

To the Justices of the Maine Supreme Judicial Court:

I would like to submit a few comments regarding what I consider to be two pernicious proposed rules which from both a social and political view are vastly concerning and demonstrate an overreach of governmental power as it relates specifically to free speech under both the Federal and State constitutions. While there will be plenty of pure legal analysis regarding these proposed rules other aspects of the effect of enacting these rules cannot be ignored.

The first question to be answered here is whether there is sufficient empirical evidence to justify enactment. No reasonable person would argue the legal profession should be exempt from the operation of existing federal and state laws regarding sexual harassment and discrimination. Further, no reasonable person would deny the existence of at least at some level isolated harassment or discriminatory conduct from time to time by Maine attorneys. The problem with these two rules is they impose effectively "collective guilt" on all the members of the Maine Bar when in reality neither harassment or discriminatory behaviors may be anywhere near as pervasive as the rules suggest. This is a solution looking for a problem but its arbitrary nature is not justified given the unnecessary burden which these two proposed rules would place on attorneys who do not commit harassment or participate in discrimination. I respectfully suggest the Court provide solid empirical evidence of pervasive harassment or discriminatory behavior to justify the enactment of these rules before simply launching into the assumption they are necessary. If such empirical evidence exists I believe it should be shared with the entire Bar for consideration before enactment.

The free speech and first amendment issues which result from the ubiquitous language of proposed rule 8.4 are also alarming. Neither of our constitutions create freedom for people to be free from hearing offensive language or enduring boorish conduct. The commentary from the Advisory Committee notes provides no practical analysis of exactly what behavior would constitute a violation of Rule 8.4 even though there are some vague references to certain forms of behavior such as sexual advances which are "unwelcomed." While these situations may seem obvious to some members of the Advisory Committee it is impossible to know from an analytical point of view, for example, just how an attorney should know whether a sexual advance is unwelcomed until it occurs. The only way a violation of the rule as it relates to sexual harassment is formed is on an ad hoc basis and unfortunately generated from the point of view of the alleged victim and not from specifically stated standards. In effect this rule as proposed is designed to impose purely subjective perceptions and beliefs of one gender as opposed to

another. In the end, the adoption of this rule is far more likely to create more division, less cooperativeness and less candid interaction between attorneys particularly those who engage primarily in trial work. Trial work is by its nature rough and tumble and simply because a lawyer may act in an overly assertive manner does not necessarily mean he is acting in a derogatory or demeaning fashion even if the opposing attorney has that impression. How is an attorney to know whether assertive (not assaultive) behavior is perceived as derogatory or demeaning from someone else unless they are told so? The rule as written creates a whole host of possibilities for bar rule violations and complaints of misconduct which cannot in many cases be actively perceived to be a violation until after a complaint is made.

Rule 8.4 also refers to gender identity and creates, in my view, an unconstitutional imposition of a standard of behavior as it relates to the acknowledgement of self-perceived gender identity from a potential victim under the rule as opposed to the genuine constitutional freedom of an alleged violator to not accept the concept of gender identity versus traditional thoughts on gender. This constitutional conflict has been seen in recent times particularly in Canada during the consideration of proposed legislation regarding the creation of a felony for failing to acknowledge gender identity. In addition, proposed Rule 8.4 also creates the unfortunate possibility the general language and nature of the rule will allow opportunities for revenge type false claims because in many instances a proposed violation arises only out of the perception of the alleged victim and the actual motivation of the accuser is difficult if not impossible to discern.

Finally, there appears to have been no adequate consideration given to the burden of both lost time and revenue attorneys will endure as balanced against the actual need for Rule 5(a)(1). Small firms in particular are hurt financially in a disproportionate way by mandatory continuing education requirements. In that regard, it may be more useful to provide elective education programs related to the issues raised by Rule 8.4.