

STATE OF MAINE
SUPREME JUDICIAL COURT
COMMENTS ON **PROPOSED** AMENDMENTS TO THE
MAINE RULES OF PROFESSIONAL CONDUCT
AND MAINE BAR RULES

COMMENTS BY: GERALD F. PETRUCCELLI, ESQ.

The Court has invited comment on two related rule changes. One adds language to Rule 8.4 of the Maine Rules of Professional Conduct to improve or assure maintenance of the integrity of the profession, and the other amends Maine Bar Rule 5, to impose an additional CLE requirement. Both are obviously well intended. The Court, however, should not assume that either of them is well adapted to achievement of the ostensible objectives.

First, without any changes to Rule 8.4 of the Rules of Professional Conduct, it is appropriate to consider independently revisions to the requirements of Bar Rule 5 concerning continuing legal education. For example, it is not necessary to add an hour to the total requirement to add one or more hours addressing any particular subject, including the subject at hand in this proposal. The Court can require two or three ethics hours and require that at least one of those hours cover the subject of Proposed Rule 8.4(g). These changes can be accommodated simply by reducing the number of conventional subject matter hours of CLE that are to be required.

As a lawyer with some experience in both ends of CLE programs, I am not at all confident or certain that very many of the ones I taught, or very many of the ones I attended were all that useful for the participants. The supposition that the compulsory added hour of CLE on this particular topic will transform the culture of the legal profession seems optimistic. Nevertheless, the CLE change can occur without adding Rule 8.4(g)

The proposed Rule 8.4(g) is undoubtedly timely and appropriately aspirational but that is not enough to justify the enactment of this particular text. (At a minimum the word “reasonably” should be spelled correctly.) The question is not whether deliberate or reckless harassment or discrimination should ever be appropriate professional conduct. The question is whether this Rule is either necessary or helpful with respect to the reduction or elimination of any such conduct that has been observed or experienced. Obviously, to the extent that the behavior in question is already prohibited by the Rules of Professional Conduct or Maine law, including the Human Rights Act and the Criminal Code, this Rule is redundant and unnecessary. To the extent, however, that this Rule prohibits or proscribes conduct which is otherwise not prohibited by the Rules of Professional Conduct or any other provision of law, the Rule is inadequately clear as to what constitutes an offense.

More specifically, the term “harassment” is undefined in the Rule itself but invites very broad construction by reference to the comment. Harassment “includes” but is

explicitly not limited to behaviors involving or based upon sexual activity or invitations to such activity, or apparently also status. The comment states that harassment includes not only those things but also means any “derogatory or demeaning conduct or communication.” Any good lawyer of any experience who has clearly and forcefully rebutted a weak or groundless argument is no doubt open to an accusation of having demeaned the proponent of the weak or groundless argument. It is bad enough that lawyers may with impunity make weak and groundless arguments. It is not a good idea to empower them with a self-defined opportunity to retaliate against adversary counsel with the explicit authorization of the Rules of Professional Conduct. To the extent that this is about sexual imposition or unwelcome sexual advances or other sexual matters, the Rule ought to squarely and separately address those issues. To the extent that this is about protecting the hurt feelings of lawyers who are overmatched, the Rule is inadvisable.

These comments are submitted with considerable reluctance because it is not my purpose to question the desirability or advisability or wisdom or noble purposes of any proposal of this kind. But any regulatory proposal should be skillfully crafted and tailored to achievement of its apparent objectives and it has not been demonstrated that these proposals meet that test.