



**THE STATE OF NEW HAMPSHIRE
ADVISORY COMMITTEE ON RULES
SUPREME COURT**

Honorable Patrick E. Donovan, Chair
Abigail Albee, Esquire
Honorable Paul S. Berch
Honorable R. Laurence Cullen
John A. Curran, Esquire
Honorable N. William Delker
Honorable Daniel J. Feltes
Honorable Michael H. Garner
Sean P. Gill, Esquire
Joshua L. Gordon, Esquire
Jeanne P. Herrick, Esquire
Derek D. Lick, Esquire
Ari Richter
Patrick W. Ryan, Esquire
Janet L. Spalding, CPA
Charles P.E. Stewart

Frank Rowe Kenison
Supreme Court Building
One Charles Doe Drive
Concord, NH 03301
603-271-2646

TDD Access:
Relay NH 1-800-735-2964

Carolyn Koegler, Secretary

February 1, 2019

Eileen Fox
Clerk of Court
New Hampshire Supreme Court
One Charles Doe Drive
Concord, NH 03301

Dear Clerk Fox:

Pursuant to Supreme Court Rule 51, I hereby submit on behalf of the Supreme Court Advisory Committee on Rules ("Committee") the Committee's February 1, 2019 report, which contains the final draft of proposed rules and rule amendments recommended for adoption by the Committee between September 2018 and December 2018. The report also includes a proposal to amend the Supreme Court rules to change the type-volume limitations of Supreme Court briefs that has not been recommended by a majority of members of the Committee.¹

The Committee held a public meeting on September 7, 2018 and a public hearing and meeting on December 7, 2018.

I present the Committee's recommendations in the order I typically do, according to the order in which the rules appear in the court rules online.

¹ It has long been the Committee's practice to include recommendations supported by a minority in its reports to the Court.

Please note, however, that, as a result, the issue that attracted the greatest amount of attention from members of the bench, the bar, and the public is presented last. Although a majority of the Committee has recommended that the Court amend Rule of Professional Conduct 8.4(g), it is important to note that the proposal has generated an enormous number of comments, some of which have suggested that the proposal may be unconstitutional. Therefore, the Committee has also voted to recommend that the Court hold a hearing before the full Court on the proposal.

I. Supreme Court Rules – Gender Neutral Language.

2018-009. The Committee voted to recommend that the Court amend the Supreme Court Rules to make them gender neutral.

At its September 7, 2018 meeting, the Committee considered a September 4, 2018 memo from Carolyn Kogler explaining that staff attorney David Peck had submitted a memorandum proposing that the supreme court rules be amended to make them gender neutral.

Following some brief discussion of the issue, the Committee voted to recommend that the Court adopt the language changes suggested by attorney Peck, as set forth in Appendices A-Q. The Committee also recommended that the Court make the changes effective July 1, 2019, after LexisNexis issues a supplement but before LexisNexis prints the next volume of the rulebook.

II. Supreme Court Rules. Type-Volume Limitations For Supreme Court Briefs.

2018-006. The Committee considered, but voted 8-6 not to recommend, a proposal to amend Supreme Court Rules to change the type-volume limitations for Supreme Court briefs.

At its June 1, 2018 meeting, the Committee considered a May 30, 2018 memorandum from Committee member attorney Joshua Gordon. Attorney Gordon explained that the Court had recently changed the Supreme Court rules to facilitate the electronic filing of briefs. When it did so, it changed the page limits set forth in the rules type-volume limits. Attorney Gordon believes that in making this change, the Court may have made an arithmetical error and inadvertently reduced the permissible length of briefs. The Committee briefly discussed this issue, and asked attorney Gordon to provide some additional information to support his view that the type-volume limitations reduced the permissible length of briefs.

At the September meeting, the Committee considered this issue again. Attorney Gordon referred Committee members to a September 6, 2018 memo he had prepared and which he believes shows that “the 9,500 word limit does

not accurately reflect what appears to be the common practice when briefs are at or near the 35-page limit.” Justice Donovan reported that he had spoken with Supreme Court Clerk Eileen Fox and Deputy Clerk Tim Gudas about how they made a determination regarding word limit. There was some discussion about what the word limit in the federal courts is and a reference to the 2016 Federal Rules Advisory Committee notes.

Following some discussion and upon motion made and seconded the Committee voted to put out for public hearing in December a proposal to amend the relevant Supreme Court rules to change the 9,500 word limit to a 11,250 word limit.

