STATE OF TENNESSEE

Office of the Attorney General

HERBERT H. SLATERY III
ATTORNEY GENERAL AND REPORTER

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April 2, 2018

The Honorable Jeffrey S. Bivins, Chief Justice
The Honorable Cornelia A. Clark, Justice
The Honorable Holly Kirby, Justice
The Honorable Sharon G. Lee, Justice
The Honorable Roger A. Page, Justice

Attn: James M. Hivner, Clerk
Tennessee Supreme Court
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219

Re: No. ADM2017-02244 — Supplemental Comment Letter of the Tennessee Attorney General in Opposition to Proposed Amended Rule of Professional Conduct 8.4(g)

Dear Chief Justice Bivins, Justice Clark, Justice Kirby, Justice Lee, and Justice Page:

On March 16, 2018, I submitted comments in opposition to the Joint Petition of the Tennessee Board of Professional Responsibility and Tennessee Bar Association to adopt amendments to Rule of Professional Conduct 8.4(g). On March 21, 2018—the date the public comment period on the Joint Petition closed—the BPR and TBA ("Petitioners") submitted comments in further support of their Joint Petition in which they revised "their joint proposed language for a new Rule 8.4(g) in response to, and to accommodate a number of, the constructive suggestions for the improvement of the proposed Rule."

I write to briefly respond to the four revisions now proposed by Petitioners. Because the revisions fail to remedy the significant First Amendment problems inherent in the proposed rule, I remain strongly opposed to its adoption.

First, Petitioners deleted "in accordance with RPC 1.16" from the second sentence of the proposed rule, which originally stated that "[t]his paragraph does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with RPC 1.16." As explained on page 11 of my earlier comment letter, the qualifying language "in accordance with RPC 1.16"

suggested that the proposed rule otherwise would limit the ability of a lawyer to accept, decline, or withdraw from a representation in situations not covered by Rule 1.16. Removing this problematic language makes it less likely that the proposed rule would be applied to prohibit attorneys from representing clients whose views may be considered harassing or discriminatory or from declining to represent a client for reasons that may implicate the proposed rule. In that narrow respect, the revision is an improvement. As explained below, however, the proposed rule would continue to prohibit a substantial amount of attorney expression that is protected by the First Amendment.

Second, Petitioners "reformulated" the third sentence of their proposed rule, which originally stated that "[t]his paragraph does not preclude legitimate advice or advocacy consistent with these Rules," so that it now reads, "[t]his paragraph does not preclude legitimate advice or advocacy that does not violate other Rules of Professional Conduct." As originally phrased, the exception for "legitimate advice or advocacy" was a circular exception that was in fact no exception at all, because it would apply only to "legitimate advice or advocacy" that did not violate the proposed rule. The reformulation would clarify that "legitimate advice or advocacy" does not violate the proposed rule as long as it does not violate other Rules of Professional Conduct, but that does not cure the problem. The exception remains inadequate because it would apply only to "legitimate advice or advocacy." (Emphasis added). Limiting the exception to advice or advocacy that is "legitimate" suggests that some advice or advocacy may be deemed illegitimate solely because of its content or viewpoint. And enforcement authorities would have complete discretion in drawing the line between legitimate and illegitimate advocacy, leaving attorneys to speculate about which side of the line they are on.

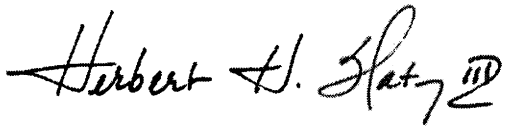
Third, Petitioners added language to proposed comment 4 in an attempt to clarify the reach of the "legitimate advice or advocacy" exception. The additional language explains that "legitimate advice or advocacy protected by Section (g) includes speech on matters of public concern at bar association functions, continuing legal education classes, law school classes, and other similar forums." While it is encouraging to see Petitioners recognize that such attorney speech should be excluded from the scope of the proposed rule, the line between speech that would be prohibited under the rule and speech that would fall into the "legitimate advice or advocacy" exception remains singularly unclear. As noted above, there is no way, consistent with First Amendment guarantees, to draw the line between "legitimate" and illegitimate "advice or advocacy." Moreover, "bar association functions, [CLE] classes, law school classes, and other similar forums" are only a few of the many places where attorneys engage in protected speech. If an attorney remarks at a law firm recruiting dinner that he is opposed to same-sex marriage, is that "conduct related to the practice of law" that would be prohibited under the proposed rule or "legitimate advice or advocacy" that is excepted? Or how about an attorney who, at a partisan political gathering, says something demeaning toward conservative Christians?

Fourth, Petitioners "reformulated" proposed comment 4a in an attempt to "more clearly recognize the role of the First Amendment in the application of" the proposed rule and provide "crystal clear guidance as to its intended application." The revised comment states that "Section (g) does not apply to conduct protected by the First Amendment, as a lawyer does retain a 'private sphere' where personal opinion, freedom of association, religious expression, and political speech are protected by the First Amendment and not subject to this Rule. A lawyer's speech or conduct

unrelated to the practice of law cannot violate this Section." This reformulation, in essence, acknowledges that the proposed rule suppresses the First Amendment rights of attorneys in the public sphere, but is willing to brook that significant and clearly unconstitutional infringement just because the rule would not abrogate all First Amendment rights of attorneys. Plainly, the revised comment is as flawed as the original comment and proposed rule: it rests on the illegitimate premise that attorney speech is protected by the First Amendment only when it occurs in a "private sphere" that is unrelated to the practice of law. My earlier comment letter explains in detail (at pages 5-7) why that premise is wholly incorrect. Far from excluding speech in the public sphere from its protections, the First Amendment affords such speech "special protection" to ensure that "debate on public issues [will] be uninhibited, robust, and wide-open." *Snyder v. Phelps*, 562 U.S. 443, 452 (2011). The revisions to comment 4a do nothing to alleviate the significant burden the proposed rule would place on the First Amendment rights of Tennessee attorneys. Instead, the revisions make "crystal clear" that the intent of the proposed rule is to target and suppress speech that is at "at the heart of the First Amendment's protection." *Id.*

Because Petitioners' revisions do not adequately address the significant constitutional problems identified in my earlier comments, I remain strongly opposed to Proposed Rule 8.4(g) and urge this Court to reject its adoption.

Sincerely,



Herbert H. Slatery III
Attorney General and Reporter

cc: Jimmie C. Miller, Chair of Tennessee Board of Professional Responsibility via email
Lucian T. Pera, President of Tennessee Bar Association via email

DAVID HAWK
STATE REPRESENTATIVE
5TH LEGISLATIVE DISTRICT

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State of Tennessee

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&
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March 22, 2018

The Honorable Jeffrey S. Bivins, Chief Justice
The Honorable Cornelia A. Clark, Justice
The Honorable Holly Kirby, Justice
The Honorable Sharon G. Lee, Justice
The Honorable Roger A. Page, Justice

Attn: James M. Hivner, Clerk
Tennessee Supreme Court
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219

Re: American Bar Association's New Model Rule of Professional Conduct Rule 8.4(g)

To the Honorable Justices of the Tennessee Supreme Court:

Thank you for requesting written comments on the potential adoption of the above referenced rule. I am taking this opportunity to respectfully, yet strenuously, object to the adoption of the rule.

I adopt and support the position of the Attorney General, Herbert H. Slatery, III, stated in Opinion No. 18-11, filed March 16, 2018. I whole-heartedly agree that the adoption of proposed Rule 8.4(g) would infringe upon Tennessee attorneys' right to free speech, freedom of association, free exercise of religion, and due process.

Thank you for allowing the opportunity to publicly comment upon this proposed rule.

Sincerely,

David Hawk

LEWIS S. HOWARD, JR.
DALLIS H. HOWARD
STEVEN K. BOWLING
JOSHUA B. BISHOP
MATTHEW W. SHERROD
ERIN J. WALLEN

LEWIS S. HOWARD
(1930-2015)

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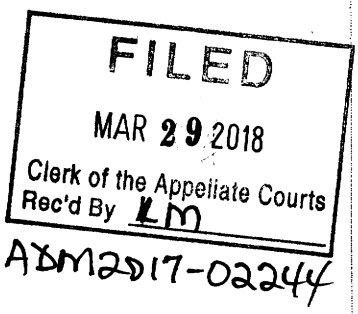
March 29, 2018



VIA EMAIL: james.hivner@tncourts.gov

Mr. James M. Hivner, Clerk
Re: Tenn. Sup. Ct. R. 9, Section 32
Tennessee Appellate Courts
100 Supreme Court Bldg.
401 7th Avenue North
Nashville, TN 37219-1407

Re: Proposed Amendments to Tennessee Rule of Professional Conduct 8.4
Docket No. ADM 2017-02244

Dear Mr. Hivner:

I write to comment on the Petition filed by the Board of Professional Responsibility seeking the amendment of Rule 8, Rules of Professional Conduct 8.4, of the Rules of the Tennessee Supreme Court by adding a new RPC 8.4(g).

Many other attorneys have commented upon the proposed change, and virtually every comment that I have seen is negative. In addition, I have lent my name to a more lengthy legal analysis of the many flaws in the proposed change. I write separately to make a further brief point.

It is difficult for me to imagine any competent attorney advising a client to agree to a provision in any contract similar to the proposed rule. It is what I refer to as a "litigation breeder." Its unconstitutionality, including its restrictions on freedom of speech and expression, as well as its impermissible vagueness, are certain to be challenged in court, leading to unnecessary litigation. I fail to understand the need for such a controversial rule absent some compelling problem that can only be solved by such drastic action.

Many other attorneys have commented on potential scenarios that could run afoul of the proposed rule. On its face it prohibits conduct that is "harassment or discrimination based on the basis of race, sex, religion, national origin, disability, age, sexual orientation, gender identity, marital status, or socioeconomic status in conduct related to the practice of law." As many others have pointed out, it does not limit itself to conduct "in the course of representing a client," but seeks to regulate conduct "related to the practice of law," including "operating or managing a law firm or practice" and "social activities in connection with the practice of law."

Thus, if an attorney speaks in a public forum where he or she has been identified as an

attorney, and expresses an opinion on one of a number current controversial topics, he or she could be subject to discipline if that opinion is deemed to "manifest[] bias or prejudice." An attorney making a public statement of opinion on homosexual marriage that coincided with his or her religious views could be subject to discipline under the proposed rule.

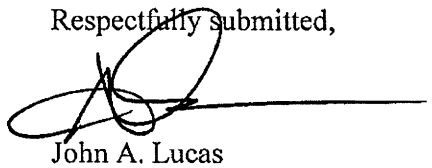
Similarly, an attorney specializing in domestic relations law who "manifests a bias" based on sex by acknowledging that he or she prefers to represent women, rather than men, would violate the proposed Rule.

Example of conduct that would violate the proposed rule are limited only by one's imagination. At the risk of belaboring the point, allow me to identify two more. The prohibition against conduct manifesting bias or prejudice (what is the difference?) based on sexual orientation or "gender identity" will strike many attorneys who give it more than an instant's thought as bizarre. It would, for example, prohibit attorneys from refusing to employ transvestites. To take another example, if a paralegal applicant listed that he was a member of NAMBLA,[1] would I be permitted to refuse to hire him on that basis alone? The proposed rule, as written, would appear to subject me to discipline were I to refuse.

Some may object that the proposed change is not intended to cover situations such as these or those discussed in other comments to the proposed Rule. However, on its face, the proposed Rule is broad enough to encompass these scenarios. To avoid results such as those discussed above – which many would consider absurd – the proposed rule would have to be enforced selectively. Such selective enforcement, of course, would raise other legal issues and would foster the perception that the Rule was being enforced only to punish deviations from perceived political correctness.

I could continue with numerous other examples, which would only serve to reinforce my point that the proposed rule is a "litigation breeder." Its adoption would ill-serve the citizens of this State and would doubtlessly lead to litigation that would be an embarrassment to the State and to the Bar.

Respectfully submitted,



John A. Lucas

JAL/lb

[1] "NAMBLA (North American Man/Boy Love Association)" is a pedophile and pederasty advocacy organization that advocates the decriminalization of adult sexual relationships with minors.

Tilman Goins
STATE REPRESENTATIVE
10th LEGISLATIVE DISTRICT
HAMBLEN COUNTY

MEMBER OF COMMITTEES

HOUSE BUSINESS AND UTILITIES
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HOUSE CRIMINAL JUSTICE
SUB-COMMITTEE

House of Representatives
State of Tennessee
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E-MAIL:
rep.tilman.goins@capitol.tn.gov

March 21, 2018

The Honorable Jeffrey S. Bivins, Chief Justice
The Honorable Cornelia A. Clark, Justice
The Honorable Holly Kirby, Justice
The Honorable Sharon G. Lee, Justice
The Honorable Roger A. Page, Justice

Attn: James M. Hivner, Clerk
Tennessee Supreme Court
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219

Re: American Bar Association's New Model Rule of Professional Conduct Rule 8.4(g)

To the Honorable Justices of the Tennessee Supreme Court:

Thank you for requesting written comments on the potential adoption of the above referenced rule. I am taking this opportunity to respectfully, yet strenuously, object to the adoption of the rule.

I adopt and support the position of the Attorney General, Herbert H. Slatery, III, stated in Opinion No. 18-11, filed March 16, 2018. I whole-heartedly agree that the adoption of proposed Rule 8.4(g) would infringe upon Tennessee attorneys' right to free speech, freedom of association, free exercise of religion, and due process.

Thank you for allowing the opportunity to publicly comment upon this proposed rule.

Sincerely,

Tilman Goins, State Representative

Christine Vicker - Fwd: Amend Rule 8, RPC 8.4 of the Rules of the TN Court

From: appellatecourtclerk
To: Christine Vicker; Kim Meador
Date: 3/26/2018 11:23 AM
Subject: Fwd: Amend Rule 8, RPC 8.4 of the Rules of the TN Court ADM2017-02244

This was forwarded to Lisa but as she is out, Jim asked that I forward them to you as well.

There are one or two more I will be forwarding to you as well.

Nancy

>>> "Anthony Berry" <anthonyberryesq@gmail.com> 3/25/2018 12:58 AM >>>

I understand that the deadline has passed, but I hope you will receive my comment nonetheless. This proposed addition to the Rules of Professional Conduct will create a chilling effect on the free expression of attorneys. Though the addition purports to not restrict any speech protected by the First Amendment, it also states that discussions with lawyers, coworkers, and others, even in social activities, connected to the practice of law are not exempted. This would place a lawyer at risk of losing his license if he were to say to a coworker that he believes in traditional Christian values that marriage ought to be between a man and a woman, that he believes homosexuality is morally wrong, or that he believes that there are only two genders. Certainly, an attorney may successfully defend against an accusation that such statements break the rule, but the wording of the rule requires that attorneys risk their licenses to do so. Thus, the proposed rule, as written, will produce a chilling effect on the free speech of attorneys, especially those who hold traditional Christian values. Essentially, this rule would require that all Christian attorneys keep silent about their faith in any and all interactions in their professional lives. Interestingly, one of the comments to the proposed rule carves out exceptions for efforts to advance diversity initiatives, as if to say that some forms of discriminatory language are acceptable while others are not. In other words, the rule would appear to be intended to permit the expression of progressive liberal values in connection to the practice of law while silencing traditional Christian values. Therefore, I request that the Supreme Court reject this proposed rule.

Sincerely,

Anthony Berry

Christine Vicker - Fwd: No. ADM2017-02244 – BPR # Updated Information

From: appellatecourtclerk
To: Christine Vicker; Kim Meador
Date: 3/26/2018 11:24 AM
Subject: Fwd: No. ADM2017-02244 – BPR # Updated Information

I think this is the only other one.

Nancy

>>> "Jay Lifschultz" <jay.lifschultz@usa.net> 3/25/2018 4:24 PM >>>
RE: No. ADM2017-02244

Dear Mr. Hivner,

Please note that I am one of the 71 signers on a joint comment titled "Joint Comment Opposing Adoption of Proposed New Rule of Professional Conduct 8.4(g)", filed on March 2, 2018. I note that my name and BPR number is listed, but it did not delineate that I was signing onto the joint comment in my capacity as a registered in-house counsel as opposed to an individual licensed to practice in Tennessee.

Please accept this email to supplement that submission noting that I should have been identified as:

Jason S. Lifschultz, BPR # 035540 (In-House Counsel)

I am sorry for any confusion and appreciate your assistance.

Please do not hesitate to contact me if you have any questions.

Respectfully,
Jason "Jay" Lifschultz
BPR # 035540 (In-House Counsel)

COURTNEY ROGERS
STATE REPRESENTATIVE
45TH LEGISLATIVE DISTRICT
PART OF SUMNER COUNTY

Committees:
Vice Chair of Transportation Committee
Civil Justice Committee
Transportation Subcommittee

House of Representatives
State of Tennessee

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The Honorable Jeffrey S. Bivins, Chief Justice
The Honorable Cornelia A. Clark, Justice
The Honorable Holly Kirby, Justice
The Honorable Sharon G. Lee, Justice
The Honorable Roger A. Page, Justice

Attn: James M. Hivner, Clerk
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100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219

Re: American Bar Association's New Model Rule of Professional Conduct Rule 8.4(g)

To the Honorable Justices of the Tennessee Supreme Court:

It is the function of a court to hear opposing arguments on issues brought before it, some sensitive or perhaps unpopular. It is my opinion that a lawyer would be unable to function effectively if the boundaries of speech are limited in such a manner as proposed in Rule 8.4 (g) throughout the entire process relative to the practice of law.

Is the asking of unpopular questions or using unpopular words or making unpopular statements in pursuit of justice within or outside the courtroom now to be disallowed in the face of another's definition of what is, or is not appropriate?

This is an abysmal attempt at enforcing political correctness, more accurately referred to as "social Marxism" upon our lawyers and our courts, denying them first amendment protections.

Thank you for allowing the opportunity to publicly comment upon this proposed rule.

Sincerely,

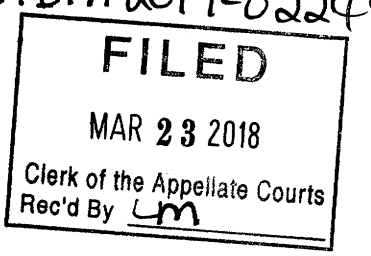
Courtney L. D. Rogers

David B. Kesler, Esq.
404 S. Slayton Street
Signal Mountain, Tennessee 37377

March 21, 2018

The Honorable Jeffery S. Bivins, Chief Justice
The Honorable Cornelia A. Clark, Justice
The Honorable Holly Kirby, Justice
The Honorable Sharon G. Lee, Justice
The Honorable Roger A. Page, Justice

ADM2017-02244



Attn: Hon. James M. Hivner, Clerk
Re: Tenn. Sup. Ct. R. 9, section 32
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

Re: No. ADM2017-02244-Opposition to Amending Rule 8, RPC 8.4, Proposed Rule 8.4(g)

Dear Chief Justice Bivins, Justice Clark, Justice Kirby, Justice Lee, and Justice Page:

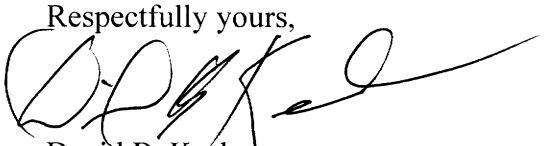
Please accept this letter as my opposition to the proposed amendment of Rule 8, Rules of Professional Conduct, of the Rules of the Tennessee Supreme Court that is presently before the Court. I graduated from the Tulane School of Law in December 1972 and have been licensed to practice law in Tennessee since 1973 (almost 45 years). My TBPR number is 001518. I am currently Of Counsel with my law firm. The views expressed herein are my own, and not necessarily those of my law firm or any other attorney in this law firm. Because I believe that my good friend and former law partner, Scott N. Brown, Jr., has stated the basis for my opposition so well in his letter to you of March 16, 2018, copy of which is enclosed, I hereby adopt and incorporate by reference his arguments.

The basic issue for me is my belief that the proposed amendment violates the First Amendment of the Constitution of the United States and Article 1 of the Constitution of the State of Tennessee, both with respect to freedom of religion and freedom of speech. While I have the utmost respect for Lucian Perra, the current President of the Tennessee Bar Association, I take issue with the views expressed in his article, *President's Perspective*, in the most recent issue of the Tennessee Bar Journal. His argument that "only a small number of lawyers have been disciplined" under similar rules adopted by a handful of other states is no justification for adoption of the proposed Rule in Tennessee. The fact that discipline under similar rules has been sparse in other jurisdictions should have no relevance to how aggressively (and unconstitutionally) the Rule will be enforced in Tennessee. If anything, Mr. Perra's argument suggests that there is no need for the adoption of the amendment.

I join with Mr. Brown and hundreds of other attorneys in Tennessee and throughout the country in urging our Supreme Court not to adopt the proposed amendment to Rule 8.

I thank you for the opportunity to direct my opinions to Your Honors on this important topic.

Respectfully yours,



David B. Kesler

Scott N. Brown, Jr., Esq.
772 Black Creek Drive
Chattanooga, Tennessee 37419
March 16, 2018

The Honorable Jeffrey S. Bivins, Chief Justice
The Honorable Cornelia A. Clark, Justice
The Honorable Holly Kirby, Justice
The Honorable Sharon G. Lee, Justice
The Honorable Roger A. Page, Justice

Attn: Hon. James M. Hivner, Clerk
Re: Tenn. Sup. Ct. R. 9, section 32
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

Re: No. ADM2017-02244 –Opposition to Amending Rule 8, RPC 8.4, Proposed Rule 8.4(g)

Dear Chief Justice Bivins, Justice Clark, Justice Kirby, Justice Lee, and Justice Page:

This letter is to address my opposition to the proposed amendment of Rule 8 to adopt the proposed harassment and discrimination matters now before the Court. By way of introduction, I was first licensed by North Carolina in 1965; served in the Navy JAG Corps from then until 1968; practiced for two years in Asheville, North Carolina; then was admitted in Tennessee by comity and practiced in Chattanooga from 1970 until last June when I retired from full time practice, but have kept my license active and do some pro bono work. My BPR number is 001212.

I am absolutely opposed to harassment and discrimination and believe that those acts and attitudes are contrary to the tenets of my (Christian) religion. On the other hand I am absolutely opposed to requiring a lawyer to do things in the legal context or any context for that matter that are contrary to his or her sincerely held religious beliefs. I think the proposed change presents a very real and present danger that this could be or would be a result.

For example, in the domestic relations/adoption arena there will be religious issues for a lawyer whose beliefs prevent him from assisting certain classes of adoptive parents. These are serious and very real situations and it would be a sad day for freedom of religion for the lawyer if he/she is at risk in declining representation, not

unlike the Colorado Masterpiece Cakeshop baker who declined to make a wedding cake for a same sex couple, although the baker was willing to make and sell other goods to them. There certainly were plenty of other bakeries in the community which would perform this service. There are certainly plenty of lawyers whose religious convictions will allow them to take cases others can't.

The First Amendment to our U. S. Constitution creates and memorializes our overall right to freedom of religion and freedom of speech. Our own State Constitution creates what seems to be even broader protection for rights of conscience, in Article 1, Section 3, and for freedom of speech in Article 1, Section 19. In addition our State Constitution in Article 1, Section 4 prohibits religious tests for "any office or public trust under this state." It seems not a stretch to consider a law license to be such an office or position of public trust. Compulsion to renounce religious beliefs in order to hold a law license looks pretty unconstitutional. It would also be a sad irony for this Court to adopt the proposed changes and then have to declare them unconstitutional in litigation.

In the current issue of the Tennessee Bar Journal, President's Perspective, there is a strong and passionate plea for adoption of the proposed change. This column recites, however, that "Reports collected by the ABA from disciplinary counsel in jurisdictions that have had such rules for as long as 20 years are clear: they have seen no surge in complaints or discipline, and only a very small number of lawyers have been disciplined under their rules." From this admission it would seem that we are addressing a "very small number of lawyers" with the treatment being worse than the disease. I would respectfully urge the Court to "First, do no harm" and deny the proposed amendment, or at the very least determine whether this is a real problem in Tennessee (in my experience over these years, it is not a problem in Tennessee).

Finally, this same Bar Journal column is critical of the current (vague) rule because it is weak or suspect as it relies on a comment to the rule itself to complete the black-letter rule and give it enough teeth to deal with bad conduct. Still the comment is seen to be of lesser force and import than the rule, being only the comment and not really the rule itself. Ironically, it is the comment to this new proposed black-letter rule which contains what is deemed the lawyer's protection relating to "decisions about whether to accept, decline or withdraw from a representation." If the rule change is adopted, then certainly the comment containing the protection deserves to be part of the black-letter rule and not a mere comment.

Thank you for the opportunity to present these points, and for taking these serious matters seriously.

Very respectfully,

s/ Scott N. Brown, Jr.
Scott N. Brown, Jr.

PAUL SHERRELL
STATE REPRESENTATIVE
43RD LEGISLATIVE DISTRICT

TELEPHONE: (615) 741-1963
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House of Representatives
State of Tennessee

Nashville

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COMMITTEES:
CRIMINAL JUSTICE
HEALTH
HEALTH SUBCOMMITTEE

March 22, 2018

The Honorable Jeffrey S. Bivins, Chief Justice
The Honorable Cornelia A. Clark, Justice
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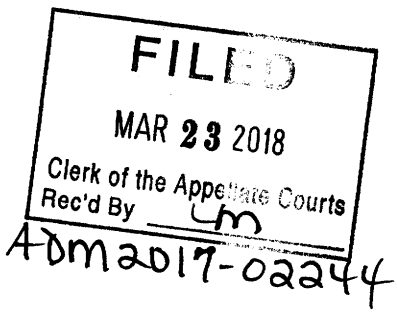

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Thank you for allowing the opportunity to publicly comment upon this proposed rule.

Sincerely,

Paul Sherrell

Paul Sherrell
State Representative
43rd Legislative District

rep.paul.sherrell@capitol.tn.gov

Legislative District
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House of Representatives
State of Tennessee

DAN HOWELL
REPRESENTATIVE 22ND DISTRICT

VICE-CHAIR-LOCAL GOVERNMENT
Local Government Sub
GOVERNMENT OPERATIONS
JOINT GOVERNMENT OPERATIONS:
Commerce, Labor, Transportation & Agriculture Sub
Education, Health & General Welfare Sub
Chairman-Judiciary & Government Sub

March 21, 2018

The Honorable Jeffrey S. Bivins, Chief Justice
The Honorable Cornelia A. Clark, Justice
The Honorable Holly Kirby, Justice
The Honorable Sharon G. Lee, Justice
The Honorable Roger A. Page, Justice

Attn: James M. Hivner, Clerk
Tennessee Supreme Court
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219

Re: American Bar Association's New Model Rule of Professional Conduct Rule 8.4(g)

To the Honorable Justices of the Tennessee Supreme Court:

Thank you for requesting written comments on the potential adoption of the above referenced rule. I am taking this opportunity to respectfully, yet strenuously, object to the adoption of the rule.

I adopt and support the position of the Attorney General, Herbert H. Slatery, III, stated in Opinion No. 18-11, filed March 16, 2018. I whole-heartedly agree that the adoption of proposed Rule 8.4(g) would infringe upon Tennessee attorneys' right to free speech, freedom of association, free exercise of religion, and due process.

Thank you for allowing the opportunity to publicly comment upon this proposed rule.

Sincerely,

Dan Howell

Dan Howell, State Representative

GLEN CASADA
STATE REPRESENTATIVE
63RD LEGISLATIVE DISTRICT

HOME ADDRESS
312 Thornton Drive
Franklin, TN 37064
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(615) 943 7396

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State of Tennessee

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LEADER
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MEMBER OF COMMITTEES

CALENDAR & RULES
GOVERNMENT OPERATIONS
CONSUMER AND HUMAN RESOURCES
CIVIL JUSTICE

March 21, 2018

The Honorable Jeffrey S. Bivins, Chief Justice
The Honorable Cornelia A. Clark, Justice
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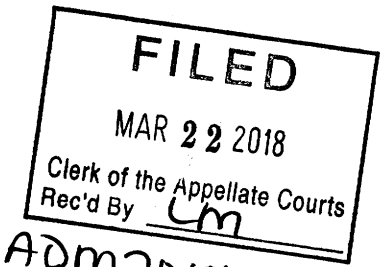
The Honorable Roger A. Page, Justice

Attn: James M. Hivner, Clerk
Tennessee Supreme Court
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219



ADM2017-02244

Re: American Bar Association's New Model Rule of Professional Conduct Rule 8.4(g)

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Thank you for allowing the opportunity to publicly comment upon this proposed rule.

Sincerely,

Representative Glen Casada

TIM RUDD
STATE REPRESENTATIVE
34TH LEGISLATIVE DISTRICT
RUTHERFORD COUNTY

Committees:
Insurance & Banking
State Government
Insurance & Banking Subcommittee

House of Representatives
State of Tennessee

NASHVILLE

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The Honorable Jeffrey S. Bivins, Chief Justice
The Honorable Cornelia A. Clark, Justice
The Honorable Holly Kirby, Justice
The Honorable Sharon G. Lee, Justice
The Honorable Roger A. Page, Justice

Attn: James M. Hivner, Clerk
Tennessee Supreme Court
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219

ADM2017-02244

Re: American Bar Association's New Model Rule of Professional Conduct Rule 8.4(g)

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Thank you for allowing the opportunity to publicly comment upon this proposed rule.

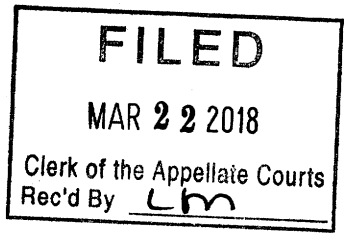
Sincerely,

Tim Rudd

State Representative
34th Legislative District

Matthew Thornton
P.O. Box 771354
Memphis, TN 38177-1354

March 21, 2018



ADM2017-02244

Honorable James Hivner
401 Seventh Avenue N, Suite 100
Nashville, TN 37219-1400

Re: Proposed Amendment to Rule 8.4

Dear Mr. Hivner:

This letter is foremost to register my strong commitment to the principles of free speech enshrined in our federal and state constitutions. Over twenty years ago I recited these words publicly in the presence of fellow lawyers and judges marking a solemn occasion: "*I do solemnly swear or affirm that I will support the Constitution of the United States and the Constitution of the State of Tennessee, and that I will truly and honestly demean myself in the practice of my profession to the best of my skill and abilities, so help me God.*" This is the oath professed by all Tennessee lawyers.

Our federal constitution enshrines the protections of free speech as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech..." Similarly, our Tennessee constitution states: "The free communication of thoughts and opinions, is one of the invaluable rights of man and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty."

Despite these strong free speech protections, our Tennessee Bar Association and the Tennessee Board of Professional Responsibility have proffered for adoption a poorly-veiled attack on the freedom of speech of lawyers hidden within the guise of anti-discrimination. In their Petition, the Petitioners seek to sacrifice the living, vibrant diversity of thought and expression using the cold steel knife of conformity. The purpose is clear - all divergence from the collective mind must be ruthlessly suppressed.

The Tennessee Bar Association, which purports to speak for Tennessee lawyers, has taken an antagonistic stance against its very constituents. The Tennessee Board of Professional Responsibility, which is charged with enforcing the rules of conduct of Tennessee lawyers, has irredeemably signaled that those who do not "tow the company line" are likely to wind up as "un-lawyers" looking for a different career.

These are not actions which foster open and honest discussion of real-world issues, nor does the proposed Rule encourage honest dialogue between attorney and client. Rather they are suppressive of discourse, particularly in light of the private nature of client/attorney interactions. If this proposed Rule is enshrined in our code of professional conduct, any reasonable attorney will become circumspect in advising a client in private whom he/she

perceives could misconstrue such advice or take offense where none was meant. Surely this is contrary to the ideals of our profession and our other rules of conduct which require attorney candor with both client and tribunal.

Even in the paragraph above, I have potentially violated the spirit of proposed Rule 8.4 in that I used the pronouns he/she. In today's ever-shifting landscape, such a binary view of gender is increasingly construed as offensive. As I understand the proposed changes, if a client who has retained me instructs me that from this date forward I should use the pronoun "zir" or "ze" in reference to that client, I then "know or should know" and any violation, however unintentional, is malpractice and subject to discipline.

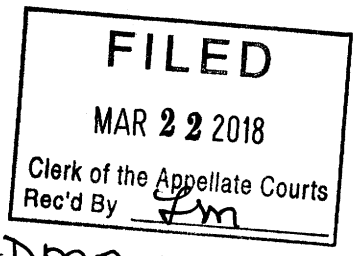
If any should think the risks of losing your law license due to a violation of this proposed Rule is minimal, I suggest you misunderstand the issue. The threat of the loss of your law career is the symptom, not the disease itself. It is said, "The value of the [Sword of Damocles] is not that it falls, but rather, that it hangs." The disease is that your right to speak freely was wrongfully taken from you and you did not value it enough to oppose its loss. If that apathy reflects the state of our bar today, then we are not far from the tyranny our forebears spilled their blood to escape.

Some will intentionally misconstrue my position as being anti-gay or pro-discrimination. That is an absurd characterization. Our current rule protects from discrimination which affects the administration of justice. The Petitioners have cited no specific examples of Tennessee lawyers for whom the current rule has proved ineffectual. Yet the Petitioners would unvirtuously exchange the constitutional rights of Tennessee lawyers for the illusion of virtue.

I cannot understate the treachery of the proposed rule. Those individual lawyers who unthinkingly violated their solemn oath in launching this broadside on the constitutional rights of Tennessee's lawyers should hang their heads in shame and be forever barred from holding a position of public trust again. Those individual lawyers who knowingly and subversively initiated this Petition should be disbarred in this State. This Petition is a travesty of soft-headed emotionalism and Tennessee lawyers should soundly reject it.

Both Petitioners should immediately move to withdraw this noxious blight upon the high-minded principles of the legal profession. Failing that, our Honorable Justices should summarily dismiss the Petition for the unconstitutional usurpation of power that it is. **In the third alternative, I petition the Court to be heard at oral argument on this matter.**

Matthew Thornton



ADM2017-02244

From: "Thomas E Williams" <ned@mhclosings.com>
To: <lisa.marsh@tncourts.gov>
Date: 3/22/2018 7:21 AM
Subject: TN Courts: Submit Comment on Proposed Rules

Submitted on Thursday, March 22, 2018 - 7:21am
Submitted by anonymous user: [98.211.57.204]
Submitted values are:

Your Name: Thomas E Williams
Your Address: 1804 Williamson Court
Your email address: ned@mhclosings.com
Your Position or Organization: attorney
Rule Change: Rule 8: Rules of Professional Conduct
Docket number: ADM2017-02244
Your public comments:
Thank you for soliciting comments on this proposed rule change.
An attorney does not surrender his or her constitutional rights by entering the legal profession, and the same is true of any regulated profession. See Ramsey v. Board of Professional Responsibility of the Supreme Court of Tennessee, 771 S.W.2d 116, 121 (Tenn. 1989).

The results of this submission may be viewed at:
https://www.tncourts.gov/node/602760/submission/22209

appellatecourtclerk - Petition for the Adoption of a New Tenn. Sup Ct Rule 8, RPC 8.4 (g) No. ADM2017-02244

From: "Florence M. Johnson" <fjohnson@johnsonandjohnsonattys.com>
To: "appellatecourtclerk@tncourts.gov" <appellatecourtclerk@tncourts.gov>
Date: 3/21/2018 5:56 PM
Subject: Petition for the Adoption of a New Tenn. Sup Ct Rule 8, RPC 8.4 (g) No. ADM2017-02244
Cc: "T. Kevin Bruce" <tkbruce@bruceturnerlaw.net>, Edd Peyton <EPeyton@Lewis...
Attachments: Comment Letter on 8.4(g).pdf

Please see attached a comment from the Ben F. Jones Chapter of the National Bar Association in Memphis, TN on the Proposed Rule.

Thank you in advance for your consideration on this important issue.

Florence M. Johnson
Johnson and Johnson, PLLC
1407 Union Avenue, Suite 1002
Memphis, TN 38104
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(901) 725-7570 Facsimile
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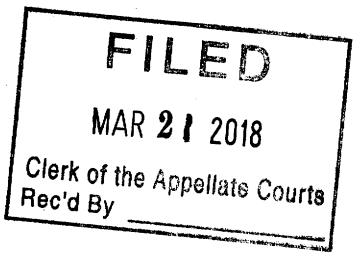
http://www.linkedin.com/pub/florence-johnson/79/99b/439



March 21, 2018

Via Email appellatecourtclerk@tncourts.gov

The Honorable James Hivner
Clerk, Tennessee Supreme Court
Supreme Court Building, Room 100
40 I 7th A venue North
Nashville, TN 37219-1407

Re: Petition for the Adoption of Proposed New Tennessee Sup., Rule 8, RPC 8.4 (g) No. ADM2017-02244

Comment Letter of Ben F. Jones, Chapter of the National Bar Association

Dear Honorable Justices of the Supreme Court:

I am Florence M. Johnson and I am the current President of the Ben F. Jones Chapter of the National Bar Association located in Memphis, Tennessee. We have reviewed the proposed changes to the Tennessee Rules and wanted to express our opinion regarding same. This Chapter, by and through the membership, believe that there is a great need for such a rule in our state. Lawyers have always been held to a standard of conduct set apart from every day citizenry and we, are proud to be a part of such a noble profession as this. Our profession should stand for the proposition that our practice is open to all and we, as lawyers, strive to rid the practice of discrimination and harassment and of all the ways it can manifest.

Our Chapter stands with the Tennessee Bar Association, Memphis Bar Association and the Association for Women Attorneys in the belief that the need for such a Rule exists. The Ben F. Jones Chapter strongly believes that the Rules should prohibit **discrimination and harassment** in all aspects of the practice of the law. The Chapter does not believe adoption of a rule that banned discrimination and

harassment in the practice of law would open the flood gates to new complaints or allow complaints that would impede the exercise of the free expression of any First Amendment Right to Free speech as some critics of the Rule fear. The Board of Professional Responsibility can parse through any ethical charge that it deems unmeritorious and there is no indication their ability would be changed with the adoption of a Rule of this type.

Based on the foregoing, the Ben F. Jones Chapter supports the spirit in which Rule 8.4(g) was proposed and urges this Honorable Court adopt a Rule that bans all discrimination and harassment in the practice of law.

Respectfully Submitted,

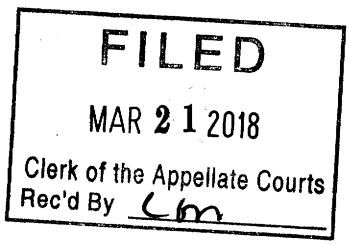
Ben F. Jones, National Bar Association

Florence M. Johnson, President
P.O. Box 3493
Memphis, TN 38173
info@benfjones.org

LAW OFFICE OF GREGORY C. KROG, JR.

March 21, 2018

James M. Hivner, Clerk
Re: Tenn. Sup. Ct. R. 9, section 32
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407
appellatecourtclerk@tncourts.gov



VIA Email

Re: Proposed addition of paragraph 8.4(g) and comments to the Rules of Professional Conduct in Supreme Court Rule 8
Docket # ADM2017-02244

Dear Mr. Hivner:

Attached please find my comment in opposition to the adoption of the proposed rule, which I respectfully submit for the Court's consideration.

Sincerely yours,

Gregory C. Krog, Jr.

Gregory C. Krog, Jr.
TN BOPR # 011029

840 Valleybrook, Memphis, Tennessee 38120-2766
Office 901-683-9080 ◆ Mobile 901-652-7642 ◆ Fax 901-685-2824
e-mail: kroglaw@bellsouth.net

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE:
PETITION FOR THE ADOPTION OF A
NEW TENN. SUP. CT. R. 8, RPC 8.4(g) No. ADM2017-02244

COMMENT IN OPPOSITION TO ADOPTION OF PROPOSED RPC 8.4(g) AND ACCOMPANYING COMMENTS

Pursuant to the Court's Order of November 21, 2017, the undersigned presents the following comment in opposition to the adoption of the proposed Rule of Professional Conduct 8.4:

This comment opposes adoption of a new paragraph (g) to Rule 8.4, and the adoption of any of the amended comments to the Rule. It also opposes any modification of our Tennessee Rules, including modifications of the comments, based on, informed by, or derived from the Model Rule 8.4(g) and related comments as adopted by the American Bar Association.

This comment joins and endorses the comments of the Reverend Deacon Dillon Ezekiel Barker, (filed 8 January 2018); G. Clark Shifflett, III, (filed 12 March 2018); Charles L. Trotter, Jr., (filed 8 March 2018); and Paul J. Krog, (filed 21 March 2018). I write separately to address a narrow issue: the danger posed by the misleading and deceptive use of the terms deployed by the proponents of the proposed Tennessee Rule.

Words are the tools of lawyers and judges. Defined precisely and used with care they allow us to apply reason to resolve disputes fairly, dispassionately, and justly. Used carelessly or without attention to precise meaning they frustrate the goals of dispute resolution and substitute the rule of men for the rule of law.

The proponents of this Rule desire the Court and our bar to deter and forbid discrimination to protect the public from its manifest evils. Anyone opposing the enlightened non-discrimination

model rule of the American Bar Association is cast as biased and "reactionary." This perspective is flawed, and its adherents rely on the ambiguous use of misleading language to persuade the Court. Far from merely creating a shield against non-discrimination, the amendment forges a sword to wield against persons who disagree with one side of a debate on the nature of culture and civilization.

The Rule and the comments employ certain terms that mean one thing to the proposers, another thing to the Courts, and multiple and conflicting meanings to the general public. The resulting ambiguities would interfere with the rule of law, contradict the civic virtues of our constitutional order, and frustrate the professional duties of the Courts and the attorneys who appear before them.

The verb "discriminate" has, for two generations, been misapplied as a universal pejorative. This introduces an immediate ambiguity into the very nature of discussions about justice and equal protection. In reality, the act of discrimination is simply the act of legitimate discernment, essential to and implicit in almost all human conduct. In the popular imagination, however, the word has become a convenient synonym for the motivation by which the discernment occurs, obscuring reasoned analysis of that motivation and the underlying philosophy informing it. The term is often exploited not for legitimate equal protection purposes, such as preventing reliance on immutable characteristics that are irrelevant to constitutionally permissible choices, but as a code word to prevent reasoned debate about both the underlying philosophy or public policy and the wisdom of applying them. Increasingly, this use of coded and masked language is deployed specifically for tactical purposes in a political arena that has come to resemble not the deliberations of a civilized society, but a frontier knife–fight.

The persons proposing the rule are NOT opposed to discrimination. In fact, they want this Court to endorse discrimination, but on the basis of their own ideas and philosophies, which they attempt to disguise behind terms that are laden with a priori value judgments and a positivist philosophy.

Thus the proposed rule, and its comments, misuse and misapply the language of civil rights that were adopted to achieve a rational and laudable objective: the fulfillment by the Fourteenth Amendment of Lincoln's definition of democracy: "As I would not be a slave, so I would not be a master." *Collected Works of Abraham Lincoln, v. 2.* As with Lincoln's most famous opponent, William Douglas, the proponents of this Rule twist legitimate language to achieve an altogether different pupose. ***Cf.*** "House Divided Speech", delivered at the Springfield, Illinois statehouse on 16 June 1858 (condemning "the notable argument of '*squatter sovereignty*,' otherwise called '*sacred right of self government*,' which latter phrase, though expressive of the only rightful basis of any government, was so perverted in this attempted use of it as to amount to just this: That if any *one* man, choose to enslave another, no *third* man shall be allowed to object."). http://www.abrahamlincolnonline.org/lincoln/speeches/house.htm (emphasis in original). Similarly, a government that establishes an authority to usurp one person's rights based on a misguided definition of the human person can turn and usurp anyone else's rights. ***Cf.*** Lincoln Fragment on Slavery of 1 April 1854, *Collected Works of Abraham Lincoln*, v. 2.

In this instance, the drafters and proponents of the proposed rule rely on terms that they intend to *sound* innocent and noble, but which they seek to use to influence changes inimical to a self-governing republic. Each of the terms "marital status," "gender identity," "sexual orientation," and "socio-economic status" is laden with politically charged and independent meanings that belong

to the realm of legislative policy, rather than of court rules. For instance, even before *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the term marital status could simply mean "single, married or unmarried or divorced" or it could imply a whole host of accompanying factors. Socio-economic status references not merely a person's income, assets, and current credit report, but a virtually innumerable series of concepts. "Gender identity" is arguably not a scientific term or category at all, but a philosophical, linguistic, or even *religious* concept concerning the nature of the person and personality. "Sexual orientation," while arguably having achieved a meaning endorsed by some scientists, is still a term whose scientific foundation is certainly not free from all dispute.

In particular, the whole notion of "gender identity" is inflammatory and scientifically debatable. The proponents of the Rule clearly desire that it should be recognized as a well-defined category grounded in scientific fact, so that any debate about its validity as an equal protection category constitutes self-evident bias. The term, however, is simply not well-defined. It is clearly not identical with the clinical "gender dysphoria." Even the latter term, as a subcategory of the term "disability," lacks a universally recognized meaning.

Similarly, socioeconomic status involves the use of a type of coded language that cloaks the actual intent of the proponents. As merely one practical example, how is it proposed to review an application to proceed *in forma pauperis* without rejecting some applicants on the basis of a heftier wallet? Do the ethics experts proposing this rule intend to offer all of their services on a pro bono basis in the future? Or do they constitute the "more equal pigs" who will occupy the jurisprudential farmhouse?

Any limitation on attorney conduct or speech based on such ill-defined categories fails the most elementary definitional standards, much less surmounting constitutional hurdles. This is true

even apart from considering the implications such a limitation for persons whose religious beliefs inform a different perspective on the nature of sexuality, its relationship to human fulfillment, and the proper treatment of it by our laws and society.

Finally, the very concept of truth is implicitly threatened by this proposed rule. How is anyone to take an oath to uphold the Constitution, give truthful testimony, or adhere to the dictates of Rule 11 if the underlying terms governing attorney conduct are disguised in this manner?

The proposed rule, in purporting to ban "discrimination" is actually creating a license to discriminate between those attorneys who enjoy the balmy temperature of certain current political climates, and those who find those climates intolerably frosty. The Court should not be made a party to this latest effort to chill the words and deeds of attorneys who might protect the members of our society who oppose the categorical redefinition of its very foundations. A Supreme Court rule governing the ethical conduct of lawyers is simply no place to adopt social experiments, explore the boundaries of human psychology, or recreate society in the name of the latest progressive fad. The Court should reject the suggested language as misleading, deceptive, and destructive.

Respectfully submitted,

Gregory C. Krog, Jr.

Gregory C. Krog, Jr.
TN BOPR # 011029

appellatecourtclerk - Re: No. ADM2017-02244-Comment Letter of The National Legal Foundation and the Congressional Prayer Caucus Foundation

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From: <sfitschen@nationallegalfoundation.org>
To: <appellatecourtclerk@tncourts.gov>
Date: 3/21/2018 6:34 PM
Subject: Re: No. ADM2017-02244-Comment Letter of The National Legal Foundation and the Congressional Prayer Caucus Foundation
Attachments: Letter re ABA Model Rule 8.4(g)--NLF and CPCF.pdf

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Dear Mr. Hivner:

Pursuant to the Order of the Supreme Court of Tennessee, in No. ADM2017-02244, attached please find the Comment Letter of the National Legal Foundation and the Congressional Prayer Caucus Foundation opposing Amending Rule 8, RPC 8.4 of the Rules of the Tennessee Supreme Court by Adopting a New RPC 8.4(g).

