NHWBA
NEW HAMPSHIRE WOMEN'S BAR ASSOCIATION

April 11, 2019

New Hampshire Supreme Court
Attn: Eileen Fox, Clerk of Court
1 Charles Doe Drive
Concord, NH 03301

Re: Support for Proposed New Hampshire Rule of Professional Conduct 8.4(g)

Dear Clerk Fox:

On behalf of the New Hampshire Women's Bar Association (NHWBA)'s Board of Directors, I respectfully submit the following comments regarding the current iteration of Proposed New Hampshire Rule of Professional Conduct 8.4(g), which, on or about September 7, 2018, the Supreme Court Advisory Committee on Rules recommended 12-3 for the Court's consideration and addition.

The NHWBA strongly supports the adoption of Proposed New Hampshire Rule of Professional Conduct 8.4(g), without further revision and as it is listed in the Court's February 11, 2019 Order:

> **(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.**

The NHWBA is a statewide professional organization with a diverse membership of over 250 attorneys, members of the judiciary, paralegals, and law students. The NHWBA's mission is to promote and support the advancement and interests of women in the legal community through leadership, professional interaction, education, and the exchange of ideas between our members and the community. Prior to 1998, there was no organization in New Hampshire dedicated solely to the advancement of women in the legal profession. For more than 20 years, the NHWBA has supported women in New Hampshire's legal profession in developing practical skills through programs, networking with peers, bringing awareness to the issues and challenges that women face in the legal profession, and responding to these issues and challenges through advocacy.

Unfortunately, two of the challenges that women continue to face in our profession are discrimination and harassment based on, among other things, gender, gender identity,

and marital status. Such misconduct occurs in workplaces, in interactions with colleagues, opposing counsel, and clients, and even in our courts.

During the deliberative process regarding this Proposed Rule, I have been dismayed to hear as an argument against adoption of the Proposed Rule that discrimination and harassment are not "real" problems in our profession. The undertone of that argument is that those who highlight discrimination and harassment as issues in our profession are not credible or are those who "can't hack it" for some reason, such as they don't work hard enough, they spend more time on their families, they are insecure or too sensitive, etc., as the list goes on.

Respectfully, that argument is not only false but dangerous to our profession and to the public's perception of the legal system. One does not need to look far to find an abundance of thorough, credible, evidence-based data and studies, conducted by a variety of organizations and groups throughout the United States, that consistently show the same message:

- Discrimination and harassment, often exhibited through instances of systemic explicit and implicit bias, are endemic issues in the legal profession; and

- These issues have a deleterious impact, not only on the individuals who are the victims of bias, harassment, or discrimination, but also on the public, who we as the legal profession have a responsibility to protect.

These issues persist in our own Bar. They are not issues that only existed in the past, when "things were different." Just because someone has not personally experienced these issues, does not mean that they do not exist and that they do not have adverse effects on our profession and all who interact with it, including, but not limited to, members of the judiciary, attorneys, paralegals, legal assistants, witnesses, court reporters, court personnel, and clients. We must change even what we don't all see.

Engaging in harassment and discrimination is inconsistent with an attorney's ethical obligations. Harassment and discrimination are barriers in our profession that we must lead the way in removing. It is not enough to be aware of the problem – we need to implement policies and procedures and cultural change that eliminate it. Adopting Proposed Rule of Professional Conduct 8.4(g) is a good step towards doing that, and it is an opportunity that we should now seize.

Without the adoption of Proposed Rule of Professional Conduct 8.4(g), individuals who suffer harassment and discrimination 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, have no reasonable recourse or remedy that they can pursue through our disciplinary authority. There is a gap within our present Professional Rules that allows this unethical behavior to go unchecked. New Hampshire Professional Rule of Conduct 4.4(a) is too narrow in scope to cover the behavior that Proposed Rule of Professional Conduct 8.4(g) is designed to prevent, and, accordingly, unless the narrow requirements of Rule 4.4(a) are met, it is not a viable option for victims of harassment and discrimination seeking recourse.

Further, state and federal anti-discrimination and anti-harassment statutes and related case law do not apply to harassing or discriminatory behavior directed at non-employees, such as equity owners or equity partners of law firms, opposing counsel, paralegals, legal assistants, witnesses, court reporters, court personnel, clients, and others. Without Proposed Rule of Conduct 8.4(g), these individuals have no recourse or remedy.

Opponents of the Proposed Rule have voiced constitutional and other concerns during this process. However, after a lengthy debate and deliberative process with a collective of stakeholders, including the NHWBA, in which potential revisions were discussed and some adopted, leading to the iteration that is presently before the Court, the majority of those concerns were addressed by the Proposed Rule's present language, which reasonably limits its reach.