At the December 7, 2018 public hearing, Deputy Clerk Tim Gudas addressed the Committee. He provided background regarding how the Court arrived at a 9,500 word limit for Supreme Court briefs. Attorney Gordon addressed the Committee and spoke in support of his proposal to change the word limit from 9,500 words to 11,250 words. Few details are provided in the meeting minutes regarding the testimony offered, *see* December 7, 2018 meeting minutes at courts.state.nh.us/committees/adviscommrules/minutes.htm, but a CD recording of the hearing is available at the Supreme Court.

Following the public hearing there was some discussion about the proposal regarding, among other things: (1) what percentage of the briefs filed with the Supreme Court are the long briefs attorney Gordon referred to in his comments; and (2) how burdensome it is for an attorney to file a request to extend the word limit. Attorney Gordon stated that filing the request is not burdensome, but the problem is that an attorney often does not know until the last minute that he or she is going to exceed the word limit, so the practice is usually to file the motion to extend along with the brief. This can be very nerve-racking because the attorney does not know what is going to happen if the motion is not granted.

The Committee voted 8-6 against recommending that the word limit in the supreme court rules be changed from 9,500 words to 11,250 words. The following members voted against recommending the change: Judge Cullen, attorney Curran, Judge Delker, Justice Donovan, attorney Gill, attorney Herrick, Mr. Richter and attorney Ryan. The following members voted to recommend the change: Attorney Albee, Representative Berch, Judge Garner, attorney Gordon, Ms. Spalding and Mr. Stewart.

Mr. Richter noted that attorney Gordon’s analysis seems correct. That is, it does appear that the 35 page limit was “flexible,” so that, in effect, the old limit gave the parties more room. So, if the Court believes that this change was not sufficiently aired and that there should be more discussion about the change, then it would not be unreasonable for the Court to seek comment on

that. Judge Cullen noted that it might be helpful for there to be a procedure in place for situations in which the limit is to be exceeded.

Justice Donovan noted that in setting the type-volume limitation, the Court took the federal number and rounded up, and that the rule put the New Hampshire limit in the middle of what all the other states are doing. Attorney Gordon acknowledged that this is true, but that his point is that the effect of this was to decrease the length from what was permissible under the prior rule.

The changes the Committee voted 8-6 to not recommend to the Court for adoption are set forth in Appendices R and S.

III. Supreme Court Rule 36. Appearances in Courts by Eligible Law Students and Graduates.

2018-004. The Committee voted to recommend that the Court amend Supreme Court Rule 36 to allow students who have completed a 9 hour training program for the DOVE project to start supervised practice right away, rather than wait until the end of the spring semester of their first year.

At its June 8, 2018 meeting the Committee briefly considered an April 13, 2018 memorandum and attached letter asking whether Supreme Court Rule 36 should be amended. The Committee took no action.

At the September 7, 2018 meeting, Justice Lynn reported that he had spoken with Professor John Garvey, the Director of the Daniel Webster Scholars Honors Program to ask about the details of the proposed change. Justice Lynn stated that he believes that the change that has been requested is minor and limited in scope. He explained that the change would allow students who complete the DOVE training program during the spring semester of their second year to start supervised practice right away, rather than wait until the end of the semester. Attorney Albee noted that it is only the Daniel Webster Scholars students who are doing this, and that the rule change is very narrowly tailored.

Following some discussion, and upon motion made and seconded, the Committee asked Carolyn Kogler to draft language to implement the proposal and voted to put the proposal out for public hearing in December.

No comments were offered about this proposal prior to, or during, the December 7, 2018 public hearing. At the meeting following the public hearing, upon motion made by attorney Albee and seconded by Judge Cullen the Committee voted to recommend that the Court amend Supreme Court Rule 36, as set forth in Appendix T.

IV. Rule of Professional Conduct 6.5. Nonprofit and Court-Annexed Legal Services Programs.

2018-008. The Committee voted to recommend that the Court adopt on a permanent basis a comment it had adopted on a temporary basis.

At the September 7, 2018 meeting, the Committee considered this Court's July 13, 2018 order adopting, on a temporary basis, a comment to follow New Hampshire Rule of Professional Conduct 6.5. The Court had referred the comment to the Committee for its recommendation as to whether the comment should be adopted on a permanent basis, or whether some other action should be taken. Justice Lynn explained that the Ethics Committee and the Access to Justice Committee had had a disagreement about what to do, but that the Court felt that it was important to adopt this comment. The Committee voted to put the comment out for public hearing in December.

