

THE STATE OF NEW HAMPSHIRE
SUPREME COURT OF NEW HAMPSHIRE

ORDER

R-2019-0001, In re February 8, 2019 Report of the Advisory Committee on Rules (Proposal to amend Rule of Professional Conduct 8.4)

Following a public hearing held on April 12, 2019, and after considering the Advisory Committee on Rules proposal and all written and oral comments submitted, the New Hampshire Supreme Court is considering adopting Rule of Professional Conduct 8.4(g), as set forth in Appendix A, and amending Rule of Professional Conduct 4.4, as set forth in Appendix B. The proposal to amend Rule of Professional Conduct 8.4 differs from the proposal submitted by the Advisory Committee on Rules, but draws from that proposal as well as one offered by the Attorney Discipline Office shortly before the hearing. Given the level of interest shown by the Bar, and the disparate viewpoints expressed by members of the Bar about the proposed amendment, the Court requests comment on this new proposal.

On or before **May 31, 2019**, members of the bench, bar, legislature, executive branch or public may file with the clerk of the supreme court comments on any of the proposed rule amendments. Comments may also be emailed to the court at rulescomment@courts.state.nh.us.

Date: May 17, 2019

ATTEST:



Eileen Fox, Clerk
Supreme Court of New Hampshire

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.

[(g) while acting as a lawyer in any context, engage in conduct for which the lawyer's primary purpose is to embarrass, harass or burden another person, including conduct primarily 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.]

[Comment

Subsection (g) is intended to govern the conduct of lawyers in any context in which they are acting as lawyers. By requiring that the proscribed action have the primary purpose or primary motive of embarrassing, harassing, or burdening another person, which includes 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, the rule is intended to cover only deliberate conduct that is intended to cause the described result. The rule does not prohibit conduct that lacks such deliberate motivation, even if the conduct incidentally produces, or has the effect or impact of producing, the described result.]

Ethics Committee Comment

Section (d) of the ABA Model Rule is deleted. A lawyer's individual right of free speech and assembly should not be infringed by the New Hampshire Rules of Professional Conduct when the lawyer is not representing a client. The deletion of section (d) was not intended to permit a lawyer, while representing a client, to disrupt a tribunal or prejudice the administration of justice, no matter how well intentioned nor how noble the purpose may be for the unruly behavior.

Model Rule section (e) is split into New Hampshire sections (d) and (e).

Amend New Hampshire Rule of Professional Conduct 4.4 ((new material is in **[bold and in brackets]**); deleted material is in ~~strikethrough~~) as follows:

Rule 4.4. **[Inadvertent Receipt of Materials]** ~~Respect for Rights of Third Persons~~

~~(a) In representing a client, a lawyer shall not take any action if the lawyer knows or it is obvious that the action has the primary purpose to embarrass, delay or burden a third person.~~

(b) A lawyer who receives materials relating to the representation of the lawyer's client and knows that the material was inadvertently sent shall promptly notify the sender and shall not examine the materials. The receiving lawyer shall abide by the sender's instructions or seek determination by a tribunal.

Ethics Committee Comment

~~Paragraph (a) substantially differs from the ABA model rule by using the word “obvious” to set a higher objective standard.~~

The Rule ~~Paragraph (b)~~ differs from the ABA model rule in three respects: the broader term “materials” replaces “document;” the phrase “reasonably should know” is deleted setting an objective standard for “knowledge”; and a second sentence is added. The second sentence incorporates the New Hampshire Bar Association's Ethics Committee's June 22, 1994, Practical Ethics Article, “Inadvertent Disclosure of Confidential Materials.” The Committee concluded that notice to the sender did not provide sufficient direct guidance to lawyers.

The term “materials” includes, without limitation, electronic data.

As to ABA Comments [2] and [3], see Ethics opinion 2008-9/4 discussing duties relating to “metadata”; www.nhbar.org/legal-links/Ethics-Opinion-2008-09_04.asp.