For example, the Proposed Rule states that it does not limit the "ability of the lawyer to accept, decline, or withdraw from representation consistent with other Rules" and that it does not "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." This statement regarding no infringement on an attorney's constitutional rights follows long-standing case law that stands for the same proposition. See, e.g., Nat'l Ass'n for Advancement of Colored People v. Button, 371 U.S. 415, 428–29 (1963) (holding that "the activities of the NAACP, its affiliates and legal staff shown on this record are modes of expression and association protected by the First and Fourteenth Amendments which Virginia may not prohibit, under its power to regulate the legal profession.").

In addition, unlike other misconduct referenced in Rule 8.4, the Proposed Rule also includes the requirement that an attorney must know, or reasonably should know, that the conduct constituted harassment or discrimination on the basis of the protected classes listed.

Opponents of the Proposed Rule also argue that the Proposed Rule is vague, and therefore, unconstitutional, because it does not define the terms, "harassment" and "discrimination," by how the terms are defined under state and federal anti-discrimination and anti-harassment statutes and related case law. First, it is unlikely that a constitutional challenge based on vagueness is an actual issue with respect to the Proposed Rule. As attorneys, we have the unique ability to discern what conduct is prohibited under our Professional Rules without precise specificity of the terms of those Rules. See, e.g., Howell v. State Bar of Texas, 843 F.2d 205, 208 (5th Cir. 1988); see also Villeneuve v. Connecticut, No. 3:10CV296 JBA, 2010 WL 4976001, at *4 (D. Conn. Dec. 2, 2010) (summarizing Howell and other decisions from a variety of state supreme courts who also have held that Professional Rules are not unconstitutionally overbroad when viewed in a manner relevant to the legal profession.); see also Matter of Keiler, 380 A.2d 119, 126 (D.C. 1977), overruled on other grounds by In re Hutchinson, 534 A.2d 919 (D.C. 1987) (stating that "[t]he language of a rule setting guidelines for members of the bar need not meet the precise standards of clarity that might be required of rules of conduct for laymen.").

Second, such strict definitions of these terms would render the Proposed Rule useless as a tool to actually combat harassment and discrimination in our profession. If the Proposed Rule defined "harassment or discrimination" as "conduct prohibited under substantive federal or state law" or similar, it would exclude the majority of the harassing

or discriminatory behavior that the Proposed Rule seeks to address (and prevent) and that should be prohibited in the legal profession. Currently, federal and state law regarding discrimination and harassment based on a variety of protected classes sets a high threshold for what constitutes unlawful harassing or discriminatory behavior. If the Proposed Rule defined "harassment or discrimination" as "conduct prohibited under substantive federal or state law" or similar, it would essentially require aggrieved individuals to first prove that the behavior for which they complain is unlawful before the offending attorney could be subject to professional discipline. Victims should not have to wait for attorneys who harass and discriminate to break the law before they may be held accountable by our regulatory authority. That would not only be an unreasonably high burden for complainants, but it would also provide a roadmap for culpable attorneys to escape appropriate professional discipline.

There are many instances of behavior that may not meet the definitions of harassment or discrimination under state or federal law, but nonetheless still should be actionable under our Professional Rules. Microaggressions and covert harassing and discriminating behavior occur every day in our profession. While explicit behavior is still an issue, it is overshadowed by the camouflaged behavior that occurs more frequently. As President of the NHWBA, I hear from New Hampshire attorneys about these types of behavior regularly. Examples include, but are not limited to, the behavior widely reported in the New Hampshire Bar Association's 2017 Draft Gender Equality Survey Results: sexist or racist jokes, use of gendered or coded language, use of terms of endearment, such as "sweetie" or "dear," condescending treatment, comments on apparel and appearance, comments on pregnancy and "mommy brain", comments regarding female attorneys' "emotions", and automatically being mistaken for court reporters and support staff simply on the basis of one's gender.

"One off" and single instances of such harassing and discriminating behavior must be addressed under the Proposed Rule because we, as legal professionals, must act on a higher ethical level and should demand it of ourselves. Otherwise, this Proposed Rule will have little to no practical effect on the irrefutable, pervasive problem of harassment and discrimination in our profession.

Therefore, at the most, substantive federal and state law should be a reference point instead of a bright-line definition. The NHWBA would support language in a Comment to the Proposed Rule that uses "guided by" rather than "as defined by," or language that states that the definition of the terms, "harassment" or "discrimination," "shall include, but not be limited to." By using this type of language, rather than "defined by," if the complained-of conduct is unclear, then federal and state law can be a reference point for our profession's regulatory authority, who, in the NHWBA's opinion, is more than able to discern between actionable and non-actionable conduct, as evidenced by their ability to do so on a regular basis to date in many other scenarios.

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In closing, 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. The NHWBA supports the current version of Proposed New Hampshire Rule of Professional Conduct 8.4(g), and strongly urges the Court to adopt it without further delay.

Thank you for your consideration.

Very truly yours,

Christina A. Ferrari, Esquire

President
NHWBA Board of Directors

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