Sincerely,

National Legal
FOUNDATION

Steven W. Fitschen
President

p: (757) 463.6133 e: nlf@nlf.net
a: 2224 Virginia Beach Blvd., Ste. 204
Virginia Beach, VA 23454
w: nlf.net

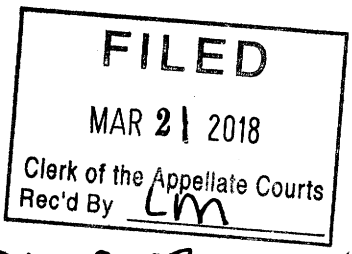
THE NATIONAL LEGAL FOUNDATION

2224 VIRGINIA BEACH BOULEVARD, SUITE 204, VIRGINIA BEACH, VA 23454; (757) 463-6133; FAX: (757) 463-6055

WEBSITE: WWW.NLF.NET ♦ E-MAIL: NLF@NLF.NET

March 21, 2018

The Honorable Jeffrey S. Bivins, Chief Justice
The Honorable Cornelia A. Clark, Justice
The Honorable Holly Kirby, Justice
The Honorable Sharon G. Lee, Justice
The Honorable Roger A. Page, Justice



ADM2017-02244

Attn: James M. Hivner, Clerk
Re: Tenn. Sup. Ct. R. 9, section 32
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

Via email only: appellatecourtclerk@tncourts.gov

Re: No. ADM2017-02244—Comment Letter of The National Legal Foundation and the Congressional Prayer Caucus Foundation Opposing Amending Rule 8, RPC 8.4 of the Rules of the Tennessee Supreme Court by Adopting a New RPC 8.4(g)

Dear Chief Justice Bivins, Justice Clark, Justice Kirby, Justice Lee, and Justice Page:

The National Legal Foundation (NLF), joined by the Congressional Prayer Caucus Foundation, writes in opposition to the adoption of proposed RPC 8.4(g) ("proposed rule"), which substantially follows the ABA Model Rule 8.4(g) ("model rule"). The NLF is a public interest law firm dedicated to the defense of First Amendment liberties. We write on behalf of ourselves and donors and supporters, including those in Tennessee. The NLF has had a significant federal and state court practice since 1985, including representing numerous parties and *amici* before the Supreme Court of the United States and the supreme courts of several states.

The Congressional Prayer Caucus Foundation (CPCF) is an organization established to protect religious freedom, preserve America's Judeo-Christian heritage, and promote prayer, including as it has traditionally been exercised in Congress and other public places. CPCF reaches across all denominational, socioeconomic, political, racial, and cultural dividing lines. CPCF has an associated national network of citizens, legislators, pastors, business owners, and opinion leaders hailing from thirty-one states, including Tennessee.

We agree with much of what the Christian Legal Society (CLS) expressed in its comments, submitted to the Court on January 31, 2018. Those comments noted the growing body of scholarly and professional criticism focusing on the model rule's Constitutional deficiencies.

CLS also ably summarized the track record of the model rule to date and its difficulty gaining traction because of its Constitutional infirmities. Those infirmities are regrettably present in the proposed rule submitted by Petitioners.

The model rule, substantially replicated in the proposed rule, purports to put lawyers at the forefront of a cultural movement. Whatever the merits of that widely debated cultural movement in the abstract, what the model rule most certainly attempts is to coopt State bars and judiciaries to undermine basic fairness with respect to Constitutionally protected, sincerely held religious beliefs and ethical standards.

The model rule and comments are a model of poor draftsmanship. The proposed rule and comments adopt some of this infelicitous drafting.[1] Despite the expressed and laudable goal of eliminating harassment and discrimination from the practice of law, the breadth of the language and the overreach of scope suggests that something else is at work.

It is hard to see how the model rule has, as claimed, "fully and artfully" addressed the issues it tackles. Far from being "a legally and constitutionally sound approach to prohibiting discrimination and harassing conduct," it imposes a speech code on lawyers who may not agree with the ABA leadership's and other so-called progressives' sentiment that everyone must conform to their view of how society should be ordered or else be subject to sanction and potentially career-ending actions. This take-no-prisoners attitude is symptomatic of any intolerant ideology, right or left, that wants to shrink the First Amendment's guarantees to fit the diminutive size of its particular bias.

In considering the merits of the proposed rule, the turbulence encountered on the model rule's journey thus far is telling. As detailed in the CLS comments (at page 9 of 23, submitted January 31, 2018), numerous jurisdictions have taken action (or declined to take action) based on grave reservations about the wisdom and Constitutionality of the model rule.

Much of the thinking and advocacy that undergird the push for the model rule's adoption also ignores credible and significant health and social science data that should signal skepticism in approaching the expansive scope of the proposed rule's language. There is well founded concern that the proposed rule would align the State of Tennessee behind those who are most actively pushing an expansive definition of "sexual orientation," "gender identity," and "marital status," to the degree that any such "discrimination," broadly defined, will override religious, speech, assembly, and other freedoms.

With respect to the categories of "sexual orientation," "gender identity," and "marital status," there are a number of relevant considerations that urge caution in their use in a rule of this sort. We outline several of them below, in part to explain more fully the key difference between

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[1] For example, the final sentence of the Petitioners' proposed addition of Rule 8.4(g) is circular: "This paragraph does not preclude legitimate advice or advocacy consistent with these Rules" and proposed Comment 4 (at 2-3, Exhibit A, "Specific Language Proposed by BPR and TBA (Redlined to Current Tennessee Rule)") includes this tautology: "Conduct related to the practice of law includes . . . participating in bar association, business[,] or social activities in connection with the practice of law."

homosexual and transgender *inclinations* and *conduct* and in part to reinforce that the public policy debate on such conduct is not closed but is still being informed by substantial health and social science evidence.[2]

Religiously Informed Views on Sexual Orientation and Gender Identity

Christians are called to love and serve all persons, including those with a homosexual orientation or those who feel a closer association to the gender other than their biological sex. However, most orthodox Christians (and those of other religions) sincerely believe that their Holy Scriptures (not to mention biology) identify same-sex intercourse and rejection of one's birth gender as both unnatural and immoral. Thus, while Christian lawyers would not (and overwhelmingly do not) refuse to take work from persons who identify themselves as gay or transgender *when the work does not involve supporting that lifestyle* (e.g., representation as a victim of a car accident), many would have ethical qualms in working for such a person or organization if the representation directly or indirectly advanced the cause of such lifestyles or helped entrench their participants in it. It is *not* discrimination on the basis of sexual orientation or gender identity to refuse to approve or support same-sex intercourse or gender "transformations." Rather, it recognizes the difference between personhood and activity. Persons are just as much persons if they never engage in sexual intercourse, of whatever kind.

The orthodox Christian view that separates the person from the offensive activity is not generally accepted by either the LGBT community or, increasingly, administrative and judicial officials. *E.g., Christian Legal Soc'y Chapter v. Martinez*, 130 S. Ct. 2971, 2980 (2010) (recounting state university's labeling of CLS chapter's requirement that leaders not engage in sexual intercourse outside marriage between a man and a woman as "sexual orientation" and "religious" discrimination, although the case was decided on other grounds). Christian attorneys are often representing citizens whose refusals, made for religious reasons, to support the LGBT lifestyle or participate in LGBT events are attacked as "sexual orientation" or "marital status" discrimination. *E.g., In re Klein,* Case Nos. 44-14 *et al.*, Final Order, Ore. Bureau of Labor and Indus. (July 2, 2015); *Masterpiece Cakeshop v. Colo. Civil Rights Comm'n* (2015COA115), cert. granted, 137 S.Ct. 2290 (U.S. June 26, 2017) (No. 16-111) (argued Dec. 5, 2017). The proposed rule, if adopted without change, could be used in similar ways against attorneys acting in accord with their basic constitutional freedoms. And, of course, this could affect not just Christian attorneys, but also those of other faiths, such as Judaism and Islam, that teach the immorality of homosexual conduct.

The view that distinguishes the person from the activity may not be held currently by a majority of the ABA's or even the Tennessee Bar Association's leadership, but it is held by many lawyers in Tennessee and nationwide and is religiously, scientifically, and logically informed. And to some degree, this view has informed legislators at all levels of our government – from federal to

[2] See, e.g., Mayer & McHugh, "Sexuality and Gender," 50 *The New Atlantis* 8 (Fall 2016), noting (1) that there is limited evidence that social stressors such as discrimination and stigma contribute to the elevated risk of poor mental health outcomes for non-heterosexual and transgender populations and (2) that more high-quality longitudinal studies are necessary for the "social stress model" to be a useful tool for understanding public health concerns.

local – in rejecting the addition of "sexual orientation," "gender identity," and "marital status" to their non-discrimination laws and policies.

Obviously, those who sponsor adoption of the model rule are not satisfied with the pace of change across the country. The ABA Ethics Committee in its December 22, 2015, memorandum ("ABA Memorandum") quoted (at 2) from the "eloquence" of the Oregon New Lawyers Division that "[t]here is a need for a cultural shift in understanding." In uncritically accepting that there is such a "need" for a "cultural shift" and in seeking to advance it, the proponents of the proposed rule have taken an unwise step that should not be endorsed and followed by Tennessee. At a minimum, Tennessee's approach to this subject should be more nuanced to recognize and exempt speech and conduct motivated by sincerely held religious beliefs and to clarify exactly what is being proscribed.

Suggested Revisions to the Proposed Rule

We support the formulation of a black-letter ethics rule addressing inappropriate, invidious discrimination. Such a provision would properly address discrimination based on uncontroversial and Constitutionally protected categories, such as race, religion, national origin, and sex. However, the inclusion of "sexual orientation," "gender identity," and "marital status" as nondiscrimination categories is ill-advised unless those terms are more carefully defined and limitations more clearly specified to prevent unconstitutional application of the proposed rule.

1. Proposed use of "sexual orientation"

The category of "sexual orientation" should not be included in the text of the rule. It is not a category uniformly recognized throughout the country, and it is subject to misinterpretation and abuse. *See* Todd A. Salzman & Michael G. Lawler, *The Sexual Person* 150 (2008) ("The meaning of the phrase 'sexual orientation' is complex and not universally agreed upon.")

If used, however, the proposed rule should include an explanation that "sexual orientation" discrimination does not encompass the refusal to approve or support same-sex conduct, be that conduct intercourse, marriage, advocacy, or some other activity. Suitable clarifying language would be along these lines: "The [proposed] rule does not extend to a lawyer's refusal to approve or support same-sex conduct, refusal to represent an individual in a matter related to such conduct, or expressed opposition to such conduct."[3]

[3] That such clarification is needed is demonstrated by *Ward v. Wilbanks*, No. 09-cv-11237, 2010 WL 3026428 (E.D. Mich. July 26, 2010), *rev'd sub nom.*, *Ward v. Polite*, 667 F.3d 727 (6th Cir. 2012), and other recent cases. Ward was dismissed from her graduate counseling program by a state university because, although she did not have objection to counseling homosexual individuals generally, she did not want to counsel them about same-sex marriage, which she believed to be unethical, and sought to refer such counseling to others, instead. The school was not satisfied with this resolution and found her beliefs inconsistent with the American Counseling Association Code of Ethics, which prohibits discrimination on the basis of sexual orientation. The school (and the district court) rejected the distinction between personhood

Without the clarification that "sexual orientation" discrimination does not encompass a lawyer's refusal to approve or support same-sex *conduct*, refusal to represent an individual in a matter related to such *conduct*, or expressed opposition to such *conduct*, lawyers could be driven out of the practice because of their sincerely held and Constitutionally protected religious beliefs. To use the proposed rule to coerce an attorney to represent clients to support the advancing of conduct that the attorney considers harmful to both the individuals involved and to our society violates several constitutional protections, including compelled speech and asembly.

Finally, if "sexual orientation" is included, the rule also should clarify that the term does not include "gender identity" and that the category of "sex" does not include either "sexual orientation" or "gender identity." These positions have been put forward in proposed federal regulations by the EEOC in the prior administration, but they are not universally accepted or approved expansions of the category of "sex." The proposed inclusion of "gender identity" to the categories of "sexual orientation" and "sex" indicates that the terms do not include each other, but this point should be made explicit to address, in part, the vagueness of the term *sexual orientation* (and *gender identity*).

2. Proposed use of "gender identity"

"Gender identity" should not be included in the rule as a nondiscrimination category for several reasons.

- *The movement for official acknowledgement that taking transgender actions is "normal," and that such inclinations should even be encouraged, contrasts with social science studies documenting the dramatic, long-term deleterious effects on those who have elected to have transgender medical procedures performed.*[4] By including this term, the

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(which homosexuals share with all other persons) and conduct (such as same-sex marriage and relations). (The Sixth Circuit did not reach the issue, but reversed because the student was not given the opportunity to show that the refusal to allow her to refer was applied to her in a discriminatory manner due to her speech and faith.) With respect to whether Title VII of the Civil Rights Act of 1964 extends to "sexual orientation," there is a split among the U.S. Circuit Courts of Appeal. In *Hively v. Ivy Tech Community College*, 853 F.3d 339 (7th Cir. 2017) (*en banc*) and *Zarda v. Altitude Express, Inc.*, 2018 WL 1040820 (2d Cir. 2018) (*en banc*), the overruled prior precedent in their courts and concluded that Title VII's protected categories include sexual orientation as a subset of discrimination on the basis of sex. In *Evans v. Georgia Regional Hospital,* 850 F.3d 1248 (11th Cir. 2017), however, an Eleventh Circuit panel held that the protected categories under Title VII do not include sexual orientation.

[4] Dr. Paul McHugh, former Chief of Psychiatry at Johns Hopkins Hospital, noted that gender identity confusion is a mental disorder that deserves understanding, treatment, and prevention and that the suicide rate among those who had "reassignment" surgery is 20 times higher than that among non-transgender people. Dr. McHugh also noted studies show that 70% - 80% of children who express transgender feelings spontaneously lose such feelings over time. P. McHugh, "Transgender Surgery Isn't the Solution," 6/12/14 *Wall St. J.*, available at http://www.wsj.com/articles/paul-mchugh-transgender-surgery-isnt-the-solution-1402615120;

proposed rule helps perpetuate a pretense that ignores physical reality and social science results, unfairly and improperly accusing those who do not support transvestitism and gender transfers of "harassment" and "discrimination."

- *The term "gender identity" is unconstitutionally vague.* This term has no fixed meaning and, by definition, is the product of an individual, subjective determination that may conflict with how the individual objectively appears to others. Moreover, because of its subjectivity, the term is malleable and can even be used by an individual in a temporally inconsistent manner.[5] Needless to say, such ambiguity in the term raises serious vagueness concerns. In fact, the ABA Ethics Committee, which drafted the proposed rule, demonstrated the ambiguity of the term when it stated (December 22, 2015, memorandum, at 5) that the term *gender identity* recognizes that "a new social awareness of the individuality of gender has changed the traditional binary concept of sexuality." Any "identity" subject to changeable, subjective "individuality" untethered to time or objective biology is, by definition, vague and subject to abuse.

To reiterate, Christians (and others) do not believe those with transgender inclinations are any less persons for having such inclinations, but that is not the same as approving and being able to support or advocate for *actions* taken in furtherance of that inclination or to advance its spread. Christians recognize that they themselves and all other persons take immoral actions. Christians are enjoined by their Scriptures to love and serve all persons, even though they do not approve of the immoral actions persons perform.[6] At a minimum, if the proposed rule is adopted and this phrase is retained, the language suggested above for "sexual orientation" should be expanded to include "gender identity," to wit: "Paragraph (g) does not include a lawyer's refusal to approve or support same-sex or gender transfer conduct, refusal to represent an individual in a matter related to such conduct, or expressed opposition to such conduct."

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see also Cal. Health Interview Study, *reported in* Center for American Progress, "How to Close the LGBT Health Disparities Gap," www.americanprogress.org/issues/lgbt/report/2009/12/21/7048 ("[t]ransgender adults are much more likely to have suicide ideation" (2% heterosexual; 5% gay; 50% transgender).

[5] "The term [transgender] includes androgynous and gender queer people, drag queens and drag kings, transsexual people, and those who identify as bi-gendered, third gender or two spirit. 'Gender identity' refers to one's inner sense of being female, male, or some other gender.... Indeed, when used to categorically describe a group of people, even all of the terms mentioned above may be insufficient..., individuals may identify as any combination of gender identity referents simultaneously or identify differently in different contexts or communities." *Self-Determination in a Gender Fundamentalist State: Toward Legal Liberation of Transgender Identities*, 12 Tex. J. on C.L. & C.R. 101, 103-04 (2006). See also *DeJohn v. Temple Univ.*, 537 F.3d 301, 381 & n.20 (3d Cir. 2008) (noting fluidity of the term *gender*).

[6] *See John 8:2-11* (New Int'l Version) (story of Jesus not condemning the woman caught in adultery but telling her "leave your life of sin").

3. Proposed use of "marital status"

The term *marital status* is hopelessly ambiguous. It is obviously not an inherent condition like race, ethnicity, or sex, but what exactly it covers is unclear, and its meaning is not well settled or accepted.

The ABA Ethics Committee indicated (ABA Memorandum, at 5) that it included this term based on the U.S. Supreme Court's *Obergefell* decision and on "the rise in single parenthood." This explanation provides more questions than answers. If the reference to *Obergefell* is meant to suggest that a lawyer could not discriminate against those in a same-sex marriage, "marital status" adds nothing to "sexual orientation." Moreover, *Obergefell* did not overturn the public policy of many States that still *disfavors* same-sex marriage, even though those States may no longer prohibit a civil ceremony.[7] To the extent "marital status" is intended to cover the same-sex marriage status, it runs directly contrary to the statements of public policy still common and effective throughout this country that *disfavor* same-sex marriage, including Tennessee. Tennessee's Constitution in Article IX ("Miscellaneous Provisions."), section 18, provides, "The historical institution and legal contract solemnizing the relationship of one man and one woman shall be the only legally recognized marital contract in this state. Any policy or law or judicial interpretation, purporting to define marriage as anything other than the historical institution and legal contract between one man and one woman, is contrary to the public policy of this state and shall be void and unenforceable in Tennessee. If another state or foreign jurisdiction issues a license for persons to marry and if such marriage is prohibited in this state by the provisions of this section, then the marriage shall be void and unenforceable in this state."

To the extent the ABA included "marital status" based on the implication that there is some kind of invidious discrimination against single parents, the support mustered for that was exactly zero. The reason why representation (or employment at a law firm) would be refused because a person is single but has a child goes unarticulated and its occurrence unproven. Nondiscrimination categories should not be proliferated without cause.

A broad reading of *marital status* could also intrude in law firm hiring decisions. Relational skills are of major importance in both client contacts and in the close working quarters of a law firm. If someone has been divorced repeatedly, it is a possible indicator of relational difficulties, failures to honor commitments, and other immaturities in that person. Would asking about the facts and circumstances of such a personal history, and/or basing a non-hiring decision in part on it, be "harassment" or "knowing discrimination" on the basis of "marital status?" Would that be true if the person's marital history was well known to the recruiter and in the community, and

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[7] In this respect, the right of a same-sex couple to a civil marriage parallels the right of a woman to a pre-viability abortion. Although such abortions may not be prohibited by governments, *see Planned Parenthood of Se. Pa. v. Casey,* 505 U.S. 833 (1992), the Supreme Court has repeatedly upheld the right of federal, state, and municipal governments to disfavor abortion and not to fund the practice. *E.g., Webster v. Reproductive Health Serv.*, 492 U.S. 490 (1989); *Williams v. Zbarez*, 448 U.S. 358 (1980); *Harris v. McRae*, 448 U.S. 297 (1980); *Poelker v. Doe*, 432 U.S. 519 (1977); *Maher v. Roe*, 432 U.S. 464 (1977); *Beal v. Doe*, 432 U.S. 438 (1977).

she based her refusal to hire in part on that knowledge? After all, the practice of law is not just a "big city" profession; it is also practiced in scores of small communities.

On its face, it is also conceivable that "marital status" discrimination would include, for example, when a Christian attorney, for religious reasons, refused to craft a prenuptial agreement for previously divorced individuals because the lawyer held the belief that the Bible disallows most remarriage after divorce if the divorced spouse is still alive. Similarly, would a family law attorney who refuses for religious reasons to assist a same-sex couple adopt a child have engaged in improper "marital status" discrimination?

The "marital status" category is simply too vague, pliable, and potentially subject to abuse to be used in the proposed rule. It fails due process analysis and could intrude on many decisions and actions that are constitutionally protected.

Conclusion

For the reasons detailed above, we encourage the Supreme Court of Tennessee to reject adoption of this proposed rule. If the rule is adopted, we recommend the following revisions to the current text:

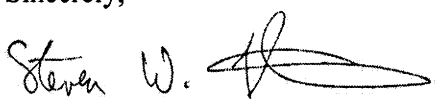
- Remove "sexual orientation" and "gender identity" as nondiscrimination categories. At a minimum:
    - add additional language to the rule that "this rule does not include a lawyer's refusal to approve or support same-sex or gender transfer conduct, refusal to represent an individual in a matter related to such conduct, or expressed opposition to such conduct;" and
    - add language to the rule that "the terms *sex* and *sexual orientation* do not overlap with each other and that neither of those terms overlaps with the term *gender identity*."
- Remove "marital status" as a nondiscrimination category.

Christians do, indeed, believe that all people are created equal by God, and they also believe that God has set moral absolutes for behavior for those he has created, including that life is sacred from conception to natural death, that sexual intercourse is only ethical when between a man and woman married to each other, and that violating God's moral norms does not bring true liberty either to an individual or to a culture. Social science amply supports the wisdom of these religious principles.

The text of the proposed rule is susceptible of being used to attack those who sincerely hold religiously based views on and object to what they understand to be sexual libertinism. This is no idle threat, as the desire of some in the LGBT movement is quite evident to punish and drum out of the public conversation any who disagree with them and who express their religious beliefs that homosexual and transgender conduct are immoral and deleterious to our civil society, as well as to the individuals involved. The Tennessee Supreme Court should not provide a platform for such actions by adopting this proposed rule.

Thank you for the opportunity to provide these comments and for your consideration of them.

Sincerely,



Steven W. Fitschen
President, The National Legal Foundation
Senior Legal Advisor, Congressional Prayer Caucus Foundation

appellatecourtclerk - Comment Regarding Docket No. ADM2017-02244

From: Nicholas Barry <nicholasrbarry@gmail.com>
To: <appellatecourtclerk@tncourts.gov>
Date: 3/21/2018 9:35 PM
Subject: Comment Regarding Docket No. ADM2017-02244

To the Justices of the Tennessee Supreme Court,

I signed the Joint Comment of 71 Tennessee Attorneys Opposing Adoption of Proposed New Rule of Professional Conduct 8.4(g) filed on March 2, 2018.

I write separately to comment on one aspect of the Proposal. The Joint Petition states: "Moreover, because it limits its reach to conduct related to the practice of law, proposed Rule 8.4(g) leaves a *sphere of private thought and private activity* for which lawyers will remain free from regulatory scrutiny." Interpreted most favorably, this is meant to show that attorneys would be allowed to express their objections on controversial subjects *only in activity unrelated to the practice of law* that is *private* and not public. But even then, it is offensive to the Constitution of Tennessee and the United States of America. America, and its republican form of government, relies on free expression from all of its citizens to function properly. The idea that Rule 8.4(g) is *saved* because it allows a sphere of private thought and activity is absurd. Even the most oppressive regimes in the world allow their citizens a full-range of private thought. This is no safe haven; this is a warning bell. The concept of government regulation of all activity *except private activity* should be categorically rejected by all of us. Freedom isn't free, while a clichè, still holds true. It requires courage from each of us to reject oppression and seek freedom. Equally, the idea that our freedom of speech is safe because we are allowed a sphere of private thought and private activity should be rejected. It is the opposite. It is totalitarianism creeping in, to regulate all things public, and eventually, all things private.

I strenuously object to the adoption of Proposed Rule 8.4(g).

Best,

Nicholas R. Barry
Bar No. 031963

appellatecourtclerk - No. ADM2017-02244

From: Paul Krog <PKrog@leaderbulso.com>
To: "appellatecourtclerk@tncourts.gov" <appellatecourtclerk@tncourts.gov>
Date: 3/21/2018 3:46 PM
Subject: No. ADM2017-02244
Attachments: Comment in Opposition.pdf

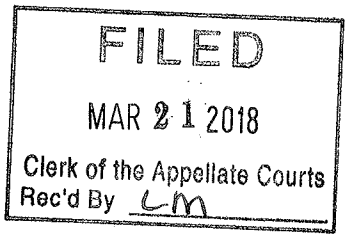
Dear Mr. Hivner:

Please find attached a comment tendered in the above-referenced matter. If your office could acknowledge receipt, I would be most appreciative.

I am, with thanks for your assistance,

Respectfully yours,

Paul Krog



IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE:

PETITION FOR THE ADOPTION OF A NEW TENNESSEE SUPREME COURT RULE 8, RPC 8.4(g)

No. ADM2017-02244

COMMENT IN OPPOSITION TO ADOPTION OF PROPOSED RPC 8.4(g)

Pursuant to the Court's Order of November 21, 2017, the undersigned present the following comment in opposition to the adoption of the proposed Rule of Professional Conduct 8.4:

1. Introduction.

The Court has been asked to adopt amendments to Tennessee's Rule of Professional Conduct 8.4 so as to make it substantially conform to ABA Model Rule 8.4. The Court should decline to do so. It should reject the proposed Rule 8.4(g) and its accompanying comments because they (1) unlawfully infringe upon the rights of Tennessee attorneys under the free-speech, freedom-of-religion, and freedom-of-association clauses of the First Amendment; (2) propose to violate the due-process rights of Tennessee attorneys protected by the Fourteenth Amendment and Article I, Section 8, of the Tennessee Constitution; and (3) represent a poorly framed and undesirable imposition on Tennessee attorneys in general.

Certainly the Proposed Rule's proscriptions encompass, inter alia, an array of conduct that is unbecoming, unprofessional, uncivilized, and not tolerated (or, thank-

fully, generally encountered) in the practice of law in Tennessee. The present Comment is not an attempt to defend boorish conduct. Nor should it be viewed as expressing the sentiment that such behavior does not exist: social and political events over the last two years have made clear both that the sexual revolution did not eliminate the willingness of those who can to abuse positions of power for sexual exploitation and that a certain segment of society views (let us call it) indecorous behavior as an appropriate protest against the perceived encroachment of ivory-tower political correctness on everyday life. The undersigned endorse neither species of miscreant. But neither do they endorse an overbroad speech code that threatens the livelihood of Tennessee attorneys who decline to conform to the orthodoxies promulgated by the high priesthood of post-modern secularism. Because the Proposed Rule 8.4(g) and its accompanying proposed comments (which will generally collectively be referred to herein simply as the "Proposed Rule") constitutes—or is at least amenable on its face to weaponization as—such a speech code, the Court should decline to adopt it and deny the Petition.

Part 2 of this Comment argues that the Proposed Rule impermissibly infringes on rights protected by the First Amendment to the United States Constitution and the corresponding portions of Article I of the Tennessee Constitution. Much of the case law on the topic of the freedom speech discusses "offensive" speech, and at least some of the speech at issue in the cases was, beyond dispute, legitimately offensive to reasonable sensibilities. The undersigned, who write largely from concern over the

Proposed Rule's ramifications for discussion expressing views from within the Catholic intellectual tradition, do not of course concede that the views they wish to remain free to express are truly "offensive."[1] Rather, experience suggests that some appreciable portion of society has come to regard them in that way. Such disagreements, to a lesser or greater degree, are likely inevitable. But we will take these people at their word. Thus, Part 3, which sketches something of the world of Catholic legal, philosophical, and theological thought that may find itself implicated by the Proposed Rule, does not set forth any detailed explication or defense: this Comment is neither catechism nor apologia. It suffices to demonstrate that there exist theses that one may wish to discuss that fall, facially, on the wrong side of the Proposed Rule's edicts concerning inclusivity. Part 4 suggests, quite briefly, some reasons beyond Constitutional infirmity for not adopting the Proposed Rule.[2]

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[1] *Cf., e.g.*, G.K. Chesterton, ***Orthodoxy*** 219 (1908) (Shaw Books ed. 2001) ("Catholic doctrine and discipline may be walls; but they are the walls of a playground.").

[2] The ABA's Model Rule has been the topic of discussion for close to three years now. This Comment has been in material progress only a few days. As the undersigned, perhaps unlike the TBA's ethics experts, who appear to have plenty of time, already has a full plate of professional obligations, he has relied on the various other comments and essays on the Model Rule cited herein for the formulation of some of the general arguments contained in this Comment as well as for helpful leads with respect to citations. Citation to commentary, including the bibliographic citations in this footnote, is not an endorsement. *See also* Ronald Rotunda, *The ABA Decision to Control What Lawyers Say: Supporting "Diversity" But Not Diversity of Thought*, The Heritage Foundation (Oct. 6, 2015), https://tinyurl.com/y6uvekhy; Edwin Meese III and Kelly J. Shackelford, *How the Lawyers Plan to Stifle Speech and Faith*, The Washington Times (Aug. 17, 2016), https://tinyurl.com/y8h2kowg; National Lawyers Ass'n Commission for the Protection of Constitutional Rights Statement on ABA Model Rule 8.4(g) (March 7, 2017), https://tinyurl.com/ydeqvmjq; Thomas D. Morgan, *The Challenge of Writing Rules to Regulate Lawyer Conduct*, 49 Creighton L. Rev. 807 (2016); Christian Legal Society, *Comments of the Christian Legal Society on Proposed Rule 8.4(g) and Comment (3)* (March 10, 2016), *available at* https://tinyurl.com/yc39xbkx; Op. Tex. Att'y Gen. No. KP-0123, 2016 WL 7433186 (2016).

2. The Proposed Rule 8.4(g) Facially Violates the First Amendment to the United States Constitution and Article I, Section 9, of the Tennessee Constitution.

The drafters of the Proposed Rule 8.4(g) made a feeble effort to assuage objections based on the First Amendment that had been leveled at the ABA Model Rule, but their efforts have not been successful. The Proposed Rule would violate the First-Amendment rights of Tennessee attorneys in numerous respects.

Individuals do not exchange their constitutional rights for a bar card when admitted to the practice of law. The United States Supreme Court has unambiguously held that, while the respective States have an "especially great" "interest in ... regulating lawyers," ***In re Primus***, 436 U.S. 412, 422 (1978), attorneys retain rights under the First Amendment, *see* ***id.*** at 432–33. Its "cases recognize that disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment, and that First Amendment protection survives even when the attorney violates a disciplinary rule he swore to obey when admitted to the practice of law." ***Gentile v. State Bar of Nev.***, 501 U.S. 1030, 1054 (1991); *see also* ***Shapero v. Ky. Bar Ass'n***, 486 U.S. 466, 469 (1988) (holding First Amendment incorporated via Fourteenth Amendment so as to govern bar disciplinary proceedings). Indeed, the Court has long struck down disciplinary rules that violate generally applicable Constitutional norms even when those rules proscribe conduct, such as advertising, that many attorneys find detrimental to the legal profession. *See generally* ***Bates v. State Bar of Ariz.***, 433 U.S. 350 (1977). Despite the efforts of its drafters, Proposed Rule 8.4(g) violates these same norms and should be rejected.

2.1. The Proposed Rule Infringes on the Right to Freedom of Speech.

The Proposed Rule infringes on the freedom of speech by imposing content-based restrictions on attorneys' speech in contexts entirely divorced from the operation of the judicial system. The shocking breadth of its reach, moreover, makes it hopelessly overbroad on its face, rendering impossible any chance at its survival as a narrowly tailored mechanism directed at a compelling interest.

2.1.1. The Proposed Rule Imposes Prohibited Content-Based Restrictions on Speech.

The fundamental touchstone of the free-speech protections articulated in the United States Constitution and in Article I, Section 9, of the Tennessee Constitution is that the state may not "single out speech of a particular content for special treatment" or "restrain[it] because of 'its message, its ideas, its subject matter, or its content." ***H&L Messengers Inc. v. City of Brentwood***, 577 S.W.2d 444, 452 (Tenn. 1979). "Viewpoint discrimination ... is an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." ***Rosenberger v. Rector & Visitors of Univ. of Va.***, 515 U.S. 819, 829 (1995).

The Proposed Rule does precisely what ***H&L Messengers*** and ***Rosenberger*** proscribe. It proposes to discipline attorneys for saying certain things: not for saying them in an improper place, or at an improper time, or in a manner that injures others, but simply for saying certain things. *Cf., e.g.*, Tenn. S. Ct. R. 8, RPC 8.4 cmt. 3 (currently proscribing conduct only "in the course of representing a client" and "when ...

prejudicial to the administration of justice"); ***Gentile***, 501 U.S. at 1071–72 (discussing holdings allowing for regulation of attorney speech in court and elsewhere if disruptive to judicial proceedings). Such restrictions on speech are "presumptively unconstitutional and may be justified only if the government proves they are narrowly tailored to serve compelling state interests." ***Reed v. Town of Gilbert***, 135 S. Ct. 2218, 2226 (2015). This is especially true when the speech in question relates to a matter of public concern, which lies "at the heart of the First Amendment's protection." ***Snyder v. Phelps***, 562 U.S. 443, 451–52 (2011).

Moreover, the Proposed Rule is plainly not only a content-based prohibition on speech that others can be expected to find derogatory or demeaning, its comments[3] reveal it as an overt attempt at viewpoint discrimination: favored speech on controversial topics will remain protected, while unfavored speech on those same topics will be sanctionable. Comment 4 to the Proposed Rule provides, "Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule." Thus, if we believe the comments, the Proposed Rule will permit attorneys to engage in conduct and speech that constitutes discrimination, that manifests bias or prejudice, or that is "derogatory or demeaning" if it "promotes diversity and inclusion." Attorneys who engage in speech endorsing the fluidity of gender identity, advocating

[3] The comments, of course, do not change the otherwise clear meaning of a rule's text itself. The fact that the proposed comments attempt both to expand and constrict the Proposed Rule is a fundamental infirmity. Some portions of this Comment will address the proposed comments' efforts to expand the scope of the Proposed Rule while others will address their efforts to narrow the Proposed Rule's scope. Purely apart from the permissibility or desirability of such restriction or such expansion vis-à-vis this particular Proposed Rule, adoption of any rule (on any topic) subject to such voluminous prodding around its edges by comments would be a poor exercise of any rulemaking power.

societal acceptance of transgenderism, or defending on policy grounds the Americans with Disabilities Act's civil penalties need not fear sanctions under the Proposed Rule. Attorneys who take a contrary view of any of these can expect to be made subject to Bar complaints. And these hypotheticals only address the easiest-to-imagine scenarios: "socioeconomic status" is so malleable and vague a concept that it is hard to imagine a topic outside the natural sciences[4] on which one could express an opinion without potentially violating a rule against exhibiting discrimination on such grounds.[5] It is simply inconceivable that this sort of regulatory system passes the requirements imposed by the United States Supreme Court's viewpoint-discrimination jurisprudence.[6] *Cf., e.g.*, ***Reed***, 135 S. Ct. at 2226; ***Snyder***, 562 U.S. at 457–58 ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the

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[4] Of course, commenting on the natural sciences with respect to *Homo sapiens* can, we have learned, include commentary that many now find derogatory and demeaning with respect to sex, sexual orientation, or gender identity. *See, e.g.*, Samantha Schmidt, *'I'm Not a Sexist': Fired Google Engineer Stands Behind Controversial Memo*, The Washington Post (Aug. 10, 2017), https://tinyurl.com/y7de5ltu [https://tinyurl.com/y9f8ykek]. *Cf.* Proposed RPC 8.4(g).

[5] Here, the comments doom the Proposed Rule even if one were to interpret its plain text as proscribing both pro-inclusivity comments and anti-inclusivity comments. "[E]ven a regulation neutral on its face may be content based if it its manifest purpose is to regulate speech because of the message it conveys." ***Turner Broad. Sys. Inc. v. FCC***, 512 U.S. 622, 645 (1994). Comment 4 makes manifest that the Proposed Rule has been put forth to distinguish between "favored speakers" and "disfavored speakers" in the administration of ethics sanctions; this is "of course ... unconstitutional." ***Thomas v. Chicago Park Dist.***, 534 U.S. 316, 324 (2002).

[6] Note that the Proposed Rule applies expressly and directly to speech; the issue here is not, then, whether or not a law school, bar association, or other entity may, in pursuit of permissible diversity goals, utilize some narrowly tailored mechanism to achieve them without running afoul of the Equal Protection Clause. *Cf.* ***Grutter v. Bollinger***, 539 U.S. 306, 340–41 (2003). The issue is whether or not a State Bar may impose ethics sanctions on attorneys for engaging in disfavored speech even when they are not acting in an official capacity. Nothing in American constitutional jurisprudence suggests that it may.

idea itself offensive or disagreeable.") (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989)).

Some proponents of the Proposed Rule appear to believe that it comports with the requirements of the First Amendment despite its blatant content-based regulation because it addresses only speech constituting "harassment or discrimination." The law is plainly otherwise, however. The use of these terms—which can be useful shorthand in the context of a more rigorously drafted regulation—imbeds a hopeless and fatal ambiguity within the Proposed Rule. *See* Part 3, *infra*. So it does not suffice simply to point to them and pretend that because the words generally describe undesirable activities, that the Proposed Rule passes muster. Simply put, one cannot reasonably tell which activities are, in fact, described (and thus whether or not that they are actually either undesirable or unprotected by the First Amendment). *See id.* But secondly, courts have widely and routinely held that these terms describe a wide range of constitutionally protected speech.

"[C]onstitutional rights may not be denied simply because of hostility to their assertion or exercise." ***Cox v. State of La.***, 379 U.S. 536, 551 (1965) (quoting *Watson v. City of Memphis*, 373 U.S. 526, 535 (1963)). Thus, the Constitution in fact protects much speech that can reasonably be described as harassing, discriminatory, derogatory, or demeaning. *Cf.* Proposed RPC 8.4; *id.* cmt. 3. Rules targeting such speech routinely fall as overbroad or content-based speech restrictions. *See, e.g.*, ***Snyder***, 562 U.S. at 455–57; ***R.A.V. v. City of St. Paul***, 505 U.S. 377, 380–81 (1992); ***McCauley v. Univ. of V.I.***, 618 F.3d 232, 250, 252 (3d Cir. 2010); ***DeJohn v. Temple Univ.***,

537 F.3d 301, 313-314 (3d Cir. 2008); ***Saxe v. State Coll. Area School Dist.***, 240 F.3d 200, 215 (3rd Cir. 2001; ***Dambrot v. Cent. Mich. Univ.***, 55 F.3d 1177, 1185 (6th Cir. 1995); ***Muller v. Conlisk***, 429 F.2d 901, 903–04 (7th Cir. 1970) ("We think it clear beyond dispute that the rule [prohibiting 'derogatory' speech] is overbroad."). Accordingly, the Proposed Rule's proscription of "harassment" and "discrimination" does not save it from the constitutional consequences of being a content-based restraint on speech. And that is to say nothing of the comments' reference to speech "manifest[ing] bias," a category much more expansive than either *harass* or *discriminate*, which contain at least a kernel of connotation of being directed towards a distinct third party.

Comment 3, which the drafters of the Proposed Rule perhaps intended to limit its overbreadth in this respect, in fact provides no such limitation. The comment provides, in part, "The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g)." But this language in the comment provides only the appearance of a limitation. Most obviously, the comment presents a purely optional rubric: "may guide." Neither the Proposed Rule itself nor Comment 3 specifies that the Proposed Rule in fact only proscribes conduct that would violate, e.g., Title IX or Title VII. Moreover, Title IX, for example, only prohibits "harassment" when it is "so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." ***Davis ex rel. LaShonda D. v. Monroe Cty. Bd. of Educ.***, 526 U.S. 629, 633 (1999). Nothing in the Proposed Rule suggests the existence of this kind of limitation, and cases

from jurisdictions with existing anti-bias rules suggest that they have not been imported. *See, e.g.*, ***In re Thomsen***, 8.7 N.E.2d 1011, 1011 (Ind. 2005). Title VII, by contrast, does not even prohibit mere "discrimination" or "harassment" at all: it provides a detailed list of prohibited acts, for which these terms are merely shorthand. *See* 42 U.S.C. § 2000e-2. Moreover, Title VII governs conduct in the workplace and so does not generally apply in contexts at which one's coworkers are not present; as noted First Amendment scholar Eugene Volokh has noted, however, under the Proposed Rule, "even a solo practitioner could face discipline because something that he said at a law-related function offended someone employed by some other law firm." Eugene Volokh, *A Speech Code for Lawyers, Banning Viewpoints That Express 'Bias,' Including Law-Related Social Activities*, The Volokh Conspiracy (Aug. 10, 2016), https://tinyurl.com/y95gxwl4. Thus, the Proposed Rule cannot take meaningful guidance from existing anti-harassment or anti-discrimination law, because its plain terms apply it to a wide array of contexts in which these existing regimes have no application.

Most fundamentally, any attempt to limit the plain terms of Proposed Rule 8.4(g) by reference to an optional pseudo-directive in its accompanying comments is doomed to failure. "[Official] comments have weight and can provide helpful guidance for construing rules when their text is unclear. They cannot, however, alter the meaning of a rule, and the courts need not resort to them when the text of the rule is clear." ***Covington v. Acuff***, No. 01A01-9605-CV-00236, 1997 WL 626872, at *2 (Tenn. Ct. App. Oct. 10, 1997) (Koch, J.). The text of the Proposed Rule is clear: it is clearly an

overbroad, viewpoint-based prohibition on (perceived) derogatory speech. The reference to anti-discrimination law and anti-harassment law does not in any way cabin the Rule's otherwise plain scope.

Other defenders of the Proposed Rule suggest that it permissibly employs the courts' wide power over members of the legal profession, and thus passes muster in this manner. Not so. The existing Rules of Professional Conduct "are grounded in one of three ethical philosophies: client-protective rules, officer-of-the-court rules, or profession-protective rules." David Nammo, *Comments of the Christian Legal Society on Proposed Rule 8.4(g) and Comment (3)* 2 (March 10, 2016), https://tinyurl.com/yc39xbkx [https://tinyurl.com/y7upbvvg]. Thus, the Rules (and the Courts in their general supervisory powers) exercise the most control over what attorneys say in the courtroom or in proceedings such as depositions, or what they say beyond those contexts that may prejudice the proceedings within them. Such regulation is permissible.

But the Proposed Rule is none of these. By extending its reach to any "conduct related to the practice of law," the Proposed Rule extends the ambit of the Rules of Professional Conduct into areas where the compelling interests that permit and necessitate the existing regulation of attorney conduct simply do not apply. What area of an attorney's life is *not* "related to the practice of law"?[7] The Proposed Rule does not define the concept, and the comments give it an expansive interpretation:

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[7] As one pair of commentators noted, "So much of a lawyer's social life can be viewed as business development and opportunities to cultivate relationships with current clients or gain exposure to new clients." Kimberlee Wood Colby and Michael P. Schutt, ***ABA Model Rules of Professional Responsibility 8.4(g): Threat or Menance?*** 5 (Feb. 2, 2017), https://www.clsnet.org/document.doc?id=1005 [https://tinyurl.com/ybd3z2rd].

> 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.

Proposed RPC 8.4 cmt. 4. Leaving aside the tautology in the last element ("related to the practice law includes ... activities in connection with the practice of law"), this sweeps up almost anything an attorney might do or say in his capacity as a person learned in the law. One defender of the Proposed Rule claims that it addresses only "opposing counsel in the courtroom or other lawyers ... encounter[ed] in the practice of law." Claudia E. Haupt, ***Antidiscrimination in the Legal Profession and the First Amendment: A Partial Defense of Model Rule 8.4(g)***, 19 J. Const. L. 1, 15 (2017), *available at* https://tinyurl.com/y8bmm3sp. But neither the Proposed Rule's text nor its comments reflect Professor Haupt's imagined limitation: conversations at bar luncheons, discourse at CLE conferences, arguments at law school reunions, comments on legal blogs, potentially any conversation in which someone says "let's ask so-and-so, he's a lawyer"—in all of these contexts, an attorney governed by the Proposed Rule must be careful to refrain from engaging in speech that manifests a disfavored viewpoint about the enumerated range of topics. The State does not require a prohibition on controversial speech at cocktail parties in order to operate an orderly judicial system.

2.1.2. The Proposed Rule Is Facially Overbroad, Rather Than Narrowly Tailored to Address a Compelling State Interest.

Content-based limitations on speech, in the few instances where the Constitution permits them, must be narrowly tailored to meet compelling state interests. Most of the justifications advanced for the Proposed Rule are merely advocacy for a particular viewpoint. *See, e.g.*, Myles V. Lynk, ***Report of the ABA Standing Committee on Ethics & Prof'l Responsibility*** 26 (Aug. 2016), *available at* https://tinyurl.com/y9gjzftd [https://tinyurl.com/y8x7t9fj].[8] These are not compelling interests. Vis-à-vis the ground observed in the undersigned's survey of the comments on the topic that most readily suggests a compelling state interest, the Proposed Rule is comically overbroad.

One of the Proposed Rule's apparent architects justifies it on the basis of a need to combat sexual predation by senior male attorneys in law firms. *See* Wendi Lazar, ***ABA Adopts Ethics Rule to Prohibit Discrimination and Harassment ... and It's About Time***, Outten & Golden LLP Blog, (Aug. 10, 2016), https://tinyurl.com/yctm2dzn [https://tinyurl.com/yaueh4ue].[9] But a rule that prohibits attorneys from engaging in speech that manifests bias concerning an entire range of factors (ranging from the well-defined to the entirely amorphous) in any context "related

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[8] "As the premier association of attorneys in the world, the ABA should lead antidiscrimination, anti-harassment, and diversity efforts not just in the courtroom, but wherever it occurs in conduct by lawyers related to the practice of law. The public expects no less of us."

[9] "In my law practice at Outten & Golden, I am privy to the most painful stories from lawyers who are mistreated, harassed, and undervalued ... Female lawyers have had male colleagues expose themselves in conference rooms, been groped in limousines, and told they would not be promoted or receive choice assignments unless they agreed to have sex in the bathroom."

to the practice of law" is manifestly not narrowly tailored to address the evil of sexual exploitation of junior female attorneys. In fact, the disconnect between the Proposed Rule's text and this particular type of misconduct is so profound that the latter's proffer as a justification might reasonably be found pretextual. *See* ***Turney v. Safley***, 482 U.S. 78, 89–90 (1987) (holding justification for a regulation under First-Amendment scrutiny must have a "valid, logical connection" to the regulation); ***Baraldini v. Thornburgh***, 884 F.2d 615, 620 (D.C. Cir. 1989) ("A reviewing court must always be careful to make certain that [officials] are not pretextually using alleged concerns in order to punish ... political or other views."). If the Court wishes to adopt an ethical rule reinforcing what should (but in today's world may not) be the obvious principle that attorneys may not coerce their subordinates into sexual relationships, the Court should adopt a rule saying that. The Proposed Rule is not it.

Finally, Tennessee's proponents of the Proposed Rule have crafted a particularly ham-handed attempt to sidestep the foregoing defects by inserting a non-standard comment 4a: "Section (g) does not restrict any speech or conduct not related to the practice of law, including speech or conduct protected by the First Amendment. Thus, a lawyer's speech or conduct unrelated to the practice of law cannot violate this Section." Comment 4a does nothing to ameliorate the Proposed Rule's defects, and its fig-leaf efforts should not serve as grounds for adopting what remains, in spite of it, a decidedly naked rule.

First, Comment 4a faces precisely the same problem as Comment 3: it squarely contradicts the text of the Proposed Rule itself. "[Comments] cannot ... alter the

meaning of a rule, and the courts need not resort to them when the text of the rule is clear." ***Covington***, 1997 WL 626872, at *2. The fact that the Tennessee advocates of the Proposed Rule thought its plain text sufficiently violative of the First Amendment to require an extra comment disclaiming that meaning should give pause by itself.[10]

Second, Comment 4a fares little better than the Proposed Rule itself in terms of clarity or proper tailoring. It tells us that "Section (g) does not restrict any speech or conduct not related to the practice of law, including speech or conduct protected by the First Amendment." That neither adds to nor subtracts one iota from the Proposed Rule itself: the problem is that the Proposed Rule impermissibly intrudes on the wide array of attorney speech that does "relate[] to the practice of law" and that nevertheless enjoys protection under the First Amendment. So for the drafters to tell us that circumstances beyond the scope of the Proposed Rule's plain terms are beyond its terms—and then to mention the First Amendment there, as if their qualification had any content whatsoever—displays either foolishness or sleight of hand. For the drafters either have attempted to impose an actual limitation and failed (because their Comment does nothing about Constitutionally protected speech related to the practice of law) or attempted to create the impression of imposing a limitation that they know well they have not effected. In either case, Comment 4a, far from being laudable, is simply shameful. It solves nothing, and should be rejected along with the rest of the poorly conceived assemblage to which it has been appended.