No comments were offered about this proposal prior to, or during, the December 7, 2018 public hearing. Following some brief discussion and upon motion made by attorney Albee and seconded by attorney Gordon, the Committee voted to recommend that the Court adopt the comment on a permanent basis, as set forth in Appendix U.

V. Rule of Professional Conduct 8.4. Harassment and Discrimination.

2016-009. The Committee voted to recommend that the Court consider adding a provision (g) to Rule of Professional Conduct 8.4 which would make it professional misconduct for a lawyer to engage in 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. The Committee also voted to recommend that the Court hold a public hearing before the full court on the proposal.

At its March 17, 2017 meeting, the Committee considered a September 29, 2016 letter from the American Bar Association's Center for Professional Responsibility Policy Implementation Committee to Chief Justice Dalianis. See 9/29/16 letter to Chief Justice Dalianis, which can be found at courts.state.nh.us/committees/adviscommrules/dockets/2016/index.htm. The letter reported that ABA Model Rule of Professional Conduct had recently been amended to add a new paragraph (g) establishing a black letter rule prohibiting harassment and discrimination in the practice of law, along with three new Comments related to paragraph (g). According to the Adopted Revised Resolution 109 cited in the letter, the ABA had amended Model Rule 8.4 to add a section (g) to make it professional misconduct for a lawyer to:

(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 representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

The Committee agreed that further study of this issue would be needed. Attorney Joshua Gordon agreed to chair a subcommittee to take a closer look at the issue.

At its June 16, 2017 meeting, the Committee considered a March 23, 2017 letter from attorney Rolf Goodwin stating that the Ethics Committee proposed that a variation of the ABA Model Rule be adopted in New Hampshire as follows (proposed additions to the ABA language are in **[bold and brackets]**; deletions are in ~~strike through~~ format):

(g) engage in conduct **[related to the practice of law]** that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, **[physical or mental]** disability, age, sexual orientation, ~~gender identity,~~ **[or]** 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 representation in accordance with Rule 1.16. ~~This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.~~

Attorney Peter Imse addressed the Committee on behalf of the New Hampshire Bar Association Ethics Committee. Attorneys Rolf Goodwin and Maureen Smith were present at the meeting to answer questions. See June 16, 2017 public hearing and meeting minutes, which can be found at courts.state.nh.us/committees/adviscommrules/minutes.htm. Attorney Imse's presentation to the Committee addressed, among others, the following issues:

- The fact that that all other learned professions include in their codes language regarding discrimination and harassment.
- This proposal is not intended to limit the right of attorneys to represent clients or limit the right to free speech.
- The behavior being regulated is behavior "related to the practice of law."

- The rule does not simply make it attorney misconduct to engage in behavior that is a violation of federal law because federal law only applies to businesses of a certain size.
- The list of protected classes in the proposed New Hampshire rules is based on New Hampshire law.
- The Montana legislature has taken a strong position against the ABA proposal, apparently due to: (1) free speech concerns; and (2) the belief that the proposal would hamper the ability of lawyers to represent clients involved in this kind of behavior. Attorney Imse believes that the Montana legislature is wrong, but noted that the Texas Attorney General recently took the position that the rule violates free speech rights.
- The Ethics Committee had considered the Illinois rule, which would make it professional misconduct to engage in this kind of behavior, but only after a finding by a court or administrative agency that the lawyer has violated an anti-discrimination law. The Ethics Committee decided not to recommend the Illinois rule because there are many who would not be covered by the rule, for example, a secretary at a small firm.

Committee members inquired about the following:

- Justice Lynn asked attorney Imse to provide the Committee with copies of the rules that have been adopted in the other professions. Justice Lynn also noted that unlike other professions, lawyers are inherently involved in conflict.
- Representative Berch stated that it would be helpful to know whether there are jurisdictions in which this was determined to be a legislative matter.
- Justice Lynn noted that some jurisdictions have adopted a specific exemption related to *Batson* challenges.
- Mr. Stewart noted that concerns had been raised that investigating these claims will be burdensome to the Attorney Discipline Office.

Following some discussion, the Committee concluded that the proposal was in need of more work. Attorneys Gordon and Herrick agreed to work with the Ethics Committee on the proposal.

