STATE OF MAINE
SUPREME JUDICIAL COURT

IN RE:	**PROPOSED AMENDMENT**	**)**
	TO THE MAINE RULES OF	**)**
	PROF. CONDUCT - RULE 8.4(g)	**)**

Joint Comment Opposing Adoption of
Proposed New Rule of Professional Conduct 8.4(g)

This Joint Comment, submitted by fifteen (15) Maine licensed attorneys, opposes Maine's adoption of the newly proposed Rule 8.4(g), for the reasons set forth herein.

I. The Rule

A. Maine's Current Rule

Maine's current Rule of Professional Conduct 8.4 provides as follows:

It is professional misconduct for a lawyer to:

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

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

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

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Maine 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.

B. <u>Proposed Rule 8.4(g)</u>

Adopting the proposed new Rule 8.4(g) would amend Maine Rule 8.4 by adding a new subsection (g). The proposed Rule 8.4(g) would read as follows:

It is professional misconduct for a lawyer to: . . . (g) engage in unlawful harassment or unlawful discrimination.

II. <u>Objections to the Proposed Rule</u>

A. The Proposed Rule is Duplicative and Unnecessary.

The proposed new Rule 8.4(g) prohibits "*unlawful harassment or unlawful discrimination*."

But Rule 8.4(b) already prohibits attorneys from committing "*a criminal or <u>unlawful act</u> that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects*" (our emphasis). The term "*unlawful act*", as used in Rule 8.4(b), would obviously include both "*unlawful* harassment" and "*unlawful* discrimination" – because both *unlawful harassment* and *unlawful discrimination* are, by definition, unlawful acts.

In addition, Rule 8.4(d) already provides that "*a lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice*." Rule 8.4(d) [Comment 3]. So this provision, as well, would cover unlawful discriminatory acts.

Therefore, the proposed new Rule 8.4(g) is duplicative and unnecessary.

Further, as noted below, if unlawful harassment and discrimination are subsumed under Rule 8.4(b) and (d), where they belong, such would retain the important link between the proscribed conduct and a legitimate interest of the bar – namely, attorney fitness or prejudice to the administration of justice. As it stands, the proposed Rule 8.4(g) severs that link because, unlike Rule 8.4(b) (which requires that the unlawful act reflect adversely on the lawyer's fitness as a lawyer) and 8.4(d)(which requires that the biased or prejudicial act prejudice the administration of justice), the proposed Rule proscribes unlawful harassment and discrimination regardless of whether such conduct has anything to do with the practice of law, the attorney's fitness, or prejudice to the administration of justice. Under the proposed rule, it is not clear what is the intended scope of "unlawful harassment." Unlawful harassment (*e.g.*, based on sex, race, and religion) generally would be subsumed within the term "unlawful discrimination." What

additional or different conduct is this intended to capture?

Also, violations of discrimination law do not always involve any malice or *mens rea*, but rather can come from judgments about compliance or other errors that do not stem from any evil motive. A law office, for example, is considered a "place of public accommodation" under state and federal disability discrimination laws. If an attorney fails to make reasonable accommodations to a prospective client or an employee with a disability (such as failure to provide a sign language interpreter for a hearing impaired person), or does not grant an employee an additional medical leave extension after six months of leave, this could later be found to constitute unlawful discrimination under the ADA and MHRA. Yet it would not seem to be the kind of misconduct warranting professional discipline.

The Advisory Committee Note to the proposed rule points out that Maine has considered and declined to adopt the ABA version of Model Rule 8.4 (g), which we consider reflects a wise decision. It goes on to say, however, "Maine's version makes a statement to all attorneys that the profession does not tolerate unlawful harassment or unlawful discrimination." Firstly, as noted above the current rule already reflects the principle that such unlawful conduct is wrong and can support professional discipline. Beyond that, however, it is worth remembering that the RPC are a prescriptive code of conduct, not suggestions, not aspirations, and not philosophical "statements." Such expressions can be apt in

various settings, and to question the wisdom of using the prescriptive code of conduct to make a "statement" is not so much to say the statement is wrong, but only that this is not the place for it.

B. The Proposed Rule Would Treat Harassment and Discrimination as Worse than Criminal and Other Unlawful Conduct, And Would Create a Class of "Super Offenses."

Rule 8.4(b) already makes it a violation of the Rules of Professional Conduct to "*commit a criminal or unlawful act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects.*" And Comment [3] to Rule 8.4(d) already makes it a violation of the Rules of Professional Conduct to "*manifest bias or prejudice*" toward certain protected classes to the extent such acts prejudice the administration of justice..