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[10] The special comment concerning "advocacy" is equally puzzling. It purports to tell us that attorneys may freely advocate, even when they are not advocating. There is little solace in obfuscation.

2.2. The Proposed Rule Impermissibly Infringes on the Constitutional Rights to Freedom of Religion.

Others who have commented on either the ABA's Model Rule or the Proposed Rule itself have noted its potential to intrude upon the work of attorneys representing religious organizations or individual clients with religious motivations. These observations need not be separately reiterated here, although this Comment endorses them.[11]

Rather, something unique remains to be said: namely, the dreadful danger that the Proposed Rule poses to anyone wishing to engage with the field of Catholic legal thought. The Catholic Church, in addition to maintaining internally the oldest operating legal system in the world, possesses an ancient, robust, and continuingly discursive body of thought on law, politics, and society. Supporters of the Model Rule who have attempted to rebut religious-freedom objections to it have displayed, at least at times, complete ignorance of (or perhaps merely disdain for) the Catholic intellectual tradition. *See, e.g.*, Haupt, 19 J. Const. L at 12–13. The Church's conception of jurisprudence has never been simply that the content of Divine Revelation should be inscribed in stone and set up by the State as an immutable and complete guide to human conduct, *see* St. Thomas Aquinas, ***Summa Theologiae*** II.I q.96, art. 2, *available at* https://tinyurl.com/ydad9mos, although such Nastian caricatures have long

[11] The comment of the Christian Legal Society to the ABA Model Rule, for instance, addresses this point. The CLS posited that an attorney belonging to an organization that imposed a religious requirement for membership or leadership would run afoul of the proposed Model Rule. Perhaps. But the case of an attorney who participates in such a body in a manner connected to his status as an attorney and either implements or assists the organization in implementing or enforcing such a requirement would be a much clearer case, and the distinction between the two circumstances is little solace to the attorney in question.

had, and continue to have, surprising traction in the United States, *see, e.g.*, Richard Garnett, *Paul Blanshard Lives ... in the U.S. Senate*, Mirror of Justice (Sept. 6, 2017), https://tinyurl.com/ycdrjqyl [https://tinyurl.com/y76ds84l].

Rather, the Church has steadfastly maintained that human law and public policy properly result from a dialogue between faith and reason, *fides et ratio*.[12] Thus, the Church has nurtured a deep social teaching rooted in Her theological anthropology—that is, the understanding of the human person based on Divine Revelation—but developed by and articulated in light of the application of human reason and experience to certain theological premises. *See generally, e.g.*, St. John Paul II, ***Centesimus annus*** (1991), *available at* https://tinyurl.com/z4rpxw3.

An abiding confidence in the ability of man to access, by observation and the use of reason, truths about the world and right conduct inheres in the undertaking of this dialogue. For instance, when St. Thomas posited that man can discern the existence of God without the aid of revelation, he was not giving a gloss on the Scriptures: he was developing concepts set out by Aristotle. *See* St. Thomas Aquinas, ***Summa Theologiae***, I q.2, art. 1–2, *available at* www.newadvent.org/summa/ 1002.htm; *cf.* 12 Aristotle, ***Metaphysics*** §§ 1071b2–1072b31 (2 *The Complete Works of Aristotle* 1692–95 (Jonathon Barnes ed., Princeton Univ. Press 1984)). Thus, the Church has steadfastly maintained that there exists a natural law, discernible through the application of human reason to premises derived from observation of the natural world,

[12] Catholic thought situates not only these fields, indeed, but human life in general within this dialogue. *See generally* St. John Paul II, ***Fides et ratio*** (1998), *available at* https://tinyurl.com/qfqndk3.

without the intervention or aid of revelation. Indeed, natural law theory has remained an important, living field of jurisprudential studies over the eight centuries since St. Thomas gave it not its first, but its most vigorous early, articulation.

Natural law theory may not represent the only conceivable alternative or systematic opposition to the dominant forces of legal Positivism and the post-modern consortium of Critical Legal Studies, but it is their oldest and most intractable foe. And while its position there may not be dominant, or even substantial within the judiciary or secular academia,[13] it is more than simply another Sunday morning oddity of Roman Catholics. John Finnis, the leader of the "new natural law" school,[14] enjoys substantial respect (even if not agreement) in jurisprudential circles; his seminal work, *Natural Law and Natural Rights* is an important stone in the edifice of modern legal thought. Finnis and an array of scholars and jurists from around the English speaking world today man the journal of the University of Notre Dame's Natural Law Institute, *The American Journal of Jurisprudence. See* Editorial Board, *The American Journal of Jurisprudence*, https://scholarship.law.nd.edu/ajj/editorial-board.html.

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[13] It does, however, sometimes make the Wall Street Journal, at least online. *See* Amir Efrati, *The (Ultimate Cheat Sheet to Law and Jurisprudence*, The Wall Street Journal Law Blog (May 15, 2007), https://tinyurl.com/y92oagm4. Professor Blakey's outline of the history of jurisprudence is essentially a natural lawyer's catalogue of "wrong turns" in philosophy taken since William of Occam.

[14] That phrase exemplifies the vivacity of natural law theory: as in any robust academy, not all natural-law theorists agree with one another. Some continue to embrace the fundamentally Aristotelian character of St. Thomas's work by describing the natural law as teleological; others have abandoned teleology in favor of an articulation of natural law grounded in irreducible human goods. *Compare generally* Charles E. Rice, ***50 Questions on the Natural Law: What It Is and Why We Need It*** (1999) *with* John Finnis, ***Natural Law and Natural Rights*** (1980).

All of that is merely by way of inadequate introduction. The ultimate point is that the Proposed Rule enforces on all attorneys a world view thoroughly at odds with ideas indefatigably rooted in both natural-law jurisprudence and the Church's revelation-based social teachings. The Proposed Rule and its comments make clear that, under them, attorneys are henceforth to embrace and refrain from dissenting from "inclusiv[e]" views on sex, sexual orientation, and gender identity.[15] It does not tax the imagination to locate theses of both Church teaching and natural law theory touching on law and public policy that are widely viewed as "derogatory," "demeaning," or "manifest[ing] bias" on these topics.

Consider the following statements:

1. "Marriage and conjugal love are by their nature ordained toward the procreation and education of children."[16]
2. "If [men] reflect, they must ... recognize that an act of mutual love which impairs the capacity to transmit life which God the Creator, through specific laws, has built into it, frustrates His design which constitutes the norm of marriage, and contradicts the will of the Author of life. Hence to use this divine gift while depriving it, even if only partially, of its meaning and purpose, is equally repugnant to the nature of man and of

[15] Saying nothing, again, of "socioeconomic status," because it is so amorphous and broad a concept that an attempt to discuss, even in the cursory fashion of this comment, its potential interplay with the social and moral teachings of the Church would prove overwhelming. Will mention of Matthew 26:11 be an ethics violation under the Proposed Rule? Who knows. *Cf.* Part 3, *infra* (discussing the Proposed Rule's facial invalidity under the due process clause on vagueness grounds).

[16] Second Vatican Council, ***Gaudium et Spes*** ¶ 50, *available at* https://tinyurl.com/34xrhq.

woman, and is consequently in opposition to the plan of God and His holy will."[17]

3. "Human life must be respected and protected absolutely from the moment of conception. From the first moment of his existence, a human being must be recognized as having the rights of a person—among which is the inviolable right of every innocent being to life."[18]

4. "Basing itself on Sacred Scripture, which presents homosexual acts as acts of grave depravity, tradition has always declared that 'homosexual acts are intrinsically disordered. They are contrary to the natural law."[19]

5. "And God created man to his own image: to the image of God he created him: male and female he created them."[20]

6. "Faced with theories that consider gender identity as merely the cultural and social product of the interaction between the community and the individual, independent of personal sexual identity without any reference to the true meaning of sexuality, the Church does not tire of repeating her teaching: 'Everyone, man and woman, should acknowledge and accept his sexual identity. Physical, moral and spiritual difference and complementarities are oriented towards the goods of marriage and the flourishing of family life. The harmony of the couple and of society depends in part on the way in which the complementarities, needs and mutual support between the sexes are lived out.' According to this perspective, it is obligatory that positive law be conformed to the natural

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[17] Bl. Paul VI, ***Humanae vitae*** ¶ 13, *available at* https://tinyurl.com/of8rjur.

[18] ***Catechism of the Catholic Church*** ¶ 2270, *available at* https://tinyurl.com/2eb2k.

[19] ***Id.*** ¶ 2357 (footnotes omitted), *available at* https://tinyurl.com/ldg9ffb.

[20] Gen. 1:27 (Douay-Rheims).

law, according to which sexual identity is indispensable, because it is the objective condition for forming a couple in marriage."[21]

7. "The Church's teaching on marriage and on the complementarity of the sexes reiterates a truth that is evident to right reason and recognized as such by all the major cultures of the world. Marriage is not just any relationship between human beings. It was established by the Creator with its own nature, essential properties and purpose. No ideology can erase from the human spirit the certainty that marriage exists solely between a man and a woman, who by mutual personal gift, proper and exclusive to themselves, tend toward the communion of their persons."[22]

Does anyone who has made even the most cursory observation of society over the last thirty years believe that any of the foregoing seven statements—predominantly modern, moderately drafted statements that have been chosen from among many potential candidates based primarily on ease of access and citation—would not be viewed by a noticeable quantity of contemporary society as "derogatory," "demeaning," or "evidencing bias"? Thirty seconds on a social-media platform or Google, or perhaps a minute on Westlaw's secondary-sources database, would readily provide the answer to anyone who remains in doubt.[23]

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[21] Pontifical Council for Justice and Peace, ***Compendium of the Social Doctrine of the Church*** ¶ 224 (2005) (footnotes and emphasis omitted), *available at* https://tinyurl.com/hn2pc.

[22] Congregation for the Doctrine of the Faith, ***Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons*** ¶ 2 (2003), *available at* https://tinyurl.com/imqm.

[23] A complete index of social commentary or legal writings treating the Catholic Church institutionally, or some aspect of its teaching, as invidious would be exhausting to compile. But examples can be found readily at hand. *See, e.g.*, Cheryl Y. Haskins, ***Gender Bias in the Roman Catholic Church: Why Can't Women Be Priests?***, 3 Margins: Md. L.J. Race, Religion, Gender & Class 99, 99 (2003) ("I attempt to answer the question by exploring gender bias in the Roman Catholic Church, which adamantly maintains that its refusal to allow

Nor need one look even that far. The *United States Reports* provides an ample jumping-off point. The United States Supreme Court tells us, for instance, that laws reflecting what everyone, everywhere, has always understood the word *marriage* to mean "work[] a grave and continuing harm" on homosexual persons. *See* ***Obergefell v. Hodges***, 135 S. Ct. 2584, 2604 (2015). And while the ***Obergefell*** majority insisted that it was talking only about laws concerning marriage and not portending any ill effects for those with dissenting religious or philosophical views, the case's subsequent application suggests that its holding includes no such limitation.[24] *See, e.g.*, ***Telescope Media Grp. v. Lindsey***, 271 F. Supp. 3d 1090, 1114–17 (D. Minn. 2017) (holding that antidiscrimination statute constitutionally compelled videographer to

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women to be ordained priests is a decision based on centuries of tradition. ... [T]he article will discuss what role, if any, the courts may play in alleviating gender bias in the Roman Catholic Church."); Roy Lucas, ***New Historical Insights on the Curious Case of Baird v. Eisenstadt***, 9 Roger Williams U.L. Rev. 9, 44 (2003) ("The Roman Catholic Church still has not made great gains in accepting human liberty, gender equality, and privacy, preferring authoritarian control instead."); James G. Dwyer, ***The Children We Abandon: Religious Exemptions to Child Welfare and Education Laws as Denials of Equal Protection to Children of Religious Objectors***, 74 N.C.L. Rev. 1321, 1344 (1996) (asserting, e.g., that the Catholic Church "remains notoriously patriarchal"); *see also, e.g.*, ***Catholic Charities of Sacramento Inc. v. Superior Ct.***, 109 Cal. Rptr. 2d 176, 187–88 (Ct. App. 2001), *aff'd* 85 P.3d 67 (Cal. 2004) ("[A]n employer's failure to include contraceptive methods in employee prescription benefits when other preventative-type prescription coverage is provided constitutes an unlawful employment practice."); U.S. Comm'n on Civil Rights, ***Peaceful Coexistence: Reconciling Nondiscrimination Principles with Civil Liberties*** 29 (2016), *available at* http://www.usccr.gov/pubs/Peaceful-Coexistence-09-07-16.PDF ("The phrases 'religious liberty' and 'religious freedom' will stand for nothing except hypocrisy so long as they remain code words for discrimination, intolerance, racism, sexism, homophobia, Islamophobia, Christian supremacy or any form of intolerance.").

[24] Indeed, whenever the Court attempts to limit the inescapable scope of its holding's rationale, the limitation will almost invariably eventually be discarded in favor of the rationale's logical conclusion. *Compare, e.g.*, ***Griswold v. Conn.***, 381 U.S. 479, 485–86 (majority op.), 498–99 (Goldberg, J., concurring) (1965) *with* ***Eisenstadt v. Baird***, 405 U.S. 438, 442–43 (1972); ***Lawrence v. Tex.***, 539 U.S. 558, 585 (2003) (O'Connor, J., concurring), *with* ***Obergefell***, 135 S. Ct. at 2598–2602.

provide services at same-sex wedding and that law was not content-based, but an appropriate government response to invidious discrimination). The Supreme Court tells us that "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life," and that this freedom of definition must encompass the right to kill unborn children. *See* ***Planned Parenthood of Se. Pa. v. Casey***, 505 U.S. 833, 851 (1992). These cases, their progeny, and tangentially related lines of cases arising under the due-process and equal-protection clauses make clear that the traditional views on many of the topics in question reflected in Catholic thought can be construed as indistinguishable from invidious bias.[25]

No one, of course, need accept either the Church's teachings on marriage, sexuality, the dignity of human life, or the nature of man, or natural law theorists' non-dogmatic theses about the same topics. Nor, in a democratic society, need the majority adopt laws that reflect them. Indeed, Catholic scholars frequently disagree among themselves how the laws even should do so. But the point, for relevant purposes, is not "Catholics believe Catholicism is true and therefore the State ought not to make laws that run afoul of its precepts." The point is that the First Amendment and Article I, Section 3, of the Tennessee Constitution clearly articulate and safeguard the inviolable right of Catholics to talk about such topics and to discuss among themselves

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[25] In public discourse, rather than in the courtroom, there is no "can be" about it: outspoken elements of society emphatically construe such views as invidious bias. *See, e.g.*, Randall Smith, *The New McCarthyism: Religion, Marriage, and Judicial Nominations*, Public Discourse (March 20, 2018), https://tinyurl.com/y6vqam8g [https://tinyurl.com/y6vqm64o] (citing others).

and to urge upon their fellow citizens views about jurisprudence, law, and public policy that are rooted in their religious understanding.

The relationship between law and morality is both complex and inevitable. *See generally* Dennis Lloyd, ***The Idea of Law*** 43–63 (1964) (discussing, in broad terms, currents of thought on the relationship between them). It is equally inevitable that when attorneys, at least attorneys possessed of religious sensibilities, engage in the professional task of talking and thinking about not only what the law is but what it ought to be—that endless task we term "legal scholarship"—that they at least sometimes employ premises drawn from religious thought. *See generally, e.g.*, Mirror of Justice, http://www.mirrorofjustice.blogs.com. *See also, e.g.*, Villanova University, Journal of Catholic Social Thought, https://tinyurl.com/ybtawo85; St. John's Law School Center for Law and Religion, The Tradition Project, https://lawandreligionforum.org/tradition-project; Giancarlo Sciascia, *Why "Traditional Values" Are Today at the Core of National and International Law and Politics Debates?*, Fondazione Bruno Kessler Magazine (June 14, 2017), https://tinyurl.com/yd6bnp54 [https://tinyurl.com/y8v3xxtg]; Patrick Brennan, ***A Catholic Way to Cook a Hamburger? The Catholic Case Against McLaw***, 61 Vill. L. Rev. 405 (2016); Richard W. Garnett, ***Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses***, 53 Vill. L. Rev. 273 (2008); Richard W. Garnett, ***The Freedom of the Church***, 4 J. Catholic Soc. Thought 59 (2007); Gregory R. Beabout & Mary C. Hodes, ***John Paul II on the Relationship between Civil Law and the Moral***

Law: Understanding Evangelium Vitae in Light of the Principle of Subsidiarity and the Moral Grammar of John Paul II, 21 N.D. J. Ethics & Pub. Pol'y 71 (2007). Likewise, individuals who observe religious moral codes may wish to engage in professional discussions about the ways in which their religious obligations intersect with their legal obligations. *See, e.g.*, Edward A. Hartnett, ***Catholic Judges and Cooperation in Sin***, 4 U. St. Thomas L.J. 221 (2006); John Garvey & Amy Coney, ***Catholic Judges in Capital Cases***, 81 Marq. L. Rev. 303 (1998).

Not every one of the foregoing examples necessarily touches upon the particular topics embraced by the Proposed Rule. They are merely readily-at-hand examples of the existence of an entire field of scholarship in and adjacent to the law in which religious claims about man and society—and specifically the claims of a religious tradition that maintains teachings diametrically opposed to certain favored views on the topics addressed by the Proposed Rule—are discussed in a serious manner. It cannot seriously be disputed that a Catholic attorney partaking in that discussion engages in activity protected by the First Amendment: the Free Exercise Clause is a broad mantle.[26] *See, e.g.*, ***Watchtower Bible & Tract Soc'y of N.Y. Inc. v. Village of Stratton***, 536 U.S. 150, 160–64 (2002); ***Good News Club v. Milford Cent. School***, 533 U.S. 98, 107–08 (2001); ***Wisconsin v. Yoder***, 406 U.S. 205, 213–18 (1972); ***W. Va. State Bd. of Educ. v. Barnette***, 319 U.S. 624, 642 (1943).[27] Nor can it seriously

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[26] And the mantle of the Tennessee Constitution, in fact, is perhaps even broader. *See* ***Carden v. Bland***, 288 S.W.2d 718, 721 (Tenn. 1956).

[27] Free-exercise cases often involve judicial attempts to balance government interests against religiously motivated claims to be exempted from generally applicable rules; some require

be disputed that attorneys partaking in that discussion engage in activity "related to the practice of law."

The Proposed Rule, however, poses a significant danger to the right of Tennessee attorneys to participate in the centuries-old dialogue that is Catholic legal thought. Not only can the Proposed Rule reasonably be read to proscribe commentary reflecting Catholic teaching and important strands of Catholic philosophy because contemporary listeners may view them as offensive, it would inevitably have a chilling effect on speech on those topics even if it were not in fact so broad on its face. Elementarily, of course, even laws that *can be* interpreted to reach only proscribable speech or activities will fail on this basis if individuals of reasonable intelligence might reasonably interpret them as also reaching protected speech. *See, e.g.*, ***Citizens United v. Fed. Election Comm'n***, 558 U.S. 310, 324 (2010); ***City of Knoxville v. Entm't Resources LLC***, 166 S.W.3d 650, 655–56 (Tenn. 2005); ***Am. Show Bar Series Inc. v. Sullivan Cty.***, 30 S.W.3d 324, 339 (Tenn. Ct. App. 2000). The Proposed Rule's plain terms are amenable to a reasonable interpretation that proscribes Constitutionally protected speech. As such, it cannot be enforced consistently with either the United States or Tennessee Constitutions and should not be adopted in the first place.

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drawing lines between the protected realm of free exercise and the proscribed realm of establishment. The Supreme Court's efforts to balance these interests are not always met with universal acclaim.

3. The Proposed Rule Would Violates the Due-Process Rights of Tennessee Attorneys, because It Is Impermissibly Vague and Indeterminate.

As noted in Part 2.1.1, *supra*, the Proposed Rule incorporates a number of terms that have previously been held by courts to be impermissibly vague. "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." ***State v. Crank***, 468 S.W.3d 15, 22 (Tenn. 2015) (*quoting, ultimately, Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972)). Due process requirements apply to the Rules of Professional Conduct and proceedings under them. *See* ***In re Ruffalo***, 390 U.S. 544, 550–51 (1968). The Proposed Rule will subject Tennessee attorneys to discipline on the basis of prohibitions that are anything but clearly defined.

For instance, the term *harass*, without more, has been held unconstitutionally vague by at least one state court of last resort. *See, e.g.*, ***Kansas v. Bryan***, 910 P.2d 212, 220–21 (Kan. 1996). *Derogatory* and *demeaning* are even worse. Those terms have been recognized, at least in certain contexts, as problematically vague. *See* ***Nuxoll ex rel. Nuxoll v. Indian Prairie School Dist. #204***, 523 F.3d 668, 675 (7th Cir. 2008) ("[T]he term 'derogatory comments' is unavoidably vague."); ***AM. Freedom Defensive Initiative v. Metro. Transp. Auth.***, 880 F. Supp. 2d 456, 477 n.14 (S.D.N.Y. 2012); ***Am. Postal Workers Union v. Mail Contractors of Am. Inc.***, No. 1:04-cv-2094, 2005 WL 8154727, at *4 (N.D. Ga. July 1, 20025) ("The term "derogatory statements" [in a contract] is simply too vague for the court to enforce with any kind of precision."); ***Hinton v. Devine***, 633 F. Supp. 1023 (E.D. Pennsylvania 1986) (holding *derogatory* by itself unconstitutionally vague); ***Summit Bank v. Rogers***, 206 Cal.

App.4th 669 (2012) (holding prohibition on statements "derogatory to the financial condition of a bank" facially unconstitutional for vagueness).

"Socioeconomic status" is likely the worst of the bunch. Apparently the ABA inserted this phrase without recourse to any relevant precedent at all.[28] *See* Andrew F. Halaby and Brianna L. Long, *New Model Rule of Professional Conduct 8.4(g): Legislative History, Enforceability Questions, and a Call for Scholarship*, 41 J. Legal Prof. 201, 237 n.174 (2017). The phrase is found in the Federal Sentencing Guidelines, and courts interpreting them have construed it—in that context, as "refer[ring] to an individual's status in society as determined by objective criteria such as education, income, and employment." ***United States v. Lopez***, 938 F.2d 1293, 1297 (D.C. Cir. 1991). But even if the ***Lopez*** definition were adopted—and there is little reason to think it would govern, it does little to solve the vagueness problem on this point.

What sort of speech might "manifests bias" related to socioeconomic status? Some commentators have hypothesized likely examples.[29] But others abound. Consider the attorney who asks during voir dire, "Some people might be inclined to think that individuals who receive disability benefits are layabouts and malingerers. Has

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[28] Apparently some examples do in fact exist. Indiana Rule of Professional Conduct 8.4(g) prohibits "engag[ing] in conduct, in a professional capacity, manifesting ... bias or prejudice based upon ... socioeconomic status." Of course, that rule applies only to acts "in a professional capacity," not "related to the practice of law," and has apparently been applied to impose sanctions based on belittling argument in the courtroom. *See* ***In re Campiti***, 937 N.E.2d 340 (Mem.) (Ind. 2009).

[29] *See, e.g.*, Ronald Rotunda, *The ABA's Control Over What Lawyers Say Around the Water Cooler*, The Harvard Law Record (Oct. 4, 2016), https://tinyurl.com/y9slraox [https://tinyurl.com/y7rasjxs] ("One lawyer tells another, at the water cooler or a bar association meeting on tax reform, 'I abhor the idle rich. We should raise capital gains taxes.'").

anyone ever encountered that sentiment?" Is the attorney's comment (a) not a violation of the Proposed Rule because he is not clearly manifesting his own bias or (b) a violation regardless because it echoes a biased viewpoint that some listeners may find hurtful to hear and the Proposed Rule does not limit its terms to expressions of the attorney's own bias.[30] The same question arises if an attorney remarks, in a water-cooler conversation, or in a policy discussion concerning public assistance and welfare reform, "if any man will not work, neither let him eat." *Cf.* 2 Thess. 3:10.

Move beyond the context of comments. A number of attorneys enter into a partnership agreement that provides that if any of them becomes insolvent or files a petition in bankruptcy, that the individual shall be thereby disassociated from the firm. Such clauses are common and are likely perceived to be important stop-loss measures for partnerships and limited-liability companies. Indeed, bankruptcy is a statutory basis for disassociation under Tennessee's Revised Uniform Partnership Act. *See* Tenn. Code Ann. § 61-1-601(6)(A). But under the Proposed Rule, do the attorneys commit an ethical violation for discriminating, prospectively, against any of their number whose socioeconomic status declines? Or consider that the same partners, looking for a combination office manager-bookkeeper, refuse to hire in this capacity an applicant who has filed a series of bankruptcy petitions: is this unethical discrimination on the basis of socioeconomic status in violation of Proposed Rule 8.4(g)? Or,

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[30] Society is perfectly willing, of course, to censure the rhetorical expression of viewpoints other than the speaker's. *See, e.g.*, James Schall, ***The Regensburg Lecture*** 21–23 (2007) (discussing the reaction to a speech in September 2006 by Pope Benedict XVI in which, expressly quoting, he mentioned an inflammatory remark about Islam by a fourteenth-century figure). The perennial resistance to students reading *Huckleberry Finn* is a member of the same species.

again, the firm declines to obtain bonds for clients from a particular bondsman the firm believes to be undercapitalized. Without more substantial guidance in the text of the Proposed Rule, how can any of the foregoing attorneys, operating under it, have any confidence that his conduct does not constitute an ethical violation? They cannot.

The supposed safety valve for "legitimate advocacy" suffers similarly. We know that every word in an enactment has some meaning. *E.g.*, ***State v. Strode***, 232 S.W.3d 1, 12 (Tenn. 2007). What does the word *legitimate* in the Proposed Rule mean? How is an attorney meant to distinguish between permissible "legitimate advocacy" and unethical illegitimate advocacy? As one set of commentators has written, using a hypothetical that has become perhaps obsolete in its particulars in light of ***Matal v. Tam***, 137 S. Ct. 1744 (2017), but that retains saliency as an illustration of analogous circumstances:

> Consider, for example, the litigation in *Blackhorse v. Pro-Football, Inc.* (regarding commercial use of the term "redskins") and *In re Tam* (regarding commercial use of the term "slants"). Detractors of the Washington, D.C., National Football League franchise's persistence in using the former term as its mascot persuaded the United States Trademark Trial and Appeal Board ("TTAB") to cancel registration of the franchise's federally registered "REDSKINS" marks under Section 2(a) of the federal Lanham Act ...
>
> It is unclear whether a discipline enforcement agency or court would view advice or advocacy in support of Pro-Football, Inc., to be "legitimate" under the new model rule. ... Th[e] fluidity [arising from the progression of various pieces of litigation on a topic] marks one difficulty with the "legitimate" qualifier—lawyers need to make the arguments in order to change the law, yet the new model rule obstructs novel legal

> arguments. The difficulty is especially pronounced where, as here, the subject matter is socially, culturally, and politically sensitive. Detractors of the REDSKINS mark would almost certainly argue that arguments supporting Pro-Football, Inc.'s use of the mark are not "legitimate"; others might disagree.
>
> ***
>
> [O]ne wonders how the lawyers asked to represent Pro-Football, Inc., or, for that matter, The Slants, ever comfortably could represent their clients while laboring under the cloud of a potential disciplinary complaint that their position is not "legitimate." This uncertainty is unfair to the lawyers, not to mention their clients and the integrity of the judicial system.

Halaby and Long, 41 J. Legal Prof. at 237–39 (footnotes omitted).[31] Stated differently, does "legitimate" mean "for the subjective purpose of making an argument," or does it incorporate an element of colorability? Or does it even incorporate some substance of the anti-discrimination norm, such that advocacy is "legitimate" if close to the line between biased and unbiased or demeaning and nondemeaning speech, but "illegitimate" if it deviates by some sufficient quantum from the acceptable line? And will those be objective or subjective standards?

Nobody knows the answers to those questions. Yet the Proposed Rule cannot operate in any real-world environment without such answers. And for the answers to be meaningful, they must inhere in the text of the Rules of Professional Conduct themselves. It will not do, as some commentators have suggested, for attorneys

[31] Professor Halaby and Ms. Long point to other ambiguities: "the terms 'diversity' and 'inclusion' themselves are left undefined."

simply to trust that their fellow attorneys will not report them on unreasonable bases or that the Bar will readily dismiss such complaints. *Cf.* Josh Blackman, ***Reply: A Pause for State Courts Considering Model Rule 8.4(g): The First Amendment and "Conduct Related to the Practice of Law,"*** 30 Geo. J. Legal Ethics 241, 260 (2017) (recounting exchange at the 2016 Federalist Society National Lawyers Convention). As Halaby and Long succinctly noted, "Prosecutorial whim is not the rule of law." Halaby and Long, 41 J. Legal Prof. at 241. The confidence that we have in our system of laws is neither the same as, nor—by design—dependent on, our confidence in the individuals who enforce them. Such a system is precisely the "rule of men" against which the Framers erected the bulwarks of the Republic.

> If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place, oblige it to control itself.

The Federalist No. 51 (James Madison).

If defense of the Proposed Rule depends not on an appeal to its objective terms, but on an appeal to the trustworthiness of the persons charged with enforcing it, then it is simply indefensible. The rule of law requires that we have laws that can be read and whose content can be ascertained and applied irrespective of whether those charged with enforcing them be sages or scoundrels. Because the Proposed Rule does not appear to meet this standard, it would be a bad law. Because it appears to fail the standard by a significant margin, its enforcement would violate the due process

clause of the Fourteenth Amendment and Article I, Section 8, of the Tennessee Constitution. It should not be adopted.

4. Even Were It Constitutional, the Proposed Rule Would Represent an Undesirable Act of Policymaking.

Even if there were not significant Constitutional objections to the Proposed Rule, it would still not warrant adoption by the Court. This is so for at least three reasons. First, as the discussion in Parts 2 and 3 should have highlighted, the Proposed Rule is inartfully drafted. Two, the Proposed Rule's breadth may generate needless controversy under Article II of the Tennessee Constitution,[32] controversy avoidable by way of better rulemaking. Third, the Proposed Rule will enforce on Tennessee attorneys antidiscrimination mandates that have no analogue elsewhere in Tennessee law.

Well-drafted rules of law say what they mean and mean what they say. The Proposed Rule and its comments, however, repeatedly fall over themselves in an attempt to expand and contract each other. The cumulative effect yields a contradictory patchwork: take the rule's plain text, but ignore it sometimes, maybe, when the comment says so. *Cf., e.g.*, ***Carson Creek Vacation Resorts v. Dep't of Revenue***, 865 S.W.2d 1, 2 (Tenn. 1993) ("Where the language contained within the four corners of a statute is plain, clear, and unambiguous and the enactment is within legislative competency, 'the duty of the courts is simple and obvious, namely, to say sic lex

[32] The Montana State legislature, for instance, adopted a joint resolution finding that Model Rule 8.4(g) impermissibly invaded the province of the legislature by, *inter alia*, "imposing a speech code on attorneys." Mont. Bill No.SJ15, *available at* http://leg.mt.gov/bills/2017/billpdf/SJ0015.pdf.

scripta, and obey it.'"). The whole enterprise yields an indeterminate mess, something out of H.L.A. Hart's own personal hell. The tension between the plain text of the Proposed Rule and the obviously drawn-by-committee comments designed to make the text appear palatable to various constituencies points to the conclusion that the Proposed Rule is simply not well drawn.

Most fundamentally, however, the Proposed Rule needlessly embroils the Court in ongoing cultural and social debates in this country in ways that have little, fundamentally, to do with the fitness of persons to practice law. Rather, the Proposed Rule reflects a transparent attempt to have the Court take sides in those debates in a far more pervasive manner than it could ever hope to do by deciding a case. An ethics regulation of the breadth seen in the Proposed Rule is not necessary to clamp down on workplace violence, sexual predation, shocking and boorish behavior by attorneys in the course of judicial proceedings, or unlawful employment practices by law firms. An ethics regulation of this type is needed (so to speak), rather, to rope the legal profession into line behind the kind of vision of the post-modern secularist society for which the American Bar Association serves as an echo chamber. Based on the reports, not a single delegate spoke against the final adoption of Model Rule 8.4(g) in the ABA's House of Delegates. Yet the opposition to its adoption in the several states has been significant.

The judiciary and the bar should demand that attorneys display personal integrity and trustworthiness, and that they display courtesy, decorum, and restraint in the courtroom; nor should the law look with indifference on the attorney who uses the

press outside the courthouse to cast reckless and self-interested aspersions on the process that occurs inside it. But for the Court to insist that attorneys tow a party line on a wide array of philosophical issues, especially in contexts without clients and outside the confines of judicial proceedings, is for it to impose an obligation that few law-school graduates could have imagined they would be undertaking when they raised their hands and entered into this profession. We swore to uphold the Constitution, not conform to what the ABA might someday decide to make its preferred views on gender identity.

The bar may be a confraternity, but it is not a religious order; the philosophical obligations imposed on its members have generally been no more than to agree to do what lawyers do: argue honestly within the system. Proposed Rule 8.4(g), by contrast, has the definite odor, and all the charm, of the Test Acts. *See, e.g.*, Corporations Act 1661, 13 Cha. II c. 1 § 9.[33] The Court should not place its thumb on the scales of civil discourse in this fashion, especially when certain of the positions it proposes to support do not enjoy support elsewhere in Tennessee public policy.

It should be especially loath to do so at a time when interests on one side of the cultural discourse in this country have made clear their opposition not only to the cultural traditionalist's viewpoints on their merits, but indeed to the participation in

[33] The Treason Act of 1547 may be more precisely analogous, although there is little comfort in the distinction. *See* 1 Ed. VI c. 12 §§ 6. ("[I]f any person ... by open preaching, express words or sayings, do affirm or set forth that the King ... is not, or ought not to be supreme head in earth of the church of England ..., immediately under God, ... that then every such offender ... shall lose and forfeit to the King all his ... goods and chattels, and also shall have and suffer imprisonment of his ... bod[y], at the King's will and pleasure."). If you wrote it down, the penalty was forfeiture *and* death. *See id.* § 7.

public life of any individual dedicated to a belief in transcendent realities. Senator Diane Feinstein made headlines in September 2017 for what many saw as her Know-Nothing grilling of judicial nominee Amy Coney Barrett during the latter's confirmation hearings. When the Senator's expression of skepticism at Professor Barrett's ability to apply the law, rather than her religious beliefs, as the rule of decision in cases sparked inquiry from journalists, her office defended the remarks by pointing to speeches and articles by Professor Barrett. Specifically, her office cited pieces in which Professor Barret had encouraged attorneys and law students to use their legal training for the service of others in light of their duties towards God. *See* Alexandra DeSanctis, *Dianne Feinstein Attacks Judicial Nominee's Catholic Faith*, The Corner (Sept. 6, 7, 12, 2017), https://tinyurl.com/ycxcgegh [https://tinyurl.com/ y987g9oe]. The mere fact that Professor Barrett had attempted to motivate attorneys to do good work by appealing to the transcendent rendered her at least suspect, if not downright unfit, to sit on the federal bench.

Yet the idea that there exist transcendent realities of which individuals should take account is one that still matters to many Tennesseans, attorneys among them. The Proposed Rule appears to have the intent, and may likely have the effect, of marginalizing those ideas within the legal community and, thus, within society as a whole. It thus poses not merely a threat to the views and beliefs of numerous Tennesseans, but to the essence of classical liberalism that—we have long been led to believe, at least—underlies the American experiment itself. *See* Marc DeGirolami, *#Never-Liberal*, Mirror of Justice (May 10, 2016), https://tinyurl.com/hzklpr3; Smith, *supra*

note 25. The Court should reaffirm that vision of our republic by rejecting the Proposed Rule.

5. Conclusion.

For all of the foregoing reasons, the undersigned respectfully request that the Petition for the Adoption of a New Tennessee Supreme Court Rule 8, RPC 8.4(g) be denied.

Respectfully submitted,

s/ Paul J. Krog
Paul J. Krog (BPR No. 29263)

s/ Gregory C. Krog Jr.
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Judge Robert L. Childers (ret)
Arbitration and Mediation
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March, 20 2018

The Honorable Jeffrey S. Bivins, Chief Justice
The Honorable Cornelia A. Clark, Justice
The Honorable Sharon G. Lee, Justice
The Honorable Holly Kirby, Justice
The Honorable Roger A. Page, Justice

Attn: James M. Hivner, Clerk
Tennessee Appellate Courts
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401 7th Avenue North
Nashville, Tennessee 37219-1407

IN RE: PETITION FOR THE ADOPTION OF A NEW TENN. SUP. CT. R. 8.4(g)
No.. ADM2017-02244, Ins the Supreme Court of Tennessee

To the Honorable Justices of the Supreme Court:

I am writing to oppose the Court's adoption of proposed Rule 8.4(g) in Tennessee for the following reasons:

1. There is no demonstrated need for a black letter rule regulating this wide range of conduct of lawyers. I believe the existing RPC 8.4(d) and Comment 3 adequately address discrimination in the practice of law;

2. It would infringe upon the First Amendment;

3. It is overly broad;

4. It would punish for mere negligent, unintentional conduct; and

5. It broadens the definition of the practice of law far beyond both the statutory definition and the definition currently spelled out in Supreme Court Rule 9. Proposed Comment [4] provides:

> "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

. . ." (Emphasis added)

One could make the argument that any activity involving a lawyer is "in connection with the practice of law" simply because a lawyer has a license to practice law. Further, it would also arguably restrict lawyers from engaging in social clubs or other organizations, if the social club or organization displays any signs of discrimination in its membership policies.

I have read and agree with the excellent points expressed in Attorney Charles L. Trotter Jr.'s March 6, 2018 letter. His comment on page 4 of his letter is particularly noteworthy regarding the question asked of the representative of the Disciplinary Counsel's office during a meeting of the TBA Standing Committee on Ethics and Professional Responsibility. When asked whether Discipline Counsel saw any evidence of problems in Tennessee of the kind envisioned by the proposed rule change, such that a rule change like the one being discussed was necessary, the representative from Discipline Counsel responded that there is no evidence.

I trust the Supreme Court will require the Petitioners to produce evidence to support their assertion in the Petition that the proposed change is necessary for our state, the same as is required for petitions in any court of law.

I believe it is also noteworthy that to date only one state has seen fit to adopt the ABA Model Rule on this issue. Several other states either through the highest court in the state, the Bar Association or through other means have seen fit not to adopt such a rule as is being proposed by the Petitioners. I trust that the Supreme Court will move cautiously on this issue and will not adopt it unless the Petitioners can show strong evidence such a rule is necessary in Tennessee, particularly since the adoption of such a rule would have serious implications on First Amendment rights.

I respectfully urge the Court to deny the Petition.

Sincerely yours,

/s/ Robert L. Childers

appellatecourtclerk - Comments re: No. ADM2017-02244 (IN RE: PETITION FOR THE ADOPTION OF A NEW TENN. SUP. CT. R. 8, RPC 8.4(g))

From: Tyler Brooks <tbrooks@thomasmore.org>
To: "appellatecourtclerk@tncourts.gov" <appellatecourtclerk@tncourts.gov>
Date: 3/21/2018 3:09 PM
Subject: Comments re: No. ADM2017-02244 (IN RE: PETITION FOR THE ADOPTION OF A NEW TENN. SUP. CT. R. 8, RPC 8.4(g))
Attachments: OPP TO TENN ETHICS RULE.pdf

Dear Mr. Hivner,

Attached please find comments from the Thomas More Law Center respectfully opposing the adoption of the proposed new Rule 8.4(g) of the Tennessee Rules of Professional Conduct. Please do not hesitate to contact us if you have any questions or concerns. Thank you very much for your time and assistance.

Respectfully,

B. Tyler Brooks
Senior Trial Counsel*
THOMAS MORE LAW CENTER
Cell: 336.707.8855

*Admitted to practice law in Tennessee, North Carolina, and South Carolina. Not admitted to practice law in Michigan.

THOMAS MORE
Law Center
"The Sword and Shield for People of Faith"

Richard Thompson
President & Chief Counsel

March 21, 2018

By Email: appellatecourtclerk@tncourts.gov

James M. Hivner, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

Re: IN RE: PETITION FOR THE ADOPTION OF A NEW TENN. SUP. CT. R. 8, RPC 8.4(g)

In the Supreme Court of Tennessee at Nashville, No. ADM2017-02244

TO THE HONORABLE JUSTICES OF THE TENNESSEE SUPREME COURT:

Pursuant to this Court's Order in matter No. ADM2017-02244, entered November 21, 2017, the Thomas More Law Center ("TMLC") hereby files these written comments opposing adoption of the proposed new Tennessee Supreme Court Rule 8, RPC 8.4(g) (hereinafter "new RPC 8.4(g)" or "new rule"), that was submitted for the Court's consideration by a joint petition of the Tennessee Board of Professional Responsibility and the Tennessee Bar Association on November 15, 2017. For the reasons set forth below, TMLC vigorously opposes this Court's adoption of new RPC 8.4(g) and respectfully urges this Court to reject it.

TMLC has an interest in strongly opposing the proposed new rule. First, TMLC defends and promotes America's Judeo-Christian heritage and moral values, including the religious freedom of Christians, time-honored family values, and the sanctity of human life. It supports a strong national defense and an independent and sovereign United States. TMLC accomplishes its mission through litigation, education, and related activities. It does not charge for its services. TMLC is supported by contributions from individuals, corporations, and foundations, and is recognized by the IRS as a section 501(c)(3) organization. New RPC 8.4(g) would strike at the heart of organizations, like TMLC, whose mission and scope of practice are grounded in religious and moral values.

Additionally, TMLC's undersigned Senior Trial Counsel has been an active member of the Tennessee bar since 2006 and a member of the bar of the United States District Court for the Western District of Tennessee since 2011. Similarly, TMLC President and Chief Counsel Richard Thompson and TMLC Trial Counsel Kate Oliveri are both regular members of the bar of the United States District Court for the Western District of Tennessee. Through Senate Joint Resolution 467 (2015), the Tennessee General Assembly designated TMLC as its counsel for purposes of pursuing certain litigation against the United States government, which was filed in the Western District of Tennessee. *See State of Tennessee v. United States Department of State*, Case No. 1:17-cv-01040-STA-egb (W.D. Tenn.). The Western District of Tennessee's Local Rules incorporate by reference Tennessee's Rules of Professional Conduct.[1] *See* W.D. Tenn. L.R. 83.4(c). Therefore, TMLC and its attorneys possess a direct interest in the cause of protecting the free speech and free exercise rights of Tennessee attorneys.[2]

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[1] The local rules for the Middle and Eastern Districts likewise require adherence to the Tennessee Rules of Professional Conduct. *See* M.D. Tenn. L.R. 83.01(e) and E.D. Tenn. L.R. 83.6.

[2] This Court has already received many excellent and well-reasoned comments from numerous individual attorneys and organizations noting the many flaws in new RPC 8.4(g) and thus urging its rejection. TMLC will avoid repeating several points already made and focus on certain issues that it believes merit further discussion.

SUMMARY

The proposed rule is a direct affront to the First Amendment of the U.S. Constitution and to Article I, §§ 3 and 19, of the Tennessee Constitution that will assuredly invite litigation challenging its constitutionality without conferring any countervailing benefit to the bar or the public. New RPC 8.4(g) would empower the State to police the speech, expressive conduct, and religious activities of attorneys under the guise of combating discrimination and harassment. Indeed, if adopted, such a code would suppress and chill speech and other protected activities, including core political speech, because of its content and viewpoint and would inhibit the free exercise of an attorney's religious beliefs. Not only would faith-based law firms and similar organizations fall within the crosshairs of new RPC 8.4(g), but ordinary attorneys could be targeted whenever someone somewhere is offended by something they have said or done and the offended party proceeds to file an ethics complaint.

This Court's interest in upholding the integrity of the legal profession and in securing the public's right to an honest and ethical bar is unquestioned. This sacred and time-honored duty, however, should not be sullied by adopting a rule that would inject the Court into the vicissitudes of the culture wars.

Because new RPC 8.4(g) is both unconstitutional and wholly unnecessary, TMLC respectfully urges this Court to follow the recent example set by the Supreme Court of South Carolina and by legal stakeholders in other states and reject adoption of new RPC 8.4(g).

ARGUMENT

I. NEW RPC 8.4(g) PROSCRIBES PROTECTED SPEECH AND THE RELIGIOUS FREEDOM OF ATTORNEYS IN VIOLATION OF THE UNITED STATES AND TENNESSEE CONSTITUTIONS.

A. New RPC 8.4(g) Broadly Prohibits Attorneys From Engaging In Constitutionally-Protected Speech And Conduct.

There can be no avoiding that new RPC 8.4(g) uses governmental power to censor and suppress speech. By its very terms, RPC 8.4(g) addresses "harmful verbal . . . conduct that manifests bias or prejudice towards others" and "derogatory or demeaning verbal . . . conduct." *See* Cmt. [3] to New RPC 8.4(g). Such speech would become impermissible when "the lawyer knows or reasonably should know [it] 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[.]" New RPC 8.4(g). Stated differently, Tennessee lawyers would become subject to a speech code. *See, e.g.*, Eugene Volokh, *A speech code for lawyers, banning viewpoints that express 'bias,' including in law-related social activities*, The Volokh Conspiracy (Aug. 10, 2016), *available at* https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/10/a-speech-code-for-lawyers-banning-viewpoints-that-express-bias-including-in-law-related-social-activities-2/?utm_term=.4548d388fed0 (last visited Mar. 21, 2018) ("My inference is that the ABA wants to do exactly what the text calls for: limit lawyers' expression of viewpoints that it disapproves of.").

To purportedly mitigate the harshness of this prohibition, new RPC 8.4(g) includes some exceptions. These exceptions, though, are so narrow, cabined, and ambiguous as to leave attorneys with only a woefully emaciated version of their constitutional rights. What is more telling, though, is that the comments to the new rule take great pains to permit expressions that are politically favored. Thus, it is said that

"[l]awyers 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." Cmt. [4] to RPC 8.4(g). Apparently, then, a lawyer in a firm partners' meeting could advocate that the firm to do more to hire minority attorneys without running afoul of this rule. An attorney in the same meeting who disagreed by stating her sincere belief that the firm's diversity plan is already working well could, however, be sanctioned.

This one example shows that new RPC 8.4(g) creates restrictions based on the content and, moreover, the viewpoint of speech that cannot pass constitutional muster. Laws "that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government" satisfies strict scrutiny, which requires the government, not the speaker, to "prove[] that [its restrictions] are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015) (citations omitted). A regulation restricting speech is content based if it "applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* at 2227 (citations omitted); *see United States v. Marcavage*, 609 F.3d 264, 279 (3d Cir. 2010) ("Content-based restrictions . . . encompass restrictions not only on 'particular viewpoints' but also 'an entire topic.'") (citing *Consol. Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 537 (1980)). "Government discrimination among viewpoints—or the regulation of speech based on the specific motivating ideology or the opinion or perspective of the speaker—is a more blatant and egregious form of content discrimination. But it is well established that the First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Reed*, 135 S. Ct. at 2230 (internal quotation marks and citations omitted).

