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December 15, 2017

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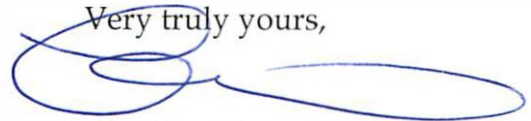
Re: Comments on Proposed amendments to the Maine Rules of  
Professional Conduct

Dear Matt:

The enclosed comments are submitted on behalf of Pine Tree Legal  
Assistance, and include the attached article which appeared in November  
in the Maine Lawyers Review.

Please let me know if additional information would be helpful.

Very truly yours,



Nan Heald  
Executive Director

RECD ME SUPREME JUD CT  
DEC 18 '17 PM 2:38

Pine Tree Legal Assistance is a statewide nonprofit providing free legal assistance to low-income individuals in the civil justice system in Maine. It has been in operation since 1967 and currently maintains offices in six locations (Portland, Lewiston, Augusta, Bangor, Machias and Presque Isle.) It currently employs 39 lawyers, most of whom regularly appear in Maine District Courts throughout the state, and, less frequently, before the Superior Court, Supreme Judicial Court and Maine probate courts.

The Maine Supreme Judicial Court has invited comments on proposed amendments to the Maine Rules of Professional Conduct. The proposed amendments would add new language to state specifically that unlawful harassment and unlawful discrimination constitutes professional misconduct.

These comments are being submitted on behalf of Pine Tree Legal Assistance. We believe the proposed amendments are insufficient to address conduct that manifests bias or prejudice on the basis of various characteristics and which undermines confidence in the legal profession and the legal system. Instead, we urge the Court to adopt the full language of ABA Model Rule 8.4(g), which was approved by the Vermont Supreme Court earlier this year.

The standards set forth in Rule 2.3 of the Maine Code of Judicial Conduct regarding bias, prejudice and harassment are clearly relevant to this discussion:

*A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice for or against an individual or a party, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, gender identity, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others, while subject to the judge's direction and control, to do so.*

*A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited to race, sex, gender, gender identity, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation against parties, witnesses, lawyers, court staff, or others.*

These Canons provide judges with the authority to control offensive conduct in the courtroom or within their presence. However, a survey of Pine Tree staff attorneys in the fall of 2017 uncovered numerous incidents that took place outside the courtroom and reflected bias or harassment by attorneys, primarily on the basis of age or gender. Subsequent conversations with other lawyers in Maine have confirmed that these

experiences have been shared by attorneys throughout Maine over a very long period of time.<sup>1</sup> Pine Tree staff examples include the following:

- Having to tell opposing counsel not to touch her during negotiations;
- Negotiating with an attorney who kept intruding into her personal space, pushing the attorney against a bench in a court hallway and prompting a court marshal to intervene;
- Having opposing counsel disrupt staff discussions with other clients by persistently stepping between the staff attorney and the client with whom she was speaking in order to focus her attention on his case;
- Having opposing counsel smirk and make sexually suggestive comments when it is clear that a case will not settle and a hearing is required (e.g. “aren’t you a bad girl...”);
- Referring to a female attorney as a “hot young thing”;
- Being in a mediation where an opposing counsel stood up, banged on the table and leaned over the staff attorney while yelling “you women make up domestic violence to get the upper hand in divorce;”

These actions are unlikely to be considered unlawful discrimination or unlawful harassment, but are clearly inconsistent with the standards expected under Rule 2.3 of the Maine Code of Judicial Conduct. In truth, one should expect that unlawful discrimination or harassment by an attorney will be addressed without need for this proposed amendment. However, there is a clear need for a rule change that will curb a wide range of bad behaviors that undermine the professionalism expected by Rule 2.3 and contribute to cynicism and distrust of our legal system.