So what, if anything, would proposed Rule 8.4(g) add to Rule 8.4? The answer is that Rule 8.4(g) would operate so as to treat unlawful harassment and discrimination as *worse* offenses than the criminal and other unlawful acts proscribed in 8.4(b) and the biased and prejudicial acts prohibited in 8.4(d). In other words, Rule 8.4(g) would create a class of "super offenses," because – although under Rule 8.4(b) only criminal or unlawful acts *that reflect adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects* are prohibited, and under Rule 8.4(d) only bias and prejudice that prejudices the

administration of justice are prohibited – under proposed Rule 8.4(g) acts of unlawful harassment or discrimination will constitute violations of the Rules *regardless* of whether or not they reflect adversely on the lawyer's honesty, trustworthiness or fitness, or prejudice the administration of justice.

Comment [2] of the current Maine Rules explains the reason why Rule 8.4(b) does not prohibit all criminal or unlawful acts, but only criminal and unlawful acts that reflect adversely on the lawyer's honesty, trustworthiness or fitness:

> *Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. . . Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category*" (our emphasis).

The same rationale should apply to unlawful harassment and discrimination. There is nothing peculiar – either in nature or effect – about acts of unlawful harassment and discrimination that would justify treating them as "super offenses." Indeed, it should strike one as quite remarkable that, under the proposed Rule's regime, many kinds of *criminal* and other unlawful acts of attorneys would *not* constitute violations of the Rules, but that *any* case of unlawful harassment or discrimination – regardless of the circumstances – would.

In short, there is no reason to treat attorneys who have engaged in unlawful harassment or discrimination differently than attorneys who have engaged in other unlawful acts.

C. The Proposed Rule Extends Beyond the Legitimate Interests of the Bar.

The bar has a legitimate interest in insuring attorney competence and fitness and in protecting the administration of justice from prejudice.

So, for example, Rule 8.4(b) prohibits criminal and unlawful behavior, but only when such behavior reflects adversely on the lawyer's honesty, trustworthiness or fitness *as a lawyer*.

And Rule 8.4(d) prohibits bias and prejudice, but only when such bias or prejudice occurs in the lawyer's representation of a client – that is, when a lawyer is acting in his or her professional capacity – and, even then, only when such bias or prejudice prejudices the administration of justice.

So both Rule 8.4(b) and (d) are related and limited to attorney conduct which the bar has a legitimate interest in regulating.

But the proposed Rule is not so limited.

The proposed Rule proscribes unlawful harassment or discrimination, without regard to whether such acts prejudice the administration of justice or reflect adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer.

Indeed, under the proposed Rule, a lawyer could be punished for engaging in unlawful harassment or discrimination even when such acts have nothing whatsoever to do with the lawyer's competence or fitness as an attorney. In fact, under the proposed Rule, an attorney could be punished for acts committed in his or her private capacity having nothing whatsoever to do with the lawyer's activities as a lawyer.

No Rule of Professional Conduct should purport to regulate attorney conduct that has no relationship to the attorney's professional activities, the lawyer's competence or fitness to practice law, or that does not prejudice the administration of justice.

D. The Proposed Rule Would Treat Lawyers Unfairly by Subjecting Them to Professional Discipline for Having Engaged in Unlawful Conduct Without a Judicial Finding That the Attorney Actually Engaged in Unlawful Conduct.

Proposed Rule 8.4(g) prohibits "unlawful" harassment or discrimination. But the Rule does not actually require an attorney to have been judicially determined to have engaged in "unlawful" harassment or discrimination before facing professional discipline. Therefore, under the proposed Rule, an attorney could be found by disciplinary counsel to have engaged in "unlawful" conduct even when no court has determined that to be the case. That is patently unfair.

Other states – such as Illinois and New York – have recognized and addressed this problem in their Rules of Professional Conduct. For example, Illinois Rule of Professional Conduct 8.4(j) provides:

> *It is professional misconduct for a lawyer to: . . . (j) violate a federal, state or local statute or ordinance that prohibits discrimination based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status by conduct that reflects adversely on the lawyer's fitness as a lawyer. Whether a discriminatory act reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of all the circumstances, including: the seriousness of the act; whether the lawyer knew that the act was prohibited by statute or ordinance; whether the act was part of a pattern of prohibited conduct; and whether the act was committed in connection with the lawyer's professional activities. No charge of professional misconduct may be brought pursuant to this paragraph until a court or administrative agency of competent jurisdiction has found that the lawyer has engaged in an unlawful discriminatory act, and the finding of the court or administrative agency has become final and enforceable and any right of judicial review has been exhausted* (our emphasis).

