May 31, 2019

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

RE: Proposed New Hampshire Rule of Professional Conduct 8.4(g)

Dear Clerk Fox:

I respectfully submit the following comments regarding the proposed amendment to Rule 8.4 of the New Hampshire Rules of Professional Conduct as proposed by the Court with its Order of May 17, 2019 (the “Proposed Rule”).

I continue to applaud the Court’s effort to explicitly address harassment and discrimination within the New Hampshire legal profession. Having attended the public hearing on April 12, 2019 and having heard the stories of other women in the bar with experiences similar to my own, I am more convinced than ever that an ethical rule that explicitly and clearly addresses the insidiousness of discrimination and harassment in our profession is needed.

Unfortunately, the Proposed Rule as released on May 17, 2019 falls far short of what I believe is needed to meaningfully and responsibly address these issues.

What I find most troubling about the Proposed Rule is that it introduces a new legal standard for evaluating attorney misconduct, namely “conduct for which the lawyer’s primary purpose is to embarrass, harass or burden another person.” I ask the Court to recall the testimony of Attorney Elizabeth Larochelle. Had the Proposed Rule been implemented at the time that Attorney Larochelle had the encounter with opposing counsel that she spoke of at the April 12th hearing and she had reported that attorney to the Attorney Discipline Office, it is easy to imagine that the offending attorney would have quickly offered a rebuttal that he was joking or that his “primary purpose” was not to offend or burden her. In the face of such a rebuttal and with no objective standard in
May 31, 2019
Page 2

the Proposed Rule by which to assess his conduct, that offending attorney would likely
have prevailed in the defense of his conduct.

Is it acceptable to this Court that male members of the New Hampshire bar be able to
continue to make statements about being sexually aroused by the legal arguments of
young female attorney as long as they have couched such statements as jokes? I have to
believe that it would not be.

I further ask the Court to consider the language of the Proposed Rule in light of other
rules contained within the Professional Rules of Conduct that express clear standards of
conduct. For example, Rule 1.15(a) requires attorneys to hold client property separately
from the attorney’s own assets. In enforcing Rule 1.15(a), how many times has the
Attorney Discipline Office and this Court seen testimony from the offending attorney
that he or she didn’t intend to use or steal money from their clients and had every
intention of returning misappropriated fund? While intention might be a mitigating
factor in a disciplinary proceeding, it has never been the standard by which conduct is
assessed under Rule 1.15(a) or under other rules. Rule 1.15(a) focuses on the conduct
itself, not the intentions of the attorney. Why should an amendment to Rule 8.4 to
prohibit discrimination be assessed any differently?

To the extent that the Court harbors concerns about members of the bar being held to a
new standard of conduct that creates anxiety or uncertainty, I would argue that
education is a more effective tool for addressing such perceived anxieties. In addition to
implementing a stronger amendment to Rule 8.4, such as the one proposed by the
Supreme Court Advisory Committee on Rules, the Court could consider either: (A)
temporarily requiring at least 1 of the 2 required hours of ethics training as part of our
annual continuing legal education requirement consist of harassment and diversity
training, or (B) add a third hour to the existing ethics training requirements which is
devoted solely to harassment and diversity training. With a strong rule prohibiting
discrimination and offering members of the bar the training and tools to improve our
collective culture, the Court is in a position to effect real and much-needed change.

In light of what this Court now knows and understands about the pervasive harassing
and discriminating behavior that continues to find safe harbor within our bar, I hope that
the Court will agree that the Proposed Rule sets the bar for conduct at too low a level. I
encourage the Court to be bold in addressing this harmful conduct and to adopt either
the version of the amendment to Rule 8.4 as proposed by the Supreme Court Advisory
Committee on Rules or some similar version.
May 31, 2019
Page 3

Thank you for the opportunity to comment and for your consideration.

Sincerely,

Kristin A. Mendoza, Esq.

KAM