Anecdotal information suggests that most of the problematic behaviors have been experienced by young white women who are practicing law in Maine. However, Maine is becoming a more diverse state and other forms of bias and harassment could become evident as the legal community becomes more diverse. Awareness of these behaviors is also likely to have a chilling effect on recent law graduates considering work in Maine, who could understandably prefer to practice law in jurisdictions with stronger norms and standards about interactions between members of the legal community. Experiencing these behaviors in the formative years of an attorney’s practice has resulted in talented attorneys leaving the practice of law or moving to non-litigation roles.

In 2016, the American Bar Association passed Resolution 109 supporting a stronger standard with respect to attorney misconduct of this type, which more clearly tracks Maine Rule 2.3 of the Maine Code of Judicial Conduct.<sup>2</sup> Model Rule 8.4(g) states:

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<sup>1</sup> Those incidents are described in “*Unprofessional Conduct by Maine Lawyers*” which was published at page 14 of the November 24, 2017 edition of the Maine LAWYERS REVIEW. A copy of the original article is attached to these comments.

<sup>2</sup> During the House deliberations, SCEPR Chair Myles Lynk delivered the report and Mark Johnson Roberts, chair of the ABA Commission on Sexual Orientation and Gender Identity; Wendi S. Lazar, of the ABA Commission on Women in the Profession; Don Bivens, of the ABA Section of Litigation; and Donald

*It is professional misconduct for a lawyer to:*

*(g) 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, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.*

The ABA's actions specifically reflected a decision to move the anti-discrimination provisions to the black letter of the rule **in order to provide enforcement in disciplinary proceedings**. In the words of immediate past ABA President Paulette Brown,

*“The current Model Rules of Professional Conduct (the “Model Rules”), however, do not yet reflect the monumental achievements that have been accomplished to protect clients and the public against harassment and intimidation. The association should now correct this omission. It is in the public’s interest. It is in the profession’s interest. It makes it clear that discrimination, harassment, bias and prejudice do not belong in conduct related to the practice of law.”<sup>3</sup>*

The Model Rule also prohibits “harassment or discrimination ...in conduct that is related to the practice of law.” As the new Comment [4] explains:

*...Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law.<sup>4</sup> [Emphasis added.]*

The small Maine bar has traditionally prided itself on being a collegial and welcoming institution, with strong statewide and local bar associations and activities that bring lawyers together on a regular basis. That support can be particularly important in rural communities where senior members of the bar are retiring and hope to recruit new

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D. Slesnick, of the ABA Section of Labor and Employment Law, all rose to speak in favor of the amendment. No one spoke in opposition, and the rule was adopted by a voice vote. A video of the House proceedings is available [here](#).

<sup>3</sup> <https://www.americanbar.org/publications/youraba/2016-september-2016/aba-adopts-anti-discrimination-rule-8-4-g--at-annual-meeting-in-.html>

<sup>4</sup> [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_8\\_4\\_misconduct/comment\\_on\\_rule\\_8\\_4.html](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_4_misconduct/comment_on_rule_8_4.html)

attorneys to take their place. In fact, Maine has placed new emphasis on addressing that challenge through projects such as the “Rural Practice Fellowship” program<sup>5</sup>, which provides funding for law students to work with practitioners during the summer as a way to encourage future career choices. However, for all of the same reasons, it is essential that our professional standards ensure that those interactions are welcoming to all attorneys and also free of bias and harassment.

Pine Tree urges the Maine Supreme Judicial Court to follow the recent example of Vermont<sup>6</sup> in adopting the language of ABA Model Rule 8.4(g). The Vermont commentary to its new rule notes:

*[3] Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g.)*

*[4] Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business, or social activities in connection with the practice of law. Paragraph (g) does not prohibit conduct undertaken to promote diversity. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining, and advancing diverse employees or sponsoring diverse law student organizations.*

*[5] A trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer’s practice or by limiting the lawyer’s practice to members of underserved populations in accordance with these rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. See Rule 6.2(a), (b), and (c). A lawyer’s representation of a client*