At its September 2017 meeting, see September 7, 2018 meeting minutes at courts.state.nh.us/committees/adviscommrules/minutes.htm, attorney Gordon reported that two people from the subcommittee would attend the

December meeting to speak about the issue. He noted that the subcommittee is wrestling with how to address the following concerns that have arisen regarding the proposal:

- The Ethics Rules are generally aimed at protecting clients. This proposed new rule aims to protect people other than clients; that is, law firm employees. Some question has arisen regarding whether the Statement of Purpose section of the Ethics Rules would need to be amended if this rule is adopted.
- Some difficulties have arisen regarding defining discrimination and harassment.
- Concerns have been expressed that, if adopted, the rule will complicate employment issues at law firms, might create a conflict of interest within a law firm, and might take away the ability of the law firm to deal with the employment issues they have. It is important to note that if a firm has over six employees, the civil rights laws apply to the firm.

This issue was not discussed at the December meeting due to time constraints. The issue was next discussed at the March 2018 meeting. See March 9, 2018 meeting minutes at courts.state.nh.us/committees/adviscommrules/minutes.htm. At that meeting, the Committee considered three proposals to amend Rule of Professional Conduct 8.4: (1) the proposal recommended by the Ethics Committee; (2) the Ethics Committee proposal amended to include the language “against a client” following “harassment or discrimination; and (3) the Ethics Committee proposal amended to include the language “as defined by substantive state or federal law” following “harassment or discrimination.” Attorneys Imse and Smith were present at the meeting to answer any questions.

Justice Lynn explained that he had proposed adding the language “as defined by substantive state or federal law” following “harassment or discrimination” Justice Lynn stated that he would be inclined to delete the language in the comment which reads, “statutory or regulatory exemptions based upon the number of personnel in a law office, for example, shall not relieve a lawyer of the requirement to comply with this rule.” He believes that because the legislature has exempted small employers for policy reasons, small employers should be exempt from this as well. Senator Feltes expressed the view that because attorneys are a self-regulated profession, this is not an issue that needs to go through the legislature. Attorney Imse stated that he believes that this behavior should be treated the same way, regardless of a firm’s size. Judge Delker expressed concern that the language in Justice Lynn’s proposal,

“as defined by substantive law” would mean that the rule would not apply to, for example, behavior toward opposing counsel and court clerks.

Ultimately, the Committee voted to put all three proposals out for public hearing in June 2018. The Committee directed that the notice include language indicating that the Committee would consider the three proposals included in the public hearing notice, as well as any other language suggested at the public hearing.

A number of written comments were submitted regarding the proposals prior to, and during, the public hearing. Each of the following is available on the Advisory Committee on Rules webpage, under docket number 2016-009, at courts.state.nh.us/committees/adviscommrules/dockets/2016/index.htm:

- 5/25/18 letter from David Nammo, CEO and Executive Director, Christian Legal Society;
- 5/28/18 letter from attorney Paul A. Dowd;
- 5/29/18 letter from Mr. Christopher Jay;
- 5/29/19 letter from attorney Michael J. Tierney;
- 5/29/18 letter and attachment from Josh Blackman, Associate Professor, South Texas College of Law, Houston;
- 5/29/18 email from attorney Neil B. Nicholson;
- 5/30/18 letter from attorney David A. Rardin;
- 5/30/18 email from attorney Michael Donnelly;
- 5/30/18 letter from attorney Fred Potter, JustLawNH.com;
- 5/30/18 letter from attorney David P. Crocker;
- 5/30/18 letter from attorney David A. Rardin (on behalf of New Hampshire Chapter of Christian Legal Society);
- 5/30/18 letter from Eugene Volokh, UCLA School Of Law;
- 5/30/18 letter from attorneys Andrew P. Cernota, Vernon C. Maine, and Mathew J. Curran;
- 5/31/18 email from attorney Sara B. Shirley;
- 5/31/18 letter from attorney James Q. Shirley;
- 05/31/18 letter from attorney Gilles Bissonette, Legal Director, New Hampshire ACLU;
- 05/31/18 letter from attorney Eugene M. Van Loan III;
- 05/31/18 letter from attorney Timothy L. Chevalier;
- 05/31/18 letter from Steven W. Fitschen, President, National Legal Foundation and Senior Legal Advisor, Congressional Prayer Caucus;
- 06/01/18 letter from eleven members of the NH Catholic Lawyers Guild;
- 06/01/18 letter from attorney Mark D. Attori;
- 06/01/18 letter from attorneys Quinlan and Cook, in-house counsel, Roman Catholic Bishop of Manchester;

- 06/01/18 letter from attorney Christina A. Ferrari, President-Elect, New Hampshire Women's Bar Association.
- Undated Proposed Amendment to Appendix M, submitted by the New Hampshire Bar Association Ethics Committee at the June 1 public hearing.

