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

Re: Proposed Amendment to Rules of Professional Conduct

Dear Chief Justice Saufley and Members of the Court:

I am writing not in my official capacity as Vice-Chair of the Grievance Commission but, rather, based upon my experience serving on the Grievance Commission, to offer my own comments concerning the proposed amendment to Rule 8.4 of the Maine Rules of Professional Conduct.

I wish to be clear that I have not discussed this with other members of the Grievance Commission, as we are not a Commission that meets as a collegial group outside of the panels upon which we from time to time serve, so these thoughts should be viewed as mine alone.

I consider the proposed rule amendment a salutary and important one. I believe that members of the Bar should be subject to discipline if they engage in such conduct; however, my one concern is an *institutional* one.

My concerns have to do with the institutional ability of Bar Counsel and the Grievance Commission under the Rules to process such cases as these, absent a prior finding by a court or other institutional forum that such conduct has occurred. Bar Rule 13(b) requires Bar Counsel to investigate, and Rule 13(d) calls for initial review by a Grievance panel; if the case remains unresolved, the Rule might place the next Grievance panel in the position of hearing the case and making – *in the first instance* – findings of fact and law as to whether a member of the bar has engaged in unlawful harassment or unlawful discrimination – this notwithstanding that a complaint might also be pending with the Maine Human Rights Commission, with EEOC, or that there may be litigation pending or anticipated in Superior or in Federal District Court.

Discrimination cases can be complex, and typically entail pre-trial discovery and a formal litigation process that may be beyond the practical institutional capacity of a Grievance Commission panel, as the proposed rule currently reads¹.

It occurs to me, that perhaps the amendment could be rewritten as follows:

or

(g) has been determined by a court or other tribunal, having jurisdiction over such claims, to have engaged in unlawful harassment or unlawful discrimination.

I acknowledge that this could push the discipline a considerable distance down the road, but this is true of other kinds of violations of the Rules of Professional Conduct, such as Rule 8.4(b) which may require a criminal conviction.

Another alternative would be to leave it to Bar Counsel's judgment whether the alleged circumstances are sufficiently egregious to justify moving the case ahead through the Grievance process, notwithstanding that there may be other proceedings pending elsewhere.

Perhaps others might, in their comments, suggest alternative ways of addressing the concerns I have expressed.

All that said, I consider it laudable that the court has proposed a Rule to address such conduct.

Yours sincerely,



Robert S. Hark

cc: J. Scott Davis, Esquire, Bar Counsel
Sarah McPartland-Good, Esquire, Chair, Grievance Commission

¹That said, Grievance panels do occasionally need to make determinations of fact and law, especially in cases involving claims of incompetence, or intentional failure to comply with applicable statutes.