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<sup>5</sup> <http://www.pressherald.com/2017/10/22/maine-school-moves-to-reverse-shortage-of-rural-lawyers>

<sup>6</sup>

<https://www.vermontjudiciary.org/sites/default/files/documents/PROMULGATEDVRRPrP8.4%28g%29.pdf>


*does not constitute an endorsement by the lawyer of the client's views or activities. See Rule 1.2(b).*

Our nation as a whole is becoming more attuned to and concerned about instances of bias and harassment on many different levels and in many different work settings. Review of the rules regarding professional responsibility provides Maine with a unique opportunity to embrace a clear and strong standard for all members of our legal community, affirming the commitment to keep the administration of justice in our state free of bias or harassment.

We urge the Court to adopt the strongest possible statement on these issues in its action on the proposed amendments to the Maine Rules of Professional Conduct.

Respectfully submitted on December 15, 2017

By:



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Pine Tree Legal Assistance currently has 39 attorneys, primarily litigators who regularly appear in Maine District Court civil proceedings. Of this group, 22 are under the age of 40 and 16 of them are women. Many have joined us in the past two years, often with experience in other jurisdictions, although some others are recent law graduates.

The experiences of our younger attorneys, and of virtually all women litigators at Pine Tree, have fallen far short of what one envisions when describing a collegial professional bar. In some cases, the conduct is wildly inappropriate; in others, it simply reveals gender bias that most of us thought ended decades ago. It is not an excuse that Maine has a smaller number of young and/or female litigators, relative to other jurisdictions. It is an even greater concern that these behaviors will be experienced by unrepresented litigants, many of whom are also young and/or female.

Because of Pine Tree experience, our staff orientation for new and younger staff attorneys now addresses the likelihood of behaviors by opposing counsel that seem designed to intimidate or disrupt staff advocacy on behalf of program clients, or which are simply inconsistent with usual professional norms. The orientation is designed to assure staff that the bad behavior they experience is not personal to them and that staff should not internalize it or allow it to impact their own professional response. Before their first court experiences, staff are specifically cautioned to anticipate derogatory remarks, raised voices, and various forms of physical intimidation. Staff are advised to remain in the court hallways during negotiations, because of increased vulnerability to these behaviors in small conference rooms. Experienced Pine Tree attorneys and program managers also routinely debrief with new attorneys to mitigate the impact of these encounters when they occur. Despite all of these efforts, however, there is no doubt that the experiences have a negative impact on staff and their perception of our state's legal system.

Virtually all new staff attorneys report encountering hazing-type behaviors during their initial court appearances, in which opposing counsel denigrate them, their clients and/or their legal arguments. It is common for staff attorneys to be told that they are committing malpractice or that they just don't understand how to be a lawyer in Maine courts. Sometimes, the opposing counsel uses inappropriate nicknames (e.g., "sunshine") when talking with them about the case.

The most common problematic behavior involves physical intimidation and/or loud or clearly inappropriate remarks about the program staff attorney or client, and this is more clearly directed at women. The following incidents reflect actual staff experiences:

- Having to tell opposing counsel not to touch her during negotiations;
- Having her arm grabbed twice by opposing counsel and told to stay in a specific location in the court hall so that she would be available when he was ready to begin negotiations;
- Being in a small conference room with attorneys who were acting physically aggressive;
- Being in a mediation where an opposing counsel stood up, banged on the table and leaned over the staff attorney while yelling "you women make up domestic violence to get the upper hand in divorce;"
- Negotiating a case with a much taller attorney who kept stepping into her personal space, requiring her to walk backwards in order to see his face until, finally, a court marshal came over and offered to give her hand up onto the bench so she could stand 'face to face' with opposing counsel;

