

These comments are being submitted on behalf of Pine Tree Legal Assistance. Pine Tree is a statewide nonprofit providing free legal assistance to low-income individuals in the civil justice system in Maine. It has been in operation since 1967 and currently maintains offices in six locations (Portland, Lewiston, Augusta, Bangor, Machias, and Presque Isle.) It currently employs 40 lawyers, most of whom regularly appear in Maine District Courts throughout the state, and, less frequently, before the Superior Court, Supreme Judicial Court and Maine probate courts.

The proposed amendments would add new language to MRPC 8.4(g) to state 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 reasonable[y] should know is harassment or discrimination on the basis of race, religion, national origin, ethnicity, disability, age, sexual orientation or gender identity.*” In addition, Rule 5 of the Maine Bar Rules would be amended to annually require at least one live credit hour that is “*primarily 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.*”

Pine Tree strongly supports both the decision to strengthen the description of behaviors that would constitute professional misconduct under MRPC Rule 8.4(g), as well as the proposed requirement that all attorneys annually receive at least one live credit hour focused on this topic.

An earlier version of MRPC 8.4(g) was briefly considered in 2017, with many commenters arguing that the proposed language would be both duplicative and unnecessary. However, following publication of “*Unprofessional Conduct by Maine Lawyers*” in the November 24, 2017 edition of the *Maine Lawyers Review* about Pine Tree staff experiences, many other attorneys began sharing their ‘Me Too’ experiences. This led to focused discussions/presentations on unprofessional conduct within the Women’s Law Section of the Maine State Bar Association, the Maine Trial Lawyers Association, and the Federal/State Judicial Council between December and April 2018. It now seems clear that new tools are essential to address the breadth and scope of professional misconduct of this type; in fact, the absence of a clear professional standard has allowed these behaviors to continue for decades.¹

Comments on the proposed 2017 amendment and a 2018 MSBA survey on bias and harassment confirm that many Maine attorneys do not perceive harassment or biased behaviors to be inconsistent with professionalism. That reality is compelling evidence of the additional need for change to Rule 5 of the Maine Bar Rules, and annual ongoing legal education on the topic. Annual ‘in person’ education can heighten awareness of implicit bias and discourage actions that might otherwise be assumed to be appropriate tools in adversarial proceedings, especially if those behaviors result from the absence of

¹ Many of the gender-based behaviors were noted in the 1996 Report of the Maine Commission on Gender, Justice and the Courts, which called for judges to receive continuing education and training on issues of gender bias, including “effective techniques to prevent inappropriate conduct on the part of attorneys and court employees and to take appropriate corrective action if it occurs.” (Report at p. 62).

training on cultural competency during law school.² From a purely self-interested perspective, the annual CLE can remind attorneys about the harmful impact of such behavior on public attitudes about the legal profession. Most importantly, a CLE focused on harassment and discriminatory conduct makes a powerful ongoing statement about the nexus between those behaviors and the administration of justice in Maine.

However, the current wording of the proposed amendment to MRCP 8.4(g) does not go far enough to address the full scope of bias and harassment impacting our justice system. As a result, Pine Tree urges the Court to expand the proposed language to MRCP 8.4(g) to specifically reference harassment and discrimination on the basis of marital status and socioeconomic status, as is done in the ABA Model Rule 8.4(g). Unprofessional actions based on marital or socioeconomic status may be infrequent when viewed through the lens of interactions between attorneys, although problematic behaviors have occurred as a result of assumptions or knowledge that an attorney was not married. However, bias and harassment of litigants by attorneys on the basis of the litigant's status as low-income and/ or their status as unmarried is pervasive and also harms the administration of justice.

