

Maine State Bar Association
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The Maine State Bar Association (MSBA) hereby submits its comment to a proposed amendment to Rule 8.4 of the Maine Rules of Professional Conduct and to Rule 5 of the Maine Bar Rules as requested by the Maine Supreme Judicial Court.

INTRODUCTION

The MSBA is a voluntary bar association with approximately 3,000 members. The MSBA promotes the honor, dignity and professionalism of lawyers, advances the knowledge, skills and interests of its members, and supports the public interest in a fair and effective system of justice. The MSBA is a trade association for attorneys that acts on behalf of its members. It is not a political organization and is not affiliated with any political party, official or candidate.

The MSBA has established Guidelines of Professional Courtesy that can be found at its website www.mainebar.org/page/Guidelines. The Guidelines make clear that lawyers should act with “utmost respect...personal dignity and professional integrity...[and] treat each other, their clients opposing parties, the courts, and members of the public with courtesy and civility and conduct themselves in a professional manner at all times.”

The MSBA has 26 sections consisting of demographic groups (e.g. New Lawyers, Women’s Law Section) and practice groups (e.g. Real Estate, Family Law). Sections and attorneys may submit comment as a section or individually separate from comment by the MSBA.

COMMENT TO PROPOSED AMENDMENT TO RULE 8.4 OF MAINE RULES OF PROFESSIONAL CONDUCT

The Maine Supreme Judicial Court has requested comment on a proposed amendment to Rule 8.4 of the Maine Rules of Professional Conduct. This is the second proposed amendment to Rule 8.4. The original proposal (hereinafter “first proposed amendment”) created a new §8.4(g) that stated in its entirety that it would constitute misconduct for a lawyer to “*engage in unlawful harassment or unlawful discrimination.*” The MSBA did not support that language as written on the grounds that it was too vague and over broad. The MSBA referred to the ABA Model Rule 8.4(g) as an example of more specificity that would be useful to practitioners.

The Advisory Committee has now proposed incorporating some but not all of the language from the ABA Model Rule 8.4(g). The second proposed amendment for §8.4(g) provides that it is professional misconduct for a lawyer to

engage in conduct or communication 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, disability, age, sexual orientation, or gender identity.

The second proposed amendment accomplishes the goal of being more specific than the first proposed amendment by identifying behavior as “conduct or communication related to the practice of law.” It further identifies potential bases for discrimination or harassment. This revised language improves on the first proposed amendment by providing greater guidance to practitioners.

The Advisory Committee states that it does not adopt ABA Comments when adopting amendments to Rules of Professional Conduct.¹ In this case, however, it would be helpful to include the following definitional comments from the ABA:

“Discrimination” as used in this Rule means conduct or communication that a lawyer intends or reasonably should know manifests and intention : to treat a person as inferior based on one or more of the characteristics listed in the Rule; to disregard relevant considerations of individual characteristics or merit because of one or more of the listed characteristics; or to cause or attempt to cause interference with the fair administration of justice based on one or more of the listed characteristics.

“Harassment” as used in this Rule means derogatory or demeaning conduct or communication and includes unwelcome sexual advances, or other conduct or communication unwelcome due to its implicit or explicit sexual content.

“Related to the practice of law” as used in the Rule means occurring in the course of representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; or operating or managing a law firm or law practice. Declining representation, limiting one’s practice to particular clients or types of clients, and advocacy of policy positions or changes in the law are not regulated by Rule 8.4(g).

The second proposed amendment, specifically with the inclusion of the ABA definitional comments, accomplishes the goal of the rule, which is to set a standard of conduct that addresses bias, prejudice or harassment based on, among other things, gender, race, religion, age, sexual orientation and other grossly inappropriate conduct that should not be tolerated by members of the Maine bar, or frankly anyone in a tolerant and civilized society. The MSBA supports the second proposed amendment to Maine Rule of Professional Conduct 8.4(g).

Notwithstanding the foregoing, the MSBA takes this opportunity to share opposing viewpoints raised by some members. Some members have suggested that the second proposed amendment could lead to over-reporting or over-prosecution. It has been suggested that the amendment is unnecessary because issues addressed in 8.4(g) are covered under other bar rules, the Maine Human Rights Act, the ADA and Title VII despite that such laws have not fully eradicated bad behavior. There is a suggestion that, even as amended, Rule 8.4(g) is overbroad and constitutes a viewpoint-based restriction on speech in violation of the First Amendment. For

¹The Preamble From the Maine Task Force states that “Comments and Notes are published with the rules to provide background information and illustration.” ¶14A. “Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules. . . .” *Id.* at ¶14B.

more discussion, readers are referred to an article in the October 2017 ABA Journal entitled, “States Split On New ABA Model Rule Limiting Harassing Or Discriminatory Conduct.”

