's review of Rule 8.4(g), which should be careful, transparent, and provide ample opportunities for all interested parties to participate in the negotiation of any proposals with regard to Rule 8.4(g) that are put forth.

New Hampshire Supreme Court Advisory Committee on Rules
December 1, 2021

Thank you for your consideration.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Christina A. Ferrari', with a long horizontal flourish extending to the right.

Christina A. Ferrari, Esquire

Immediate Past President
NHWBA Board of Directors