The test of strict scrutiny is one that the joint petition for new RPC 8.4(g) flunks. There is no evidence that any new version of RPC 8.4(g) is needed to combat invidious discrimination, let alone a new rule that is as restrictive as the one currently being considered; nor is there evidence that other less restrictive means of combating such discrimination have

been tried and found wanting. To the contrary, new RPC 8.4(g) is a blatant attempt to suppress certain points of view, which is a power no government possesses. *See, e.g., Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) (citations omitted) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

B. The Terms Of The New Rule Are Overbroad, Vague, And Ambiguous.

In creating a lawyer speech code, new RPC 8.4(g) traffics in terms whose meanings are expansive and not capable of ready definition. Other opponents of new RPC 8.4(g) have already filed comments explaining very well how the terms used by the proposed new rule are unconstitutionally vague and ambiguous and how it would impose restrictions that are vastly overbroad. It should be added, though, that even terms whose meaning might seem settled now can later be turned on their heads.

A few years ago, not many would have surmised that using an "incorrect pronoun" when referring to another person could be considered harassment or discrimination. Likewise, only recently did it become thinkable to argue that the term "sex" as used in federal law, including Title IX, should be understood to mean "gender identity," with the failure to accordingly accommodate being deemed a violation of federal civil rights protections. *See, e.g., G. G. v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709, 719-25 (4th Cir. 2016); *see also Carcaño v. McCrory*, 203 F. Supp. 3d 615, 632-39 (M.D.N.C. 2016).

Thus, under the pretext of prohibiting "discrimination" and "harassment," new RPC 8.4(g) in fact creates an open-ended standard. The definitions of its terms would not be fixed, but could in fact change, always susceptible of being weaponized at will against ideological opponents. Tennessee attorneys deserve better than to have their licenses and livelihoods placed at the mercy of political winds.

II. NEW RPC 8.4(g) STRIKES AT THE HEART OF FAITH-BASED LEGAL ORGANIZATIONS AND WOULD CHILL CONSTITUTIONALLY PROTECTED ACTIVITIES OF ATTORNEYS IN GENERAL.

A. The New Rule Would Interfere With The Operation Of Faith-Based Law Firms And Related Legal Organizations.

Many legal organizations, like TMLC, exist as part of a religious ministry or other faith-based mission. Thus, for example, TMLC expressly advocates for Judeo-Christian values, including many beliefs that have come to be unpopular in certain politically-influential circles. For example, it supports the belief that marriage is limited to one man and one woman. It also opposes special protections for individuals based on the person's sexual orientation. State ethics rules have no power to compel such organizations to change their religious beliefs and thus their mission. *See, e.g., Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1054 (1991) ("[D]isciplinary rules governing the legal profession cannot punish activity protected by the First Amendment."). New RPC 8.4(g), however, makes no attempt to recognize the constitutional protections afforded to these legal organizations.

B. The New Rule Would Chill The Speech Of All Attorneys.

The vast majority of attorneys not practicing with such faith-based firms are at an even greater risk from new RPC 8.4(g). Whatever qualifies as "related to the practice of law" would hereafter have to be compliant with new RPC 8.4(g), but not even actual compliance would be enough. The proposed rule, with all of its vagaries, would be suspended over an attorney's head, causing self-censorship and disinclination to undertake potentially controversial positions. After investing years of study and financial resources in law school and working hard to establish a practice and professional reputation, an attorney could one day face discipline for engaging in conduct that today is uncontroversial. Simply having to defend oneself against such allegations, likely expending large amounts of time and money in the process, is a deterrent that chills.

"That this Court will ultimately vindicate if his speech is constitutionally protected is of little consequence—for the value of a sword of Damocles is that it hangs—not that it drops." *Arnette v. Kennedy*, 416 U.S. 134, 231 (1974) (Marshall, J., dissenting).

This chilling effect would be particularly pronounced when an attorney decides whether to join faith-based organizations. For example, the Christian Legal Society requires its members to adhere to certain religious tenets, including beliefs in the Holy Trinity and the Bible as the inspired Word of God. *See, e.g.*, CLS Membership Form, *available at* https://www.christianlegalsociety.org/sites/default/files/site_files/2017_CLS_NewMember_Form.pdf (last visited Mar. 21, 2018). That an attorney would have to pause before joining such an organization to consider how professing standard Christian beliefs would square with new RPC 8.4(g) shows the alarming effect it would have on both free speech and the free exercise of religion.

III. NEW RPC 8.4(g) IS UNNECESSARY AND UNWORKABLE AND WOULD INJECT THIS COURT INTO THE CULTURE WARS.

A. There Is No Demonstrated Need For New RPC 8.4(g).

Even apart from the countless constitutional infirmities present in new RPC 8.4(g), the petition for its adoption faces a further substantial problem: no evidence for its need.

As to regulation of attorneys and firms in their capacities as employers, there are already myriad statutes governing this activity. Title VII of the Civil Rights Act of 1964 makes illegal discrimination based on "race, color, religion, sex, or national origin" by employers of 15 or more employees. 42 U.S.C. § 2000e-2(a). Similarly, the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, and the Tennessee Human Rights Act, Tenn. Code Ann. § 4-21-101 *et seq.*, impose additional restrictions on discriminatory employment practices. Furthermore, law firms that contract with governmental entities are often subject to non-discrimination requirements, and corporate clients likewise often

contractually require their attorneys to adhere to certain standards related to diversity and non-discrimination. There is no claim here that there exists an epidemic of employment discrimination by lawyers and firms. To the contrary, what the proponents of new RPC 8.4(g) seem to desire is to regulate far more subtle conduct that would not qualify as employment discrimination in any context.

RPC 8.4(g) would, of course, also extend to an attorney's interactions with all manner of individuals, not just employees. Again, however, the question arises as to what epidemic of misconduct warrants such a draconian response. Indeed, for that matter, it is curious why only certain types of misconduct earn review by disciplinary authorities—namely, misconduct based on certain personal attributes—whereas as others do not. For example, it can be readily agreed that attorneys ought to refrain from calling one another vulgar names during a break in a deposition. New RPC 8.4(g), however, would only deem such conduct a matter for disciplinary action if the name calling was based on one of the protected categories set forth in the new rule. This distinction illustrates that new RPC 8.4(g) is less about elevating the standards of the profession than it is about setting up special ideologically-based protections.

Finally, even assuming there is a problem to be addressed in the bar, less drastic measures could first be tried. For example, attorneys could be required to take a course in diversity as part of their continuing legal education obligations. Even this idea is likely a solution in search of a problem, but at least it would not come at the price of constitutional liberties.[3]

B. This Court Should Follow The Example Of Other Authorities That Have Rejected New RPC 8.4(g).

The respect lawyers accord to the Rules of Professional Conduct should not be diminished by allowing them to become weapons in the culture wars. Numerous other authorities have recognized that the rules of attorney ethics are no place for a requirement like new RPC 8.4(g).

[3] To be clear, TMLC submits that the modifications proposed by Professor Blackman do not remedy the numerous defects present in new RPC 8.4(g).

See, e.g., Order of June 20, 2017, *Re: Proposed Amends. to Rule 8.4 of the Rules of Prof'l Conduct*, S.C. Supreme Court Appellate Case No. 2017-000498, *available at* https://www.sccourts.org/whatsnew/displaywhatsnew.cfm?indexID=2210 (last visited Mar. 21, 2018) ("Following review, this Court declines to incorporate the ABA Model Rule within Rule 8.4, RPC, as requested by the ABA."); Tex. Att'y Gen. Op. No. KP-0123, dated Dec. 20, 2016, https://www.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2016/kp0123.pdf (last visited Mar. 21, 2018).

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Justice Jackson's stirring words are as valid today as they were when written for the Supreme Court in 1943. Accordingly, in the contest of ideas, "the remedy . . . is more speech, not enforced silence." *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring); *see Citizens United v. FEC*, 558 U.S. 310, 361 (2010) ("[I]t is our law and our tradition that more speech, not less, is the governing rule."). New RPC 8.4(g), however, enforces silence where debate should be encouraged and, moreover, is constitutionally protected.

CONCLUSION

A lawyer does not, by mere virtue of holding a law license, forfeit her right to speak freely and adhere to the political, moral, social, and religious beliefs her conscience compels her to follow. Sadly, new RPC 8.g(4) ignores these principles and instead embraces a speech code that seeks to impose ideological conformity on a profession that has for centuries been at the forefront of championing challenging ideas. Our profession and the public we serve deserve better than new RPC 8.4(g).

For the foregoing reasons, the Thomas More Law Center and undersigned counsel respectfully urge rejection of new RPC 8.4(g).

Respectfully submitted,

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appellatecourtclerk - Alternative Comment to Proposed Rule 8.4

From: "Tucker, Tina L." <TTucker@chamblisslaw.com>
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Date: 3/21/2018 4:05 PM
Subject: Alternative Comment to Proposed Rule 8.4
Cc: "Kinard, Nate L." <NKinard@chamblisslaw.com>
Attachments: CBS_CHA-#3289584-v2-Alternative_Comment_to_Proposed_Rule_8_4(g).pdf

Please find attached our Alternative Comment to Proposed Rule 8.4.

Thank you,
Nate L. Kinard

Tina L. Tucker
Legal Assistant to Stephen D. Barham, Jeffrey W. Maddux, & Hugh J. Moore

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CHAMBLISS
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IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE: PETITION FOR THE ADOPTION OF A NEW TENN. SUP. CT. R. 8, RPC 8.4(g)

No. ADM2017-02244

COMMENT

Timothy M. Gibbons and Nathan L. Kinard, of the Chattanooga bar, files this comment pursuant to this Court's November 21, 2017 Order. Proposed Rule of Professional Conduct 8.4(g) is not within the sphere of this Court's appropriate authority to regulate our profession.

The authority to regulate the legal profession is a byproduct of the judiciary's inherent authority over Tennessee's courts. The self-evident core of that power, therefore, is to prevent disruption of the court's truth-discerning purpose. Quite near to that core is the need to protect clients from incompetent, dishonest counsel, otherwise the courts would offer no safe haven to those seeking justice. Other rules lie further from the central purpose of the rules, but in general serve the two dominant needs to protect the courts and protect those who come before the courts.

Some matters are so distant from the courts' duty to regulate that they may be suitable for admonishment or aspiration, but not coercion. The Preamble to the Rules acknowledges this truth: "[A] lawyer is also guided by personal conscience and the approbation of professional peers." Consider Rule 6.1. To condition a lawyer's right to practice his or her chosen profession on charity, though perhaps socially desirable, is beyond what an unelected judiciary ought to require.

Similarly, Proposed Rule 8.4(g) is beyond what is appropriate for this Court to enforce by law. True, part of the proposed rule's ambit is discrimination or harassment prejudicial to the administration of justice, but that is prohibited already by Rule 8.4(d).

The parallels between the proposed rule and existing legislation is apparent. While that may suggest that the proposed rule is wise social policy, it does not follow that this Court should thereby be emboldened to import those concepts into professional discipline. The opposite may be true. Legislators are elected and have the mandate to regulate health, safety, and morals, unlike this Court.

Adopting the Proposed Rule invites dragging controversial questions of conscience into professional disciplinary proceedings. A striking case from Canada justifies this fear. Several years ago, Trinity Western University in British Columbia opened a law school. The law societies of three provinces passed resolutions that the new school's graduates could not practice

in their provinces. At least one province expressly stated its decision had nothing to do with competence, but that the new school had a covenant which required students to confine sexual relations to heterosexual marriage. This was, according to those law societies, in violation of Canada's equal protection guarantee, and as the entities tasked with regulating the legal profession, they had to act.[1] The case is now before the Supreme Court of Canada.

The Canadian law societies turned professional regulation into a forum for venting the controversial issues of the day. The proposed rule invites precisely those kinds of questions to be litigated before the Board of Professional Responsibility and ultimately this Court. Are not those kinds of questions best left to the legislature?

It is wise to remember that not all that is good must be required, and not all that is bad must be prohibited. The proposed rule strays far from the courts' central purposes of protecting the courts and protecting clients. The appropriate locus for the matters covered by the proposed rule is not before the Board of Professional Responsibility, and for that reason, the undersigned respectfully oppose the proposed rule.

Respectfully submitted,

CHAMBLISS, BAHNER & STOPHEL, P.C.

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[1] *See generally Trinity W. Univ. v. The Law Soc'y of British Columbia*, 2016 BCCA 423 (Nov. 1, 2016), *available at* https://www.lawsociety.bc.ca/Website/media/Shared/docs/newsroom/TWU-LSBC-BCAA-reasons.pdf.

appellatecourtclerk - ADM2017-02244, Tenn. Sup. Ct. R. 8, 8.4(g)

From: "Kuo, Eileen (Memphis)" <Eileen.Kuo@jacksonlewis.com>
To: "appellatecourtclerk@tncourts.gov" <appellatecourtclerk@tncourts.gov>
Date: 3/21/2018 9:28 AM
Subject: ADM2017-02244, Tenn. Sup. Ct. R. 8, 8.4(g)
Attachments: Letter re Rule 8.4(g) 3-21-2018.pdf

Mr. Hivner:

Please find attached a comment by the Association for Women Attorneys regarding ADM2017-02244, Tenn. Sup. Ct. R. 8, 8.4(g).

Sincerely,

Eileen Kuo

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Jackson Lewis P.C. is included in the AmLaw 100 law firm ranking and is a proud member of the CEO Action for Diversity and Inclusion initiative

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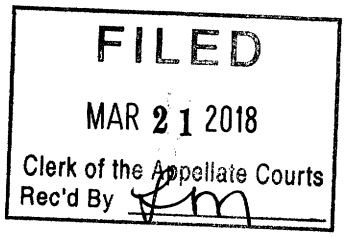

March 21, 2018

VIA EMAIL

James M. Hivner, Clerk
Re: Tenn. Supp. Ct. R. 8, Proposed Rule 8.4(g)
Tennessee Appellate Courts
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In Re: Petition for the Adoption of a New Tenn. Sup. Ct. R. 8, RPC 8.4(g)
No. ADM2017-02244
Comment letter of the Association for Women Attorneys in favor of adopting the proposed rule.

To the Honorable Justices of the Supreme Court:

We write in support of adopting the proposed Rule 8.4(g) in Tennessee. A prohibition against discrimination and harassment in the practice of law is necessary and long overdue.

Each attorney admitted to practice law in Tennessee swore an oath: "I do solemnly swear or affirm that I will support the Constitution of the United States and the Constitution of the State of Tennessee, and that I will truly and honestly demean myself in the practice of my profession to the best of my skill and abilities, so help me God." As members of the bar are aware, the Fourteenth Amendment of the Constitution of the United States provides that: "No State shall ... deny to any person within its jurisdiction the *equal protection of the laws*."

To extend equal protection of the laws to conduct related to the practice of law should be a natural extension of this oath. Discrimination—unjust and prejudicial treatment of people based on membership in a protected class—has no place in the practice of law. To the extent opponents of Rule 8.4(g) fear viewpoint discrimination on the grounds that it "favors inclusion and equality," such "viewpoints" are not so much political opinions for debate so much as constitutional principles we as attorneys have sworn to uphold.

Many members of the Association for Women Attorneys are acutely aware of the continuing need for a rule of professional conduct prohibiting discrimination and harassment in the practice of law. For instance, although women make up 46% of law firm associates, they make

up only 19% of equity partners, and 25% of executive leadership positions.[1] Although other factors may contribute to the decline of female representation in law firms past the associate level, gender bias should not be one. This is just one example out of the multitude of ways in which women and minorities continue to face discrimination in the legal field.

The necessity of a rule prohibiting harassment, including sexual harassment and derogatory or demeaning verbal or physical conduct, is equally pressing. The current Rules of Professional Conduct, which only address discrimination and harassment "in the course of representing a client" in Comment [3] to RPC 8.4, is too limited to reach all the areas in which such protection is needed. Extending the rule to activities related to the practice of law is necessary, particularly when so many transactions and relationships in legal practice begin as social and networking connections. Women and minorities should feel safe participating in the routine activities associated with the practice of law, including networking, and have adequate recourse for addressing harassment.

We are encouraged that the proposed Rule 8.4(g) offers additional protection against discrimination or harassment to individuals who may not be protected by Title VII of the Civil Rights Act or the Tennessee Human Rights Act due to the size of their workplace. Additionally, we believe that the carefully crafted language of the proposed rule is sufficiently narrowly tailored to serve its desired end without infringing on the First Amendment rights of attorneys or policing attorneys' private thoughts or activities.

While we have little reason to believe that the adoption of the proposed rule would result in a surge of unfounded complaints and unwarranted discipline, we are continually reminded of the many ways that discrimination and harassment continue to affect our everyday lives. Officers of the law should be held to a high standard of character and conduct. Asking the members of the bar to hold their law-related conduct to the anti-discrimination and anti-harassment standards we hold employers and public accommodations to is eminently reasonable.

For the foregoing reasons, we respectfully urge this Court to adopt the proposed Rule 8.4(g) as revised.

Respectfully submitted,

ASSOCIATION FOR WOMEN ATTORNEYS

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[1] *Women in Law Firms*, McKinsey & Company, report available at https://www.mckinsey.com/global-themes/gender-equality/women-in-law-firms (last visited March 20, 2018).

appellatecourtclerk - docket # ADM2017-02244, proposed amendment Rule 8, RPC 8.4 of the Rules of the Tennessee Supreme Court by adopting a new RPC 8.4(g) and comments

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From: "Claire Reno" <claire@renofirm.com>
To: <appellatecourtclerk@tncourts.gov>
Date: 3/21/2018 11:13 AM
Subject: docket # ADM2017-02244, proposed amendment Rule 8, RPC 8.4 of the Rules of the Tennessee Supreme Court by adopting a new RPC 8.4(g) and comments

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Dear Mr. Hivner,
Please accept this email that I am opposed to amending the above-referenced rule and oppose adding the comments as well.

Claire D. Reno
Attorney at Law
THE RENO LAW FIRM
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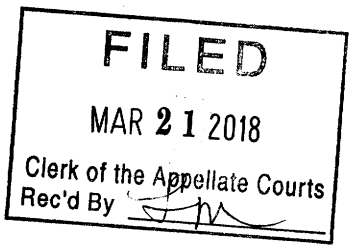

appellatecourtclerk - Support for Proposed Rule 8.4(g), Docket No. ADM2017-02244

From: Crista Cuccaro <cmcuccaro@gmail.com>
To: <appellatecourtclerk@tncourts.gov>
Date: 3/21/2018 12:07 PM
Subject: Support for Proposed Rule 8.4(g), Docket No. ADM2017-02244
Attachments: THE PERSISTENCE OF WHITE PRIVILEGE.pdf

To Mr. Hivner and the Honorable Justices of the Tennessee Supreme Court:

I am emailing to express my support for the proposed amendments to adopt a new 8.4(g) filed by the Tennessee Board of Professional Responsibility and the Tennessee Bar Association. I applaud these organizations for their initiative to address pervasive problems within the practice of law, and I would urge the Court to consider carefully the request before it.

As a former student of sociology, I understand that our institutions are in the best position to address issues of bias, privilege, and discrimination--yet, at the same time, institutions are slow to change. The practice of law and our judicial system are not exempt from these flaws of bias, privilege, and discrimination. I have attached a 2005 article by Stephanie Wildman, Professor and Director of the Center for Social Justice and Public Service at Santa Clara University. The article, titled *The Persistence of White Privilege*, examines issues of bias, privilege, and discrimination in law through the lens of race. By reference, I incorporate the article into my comments.

The proposed Rule attempts to address racial and other discrimination, which is a valuable endeavor when women lawyers, lawyers of color, and LGBT lawyers continue to be underrepresented in leadership at law firms and on the bench. Representation matters--for those who are already practicing law, for those considering entering the practice, and for the clients that we represent.

All that said, I recognize that there are significant concerns about the implications of the Rule, especially regarding the First Amendment. These concerns cannot be taken lightly. Several commenters on the Rule have offered solutions to mitigate First Amendment concerns. I would encourage the Court to entertain amending the proposed Rule to incorporate these solutions. In particular, the commentary by Josh Blackman, Associate Professor of Law at the South Texas College of Law Houston, and by the Knoxville Bar Association advance ideas for improving upon the proposed Rule.

Despite many comments in opposition to the proposed Rule, I do not believe the Court should abandon the proposal before it. Wildman closes her article by quoting Justice Benjamin Cardozo, as follows: "Self-consciousness can be the first step toward action." This proposal for Rule 8.4 (g) has generated spirited dialogue across the State of Tennessee; this dialogue can help all of us, and especially those of us in positions of privilege, to acknowledge and to address problems that prevent the advancement of some lawyers within our community and that prevent full and fair representation of those who come into contact with lawyers.

I believe we have arrived at a crossroads where we have to decide how to move forward as a legal community. The statistics are clear, and the stories--often shared in hushed whispers--about overt and covert discrimination and harassment are troubling. Something has to change, and I respectfully submit to the Court that now is the time to take action.

Thank you for your time and consideration.

Sincerely,
Crista Cuccaro

--
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University of Tennessee College of Law, 2013
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Whiteness: Some Critical Perspectives

Stephanie M. Wildman [a1]

THE PERSISTENCE OF WHITE PRIVILEGE

Barbara Flagg published her landmark article, Was Blind, But Now I See, in 1993. [1] The article, later developed into a book, [2] named the common white tendency not to think about whiteness as the "transparency phenomenon." As Flagg explained, white people have an option, every day, not to think of themselves in racial terms. [3] "In fact, whites appear to pursue that option so habitually that it may be a defining characteristic of whiteness: To be white is not to think about it." [4] Flagg identified this "tendency for whiteness to vanish from whites' self-perception" as a transparency approach. [5]

Flagg's essay, on the cutting edge of legal scholarship, contributed to the body of work that has developed into critical white studies. Indeed many of the authors in this symposium have contributed to expanding the knowledge and awareness about whiteness and the privileges associated with being white. [6] Reflecting on the development of critical white studies, Eric Arnesen says that the influence of this scholarship has been profound, but he also faults ***246** critical white studies for creating a "moving target" as to the meaning of whiteness: [7]

> Whiteness is, variously, a metaphor for power, a proxy for racially distributed material benefits, a synonym for "white supremacy," an epistemological stance defined by power, a position of invisibility or ignorance, and a set of beliefs about racial "Others" and oneself that can be rejected through "treason" to a racial category. [8]

Arnesen characterizes the political drift of this work as defined by "the voluntary mass relinquishing of privilege and identity." [9] He fears that those skeptical of the persistence of privilege regard this prescription for change as "envisioning [that] the withering away of whiteness requires nothing but imagination." [10]

Arnesen is correct that more than imagination will be necessary for any "withering away" of white privilege to occur. White privilege persists. Identifying the reasons for the persistence of white privilege is a necessary precursor to combating it. Both material conditions and socio-cultural factors contribute to the resilience of white privilege.

White Privilege

Peggy McIntosh's widely acknowledged definition of white privilege emphasizes the benefit that privilege bestows upon the individual holder. She explains that white privilege can be likened to "an invisible package of unearned assets." [11] The holder of this package remains oblivious to its presence, yet can reliably depend on its contents. McIntosh continues:

"White privilege is like an invisible weightless knapsack of special provisions, assurances, tools, maps, *247 guides, codebooks, passports, visas, clothes, compass, emergency gear, and blank checks." [12]

The significance of white privilege, on a personal level, does not go far enough to explain why privilege persists. The systemic nature of white privilege beyond the individual also must be examined. [13] The Latin root of the word privilege, "privilegium," means a law affecting an individual. [14] Thus, the core meaning of privilege encompasses both the individual beneficiary and the systemic nature of the benefit. While privilege serves the individual holder, it is the systemic nature of privilege, McIntosh's "invisible knapsack" multiplied throughout the group of white people, that supplies its societal force. Characteristics of the privileged group define the societal norm. From "flesh-colored" bandages or crayons and "nude" hosiery that depict fair skin [15] to standardized testing, [16] individual members of society are judged against characteristics held by the privileged. Furthermore, privileged group members can rely on this privilege to avoid objecting to oppression or subordination. [17] Those with privilege can afford to look away from mistreatment that does not affect them personally. The conflation of privilege with the societal norm and this option to ignore oppression contribute to the invisibility of that privilege both to its holder and to society. [18]

A body of scholarship has explored the privileging dynamic. [19] Yet white privilege persists. Given this information and understanding *248 about privilege, why does it remain so easy for white people to move through the world and not be aware of the presence and operation of their privilege? The transparency phenomenon that Flagg identified certainly contributes to the persistence of white privilege. After all, if whites do not see whiteness, they cannot see the privileges associated with it. But other dynamics join with transparency to create a reinforcing structure for the perpetuation of white privilege.

Material Conditions and Socio-Cultural Factors Reinforce White Privilege

Both material and socio-cultural factors combine to entrench white privilege. Material forces rooted in the physical world, such as the distribution of societal goods and resources, the division of labor, and immigration policies, create a world that privileges whiteness. [20] Socio-cultural factors, including discursive practices, patterns of behavior, and the thinking patterns that language creates, further strengthen white privilege, contributing to its endurance. [21] *249 Commentators have expressed concern about the focus in recent scholarship on identity politics at the expense of analysis of those material conditions. [22] Yet those material conditions and socio-cultural patterns of behavior work in tandem to reinforce white privilege.

Material forces that privilege whiteness permeate society, [23] but remain largely unknown and invisible. A detailed exposition of these material forces requires book-length treatment, but a few examples illustrate the scope and power of these material conditions. Scholars *250 have documented the construction of white suburbs, explaining that federal policy excluded African Americans from the opportunity to buy housing even as these policies subsidized white buyers. [24] The building of the interstate highway system had a "dramatic and lasting impact on the late twentieth-century urban United States." [25] While the highway project assisted suburban growth, it also decimated inner-city housing. [26] According to Raymond Mohl, "[P]ostwar policymakers and highway builders used Interstate construction to destroy low-income and especially black neighborhoods in an effort to reshape the racial landscapes of the U.S. city." [27] Educational policies in the United States, from segregation in education [28] to exclusion from the legal profession, [29] have constructed and reinforced white privilege. The repercussions of these policies continue today, manifested by the increase of white wealth [30] and well-being. [31]

Socio-cultural factors, such as societal practices and thinking patterns, including language itself, operate in conjunction with ***251** material forces to reinforce white privilege, enabling whites to self-perpetuate as a dominant racialized identity, albeit a transparent one. This article focuses on four of these socio-cultural factors: (1) the contemporary cultural push to colorblindness; (2) the sleight of mind [32] that typifies the relation between an individual and groups in American culture; (3) a comfort zone in whiteness, which includes whiteness as the fabric of daily life for whites and white participation in the construction of race from a white-privileged viewpoint; and (4) the tendency for holders of white privilege to "take back the center" in discourse, turning attention away from potentially uncomfortable conversations about race toward an emphasis on white concerns and issues. [33] These dynamics support the persistence of privilege.

The Contemporary Push to Colorblindness

Michael Omi recounts a conversation between Oakland, California, mayor Jerry Brown [34] and two newspaper columnists about race. [35] The reporters question Brown, asking whether his proposed redevelopment plan would predominantly benefit whites. Brown responds that race is "silly" because people have 99 percent the same DNA. Brown, who is white, acknowledges "a tradition and a history of racism and disadvantage and oppression," but he asks, "when do you move on?" [36]

***252** Omi recounts this story as emblematic of a new racial "common sense," based on the premise that race is unimportant as a social category, because it lacks any biological basis. [37] This racial "common sense" further assumes that the time has come to move beyond race and to emphasize colorblindness. [38] Brown typifies the politician trying to be on the cutting edge of contemporary thought by tapping into an attitude that has intellectual currency. He is striving to demonstrate that he is "in vogue." Unfortunately, behind the style points lies a serious wrongheadedness. Critiquing this colorblind view as failing to see racial inequality as structured, Omi urges particular attention to the use of terms like "race" and "racism." [39] The idea of colorblindness pushes any discussion toward a narrow view of discrimination, privilege, and subordination. It promotes an attitude that since society should not notice race, "we don't have a problem" anymore. [40]

*253 Individual-Groups Sleight of Mind [41]

Descartes' famous quote, "I think therefore I am" epitomizes the individuality of Western liberal ideology. [42] The individual is the center of that world. David Wilkins, reflecting on his visit to aboriginal peoples in Australia, suggests "I experience therefore I am" as a phrase more descriptive of the constitutive process that humans undergo in reacting to and learning from each other and the world around them. [43] "I experience therefore I am" portrays the relational nature of individuals, who do not become who they are in isolation from each other or solely within the confines of the thinking brain.

Understanding the persistence of privilege requires recognizing the sleight of mind that occurs on the subject of individuals as members of groups. [44] We are each individuals, assured of individual rights. But sometimes we are group members, acting relationally. Understanding privilege requires conceptualizing individuals as part of groups. [45] As john powell explains, "our personal relationships are mediated through power and institutional structures; privilege cannot be addressed at only the personal level." [46] Considering only the personal, individual holder of the knapsack of privilege results in missing a significant part of how privilege operates. The systemic, group aspect of privilege fortifies and maintains the societal advantage it bestows. The group "white" and individuals within it benefit from the normalization of these advantages in the material ***254** conditions of society. So, for example, "white" neighborhoods feature good schools, transportation, and commercial services that make it easier to negotiate life's daily chores.

This failure to engage the individual-group dynamic in relation to the notion of equality, generally, and the Fourteenth Amendment, in particular, has strengthened the likelihood that white privilege will flourish. The language of the Fourteenth Amendment does use the word "person"; it says: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." [47] This language indicates the primacy of equal protection to individuals.

> But the Supreme Court's development of equal protection jurisprudence, while seeking to retain that primacy, has ignored the relationship of that individual person to the significant identity groups in which that individual might be a member. This failure to recognize the individual-group interrelation has resulted in a jurisprudence that makes no sense. It has created a body of decisional law resulting in whites suing with impunity as their charge of race discrimination finds ready remedy. Yet people of color claiming race discrimination, in a society that systemically privileges whiteness, find their pleas unheard. [48] Challenges to material conditions that facilitate the persistence of white privilege fail when legal analysis focuses solely on individuals and ignores group advantage.

The ability to choose whether to focus on ourselves as individuals or as group members reinforces white privilege. Antidiscrimination laws, like Title VII, do recognize group membership, prohibiting discrimination against an individual because of that group identification. But the focus in antidiscrimination doctrine upon ***255** individuals makes subordination and discrimination seem like anecdotal problems, veiling their systemic nature. [49]

Comfort Zone in Whiteness

Charles Lawrence described the existence of this comfort zone in whiteness from the position of an outsider, viewing it in a dream he had. [50] In the dream two white colleagues are discussing his teaching future. Even though he is present, he is not visible to them; they speak as though he were not there. [51] The two white colleagues create a community, sharing a comfort level in their interaction that is evident to him, even though they seem to be unaware of it as they converse.

Martha Mahoney illustrates the manner in which this phenomenon operates from a white perspective in the context of residential segregation:

> [W]hen you wake up in the morning and go to the kitchen for coffee, you do not feel as if you hold partial interests or particular sticks in a bundle of rights in the structure you inhabit, nor does it feel as if land-use regulation shaped your structure, street, and community. This is home, where you roll out of bed, smell the coffee, reach for clothing, and inhabit the "reality" of the house. The physicality of home and community . . . tends to make our lived experience appear natural. [52] The white person's lived experience, the fabric of daily life, emphasizes--and minute to minute recreates--the whiteness of the world. This whiteness is just normal--"the way things are." [53] But as ***256** Mahoney explains, "the way things are . . . tends to make prevailing patterns of race, ethnicity, power, and the distribution of privilege appear as features of the natural world." [54] The maintenance of whiteness, the re-creation of that community, remains unseen.

Mahoney's illustration of the white person waking up and smelling the coffee serves as an important reminder of the role we each play in constructing race from the world around us. Amy Kastely further elaborates on white participation in racial construction, using the example of Toni Morrison's story Recitatif. [55] As Kastely explains:

> Recitatif draws attention to ways that race functions for informative purposes in contemporary written texts, as readers give significance to racial identification in matters of character, situation, and narrative movement and as they unconsciously or uncritically locate themselves in relation to race consciousness in the text. [56] In Recitatif, Morrison never identifies the characters' races. Where racial ambiguity exists, the human mind makes its own assumptions, based on cues, categories, and stereotypes. [57] The fabric of daily life for most whites, coupled with colorblindness and a focus on the individual, tilts white participation in the construction of race toward utilizing cues, categories, and stereotypes that maintain the privileged comfort zone.

Taking Back the Center

Meetings, colloquies, and classrooms usually convene with an agenda that defines the purpose or center of discourse. White ***257** privilege has promoted a white sense of entitlement to place white concerns at the center of most agendas. [58]

> Members of dominant groups assume that their perceptions are the pertinent perceptions, that their problems are the problems that need to be addressed, and that in discourse they should be the speaker rather than the listener. . . .

So strong is this expectation of holding center stage that even when a time and place are specifically designated for members of a nonprivileged group to be central, members of the dominant group will often attempt to take back the pivotal focus. They are stealing the center--usually with a complete lack of self-consciousness. [59] This dominant white perspective, monopolizing the center of discourse, manifests itself in judicial form, when legal analysis takes the focus away from outrageous injustice. Decisions that parse an unjust situation to show how it differs from other cases that have found injustice resonate as a form of "taking back the center." Minimizing or rejecting claims of racial injustice reinforces a white comfort zone.

Privilege and Law

Audiences at presentations and lectures about privilege frequently ask, "What does privilege have to do with law?" The fact that any analysis of privilege has been omitted historically from legal reasoning does not mean it could not be a useful lens, perhaps more useful than discrimination, for viewing fact patterns. The socio-cultural factors, discursive practices, patterns of behavior, and thinking patterns created by language have resulted in an absence of an awareness of privilege in legal arguments. Courts' failure to ***258** recognize the privileging dynamic and to include it in legal analysis further perpetuates that privilege.

Court decisions have recognized privilege without naming it as such. For example, in Sweatt v. Painter, [60] one of the legal building blocks that led to the decision in Brown v. Board of Education, [61] Thurgood Marshall and the lawyers who worked with him tackled inequality and segregation in legal education. Heman Marion Sweatt, who was African American, applied for admission to the University of Texas Law School. The school denied his application because it admitted only white students. [62] The Court acknowledged the potential argument that no denial of equal protection had occurred because, just as Texas excluded African-American students from the University of Texas, it excluded white students from the School of Law of the Texas State University for Negroes, a black law school created in response to the litigation. [63] In Sweatt, the Court stepped out of the traditional legal liberalism, "equal treatment" paradigm. [64] The

Court rejected the argument that excluding whites from an all black school paralleled excluding blacks from a white school. Rather the Court said that argument "overlook[ed] realities." [65] In Sweatt, the Court identified tangible and intangible factors that were important to a quality education, factors that related to privilege. [66] Although the ***259** Court did not use the term privilege, it recognized its existence in the form of tangible factors, like faculty, courses, and library, and intangible factors such as faculty reputation, administration experience, alumni influence, school tradition, and prestige. That recognition of privilege has been largely absent in post-Brown jurisprudence. [67]

The absence of a privilege analysis in law can result in the perpetuation of injustice, as occurred in the case based on the following facts. In March 1995, Denise Arguello and her family, including her father Alberto Govea, stopped to purchase gas at a Conoco gas station in Fort Worth, Texas. [68] After her husband pumped the gas, Ms. Arguello and her father entered the station's convenience store to pay for the gas and to purchase beer. They waited in line while Cindy Smith, a clerk, helped other customers. Fifth Circuit Judge Jerry E. Smith summarizes the testimony about what happened next:

> Arguello testified that Smith was rude to her when she reached the counter and that her demeanor was less friendly than it had ***260** been with the customers she had previously served. After Arguello presented her credit card as payment, Smith requested identification. Arguello testified that Smith singled her out by demanding that she provide identification; Smith contends that she requested identification because Arguello was attempting to buy beer.

Arguello, an Oklahoma resident, presented Smith with her valid Oklahoma driver's license. Smith initially refused to accept it, claiming she could not take an out-of-state license, but she eventually accepted it and completed the transaction. During Arguello's purchase, Govea became increasingly frustrated with the manner in which Smith was treating his daughter. Consequently, he left the beer he had intended to purchase on the counter and walked out of the store.

After Smith completed Arguello's sale, the tension between them escalated into a confrontation. Arguello testified that Smith began shouting obscenities at her and making racially derogatory remarks. [According to the trial court memorandum opinion Arguello alleged that "Smith referred to her as a 'f* * * ing [sic] Iranian Mexican bitch.'" [69]] Arguello began to leave with her purchase, but realized that she had the wrong copy of the credit card slip and approached the counter again. After another argument, Arguello and Smith exchanged copies. As Arguello walked away the second time, Smith shoved a six-pack of beer off the counter and onto the floor.

Plaintiffs testified that after Arguello left the store, Smith began screaming racist remarks over the intercom. At the same time, Smith laughed at Arguello and her family and made several crude gestures. Govea and other family members telephoned Conoco from a payphone outside the store to lodge a complaint. During that telephone conversation, the Conoco official indicated that he wanted to know the name of the clerk in question. When Govea attempted to re-enter the store to ***261** determine Smith's name, Smith locked him out while laughing and making crude gestures. [70]

Arguello and Govea sued claiming race discrimination under 42 U.S.C. § 1981. A jury decided the case in their favor, but the district court granted Conoco's motion for a judgment as a matter of law. The Fifth Circuit affirmed the district court ruling in favor of Conoco. [71]

The Fifth Circuit began its decision by reviewing the elements of a § 1981 claim:

> [A] plaintiff must establish "(1) that she is a member of a racial minority; (2) that [the defendant] had intent to discriminate on the basis of race; and (3) that the discrimination concerned one or more of the activities enumerated in the statute." [72] The court acknowledged no dispute existed over plaintiffs' status as racial

> minorities [73] and that the evidence had been sufficient to create a jury question as to whether they had suffered discrimination during their visit to defendant's store. [74] The court stated: "this case turns on the third element, namely, whether Smith's conduct implicated rights guaranteed by § 1981." [75]

Fifth Circuit law for establishing a denial of § 1981 rights in the retail setting requires evidence of an attempt to contract that was thwarted by the defendant merchant. The purchase must be thwarted, not merely deterred by the merchant. [76] The Fifth Circuit stated that because Govea voluntarily left the beer on the counter and exited the ***262** store without trying to buy it, the clerk Smith did not prevent Govea from making the purchase. [77] The court similarly found Arguello without remedy because she did "successfully complete the transaction." [78]

Plaintiffs had argued for a broader interpretation of the statute that included "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." [79] The court declined to follow this proposed broader application. Rather, it distinguished case law involving both discriminatory service in restaurants and clubs [80] and other cases concerning discriminatory prepayment or check-writing policies. [81]

The lack of outrage surrounding the result illustrates another way that privilege operates. The decision does not merely reflect the view of an aberrational circuit court ignored by the Supreme Court in its denial of certiorari; the case also becomes precedent, setting the terms for appropriate future behavior. How will the general counsel of Conoco advise employees to act in the future? [82] What advice might corporate counsel have given to employees if the result had come out differently? This decision permits subordination and abuse to continue without redress or even acknowledgment that it was wrong. That continuation reinscribes the white privilege that made the conduct and ensuing judicial decision possible. White privilege enabled the judges to cast Mr. Govea's transaction as a voluntary withdrawal from purchasing beer. Most likely, the judges had been to convenience stores much like this one, but they probably had not been welcomed with racial epithets. [83] Life lived in the white comfort zone made it easy for judges to miss the injustice. The judges likely experienced their own convenience store visits as individuals. As ***263** individuals they were unable to see the group identification that represents the lived reality for non-whites. That reality means not only facing this kind of harassment but also never knowing when it will strike as one goes about the business of life. [84] That fear of a world gone awry, like a rug pulled from under one's feet, has not been part of the white comfort zone. The push to colorblindness further supports law operating within these cultural practices to ignore the racialized reality in which the transaction took place. The judicial form of "taking back the center" maintains the status quo that led to the injustice.

Until law and the legal system address scenarios like that faced by Ms. Arguello and Mr. Govea, subordinating practices will continue. This case suggests the limits of antidiscrimination law, which does seem fairly useless if its scope cannot comprehend the injustice apparent in this situation. [85] Reflecting on the inexplicable unfairness of key judicial decisions, Jerome Culp asked:

> How do you defend the tests in Washington v. Davis, the decision in Bowers, or the rule in Korematsu, the failure to apply prior principles in McCleskey, or the reasoning in Shaw v. Reno? [86] He answers his question, "The court ultimately simply responds that we the white majority have the power to do what we want in these cases." [87] He reminds us that white judges, who do not face the same risk in making contracts as the Arguello family, have the power, reinforced by white privilege, to ignore the non-privileged reality. This failure to recognize privilege results in injustice like the Arguello case.

***264 Conclusion**

Catharine Wells explains that judging is "an inherently situated activity." [88] According to Wells, a judge "cannot escape the effects of his or her own particular situation" in performing the task of judging. [89] Wells relates Justice Benjamin Cardozo's illuminating delineation of the situated nature of judging:

> There is in each of us a stream of tendency . . . which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them--inherited instincts, traditional beliefs, acquired convictions . . . . In this mental background every problem finds its settings. We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own. [90] Wells argues that if judging is situated, judges must pay attention to their situation. [91] But it is not only judges, but all of us with white privilege, whether we are decision makers, part of decision-making bodies, or comfortable individuals, who need to pay more attention. Paying attention means becoming more self-conscious about the ways "personal history, character, and outlook" impact the decisions and interactions with which we engage the world. [92] Reaching that self-consciousness is more difficult from within the white comfort zone that emphasizes colorblindness and individualism. Combating the persistence of privilege requires self-consciousness about these socio-cultural patterns and the material conditions that maintain the ***265** white privilege reality. Self-consciousness can be the first step toward action.

Footnotes

a1 Copyright © 2005 Stephanie M. Wildman, Professor of Law and Director, Center for Social Justice and Public Service, Santa Clara University. Thank you to Margalynne Armstrong, Richard Delgado, Barbara Flagg, Sharon Hartmann, Colleen Hudgens, Patricia Leary, Martha Mahoney, Beverly Moran, Margaret Russell, Alan Scheflin, and Michael Tobriner for support and commentary and to Sharon Bashan, John Lough, Jr., Priya Moore, Sylvia Pieslak, and Ellen Platt for research assistance. Thank you to the Santa Clara University School of Law Faculty Scholarship Support Fund for assistance in completing this project.

1 Barbara J. Flagg, "Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent, 91 Mich. L. Rev. 953 (1993).

2 Barbara J. Flagg, Was Blind, But Now I See: White Race Consciousness and the Law (1998).

3 Flagg, supra note 1, at 969.

4 Id.

5 Id.

6 The term "privilege" remains problematic, since privilege can connote a reward for an earned achievement. White privilege is not earned. Yet academic discourse has widely adopted the phrase "white privilege," and, increasingly, more popular circles recognize it as well. An internet search of the phrase, conducted on April 13, 2005, yielded over 102,000 web sources.

7 Eric Arnesen, Whiteness and the Historians' Imagination, 60 Int'l Lab. & Working-Class Hist. 3 (2001) (emphasizing the impact of whiteness studies on labor history).

8 Id. at 9.

9 Id. at 8.

10 Id.

11 Peggy McIntosh, White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work in Women's Studies, in Leslie Bender & Daan Braveman, Power, Privilege, and Law: A Civil Rights Reader 23 (1995).

12 Id. McIntosh lists "special circumstances and conditions" that she did not earn but has been made to feel entitlement for. Her African American co-workers, friends and acquaintances cannot count on these same circumstances and conditions. See also Stephanie M. Wildman, Reflections on Whiteness and Latina/o Critical Theory, 2 Harv. Latino L. Rev. 307 (1997) (listing circumstances and conditions that Latina/os cannot count on).

13 Stephanie M. Wildman with contributions by Margalynne Armstrong, Adrienne D. Davis, & Trina Grillo, Privilege Revealed: How Invisible Preference Undermines America (1996) [hereinafter Privilege Revealed].

14 Id. at 13.

15 Id. at 29.

16 See, e.g., Nicholas Lemann, The Big Test: The Secret History of the American Meritocracy (1999); Daria Roithmayr, Deconstructing the Distinction Between Bias and Merit, 85 Cal. L. Rev. 1449 (1997).

17 Privilege Revealed, supra note 13, at 16-17.

18 Id. at 13-14.

19 See Maurice Berger, White Lies: Race and the Myths of Whiteness (1999); Flagg, supra note 2; Ruth Frankenberg, White Women, Race Matters: The Social Construction of Whiteness (1997); George Lipsitz, The Possessive Investment in Whiteness: How White People Profit from Identity Politics (1998); Thomas Ross, Just Stories: How the Law Embodies Racism and Bias (1996); Privilege Revealed, supra note 13; Sylvia A. Law, White Privilege and Affirmative Action, 32 Akron L. Rev. 603 (1999); McIntosh, supra note 11; Martha R. Mahoney, Segregation, Whiteness, and Transformation, 143 U. Pa. L. Rev. 1659 (1995); Martha R. Mahoney, Whiteness and Remedy: Under-Ruling Civil Rights in Walker v. City of Mesquite, 85 Cornell L. Rev. 1309 (2000); Martha R. Mahoney, Whiteness and Women, In Practice and Theory: A Reply to Catharine MacKinnon, 5 Yale J.L. & Feminism 217 (1993).

20 See Richard Delgado, Two Ways to Think about Race: Reflections on the Id, the Ego, and Other Reformist Theories of Equal Protection, 89 Geo. L.J. 2279, 2280 (2001) (urging consideration of the material factors that contribute to race and racism, including socioeconomic competition, immigration pressures, the search for profits, and changes in the labor pool).

21 Socio-cultural forces may operate indirectly. Political scientist Steven Lukes articulates mechanisms through which dominant forces maintain political power. Steven Lukes, Power: A Radical View (1974). Lukes' second dimension of power includes social values and institutional practices that suppress conflict, keeping "certain interests and issues out of the political sphere altogether." Lucie E. White, To Learn and Teach: Lessons from Driefontein on Lawyering and Power, 1988 Wis. L. Rev. 699, 748. Lukes' third dimension also involves more subtle mechanisms "that place individuals and communities in circumstances where they are constrained from clearly asserting their own interests." Id. at 751. This constraint is accomplished by socializing subordinated groups into "the norms and practices of the dominant culture.... They [subordinated groups] are taught to perceive, remember, imagine the world as though things cannot--and should not--change." Id. at 751-52. See also Lani Guinier & Gerald Torres, The Miner's Canary: Enlisting Race, Resisting Power, Transforming Democracy 109-11 (2002) (discussing Lukes' dimensions of power and the role of cultural mythology in maintaining domination).

22 See Delgado, supra note 20; Nancy Fraser, Recognition or Redistribution? A Critical Reading of Iris Young's, Justice and the Politics of Difference, 3 J. of Pol. Phil. 166 (1995); Nancy Fraser, From Redistribution to Recognition? Dilemmas of Justice in a 'Post-Socialist' Age, 212 New Left Rev. 68. But see Iris Marion Young, Unruly Categories: A Critique of Nancy Fraser's Dual Systems Theory, 222 New Left Rev. 147 (Mar./Apr. 1997) (discussing Nancy Fraser's critique of Young's work

for focusing on identity politics and failing to address the political economy). This article sides with Young in refusing to accept the dichotomization of culture and economy. Young observes:

From Zapatista challengers to the Mexican government, to Ojibwa defenders of fishing rights, to African-American leaders demanding that banks invest in their neighbourhoods, to unions trying to organize a Labor Party, to those sheltering battered women, resistance has many sites and is often specific to a group without naming or affirming a group essence. Most of these struggles self-consciously involve issues of cultural recognition and economic deprivation, but not constituted as totalizing ends. None of them alone is 'transformative,' but, if linked together, they can be deeply subversive. Coalition politics can only be built and sustained if each grouping recognizes and respects the specific perspective and circumstances of the others ....

Id. at 160.