The June 1, 2018 public hearing was very well-attended. The bulk of the testimony offered at the public hearing related to the proposal to amend New Hampshire Rule of Professional Conduct 8.4. As has been noted, the Committee had requested comment on three different proposed amendments to Rule of Professional Conduct 8.4. Given the length of the public hearing, detailed minutes of the public hearing were not prepared. See June 1, 2018 meeting minutes at courts.state.nh.us/committees/adviscommrules/minutes.htm. However, a CD of the hearing is available at the New Hampshire Supreme Court. The names of the speakers who testified and a summary of their testimony follows:

- Peter Imse, an attorney at Sulloway and Hollis and a member of Bar Association Ethics Committee, stated that he was very involved in the subcommittee that worked on this proposal. He noted that the proposal set forth at Appendix K of the June 1 public hearing notice is the proposal made by the Bar Association, endorsed by the Ethics Committee and the Board of Governors. They support its adoption.
- Rolf Goodwin, an attorney at the McLane firm and a member of the Bar Association Ethics Committee, stated that he had participated in the Ethics Committee retreat in Concord in 2001 to review new Model Rules of Professional Conduct adopted by ABA. He provided some background about how the New Hampshire Rules of Professional Conduct differ from the ABA's Model Rules of Professional Conduct. He spoke in support of the proposal.
- Maureen Smith, an attorney at Orr and Reno who served on a subcommittee of the Ethics Committee relating to the proposal to adopt Rule 8.4(g) emphasized that the purpose of the attorney discipline system is to protect the public, maintain public confidence in the bar, preserve the integrity of the legal profession and prevent misconduct in the future. She spoke in support of the proposal.
- Meredith Cook, Director of Public Policy and Vice Chancellor of the Roman Catholic Dioceses of Manchester, stated that she was appearing in her own capacity, and stated that when she was in private practice she was an employment attorney and in that role worked to prevent unlawful harassment and discrimination. She noted several concerns she had with all three versions of the rule, and submitted a letter urging

the Committee not to adopt any of the three versions of the proposed rule. She stated that she would be happy to assist the Committee if the Committee is going to continue to work on a proposal.

- Christina Ferrari, an attorney at Bernstein Shur and a representative of the New Hampshire Women's Bar Association, stated that the New Hampshire Women's Bar Association supports the adoption of the proposal set forth in Appendix K.
- Fred Potter, an attorney at JustLawNH.com, PLLC, stated that he has practiced law since 1975, is a past president of the New Hampshire Bar Association, and former CEO and Executive Director of the Christian Legal Society. He expressed concern about all three proposals and stated that his biggest concern is the inclusion of speech in the rule. He is concerned that a single inappropriate comment could result in disciplinary action being taken against an attorney.
- Michael Tierney, an attorney Wadleigh, Starr & Peters, stated that he was appearing personally to offer comment on the proposal based on his 14 years of practice representing religious organizations and litigating free speech cases. He expressed concern about all three versions of the rule.
- Bob Dunn, an attorney at Devine Millimet, stated that he was appearing on his own behalf and on behalf of himself and ten other members of the New Hampshire Catholic Lawyers Guild, and not as a member of his firm. He stated that he understands the impetus behind the rule, but is concerned about unintended consequences. He expressed concern about what impact the adoption of a rule might have on lawyers participating in matters of public policy.
- Janet DeVito, General Counsel at the Attorney Discipline Office, stated that the lawyers at the Attorney Discipline Office are concerned about having to enforce anti-discrimination and anti-harassment rules. She also noted that she believes that there are rules of professional conduct that already exist that will address many behaviors that would be considered harassment or discrimination. She also noted that there are state and federal laws regarding harassment and discrimination that are subjects of "hugely complex litigation," and that for the ADO to determine those same issues that courts are struggling with all over the country would be really challenging.
- Mark Attori, an attorney at Devine Millimet, noted that he was speaking on his own behalf. He expressed concern that the adoption of a rule might keep lawyers from speaking out about issues at legislative

hearings, and in debates like this one. He inquired whether the benefits of this rule outweigh the detrimental effects on speech.