And New York Rule of Professional Conduct 8.4(g) provides:

> *A lawyer or law firm shall not: . . . (g) unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment on the basis of age, race, creed, color, national origin, sex, disability, marital status or sexual orientation. Where there is a tribunal with jurisdiction to hear a complaint, if timely brought, other than a Departmental Disciplinary Committee, a complaint based on unlawful discrimination shall be brought before such tribunal in the first instance. A certified copy of a determination by such a tribunal, which has become final and enforceable and as to which the right to judicial or appellate review has been exhausted, fin dg that the lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding* (our emphasis).

Comment [5A] Unlawful discrimination in the practice of law on the basis of age, race, creed, color, national origin, sex disability, marital status, or sexual orientation is governed by paragraph (g).

Maine attorneys should not be subjected to charges of – and disciplined for – having engaged in "unlawful" harassment or discrimination absent a judicial finding that the attorney has, in fact, committed such acts. Anything less is a deprivation of due process.

E. The Proposed Rule Threatens Discipline to Attorneys for Complying with Other Rules of Professional Conduct.

The proposed Rule 8.4(g) prohibits attorneys from committing unlawful discrimination.

One act of unlawful discrimination an attorney might commit is to decline to represent a prospective client who belongs to a protected class. 5 M.R.S.A. § 4592(1) (It is unlawful public accommodations discrimination for any public accommodation – specifically including a lawyer's office – to directly or indirectly refuse, discriminate against or in any manner withhold from or deny the full and equal enjoyment to any person, on account of race or color, sex, sexual orientation, physical or mental disability, religion, ancestry or national origin, any services).

So, for example, if a female family law attorney who, due to her personal experiences with men, her personal beliefs and commitment to feminism, and her

belief that the law favors men in divorce actions so that women need more protection than men, believes she cannot zealously represent men in divorce actions and, therefore, turns away a man seeking her representation in a divorce – she could be found to have committed unlawful discrimination under Maine's Human Rights Act, which would then amount to a violation of the proposed Rule 8.4(g). Indeed, a similar scenario has actually occurred in Massachusetts. *Stropnicky v. Nathanson* (1999 WL 33453078) (a female attorney who, due to her personal beliefs, restricts her family law practice to representing only women, engages in unlawful discrimination).

The problem with this result is that the Rules themselves impose upon attorneys a professional obligation to decline to represent clients with whom the attorney has a personal conflict of interest (Rule 1.7(a) (2)).

In particular, Rule 1.7 provides that: "*(a) . . . a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: . . . (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or* ***by a personal interest of the lawyer***" (our emphasis).

And Restatement (Third) of the Law Governing Lawyers §125 (2000) clarifies that: "*A conflict under this Section need not be created by a financial*

interest. . . ***Such a conflict may also result from a lawyer's deeply held religious, philosophical, political, or public-policy belief***" (our emphasis). See also Rule 6.2 which provides that "*A lawyer shall not seek to avoid appointment by a tribunal to represent a person* ***except for good cause****: such as: . . . (c)* ***the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client***" (our emphasis).

As applied to the scenario in *Stropnicky v. Nathanson*, discussed above, the female family-law attorney had a deeply held philosophical, political, or public-policy belief that she believed would prevent her from providing un-conflicted representation to men in divorce actions. That being the case, the attorney had a *duty* – under Rule 1.7 – to decline the representation of men in divorce actions, which she did. And yet – in that case – complying with Rule 1.7 placed her in the position of having engaged in "unlawful discrimination" under state law. Fortunately for that attorney, the Massachusetts Rules of Professional Conduct had – and still has – no Rule similar to Rule 8.4(g) now being proposed in Maine, or she would have been in violation of it – thereby subjecting her to professional discipline for having complied with Rule 1.7.

In short, proposed Rule 8.4(g) will – if adopted – conflict with other Maine Rules of Professional Conduct, and will threaten attorneys with professional discipline simply for complying with those other Rules.

Maine should never adopt a Rule of Professional Conduct – such as the proposed Rule 8.4(g) – that conflicts with other Rules of Professional Conduct, because attorneys should never be placed in the no-win position of having to comply with conflicting Rules of Professional Conduct.

III. Conclusion

For all the foregoing reasons, this Honorable Court should reject the proposed new Rule 8.4(g).

Respectfully submitted,

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