23 For a breathtaking summary of "the way things are" that privilege maleness, see Catharine A. MacKinnon, Toward a Feminist Theory of the State 224 (1989).

Men's physiology defines most sports, their health needs largely define insurance coverage, their socially designed biographies define workplace expectations and successful career patterns, their perspectives and concerns define quality in scholarship, their experiences and obsessions define merit, their military service defines citizenship, their presence defines family, their inability to get along with each other--their wars and rulerships-- defines history, their image defines god, and their genitals define sex.

Id. Male privilege defines these vital aspects of American culture from a male point of view, which then becomes the measure for all of society. See Privilege Revealed, supra note 13, at 15. The breadth of male privilege, illustrated by this quotation explaining the manner in which it defines societal norms, is a useful reference point for beginning to analyze the scope of white privilege. McIntosh, supra note 11.

24 Sheryll Cashin, The Failures of Integration: How Race and Class Are Undermining the American Dream (2004); Douglas S. Massey & Nancy Denton, American Apartheid: Segregation and the Making of the Underclass (1993); Melvin L. Oliver & Thomas M. Shapiro, Black Wealth/White Wealth: A New Perspective on Racial Inequality (1995); Margalynne Armstrong, Race and Property Values in Entrenched Segregation, 52 U. Miami L. Rev. 1051 (1999); Mahoney, Segregation, Whiteness, and Transformation, supra note 19; Florence Wagman Roisman, Teaching About Inequality, Race, and Property, 46 St. Louis U. L.J. 665 (2002).

25 Raymond A. Mohl, Planned Destruction: The Interstates and Central City Housing, in From Tenements to the Taylor Homes: In Search of an Urban Housing Policy in Twentieth-Century America 226, 226 (John F. Bauman et al. eds., 2000).

26 Id.

27 Id.

28 Nancy A. Denton, The Persistence of Segregation: Links Between Residential Segregation and School Segregation, 80 Minn. L. Rev. 795 (1996); Bryan K. Fair, Taking Educational Caste Seriously, 78 Tul. L. Rev. 1843 (2004).

29 William C. Kidder, The Bar Examination and the Dream Deferred, 29 Law & Soc. Inquiry 547 (2004); Daria Roithmayr, Barriers to Entry Entry: A Market Lock-in Model of Discrimination, 86 Va. L. Rev. 727 (2000); Roithmayr, supra note 16.

30 See Oliver & Shapiro, supra note 24; Nancy A. Denton, The Role of Residential Segregation in Promoting and Maintaining Inequality in Wealth and Property, 34 Ind. L. Rev. 1199 (2001); Study Says White Families' Wealth Advantage Has Grown, N. Y. Times, Oct. 18, 2004, at A13 (net worth of white households eleven times greater than Latino households and over fourteen times greater than Black households).

31 See Michael K. Brown et al., Whitewashing Race: The Myth of a Color-Blind Society (2003); Lipsitz, supra note 19.

32 Sleight of hand is a conjuring trick that requires manual dexterity, whereas the individual-group dynamic, see infra notes 41-49 and accompanying text, is a mental trick. The phrase "sleight of mind" better captures the mental process that weaves between individuals and groups, occurring unnoticed. Thank you to Patricia Leary for suggesting this phrase.

33 See Privilege Revealed, supra note 13, at 90-93, for a discussion of "taking back the center," explaining how the use of analogies in reasoning and conversation fuels that sense of entitlement.

34 Edmund G. ("Jerry") Brown Jr. served as governor of California for eight years beginning in 1975. "He appointed an extraordinary number of women and minorities to high government positions, including the first woman, African-American and Latino to the California Supreme Court." Jerry Brown, at http://oaklandnet.com/government/mayor/biography.html (last visited Apr. 13, 2005). In 1998, he was elected mayor of Oakland. Id.

35 Michael Omi, Rethinking the Language of Race and Racism, 8 Asian L.J. 161, 161-62 (2001).

36 Id. at 161-62 (quoting Philip Matier & Andrew Ross, Long March, S.F. Chron., Jan. 10, 2000, at A17). Here is Omi's description of the conversation and its context:
In January of 2000, Oakland Mayor Jerry Brown was asked by San Francisco Chronicle political columnists Phillip Matier and Andrew Ross about his downtown revitalization plans.
The following dialogue ensued:
Matier & Ross: Some people say you're just trying to bring 10,000 white people into the downtown with all these high-priced live-work lofts.
Brown: How do you know what color they are going to be?
Matier & Ross: Come on, who do you think lives in these lofts?
Brown: Well, that's kind of a stigmatization of nonwhite people. There are African Americans, Chinese, Filipinos and there are white people--and by the way, race is just kind of silly anyway because 99 percent of our DNA is the same.
Matier & Ross: Maybe, but race is still a part of politics--especially local politics.
Brown: It's a fact that is often manipulated and used. Yes, there is a tradition and a history of racism and disadvantage and oppression. But having said all that, when do you move on? And when do you try and pull it all together?
Id.

37 Id. at 162.

38 Id. Omi comments, "Any hints of race consciousness are now suspiciously viewed as racist and impermissible in a good, just, and supposedly color-blind society." Id. at 163.

39 Id. at 163. His essay concludes by discussing racial classification, the notion of racism as hate, and conflicts between communities of color. Id. at 163-67.

40 For additional critiques of the notion of colorblindness, see Brown et al., supra note 31; Patricia J. Williams, Seeing a Color-Blind Future (1997); Neil Gotanda, A Critique of "Our Constitution Is Color-Blind," 44 Stan. L. Rev. 1 (1991).

41 See supra note 32 (explaining this phrase).

42 See Robert S. Chang, Disoriented: Asian Americans, Law, and the Nation-State 110 (1999) (musing about Descartes' phrase in relation to affirmative action).

43 David E. Wilkins, Keynote Address: A Constitutional Confession, 37 New Eng. L. Rev. 473, 475 (2003).

44 See john a. powell, Whites Will Be Whites: The Failure to Interrogate Racial Privilege, 34 U.S.F. L. Rev. 419, 422 (2000); Stephanie M. Wildman, Privilege, Gender, and the Fourteenth Amendment: Reclaiming Equal Protection of the Laws, 13 Temp. Pol. & Civ. Rts. L. Rev. 709 (2004) (describing clash between individuals and groups in equal protection jurisprudence).

45 powell, supra note 44, at 449 (criticizing court decisions that "decontextualiz[e] people and groups of people, portraying them as self-created individuals who live outside of any social, historical, or political context"). See also Wildman, supra note 44.

46 powell, supra note 44, at 444 (citing Iris Marion Young, Justice and the Politics of Difference (1990)).

47 U.S. Const. amend. XIV, §1.

48 Mahoney, Whiteness and Remedy, supra note 19; Wildman, supra note 44, at 711-12; see also Michelle Adams, Intergroup Rivalry, Anti-Competitive Conduct and Affirmative Action, 82 B.U. L. Rev. 1089 (2002) (suggesting viewing equal protection in terms of group status and competition).

49 See Privilege Revealed, supra note 13 at 25-41, for further discussion of antidiscrimination law, especially in the workplace context.

50 Charles R. Lawrence III, The Word and the River: Pedagogy as Scholarship as Struggle, 65 S. Cal. L. Rev. 2231, 2231 (1992).

51 Id. at 2231-32.

52 Mahoney, Segregation, Whiteness, and Transformation, supra note 19, at 1661-62.

53 Id. at 1662. John O. Calmore emphasizes the segregation that created this white world: "[I]t is difficult for whites to appreciate the dehumanizing constraints and isolation of imposed segregation .... The compoundedness of race and space ... for whites [is] taken for granted; white space is not problematic and black space is somewhere else." John O. Calmore, Racialized Space and the Culture of Segregation: "Hewing a Stone of Hope from a Mountain of Despair," 143 U. Pa. L. Rev. 1233, 1234 (1995).

54 Mahoney, Segregation, Whiteness, and Transformation, supra note 19, at 1661-62.

55 Amy H. Kastely, Out of the Whiteness: On Raced Codes and White Race Consciousness in Some Tort, Criminal, and Contract Law, 63 U. Cin. L. Rev. 269 (1994); see also Toni Morrison, Recitatif, in Confirmation 243-61 (Amiri Baraka & Amina Baraka eds., 1983).

56 Kastely, supra note 55, at 270-71.

57 Id. at 271 ("Recitatif invites readers to pay attention to the complex arrangements of raced and gendered tropes and codes that are, or are expected to be, quite clear to contemporary readers and to look closely at the construction of race we bring or perform as readers.").

58 One recent, well-publicized example of the battle to control the education agenda has been dubbed the "culture wars" that arose with introduction of non-white-centered history and literature on college campuses. See, e.g., Henry L. Gates, Jr., Loose Canons: Notes on the Culture Wars (1992); Todd Gitlin, The Twilight of Common Dreams: Why America Is Wracked by Culture Wars (1995).

59 Privilege Revealed, supra note 13, at 91.

60 339 U.S. 629 (1950).

61 347 U.S. 483 (1954).

62 Sweatt, 339 U.S. at 631 (at the time of the original lawsuit "there was no law school in Texas which admitted Negroes"). For biographic information on Heman Sweatt, see The Handbook of Texas Online, at http:// www.tsha.utexas.edu/handbook/online/articles/view/SS/fsw23.html (last modified Mar. 8, 2005).

63 Sweatt, 339 U.S. at 633.

64 See Privilege Revealed, supra note 13, at 170-71 for a discussion of legal liberalism.

65 Sweatt, 339 U.S. at 634.

66 The Court stated:
[W]e cannot find substantial equality in the educational opportunities offered white and Negro law students by the State. In terms of number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review and similar activities, the University of Texas Law School is superior. What is more important, the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige. It is difficult to believe that one who had a free choice between these law schools would consider the question close.
Id. at 633-34.

67 Kenneth M. Casebeer, The Empty State and Nobody's Market: The Political Economy of Non-Responsibility and the Judicial Disappearing of the Civil Rights Movement, 54 U. Miami L. Rev. 247 (2000) (describing the dismantling of civil rights precedent); see also id. at 974 (explaining how the Civil Rights Act of 1964 overturned aspects of American culture that had resulted in white privilege); cf. Thomas B. Stoddard, Bleeding Heart: Reflections on Using the Law to Make Social Change, 72 N.Y.U. L. Rev. 967 (1997) (urging a legislative rather than judicial focus for social change); see also id. at 974 (explaining how the Civil Rights Act of 1964 overturned aspects of American culture that had resulted in white privilege).

68 Arguello v. Conoco, 330 F.3d 355, 356 (5th Cir. 2003). The absence of outrage surrounding this decision suggests it is unremarkable, part of "the way things are." A few exceptions, expressing a sense of injury from the case include Deseriee A. Kennedy, Processing Civil Rights Summary Judgment and Consumer Discrimination Claims, 53 DePaul L. Rev. 989 (2004) and Allison McJunkin, Casenote, 10 Wash. & Lee Race & Ethnic Anc. L.J. 163 (2004); see also Anne-Marie G. Harris, Shopping While Black: Applying 42 U.S.C. § 1981 to Cases of Consumer Racial Profiling, 23 B.C. Third World L.J. 1 (2003) (citing facts of Arguello in notes).
Several surveys of franchise law do mention the case, see, e.g., Deborah S. Coldwell et al., Franchise Law, 53 SMU L. Rev. 1055, 1076 (2000); William L. Killion, Ellen R. Lokker, & Anne-Marie Gauthier, 2001 Franchising Currents, 20 WTR Franchise L.J. 150, 152 (2001); see also Lynn M. LoPucki, Toward a Trademark-Based Liability System, 49 UCLA L. Rev. 1099, 1101 (2002) (citing Arguello as supporting the need for liability for trademark owners).

69 2001 WL 1442340, No. CIV.A. 397CV0638-H, at *1 (N.D. Tex. Nov. 9, 2001).

70 330 F.3d at 356-57.

71 Id. at 362.

72 Id. at 358.

73 "The first element is not disputed--all parties concede that Arguello and Govea are Hispanic." Id.

74 [T]he testimonial and other evidence provides a basis for concluding that Smith subjected Arguello to substandard service. In conjunction with that evidence of maltreatment, the testimony regarding the racially charged nature of Smith's comments sufficed to create a jury question regarding whether Smith intentionally discriminated against plaintiffs on the basis of race. Id.

75 Id.

76 Id. at 359.

77 Id.

78 Id.

79 Id. (citing 42 U.S.C. §1981(b)).

80 Id. at 360-61.

81 Id. at 361.

82 Thank you to Martha Mahoney for offering this insightful question.

83 Kennedy, supra note 68, at 1009 ("[W]hite judges may lack the experiences to be able to recognize the legal harms articulated in a consumer discrimination complaint.... [I]t is very likely that these are the same stores in which white upper-class males (like judges) shop without incident.").

84 This family did not have same security a white family would have when traveling by car and stopping to purchase gas. See, e.g., Privilege Revealed, supra note 13, at 168-69 (following the eviction of two families, one white and one African-American, the African-American family has fewer options when seeking new housing than the white counterpart).

85 Wildman, supra note 44, at 711-12.

86 Jerome McCristal Culp, Jr., To the Bone: Race and White Privilege, 83 Minn. L. Rev. 1637, 1669 (1999).

87 Id.

88 Catharine Pierce Wells, Improving One's Situation: Some Pragmatic Reflections on the Art of Judging, 49 Wash. & Lee L. Rev. 323, 323 (1992); see also Sherrilyn A. Ifill, Racial Diversity on the Bench, 57 Wash. & Lee L. Rev. 405 (2000) (explaining that minority judges could enrich judicial decisionmaking as representatives of outsider perspectives); Catharine Wells, Situated Decisionmaking, 63 S. Cal. L. Rev. 1727 (1990) (discussing contextual decisionmaking).

89 Wells, Improving One's Situation, supra note 88, at 324.

90 Id. at 323 (quoting Benjamin N. Cardozo, The Nature of the Judicial Process 12-13 (1921)).

91 Id.

92 Id. at 324.

18 WAUJLP 245

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CHARLES J. GEARHISER (1938-2013)

*ALSO ADMITTED IN GEORGIA
**ALSO ADMITTED IN MISSISSIPPI

March 21, 2018

VIA ELECTRONIC MAIL
Honorable Jeffrey S. Bivins, Chief Justice
Honorable Cornelia A. Clark, Justice
Honorable Holly Kirby, Justice
Honorable Sharon G. Lee, Justice
Honorable Roger A. Page, Justice

Attn: James M. Hivner, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, Tennessee 37219-1407
appellatecourtclerk@tncourts.gov

Re: Tenn. Sup. Ct. R. 8, Proposed Rule 8.4(g), Docket No. ADM2017-02244

To the Honorable Justices of the Tennessee Supreme Court:

I write to oppose the above-referenced petition and proposed changes to Tennessee Rule of Professional Conduct 8.4(g). Though several lawyers have provided thoughtful and cogent arguments and reasons for rejecting the proposed revisions to Rule 8.4(g), I adopt by reference and join the comments filed by the Christian Legal Society on January 31, 2018 and my law partner Sam D. Elliott on February 9, 2018.

I respectfully urge the Court to reject the proposed revisions to Rule 8.4(g).

Very truly yours,

Gary L. Henry
For Gearhiser, Peters, Elliott & Cannon, PLLC
BPR #025448

appellatecourtclerk - Tenn. Sup. Ct. R. 8, Proposed Rule 8.4(g), Docket No. ADM2017-02244

From: "Gary L. Henry" <ghenry@gearhiserpeters.com>
To: "appellatecourtclerk@tncourts.gov" <appellatecourtclerk@tncourts.gov>
Date: 3/21/2018 11:02 AM
Subject: Tenn. Sup. Ct. R. 8, Proposed Rule 8.4(g), Docket No. ADM2017-02244
Attachments: Letter to Supreme Court Justices re Propsosed Rule 8(g).pdf

Mr. Hivner:

Attached please find my comment regarding Tennessee Rule of Professional Conduct 8.4(g). Thank you in advance for accepting my comment.

Gary L. Henry (BPR #025448)
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AARON SHANKMAN (1918-2011)
*ALSO ADMITTED IN MISSISSIPPI
**ALSO ADMITTED IN ARKANSAS

March 21, 2018

VIA EMAIL: appellatecourtclerk@tncourts.gov
James M. Hivner, Clerk
Tennessee Supreme Court
100 Supreme Court Bldg.
401 7th Avenue North
Nashville, TN 37219-1407

Re: **Comment as to Proposed Amendments to RPC 8.4(g)**
Docket No. ADM 2017-02244

Dear James:

I write to express my strong feelings **against** the Tennessee Supreme Court adopting proposed amended RPC 8.4(g). As a member of the Professionalism Committee of the Memphis Bar Association, I have reviewed this matter rather extensively and have talked with a number of colleagues both on and off such committee. I remain extremely concerned about the potential violation of First Amendment rights, as well as independent, professional judgment issues that we as practicing attorneys hold dear, and must safeguard.

While I do not, in any way, condone harassment or discrimination by anyone, particularly a member of the Bar, I feel very strongly that a lawyer should have no additional or unnecessary restraints on his or her ability to give independent legal advice and counsel, and to speak freely as a citizen protected by the First Amendment of our United States Constitution, at any time, including advising a client in an attorney-client privilege relationship. The overly broad language of the proposed amendments as to what constitutes the "practice of law," which could include an attorney's speaking at unrelated civic or religious venues or even in family situations, is unacceptable.

There are many other reasons which are much more artfully stated in the comment opposing the proposed amendments filed by the Christian Legal Society, to which I refer, and with which I concur wholeheartedly. I understand that such CLS comment was filed on January 31, 2018 with your office.

Thank you for your courtesies and allowing me to comment on this matter.

Very truly yours,

Lancelot L. Minor

LLM/vcl

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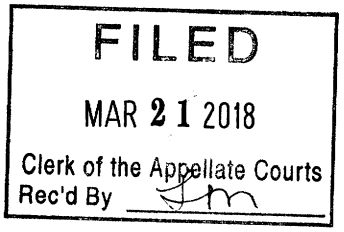
appellatecourtclerk - Comment Submitted - Docket No. ADM2017-02244 Attached Image

From: Lance Minor <lminor@bhammlaw.com>
To: "James Hivner (appellatecourtclerk@tncourts.gov)" <appellatecourtclerk@t...
Date: 3/21/2018 12:03 PM
Subject: Comment Submitted - Docket No. ADM2017-02244 Attached Image
Attachments: 0687_001.pdf

Please see attached correspondence.



Respectfully,
-Lance

BOURLAND HEFLIN ALVAREZ MINOR & MATTHEWS, PLC
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TENNESSEE BAR ASSOCIATION

March 21, 2018

The Honorable James Hivner
Clerk, Tennessee Supreme Court
Supreme Court Building, Room 100
401 7th Avenue North
Nashville, TN 37219

IN RE: COMMENT OF BOARD OF PROFESSIONAL RESPONSIBILITY OF THE SUPREME COURT OF TENNESSEE AND TENNESSEE BAR ASSOCIATION IN FURTHER SUPPORT OF JOINT PETITION FOR THE ADOPTION OF A NEW TENN. SUP. CT. R. 8, RPC 8.4(g)

Dear Jim:

Attached please find an original and one copy of the Comment of the Board of Professional Responsibility and the Tennessee Bar Association in reference to the above matter.

As always, thank you for your cooperation.

Sincerely,

Joycelyn A. Stevenson
Executive Director

cc: Jimmie C. Miller, Board of Professional Responsibility
Sandy Garrett, Board of Professional Responsibility
Lucian T. Pera, President, Tennessee Bar Association
Brian S. Faughnan, Chair, Tennessee Bar Association Committee on Ethics and Professional Responsibility
Ed Lanquist, General Counsel
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IN THE SUPREME COURT OF TENNESSEE

IN RE:	)	
PETITION FOR THE ADOPTION OF A NEW TENN. SUP. CT. R. 8, RPC 8.4(g)	)	No. ADM2017-02244

COMMENT OF BOARD OF PROFESSIONAL RESPONSIBILITY OF THE SUPREME COURT OF TENNESSEE AND TENNESSEE BAR ASSOCIATION IN FURTHER SUPPORT OF JOINT PETITION FOR THE ADOPTION OF A NEW TENN. SUP. CT. R. 8, RPC 8.4(g)

The Board of Professional Responsibility of the Supreme Court of Tennessee ("BPR") and the Tennessee Bar Association ("TBA") jointly submit this comment in further support of their joint petition, filed November 15, 2017, to adopt a new Tenn. Sup. Ct. R. 8, RPC 8.4(g) to prohibit discrimination and harassment by lawyers in conduct related to the practice of law:

Specifically, the BPR and the TBA amend their joint proposed language for a new Rule 8.4(g) in response to, and to accommodate a number of, the constructive suggestions for the improvement of the proposed Rule made by Professor Josh Blackman of the South Texas College of Law and the Knoxville Bar Association. Professor Blackman's comment, filed by email on December 11, 2017, included praise for certain aspects of Petitioners' modifications of the ABA Model Rule and several specific suggestions for further improvement. The Knoxville Bar Association filed its comment on March 14, 2018, and supported enactment of a Tennessee rule that would incorporate these suggested revisions and a separate black-letter revision. Petitioners' revised proposed language is attached as Exhibit A.

Petitioners have carefully considered each of these suggestions and adopted revisions to the proposal intended to accommodate almost all of these suggestions.

AMENDMENTS TO PROPOSED LANGUAGE

I. Clarifying and confirming that the proposed Rule would not affect or limit lawyer decision-making concerning accepting, declining, or withdrawing from representation.

In the first of two amendments to the proposed black-letter Rule 8.4(g), Petitioners have deleted "in accordance with RPC 1.16," from the second sentence of the proposed black-letter Rule, as follows:

Original proposed Rule 8.4(g):

> This paragraph does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with RPC 1.16.

Revised proposed 8.4(g) (deleted language ~~struckthrough~~):

> This paragraph does not limit the ability of a lawyer to accept, decline, or withdraw from a representation ~~in accordance with RPC 1.16~~.

The original reference to Rule 1.16 was intended to point to the only provision in the Rules of Professional Conduct that *does*, in fact, limit "the ability of a lawyer to accept, decline, or withdraw from a representation. However, some commenters believed that the reference was confusing. Petitioners agree that deleting "in accordance with RPC 1.16" leads to a simpler and clearer rule that has the same meaning as the drafters intended by the original proposed language.

II. Clarifying and confirming that the "legitimate advice or advocacy" exception to the proposed Rule is not limited by the ban on discrimination or harassment in proposed Rule 8.4(g).

In the second of two amendments to the proposed black-letter Rule 8.4(g), Petitioners have reformulated the second sentence of the proposed black-letter Rule to avoid an unintended circularity that some commenters saw in the original proposed Rule. The revision is as follows:

Original proposed Rule 8.4(g):

> This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

Revised proposed 8.4(g) (deleted language ~~struckthrough~~; added language underlined:

> This paragraph does not preclude legitimate advice or advocacy ~~consistent with these Rules~~ that does not violate other Rules of Professional Conduct.

In the view of Petitioners, a clear and strong "legitimate-advice-or-advocacy" exception to proposed Rule 8.4(g) is an absolutely essential element of the proposal. Without it, the proposed Rule should not be adopted. That said, the Petitioners nevertheless believe it is important that this the "legitimate-advice-or-advocacy" exception not be used to excuse or defend speech or conduct that *otherwise* amounts to disciplinary misconduct under the Rule. For example, filing a frivolous pleading in court violates RPC 3.1 (Meritorious Claims and Contentions), but a non-frivolous complaint that violates neither Rule 3.1 nor any other Rule (other than Rule 8.4(g)) should be considered "legitimate advocacy" exempt from the prohibition on discrimination and harassment in proposed Rule 8.4(g).

Some commenters believed, however, that the original formulation meant (or could be read to mean) that no advice or advocacy could be "legitimate," and thus excepted from the ban on discrimination and harassment, if that advice or advocacy itself was somehow discriminatory or harassing. That was not the intent of the drafters. Therefore, following the suggestion of the Knoxville Bar Association, the revised proposed language limits the internal reference so that it only refers to Rules of Professional Conduct *other than* proposed Rule 8.4(g). Petitioners believe that this amendment clarifies and better expresses the intent of this provision and avoids the circularity perceived by some commenters.

III. Adding language to proposed Comment [4] to clarify the reach of the "legitimate advice or advocacy" exception.

In the first of two amendments of the proposed Comments, Petitioners have added a sentence to Comment [4] substantively identical to language suggested by Professor Blackman and the Knoxville Bar Association aimed at addressing the interaction of First Amendment protection of speech and the extension of the prohibition on lawyer discrimination and harassment beyond the representation of clients to all lawyer conduct related to the practice of law.

Professor Blackman suggested that language added by the Petitioners to the ABA version "could be improved by providing some context of what "non-traditional settings" are covered by "conduct related to the practice of law." Thus, in context, Petitioners have revised proposed Comment [4] to add a sentence substantively identical to language suggested by Professor Blackman and endorsed by the Knoxville Bar Association. That added language, shown in context, is as follows (added language underlined):

> [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. 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. Legitimate advocacy protected by Section (g) includes advocacy in any conduct related to the practice of the law, including circumstances where a lawyer is not representing a client and outside traditional settings where a lawyer acts as an advocate, such as litigation. For example, legitimate advocacy protected by Section (g) includes speech on matters of public concern at bar association functions, continuing legal education classes, law school classes, and other similar forums.

Petitioners believe that this added language clarifies the interpretation of "conduct related to the practice of law" in a way consistent with the black letter and directly responsive to

numerous comments expressing concern about the reach of the proposed Rule into lawyer speech in public and in venues such as CLE presentations.

IV. Adding language to proposed Comment [4a] to clarify that the intent of the proposed Rule is that it not reach conduct protected by the First Amendment.

In the second of two amendments of the proposed Comments, Petitioners have reformulated proposed Comment [4a] to address legitimate criticism that the original proposed language – language drafted by Petitioners to improve the ABA draft – could more clearly recognize the role of the First Amendment in the application of this proposed Rule. Petitioners believe that the proposed Rule does not violate the First Amendment rights of lawyers. That said, to provide those who would be charged with interpreting and applying this language with crystal clear guidance as to its intended application, Petitioners believe that adding express Comment language to this effect would be beneficial. Commenters suggested, however, that this express statement of intent could be improved, and Petitioners agree.

For this reason, the Petitioners have revised Comment [4a] as follows:

Original Comment [4a]:

> [4a] Section (g) does not restrict any speech or conduct not related to the practice of law, including speech or conduct protected by the First Amendment. Thus, a lawyer's speech or conduct unrelated to the practice of law cannot violate this Section.

Revised Comment [4a]:

> [4a] Section (g) does not apply to conduct protected by the First Amendment, as a lawyer does retain a "private sphere" where personal opinion, freedom of association, religious expression, and political speech are protected by the First Amendment and not subject to this Rule. A lawyer's speech or conduct unrelated to the practice of law cannot violate this Section.

This revision is again based on language proposed originally by Professor Blackman and endorsed by the Knoxville Bar Association.

Petitioners believe that this amendment more clearly expresses the intent of the drafters and would more clearly guide the Rule's appropriate interpretation and application.

CONCLUSION

For all of the reasons set forth in the original Joint Petition and above, the BPR and the TBA jointly request this Court to adopt the amendments to Tenn. Sup. Ct. R. 8, RPC 8.4 that are reflected in Exhibit A, as revised from their original joint proposal. Further, the TBA and the BPR request that the costs of filing this Petition be waived in the public interest and given the purpose for which submitted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing will be served, within 7 days of the filing of this document, upon the individuals and organizations identified in Exhibit "D" to the petition by regular U.S. Mail, postage prepaid.

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EXHIBIT A TO COMMENT OF BPR AND TBA

Comparison of Specific *Revised* Language Proposed by BPR and TBA
to Current Tennessee Rule
(as revised March 21, 2018, as part of Comment)

Comparison of Specific *Revised* Language Proposed by BPR and TBA to Current Tennessee Rule
(as revised March 21, 2018, as part of Comment;
deleted language ~~struckthrough~~; added language underlined)

RULE 8.4: MISCONDUCT

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence a tribunal or a governmental agency or official on grounds unrelated to the merits of, or the procedures governing, the matter under consideration;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;

(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. This paragraph does not preclude legitimate advice or advocacy that does not violate other Rules of Professional Conduct; or

(~~g~~h) knowingly fail to comply with a final court order entered in a proceeding in which the lawyer is a party, unless the lawyer is unable to comply with the order or is seeking in good faith to determine the validity, scope, meaning, or application of the law upon which the order is based.

Comment

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so

through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. Although under certain circumstances a single offense reflecting adversely on a lawyer's fitness to practice --such as a minor assault -- may not be sufficiently serious to warrant discipline, a pattern of repeated offenses, even ones that are of minor significance when considered separately, can indicate indifference to legal obligation.

[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). ~~A lawyer who, in the course of representing a client, knowingly manifests, by words or conduct, bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation, or socio-economic status violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d).~~

[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. 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. Legitimate advocacy protected by Section (g) includes advocacy in any conduct related to the practice of the law, including circumstances where a lawyer is not representing a client and outside traditional settings where a lawyer acts as an advocate, such as litigation. For example, legitimate advocacy protected by Section (g)

includes speech on matters of public concern at bar association functions, continuing legal education classes, law school classes, and other similar forums.

[4a] Section (g) does not apply to conduct protected by the First Amendment, as a lawyer does retain a "private sphere" where personal opinion, freedom of association, religious expression, and political speech are protected by the First Amendment and not subject to this Rule. A lawyer's speech or conduct unrelated to the practice of law cannot violate this Section.

[5a] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g).

[5b] 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.

[5c] Lawyers should be mindful of their professional obligations under RPC 6.1 to provide legal services to those who are unable to pay, and their obligation under RPC 6.2 not to avoid appointments from a tribunal except for good cause. Nevertheless, a lawyer does not engage in conduct that harasses or discriminates based on socio-economic status merely by charging and collecting reasonable fees and expenses for a representation.

[5d] A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. *See* RPC 1.2(b).

[64] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of RPC 1.2(d) concerning a good faith challenge to the validity, scope, meaning, or application of the law apply to challenges of legal regulation of the practice of law.

[75] Paragraph (c) prohibits lawyers from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. Such conduct reflects adversely on the lawyer's fitness to practice law. In some circumstances, however, prosecutors are authorized by law to use, or to direct investigative agents to use, investigative techniques that might be regarded as deceitful. This Rule does not prohibit such conduct.

[86] The lawful secret or surreptitious recording of a conversation or the actions of another for the purpose of obtaining or preserving evidence does not, by itself, constitute conduct involving deceit or dishonesty. *See* RPC 4.4.

[97] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill

the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director, or manager of a corporation or other organization.

[10~~8~~] Paragraph (f) precludes a lawyer from assisting a judge or judicial officer in conduct that is a violation of the rules of judicial conduct. A lawyer cannot, for example, make a gift, bequest, favor, or loan to a judge, or a member of the judge's family who resides in the judge's household, unless the judge would be permitted to accept, or acquiesce in the acceptance of such a gift, favor, bequest, or loan in accordance with Canon 4, Section D(5) of the Code of Judicial Conduct.

[11~~9~~] In both their professional and personal activities, lawyers have special obligations to demonstrate respect for the law and legal institutions. Normally, a lawyer who knowingly fails to obey a court order demonstrates disrespect for the law that is prejudicial to the administration of justice. Failure to comply with a court order is not a disciplinary offense, however, when it does not evidence disrespect for the law either because the lawyer is unable to comply with the order or the lawyer is seeking in good faith to determine the validity, scope, meaning, or application of the law upon which the order is based.

DEFINITIONAL CROSS-REFERENCES

"Fraud" *See* RPC 1.0(d)
"Knowingly" and "knows" *See* RPC 1.0(f)
"Reasonably should know" *See* RPC 1.0(j)
"Tribunal" *See* RPC 1.0(m)

EXHIBIT B TO COMMENT OF BPR AND TBA

Comparison of Specific *Revised* Language Proposed by BPR and TBA
To ABA Model Rule of Professional Conduct 8.4(g)
(as revised March 21, 2018, as part of Comment)

Comparison of Specific *Revised* Language Proposed by BPR and TBA
To ABA Model Rule of Professional Conduct 8.4(g)
(as revised March 21, 2018, as part of Comment)

RULE 8.4: MISCONDUCT

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 RPC 1.16~~. This paragraph does not preclude legitimate advice or advocacy ~~consistent with these Rules~~ that does not violate other Rules of Professional Conduct.

Comment

* * *

[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. 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. For example, legitimate advocacy protected by Section (g) includes speech on matters of public concern at bar association functions, continuing legal education classes, law school classes, and other similar forums.

[4a] Section (g) does not apply to conduct protected by the First Amendment, as a lawyer does retain a "private sphere" where personal opinion, freedom of association, religious expression, and political speech are protected by the First Amendment and not subject to this Rule. A lawyer's speech or conduct unrelated to the practice of law cannot violate this Section.

[5a] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g).

[5b] 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.

[5c] ~~A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a).~~ Lawyers should ~~also~~ be mindful of their professional obligations under R~~ule~~PC 6.1 to provide legal services to those who are unable to pay, and their obligation under R~~ule~~PC 6.2 not to avoid appointments from a tribunal except for good cause. ~~See Rule 6.2(a), (b) and (c).~~ Nevertheless, a lawyer does not engage in conduct that harasses or discriminates based on socio-economic status merely by charging and collecting reasonable fees and expenses for a representation.

[5d] A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. *See* R~~ule~~PC 1.2(b).

* * *

EXHIBIT C TO COMMENT OF BPR AND TBA

Comparison of Specific *Revised* Language Proposed by BPR and TBA
to Original Language Proposed by BPR and TBA
(as revised March 21, 2018, as part of Comment)

Comparison of Specific *Revised* Language Proposed by BPR and TBA to Original Language Proposed by BPR and TBA
(as revised March 21, 2018, as part of Comment;
deleted language ~~struckthrough~~; added language underlined)

RULE 8.4: MISCONDUCT

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence a tribunal or a governmental agency or official on grounds unrelated to the merits of, or the procedures governing, the matter under consideration;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;

(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 RPC 1.16~~. This paragraph does not preclude legitimate advice or advocacy ~~consistent with these Rules~~ that does not violate other Rules of Professional Conduct; or

(h) knowingly fail to comply with a final court order entered in a proceeding in which the lawyer is a party, unless the lawyer is unable to comply with the order or is seeking in good faith to determine the validity, scope, meaning, or application of the law upon which the order is based.

Comment

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. Although under certain circumstances a single offense reflecting adversely on a lawyer's fitness to practice --such as a minor assault -- may not be sufficiently serious to warrant discipline, a pattern of repeated offenses, even ones that are of minor significance when considered separately, can indicate indifference to legal obligation.

[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. 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. Legitimate advocacy protected by Section (g) includes advocacy in any conduct related to the practice of the law, including circumstances where a lawyer is not representing a client and outside traditional settings where a lawyer acts as an advocate, such as litigation. <u>For example, legitimate advocacy protected by Section (g) includes speech on matters of public concern at bar association functions, continuing legal education classes, law school classes, and other similar forums.</u>

[4a] ~~Section (g) does not restrict any speech of conduct not related to the practice of law, including speech or conduct protected by the First Amendment.~~ Section (g) does not apply to conduct protected by the First Amendment, as a lawyer does retain a "private sphere" where personal opinion, freedom of association, religious expression, and political speech are protected by the First Amendment and not subject to this Rule. ~~Thus, a~~ A lawyer's speech or conduct unrelated to the practice of law cannot violate this Section.

[5a] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g).

[5b] 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.

[5c] Lawyers should be mindful of their professional obligations under RPC 6.1 to provide legal services to those who are unable to pay, and their obligation under RPC 6.2 not to avoid appointments from a tribunal except for good cause. Nevertheless, a lawyer does not engage in conduct that harasses or discriminates based on socio-economic status merely by charging and collecting reasonable fees and expenses for a representation.

[5d] A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. *See* RPC 1.2(b).

[6] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of RPC 1.2(d) concerning a good faith challenge to the validity, scope, meaning, or application of the law apply to challenges of legal regulation of the practice of law.

[7] Paragraph (c) prohibits lawyers from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. Such conduct reflects adversely on the lawyer's fitness to practice law. In some circumstances, however, prosecutors are authorized by law to use, or to direct investigative agents to use, investigative techniques that might be regarded as deceitful. This Rule does not prohibit such conduct.

[8] The lawful secret or surreptitious recording of a conversation or the actions of another for the purpose of obtaining or preserving evidence does not, by itself, constitute conduct involving deceit or dishonesty. *See* RPC 4.4.

[9] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill

the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director, or manager of a corporation or other organization.

[10] Paragraph (f) precludes a lawyer from assisting a judge or judicial officer in conduct that is a violation of the rules of judicial conduct. A lawyer cannot, for example, make a gift, bequest, favor, or loan to a judge, or a member of the judge's family who resides in the judge's household, unless the judge would be permitted to accept, or acquiesce in the acceptance of such a gift, favor, bequest, or loan in accordance with Canon 4, Section D(5) of the Code of Judicial Conduct.

[11] In both their professional and personal activities, lawyers have special obligations to demonstrate respect for the law and legal institutions. Normally, a lawyer who knowingly fails to obey a court order demonstrates disrespect for the law that is prejudicial to the administration of justice. Failure to comply with a court order is not a disciplinary offense, however, when it does not evidence disrespect for the law either because the lawyer is unable to comply with the order or the lawyer is seeking in good faith to determine the validity, scope, meaning, or application of the law upon which the order is based.

DEFINITIONAL CROSS-REFERENCES

"Fraud" *See* RPC 1.0(d)
"Knowingly" and "knows" *See* RPC 1.0(f)
"Reasonably should know" *See* RPC 1.0(j)
"Tribunal" *See* RPC 1.0(m)

"Exhibit D"

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March 21, 2018

ADM2017-02244

The Honorable Jeffrey S. Bivins, Chief Justice
The Honorable Cornelia A. Clark, Justice
The Honorable Holly Kirby, Justice
The Honorable Sharon G. Lee, Justice
The Honorable Roger A. Page, Justice

Attn: James M. Hivner, Clerk
Tennessee Supreme Court
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219

Re: American Bar Association's New Model Rule of Professional Conduct Rule 8.4(g)

To the Honorable Justices of the Tennessee Supreme Court:

Thank you for requesting written comments on the potential adoption of the above referenced rule. I am taking this opportunity to respectfully, yet strenuously, object to the adoption of the rule.

I adopt and support the position of the Attorney General, Herbert H. Slatery, III, stated in Opinion No. 18-11, filed March 16, 2018. I whole-heartedly agree that the adoption of proposed Rule 8.4(g) would infringe upon Tennessee attorneys' right to free speech, freedom of association, free exercise of religion, and due process.

Thank you for allowing the opportunity to publicly comment upon this proposed rule.

Sincerely,

Sheila Butt

appellatecourtclerk - Re: Tenn. Sup. Ct. R. 9, section 32; No. ADM2017-02244

From: "Tarkington, Margaret Christine" <mtarking@iupui.edu>
To: "appellatecourtclerk@tncourts.gov" <appellatecourtclerk@tncourts.gov>
Date: 3/20/2018 2:02 AM
Subject: Re: Tenn. Sup. Ct. R. 9, section 32; No. ADM2017-02244
Attachments: Tennessee Rule 8.4(g) Letter.docx

Attached please find my comments as to the proposed adoption of Tenn. Sup. Ct. R. 8, RPC 8.4(g).

Thank you,

Margaret Tarkington
Professor of Law
Indiana University McKinney School of Law
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Margaret Tarkington
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James M. Hivner, Clerk
Re: Tenn. Sup. Ct. R. 9, section 32
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

March 20, 2018

RE: In Re Petition for the Adoption of a New Tenn. Sup. Ct. R. 8, RPC 8.4(g), No. ADM2017-02244

Dear Mr. Hivner and the Tennessee Supreme Court:

My name is Margaret Tarkington and I am a Professor of Law at Indiana University McKinney School of Law. My primary area of research expertise is the First Amendment rights of lawyers. I have written seven articles on that topic and have just completed a book for Cambridge University Press entitled *Voice of Justice: Reclaiming First Amendment Rights of Lawyers*, which will be published later this year. The following comments are adapted from a chapter of that manuscript. I have also served as an expert witness and consultant in disciplinary proceedings in several States brought against lawyers for their speech, association, or petitioning as protected by the First Amendment.

While the goals of Tennessee proposed Rule 8.4(g) are admirable and important (curbing bias and discrimination), that does not render the rule constitutionally firm. Laudably, Tennessee's proposed rule expressly asserts protection of lawyer First Amendment rights—but only as to speech that is wholly "unrelated to the practice of law." While this is a good alteration from the ABA's Model Rule 8.4(g), it alone does not adequately protect lawyers' First Amendment rights.

Antidiscrimination laws that have withstood constitutional challenge require that prohibited harassment or discrimination—especially if accomplished through pure speech—be "pervasive" or "severe." Unlike these antidiscrimination laws, Tennessee's proposed rule 8.4(g) broadly defines prohibited discrimination as "harmful ***verbal*** or physical ***conduct that manifests bias or prejudice towards others***," and defines prohibited harassment to include "***derogatory or demeaning verbal*** or physical ***conduct***." Despite using the word "conduct" in each definition, the fact of the matter is that a restriction on "verbal conduct" is a restriction on pure speech. "Verbal conduct" is speech, pure and simple. Requiring such harassment or discrimination whenever solely verbal to be severe or pervasive would substantially solve the infirmities with this rule.

Moreover, while the rule does not apply to speech unrelated to the practice of law, nevertheless, the rule expressly extends to "*conduct related to* the practice of law," which is **expansively defined in the comments to include "participating in bar association, business or social activities in connection with the practice of law."** The ABA's Report on Model Rule 8.4(g) and the legislative history indicate that this expansive definition of "related to the practice of law" was intended to capture sexual harassment at dinner events, CLEs, etc.[1] But if

[1] *Am. Bar Ass'n, Standing Comm. on Ethics and Professionalism, Report to the House of Delegates (Revised 109) 2 (August 2016)* at 11 (stating that "conduct related to the practice of law includes activities such as law firm dinners and

Tennessee wants to stop sexual harassment in such contexts, then it should narrowly define the prohibition as covering sexual harassment and ***not as prohibiting all speech that "manifests bias or prejudice" or is "derogatory or demeaning."***

Critically, the speech that is swept within the ambit of Rule 8.4(g) has implications for many of "the major public issues of our time"[2]—issues that decisively divide our country. These issues include marriage equality, gender identity issues including bathroom and locker-room usage, homosexual and single parent adoptions and surrogacies, birth control and abortion, terrorism, and immigration and refugee assistance—to name only a few. Importantly, Rule 8.4(g) tends to cut out expression on only one side of a given debate. For example, if an attorney says that he opposes bathroom usage in one's bathroom of choice rather than according to biological sex because it keeps out sexual predators, that argument may be considered demeaning or as manifesting bias on the basis of gender identity. But a person on the opposite side of the issue is free to argue that everyone should be free to use their bathroom of choice, because that statement does not manifest bias. Similarly, to support and make arguments in favor of marriage equality is allowed, but to make arguments against it may be demeaning or expressing bias on the basis of sexual orientation. And so it continues, with exclusion heavily weighted against conservative views. Rule 8.4(g) stops such arguments before they are even made—it is a ***viewpoint-based prior restraint*** that disproportionately forecloses arguments and expressions of opinion on one side of issues of public concern.

These issues are of acute importance to millions of Americans—issues that drive people to vote for particular candidates or to belong to certain political parties. And ultimately these issues will be resolved by laws, regulations, and policies, which will be determined and enforced through legislation, court cases, and executive action—all of which is entirely dependent on lawyers. Lawyers will write the legislation, will litigate the court cases, will draft policies, will evaluate constitutionality, and will execute the law. To cut lawyers on one side of these issues out of the conversation is wildly unconstitutional and completely undermines the role of the lawyer in the system of justice. Lawyers are the very people who have the knowledge, skills, and ability to articulate and implement legal policies, accommodations, and options—as well as to air and evaluate grievances and to propose legal remedies. Silencing lawyers from expressing their opinions on these issues—especially to other lawyers at law-related functions, CLEs, law school presentations, conferences, etc.—will forestall the wheels of political change; it will halt accommodation and conversation across the aisle of political divergence among lawyers. Such conversations and accommodations are desperately needed. ***Rule 8.4(g) constitutes viewpoint discrimination of political speech on the great issues of our times as to the very people (lawyers) who are necessary to consider and implement political change.***

Even if one whole-heartedly believes that certain viewpoints are entirely wrongheaded, the First Amendment forbids government—including state courts and bars—from authoritative selection as to what is orthodox in national politics, society, and policy. If one disagrees with speech that indicates it is essential to protect privacy to require that people use bathrooms of their biological sex, that marriage should only be between a man and a woman as it has been for millennia before us, that a woman's primary role in society is as mother, that married heterosexual couples are the preferred choice for adoption of children, that a significant contingent of Muslims are radical Islamic terrorists, that the country would fare better with fewer immigrants and refugees (and for the record, I am not personally advocating any of these views here), then the First Amendment declares that **the answer is *more speech***—one can and should explain why these views are wrong and are

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other nominally social events at which lawyers are present," and explaining that the committee "was presented with substantial anecdotal information that sexual harassment takes place at such events").

[2] New York Times v. Sullivan, 376 U.S. 254, 271 (1964).

detrimental to individuals and to society. "It is precisely this kind of choice"—between more speech and an enforced silence—"which the First Amendment makes for us."[3]

The First Amendment, as Justice Brandeis reminds us "eschews silence coerced by law—the argument of force in its worst form."[4] And the proposed Rule 8.4(g) is an enforced silence—an "argument of force" rather than of deliberation and education. Lawyers are threatened with loss of their livelihood should they express such views. The First Amendment forbids such "authoritative selection."[5] The Supreme Court explained:

> If there is any *fixed star* in our constitutional constellation, it is that *no official*, high or petty, *can prescribe what shall be orthodox in politics, nationalism, religion, or other matters* of opinion or *force citizens to confess* by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us."[6]

State bars cannot declare what views are "orthodox" and thus allowed to be expressed at CLE programs, dinner parties, bar-sponsored discussions, and law school panels, presentations and classes.

Additionally, to forbid or chill speech on one side of these issues at CLEs and bar-sponsored discussions will undermine a healthy robust dialogue *among lawyers* as to how to represent and accommodate divergent viewpoints and interests. Again, it is lawyers who generally spearhead changes in law and policy, and they must collectively—precisely at CLEs, dinners, conferences, law school panels—fully discuss these issues. As the *Sullivan* Court emphasized, debate on public issues must be "robust, uninhibited, and wide open." But by chilling speech on one side of these public issues, instead we would have "myopic, inhibited, and enclosed" debate. Political myopia—the inability to see, countenance, or even give a hearing to—another party's viewpoints seriously undermines the dialogue that is necessary to successful self-government. It was precisely in the context of punishment of lawyer speech that the Supreme Court asserted that "speech concerning public affairs is more than self-expression; it is the essence of self-government."[7] Moreover, as Justice Brandeis warned, "repression breeds hate."[8] It just does. And "hate menaces stable government."[9] That—maintaining a stable system of self-government where each citizen, including lawyers, retains the "freedom to think as you will and to speak as you think" as to public issues—is the value of allowing people who hold these views to express them.[10] It is the *only* path of safety—to allow people "the opportunity to discuss freely supposed grievances and proposed remedies" and accommodations.[11]

Importantly, it is not enough to allow attorneys to represent people who hold these views but to forbid lawyers from personally advocating or expressing their own views in agreement therewith. Imagine if Thurgood Marshall and the NAACP were allowed by the United States Supreme Court in *NAACP v. Button* to litigate cases, but prohibited from publicly advocating their point of view, or expressing or articulating their arguments in support of these causes at dinners, debates, law forums, and other venues. Imagine if they were prohibited from expressing or indicating their personal belief in the causes of their clients. Lawyers who understand and share viewpoints with their clients will often be vastly better at articulating those viewpoints and proposing solutions and accommodations than non-lawyers. It is insufficient to allow lawyers to represent

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[3] Virginia State Bd. Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976).
[4] Whitney v. California, 274 U.S. 357, 375–76 (Brandeis, J., concurring).
[5] New York Times v. Sullivan, 376 U.S. 254, 270 (1964).
[6] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).
[7] Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964).
[8] *Whitney*, 274 U.S. at 375–76 (Brandeis, J., dissenting).
[9] *Id.*
[10] *Id.*
[11] *Id.*

clients with these views in court proceedings, but then silence lawyers from discussing those issues outside of that representation, including, expressions of their own views built in part upon representing such clients.

