

THE STATE OF NEW HAMPSHIRE
SUPREME COURT OF NEW HAMPSHIRE

O R D E R

Pursuant to Part II, Article 73-a of the New Hampshire Constitution and Supreme Court Rule 51, the Supreme Court of New Hampshire entered the following order:

Following a public hearing held on April 12, 2019 on the recommendation made by the Advisory Committee on Rules (the Committee) to amend New Hampshire Rule of Professional Conduct (Rule) 8.4, and following a comment period on the court's alternative proposal to amend Rules 8.4 and 4.4 set forth in its May 17, 2019 order, and after considering all comments submitted, the New Hampshire Supreme Court hereby amends the Rules by adopting Rule 8.4(g) and the comments thereto as specified in Appendix A attached to this order. The court makes no changes to Rule 4.4.

The Bar has shown a high level of interest in the proposed amendment to Rule 8.4 since March 2017, when the Committee first considered the question of whether to recommend that this court adopt the American Bar Association's Model Rule of Professional Conduct 8.4(g)(Model Rule 8.4(g)). Since then, members of the Bar have expressed disparate views about Model Rule 8.4(g) and other proposals that were submitted to the Committee and this court. Model Rule 8.4(g) is of relatively recent origin, and a majority of jurisdictions have not yet considered whether to adopt it. Of those jurisdictions that have considered adopting Model Rule 8.4(g), several have declined to do so. As of this writing, only one state, Vermont, has adopted a rule that is nearly identical to the model rule. Maine has adopted a rule that is similar, but is not nearly identical, to Model Rule 8.4(g). As of this writing, Model Rule 8.4(g) remains under consideration in a number of jurisdictions.

In light of the nascent and ongoing discussion regarding the model rule, the court declines to adopt the rule proposed by the Advisory Committee on Rules. The amendment to Rule 8.4 that the court adopts today is similar to that proposed by the Attorney Discipline Office in a March 25, 2019 letter submitted prior to the April 12 hearing on the Committee's proposal.

The court believes that a review of the operation of the rule that the court adopts today is appropriate once it has been in effect for a reasonable period of time. Accordingly, the court hereby directs the Committee to undertake such a review after the amended rule has been in effect for two years, and that the Committee provide the court with its recommendations, if any, upon completing that review. The court requests that the Committee work with the

New Hampshire Bar Association Ethics Committee, the Attorney Discipline Office, and any other entities or persons the Committee believes would assist in the review.

The amendments to the New Hampshire Rules of Professional Conduct made by this order shall take effect on August 1, 2019.

Date: July 15, 2019

ATTEST:



Eileen Fox, Clerk
Supreme Court of New Hampshire

APPENDIX A

Amend New Hampshire Rule of Professional Conduct 8.4 (new material is in **[bold and in brackets]**) as follows:

Rule 8.4. Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) state or imply an ability to influence improperly a government agency or official;

(e) state or imply an ability to achieve results by means that violate the Rules of Professional Conduct or other law; ~~or~~

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; ~~or~~ **or**

(g) take any action, while acting as a lawyer in any context, if the lawyer knows or it is obvious that the action has the primary purpose to embarrass, harass or burden 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 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.

New Hampshire Supreme Court Comment

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.]