- Attorney Imse addressed the Committee again. He stated that he had today submitted a proposal to amend the Ethics Committee proposal set forth at Appendix M of the June 1 public hearing notice. The Ethics Committee proposed the following amendment (additions are in **[bold and in brackets]**; deletions are in ~~strikethrough~~):

(g) engage in conduct related to the practice of law that the lawyer knows or reasonably should know is harassment or discrimination, as defined by substantive state or federal law, on the basis of race, sex, religion, national origin, ethnicity, physical or mental disability, age, sexual orientation or marital status.**[; 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 Rule 1.16 **[nor does it infringe on a lawyer's First Amendment rights or a lawyer's right to advocate for a client in a manner that is consistent with these Rules.]**

Attorney Imse believes that the proposed amendment addresses many of the concerns that were raised by the speakers at the hearing. He also noted that many of the speakers agreed that harassment and discrimination are not acceptable and have criticized the proposed rules, but have not offered an alternative proposal to address the problematic behavior.

- James Q. Shirley, an attorney at Sheehan, Phinney Bass & Green addressed the Committee. He expressed a number of concerns about the proposals. He noted that there are remedies within the rules for this kind of behavior. He is concerned about opening the floodgates and asking the Attorney Discipline Office to engage in an analysis of federal statutory and constitutional law.
- Attorney Maureen Smith addressed the Committee again. She stated that the subcommittee of the Ethics Committee had looked throughout the country to see whether the floodgates have opened in other states. She stated that they did not see any rash of complaints being filed as a result of the adoption of rules like the ones proposed.

Following the close of the public hearing, given the late hour, the Committee did not have a substantive discussion about any of the proposals. Senator Feltes suggested, and Committee members agreed, that it would make

sense for members of the Ethics Committee and some of the people who spoke at the public hearing to meet and to try to agree on a compromise proposal. Attorneys Feltes and Herrick agreed to facilitate the working group discussions.

At the September 7, 2018 meeting, Senator Feltes reported that he and attorney Herrick had met with the working group three times over the course of the summer and had had extensive conversations about the concerns expressed about the proposals. See September 7, 2018 meeting minutes at courts.state.nh.us/committees/adviscommrules/minutes.htm. He stated that the working group included attorneys Gilles Bissonnette, Meredith Cook, Bob Dunn, Jim Shirley, Michael Tierney, Christina Ferrari and three members of the New Hampshire Bar Association Ethics Committee who had worked on the original proposal – attorneys Smith, Goodwin and Imse.

Senator Feltes informed the Committee that the working group was not able to reach consensus, but that he and attorney Herrick had submitted Feltes-Herrick Subcommittee Proposed Rule 8.4(g) to the Committee, which reads:

(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.

Senator Feltes noted the following about the proposal:

- The language from the original proposal, “engage in conduct related to the practice of law” has been replaced with “engage in conduct while acting as a lawyer in any context.” He noted that comment 4 of the original proposal reads, “see ABA Comment 4 related to the intended scope of the phrase, ‘related to the practice of law.’” This language is not included in the Feltes-Herrick proposal. This is because he believes that the model comment is too specific.
- The Feltes-Herrick proposal includes gender identity as one of the protected classes because gender identity was recently added to the New Hampshire human rights statute.

- The Feltes-Herrick proposal makes clear in the rule itself that “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 statement was included in footnote three of the comments following the proposals that were put out for public hearing in June.
- The last sentence of the Feltes-Herrick proposal (“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.”) was not included in any of the proposals put out for public hearing in June. It provides exceptions to the general rule set forth in the first sentence. This is intended to address concerns raised at the public hearing.

Senator Feltes reiterated that, as is clear from the comments attached to the proposal he and attorney Herrick submitted, the subcommittee was unable to reach a broad consensus. A brief summary of the views expressed in each of the comments follows (the comments themselves are attached to the September 5, 2018 Subcommittee Submission, under docket # 2016-009, which can be found on the Advisory Committee on Rules webpage at courts.state.nh.us/committees/adviscommrules/dockets/2016/index.htm)

- Attorneys Meredith Cook and Bob Dunn stated that they could not support the proposal because it “fails to define discrimination and harassment.”
- Attorney Bissonnette stated that the ACLU would not oppose the proposed language if there were language defining harassment or discrimination by reference to state or federal law. Attorney Bissonnette’s comment suggests adding the words “under state or federal law” following “that is harassment and discrimination.”
- Attorney Imse stated that the Ethics Committee urges that the revised proposal, with attorney Bissonnette’s amendment, be submitted to the Advisory Committee on Rules.
- The New Hampshire Women’s Bar Association expressed concern that including the language, “under state or federal law” would be too limiting, and prefers “guided by state or federal law.”
- Attorney James Q. Shirley does not support the Feltes-Herrick proposal. Attorney Shirley believes that even with a reference to state and federal law, the rule would be impermissibly vague.