In September 1950, during the height of the second red scare, the ABA Assembly and House of Delegates adopted a resolution requesting that states enact a regulation to require each attorney to swear an anti-Communism loyalty oath and to file an affidavit periodically thereafter attesting as to whether the attorney was or ever had been a member of the Communist Party or other subversive organizations.[12] States were then to investigate and disbar any communist attorneys. As Zecharaiah Chafee recounted in *The Blessings of Liberty*, written five years later, *not a single state* adopted the ABA's proposed regulation.[13] It was in this context—in discussing regulations of the ilk of the ABA's 1950 loyalty oath—that Chaffee chastised regulators for undermining liberty "in the very process of purporting to defend" it.[14] In a similar vein, there is significant irony that Rule 8.4(g) purports to promote diversity and eliminate bias through the means of silencing divergent and dissenting views. Tennessee certainly can and should promote diversity—but it should do so by means that do not themselves undermine diversity (as well as Constitutional rights) by silencing a contingent of people with unpopular viewpoints. In retrospect, it seems clear (and Chafee argued at the time) that rather than trying to improve loyalty among lawyers, "the true aim of the loyalty oaths was *to purge unpopular opinions or sympathies* among members of the bar."[15] The ABA wanted to sanitize the bar of any with communist ties, views, or sympathies. Eugene Volokh has come to a similar conclusion about Model Rule 8.4(g): "My inference is that the ABA wants to do exactly what the text calls for: limit lawyers' expression of viewpoints that it disapproves of."[16] As Chafee asserted, as a nation, "we are more especially called upon to maintain the principles of free discussion in cases of unpopular sentiments or persons, as in no other case will any effort to maintain them be needed."[17]

Regardless of whether Volokh is correct about the purpose of the ABA's Model Rule, the fact remains that rule's language is so broad that it *will* have the effect of silencing certain lawyer speech. Even if jurisdictions that adopt it do not enforce it, lawyers will steer clear of expressing such viewpoints if there is any specter of discipline for so doing. Most lawyers do not go anywhere near the line of risking discipline—because being a lawyer is their livelihood for which they have undertaken extensive schooling and cost. They will not risk it; they will acquiesce instead. As the *Button* Court explained in the context of prohibitions on attorney speech, association, and petitioning: "The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions."[18]

Some may contend that silencing biased viewpoints or demeaning and derogatory speech is justifiable because such speech is not just "unpopular," but wrong. But that still doesn't solve the First Amendment problem because, again, if people, even the vast majority of people, think a viewpoint is wrong, the answer is more speech, not enforced silence.

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[12] *See* Mary Elizabeth Basile, *Loyalty Testing for Attorneys: When Is It Necessary and Who Should Decide?*, 30 Cardozo L. Rev. 1843, 1856–67 (2009).

[13] ZECHARAIAH CHAFEE, THE BLESSINGS OF LIBERTY 159 (1956).

[14] *Id.* at 156. Chaffee eloquently explained:

> The only way to preserve 'the existence of free American institutions' is *to make free institutions a living force*. To ignore them in the very process of purporting to defend them, as frightened men urge, will leave us little worth defending. We must choose between freedom and fear—we cannot have both.

Id.

[15] Basile, *supra* note 12, at 1850.

[16] Eugene Volokh & Keith Swisher, *Point-Counterpoint: A Speech Code for Lawyers?*, JUDICATURE at 74 (statements of Eugene Volokh).

[17] ZECHARIAH CHAFEE, FREEDOM OF SPEECH 3 (1920).

[18] NAACP v. Button, 371 U.S. 415, 433 (1963).

Returning to the second red scare, Alexander Meiklejohn explains that speech regarding public issues cannot be suppressed "because it is on one side of the issue rather than another" even if a view is seen as being "false or dangerous," "unwise, unfair," or "un-American."[19] Certainly equality is a central American tenet. Although never fully realized, it is proudly proclaimed as a self-evident truth in the Declaration of Independence: "all men are created equal."[20] The phrase "Equal Justice under Law" is inscribed above the entrance of the United States Supreme Court. The idea of equality and of equality under law is an ideal that is central to the United States justice system and is absolutely worth every effort to achieve. Although views that express bias or are derogatory or demeaning are thus arguably contrary to this ideal and could even be considered "un-American," suppressing them is far more un-American.

As Justice Holmes explained, we must "be eternally vigilant against attempts to check the expression of opinions *that we loathe* and believe *to be fraught with death*."[21] In 2017, the United States Supreme Court in *Matal v. Tam*[22] emphasized this "bedrock First Amendment principle: **Speech may not be banned *on the ground that it expresses ideas that offend.***"[23] Further, the Court indicated that suppressing such speech has consequences for all of society:

> A law that can be directed against speech *found offensive* to some portion of the public can be t*urned against minority and dissenting views* to the *detriment of all*. The First Amendment does *not entrust that power to the government's benevolence*. Instead, our reliance must be on the ***substantial safeguards of free and open discussion*** in a democratic society.[24]

Again, Meiklejohn posed the question of whether the government's right and duty to prevent evils allowed it to prevent "evil" and un-American speech. He asserted:

> In the judgment of the Constitution, *some preventions are more evil than are the evils from which they would save us*. And the First Amendment is a case in point. If that amendment means anything, it means that certain substantive evils which, in principle, [regulators have] a right to prevent, must be endured *if the only way of avoiding them is by the abridging of that freedom of speech upon which the entire structure of our free institutions rests*.[25]

The Supreme Court embraced this view in *New York Times v. Sullivan*, quoting James Madison and Thomas Jefferson in the Virginia Resolutions of 1798 that "the right of ***freely examining public*** characters and ***measures***, and of *free communication among the people thereon, . . .* has ever been justly deemed *the only effectual guardian of every other right*."[26]

It is for these reasons, among others, that I respectfully recommend as a member of the public with expertise on the First Amendment rights of lawyers that the Tennessee Supreme Court *not* adopt Rule 8.4(g) as proposed.

Sincerely,

Margaret Tarkington
Professor of Law

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[19] ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 26–27.
[20] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
[21] *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting) (emphasis added).
[22] 137 S. Ct. 1744 (June 19, 2017).
[23] Matal v. Tam, 137 S. Ct. at 1751 (Alito, J.) (emphasis added).
[24] *Id.* at 1769 (Kennedy, J.) (emphasis added).
[25] MEIKLEJOHN, *supra* note 94, at 48.
[26] New York Times v. Sullivan, 376 U.S. 254, 274 (1964) (internal citations omitted; emphasis added).

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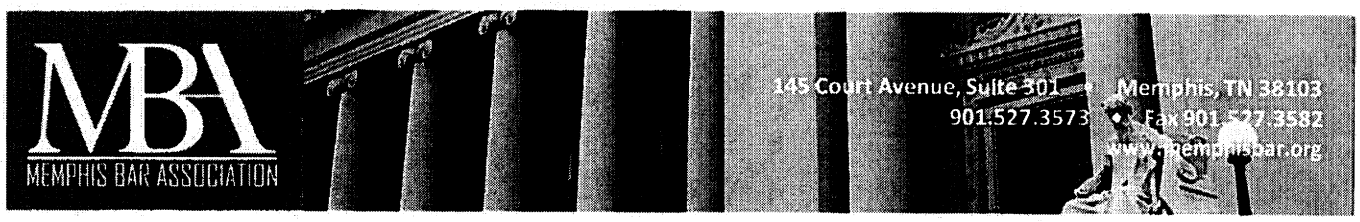

March 16, 2018

FILED
MAR 20 2018
Clerk of the Appellate Courts
Rec'd By LM

James Hivner, Clerk of Appellate Courts
Tennessee Supreme Court
100 Supreme Court Building
401 Seventh Ave. North
Nashville, TN 37219-1407

Re: Petition for the Adoption of a new Tennessee Supreme Court Rule 8, RPC 8.4(g); No. ADM 2017-02244

Dear Mr. Hivner:

In response to the Tennessee Supreme Court's Order dated November 21, 2017, the Memphis Bar Association Board of Directors met on March 13, 2018 to consider the merits of the above proposed amendment. The Board heard reports from its Professionalism Committee, which voted to oppose the petition due to concerns about its impact on First Amendment rights and other constitutional concerns, and Tennessee Bar Association President Lucian Pera.

After careful consideration and discussion, the MBA Board voted to support the proposed amendment to RPC 8.4(g) subject to the Court's willingness to accept the revisions proposed by the Tennessee Bar Association in the following respects:

a. Revise the last two sentences of paragraph (g) to remove a circular reference as follows: "This paragraph does not limit the ability of a lawyer to accept, decline, or withdraw from representation ~~in accordance with RPC 1.16~~. This paragraph does not preclude legitimate advice or advocacy **that does not violate other Rules of Professional Conduct** ~~consistent with these Rules~~.

b. Add the following as the last sentence to Comment [4]: **For example, legitimate advocacy protected by Section (g) includes speech on matters of public concern at bar association functions, continuing legal education classes, law school classes, and other similar forums.**

c. Revise proposed comment [4a] as follows: ~~Section (g) does not restrict any speech or conduct protected by the First Amendment.~~ **Section (g) does not apply to conduct protected by the First Amendment, as a lawyer does retain a "private sphere" where personal opinion, freedom of association, religious expression, and political speech are protected by the First Amendment and not subject to this Rule.** ~~Thus, a~~ **A** lawyer's speech or conduct unrelated to the practice of law cannot violate this Section.

The Memphis Bar Association appreciates the opportunity to comment on proposed Rules promulgated by the Tennessee Supreme Court.

Sincerely,

Earle Schwarz, President
Memphis Bar Association

Lisa Marsh - Fwd: No. ADM2017-02244

From: appellatecourtclerk
To: Lisa Marsh
Date: 3/20/2018 11:00 PM
Subject: Fwd: No. ADM2017-02244
Attachments: Comment CLS Rule 8.4.docx

FYI - See attached.

>>> "Chad W. Blair" <blairmountain@protonmail.com> 3/20/2018 5:01 PM >>>
Dear Mr. Hivner:

Please find attached a comment letter in regard to the petition for the adoption of RPC 8.4(g), No. ADM2017-02244. Thank you for your assistance in this matter.

-Chad Blair, JD

Greater Nashville Christian Legal Society
901 Commerce Street
Nashville, TN 37203

March 16, 2018

The Honorable Jeffrey S. Bivins, Chief Justice
The Honorable Cornelia A. Clark, Justice
The Honorable Holly Kirby, Justice
The Honorable Sharon G. Lee, Justice
The Honorable Roger A. Page, Justice

Attn: James M. Hivner, Clerk
Re: Tenn. Sup. Ct. R. 9, section 32
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219

In Re: No. ADM2017-02244 – Comment Letter in Opposition to the Adoption of a New Tenn. Sup. Ct. R. 8, RPC 8.4(g)

Dear Chief Justice and Associate Justices:

The members of the Greater Nashville Christian Legal Society respectfully urge you to reject the newly proposed RPC 8.4(g). The proposed rule is the ABA Model Rule 8.4(g) replicated, only with modified comments.[1] If adopted, the rule would, rather blatantly, violate every Tennessee lawyer's right to the freedom of speech and to the free exercise of his or her religion. Other commenters have already discussed many reasons for this. To avoid repetition, we fully adopt the facts and reasoning in the comment letter of the Christian Legal Society that was filed on January 31, 2018.

We also take this opportunity to raise an additional, and crucial, ground on which the proposed rule should be rejected—our own Tennessee Constitution. Nothing else protects Tennesseans' liberties against infringement more so than this fundamental law. As you know, Sections 3 and 4 of Article I protect Tennesseans' religious freedom. Section 4 also protects citizens' right to hold a position of public trust regardless of their political beliefs and affiliations. Moreover as one commenter has pointed out, Section 19 protects Tennesseans' right

[1] *See* Joint Petition of Board of Professional Responsibility of the Supreme Court of Tennessee and Tennessee Bar Association for the Adoption of a New Tenn. Sup. Ct. R. 8, RPC 8.4(g), at Exhibit B.

to speak, write, and publish on any topic.[2] As they bear repeating, these sections are reprinted, here.

> *That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience; that no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any minister against his consent; that no human authority can, in any case whatever, control or interfere with the rights of conscience; and that no preference shall ever be given, by law, to any religious establishment or mode of worship.* Article I, Section 3.
>
> *That no political or religious test, other than an oath to support the Constitution of the United States and of this state, shall ever be required as a qualification to any office or public trust under this state*. Article I, Section 4.
>
> *That the printing presses shall be free to every person to examine the proceedings of the Legislature; or of any branch or officer of the government, and no law shall ever be made to restrain the right thereof.* ***The free communication of thoughts and opinions, is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty.*** *But in prosecutions for the publication of papers investigating the official conduct of officers, or men in public capacity, the truth thereof may be given in evidence; and in all indictments for libel, the jury shall have a right to determine the law and the facts, under the direction of the court, as in other criminal cases.* Article I, Section 19 (emphasis added).

The breadth and boldness of these provisions are self-evident. Nevertheless, the petition to adopt RPC 8.4(g) is silent regarding our State's Constitution despite its applicability in this matter.

The plain text of RPC 8.4(g) invites individuals and the Board to interfere with a lawyer's right of conscience and with his/her right to "freely speak, write, and print on any subject...." A *de facto* political and religious test for retention at the bar would develop. Especially in light of the rule's vague "conduct related to the practice of law" scope, the scenarios that will bring about the operation of such a test are many and varied. The Christian Legal Society's comment letter offers examples on pages 12 through 17. These are the likely scenarios described by Professors Eugene Volokh and Ronald Rotunda, as well as the fact of many lawyers' memberships in various political, religious, and social organizations that are controversial because of the stances they take. Even submitting a letter to this Court about any rule, at this Court's invitation, would fall

[2] Letter from Sam D. Elliott to this Court of 2/9/18, at 2.

within the scope of RPC 8.4(g) and could serve as grounds for discipline. We submit that this is wholly inconsistent with the constitutional provisions, above.

Finally, it is very troubling that the petition implies that Tennessee lawyers will not be protected by the First Amendment while practicing law,[3] and states that, instead, they will be left with "a sphere of private thought and activity...."[4] in which they are free. Having only that sphere of liberty is a foreign idea to citizens of a free republic, and is, frankly, shocking to read. We do not believe, and find no law to support the idea, that the First Amendment is so malleable that it can be set aside this easily. Rather, it is the envy of the world.

For the foregoing reasons, we ask this Court to reject the proposed RPC 8.4(g).

Respectfully,

Zale Dowlen /s/ (BPR No. 026816)
President

Chad W. Blair /s/ (BPR No. 024321)
Vice President

Christopher L. Kelly /s/ (BPR No.019451)
Secretary

Travis D. Creel /s/ (BPR No. 032048)
Treasurer

Nicholas R. Barry /s/ (BPR No. 031963)
Charter Member

John L. Kea, II /s/ (BPR No. 016770)
Charter Member

Eric K. Fox /s/ (BPR No. 022087)
Charter Member

[3] Joint Petition, at 6-7
[4] *Id* at 6.

appellatecourtclerk - Memphis Bar Association response to Petition for the Adoption of a New TENN. SUP. CT. R. 8, RPC 8.4(g); ADM 2017-02244

From: Anne Fritz <afritz@memphisbar.org>
To: "appellatecourtclerk@tncourts.gov" <appellatecourtclerk@tncourts.gov>
Date: 3/20/2018 2:31 PM
Subject: Memphis Bar Association response to Petition for the Adoption of a New TENN. SUP. CT. R. 8, RPC 8.4(g); ADM 2017-02244
Attachments: Scanned from a Xerox Multifunction Device.pdf

Attached is the response of the Memphis Bar Association to the above petition for the adoption of a new subsection (g) to Rule 8.4. If you have any questions or need anything else, please let me know.

Anne Fritz
Executive Director
Memphis Bar Association
afritz@memphisbar.org

NAPIER LOOBY BAR ASSOCIATION

901 Broadway PO Box #23121 Nashville TN 37202
www.napierlooby.com

March 20, 2018

James M. Hivner, Clerk
Re: Tenn. Sup. Ct. R. 9, section 32
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407
appellatecourtclerk@tncourts.gov

RE: IN RE: PETITION FOR THE ADOPTION OF A NEW TENN. SUP. CT. R. 8, RPC 8.4(g); No. ADM2017-02244

Dear Clerk Hivner,

After reviewing the November 2017 filing, the Napier-Looby Bar Association recommends support for Ethics Rule 8.4(g), with the acknowledgment that it may require further amendment to address unforeseen considerations. This proposed rule falls squarely within Napier-Looby's historical mission of promoting diversity within the bar and eliminating discrimination and inequality based on racial and/or ethnic considerations. This proposed rule appears to hold members of the bar accountable in a manner not previously proposed. Discrimination of any kind has no place in the law or among its practitioners. It is the hope of the Napier-Looby Bar Association that this proposed rule is not just a lofty ambition, but rather a transformative step in improving the legal profession.

Thank you for your courtesies in considering these comments. Please do not hesitate to contact me if any additional information is necessary.

Very truly yours,

Amy Willoughby Bryant
President

appellatecourtclerk - NLBA Comment PETITION FOR THE ADOPTION OF A NEW TENN. SUP. CT. R. 8, RPC 8.4(g); No. ADM2017-02244

From: Napier-Looby Bar Association <napierlooby@gmail.com>
To: <appellatecourtclerk@tncourts.gov>
Date: 3/20/2018 9:49 AM
Subject: NLBA Comment PETITION FOR THE ADOPTION OF A NEW TENN. SUP. CT. R. 8, RPC 8.4(g); No. ADM2017-02244
Attachments: NLBA Comment - TBA - BPR Sup Ct Rule 8 FINAL.docx

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Dear Clerk Hivner,

Thank you for your courtesies in considering these comments. Please do not hesitate to contact me if any additional information is necessary.

Very truly yours,

Amy Willoughby Bryant
President

appellatecourtclerk - FW: March 21 is the Comment Deadline for Proposed Tennessee Supreme Court Rule 8.4(g)

From: "Regina M. Newman" <regina@reginanewman.com>
To: <appellatecourtclerk@tncourts.gov>
Date: 3/20/2018 10:37 AM
Subject: FW: March 21 is the Comment Deadline for Proposed Tennessee Supreme Court Rule 8.4(g)

Excellent.

REGINA MORRISON NEWMAN
Attorney at Law

NEWMAN LAW & MEDIATION
1714 Monroe Avenue, #1
P.O. Box 40025
Memphis, TN 38174
Telephone (901) 604-4811
Facsimile (901) 328-5506
www.reginanewman.com

From: Tennessee Lawyers' Association for Women [Tlaw22@wildapricot.org]
Sent: Monday, March 19, 2018 7:36 PM
To: Regina Morrison Newman
Subject: March 21 is the Comment Deadline for Proposed Tennessee Supreme Court Rule 8.4(g)

TLAW

Tennessee Lawyers' Association for Women

TLAW has received a request from TBA President Lucian Pera for comments on proposed Tennessee Supreme Court Rule 8.4(g) within the Rules of Professional Conduct.

A copy of the proposed rule can be found online here. The deadline to provide comments on the proposed rule is **this Wednesday, March 21st**.

You may read Lucian Pera's article in support of the amendment in the March issue of the TBA Journal here.

Written comments on the proposed rule can be emailed to appellatecourtclerk@tncourts.gov or mailed to James M. Hivner, Clerk, Re: Tenn. Sup. Ct. R. 8, Proposed Rule 8.4(g), Docket No. ADM2017-02244, Tennessee Appellate Courts, 100 Supreme Court Building, 401 7th Avenue North, Nashville, TN 37219-1407.

You may read the comments that have been submitted thus far here.

Keep in touch with TLAW on our website and on social media!

Yvonne K. Chapman
Attorney at Law

1313 Pebble Creek Lane
Memphis, Tennessee 38120

Phone: 901-494-4420

The Honorable Jeffrey S. Bivins, Chief Justice
The Honorable Cornelia A. Clark, Justice
The Honorable Holly Kirby, Justice
The Honorable Sharon G. Lee, Justice
The Honorable Roger A. Page, Justice

Tennessee Supreme Court
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

Attn: James M. Hivner, Clerk of Appellate Courts

Transmitted via email to appellatecourtclerk@tncourts.gov

RE: Petition for the Adoption of New Tennessee Supreme Court Rule 8, RPC 8.4(g), No. ADM2017-02244

Dear Chief Justice Bivins, Justice Clark, Justice Kirby, Justice Lee, and Justice Page:

This comment letter is in response to the Order of the Supreme Court of Tennessee, dated November 21, 2017, requesting written comments on whether to adopt proposed RPC 8.4(g).

For reasons stated below, I oppose the adoption of proposed new RPC 8.4(g) and its new comments and request the Court to reject the Petition.

In the interest of disclosure, I have chaired the Memphis Bar Association Professionalism Committee since January 2017; however, these comments are made by me individually and not as chair. Furthermore, I am a signatory to the Joint Comment of 71 Tennessee Attorneys Opposing Adoption of 8.4(g) filed March 2, 2018; though I do not intend to reiterate all the arguments made there, I do stand by them. Additionally, I support the comments of the Christian Legal Society dated and filed January 31, 2018; currently, I serve as Secretary of the Greater Memphis Chapter of the Christian Legal Society.

Certainly, there are more arguments opposing the proposed rule than I relate here; already many lawyers opposing the rule have posted comments that are more captivating than my own. Nevertheless, I submit these contentions and facts in opposition to the adoption of proposed new RPC 8.4(g) and its new comments.

The Professionalism Committee of the Memphis Bar Association (MBA) recommends opposing the proposed rule.

The Professionalism Committee of the MBA met February 21, 2018 to discuss the proposed RPC 8.4(g) and proposed comments [3]-[5]. Prior to the meeting, committee members studied the Joint Petition of the TBA and BPR proposing the adoption of 8.4(g), the Supreme Court's Order Soliciting Comments, and all comments filed and posted on the Court's website prior to the meeting. Lucian Pera, TBA President and ABA representative to the MBA Board, attended our meeting, spoke to the committee and answered questions.

After engaging in a serious intellectual discussion of the substance and language of the proposal, the Committee approved the following motion: That our committee recommend to the Memphis Bar Association Board of Directors to oppose the proposed rule as written. Seven of nine committee members were present and voting. The motion passed by a vote of six (6) ayes, one abstention.

The MBA Board of Directors met at a special meeting the afternoon of March 13 to consider the recommendation of the Professionalism Committee; I attended that meeting to present the position of the Professionalism Committee. A few hours before that meeting, Lucian Pera, who also attended, submitted to Board members a revision of the proposed rule, which, he indicated, the Executive Committee of the TBA (co-Petitioner) had adopted. Disappointingly, the Board decided to support that revision of the proposed rule, which the Professionalism Committee did not have an opportunity to review.

The last minute revisions presented to the MBA Board by the co-Petitioner indicate that it recognizes some of the serious flaws in the proposed rule, that the proposal requires significant revision, and that submission of the proposed rule to the Court for adoption is premature.

Nonetheless, these recent revisions are wholly inadequate and fail to address the main concerns about proposed 8.4(g) expressed by the Professionalism Committee and stated in its report to the MBA Board, including:

- there is no demonstrated need for a black letter rule regulating this wide range of conduct of lawyers;
- it is an unconstitutional infringement upon the First Amendment;
- it is overbroad;
- it expands the definition of "practice of law;"
- it infringes upon the independence of lawyers in providing advice and counsel in areas beyond client representation and in court proceedings; and
- it imposes a negligence standard upon lawyer misconduct.

Members of the MBA Board agreed that proposed (revised) 8.4(g) has flaws, including that it is overbroad, has the potential to infringe upon a lawyer's speech, personal beliefs and personal life; some members expressed ambivalence about the need for this rule. Despite that, the Board agreed to support the proposed (revised) 8.4(g) while indicating it was better to do something rather than nothing. Perhaps the Board was afraid that a rejection of the proposal would be misconstrued as reluctance to stand against discriminatory and harassing behavior.

Undoubtedly, the MBA, including its Board and Professionalism Committee, is opposed to any form of discrimination or harassment. That is no reason to support this flawed, unconstitutional, and unnecessary proposal. We do not approach business decisions or client matters by thinking, "let's just do something, even if it is wrong." Why would we approach decisions about the rules that regulate our profession in such a manner?

Lawyers ought to be first to stand against attempts to erode rights secured by state and federal constitutions. The oath we take upon admission to practice requires no less:

> I, _____, do solemnly swear or affirm that I will support the Constitution of the United States and the Constitution of the State of Tennessee, and that I will truly and honestly demean myself in the practice of my profession to the best of my skill and abilities, so help me God. Tennessee Supreme Court Rule 6 (4).

The proposed rule is an unconstitutional violation of First Amendment rights.

The Tennessee Constitution provides that "the free communication of thoughts and opinions, is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty." Tennessee Constitution, Article I. DECLARATION OF RIGHTS, § 19.

The Supreme Court held in *Ramsey v. Board of Professional Responsibility*, 771 S.W.2d 116, 122 (Tenn.1989) that an attorney who made out-of-court statements to the media regarding judicial proceedings[1] was not subject to discipline, and the statements were protected by the First Amendment.

> There is thus a delicate balance between a lawyer's right to speak, the right of the public and the press to have access to information, and the need of the bench and bar to insure that the administration of justice is not prejudiced by a lawyer's remarks. In balancing these rights, we must ensure that lawyer discipline, as found in Rule 8 of the Rules of this Court, does not create a chilling effect on First Amendment rights. *Ramsey v. Board of Professional Responsibility of the Supreme Court of Tennessee*, 771 S.W.2d 116, 121. (Emphasis added)

By the addition of Comment 4(a), the drafters recognize constitutional defects in the proposed rule. Yet, an unconstitutional law is not rendered constitutional by putting a provision in the law that says it will not be applied in an unconstitutional manner.

Furthermore, Petitioners try to assure us that a lawyer retains "a sphere of private thought and private activity" protected by the First Amendment. (A similar phrase is included in the revision of Comment 4 that the TBA presented to the MBA Board.) Rather than provide comfort, this raises serious alarms since the First Amendment and the Tennessee Constitution grant free speech in the public forum and not just within a "private sphere."

---

[1] In the context of judicial proceedings, an attorney's First Amendment rights are not without limits. Although litigants and lawyers do not check their First Amendment rights at the courthouse door, those rights are often subordinated to other interests inherent in the judicial setting. *Board of Professional Responsibility of Supreme Court of Tennessee v. Slavin*, 145 S.W.3d 538, 549 (2004).

There is no demonstrated need for such a black letter rule regulating this wide range of conduct of lawyers.

Current Comment [3] to 8.4(d) meets any need to regulate discriminatory misconduct within the scope of the practice of law by proscribing bias and prejudice that is actually "prejudicial to the administration of justice."

Proposed 8.4(g) regulates and imposes discipline on lawyer speech and conduct unrelated to either representing a client in legal matters or affecting the administration of justice and is well beyond the scope of "practice of law" as defined in Tennessee.

Where is the evidence to justify a new disciplinary rule - that systematic discrimination by lawyers exists or that discriminatory conduct is increasing within the law practice? Where is the proof that any discrimination that currently exists within the practice of law is not manageable under the current disciplinary rules or otherwise applicable laws? *Ipse dixit* is a fallacious argument, giving rise to the suspicion that this is indeed an attempt to impose conformed thinking and to suppress free speech.

The proposed rule is overly broad.

Current Rule 8.4(d) is concerned with attorney conduct that might adversely affect an attorney's fitness to practice law or that seriously interferes with the proper and efficient operation of the judicial system. The current rule regulates lawyers acting "in the course of representing a client" and conduct that is "prejudicial to the administration of justice."

Proposed 8.4(g) imposes regulation and discipline on lawyer conduct unrelated to client representation or matters affecting the administration of justice. It seeks to regulate and discipline lawyers in their social and private lives. Proposed 8.4(g) requires no showing that the proscribed conduct prejudices the administration of justice or that such conduct adversely affects the offending attorney's fitness to practice law.

The proposed rule expands the definition of "practice of law" in Tennessee.

Tennessee law states the "practice of law means the appearance as an advocate in a representative capacity or the drawing of papers, pleadings or documents or the performance of any act in such capacity in connection with proceedings pending or prospective before any court, commissioner, referee or any body, board, committee or commission constituted by law or having authority to settle controversies, or the soliciting of clients directly or indirectly to provide such services." T.C.A. 23-3-101(3).

Similarly, Tennessee Supreme Court Rule 9, Section 10.3(e) defines "the practice of law," as "*any service rendered involving legal knowledge or legal advice*, whether of representation, counsel, or advocacy, in or out of court, rendered in respect to the rights, duties, regulations, liabilities, or business relations of one requiring the services. It shall encompass all public and private positions in which the attorney may be called upon to examine the law or pass upon the legal effect of any act, document, or law." (Emphasis added)

Proposed Comment [4] adds to the definition of "practice of law" through a new phrase, "*conduct related to* the practice of law," and provides:

> 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.* (Emphasis added)

With this language, the proposed rule extends the regulatory authority of the BPR and grounds for discipline into everything a lawyer may do simply because a lawyer engages in the business of practicing law. Conversations and interactions a lawyer has with others while conducting business at the courthouse, whether or not those conversations have anything to do with any legal business, are subject to control. Social repartee between colleagues may be scrutinized.

Grounds for discipline under Tennessee Supreme Court Rule 9, Section 11, requires acts or omissions which are violations of the RPCs, conviction of a serious crime (see Rule 9, Section 2 for that definition), or adjudication of the willful refusal to comply with a court order. Proposed 8.4(g) and its Comment [4] now subject to discipline a lawyer's speech, or negligent conduct or speech, unrelated to client services or advocacy.

The proposed rule ignores and disregards state law regarding discrimination.

Current Comment [3] includes *eight* classes protected from discrimination under 8.4(d):

> A lawyer who, in the course of representing a client, knowingly manifests, by words or conduct, bias or prejudice based upon *race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status*, violates paragraph (d) when such actions are prejudicial to the administration of justice. (Emphasis added)

State antidiscrimination law includes *seven* protected classes under T.C.A. 4-21-102(4):

> Discriminatory practices means any direct or indirect act or practice of exclusion, distinction, restriction, segregation, limitation, refusal, denial, or any other act or practice of differentiation or preference in the treatment of a person or persons because of *race, creed, color, religion, sex, age or national origin*. (Emphasis added)

Proposed 8.4(g) designates *eleven* protected classes, including **three new ones**: race, sex, religion, national origin, **ethnicity**, disability, age, sexual orientation, **gender identity**, **marital status** or socioeconomic status. (Emphasis added)

Tennessee anti-discrimination law does not protect these additional classes. Furthermore, federal law applies protections to these classes inconsistently, or not at all. A lawyer has no consistent or objective guide regarding the proscriptions of proposed 8.4(g), especially given the language of proposed Comment [3]: "The substantive law of antidiscrimination and anti-harassment statutes and case law *may guide* application of paragraph (g)." (Emphasis added)

Moreover, the proposed rule does not require a conviction or final adjudication of unlawful discrimination (as required under Supreme Court Rule 9). In fact, the proposed rule does not require a discriminatory act; speech may trigger a disciplinary complaint.

Vagueness implicit in this proposed rule is complicated further by the negligence standard. While the current rule contains a *mens rea* requirement, (under Comment 3, *knowingly manifests*), proposed 8.4 (g) imposes a negligence standard[2] and would discipline "conduct that the lawyer knows or reasonably should know is harassment or discrimination." A lawyer cannot possibly know what is harassment or discrimination under proposed 8.4(g).

The TBA House of Delegates voted to reject 8.4(g).

One fact not mentioned by Petitioners is that the Tennessee Bar Association House of Delegates recommended that the Board of Governors **reject** the recommendation of the Ethics & Professional Responsibility Committee to adopt 8.4(g). See the attached email exchange I had about this vote with the Executive Director of Tennessee Bar Association (*see page 7*). The comments of Charles L. Trotter, Jr., dated March 6 and filed March 8, are most enlightening regarding action taken before the TBA HOD in June 2017.

Thank you for the opportunity to comment.

Respectfully,

Yvonne K. Chapman

[2] The Disciplinary Board of the Supreme Court of *Pennsylvania* stated, "It is our opinion, after careful review and consideration, that the breadth of ABA Model Rule 8.4(g) will pose difficulties for already resource-strapped disciplinary authorities. The Model Rule broadly defines "harassment" to include any "derogatory or demeaning verbal conduct" by a lawyer, and the rule subjects to discipline not only a lawyer who knowingly engages in harassment or discrimination, but also a lawyer who negligently utters a derogatory or demeaning comment. A lawyer who did not know that a comment was offensive will be disciplined if the lawyer should have known that it was." http://www.pabulletin.com/secure/data/vol46/46-49/2062.html.

From: Joycelyn Stevenson <jstevenson@tnbar.org>
To: Yvonne Chapman <chapmanyvonnek@yahoo.com>
Cc: "lucian.pera@arlaw.com" <lucian.pera@arlaw.com>; Karen Belcher <kbelcher@tnbar.org>
Sent: Thursday, February 8, 2018 4:41 PM
Subject: Re: Proposed changes to RPC 8.4(g)

Ms. Chapman,

We checked the minutes and we don't have exact numbers from the House of Delegates. Following a good discussion, a motion was made in the House of Delegates to recommend that the Board of Governors **reject** the recommendation of the Ethics & Professional Responsibility Committee to adopt 8.4(g).

During the Board of Governors meeting, the motion to adopt the proposal of the Ethics & Professional Responsibility Committee (in contravention of the House of Delegates recommendation) **was approved** by a vote of 17 affirmative votes. There were 19 board members present and participating.

Joycelyn Stevenson
jstevenson@tnbar.org
(615) 383-7421

----- Forwarded Message -----
From: Yvonne Chapman <chapmanyvonnek@yahoo.com>
To: Joycelyn A. Stevenson <jstevenson@tnbar.org>
Cc: 'David Bearman' <dbearman@bakerdonelson.com>
Sent: Monday, February 5, 2018 9:23 AM
Subject: Proposed changes to RPC 8.4(g)

To: Joycelyn A. Stevenson, Executive Director, Tennessee Bar Association

Ms. Stevenson,

I accepted an invitation to participate in the Conference Call: Related to Proposed changes to Tennessee Supreme Court Rule 8, RPC 8.4(g) and signed up on the doodle link.

The MBA Professionalism Committee, which I have chaired since January 2017, is considering a response to the TBA/BPR petition. [note: cc on this message is vice-chair, David Bearman.]
I am looking forward to the conference call to hear more about the substantive changes in the proposed rule.

In the meantime, I wonder if you will provide information related to the breakdown of the voting on the approval of the Model Rule 8.4(g) by both the TBA Board of Governors and the House of Delegates. I understand that voting took place during the June 2017 annual convention and I am interested in specific numbers: pro/con/abstention/etc. for each body.

Thank you.

Yvonne K Chapman, J.D., M.A.
Chair, MBA Professionalism Committee
901-494-4420

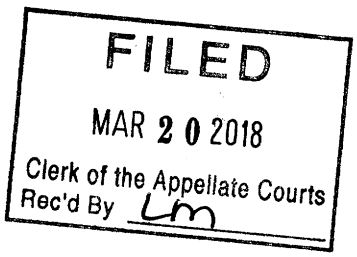
appellatecourtclerk - No. ADM2017-02244 - Comment opposing 8.4(g)

From: Yvonne Chapman <chapmanyvonnek@yahoo.com>
To: "appellatecourtclerk@tncourts.gov" <appellatecourtclerk@tncourts.gov>
Date: 3/20/2018 10:15 PM
Subject: No. ADM2017-02244 - Comment opposing 8.4(g)
Cc: Yvonne Chapman <chapmanyvonnek@yahoo.com>
Attachments: YKChapman comment opposing 8.4g.pdf

Attn: James M. Hivner, Clerk of Appellate Courts
Attached please find my comment letter opposing proposed RPC 8.4(g).

Thank you,

Yvonne K Chapman, J.D., M.A.
901-494-4420



Mike Carter
State Representative
29th District
Part of Hamilton County

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House Of Representatives
State of Tennessee

Member Of Committees

House Civil Justice
House Finance Ways & Means
House Ethics

Subcommittees
Chair-House Civil Justice

rep.mike.carter@capitol.tn.gov

ADM2017-02244

March 20, 2018

The Honorable Jeffrey S. Bivins, Chief Justice
The Honorable Cornelia A. Clark, Justice
The Honorable Holly Kirby, Justice
The Honorable Sharon G. Lee, Justice
The Honorable Roger A. Page, Justice

Attn: James M. Hivner, Clerk
Tennessee Supreme Court
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219

Re: American Bar Association's New Model Rule of Professional Conduct Rule 8.4(g)

To the Honorable Justices of the Tennessee Supreme Court:

Thank you for requesting written comments on the potential adoption of the above referenced rule. I am taking this opportunity to respectfully, yet strenuously, object to the adoption of the rule.

I adopt and support the position of the Attorney General, Herbert H. Slatery, III, stated in Opinion No. 18-11, filed March 16, 2018. I whole-heartedly agree that the adoption of proposed Rule 8.4(g) would infringe upon Tennessee attorneys' right to free speech, freedom of association, free exercise of religion, and due process.

Thank you for allowing the opportunity to publicly comment upon this proposed rule.

Sincerely,

Mike Carter, State Representative

Greater Nashville Christian Legal Society
901 Commerce Street
Nashville, TN 37203

March 16, 2018

The Honorable Jeffrey S. Bivins, Chief Justice
The Honorable Cornelia A. Clark, Justice
The Honorable Holly Kirby, Justice
The Honorable Sharon G. Lee, Justice
The Honorable Roger A. Page, Justice

Attn: James M. Hivner, Clerk
Re: Tenn. Sup. Ct. R. 9, section 32
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219

In Re: No. ADM2017-02244 – Comment Letter in Opposition to the Adoption of a New Tenn. Sup. Ct. R. 8, RPC 8.4(g)

Dear Chief Justice and Associate Justices:

The members of the Greater Nashville Christian Legal Society respectfully urge you to reject the newly proposed RPC 8.4(g). The proposed rule is the ABA Model Rule 8.4(g) replicated, only with modified comments.[1] If adopted, the rule would, rather blatantly, violate every Tennessee lawyer's right to the freedom of speech and to the free exercise of his or her religion. Other commenters have already discussed many reasons for this. To avoid repetition, we fully adopt the facts and reasoning in the comment letter of the Christian Legal Society that was filed on January 31, 2018.

We also take this opportunity to raise an additional, and crucial, ground on which the proposed rule should be rejected—our own Tennessee Constitution. Nothing else protects Tennesseans' liberties against infringement more so than this fundamental law. As you know, Sections 3 and 4 of Article I protect Tennesseans' religious freedom. Section 4 also protects citizens' right to hold a position of public trust regardless of their political beliefs and affiliations. Moreover as one commenter has pointed out, Section 19 protects Tennesseans' right

[1] *See* Joint Petition of Board of Professional Responsibility of the Supreme Court of Tennessee and Tennessee Bar Association for the Adoption of a New Tenn. Sup. Ct. R. 8, RPC 8.4(g), at Exhibit B.

to speak, write, and publish on any topic.[2] As they bear repeating, these sections are reprinted, here.

> *That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience; that no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any minister against his consent; that no human authority can, in any case whatever, control or interfere with the rights of conscience; and that no preference shall ever be given, by law, to any religious establishment or mode of worship.* Article I, Section 3.
>
> *That no political or religious test, other than an oath to support the Constitution of the United States and of this state, shall ever be required as a qualification to any office or public trust under this state.* Article I, Section 4.
>
> *That the printing presses shall be free to every person to examine the proceedings of the Legislature; or of any branch or officer of the government, and no law shall ever be made to restrain the right thereof.* ***The free communication of thoughts and opinions, is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty.*** *But in prosecutions for the publication of papers investigating the official conduct of officers, or men in public capacity, the truth thereof may be given in evidence; and in all indictments for libel, the jury shall have a right to determine the law and the facts, under the direction of the court, as in other criminal cases.* Article I, Section 19 (emphasis added).

The breadth and boldness of these provisions are self-evident. Nevertheless, the petition to adopt RPC 8.4(g) is silent regarding our State's Constitution despite its applicability in this matter.

The plain text of RPC 8.4(g) invites individuals and the Board to interfere with a lawyer's right of conscience and with his/her right to "freely speak, write, and print on any subject...." A *de facto* political and religious test for retention at the bar would develop. Especially in light of the rule's vague "conduct related to the practice of law" scope, the scenarios that will bring about the operation of such a test are many and varied. The Christian Legal Society's comment letter offers examples on pages 12 through 17. These are the likely scenarios described by Professors Eugene Volokh and Ronald Rotunda, as well as the fact of many lawyers' memberships in various political, religious, and social organizations that are controversial because of the stances they take. Even submitting a letter to this Court about any rule, at this Court's invitation, would fall

[2] Letter from Sam D. Elliott to this Court of 2/9/18, at 2.

within the scope of RPC 8.4(g) and could serve as grounds for discipline. We submit that this is wholly inconsistent with the constitutional provisions, above.

Finally, it is very troubling that the petition implies that Tennessee lawyers will not be protected by the First Amendment while practicing law,[3] and states that, instead, they will be left with "a sphere of private thought and activity...."[4] in which they are free. Having only that sphere of liberty is a foreign idea to citizens of a free republic, and is, frankly, shocking to read. We do not believe, and find no law to support the idea, that the First Amendment is so malleable that it can be set aside this easily. Rather, it is the envy of the world.

For the foregoing reasons, we ask this Court to reject the proposed RPC 8.4(g).

Respectfully,

Zale Dowlen /s/ (BPR No. 026816)
President

Chad W. Blair /s/ (BPR No. 024321)
Vice President

Christopher L. Kelly /s/ (BPR No.019451)
Secretary

Travis D. Creel /s/ (BPR No. 032048)
Treasurer

Nicholas R. Barry /s/ (BPR No. 031963)
Charter Member

John L. Kea, II /s/ (BPR No. 016770)
Charter Member

Eric K. Fox /s/ (BPR No. 022087)
Charter Member

[3] Joint Petition, at 6-7
[4] *Id* at 6.

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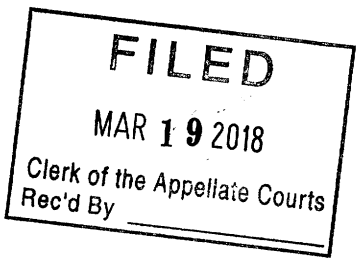
March 14, 2018



The Honorable Jeffrey S. Bivins, Chief Justice
The Honorable Cornelia A. Clerk, Justice
The Honorable Holly Kirby, Justice
The Honorable Sharon G. Lee, Justice
The Honorable Roger A. Page, Justice

Attn: James M. Hivner, Clerk
Re: Tenn. Sup. Ct. R. 9, section 32
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

In re: No. ADM2017-02244 – Comment Letter Opposing Amending Rule 8, RPC 8.4 of the Rules of Tennessee Supreme Court by Adopting a New RPC 8.4(g)

Dear Chief Justice Bivins, Justice Clark, Justice Kirby, Justice Lee, and Justice Page:

I have been a member of the Tennessee Bar Association since 1979 (Bar No. 6765) and I have witnessed a number of wonderful innovations in the law. Proposed Rule 8.4(g) is not a progressive or productive change and should be denied.

There are legitimate differences of opinion about the practice of law. I certainly do not discriminate in my personal life but I certainly must reserve the right to decline representing those who hold views which, in some cases, are so far removed from my fundamental beliefs of faith and practice that it would substantially impair my representation.

Practicing law is hard enough without "big brother" looking over your shoulder with a sledgehammer ready to swat those who do not conform to liberal policies which are rejected by the vast number of people in Tennessee.

Only one state in the country has adopted this Rule and the values of Vermont cannot remotely be said to mirror those of Tennessee.

We have historically protected the right of an attorney to decline representation when such representation conflicts with that attorney's fundamental beliefs.

I would respectfully request that you decline the adoption of new Rule 8.4(g) and preserve the sanctity of the attorney-client relationship.

Sincerely,

Hoyt O. Samples
For the Firm

HOS:aml

711 Cherry Street
Chattanooga, TN 37402

March 19, 2018

James M. Hivner, Clerk
Re: Tenn. Sup. Ct. R. 9, section 32
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

Re: **Petition for the Adoption of a New Tenn. Sup. Ct. R. 8, RPC 8.4(g)**
No. ADM2017-0244

Dear Mr. Hivner:

Please accept the enclosed response brief from the Chattanooga Chapter of the Christian Legal Society setting forth our opposition to the above petition to adopt a new RPC 8.4(g).

We thank you and the Court for allowing us an opportunity to comment on the proposed rule change.

Sincerely yours,

CHRISTIAN LEGAL SOCIETY
CHATTANOOGA CHAPTER

By: Doug S. Hamill
Doug S. Hamill, BPR No. 022825

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE: PETITION FOR THE ADOPTION OF A NEW TENN. SUP. CT. R. 8, RPC 8.4(g)

No. ADM2017-0244

RESPONSE IN OPPOSITION TO PETITION

The Chattanooga Chapter of the Christian Legal Society (hereinafter referred to as "CLS") hereby submits its response in opposition to the petition filed by the Tennessee Board of Professional Responsibility and the Tennessee Bar Association requesting the adoption of a new RPC 8.4(g) to Rule 8 of the Rules of the Tennessee Supreme Court.

Introduction of the Respondent

Founded in 1961, CLS defends the religious liberties of all Americans, not just those who profess to be Christian, and serves those most needy through making available Christian Legal Aid. By inspiring, encouraging, and equipping Christian lawyers and law students, both individually and in community, to proclaim, love, and serve Jesus Christ through the study and practice of law, the provision of legal assistance to the poor and needy, and the defense of the inalienable rights to life and religious freedom, CLS strives to fulfill the command of Micah 6:8 to "act justly and to love mercy and to walk humbly with [our] God," ensuring the next generation of Americans has the same opportunities to live out and share their faith in community.

Summary of the Argument

Proposed Rule 8.4(g) and the newly proposed comments (hereinafter referred to as the "proposed Rule") violate a lawyer's constitutionally-protected rights to free speech and exercise of religion. The enactment of the proposed changes will have a chilling effect on a lawyer's expression of disfavored political, social, and religious viewpoints. Fundamentally, the proposed rule erroneously presupposes that a lawyer's rights to free speech and exercise of religion are limited solely to his or her "private life," but not to speech or conduct "related to the practice of law." The "practice of law" is very broad, and drawing a line between what is even more broadly "related" to the law and what is not is an exercise fraught with difficulties.

Unconstitutional Speech Code

The First Amendment to the federal Constitution protects much more than a lawyer's "private sphere" of conduct. The First Amendment places real limits on the government's ability to limit a lawyer's public speech and conduct through bar rules. *Shapero v. Ky. Bar Ass'n*, 486 U.S. 466, 469 (1988) (First Amendment applied to state bar disciplinary actions through the Fourteenth Amendment). While state bar rules may restrain a lawyer's First Amendment rights, such rules are subject to a demanding standard, namely whether a substantial governmental interest is furthered by the restriction upon speech and that the restriction be no greater than is necessary or essential to protect the governmental interest involved. *Matter of Rachmiel*, 449 A.2d 505, 510 (N.J. 1982) (citing *Procunier v. Martinez*, 416 *U.S.* 396, 413, (1974)).

