

Hayes Dispute Resolution & Legal Services

December 4, 2017

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

RE: *Comments on proposed amendment to M.R.P.C. 8.4(g)*

I believe that our code of professional conduct requires lawyers to treat everyone with respect and civility. I also believe that the proposal to add to the examples of misconduct the language “engage in unlawful harassment or unlawful discrimination,” is ill-advised and unnecessary.

I followed the national debate when the ABA considered this amendment to its model rules. One consideration here was absent to that debate — the ABA never has to investigate and determine allegations of unlawful harassment or unlawful discrimination. The Board of Overseers of the Bar would be tasked with that effort, creating a Maine Bar Human Rights Commission solely to handle complaints against lawyers and law firms. The Grievance Commission is not designed nor staffed nor funded to handle these issues. It need not.

Law firms are employers and public accommodations under the law. We are already subject to most of the nondiscrimination prohibitions within state and federal law. Grieved clients and others can already make complaints about us to the MHRC or EEOC, and those commissions have the statutes, rules, regulations and procedures to adjudicate claims. Let them.

I am concerned about ambiguity in applying the term “unlawful discrimination.” You can and probably would bootstrap legislative definitions, but most laws also have interpretations, limits and accommodations (such as size of business, age of buildings, undue burden and expense, etc.) reflecting reasoned trade-offs that may not be automatically included in our new rule. Conversely, this one-line amendment would cause incorporation by reference of a vast body of law to be applied as “professional misconduct.”

Hayes Dispute Resolution & Legal Services

2 | Maine Supreme Judicial Court

December 4, 2017

How do we protect ourselves against claims of discrimination when we turn down cases because we determine the issues are outside of our normal practice and competence or we just aren't comfortable taking the case. The decision to take or turn down or refer a case is nuanced but the prospective client (and nonlawyer members of the panel) may perceive discrimination. I know from experience that the Bar Counsel advises lawyers that when they are in doubt, don't take the case — will this new amendment change that calculation?

Where are the boundaries for professional misconduct? Many people feel "harassed" by opposing counsel, in and out of court. Are we liable because a victim believes we are colluding with and not just zealously representing our client? If we are engaged in conduct that does not come within the normal definition of the "practice of law," will our license to practice be at risk? The rules encompass a wide range of activity, but this would be a huge expansion of potential liability and need to spend resources to protect ourselves against unfounded claims. Will our malpractice insurance cover such representation?

Our country has made great strides in battling harassment and discrimination against protected classes in the past half-century. Lawyers have been at the vanguard of those efforts. I am deeply embarrassed as a lawyer when I discover another lawyer has acted illegally — it tarnishes that lawyer and our profession. But we already have language within Rule 8.4 which prohibits any "unlawful act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." That language should be sufficient.

Thank you.

Sincerely yours,

Stephen T. Hayes, Bar #65