- Attorney Tierney does not support the Feltes-Herrick proposal. He believes that the proposal “goes too far in seeking to limit speech and conduct ‘that is harassment or discrimination’ without properly defining these terms and limiting them to appropriate contexts.” He suggested that the rule make it “professional misconduct for a lawyer to: (g) in his or her capacity as a lawyer, make unwelcome sexual advances or requests for sexual favors, or engage in other unwelcome, verbal, non-verbal or physical conduct of a sexual nature.”

In addition to these comments, some members of the working group, and members of the public, filed formal written comments in anticipation of the September meeting. A brief summary of the comments is provided below (the comments themselves are available on the Advisory Committee on Rules webpage under docket # 2016-009 at courts.state.nh.us/committees/adviscommrules/dockets/2016/index.htm):

- September 4, 2018 letter from Christina A. Ferrari, President, New Hampshire Women’s Bar Association Board of Directors.
- September 5, 2018 letter from attorney Tierney asking the Committee to reject the Feltes-Herrick Proposed Rule 8.4(g), for the reasons stated in his May 29, 2018 letter to the Committee and his testimony at the June 1, 2018 public hearing and because he believes: (1) narrower language is both possible and constitutional; (2) the proposed language will have a disproportionate effect on solo practitioners and small firms; and (3) because the Ethics Committee’s proposed language is unconstitutional.
- September 6, 2018 letter from attorney Gilles Bissonnette, American Civil Liberties Union – New Hampshire, stating that the ACLU-NH would not oppose the Feltes-Herrick Proposed Rule 8.4(g) if there was language added defining harassment under state or federal law.
- September 6, 2018 letter from attorney Sara B. Shirley, stating that there are many legitimate reasons to oppose all proposed versions of Rule 8.4(g). Attorney Shirley believes that two important reasons have received insufficient attention: (1) the evidence supporting the need for the rule is flawed; and (2) the proposed rule does not include a scienter requirement.
- September 6, 2018 letter from attorney Maureen Smith, writing on behalf of the Rule 8.4(g) Subcommittee of the New Hampshire Bar Association Standing Committee on Ethics, stating that the Subcommittee opposes neither the September 5, 2018 Feltes-Herrick proposal nor the proposed ACLU-NH modification. The Ethics Subcommittee believes that the

addition of the definitional qualifier, “under state or federal law,” modifying the terms harassment and discrimination would expressly incorporate the definitions developed under substantive law, thereby fully addressing any potential objections on grounds of vagueness.

- September 6, 2018 letter from attorney Meredith Cook, employed as in-house counsel by the Roman Catholic Bishop of Manchester, stating her opposition to the Feltes-Herrick Proposal and expressing support for the proposal submitted by attorney Tierney.
- September 6, 2018 letter from David Nammo, CEO & Executive Director, Christian Legal Society, supplementing comments made in his May 25, 2018 submission to the Committee and bringing to the Committee’s attention: (1) the United States Supreme Court’s decision in *National Institute of Family and Life Advocates v. Becerra*, 138 S.Ct. 2361 (U.S. June 26, 2018); and (2) the fact that the Arizona Supreme Court recently rejected adoption of ABA Model Rule 8.4(g) by order dated August 30, 2018.

Following Senator Feltes’ presentation, the Committee spent a great deal of time discussing the proposal and the comments submitted about the proposal. Provided in this report, below, is a brief summary of the major issues discussed at the meeting. Detailed notes about the issues discussed can be found in the September 7, 2018 meeting minutes at courts.state.nh.us/committees/adviscommrules/minutes.htm.

It was noted at the meeting that concern had been expressed in the comments about the removal of the language, “knows or reasonably should have known” from the proposal. Senator Feltes explained that here was discussion in the group about the fact that this may not be the actual standard. There was concern that if the standard set forth in the rule were different from the standard set forth in state and federal law, that this would add confusion to the process. Following some discussion, the Committee agreed that the language, “that the lawyer knew or reasonably should have known” should be added to the proposal.

