



Maine Human Rights Commission

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Via Electronic Mail

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

RE: Proposed Rule 8.4(g) of the Maine Rules of Professional Conduct

To the Honorable Justices of the Maine Supreme Judicial Court:

A proposed amendment to Rule 8.4 of the Maine Rules of Professional Conduct would define as attorney “misconduct” the act of engaging in “unlawful harassment or unlawful discrimination”. The Maine Human Rights Commission (“Commission”), as the State agency charged with enforcing the Maine Human Rights Act, 5 M.R.S. §§ 4551, *et seq.* (“MHRA”), has been given the responsibility of making recommendations for further legislation or executive action concerning infringements on human rights or personal dignity in Maine. 5 M.R.S. § 4566(7), (11). This duty includes commenting on proposals relating to the content of the MHRA, such as this proposed amendment.

Initially, the Commission believed that our comment on this proposed amendment was unnecessary, for it seems obvious beyond cavil that an attorney who participates in MHRA-prohibited harassment or discrimination should be considered to have engaged in professional misconduct. However, members of the Maine bar urged the Commission to comment, noting that what seems apparent to the Commission may not be as clear to others, especially considering the fact that the Court has considered adopting ABA Model Rule 8.4(g) before but has not done so. With that in mind, the Commission hereby offers its support for those portions of the proposed amendment that relate to MHRA-prohibited conduct.

Maine attorneys may be subject to the MHRA for discrimination as employers and “places of public accommodation”; less frequently, they also may be covered as housing providers. *See* 5 M.R.S. §4552. Potentially unlawful conduct might include: treating persons differently or unfairly in the terms and conditions of employment or delivery of services; failing to provide a reasonable accommodation or modification needed for a person due to disability, religion, or limited English proficiency; or subjecting a person to a hostile environment due to protected class status. Additional bases for MHRA “unlawful discrimination” that could be implicated by Maine attorney conduct may include retaliation for protected employee reporting/whistleblowing in violation of the Maine Whistleblowers’ Protection Act (“WPA”) pursuant to 26 M.R.S. §833 and 5 M.R.S. §4572(1)(A), or failing to make public premises (such as law offices) physically accessible to all pursuant to 5 M.R.S. §4592.

With regard to harassment in particular, the Model Rule 8.4(g) proposal before this Court would characterize harassment that is unlawful in any way to be attorney misconduct. Harassment that is unlawful under the MHRA is unwelcome conduct that is based on protected-class status, and which is both objectively and subjectively offensive and so severe or pervasive that it creates an abusive environment. *See Watt v. UniFirst Corp.*, 2009 ME 47, ¶ 22, 969 A.2d 897, 902-03. There are numerous defenses available to defeat liability for unlawful MHRA harassment, such as lack of knowledge, an exercise of reasonable care to prevent and correct promptly harassing behavior, or the victim's unreasonable failure to take advantage of preventive or corrective opportunities. Establishing liability for MHRA harassment is fairly difficult to do.

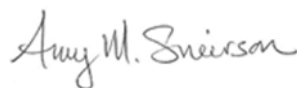
The Commission has investigated complaints of unlawful discrimination against Maine attorneys as employers, public accommodations, and housing providers. The results of those investigations have run the gamut: some led to Commission findings that there are reasonable grounds to believe unlawful MHRA discrimination occurred, or have been resolved via pre-decision settlements, a few have been withdrawn, and many have been dismissed. Unfortunately, quite a lot of the stories complainants tell about discrimination from Maine attorneys have the unnerving ring of truth to them, and it is apparent that many Maine attorneys are unaware of or unwilling to comply with of their obligations under the MHRA to avoid protected-class discrimination. In the current "Me Too" era in which women are publicly disclosing sex discrimination in the hopes of holding authority figures accountable, one hopes that lessons will be learned about reporting and preventing sex discrimination. Far too many women in Maine, including female attorneys, have experienced unlawful sex discrimination (including harassment) at the hands of attorneys licensed by this Court. Maine attorneys have an obligation to know – and do – better for their colleagues, employees and clients.

There are many who would argue that this Court need not separately define misconduct to include unlawful discrimination and unlawful harassment because other laws already offer a forum for allegations about discrimination and harassment to be investigated and addressed. While people who believe they have been subjected to MHRA-prohibited harassment or discrimination do have recourse through the Commission and courts, the process for pursuing such a remedy is arduous. A complaint filed with the Commission may take 1.5 or 2 years to investigate, and even a Commission finding that there are reasonable grounds to believe discrimination occurred is not binding on the parties; to obtain relief, a complainant must start anew in court. Such a lawsuit to press one's MHRA rights can take another several years to reach fruition.

While the statement that the Maine bar has adopted to date (that our "profession does not tolerate unlawful harassment or unlawful discrimination") is a good start, it simply is not strong enough to carry weight or consequences. The time has come for the Court to call an attorney's unlawful MHRA harassment or discrimination what it is: grounds for attorney discipline as misconduct.

If the Commission can assist the Court, or answer any questions about the above, please let me know.
Thank you.

Sincerely,



Amy M. Sneirson
Executive Director