Tennessee courts have long held that the right to free speech guaranteed by the Tennessee Constitution equally applies to both lawyers and non-lawyers. In overruling a finding of contempt and the threatened suspension of a lawyer's license for publishing an article critical of a particular judge, the Tennessee Supreme Court noted the importance of a lawyer's

constitutionally-protected free speech rights. "No class of the community ought to be allowed freer scope in the expression or publication of opinions as to the capacity, impartiality or integrity of judges than members of the bar." *In re Hickey*, 258 S.W. 417, 429 (Tenn. 1924).

Article 1, section 3 of the Tennessee Constitution states that "no human authority can, in any case whatever, control or interfere with the rights of conscience; and that no preference shall ever be given, by law, to any religious establishment or mode of worship." Tenn. Const. art. I, §3. "[T]he language of this section [Tenn. Const. art. I, §3], when compared to the guarantee of religious freedom contained in the federal Constitution, is a stronger guarantee of religious freedom." *Planned Parenthood of Middle Tenn. V. Sundquist*, 38 S.W.3d 1, 13 (Tenn. 2000) (citing *Carden v. Bland*, 288 S.W.2d 718, 721 (Tenn. 1956)). The term "conscience" is defined as "that moral sense in man which dictates to him right and wrong." *Harden v. State*, 216 S.W.2d 708, 711 (Tenn. 1948). In addition, the Tennessee Constitution specifically protects an individual's right to speech and expressive conduct. "The free communication of thoughts and opinions, is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty." Tenn. Const. art. I, § 19. Section 19 of Article I of Tennessee's Constitution should be construed to have a scope at least as broad as that afforded the freedom of speech set forth in the federal Constitution. *Leech v. American Booksellers Assoc.*, 582 S.W.2d 738, 745 (Tenn. 1979). The Tennessee Supreme Court has hinted that the Tennessee Constitution may provide "a potentially greater state protection" for freedom of speech than the federal Constitution. *Planned Parenthood*, 38 S.W.3d at 13.

A restriction on speech is an unlawful prior restraint subject to facial invalidation if it gives a government official or agency "unbridled discretion" or "substantial power" to allow or

prohibit speech based on its content or viewpoint. *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 757, 759 (1988). There are limits on the ability of the government to regulate speech based on its substantive content. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828–29 (1995). A law that restricts speech on the basis of "content discrimination" is one that (1) targets speech on a particular subject or (2) engages in "viewpoint discrimination" which occurs when it singles out speech based on the speaker's position on the subject. *Id.* The same federal constitutional prohibition against viewpoint discrimination applies under Tennessee law. The Tennessee Supreme Court has held that governmental restriction on speech exempting some, but not all, categories of speech "obliterates content neutrality and subjects the entire prohibition to the objection that speech is being restricted or prohibited on the basis of 'its message, its ideas, its subject matter, or its content.'" *H & L Messengers, Inc. v. City of Brentwood*, 577 S.W.2d 444, 453 (Tenn. 1979) (quoting *Police Department v. Mosley*, 408 U.S. 92, 95 (1972)). "Restrictions, regulations, and exemptions so based are constitutionally offensive whether [their motives] be evil or benign." *Id.*

The proposed Rule unquestionably restrains a lawyer's freedom of speech, conduct, and exercise of religion. For example, under the proposed Rule, a lawyer is prohibited from declining representation of a client in a matter that would violate his or her religious beliefs or conscience, such as representation involving an adoption for a homosexual couple, an injunction against an ordinance banning a sexually-oriented business, incorporating an organization whose mission statement is contrary to the lawyer's sincerely-held beliefs, or a workplace discrimination claim based upon the client's sexual orientation. Moreover, because of the broad scope of the proposed Rule, a lawyer is also prohibited from expressing his or her viewpoints on the topics of religion, race relations, immigration, differences between the sexes, same-sex

marriage, and cultural causes of poverty when such viewpoints are expressed while engaged in "conduct related to the practice of law." The "practice of law" and what is "related" to it are not narrowly defined. According to the proposed Rule, therefore, the prohibition on the expression of such viewpoints could potentially occur at a lawyer's office, in a public forum, on social media such as a blog or website, at a continuing education seminar, during a non-law organization's board meeting if the lawyer sits on its board of directors, or even at a bar association social event.

The proposed Rule itself is a perfect example of unlawful viewpoint discrimination. The last sentence of proposed Rule 8.4(g) states, "This paragraph does not preclude legitimate advice or advocacy ***consistent with these Rules.***" Proposed Comment 4 further clarifies what type of "consistent" activity is permitted. "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." Thus, the proposed Rule impermissibly favors speech that "promote[s] diversity and inclusion"—itself a very vague phrase--over speech that does not, which is the very definition of viewpoint discrimination. Such blatant viewpoint discrimination will inevitably chill lawyers' public speech on one side of many controversial political and social issues, while simultaneously creating no disincentives for lawyers who speak on the opposing side of these controversies.

Equally troubling is the fact that determining which speech or actions do or do not "promote diversity and inclusion" completely depends on the beholder's subjective beliefs. Where one person sees inclusion, another may see exclusion. Where one person sees the

promotion of diversity, another may equally sincerely see the promotion of conformity, uniformity, or religious orthodoxy.

Vagueness

Vague laws or orders implicating the First Amendment and Article I, section 19 of the Tennessee Constitution are subject "to a more stringent standard than laws in other contexts because of the danger of chilling protected speech." *City of Knoxville v. Entertainment Resources, LLC,* 166 S.W.3d 650 (Tenn. 2005). It is a constitutional imperative that laws provide a person of ordinary intelligence a reasonable opportunity to know what is prohibited. "Vague laws may trap the innocent by not providing fair warning." *H & L Messengers, Inc. v. City of Brentwood,* 577 S.W.2d 444, 453 (Tenn. 1979) (citing *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972)). The First Amendment to the federal Constitution and Article I, section 19 of the Tennessee Constitution mandate that laws implicating the area of freedom of expression are required to have a greater degree of specificity than laws in other contexts, so that citizens are not "chilled" from exercising their constitutional right to free expression. *Davis–Kidd Booksellers, Inc. v. McWherter,* 866 S.W.2d 520, 531 (Tenn. 1993).

The proposed Rule prohibits "harassment or discrimination" without actually defining the terms "harassment" and "discrimination." While proposed Comment 3 states that "[t]he substantive law of antidiscrimination and anti-harassment statutes and case law ***may*** guide application of paragraph (g)," this provides very little comfort or instruction as to the parameters limiting a lawyer's free speech rights. Antidiscrimination laws vary widely in their definitions of what constitutes harassment. Compare *Campbell v. Fla. Steel Corp.*, 919 S.W.2d 26, 31-32 (Tenn. 1996) (outlining the requirements that harassment must be both subjectively and objectively severe or pervasive to qualify under the Tennessee Human Rights Act) with Tenn.

Code Ann. § 39–17–315(a)(3) ("'Harassment' means conduct directed toward a victim that includes, but is not limited to, repeated or continuing unconsented contact that would cause a reasonable person to suffer emotional distress, and that actually causes the victim to suffer emotional distress.").

Comment 3 includes "derogatory or demeaning verbal or physical conduct" as an example of prohibited harassment. This definition is inherently subjective and depends largely upon the beliefs of the beholder. Who decides what speech is considered "derogatory" and by what standards? Are lawyers to be potentially subject to disciplinary action merely because they publicly espouse a viewpoint that others find disagreeable? Would a lawyer's refusal to accept representation of a client based upon the lawyer's deeply-held religious beliefs be deemed offensive, derogatory, or demeaning to the rejected client, such as to warrant disciple under the proposed Rule? Whether intended or not, the Rule could even result in a lawyer being disciplined merely for expressing policy-based disagreement with, for example, the same-sex marriage holding of Obergefell v. Hodges, 135 S. Ct. 2584 (2015), because that viewpoint is viewed as "derogatory verbal conduct" That would be so despite the fact that the lawyer might reiterate some of the same points Justice Roberts made in dissenting in Obergefell.

Overbreadth

The scope of the proposed Rule broadly extends to "conduct related to the practice of law." This phrase is defined by proposed Comment 4 to include not only the representation of clients, but also to more tangential aspects such as "participating in bar association, business or social activities in connection with the practice of law." Essentially, the proposed Rule encompasses every facet of a lawyer's conduct ranging from the daily internal operations of a

lawyer's office to purely social settings that may be either sponsored by a bar association or somehow connected to a business with which a lawyer might have a legal relationship.

"'Overbreadth' is a judicially created doctrine designed to prevent the chilling of protected expression. The doctrine of overbreadth derives from the recognition that an unconstitutional restriction of expression may deter protected speech by parties not before the court and thereby escape judicial review." 16A Am.Jur.2d *Constitutional Law* § 411 (2003). A law may be invalid on its face if it inhibits the exercise of First Amendment rights and "if the impermissible applications of the law are substantial when 'judged in relation to the statute's plainly legitimate sweep.'" *State v. Burkhart,* 58 S.W.3d 694, 697 (Tenn. 2001). "The constitutional test for overbreadth is whether the statute's language overreaches unlawful conduct and encompasses activity that is constitutionally protected." *State v. Pickett,* 211 S.W.3d 696, 702 (Tenn. 2007). If the law reaches a substantial amount of constitutionally protected conduct, the proponent of the law must then "demonstrate from the text of the law and actual fact that there are a substantial number of instances where the law cannot be applied constitutionally." *Burkhart,* 58 S.W.3d at 697 (quoting *State v. Lyons,* 802 S.W.2d 590, 593 (Tenn. 1990)).

The proposed Rule's coverage pertaining to "conduct related to the practice of law" violates the overbreadth doctrine in that its restrictions on free speech and freedom of conscience encompass activities that are protected by the Tennessee Constitution. Beyond merely applying to the representation of clients, the proposed Rule's definition of "conduct related to the practice of law" encroaches even upon a lawyer's private sphere in situations that are traditionally unregulated, such as speech and conduct at social events or in public forums (including social media) where individuals are free to express their feelings and opinions without fear of

governmental interference or sanctions. A lawyer does not forego his or her constitutional rights upon receiving a license to practice law. The proposed Rule's overly broad scope unconstitutionally blurs the lines between a lawyer's public role in representing clients and a lawyer's private life. Because of the blurred line, the proposed Rule has a chilling effect on a lawyer's constitutional guarantees and freedoms since many lawyers may chose to remain silent or refrain from otherwise engaging in conduct out of fear that their constitutionally-protected speech or conduct may fall within the proposed Rule's "conduct related to the practice of law."

No Exception for Sincerely-Held Beliefs

An individual's right of conscience is guaranteed by the Tennessee Constitution. Tenn. Const. Art. I, §3 ("that no human authority can, in any case whatever, control or interfere with the rights of conscience"). The proposed Rule has no exception for a lawyer's sincerely-held beliefs or right of conscience. While proposed Comment 4a states that the proposed Rule does not restrict speech or conduct protected by the First Amendment, the exemption is narrowed only to speech and conduct "unrelated to the practice of law."

Other professions have adopted exceptions for sincerely-held beliefs. For example, counselors and therapists are protected from refusing to provide services that conflict with their sincerely held principles. Tenn. Code Ann. §63-22-302(a). A health care provider may refuse a course of treatment for a patient – even if requested by the patient – based upon the individual provider's "reasons of conscience." Tenn. Code Ann. §68-11-1808(c).

Many lawyers have reasons to not accept representation of clients or to speak against issues involving sexual orientation, gender identity, marital status, or socioeconomic status based upon sincerely-held religious beliefs and rights of conscience. Indeed, Tennessee citizens – not just lawyers – are deeply divided on these same issues. Because these rights are guaranteed by

the Tennessee Constitution, lawyers should be allowed an exception to the proposed Rule's prohibitions if based upon sincerely-held beliefs and rights of conscience. Because the proposed Rule does not afford such an exception, it violates Article I, section 3 of the Tennessee Constitution.

Conclusion

Based on the foregoing, the CLS Chattanooga Chapter opposes amendment of Rule 8, RPC 8.4 by adopting the proposed RPC 8.4(g). Such proposed Rule violates Article I, sections 3 and 19 of the Tennessee Constitution as well as the First Amendment to the federal Constitution.

Respectfully submitted,

CHRISTIAN LEGAL SOCIETY
CHATTANOOGA CHAPTER

By: Doug S. Hamill

Doug S. Hamill, BPR No. 022825
711 Cherry Street
Chattanooga, Tennessee 37402

By: John G. Huisman

John G. Huisman, BPR No. 023991
7315 Lee Hwy., Ste 179
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Certificate of Adoption:

The following attorneys have specifically authorized us to represent that they join this brief:

Stacie Caraway, BPR No. 17287

R. Wayne Peters, BPR No. 01818

Richard P. Jahn Jr., BPR No. 01435

Timothy M. Gibbons, BPR No. 014860

David Lea Moss, BPR No. 011076

Marin L. Pierce, BPR No. 009608

David Kesler, BPR No. 001518

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Leslie A. Cory, BPR No. 022055

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Stephany Pedigo, BPR No. 019534

Scott N. Brown, Jr., BRP No. 1212

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Nancy Cogar, BPR No. 32035

Steven Dobson, BPR No. 1936

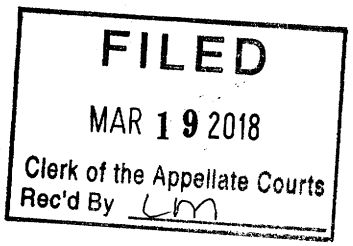
appellatecourtclerk - Re: Tenn. Sup. Ct. R. 8, Proposed Rule 8.4(g), Docket No. ADM2017-02244

From: John Huisman <jhuisman@thebedboss.com>
To: <appellatecourtclerk@tncourts.gov>
Date: 3/19/2018 4:21 PM
Subject: Re: Tenn. Sup. Ct. R. 8, Proposed Rule 8.4(g), Docket No. ADM2017-02244
Attachments: 2018.3.19 CLS Brief Signed.pdf

Mr. Hivner,

I attach a submission sent via FedEx this afternoon to your attention for submission and filing in regards to the Proposed Rule 8.4(g), Docket No. ADM2017-02244. Thank you.

John Huisman
VP & General Counsel
Upward Mobility, Inc.
7315 Lee Highway, Ste 179
Chattanooga, TN 37421



Lisa Marsh - Tenn. Sup. Ct. R. 8, Proposed Rule 8.4(g), Docket No. ADM2017-02244

From: "David Moss" <dmoss@dmosslawfirm.com>
To: <appellatecourtclerk@tncourts.gov>
Date: 3/15/2018 4:16 PM
Subject: Tenn. Sup. Ct. R. 8, Proposed Rule 8.4(g), Docket No. ADM2017-02244
Cc: <sen.bo.watson@capitol.tn.gov>, <sen.todd.gardenhire@capitol.tn.gov>, <r...

To the Justices of the Tennessee Supreme Court:

I am just learning that you are considering adopting the above-referenced rule. I want to express my **vehement opposition** to the proposed rule 8.4(g). My reasons may be similar to those expressed in other briefs and comments. I am going to briefly summarize them, however, for the benefit of the legislators who are copied on this email:

1. **It is indisputable that this proposed rule would severely limit the First Amendment rights of lawyers**. I always thought lawyers and legal associations were champions of free speech. People often want us to speak for them on matters of social and political importance because we are the most effective advocates in any community. **When did lawyers and legal organizations—and now courts—get into the business of suppressing speech, especially the speech of lawyers?**

The proposed rule threatens every lawyer with discipline—including loss of license—if he or she engages in "conduct related to the practice of law" that the lawyer "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." What does that mean?

- According to proposed Comment 3, this harassment or discrimination can be the result of "verbal conduct"—that is, **SPEECH**.
- **Moreover, the proposed rule is so broad that it would suppress a lawyer's speech (and other conduct) virtually everywhere outside his own home**. According to proposed Comment 4, "conduct relating to the practice of law" includes interaction with "clients, witnesses, coworkers, court personnel, lawyers and others" plus activities in the "operation or management of a law firm or law practice" plus "participation in bar association, business and social activities." That covers just about every interaction outside one's front door.

Some proponents of the proposed rule say it is just a "minor" regulation. That is blatantly false.

Others might say, "This is no big deal. You would never be found guilty of misconduct if, for example, you wear a Confederate flag shirt (or MAGA hat) to a football game, or if you speak to a civic group and say abortion/homosexuality/same-sex marriage is a sin, or Sharia law is bad, or we should have enhanced vetting of all immigrants from Iran, or anyone on Zoloft should not be able to own a gun, or gender fluidity is a myth." Oh, yeah? Who is to say that the people who decide my fate share my understanding of "discrimination" or "harassment" or what I "should know." Besides, it is not my goal to be vindicated at a misconduct hearing, but to avoid such hearings altogether.

The necessary result of the proposed rule is that the speech of lawyers—especially their social and political speech—will be "chilled." Under the proposed rule, a lawyer could not say anything about the primary social or political issues of today without being at risk of discipline. **If this rule was in effect in 1788-91 when the**

Constitution and Bill of Rights were being debated and ratified, every lawyer making a public comment about Slavery, Voting Rights, the Three-Fifths Compromise, the Freedom of Religion clause of the First Amendment, etc. would be subject to discipline.

In particular, the proposed rule would chill and/or silence the speech of lawyers who disagree with post-modern progressive social and political theories. Traditional liberals and conservatives cherish freedom of speech, even speech they find offensive. They cherish the right to counter with their own speech, which might also be offensive. It is against the core beliefs of traditional liberals and conservatives to file complaints against progressive lawyers every time they hear one publicly trash Christianity or hear another one claim that gender is "fluid" (contrary to science and reason). However, progressives have no reservations about punishing speech (and speakers) with which they disagree—*see, e.g.*, any college campus. So, in practice, the proposed rule (if adopted) will only be used to silence traditional liberals and conservatives. They will have to shut up (except in their homes) and pretend, for example, that progressive concepts of gender identity (now up to 56 categories) are valid. **Do our Tennessee Supreme Court justices think that is right and good—that it justifies adoption of this proposed rule? I would hope not. I guess the legal community, the legislature and the public will soon find out.**

2. Even lawyers cannot be deprived of their Constitutional rights without a compelling reason. What is wrong with the current rule and comment? Why does it need changing? Is the TBPR inundated with **valid** complaints of lawyers discriminating against or harassing clients, witnesses, court officers, civic groups, etc.? My guess is NO. The TBA and the TBPR submitted a brief in support of the proposed rule. They provided no evidence that the current rule and comment is producing poor results. If they had any evidence, they would have come forward with it. **As far as I know, there is no compelling reason for this proposed rule change, especially one so screwed up that it takes 7 comments to (inadequately) explain**.

Note: In their brief, the TBA & TBPR argued that the current rule prohibiting discrimination by lawyers is inadequate because the prohibition appears in current Comment 3 rather than in the body of the rule. Then they argue that lawyers will be able to rely upon the proposed comments to the proposed rule for protection of their First Amendment rights. If the proposed comments are authoritative, then so is the current comment. Thus, the current rule and comment are authoritative and no change to the rule is warranted.

3. Nobody seems to know what it means for a lawyer to harass or discriminate against someone on the basis of "socioeconomic status." The proposed rule does not say. I can see it being misused/misinterpreted by some to require lawyers to take the case of every person who calls, regardless whether they can pay.

This proposed rule cannot be fixed, and the Court should not try to fix it. The Court should just reject it and leave the current rule in place.

Thank you for your consideration of my comments.

Sincerely,

David L. Moss (#011076)
651 East 4th Street, Suite 100
Chattanooga, Tennessee 37403
(423) 756-4050
(423) 634-3249 [fax]

appellatecourtclerk - Fwd: Revised Comment on Proposed RPC 8.4(g) ADM2017-02244

From: John Publius <publiusintennessee@gmail.com>
To: <appellatecourtclerk@tncourts.gov>
Date: 3/19/2018 10:45 AM
Subject: Fwd: Revised Comment on Proposed RPC 8.4(g)

Dear Appellate Court Clerk:

Please include the below comment on proposed Tenn. Sup. Ct. R. 8, RPC 8.4(g), Docket No. ADM2017-02244. Please disregard the unrevised version, which had a few typos. Thank you.

Proposed rule 8.4(g) and its comments would prohibit as "derogatory," among other things, speech that displays "bias" or "prejudice" concerning sexual orientation, gender identity, or marital status when it is "related" to the practice of law; and "related to the practice of law" includes even "social activities." A lawyer deemed to violate this rule could be subject to discipline, up to and including disbarral. The rule should not be adopted for the following reasons.

The federal Civil Rights Act of 1964, as amended, and the Tennessee Human Rights Act--statutes of which I heartily approve--along with other similar statutes already prohibit verbal discrimination and harassment that rises to an actionable level. The statutes, passed through the give and take of the legislative process by elected representatives, provide robust remedies to persons harmed by unlawful discriminatory conduct, such as sexually and racially oriented misconduct. Those laws benefit our society by making it more inclusive. And the trend has been, before and since *Obergefell v. Hodges*, 135 S.Ct. 2584 (U.S. 2015), was decided, to include gender identity and sexual orientation among the protected statuses.

Given such laws, the question arises why RPC 8.4(g) it is needed. Lawyers who discriminate and harass in the workplace, for example, are already prohibited from doing so and their misconduct is actionable. What then is the purpose of adopting RPC 8.4(g)?

The answer is unstated but obvious. RPC 8.4(g) is intended to restrain speech by lawyers that is inconsistent with the policies undergirding the majority's position in *Obergefell*. Those policies are: the U.S. Constitution's implicit right to privacy protects the right of individuals not only to choose freely their gender identity and sexual orientation, but also to avail themselves of the public rights and benefits of publicly controlled statuses such as marriage and being a public-school student.

Not all Americans agree with those policies, and there have been decades of debate concerning them, as should be the case. Even *Obergefell*'s majority holding, which is now imposed as the law--as it should be--was subject to vigorous policy-based dissent.

Proposed RPC 8.4(g) and its comments, however, would quash precisely such debate. The proposed rule and its comments are designed to remove from public debate (and even causal social discussion) policy views by lawyers that are inconsistent with *Obergefell*'s majority holding. The proposed rule and its comments would, if adopted, cause every lawyer to question whether he or she could be subjected to professional discipline because he or she expressed disagreement with that holding and its related social policies, even if the lawyer concedes that it must be followed as the governing law. The proposed rule and its comments, if adopted, could be used to discipline Tennessee lawyers for expressing opinions that contradict or question the policies inherent in *Obergefell*'s majority opinion and their extension and embodiment in related rulings and directives. The Board of Professional Responsibility would have the power to censure and disbar lawyers who express disagreement over such expansion of *Obergefell*'s policies.

The point here is not to say that *Obergefell*'s majority opinion was wrong. The point is that the decision in *Obergefell* itself involved debate and the permitted expression of dissent. Proposed RPC 8.4(g) and its

comments, by quelling such debate, would contradict the process by which *Obergefell* was decided. For that very reason, the proposed rule and its comments are, ironically, fundamentally undemocratic.

The proposed rule and its comments are undemocratic in the following ways. Their definition of the scope of prohibited "derogatory" verbal expression is as broad as the day is long (when do lawyer say anything on public matters that is snot somehow law-related?) and as subject to subjective interpretation as a sunset. And that very possibility gives the Board of Professional Responsibility a potent weapon for threatening and punishing speech spoken by lawyers that is perceived as derogatory. That is so even if the speech is not targeted as a particular individual, as is typically required for liability under anti-discrimination laws. Investing the State of Tennessee with such power to regulate lawyers' speech contradicts historical principles of freedom of speech and conscience that long-predate the founding of the United States of America and that are embodied in the the U.S. Constitution's First Amendment.

This contradiction is not without considerable irony, for emphasizing "tolerance" is plainly the conceptual basis for restraining speech and debate perceived as derogatory. But when tolerance is taken to the extreme that it precludes debate over fundamental social policies at pain of professional discipline, we have crossed the line from a democratic process into something more akin to autocracy, where uncomfortable or destabilizing dissent is punished with the sword of state.

For example, were Justice John Roberts an attorney licensed in Tennessee, and were he to state at a bar association meeting the same things he said in his dissent in *Obergefell*, RPC 8.4(g) and its comments might be wielded to censure or disbar him. Is that what the Tennessee Supreme Court wishes to occur?

Were RPC 8.4(g) adopted, its proponents may justifiably celebrate. But they should not celebrate on the basis that they have promoted the freedom of speech. That would have had nothing to do with it.

Respectfully submitted,

J. Publius in Tennessee

Lisa Marsh - Comment on Adoption of New Tenn. Sup. Ct. R. 8, RPC 8.4(g) ADM2017-02244

From: John Publius <publiusintennessee@gmail.com>
To: <appellatecourtclerk@tncourts.gov>
Date: 3/18/2018 1:28 PM
Subject: Comment on Adoption of New Tenn. Sup. Ct. R. 8, RPC 8.4(g)

Proposed rule 8.4(g) and its comments would prohibit as "derogatory," among other things, speech that displays "bias" or "prejudice" concerning sexual orientation, gender identity, or marital status when it is "related" to the practice of law; and "related of law" even "social activities." A lawyer deemed to violate this rule could be subject to discipline, up to and including disbarring. The rule should not be adopted for the following reasons.

The federal Civil Rights Act of 1964, as amended, and the Tennessee Human Rights Act--statutes which I heartily approve--along with other similar statutes already prohibit verbal discrimination and harassment that rises to an actionable level. The statutes, passed through the give and take of the legislative process by elected representatives, provide robust remedies to persons harmed by unlawful discriminatory conduct, such as sexually and racially oriented misconduct. Those laws benefit our society by making it more inclusive. And the trend has been, before and since *Obergefell v. Hodges*, 135 S.Ct. 2584 (U.S. 2015), was decided, to include gender identity and sexual orientation among the protected statuses.

Given such laws, the question arises why RPC 8.4(g) it is needed. Lawyers who discriminate and harass in the workplace, for example, is already prohibited and actionable. What then is the purpose of adopting RPC 8.4(g)?

The answer is unstated but obvious. RPC 8.4(g) is intended to restrain speech by lawyers that is inconsistent with the policies undergirding the majority's position in *Obergefell*. Those policies are: the U.S. Constitution's implicit right to privacy protects the right of individuals not only to choose freely their gender identity and sexual orientation, but also to avail themselves of the public rights and benefits of publicly controlled statutes such as marriage and being a public-school student.

Not all Americans agree with those policies, and there have been decades of debate concerning them, as should be the case. Even *Obergefell*'s majority holding, which is now imposed as the law--as it should be--was subject to vigorous policy-based dissent.

Proposed RPC 8.4(g) and its comments, however, would quash precisely such debate. The proposed rule and its comments are designed to remove from public debate (and even causal social discussion) policy views by lawyers that are inconsistent with *Obergefell*'s majority holding. The proposed rule and its comments would, if adopted, cause every lawyer to question whether he or she could be subjected to professional discipline because he or she expressed disagreement with that holding and its related social policies, even if the lawyer concedes that it must be followed as the governing law. The proposed rule and its comments, if adopted, could be used to discipline Tennessee lawyers for expressing opinions that contradict or question the policies inherent in *Obergefell*'s majority opinion and their extension and embodiment in related rulings and directives.

The Board of Professional Responsibility would have the power to censure and disbar lawyers who express disagreement over such expansion of *Obergefell*'s policies.

The point here is not to say that *Obergefell*'s majority opinion was wrong. The point is that the decision in *Obergefell* itself involved debate and the permitted expression of dissent. Proposed RPC 8.4(g) and its comments, by quelling such debate, would contradict the process by which *Obergefell* was decided. For that very reason, the proposed rule and its comments are, ironically, fundamentally undemocratic.

The proposed rule and its comments are undemocratic in the following ways. Their definition of the scope of prohibited "derogatory" verbal expression is as broad as the day is long (when do lawyer say anything on public matters that is snot somehow law-related?) and as subject to subjective interpretation as a sunset. And that very possibility gives the Board of Professional Responsibility a potent weapon for threatening and punishing speech spoken by lawyers that is perceived as derogatory. That is so even if the speech is not targeted as a particular individual, as is typically required for liability under anti-discrimination laws. Investing the State of Tennessee with such power to regulate lawyers' speech contradicts historical principles of freedom of speech and conscience that long-predate the founding of the United States of America and that are embodied in the the U.S. Constitution's First Amendment.

This contradiction is not without considerable irony, for emphasizing "tolerance" is plainly the conceptual basis for restraining speech and debate perceived as derogatory. But when tolerance is taken to the extreme that it precludes debate over fundamental social policies at pain of professional discipline, we have crossed the line from a democratic process into something more akin to autocracy, where uncomfortable or destabilizing dissent is punished with the sword of state.

For example, were Justice John Roberts an attorney licensed in Tennessee, and were he to state at a bar association meeting the same things he said in his dissent in *Obergefell*, RPC 8.4(g) and its comments might be wielded to censure or disbar him. Is that what the Tennessee Supreme Court wishes to occur?

Were RPC 8.4(g) adopted, its proponents may justifiably celebrate. But they should not celebrate on the basis that they have promoted the freedom of speech. That would have had nothing to do with it.

Respectfully submitted,

Publius in Tennessee

Wm. E. Boston (1926-2000)
Charles W. Holt, Jr.
Ben Boston
Christopher V. Sockwell†*
Ryan P. Durham
Cameron Hoffmeyer

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March 19, 2018

BY EMAIL (appellatecourtclerk@tncourts.gov)

FILED
MAR 19 2018
Clerk of the Appellate Courts
Rec'd By LTW

James Hivner, Clerk of Appellate Courts
Tennessee Supreme Court
100 Supreme Court Building
401 Seventh Ave. North
Nashville, TN 37219-1407

Re: Petition for the Adoption of a new Tennessee Supreme Court Rule 8, RPC 8.4(g); No. ADM 2017-02244

Dear Mr. Hivner:

In response to the Tennessee Supreme Court's Order dated November 21, 2017, the Lawrence County Bar Association supports the adoption of the proposed amendment to add a new RPC 8.4(g) ***as it will be amended by the Tennessee Bar Association*** in the following respects:

a. Revise the last two sentences of paragraph (g) to remove a circular reference as follows: "This paragraph does not limit the ability of a lawyer to accept, decline, or withdraw from representation. This paragraph does not preclude legitimate advice or advocacy **that does not violate other Rules of Professional Conduct.**

b. Add the following as the last sentence to Comment [4]: **For example, legitimate advocacy protected by Section (g) includes speech on matters of public concern at bar association functions, continuing legal education classes, law school classes, and other similar forums.**

c. Revise proposed comment [4a] as follows: **Section (g) does not apply to conduct protected by the First Amendment, as a lawyer does retain a "private sphere" where**

personal opinion, freedom of association, religious expression, and political speech are protected by the First Amendment and not subject to this Rule. A lawyer's speech or conduct unrelated to the practice of law cannot violate this Section.

The Lawrence County Bar Association appreciates the opportunity to comment on proposed Rules promulgated by the Tennessee Supreme Court.

Sincerely,

Ben Boston, President
Lawrence County Bar Association

BB:ts

Lisa Marsh - Rule 8.4(g) Comment

From: "Ben Boston" <bboston@bhsdlaw.com>
To: <appellatecourtclerk@tncourts.gov>
Date: 3/19/2018 9:33 AM
Subject: Rule 8.4(g) Comment
Cc: <bboston@bhsdlaw.com>
Attachments: 201803190907.pdf

Please see attached and please acknowledge receipt. Thank you.

Ben Boston
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ADM2017-02244

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**licensed in Tennessee and Georgia*
+Fellow, American Academy of Adoption Attorneys

March 19, 2018

Tennessee Supreme Court Justices
c/o Mr. James M. Hivner, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, Tennessee 37219-1407

VIA EMAIL AND
UNITED STATES MAIL

In re: Tenn. Sup. Ct. R. 8, Proposed Rule 8.4(g); Docket No. ADM2017-02244

Dear Justices:

My comment to proposed Rule 8.4(g) is narrow and is motivated by an inaccurate statement in this month's Tennessee Bar Journal by TBA President Lucian Pera. More specifically, Mr. Pera states that the proposed rule "exempts decisions about whether to accept, decline or withdraw from representation . . ." This statement is patently false.

Lucian's observation no doubt is based upon the language of the Proposed Rule that states that "[t]his paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16."

The problem here is that *Rule 1.16 does not even address the question of what clients or cases an attorney may decline.* Rule 1.16 only addresses the question of what cases an attorney is *required* to decline. In other words, Rule 1.16 has nothing to do with an attorney's decision not to accept a case because the attorney does not want to advocate the position taken by the client. Rule 1.16 only addresses the opposite situation – where an attorney otherwise wants to represent a client and is prohibited from doing so.

The Justices should be aware of the fact that the Supreme Court of the only state that has adopted the new Model Rule (Vermont), has specifically stated that the new rule *does* apply to an attorney's decision not to accept a case.
[https://www.vermontjudiciary.org/sites/default/files/documents/PROMULGATEDVRPr8.4(g)pdf.]

The Proposed Rule therefore represents a quantum shift in a long-standing and historical principle granting an attorney freedom of professional autonomy when it comes to choosing who to represent and what cases to accept. The Proposed Rule then potentially puts attorneys in a position where they are required to take cases that they do not want to take. Should this Court then adopt a rule which may have the affect of forcing an attorney to violate his or her personal conscience if the attorney has a moral objection to a case?

Moreover, how is an attorney to carry out their professional obligation to represent their client zealously where the lawyer has a personal or moral objection to the client's case? Forcing an attorney to accept a case that an attorney does not want while simultaneously requiring the attorney to provide zealous representation, is both unfair to the attorney and to the client.

My greatest concern with the Proposed Rule is that in an age of unfortunately increased fractured social discourse and hyper-politicalization, that the Proposed Rule will ultimately end up as a club for individuals or organizations to use to seek out and punish individual attorneys of different religious, political, or moral persuasions.

Because it is clear that the proposed Rule 8.4(g) does *not* exempt attorney decisions about whether to accept, decline or withdraw from a representation, I urge that this Honorable Court decline to adopt the proposed rule.

Sincerely yours,

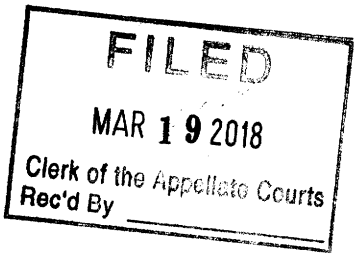
Michael S. Jennings

MSJ:rsd

appellatecourtclerk - Tenn. Sup. Ct. R. 8

From: Rebecca Harris <rebecca@sampleslaw.com>
To: "'appellatecourtclerk@tncourts.gov'" <appellatecourtclerk@tncourts.gov>
Date: 3/19/2018 3:46 PM
Subject: Tenn. Sup. Ct. R. 8
Cc: Mike Jennings <mjennings@sampleslaw.com>
Attachments: 20180319164246803.pdf

Please see attached letter. Original will follow by United States Mail.



Please confirm receipt.

Rebecca S. Harris
Adoption Paralegal for Michael S. Jennings
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Telephone: 423/892-2006
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March 14, 2018

ADM 2017-02244

The Honorable Jeffrey S. Bivins, Chief Justice
The Honorable Cornelia A. Clark, Justice
The Honorable Holly Kirby, Justice
The Honorable Sharon G. Lee, Justice
The Honorable Roger A. Page, Justice

Attn: James M. Hivner, Clerk
Re: Tenn. Sup. Ct. R. 9, section 32
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

In re: Proposed amendment of Rule 8, RPC 8.4 of the Rules of the Tennessee Supreme Court by Adopting a new RPC 8.4(g)

Dear Chief Justice Bivins, Justice Clark, Justice Kirby, Justice Lee and Justice Page:

I have been a member of the Tennessee Bar since 1979 and have always tried to uphold myself as a fair advocate of rights, while being an absolute advocate for my client. This has sometimes involved representing those who cannot afford adequate legal representation or with whom I may not agree politically. Our firm is very supportive of pro bono work and we provide many hours of that each year, by choice, without reporting it for "recognition" by the bar association. We practice to see that the right thing and right result can happen.

However, this proposed amendment takes away the professional judgment of attorneys and allows many unnecessary and unreasonable complaints by individuals. As an example, if we represented a tenant pro bono in a case against a particular landlord, but did not choose to represent another client in a similar scenario, we would potentially be subject to discipline for alleged "discrimination" under this revision even though there could be very valid reasons for refusing the second representation. Would it make a difference if we represented two but did not represent others? Who makes this call?

This proposed rule creates a presumption that if we refuse to represent all in a certain class, or a total class, we have discriminated. Obviously our judgment and beliefs must be allowed to determine who we can best represent to provide the best advocacy. This proposed rule takes that decision away from the lawyer and degrades our status as professionals.

No matter how much legislation or how many rules we have, there will be some who choose to ignore them and some, like our firm, who choose to do the right thing at the right time. We may not, however, choose to represent everyone in the same situation but this rule would subject us to argument that we discriminated against someone, and could force lawyers to represent individuals who could receive better representation elsewhere.

I adamantly oppose the adoption of this rule amendment and believe it will not solve problems in Tennessee, but will actually create more.

Thank you for your time and consideration of this matter.

Sincerely,

Mitzi P. Samples, Esq.

M:/Letters 2018/TN Supreme Court re Rule 8

appellatecourtclerk - Petition for the Adoption of a New Tenn. Sup. Ct R. 8, RPC 8.4(g) No. ADM2017-02244

From: Dale Thomas <dthomas@raineykizer.com>
To: "appellatecourtclerk@tncourts.gov" <appellatecourtclerk@tncourts.gov>
Date: 3/19/2018 4:33 PM
Subject: Petition for the Adoption of a New Tenn. Sup. Ct R. 8, RPC 8.4(g) No. ADM2017-02244

Dear Mr. Hivner,

I am opposed to the propose revision to the above-referenced rule and comments.

Everything that I do is "related to the practice of law" from speaking at church, social groups, social media, etc. The proposed language of comment 4a does not give me any comfort that the "related to the practice of law" will not be extended and will not violate my First Amendment rights to free speech and my right to the free exercise of my religion.

Thank you for your attention to my concerns, and I respectfully request that the Supreme Court decline to adopt these proposed amendments.

R. Dale Thomas | Attorney at Law
Rainey Kizer Reviere & Bell PLC

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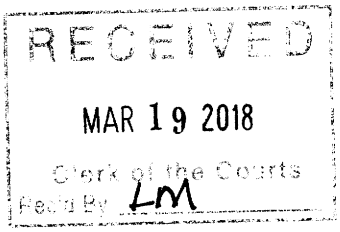
Named a *Go-To Law Firm*® by Fortune 500 General Counsel

Scott N. Brown, Jr., Esq.
772 Black Creek Drive
Chattanooga, Tennessee 37419
March 16, 2018

The Honorable Jeffrey S. Bivins, Chief Justice
The Honorable Cornelia A. Clark, Justice
The Honorable Holly Kirby, Justice
The Honorable Sharon G. Lee, Justice
The Honorable Roger A. Page, Justice



Attn: Hon. James M. Hivner, Clerk
Re: Tenn. Sup. Ct. R. 9, section 32
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

Re: No. ADM2017-02244 –Opposition to Amending Rule 8, RPC 8.4, Proposed Rule 8.4(g)

Dear Chief Justice Bivins, Justice Clark, Justice Kirby, Justice Lee, and Justice Page:

This letter is to address my opposition to the proposed amendment of Rule 8 to adopt the proposed harassment and discrimination matters now before the Court. By way of introduction, I was first licensed by North Carolina in 1965; served in the Navy JAG Corps from then until 1968; practiced for two years in Asheville, North Carolina; then was admitted in Tennessee by comity and practiced in Chattanooga from 1970 until last June when I retired from full time practice, but have kept my license active and do some pro bono work. My BPR number is 001212.

I am absolutely opposed to harassment and discrimination and believe that those acts and attitudes are contrary to the tenets of my (Christian) religion. On the other hand I am absolutely opposed to requiring a lawyer to do things in the legal context or any context for that matter that are contrary to his or her sincerely held religious beliefs. I think the proposed change presents a very real and present danger that this could be or would be a result.

For example, in the domestic relations/adoption arena there will be religious issues for a lawyer whose beliefs prevent him from assisting certain classes of adoptive parents. These are serious and very real situations and it would be a sad day for freedom of religion for the lawyer if he/she is at risk in declining representation, not

unlike the Colorado Masterpiece Cakeshop baker who declined to make a wedding cake for a same sex couple, although the baker was willing to make and sell other goods to them. There certainly were plenty of other bakeries in the community which would perform this service. There are certainly plenty of lawyers whose religious convictions will allow them to take cases others can't.

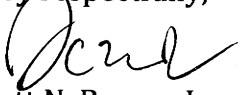
The First Amendment to our U. S. Constitution creates and memorializes our overall right to freedom of religion and freedom of speech. Our own State Constitution creates what seems to be even broader protection for rights of conscience, in Article 1, Section 3, and for freedom of speech in Article 1, Section 19. In addition our State Constitution in Article 1, Section 4 prohibits religious tests for "any office or public trust under this state." It seems not a stretch to consider a law license to be such an office or position of public trust. Compulsion to renounce religious beliefs in order to hold a law license looks pretty unconstitutional. It would also be a sad irony for this Court to adopt the proposed changes and then have to declare them unconstitutional in litigation.

In the current issue of the Tennessee Bar Journal, President's Perspective, there is a strong and passionate plea for adoption of the proposed change. This column recites, however, that "Reports collected by the ABA from disciplinary counsel in jurisdictions that have had such rules for as long as 20 years are clear: they have seen no surge in complaints or discipline, and only a very small number of lawyers have been disciplined under their rules." From this admission it would seem that we are addressing a "very small number of lawyers" with the treatment being worse than the disease. I would respectfully urge the Court to "First, do no harm" and deny the proposed amendment, or at the very least determine whether this is a real problem in Tennessee (in my experience over these years, it is not a problem in Tennessee).

Finally, this same Bar Journal column is critical of the current (vague) rule because it is weak or suspect as it relies on a comment to the rule itself to complete the black-letter rule and give it enough teeth to deal with bad conduct. Still the comment is seen to be of lesser force and import than the rule, being only the comment and not really the rule itself. Ironically, it is the comment to this new proposed black-letter rule which contains what is deemed the lawyer's protection relating to "decisions about whether to accept, decline or withdraw from a representation." If the rule change is adopted, then certainly the comment containing the protection deserves to be part of the black-letter rule and not a mere comment.

Thank you for the opportunity to present these points, and for taking these serious matters seriously.

Very respectfully,



Scott N. Brown, Jr.

Lisa Marsh - Re: Tenn. Sup. Ct. R. 8, Proposed Rule 8.4(g), Docket No. ADM2017-02244

From: "James L Henry" <jhenry@vol.com>
To: <appellatecourtclerk@tncourts.gov>
Date: 3/16/2018 3:59 PM
Subject: Re: Tenn. Sup. Ct. R. 8, Proposed Rule 8.4(g), Docket No. ADM2017-02244
Cc: <rep.gerald.mccormick@capitol.tn.gov>, <sen.bo.watson@capitol.tn.gov>, <...

To the Justices of the Tennessee Supreme Court:

Below is a letter written by David Moss, which I fully agree with and support.

Thanks
James L. Henry, Jr.

"I am just learning that you are considering adopting the above-referenced rule. I want to express my **vehement opposition** to the proposed rule 8.4(g). My reasons may be similar to those expressed in other briefs and comments. I am going to briefly summarize them, however, for the benefit of the legislators who are copied on this email:

1. **It is indisputable that this proposed rule would severely limit the First Amendment rights of lawyers**. I always thought lawyers and legal associations were champions of free speech. People often want us to speak for them on matters of social and political importance because we are the most effective advocates in any community. **When did lawyers and legal organizations—and now courts—get into the business of suppressing speech, especially the speech of lawyers?**

The proposed rule threatens every lawyer with discipline—including loss of license—if he or she engages in "conduct related to the practice of law" that the lawyer "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." What does that mean?

- According to proposed Comment 3, this harassment or discrimination can be the result of "verbal conduct"—that is, **SPEECH**.
- **Moreover, the proposed rule is so broad that it would suppress a lawyer's speech (and other conduct) virtually everywhere outside his own home**. According to proposed Comment 4, "conduct relating to the practice of law" includes interaction with "clients, witnesses, coworkers, court personnel, lawyers and others" plus activities in the "operation or management of a law firm or law practice" plus "participation in bar association, business and social activities." That covers just about every interaction outside one's front door.

Some proponents of the proposed rule say it is just a "minor" regulation. That is blatantly false.

Others might say, "This is no big deal. You would never be found guilty of misconduct if, for example, you wear a Confederate flag shirt (or MAGA hat) to a football game, or if you speak to a civic group and say abortion/homosexuality/same-sex marriage is a sin, or Sharia law is bad, or we should have enhanced vetting of all immigrants from Iran, or anyone on Zoloft should not be able to own a gun, or gender fluidity is

a myth." Oh, yeah? Who is to say that the people who decide my fate share my understanding of "discrimination" or "harassment" or what I "should know." Besides, it is not my goal to be vindicated at a misconduct hearing, but to avoid such hearings altogether.

The necessary result of the proposed rule is that the speech of lawyers—especially their social and political speech—will be "chilled." Under the proposed rule, a lawyer could not say anything about the primary social or political issues of today without being at risk of discipline. **If this rule was in effect in 1788-91 when the Constitution and Bill of Rights were being debated and ratified, every lawyer making a public comment about Slavery, Voting Rights, the Three-Fifths Compromise, the Freedom of Religion clause of the First Amendment, etc. would be subject to discipline**.

In particular, the proposed rule would chill and/or silence the speech of lawyers who disagree with post-modern progressive social and political theories. Traditional liberals and conservatives cherish freedom of speech, even speech they find offensive. They cherish the right to counter with their own speech, which might also be offensive. It is against the core beliefs of traditional liberals and conservatives to file complaints against progressive lawyers every time they hear one publicly trash Christianity or hear another one claim that gender is "fluid" (contrary to science and reason). However, progressives have no reservations about punishing speech (and speakers) with which they disagree—*see, e.g.*, any college campus. So, in practice, the proposed rule (if adopted) will only be used to silence traditional liberals and conservatives. They will have to shut up (except in their homes) and pretend, for example, that progressive concepts of gender identity (now up to 56 categories) are valid. **Do our Tennessee Supreme Court justices think that is right and good—that it justifies adoption of this proposed rule? I would hope not. I guess the legal community, the legislature and the public will soon find out.**

2. Even lawyers cannot be deprived of their Constitutional rights without a compelling reason. What is wrong with the current rule and comment? Why does it need changing? Is the TBPR inundated with **valid** complaints of lawyers discriminating against or harassing clients, witnesses, court officers, civic groups, etc.? My guess is NO. The TBA and the TBPR submitted a brief in support of the proposed rule. They provided no evidence that the current rule and comment is producing poor results. If they had any evidence, they would have come forward with it. **As far as I know, there is no compelling reason for this proposed rule change, especially one so screwed up that it takes 7 comments to (inadequately) explain**.

Note: In their brief, the TBA & TBPR argued that the current rule prohibiting discrimination by lawyers is inadequate because the prohibition appears in current Comment 3 rather than in the body of the rule. Then they argue that lawyers will be able to rely upon the proposed comments to the proposed rule for protection of their First Amendment rights. If the proposed comments are authoritative, then so is the current comment. Thus, the current rule and comment are authoritative and no change to the rule is warranted.

3. Nobody seems to know what it means for a lawyer to harass or discriminate against someone on the basis of "socioeconomic status." The proposed rule does not say. I can see it being misused/misinterpreted by some to require lawyers to take the case of every person who calls, regardless whether they can pay.

