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December 15, 2017

Matthew Pollack, Executive Clerk  
Maine Supreme Judicial Court  
205 Newbury Street Room 139  
Portland, Maine 04112-0368

RE: *Comment on proposed amendment to the Maine Rules of Professional Conduct to state specifically that unlawful harassment or unlawful discrimination constitutes professional misconduct*

Dear Mr. Pollack:

Please accept this comment on the proposed amendment to Rule 8.4 to add, at paragraph (g), that it shall be professional misconduct “for a lawyer to... engage in unlawful harassment or unlawful discrimination.”

Although at first blush the proposed amendment seems incontestably proper, on reflection I believe that (a) at minimum it is overbroad and should be more narrowly worded, and (b) the court should consider whether the core bad conduct at which the amendment is directed is already covered by existing sections of Rule 8.4.

I surmise that the intent of the proposed amendment is to punish an attorney who engages personally in intentional conduct that inflicts unlawful harassment upon another, or that constitutes invidious intentional discrimination against another based on protected categories, such as sex, race, age, sexual orientation, disability, national origin, religion, whistleblower conduct, exercise of workers compensation rights, etc. One can readily imagine a wrongdoer whose conduct of this type would deserve professional discipline.

However, the term “unlawful discrimination” covers a broader array of conduct, including failure to make reasonable accommodation to an individual with a disability, and facially neutral practices that create a disparate impact. It extends to housing, education, public accommodation, employment, and other areas. It can include, for example, a law firm’s failure to provide meaningful access to legal services by failing to take adequate steps to pay for interpreter services, or to make premises accessible to individuals with mobility limitations.

The term “unlawful harassment” also covers an array of conduct. At one end of the spectrum are intentional imposition of unwelcome sexual advances, humiliating treatment based on a protected status, or conditioning employment decisions on submission to or rejection of unwelcome conduct. At the other end are circumstances in which conduct in a law firm environment is found to have the effect of adversely changing working conditions or of creating a hostile or offensive working environment. The latter may arise from employer toleration,

through inattention or otherwise, of unwelcome conduct by coworkers, clients, or third parties, coupled with failure to maintain and use a sufficiently rigorous reporting and remediation policy.

Discrimination cases can be nuanced, and involve firmly contested versions of events and interpretations of events. Juries and judges sometimes struggle to impose the legal conclusion of discrimination or harassment.

Adding this paragraph would considerably raise the stakes for attorneys and law firms facing accusations of discriminatory or harassing conduct, in that a decision to defend a contested case rather than settle it brings the risk that an adverse determination will likely have a serious collateral effect of deprivation of or restriction upon the attorney's or firm's ability to practice law. This sort of "criminalization" of conduct otherwise treated as a civil claim or civil wrong should not be added to the rules lightly.

In addition, the rule does not make it clear whether to commit "unlawful harassment" or "unlawful discrimination" requires an adjudication by a court, or any adjudication outside the disciplinary process. It does not appear to be intended to be limited to criminal conduct, but seems intended to include violation of civil statutory standards such as in the Maine Human Rights Act, the Maine Whistleblowers Protection Act, and federal nondiscrimination statutes. The question arises whether a court judgment is needed, whether a Maine Human Rights Commission adjudication of "reasonable grounds" is sufficient, or whether bar counsel and disciplinary bodies will be required to adjudicate a "case within a case" of unlawful discrimination *de novo* in the context of a disciplinary complaint. That would impose on bar counsel a whole new prosecutorial role in a fairly complex area of law.

For these reasons, I suggest the Court consider the following:

- (a) At its core, what is at issue here is intentional, reprehensible, wrongful personal conduct by an attorney of a discriminatory or harassing nature. Some set of such adjectives should be added to the rule, so that only personal wrongful conduct is punished, not more technical infractions that do not include personal misconduct.
- (b) Even in the case of outright crimes, or other unlawful acts, by attorneys, Rule 8.4(b) conditions a finding of "professional misconduct" on the additional finding that the crime "reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." It seems out of balance not to have a similar additional finding required in the case of a civil instance of discrimination or harassment. In the egregious cases, the additional finding would be easy to make, but in the more technical cases the requirement of such an additional finding would prevent unjustified amplification of the infraction, as it does in the instances covered by Rule 8.4(b).
- (c) The Court should consider what offenses, if any, would be covered by the new section (g) that would not already be covered by Rule 8.4(b). Both deal with unlawful acts.

Matthew Pollack, Executive Clerk

December 15, 2017

Page 3

Intentional racist conduct, predatory sexual harassment, and wrongful conduct of similar gravity should certainly be subject to professional discipline when engaged in by members of the Maine bar. If the Court determines such conduct is not already subject to discipline under Rule 8.4(b) or the other sections of Rule 8.4, I encourage the Court to devise a narrower formulation to cover this conduct without the broader and perhaps unintended consequences of the rule as proposed.

Thank you for considering this comment.

Very truly yours,

A handwritten signature in black ink that reads "Frank T. McGuire". The signature is written in a cursive style with a large initial "F" and "M".

Frank T. McGuire