Concerns about the second proposed Rule 8.4(g) raise the potential pitfalls of over-regulation in any context. The MSBA takes no position here on the constitutionality of the proposed amendment under the First Amendment and further notes that all of Maine’s governmental attorneys, including bar counsel and the judiciary, have consistently exercised sound discretion and upheld the highest standards of integrity in enforcing laws and regulations.

To be sure, in a perfect world the second proposed amendment to Rule 8.4 would go without saying. However, as Stanford University law professor and ethics expert Deborah L. Rhode stated in the ABA article referenced above, “There are enough incidents of sexual harassment that make it important for the profession to have largely what is a symbolic statement.”

Whether attorneys support or oppose amending Rule 8.4 as proposed, there should be no doubt that attorneys in Maine are deeply committed to respectful civil engagement. The Rules of Professional Conduct, mandatory and aspirational, reflect that commitment and are essential to self-regulation of the profession. This sentiment is reflected in the Preamble to the Rules of Professional Conduct that states:

Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.²

The Rules, among other things, reflect a desire to foster an environment free of bias and harassment. Ultimately how we choose to act towards each other is up to us.

COMMENT TO PROPOSED AMENDMENT TO MAINE BAR RULE 5

Maine Bar Rule 5 governs continuing legal education (CLE). The proposed amendments would increase the number of required credit hours from 11 to 12 and require at least one *live* credit hour concerned with professionalism *and* one live hour “*concerned with harassment and discriminatory conduct or communication related to the practice of law as set out in Rule 8.4(g) of the Maine Rules of Professional Conduct.*”

The proposed increase to the number of required credit hours and the manner in how the credit hours are obtained-- that is live as opposed to by webinar, replay or other electronic means—impose new burdens on practitioners’ time and financial resources. The MSBA is concerned that the burdens disproportionately fall most heavily on rural, small firm and solo practitioners for whom extended time out of the office, additional travel and added overhead

² Preamble at ¶16.

pose real hardship. Concern has also been raised by some members that the proposed increase in mandatory CLE is unnecessary because the topic already exists under the category of “professionalism education.”³ Concern was raised that there is a lack of evidence that the conduct proposed Bar Rule 5 seeks to address is insidious enough to warrant increased mandatory education as a licensing requirement.

Ironically, those individuals with the least amount of awareness or understanding of harassment and discrimination are the attorneys who would benefit most from mandatory training and would be the least likely to seek it out voluntarily. Still, some critics of the proposed rule change contend that even if attendance were required, there would be no guarantee that such education would alter conduct, or even be measurable.

The MSBA recently disseminated a survey on the topic of harassment and discrimination to which it received nearly 1,600 responses. Of the respondents, 58% were male 42% were female, an accurate reflection of the demographics of Maine attorneys.

Question 5 of the survey asked whether there is a culture among lawyers in the Maine bar that needs to be addressed by either heightened rules of professional responsibility or education and training. 66% of respondents answered No. Some members see that as a vote expressing a clear preference against mandatory CLE and a reflection of the majority of respondents that the culture among lawyers is acceptable. Others assert that the fact that 34% believe enhanced rules and training are necessary shows that a significant enough percentage of the legal population views the problem as sufficiently widespread to merit action. It has been pointed out that protections of this sort were never created to protect the majority, they exist to protect a minority.

Opposition to increased mandatory CLE training from some members seems primarily motivated by the impact that increasing requirements would have on professionals who are already stretched for time and resources. That is not to say that the problem is not real. Implicit bias exists and overt misconduct occurs.

The MSBA recognizes the legitimacy of those who contend that a specific increase to CLE as a licensing requirement is burdensome. At the same time, it is important to ensure that all lawyers understand the nature of harassing and discriminatory behaviors and the impact of their conduct on others, particularly the less powerful.

A few less onerous alternatives to the proposed amendments to Rule 5 have been suggested. To reduce the impact of an additional CLE credit requirement, Maine Bar Rule 5 could be amended to reduce the number of general CLEs by one so the total number of required CLE credits remains the same. Additionally, rather than requiring two “live” CLEs, the rule could reduce the number of required “live” CLEs to one. To reduce costs, particularly in rural

³ “Qualifying professionalism education topics include professional responsibility, legal ethics, substance abuse and mental health issues, diversity awareness in the legal profession, and malpractice and bar complaint avoidance topics including law office and file management, client relations, and client trust account administration.” Maine Bar Rule 5(a)(1).

areas, the judiciary could sponsor and lead presentations and/or the CLE credit could be earned at regularly held bench/bar meetings.

Whether or not Maine Bar Rule 5 is amended as proposed, the MSBA has and will continue to actively work to promote respect, civility and collegiality among the bar through CLE programs and by convening attorneys to ensure that the conversation remains a topic of utmost importance and relevance. The MSBA is seeking to post signage in every courthouse to remind attorneys and the public of the bar's commitment to its Guidelines of Professional Courtesy.

The MSBA is grateful to the Maine Supreme Judicial Court and the Task Force for its attention to issues affecting practitioners and its relentless efforts to promote professional conduct of attorneys.