## Experiences with Unprofessional Conduct by Maine Attorneys

- Having opposing counsel walk up to within 5 inches of the staff attorney and scream that he was going to file a bar complaint against “you people” if she did not immediately dismiss her client’s case;
- Having opposing counsel disrupt staff discussions with other clients by persistently stepping between the staff attorney and the client with whom she was speaking in order to focus her attention on his case;
- Having opposing counsel smirk and make sexually suggestive comments when it is clear that a case will not settle and a hearing is required (e.g. “aren’t you a bad girl...”);
- A staff attorney was meeting with her client and a student attorney when opposing counsel walked into the room. He started talking with the male student attorney about the case and stormed out of the room after the staff attorney explained that it was her case and she would be with him in a moment. The same attorney cornered her after court and yelled that she had disrespected him and, essentially, needed to learn her place;

Comments on physical appearance of women attorneys are also common:

- A staff attorney received an email from opposing counsel referring to another attorney as a ‘hot young thing;’ when the staff attorney called him on how inappropriate that comment was, he told her to “lighten up;”
- At a work luncheon, the other attorney said to the waiter “isn’t she the most beautiful woman?” without giving the woman a chance to explain her professional role at the luncheon;
- After a trial, opposing counsel complimented the staff attorney on her skills, but then went on to say “I had to do a double take when you walked in the room,” which he mimicked for her benefit, before asking her out;
- A staff attorney was standing with a law school intern and the mediator in court. The mediator mentioned that a PTLA staff attorney had been arguing a Maine Parentage Act issue in court. The staff attorney asked what she looked like, expecting a descriptor like “long brown hair” or “tall and wears glasses.” The mediator responded “Oh, you know, she was young and beautiful like the rest of you at Pine Tree;”
- A staff attorney was riding in an elevator with a senior member of the bar who turned to her and asked “are you one of the Pine Tree babes?”

Staff also describe their discomfort listening to older male attorneys tell dirty jokes while waiting for court to start, or watching opposing counsel lean over the plaintiff while she testifies about domestic violence or sexual assault in open court.

It is also worth noting that virtually all women perceive differences in how the local bar responds to male attorneys, regardless of how long the women have practiced law in the community. Greeting men by name (whether employed by Pine Tree or not) while ignoring the female attorney standing next to him appears to be common statewide. At a time when our profession itself is so misunderstood and maligned by the general public, it is difficult to overstate the impact of being invisible to colleagues in one’s own legal community.

These behaviors are not universal, but they are being experienced by attorneys around the State. Virtually everyone with whom I have spoken has experienced “aha” moments when listening to specific examples of bad behaviors, which triggered memories of similar actions that they had experienced or witnessed.



Some conduct may be motivated by clients who expect their attorney to act like a pit bull when dealing with the other side, and attorneys who don't say 'no.' We are also learning that few bystanders intervene when these inappropriate behaviors are happening. And it is unfair to expect inexperienced attorneys to maintain a focus on their clients' best interests while simultaneously calling out opposing counsel for behavior unbecoming to a Maine attorney. Similarly, these behaviors do not usually rise to the level which would warrant attention by the Board of Bar Overseers, but they have to be addressed if Maine wants to persuade new generations of lawyers to take the place of those who will retire in coming years.

For all of these reasons, I am deeply grateful to Chief Justice Saufley and Justice Gorman for their willingness to first meet with me on behalf of the Supreme Judicial Court to discuss Pine Tree's experience and for their immediate willingness to take action in response. The Chief Justice has already communicated her concern about these behaviors to members of the Maine Judicial Branch and is moving to encourage specific discussions on this topic with all of the stakeholders in our justice system. I also understand that the Maine Advisory Committee on Professional Conduct is already working on a recommendation on ABA Model Rule 8.4(g) (which prohibits lawyers from engaging in harassing or discriminatory conduct) which may be presented for consideration in the near future. If so, I hope that lawyers who have experienced these behaviors will share that information in their comments to the Law Court.

Going forward, let's all watch out for harassing and unprofessional actions, whether directed at someone we know or not, whether directed at an unrepresented litigant or not. And let's make 2018 the year in which they stopped.