In 2017, Pine Tree handled legal services for more than 6,300 low-income client households, the socioeconomic status which is most susceptible to bias and harassment. Over 58% of the client households were comprised of a single parent with children, typically reflective of unmarried or divorced adults, the group most likely to be on the receiving end of negative assumptions about their character. On a routine basis, Pine Tree staff must respond to disparaging assumptions and offensive characterizations of their clients by opposing counsel, independent of the legal issues presented in the case. Sometimes, those comments reflect true prejudice; for others, the harassment may be a deliberate tactical choice. In either case, the attorney's actions undermine a professional resolution of the legal proceeding. And given the commonplace nature of these unprofessional actions in Pine Tree cases, one assumes those behaviors are far worse for the unrepresented litigant who is low-income or unmarried.

Even the 1996 Report of the Maine Commission on Gender, Justice and the Courts acknowledged the problem:

The complexity of these issues means that the court system cannot simply rely on gender-neutral processes and procedures to remedy the actual or perceived inequity or unfairness. The Court will also need to develop and institute procedures that will identify, and, if necessary, **correct the underlying cultural and economic inequalities and imbalances** that accompany the legal matter presented. [Emphasis added, at page 47 of the Report.]

The behaviors expected of Maine attorneys under judicial scrutiny in the courtroom should not be relaxed when they are interacting with lawyers or litigants in a court hallway or other setting. Thus, it is appropriate for MRCP Rule 8.4(g) to track the expectations set forth in Rule 2.3 of the Maine Code of Judicial Conduct:

² "Addressing Cultural Bias in the Legal Profession," 41 N.Y.U Rev.L.& Soc. Change 367 (2017)

*A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice for or against an individual or a party, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, gender identity, religion, national origin, ethnicity, disability, age, sexual orientation, **marital status, socioeconomic status,** or political affiliation, and shall not permit court staff, court officials, or others, while subject to the judge's direction and control, to do so.*

*A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited to race, sex, gender, gender identity, religion, national origin, ethnicity, disability, age, sexual orientation, **marital status, socioeconomic status,** or political affiliation against parties, witnesses, lawyers, court staff, or others. [Emphasis added]*

By adopting the full language of ABA Model Rule 8.4(g) and reinforcing that message through annual continuing legal education, the practice of law in Maine can be identified with the highest principles of professionalism. That is particularly essential at this moment in time, as we face the challenge of attracting new generations of lawyers to work in our State, particularly in our most rural counties.

To clarify what is and is not encompassed within these standards, Pine Tree also urges the Maine Supreme Judicial Court to follow the recent example of Vermont⁷ in adopting both the full language of ABA Model Rule 8.4(g) and providing a detailed commentary:

[3] Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g.)

[4] Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business, or social activities in connection with the practice of law. Paragraph (g) does not prohibit conduct undertaken to promote diversity. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this rule by, for example,

⁷ <https://www.vermontjudiciary.org/sites/default/files/documents/PROMULGATEDVRP+P8.4%28g%29.pdf>

implementing initiatives aimed at recruiting, hiring, retaining, and advancing diverse employees or sponsoring diverse law student organizations.

[5] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance with these rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. See Rule 6.2(a), (b), and (c). A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. See Rule 1.2(b).

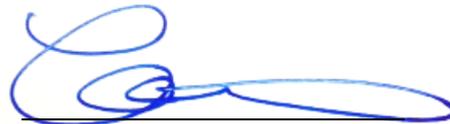
Increased understanding and awareness of these issues may be the most significant impact from adoption of ABA Model Rule 8.4(g), as with the Vermont adoption of ABA Model Rule 8.4(g) in September 2017.⁸ Other states have had such rules in place for years without disrupting free speech or other protected rights of their lawyers; for example, Minnesota adopted this language in 1990.⁹ Adoption of the full wording in ABA Model Rule 8.4(g) and the proposed amendment to Maine Bar Rule 5 will both affirm Maine's determination to keep the administration of justice in our State free of bias or harassment and provide a clear and strong standard for all members of our legal community. We urge the Court to take this action.

Respectfully submitted on June 5, 2018

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⁸ In a telephone conversation on 6/4/18, Vermont Bar Counsel Michael Kennedy reported that only one complaint had been filed since the new language was adopted, alleging racial bias.

⁹ <http://mnbenchbar.com/2018/01/harassment-and-attorney-ethics/>