In response to an inquiry from a member of the Committee, Senator Feltes stated that the working group did not seek input from the Attorney Discipline Office about the proposal. Justice Donovan reminded the Committee that according to Janet DeVito’s testimony at the public hearing, the Attorney Discipline Office does not support the adoption of a rule. Senator Feltes noted that the primary concerns expressed by the Attorney Discipline Office were that: (1) the rule would be difficult to enforce; and (2) enforcing the rule would require additional resources. Senator Feltes explained that he and attorney Herrick were not persuaded by the first concern because the rules of

professional conduct already make it misconduct for attorneys to engage in acts that are even more vaguely defined. For example, Rule 8.4 makes it professional misconduct for a lawyer to “engage in conduct involving dishonesty,” among other things.

There was discussion about whether the Committee should consider a rule similar to the rule adopted in Illinois, which states that a charge of professional misconduct cannot be brought pursuant to this paragraph until a court of competent jurisdiction has made a determination that the attorney has engaged in an act that constitutes an unlawful discriminatory practice. Senator Feltes explained that there are plenty of situations involving harassment and discrimination that do not become the subject of lawsuits. In light of this, he and attorney Herrick felt that it would make more sense to recommend the adoption of a rule that has been adopted in many other states.

Representative Berch stated that he is concerned about the constitutional issues. Even putting aside the First Amendment concerns, as he sees it, there are two issues:

(1) the lack of a definition of discrimination – we are talking about punishing behavior and then deliberately not defining that behavior. This constitutional issue is then magnified by:

(2) removing the scienter requirement and making attorneys strictly liable. We would be saying to someone, “you did it, you are in trouble,” but we are not going to tell you beforehand what the bad behavior is that you are not supposed to engage in is.” This is troublesome. Representative Berch believes that this would be held unconstitutional – it is a punishment for undefined acts.

Representative Berch agreed that the inclusion of the language, “as defined by state and federal law” would mitigate his concerns.

Judge Delker inquired whether there might be a way to draft the rule so that it does not refer to the entire body of law, but just to address the question: what does harassment mean? What does discrimination mean? Attorney Herrick stated that this had been considered, but that, unfortunately, it is not easy to come up with a definition.

Attorney Herrick noted that the concern regarding vagueness is a concern that was considered by the working group. The working group noted that there are other Professional Conduct Rules which are similarly “vague.” For example, Rule of Professional Conduct 8.4 states that “it is professional misconduct” for a lawyer to “engage in conduct involving dishonesty, fraud, deceit or misrepresentation.” She noted that “dishonesty” and “deceit” are pretty vague.

Justice Lynn inquired whether, with respect to the discrimination issue, this could be applied to disparate impact cases. For example, suppose a law firm has a policy regarding the number of working hours that an attorney is required to put in, and suppose the firm is dominated by males. Would the lawyers in the firm potentially be subjected to discipline for this, even though the policy regarding hours is neutral on its face, and was not designed to achieve this effect? Senator Feltes stated that the Attorney Discipline Office would have discretion in deciding whether to pursue such a matter, but that because disparate impact is actionable under state and federal law, the situation described could potentially result in disciplinary action.

There was some discussion about whether the proposal should include the language, “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,” given that the legislature had decided, for policy reasons, to exempt employers with fewer than six employees. Justice Lynn inquired whether the Court would be going too far in overriding that policy decision in this context. Senator Feltes responded that it was the view of the subcommittee that all lawyers should be treated equally. To say to a small subset of lawyers, “these rules do not apply to you,” would send the wrong message. The professional conduct rules should apply to all lawyers.

Following some further discussion, and upon motion made and seconded, the Committee (attorney Albee, Judge Delker, Senator Feltes, Judge Garner, attorney Gill, attorney Herrick, Mr. Richter, Ms. Spalding, Mr. Stewart, Justice Lynn and Justice Donovan) voted to recommend that the Court amend Rule of Professional Conduct 8.4, as set forth in Appendix V. Justice Lynn noted that his vote to recommend that the Court adopt this provision does not mean that as a member of the Court he would necessarily support its adoption. Representative Berch, attorney Curran and attorney Gordon voted against recommending that the Court adopt this provision.

Committee also voted, upon motion made and seconded, to recommend that the Court hold a hearing before the full court on the proposal.

Sincerely,

A handwritten signature in black ink, appearing to read 'Carolyn A. Koegler', written in a cursive style.

Carolyn A. Koegler, Secretary

APPENDIX V

Amend Rule of Professional Conduct 8.4 as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

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) 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.]

Ethics Committee Comment[s]

[(1)] 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.

[(2) ABA] Model Rule section (e) is split into New Hampshire sections (d) and (e).

[(3) As used in this Rule, discrimination and harassment based upon “sex” and “sexual orientation” are intended to encompass same-sex discrimination and harassment.]