

Comment from MSBA to proposed Rule 8.4(g) of the Maine Rules of Professional Conduct.

The Maine Supreme Judicial Court has requested comment regarding the proposed amendment to Rule 8.4 of the Maine Rules of Professional Conduct. The proposed rule 8.4(g) states it is professional misconduct for a lawyer to “engage in unlawful harassment or unlawful discrimination.”

The Maine State Bar Association (MSBA) is committed to promoting the highest standards of conduct for all members of the legal profession as a necessary component to effective advocacy and the fair administration of justice. The MSBA has established Guidelines of Professional Courtesy that can be found at its website [www.mainebar.org/page/Guidelines](http://www.mainebar.org/page/Guidelines). Honor, respect, civility and courtesy are the hallmarks of professional behavior. The Guidelines make clear that lawyers should act with “utmost respect...personal dignity and professional integrity...[and] treat each other, their clients opposing parties, the courts, and members of the public with courtesy and civility and conduct themselves in a professional manner at all times.”

While the MSBA supports amending the Rules of Professional Conduct to address concerns of inappropriate conduct by and between attorneys, the current proposed language is vague in defining the type of behavior that the rule seeks to address and as to the standard by which such language would be applied. It goes without saying that unlawful conduct of any kind should constitute professional misconduct. Indeed Rule 8.4(b) deems it professional misconduct for a lawyer to “commit a criminal or unlawful act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.”

Presumably the goal of the amendment is to set a standard of conduct that addresses bias, prejudice or harassment based on gender, race, religion, age, sexual orientation and other types of grossly inappropriate conduct that should not be tolerated by members of the Maine bar.

The ABA model rule provides that it is professional misconduct for a lawyer to “engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.” The Advisory Committee note to the proposed amendment for Maine’s Rule 8.4(g) reveals that the ABA Model Rule 8.4g was considered but not adopted. The MSBA takes no position on the ABA Model Rule 8.4g at this time, but notes that Maine’s proposed amendment could delineate with more specificity the conduct that the rule seeks to address. Additionally, the standard could reflect the fact that inappropriate acts need not rise to the level of “unlawful” in order to constitute misconduct.

A rule that goes too far to label subjective behavior or behavior committed unknowingly or without intent may result in over-reporting and should be avoided. By the same token, language that is too vague or that simply encompasses conduct that is already deemed inappropriate does little to raise consciousness. To the extent the amendment as proposed falls short of striking the right balance, the MSBA supports revising the language to provide additional specificity.