This proposed rule cannot be fixed, and the Court should not try to fix it. The Court should just reject it and leave the current rule in place.

Thank you for your consideration of my comments.

Sincerely,

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Chattanooga, Tennessee 37403
(423) 756-4050
(423) 634-3249 [fax]

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STATE OF TENNESSEE

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March 16, 2018

The Honorable Jeffrey S. Bivins, Chief Justice
The Honorable Cornelia A. Clark, Justice
The Honorable Holly Kirby, Justice
The Honorable Sharon G. Lee, Justice
The Honorable Roger A. Page, Justice

Attn: James M. Hivner, Clerk
Tennessee Supreme Court
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219

Re: No. ADM2017-02244 — Comment Letter of the Tennessee Attorney General Opposing Proposed Amended Rule of Professional Conduct 8.4(g)

Dear Chief Justice Bivins, Justice Clark, Justice Kirby, Justice Lee, and Justice Page:

This letter is being filed in response to the Court's order of November 21, 2017, soliciting written comments on whether to adopt amendments to Tennessee Supreme Court Rule 8, Rule of Professional Conduct 8.4, that were proposed by Joint Petition of the Tennessee Board of Professional Responsibility ("BPR") and the Tennessee Bar Association ("TBA"). Because proposed Rule of Professional Conduct 8.4(g) would violate the constitutional rights of Tennessee attorneys and conflict with the existing Rules of Professional Conduct, the Tennessee Office of the Attorney General and Reporter strongly opposes its adoption.

The proposed amendments to Rule 8.4 and its accompanying comment are "patterned after" ABA Model Rule 8.4(g).[1] That model rule has been widely and justifiably criticized as

[1] Joint Petition of Board of Professional Responsibility of the Supreme Court of Tennessee and Tennessee Bar Association for the Adoption of a New Tenn. Sup. Ct. R. 8, RPC 8.4(g) at 1, *In re Petition for the Adoption of a New Tenn. Sup. Ct. R. 8, RPC 8.4(g)*, No. ADM2017-02244 (Tenn. Nov. 15, 2017) (hereinafter "Joint Petition").

creating a "speech code for lawyers" that would constitute an "unprecedented violation of the First Amendment" and encourage, rather than prevent, discrimination by suppressing particular viewpoints on controversial issues.[2] To date, ABA Model Rule 8.4(g) has been adopted by only one State—Vermont.[3] A number of other States have already rejected its adoption.[4] Although the BPR and TBA assert in their Joint Petition that their Proposed Rule 8.4(g) "improve[s] upon" ABA Model Rule 8.4(g) by "more clearly protecting the First Amendment rights of lawyers," Joint Petition 1, the proposed rule suffers from the same fundamental defect as the model rule: it wrongly assumes that the only attorney speech that is entitled to First Amendment protection is purely private speech that is entirely unrelated to the practice of law. But the First Amendment provides robust protection to attorney speech, even when the speech is related to the practice of law and even when it could be considered discriminatory or harassing. Far from "protecting" the First Amendment rights of lawyers, Proposed Rule 8.4(g) would seriously compromise them.

If adopted, Proposed Rule 8.4(g) would profoundly transform the professional regulation of Tennessee attorneys. It would regulate aspects of an attorney's life that are far removed from protecting clients, preventing interference with the administration of justice, ensuring attorneys' fitness to practice law, or other traditional goals of professional regulation. Especially since there is no evidence that the current Rule 8.4 is in need of revision, there is no reason for Tennessee to adopt such a drastic change. If the TBA and BPR are right that harassing and discriminatory speech is a problem in the legal profession, then the answer is more speech, not enforced silence in the guise of professional regulation.

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[2] Letter from Edwin Meese III and Kelly Shackelford to ABA House of Delegates (Aug. 5, 2016), https://firstliberty.org/wp-content/uploads/2016/08/ABA-Letter_08.08.16.pdf. *See also, e.g.*, Eugene Volokh, *A speech code for lawyers, banning viewpoints that express 'bias,' including in law-related social activities*, The Volokh Conspiracy (Aug. 10, 2016, 8:53 AM), http://reason.com/volokh/2016/08/10/a-speech-code-for-lawyers-bann; John Blackman, *A Pause for State Courts Considering Model Rule 8.4(g): The First Amendment and Conduct Related to the Practice of Law*, 30 Geo. J. Legal Ethics 241 (2017); Ronald Rotunda, *The ABA Decision to Control What Lawyers Say: Supporting "Diversity" But Not Diversity of Thought,* The Heritage Foundation (Oct. 6, 2016), https://www.heritage.org/report/the-aba-decision-control-what-lawyers-say-supporting-diversity-not-diversity-thought.

[3] *ABA Model Rule 8.4(g) and the States,* Christian Legal Society, https://www.christianlegalsociety.org/resources/aba-model-rule-84g-and-states (last visited Mar. 6, 2018).

[4] Order, *In re Proposed Amendments to Rule 8.4 of the Rules of Professional Conduct*, No. 2017-000498 (S.C. June 20, 2017), https://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2017-06-20-01; Order, *In re Amendments to Rule of Professional Conduct 8.4*, No. ADKT526 (Nev. Sep. 25, 2017).

I. Problematic Features of Proposed Rule 8.4(g)

In their current form, the Rules of Professional Conduct do not expressly prohibit discrimination or harassment by attorneys. Rather, Rule 8.4(d) provides that it is "professional misconduct" to "engage in conduct that is prejudicial to the administration of justice." Tenn. Sup. Ct. R. 8, RPC 8.4(d). And comment 3 provides that "[a] lawyer, who in the course of representing a client, knowingly manifests, by words or conduct, bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation, or socio-economic status violates paragraph (d) when such actions are prejudicial to the administration of justice." *Id.* at RPC 8.4(d), cmt. 3. Comment 3 also makes clear that "[l]egitimate advocacy representing the foregoing factors does not violate paragraph (d)." *Id.*

Proposed Rule 8.4(g) would establish a new black-letter rule that subjects Tennessee attorneys to professional discipline for "engag[ing] 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." Comment 3 to the proposed rule would define "harassment" and "discrimination" to include not only "physical conduct," but also "verbal . . . conduct"—better known as speech.

Several problematic features of the proposed rule warrant highlighting. First, the proposed rule would apply not only to speech and conduct that occurs in the course of representing a client or appearing before a judicial tribunal, but also to speech and conduct that is merely "*related to the practice of law.*" (emphasis added). Comment 4 to the proposed rule explains that "[c]onduct 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." Far from cabining the scope of the proposed rule, comment 4 leaves no doubt that the proposed rule would apply to virtually any speech or conduct that is even tangentially related to an individual's status as a lawyer, including, for example, a presentation at a CLE event, participation in a debate at an event sponsored by a law-related organization, the publication of a law review article, and even a casual remark at dinner with law firm colleagues.[5] Such speech or conduct would be "professional misconduct" even if it in no way prejudices the administration of justice.

[5] Indeed, the report that recommended adoption of Model Rule 8.4(g) to the ABA House of Delegates explained that the rule would regulate any "conduct lawyers are permitted or required to engage in because of their work as a lawyer," including "activities such as law firm dinners and other nominally social events at which lawyers are present solely because of their association with their law firm or in connection with their practice of law." Report to the House of Delegates 9, 11 (May 31, 2016), https://www.americanbar.org/content/dam/aba/administrative/ professional_ responsibility/scepr_report_to_hod_rule_8_4_amendments_05_31_2016_resolution_and_report_ posting.authcheckdam.pdf.

Second, the proposed rule would prohibit a broad range of "harassment or discrimination," including a significant amount of speech and conduct that is not currently prohibited under federal or Tennessee antidiscrimination statutes. To the extent that federal antidiscrimination laws apply to attorneys engaged in speech or conduct related to the practice of law, they generally apply only in the employment and education contexts and prohibit discrimination only on the basis of race, color, national origin, religion, sex, age, or disability. *See* 20 U.S.C. § 1681 (Title IX); 29 U.S.C. § 623 (ADEA); 29 U.S.C. § 794 (Rehabilitation Act); 42 U.S.C. § 2000d (Title VI); 42 U.S.C. § 2000e-2 (Title VII); 42 U.S.C. § 12112 (ADA). The Tennessee Human Rights Act similarly applies only in certain limited areas, including employment, and prohibits discrimination only on the basis of "race, creed, color, religion, sex, age or national origin." Tenn. Code Ann. § 4-21-401. Under both federal and state antidiscrimination laws, moreover, the only discrimination or harassment that is actionable in the employment context is that which results in a materially adverse employment action or is sufficiently severe and pervasive to create a hostile work environment. *See, e.g., White & Burlington N. & Santa Fe Ry. Co.*, 364 F.3d 789, 795 & n.1 (6th Cir. 2004) (en banc) (explaining that "not just any discriminatory act by an employer constitutes discrimination under Title VII"); *Frye v. St. Thomas Health Servs.*, 227 S.W.3d 595, 602, 610 (Tenn. Ct. App. 2007). And the only harassment that is actionable in the education context is that which is sufficiently severe and pervasive to effectively bar a student from receiving educational benefits. *See, e.g., Doe v. Miami Univ.*, 882 F.3d 579, 590 (6th Cir. 2018). Federal and state antidiscrimination laws also explicitly protect religious freedom by exempting religious organizations from their ambit. *See, e.g.*, 42 U.S.C. § 2000e-1(a); Tenn. Code Ann. § 4-21-405.

Proposed Rule 8.4(g) would reach well beyond federal and state antidiscrimination laws. For one thing, the proposed rule would prohibit any and all "harassment or discrimination"—even that which does not result in any tangible adverse consequence and is not sufficiently severe or pervasive to create a hostile environment. The proposed amendments to comment 3, which attempt to clarify what constitutes "harassment or discrimination," do nothing to alleviate this concern. The proposed comment simply states that "discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others," and "[h]arassment includes sexual harassment and derogatory or demeaning verbal or physical conduct." In other words, any speech or conduct that could be considered "harmful" or "derogatory or demeaning" would constitute professional misconduct within the meaning of the proposed rule. And while proposed comment 3 states that "[t]he substantive law of antidiscrimination and anti-harassment statutes and case law *may* guide application of paragraph (g)" (emphasis added), there is no requirement that the scope of Proposed Rule 8.4(g) be limited in that manner.

Even more troubling, Proposed Rule 8.4(g) would prohibit "harassment or discrimination" on the basis of characteristics that are not expressly covered by federal and state antidiscrimination laws—namely, "sexual orientation, gender identity, marital status, [and] socioeconomic status." It is no secret that individuals continue to hold diverse views on issues related to sexual orientation and gender identity, and those who hold traditional views on sexuality and gender frequently do so because of sincerely held religious beliefs. As the U.S. Supreme Court recognized in *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015), for example, many who consider "same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises." By deeming as "professional misconduct" any speech that someone may view as "harmful" or "derogatory or demeaning" toward homosexuals or transgender individuals,

Proposed Rule 8.4(g) would prevent attorneys who hold traditional views on these issues from "engag[ing] those who disagree with their view in an open and searching debate," *Obergefell*, 135 S. Ct. at 2607.

Unlike Title VII and the Tennessee Human Rights Act, Proposed Rule 8.4(g) includes no exception to protect religious freedom. Comment 4a to the proposed rule gives a nod to the First Amendment by stating that paragraph (g) "does not restrict any speech or conduct not related to the practice of law, including speech or conduct protected by the First Amendment." As explained below, however, nearly all speech and conduct that is "related to the practice of law" is also protected by the First Amendment, so that explanatory comment in fact does nothing to protect attorneys' First Amendment rights.

Third, Proposed Rule 8.4(g) would prohibit not only speech and conduct "that the lawyer knows . . . is harassment or discrimination," but also that which the lawyer "reasonably should know is harassment or discrimination." In other words, the proposed rule would subject an attorney to professional discipline for uttering a statement that was not actually known to be or intended as harassing or discriminatory, simply because someone might construe it that way.

II. Proposed Rule 8.4(g) Would Violate the U.S. and Tennessee Constitutions and Conflict with the Rules of Professional Conduct.

As a result of these and other problematic features, Proposed Rule 8.4(g) would violate the U.S. and Tennessee Constitutions and conflict with the spirit and letter of the existing Rules of Professional Conduct.

A. Proposed Rule 8.4(g) Would Infringe on Tennessee Attorneys' Rights to Free Speech, Freedom of Association, Free Exercise of Religion, and Due Process.

Proposed Rule 8.4(g) would clearly violate the First Amendment rights of Tennessee attorneys, including their rights to free speech, freedom of expressive association, and the free exercise of religion, and equivalent protections under the Tennessee Constitution.[6]

The First Amendment prohibits the government from regulating protected speech or expressive conduct based on its content unless the regulation is the least restrictive means of achieving a compelling government interest. *See Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 799 (2011). That most exacting level of scrutiny would apply to Proposed Rule 8.4(g) because it regulates speech and expressive conduct that is entitled to full First Amendment protection based on viewpoint.

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[6] The Tennessee Constitution also protects the rights to free speech, freedom of expressive association, and free exercise of religion. *See* Tenn. Const. art. I, § 19 (right to free speech); Tenn. Const. art. I. § 3 (right to free exercise of religion). This Court has held that these rights are at least as broad as those guaranteed by the First Amendment to the U.S. Constitution. *See, e.g., S. Living, Inc. v. Celauro*, 789 S.W.2d 251, 253 (Tenn. 1990); *Carden v. Bland*, 288 S.W.2d 718, 721 (Tenn. 1956).

Expression that would be deemed discrimination or harassment on the basis of one of the categories included in Proposed Rule 8.4(g) is entitled to robust First Amendment protection, even though listeners may find such expression harmful or offensive. *See Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 206 (3d Cir. 2001) (Alito, J.) ("[T]here is . . . no question that the free speech clause protects a wide variety of speech that listeners may consider deeply offensive, including statements that impugn another's race or national origin or that denigrate religious beliefs."). The U.S. Supreme Court has made clear that, save for a few narrowly defined and historically recognized exceptions such as obscenity and fighting words, the "'the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.'" *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017) (plurality opinion) (quoting *Street v. New York*, 394 U.S. 576, 592 (1969)); *see also, e.g.*, *Brown*, 564 U.S. at 791, 798 (noting that "disgust is not a valid basis for restricting expression"); *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) ("[S]peech cannot be restricted simply because it is upsetting . . . ."); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) ("[T]he Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." (internal quotation marks omitted)). Indeed, the very "point of all speech protection . . . is to shield just those choices of content that in someone's eyes are misguided, or even hurtful." *Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Boston, Inc.*, 515 U.S. 557, 574 (1995); *see also Texas v. Johnson*, 491 U.S. 397, 408 (1989) ("[A] principal function of free speech under our system of government is to invite dispute." (internal quotation marks omitted)).

The fact that the speech at issue is that of attorneys does not deprive it of protection under the First Amendment. As a general matter, the expression of attorneys is entitled to full First Amendment protection, even when the attorney is acting in his or her professional capacity. *See, e.g.*, *In re Primus*, 436 U.S. 412, 432-38 (1978) (applying strict scrutiny to invalidate on First Amendment grounds discipline imposed on attorney for informing welfare recipient threatened with forced sterilization that ACLU would provide free legal representation). Courts have permitted the government to limit the speech of attorneys in only narrow circumstances, such as when the speech pertains to a pending judicial proceeding or otherwise prejudices the administration of justice. *See Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1072 (1991); *Mezibov v. Allen*, 411 F.3d 712, 717 (6th Cir. 2005); *Bd. of Prof'l Responsibility v. Slavin*, 145 S.W.3d 538, 549 (Tenn. 2004).[7]

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[7] Courts have also applied a lower level of scrutiny to regulations that implicate only the commercial speech of attorneys. *See, e.g.*, *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 622-24 (1995); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978). Proposed Rule 8.4(g) cannot be defended on that ground, because it reaches non-commercial speech. Some courts have also suggested that regulations of "professional speech" should be subject to a lower level of scrutiny. *See, e.g.*, *Pickup v. Brown*, 740 F.3d 1208, 1225-29 (9th Cir. 2013). But neither the U.S. Supreme Court, the Sixth Circuit, nor the Tennessee Supreme Court has so held. In any event, Proposed Rule 8.4(g) is not limited to "professional speech"—that is, personalized advice to a paying client, *see, e.g.*, *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor and City Council of Balt.*, 879 F.3d 101, 109 (4th Cir. 2018)—but instead reaches speech or conduct that is merely "related to the practice of law."

This Court's decision in *Ramsey v. Board of Professional Responsibility*, 771 S.W.2d 116 (Tenn. 1989), is particularly instructive. There, a District Attorney General's law license was suspended because he made remarks to the media that were critical of the judicial system. This Court held that the disciplinary sanctions violated the First Amendment because the attorney's remarks, though "disrespectful and in bad taste," were protected expression. *Id.* at 122. This Court made clear that "[a] lawyer has every right to criticize court proceedings and the judges and courts of this State after a case is concluded," as long as those statements are not false. *Id.* at 122. Were the rule otherwise, this Court explained, it would "close the mouths of those best able to give advice, who might deem it their duty to speak disparagingly." *Id.* at 121. Proposed Rule 8.4(g) is not limited to speech and conduct that pertains to a pending judicial proceeding or that actually prejudices the administration of justice; rather, it reaches all speech and conduct in any way "related to the practice of law"—speech that is entitled to full First Amendment protection.

Proposed Rule 8.4(g) would not only regulate speech that is protected by the First Amendment, but it would also do so on the basis of viewpoint. But "it is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995). "When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Id.* at 829 (referring to "[v]iewpoint discrimination" as "an egregious form of content discrimination"). Proposed Rule 8.4(g) discriminates based on viewpoint because it would permit certain expression that is laudatory of a person's race, sex, religion, or other protected characteristic, while prohibiting expression that is "derogatory or demeaning" of that characteristic. Indeed, proposed comment 4 makes clear that "[l]awyers may engage in conduct undertaken to *promote* diversity and inclusion without violating this Rule." (emphasis added). Like the trademark disparagement clause that the U.S. Supreme Court invalidated on First Amendment grounds in *Matal*, Proposed Rule 8.4(g) "mandat[es] positivity." 137 S. Ct. at 1766 (Kennedy, J., concurring in part and concurring in the judgment).

Because Proposed Rule 8.4(g) would regulate protected speech based on its viewpoint, it would be "presumptively unconstitutional" and could be upheld only if it were narrowly tailored to further a compelling government interest. *Rosenberger*, 515 U.S. at 830. But the proposed rule could not satisfy that exacting scrutiny. Even assuming that the government has a compelling interest in preventing discrimination in particular contexts such as employment or education, *see Saxe*, 240 F.3d at 209, or in protecting the administration of justice, Proposed Rule 8.4(g) is not narrowly tailored to further those interests because it would reach all speech and conduct in any way "related to the practice of law," regardless of the particular context in which the expression occurs or whether it actually interferes with the administration of justice.

Indeed, the Joint Petition does not establish empirically or otherwise any actual need for the proposed rule. The section of the Joint Petition titled "the need for proposed rule 8.4(g)" does not document any instances of harassment or discrimination brought to the attention of the BPR or TBR. Nor does it explain in what way discriminatory or harassing speech by attorneys harms the legal profession or the administration of justice. It simply agrees with the ABA House of Delegates' ipse dixit that the proposed rule is "in the public's interest" and "in the profession's interest." Joint Petition 2 (internal quotation marks omitted).

Even if discrete applications of Proposed Rule 8.4(g) could be upheld—for example, a discriminatory comment made during judicial proceedings that actually prejudices the administration of justice—the rule would still be subject to facial invalidation because it is unconstitutionally overbroad. A law may be invalidated under the First Amendment overbreadth doctrine "if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473 (2010) (internal quotation marks omitted). The "reason for th[at] special rule in First Amendment cases is apparent: An overbroad statute might serve to chill protected speech." *Bates v. State Bar of Ariz.*, 433 U.S. 350, 380 (1977). A person "might choose not to speak because of uncertainty whether his claim of privilege would prevail if challenged." *Id.* The overbreadth doctrine "reflects the conclusion that the possible harm to society from allowing unprotected speech to go unpunished is outweighed by the possibility that protected speech will be muted." *Id.*

Because Proposed Rule 8.4(g) would apply to any "harassment or discrimination" on the basis of a protected characteristic, including a single comment that someone may find "harmful" or "derogatory or demeaning," that is in any way "related to the practice of law," including remarks made at CLE events, debates, and in other contexts that do not involve the representation of a client or interaction with a judicial tribunal,[8] it would sweep in a substantial amount of attorney speech that poses no threat to any government interest that might conceivably justify the statute. Even if the BPR may ultimately decide not to impose disciplinary sanctions on the basis of such speech, or a court may ultimately invalidate on First Amendment grounds any sanction imposed, the fact that the rule on its face would apply to speech of that nature would undoubtedly chill attorneys from engaging in speech in the first place. But this Court has cautioned that "we must ensure that lawyer discipline, as found in Rule 8 of the Rules of [Professional Conduct], does not create a chilling effect on First Amendment Rights." *Ramsey*, 771 S.W.2d at 121.

Proposed Rule 8.4(g) also suffers from a related problem: the terms "harassment," "discrimination," "reasonably should know," "related to the practice of law," and "legitimate advice or advocacy" are impermissibly vague under the Due Process Clause. "A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). To comport with the requirements of due process, a regulation must "provide a person of ordinary intelligence fair notice of what is prohibited.'" *Id.* (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008)). But how is an attorney to know whether certain speech or conduct will be deemed harassing or discriminatory under the rule? Or whether certain speech or conduct will be deemed sufficiently "related to the practice of law" to fall within the ambit of the proposed rule? Determining whether an attorney "knows" or "reasonably should know" that the speech is harassing or discriminatory would require speculating about whether someone might view the speech as "harmful" or "derogatory or demeaning." Is an attorney who participates in a debate on income inequality engaging in discrimination based on socioeconomic status when he makes a negative remark about the "one percent"? How about an attorney who comments at a CLE on

[8] Even statements made by an attorney as a political candidate or a member of the General Assembly could be deemed sufficiently "related to the practice of law" to fall within the scope of Proposed Rule 8.4(g). So too could statements made by an attorney in his or her capacity as a member of the board of a nonprofit or religious organization.

immigration law that illegal immigration is draining public resources? Is that attorney discriminating on the basis of national origin? The vagueness of the proposed rule only exacerbates its chilling effect on attorney speech. *See id.* at 254.

Clarity of regulation is important not only for regulated parties, but also "so that those enforcing the law do not act in an arbitrary or discriminatory way." *Id.* at 253; *see also Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 532 (Tenn. 1993) ("[T]he more important aspect of the vagueness doctrine is not actual notice, but . . . the requirement that a legislature establish minimum guidelines to govern law enforcement"). The lack of clarity in Proposed Rule 8.4(g)'s terms creates a substantial risk that determinations about whether expression is prohibited will be guided by the "personal predilections" of enforcement authorities rather than the text of the rule. *Kolender v. Lawson*, 461 U.S. 352, 356 (1983) (internal quotation marks omitted). In fact, the proposed rule would effectively require enforcement authorities to be guided by their "personal predilections" because whether a statement is "harmful" or "derogatory or demeaning" depends on the subjective reaction of the listener. *See, e.g., Dambrot v. Cen. Mich. Univ.*, 55 F.3d 1177, 1184 (6th Cir. 1995) (invalidating university "discriminatory harassment" policy on vagueness grounds because "in order to determine what conduct will be considered 'negative' or 'offensive' by the university, one must make a subjective reference"). Especially in today's climate, those subjective reactions can vary widely. *See id.* (observing that "different people find different things offensive").

Proposed Rule 8.4(g) would also infringe on the First Amendment right of Tennessee attorneys to engage in expressive association. The First Amendment protects an individual's "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647 (2000). That right is "crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas." *Id.* at 647-48. Proposed Rule 8.4(g) is sufficiently broad that even membership in an organization that espouses views that some may consider "harmful" or "derogatory or demeaning" could be deemed "conduct related to the practice of law" that is "harassing or discriminatory." In this respect, the proposed rule is far broader than Rule 3.6 of the Code of Judicial Conduct. The latter rule prohibits a judge from "hold[ing] membership in any organization that practices invidious discrimination on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation," but comment 4 to the rule makes clear that "[a] judge's membership in a religious organization as a lawful exercise of the freedom of religion is not a violation" of the rule. Tenn. Sup. Ct. R. 10, CJC 3.6(A) & cmt. 4. Proposed Rule 8.4(g), by contrast, is not limited to "invidious" discrimination and contains no exception for membership in a religious organization.

Because Proposed Rule 8.4(g) includes no exception for speech or conduct that is motivated by one's religious beliefs, it would also interfere with attorneys' First Amendment right to the free exercise of religion. Indeed, by expressly prohibiting harassment or discrimination based on "sexual orientation" and "gender identity," the proposed rule appears designed to target those holding traditional views on controversial matters such as sexuality and gender—views that are often "based on decent and honorable religious or philosophical premises," *Obergefell*, 135 S. Ct. at 2602. It is well settled that the Free Exercise Clause protects not only the right to believe, but also the right to act according to those beliefs. *See, e.g., Emp't Div., Dep't of Human Res. of*

Or. v. Smith, 494 U.S. 872, 877 (1990) (explaining that "the 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts"). While gathering for worship with a particular religious group is unlikely to be deemed conduct "related to the practice of law," serving as a member of the board of a religious organization, participating in groups such as the Christian Legal Society, or even speaking about how one's religious beliefs influence one's work as an attorney may well be. The proposed rule may also violate Tennessee's Religious Freedom Restoration Act, which prohibits the government from "substantially burden[ing] a person's free exercise of religion even if the burden results from a rule of general applicability," unless the burden is the least restrictive means of furthering a compelling government interest. Tenn. Code Ann. § 4-1-407(c).

The Joint Petition asserts that Proposed Rule 8.4(g) addresses the First Amendment concerns that have plagued ABA Model Rule 8.4(g) by adding an additional sentence to comment 4 and a new comment 4a. Joint Petition 6-7. But these supposed improvements in fact do nothing to increase protection for attorneys' First Amendment rights. The new sentence in comment 4 provides that "[l]egitimate advocacy protected by Section (g) includes advocacy in any conduct related to the practice of the law, including circumstances where a lawyer is not representing a client and outside traditional settings where a lawyer acts as an advocate, such as litigation." But proposed section (g) itself states only that "[t]his paragraph does not preclude legitimate advice or advocacy *consistent with these Rules*." (emphasis added). So even if "legitimate advocacy" includes advocacy both in the course of representing a client and in other contexts, such advocacy is allowed only if it is otherwise consistent with Proposed Rule 8.4(g)—i.e., only if it does not constitute harassment or discrimination based on a protected characteristic. That circular exception is no exception at all. Moreover, the proposed rule nowhere defines what constitutes "legitimate" advocacy; the BPR would presumably get to draw the line between legitimate and illegitimate advocacy, creating a further risk that advocacy of controversial or politically incorrect positions would be deemed harassment or discrimination that constitutes professional misconduct.

Proposed comment 4a is likewise of no help. It provides that "Section (g) does not restrict any speech or conduct not related to the practice of law, including speech or conduct protected by the First Amendment. Thus, a lawyer's speech or conduct unrelated to the practice of law cannot violate this Section." All that comment 4a does, in other words, is reiterate that the proposed rule reaches all speech and conduct that *is* related to the practice of law. But that is the very feature of the proposed rule that gives rise to many of its First Amendment problems. The comment rests on the same erroneous premise as the proposed rule itself: that attorney speech and conduct that *is* related to the practice of law is *not* protected by the First Amendment. As explained above, that is simply not the case. Attorney speech, even speech that is connected with the practice of law, ordinarily is entitled to full First Amendment protection.

The Joint Petition asserts that Proposed Rule 8.4(g) is consistent with the First Amendment because it "leaves a sphere of *private thought and private activity* for which lawyers will remain free from regulatory scrutiny." Joint Petition 6 (emphasis added). That statement is alarming. It makes clear that the goal of the proposed rule is to *subject* to regulatory scrutiny all attorney expression that is in any way connected with the practice of law. That approach is wholly inconsistent with the First Amendment.

B. Proposed Rule 8.4(g) Would Conflict with the Rules of Professional Conduct.

In addition to violating the constitutional rights of Tennessee attorneys, Proposed Rule 8.4(g) would also conflict in numerous respects with the spirit and letter of the existing Rules of Professional Conduct. Most fundamentally, the proposed rule would disregard the traditional goals of professional regulation by "open[ing] up for liability an entirely new realm of conduct unrelated to the actual practice of law or a lawyer's fitness to practice, and not connected with the administration of justice." Blackman, *supra*, at 252. Even violations of criminal law are left unregulated by the Rules of Professional Conduct when they do not "reflect[] adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects." Tenn. Sup. Ct. R. 8, RPC 8.4(b). But Proposed Rule 8.4(g) would subject attorneys to professional discipline for speech or conduct that violates neither federal nor state antidiscrimination laws and has no bearing on fitness to practice law or the administration of justice.

The proposed rule also threatens to interfere with an attorney's broad discretion to decide which clients to represent. While the proposed rule states that it "does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with RPC 1.16," the latter rule only addresses the circumstances in which an attorney is *required* to decline or withdraw from representation. An attorney who would prefer not to represent a client because the attorney disagrees with the position the client is advocating, but is not required under Rule 1.16 to decline the representation, may be accused of discriminating against the client under Proposed Rule 8.4(g) Take, for example, an attorney who declines to represent a corporate executive because the attorney believes corporate executives are responsible for the rising income inequality in our country. Would that attorney have discriminated based on socioeconomic status? While the attorney may be able to contend that his or her personal views concerning the client's wealth created a "conflict of interest" that prevented representation under the Rule of Professional Conduct 1.7, it is far from clear how the seeming tension between that rule and Proposed Rule 8.4(g) would be resolved.

The proposed rule may also chill attorneys from representing clients who wish to advocate positions that could be considered harassment or discrimination based on a protected characteristic, or at least from doing so zealously as required by the Rules of Professional Conduct. The proposed rule states that it "does not preclude legitimate advice or advocacy consistent with these Rules," but, as noted above, the "consistent with these Rules" qualifier renders that circular exception meaningless. Comment 5d to the proposed rule states that "[a] lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities." While that clarification may provide some comfort that an attorney's representation of a client will not be deemed harassment or discrimination, it is largely duplicative of existing Rule of Professional Conduct 1.2 and, if anything, adds to the uncertainty regarding whether an attorney's decision *not* to represent a client could subject the attorney to discipline.

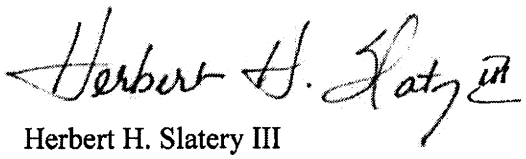
More generally, the proposed rule infringes on the ability of attorneys to practice law in accordance with their religious, moral, and political beliefs. Yet the Rules of Professional Conduct make clear that lawyers should be "guided by personal conscience" and informed by "moral and ethical considerations." Tenn. Sup. Ct. R. 8, RPC Preamble and Scope; *see also id.* at RPC 2.1

("In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation.").

* * *

Because Proposed Rule 8.4(g) would violate the constitutional rights of Tennessee attorneys and conflict with the existing Rules of Professional Conduct, it is incumbent on the Office of the Attorney General to urge this Court to reject its adoption.[9] The existing Rules of Professional Conduct are sufficient to provide for the discipline of attorneys whose expressions of "bias or prejudice" are in fact "prejudicial to the administration of justice." Tenn. Sup. Ct. R. 8, RPC 8.4, cmt. 3. And existing federal and state antidiscrimination laws may provide recourse for individuals who are subjected to discrimination or harassment by attorneys in the workplace or in educational institutions. To the extent that the Joint Petition seeks to suppress speech on controversial issues such as same-sex marriage or gender identity, it is directly contrary to the First Amendment principle that the remedy for speech with which one disagrees is "more speech, not enforced silence." *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). "Society has the right and civic duty to engage in open, dynamic, rational discourse." *United States v. Alvarez*, 567 U.S. 709, 728 (2012). As members of a highly educated profession, attorneys are uniquely equipped to engage in informed debate on these and other important issues. Such debate should be encouraged, not silenced.

Sincerely,



Herbert H. Slatery III
Attorney General and Reporter

[9] The Attorneys General of Louisiana, South Carolina, and Texas have likewise concluded that ABA Model Rule 8.4(g) would violate the First Amendment and Due Process Clause. *See* La. Att'y Gen. Op. 17-0114 (Sept. 8, 2017); S.C. Att'y Gen. Op. on Constitutionality of ABA Model Rule 8.4(g) (May 1, 2017); Tex. Att'y Gen. Op. KP-0123 (Dec. 20, 2016).

Lisa Marsh - Re: Tenn. Sup. Ct. R. 9, section 32 (No. ADM2017-02244)

From: Sheila Sage <Sheila.Sage@ag.tn.gov>
To: "appellatecourtclerk@tncourts.gov" <appellatecourtclerk@tncourts.gov>
Date: 3/16/2018 9:49 AM
Subject: Re: Tenn. Sup. Ct. R. 9, section 32 (No. ADM2017-02244)
Cc: "Andree S. Blumstein" <Andree.Blumstein@ag.tn.gov>, "Sarah K. Campbell" ...
Attachments: AG Comments on proposed rule. Ltr.3.16.18.pdf

Attention: James M. Hivner, Clerk

In response to the Tennessee Supreme Court Order of November 21, 2017, please find attached the Comment Letter of the Tennessee Attorney General Opposing Proposed Amended Rule of Professional Conduct 8.4(g).

Thank you.

Sheila Sage | Chief Executive Assistant
to Attorney General Herbert H. Slatery III
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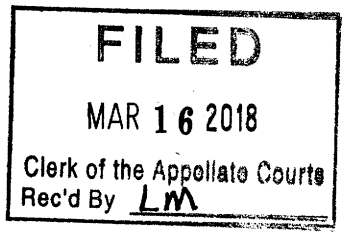


THE SUPREME COURT OF TENNESSEE

IN RE: PROPOSED ADOPTION OF	)	
A NEW TENN. SUP. CT. R. 8	)	No. ADM2017-02244
RPC 8.4(g)	)	

Comment of David E. Fowler Opposing Adoption of
Proposed New Rule of Professional Conduct 8.4(g)

I hereby voice my objection to the new proposed Rule 8.4 on a ground different from that of a Joint Committee to which I also subscribed.

I object in this instance because, to my knowledge, neither the Board of Professional Responsibility nor the Tennessee Bar Association have provided a foundation upon which the meaning of the word "discrimination" and its grammatical variations can be determined and therefore, it has not provided a basis for determining that the various listed offenses are, in fact, discriminatory or how a lawyer can know or reasonably know whether his or her actions are, in fact or in principle, discriminatory.

Law, in order not to be arbitrary, must rest upon sure and fixed standards and definitions. To do otherwise is what prior generations of legal philosophers would have called lawlessness.

Unless any act that any one claims to be discriminatory is going to be held discriminatory by all, then there must be some standard by which an act is determined to be unethical and unjust discrimination. Otherwise we who are to be defenders of the law have become lawless and rightly susceptible to claims of injustice.

For instance, the current comment 3 to current Rule 8.4 prohibits discrimination on the basis of age. But TCA § 36-13-506 uses age as a basis for discriminating against the treatment given different perpetrators of rape. There is "mitigated statutory rape" and "statutory rape," as distinguished from rape. Are those laws unethically and immorally discriminatory and would the

advocacy in favor of keeping those laws in favor of all rape being treated the same, regardless of victim's age, be unethically discriminatory? After all, the punishment of the perpetrator depends in a real sense on age.

Many would scoff at this example, but those who scoff at the serious question of the basis upon which we determine something to be ethical and justifiable discrimination or unethical and unjustifiable discrimination expose their ignorance. Even by saying my example is a poor one and irrelevant, they are, in fact, exercising a form of discrimination, discriminating between examples they believe to be relevant and those they believe to be irrelevant and doing so on the basis of a standard for determining relevancy. Their scoffing betrays the denial of the question I beg this Court to answer—is there a standard upon which we have determined that discrimination proposed in this Comment is good or bad and what standard will be applied to future claims of discrimination?

This becomes particularly problematic given that the proposed comment prohibits conduct "the lawyer knows or reasonably should know is harassment or discrimination." If one holds to certain belief systems, for example, the beliefs flowing from the orthodox, historic doctrines of Christianity regarding the nature of human beings and human sexuality, the nature of the social order, and natural law, then certain actions and statements on those subjects the understand would know "know" or "reasonably know" to be discriminatory, but denial of one's core beliefs.

Until this Court, the Bar Association, and the Board of Professional Responsibility can articulate for the members of the bar a standard for determining which acts constitute discrimination that should be prohibited and those which may be allowed, in my view none have any business proceeding on what would be an undefined and therefor arbitrary basis.

For you consideration of the merits of my objection and comment, I commend to this Court

the learned article[1] by Phillip Johnson, former law professor at U.C. Berkeley and law clerk for the Chief Justice of the U.S. Supreme Court Earl Warren and for Chief Justice of the California Supreme Court Roger J. Traynor. In it, he critiqued a speech by the late Yale law professor, Arthur Leff, later published in the Duke Law Journal.[2] Professor Johnson wrote:

> Yale Law Professor Arthur Leff expressed the bewilderment of an agnostic culture that yearns for enduring values in a brilliant lecture delivered at Duke University in 1979, a few years before his untimely death from cancer. The published lecture-titled "Unspeakable Ethics, Unnatural Law"-is frequently quoted in law review articles, but it is little known outside the world of legal scholarship. It happens to be one of the best statements of the modernist impasse that I know. As Leff put it,
>
> > I want to believe-and so do you-in a complete, transcendent, and immanent set of propositions about right and wrong, findable rules that authoritatively and unambiguously direct us how to live righteously. I also want to believe-and so do you-in no such thing, but rather that we are wholly free, not only to choose for ourselves what we ought to do, but to decide for ourselves, individually and as a species, what we ought to be. What we want, Heaven help us, is simultaneously to be perfectly ruled and perfectly free, that is, at the same time to discover the right and the good and to create it.
>
> The heart of the problem, according to Leff, is that any normative statement implies the existence of an authoritative evaluator. But with God out of the picture, every human becomes a "godlet"-with as much authority to set standards as any other godlet or combination of godlets. For example, if a human moralist says "Thou shalt not commit adultery," he invites "the formal intellectual equivalent of what is known in barrooms and schoolyards as 'the grand sez who?'" Persons who want to commit adultery, or who sympathize with those who do, can offer the crushing rejoinder: What gives you the authority to prescribe what is good for me?
>
> * * *
>
> Here is how [Leff] concluded his 1979 lecture:
>
> > All I can say is this: it looks as if we are all we have. Given what we know about ourselves, and each other, this is an extraordinarily unappetizing prospect; looking

---

[1] Phillip E. Johnson, "Nihilism and the End of the Law," First Things (March 1993) https://www.firstthings.com/article/1993/03/002-nihilism-and-the-end-of-law

[2] Arthur A. Leff, "Unspeakable Ethics, Unnatural Law," 1979 Duke L.J. 1229 1979, found at http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=3810&context=fss_papers

around the world, it appears that if all men are brothers, the ruling model is Cain and Abel. Neither reason, nor love, nor even terror, seems to have worked to make us "good," and worse than that, there is no reason why anything should. Only if ethics were something unspeakable by us could law be unnatural, and therefore unchallengeable. As things stand now, everything is up for grabs.

Nevertheless:
Napalming babies is bad.
Starving the poor is wicked.
Buying and selling each other is depraved.
Those who stood up and died resisting Hitler, Stalin, Amin, and Pol Pot-and General Custer too-have earned salvation.
Those who acquiesced deserve to be damned.
There is in the world such a thing as evil.
[All together now:] Sez who? God help us.

What Leff said is fascinating, but what he failed to say is more fascinating still. If there is no ultimate evaluator, then there is no real distinction between good and evil. It follows that if evil is nonetheless real, then atheism-i.e., the idea of the nonexistence of that evaluator or standard of evaluation-is not only an extraordinarily unappetizing prospect, it is also fundamentally untrue. Because the reality of evil implies the reality of the evaluator who alone has the authority to establish the standard by which evil can deserve to be damned. When impeccable logic leads to self-contradiction, there must be a faulty premise.

I concede to this Court that the standard I would propose and to which Professor Johnson pointed would be acceptable only to those who would follow in the legal tradition of Justice Joseph Story[3] and would be an anathema to those who follow in the tradition of Justice Oliver Wendell Holmes who denied any notion of a transcendent law existing prior to and apart from the law made by positive enactment of the legislature or by pronouncements of a judge.[4]

---

[3] "What, indeed, can tend more to exalt and purify the mind, than speculations, upon the origin and extent of moral obligations; upon the great truths and dictates of natural law; upon the immutable principles the regulated right and wrong in social and private life . . . . "Joseph Story, "A Discourse on the Past History, Present State, and Future prospects of the Law," published in *Joseph Story and the American Constitution*, James McClellan, 325, 345

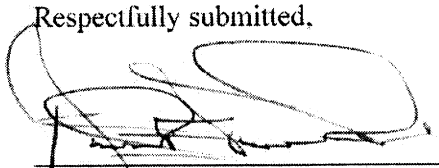
[4] See *Black and White Taxicab and Transfer Co. v. Brown and Yellow Taxicab and Transfer Co.*, 276 U.S. 518 (1928) (Holmes, J. dissenting) ("It is very hard to resist the impression that there is

Arbitrary, rootless law grounded only in the excogitative genius of those who then happen to control the apparatus of power is the definition of tyranny and is a threat to liberty, not just to me, but to all.

As George Mason, delegate to the Constitutional Convention of 1787 said, "No free government or the blessings of liberty can be preserved to any people but by . . . frequent recurrence to fundamental principles."[5] I beg of this Court to consider those fundamental principles.

So, proceed as you must, but know that for me, I stand on the side of Patrick Henry—give me *true* liberty, even if it means you take my license.

Respectfully submitted,



David Fowler (BPR 014063)
1113 Murfreesboro Road, No. 167-164
Franklin, TN 37064

---

one august corpus, to understand which clearly is the only task of any Court concerned. If there were such a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute, the Courts of the United States might be right in using their independent judgment as to what it was. But there is no such body of law.")

[5] Quoted from Charles Warren, The Making of the Constitution, 804.

Lisa Marsh - Comment on Rule 8:4

ADM2017-02244

From: David Fowler <david.fowler@factn.org>
To: <appellatecourtclerk@tncourts.gov>
Date: 3/15/2018 11:34 AM
Subject: Comment on Rule 8:4
Attachments: Fowler Comment.pdf

Mr. Hivner:

Attached is my comment that I would like to have submitted in connection with the proposed changes regarding Rule 8:4 in No. ADM2017-02244.

Thank you for seeing that it is filed. If there is a problem or defect in my filing, I would be grateful if you could call it to my attention.

Sincerely,

David Fowler (BPR 014063)
Constitutional Government Defense Fund

ADM2017-02244

March 13, 2018

James M. Hivner, Clerk
Tennessee Appellate Court
100 Supreme Court Building
401 7th Ave North
Nashville, TN 37219-1407

RE: Tenn. Sup. Ct. R. No. 9, Section 32

Dear Mr. Hivner:

I have problems with the proposed Tennessee Supreme Court Rule change adding Rule 8.4(g). Isn't this an affront to Freedom of Religion? For example, under this Rule could a Tennessee Court hold that the posting of the Ten Commandments in a law office violates this new rule? Would it prohibit posting quotes from the Bible?

Many Christians consider their job to be their ministry. Where is Tennessee headed if Christian lawyers are prohibited from making their occupation their ministry?

Many of our law schools have little respect for our Constitution. For the Supreme Court of Tennessee to adopt such a liberal, politically correct, anti-Christian, anti-free speech rule may not be well received by the Tennessee voters.

Respectfully yours,

Alex Taylor

Alexander M. Taylor, Esq.
PO Box 1280
Dandridge, Tennessee 37725
(865) 397-6283

Lisa Marsh - Tenn. Sup. Ct. R. 8, Proposed Rule 8.4(g), Docket No. ADM2017-0224

From: Hoyt Samples <hsamples@sampleslaw.com>
To: "appellatecourtclerk@tncourts.gov" <appellatecourtclerk@tncourts.gov>
Date: 3/14/2018 1:50 PM
Subject: Tenn. Sup. Ct. R. 8, Proposed Rule 8.4(g), Docket No. ADM2017-0224

Mr. Hivner: I am writing in opposition to the Proposed Rule 8.4(g) described above. I certainly do not believe in discrimination, but I do believe it important to respect the sincerely held beliefs of those of us whose guiding spiritual and religious beliefs would cause great conflict if we were to be forced to represent people against our will and to represent those whose personal views and lifestyles directly conflict with our faith. I have communicated my concerns to the Tennessee Bar Association, but have not yet had the favor of a reply.

I am also concerned about the substantial disinformation being distributed by certain proponents of the new rule. For instance, such has not been adopted by "numerous" states. In fact, only one state, Vermont, has adopted this rule change. Vermont is known as being a very, very liberal state and it would certainly be inappropriate to say that the values of those in Tennessee are the same as those in Vermont.

I do appreciate your time in reviewing my comments.

Respectfully,

Hoyt O. Samples, Esq.
Admitted 1979

Lisa Marsh - Comment from the Knoxville Bar Association re: ADM2017-02244

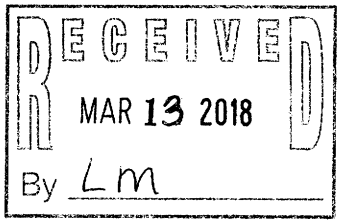
From: Marsha Watson <mwatson@knoxbar.org>
To: "appellatecourtclerk@tncourts.gov" <appellatecourtclerk@tncourts.gov>, "...
Date: 3/13/2018 7:27 PM
Subject: Comment from the Knoxville Bar Association re: ADM2017-02244
Attachments: KBA Comment on ADM2017-02244.pdf

505 Main Street, Suite 50
P.O. Box 2027
Knoxville, Tennessee 37901-2027
Telephone: (865) 522-6522
Facsimile: (865) 523-5662
www.knoxbar.org

Jim,

Please find attached the comment of the Knoxville Bar Association in response to the Petition filed by the Tennessee Board of Professional Responsibility and the Tennessee Bar Association, No. ADM2017-02244.

If you have any questions, please let me know.



ADM2017-02244

Marsha S. Watson
Knoxville Bar Association
Executive Director
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March 14, 2018

VIA E-Mail: appellatecourtclerk@tncourts.gov

James Hivner, Clerk of Appellate Courts
Tennessee Supreme Court
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

Re: Petition for the Adoption of a new Tennessee Supreme Court Rule 8, RPC 8.4(g); No. ADM2017-02244

Dear Mr. Hivner:

Pursuant to the Tennessee Supreme Court's Order dated November 21, 2017, in connection with the above-referenced Petition, the Knoxville Bar Association ("KBA") Professionalism Committee (the "Committee") has carefully considered the request of the Tennessee Board of Professional Responsibility ("TBPR") and the Tennessee Bar Association ("TBA") to amend Rule 8, RPC 8.4 of the Rules of the Tennessee Supreme Court by adopting a new RPC 8.4(g).

At the KBA Board of Governors (the "Board") meeting held on February 21, 2018, the Committee presented a detailed report of its review of the proposed new rule. Among other things, questions arose about the impact of the proposed amendment on First Amendment rights and other constitutional concerns.

Following the Committee's presentation and thorough discussion by the Board, the Board as a whole unanimously adopted the Committee's recommendations. Those recommendations were to support the TBPR/TBA proposed new RPC 8.4(g) with the following revisions:

(1) The revisions proposed by Josh Blackman, Associate Professor, South Texas College of Law, in his December 11, 2017 comment filed with the Court, specifically:

a. Revise the definition of "legitimate advocacy" contained in proposed comment [4] to add the following language: "For example, this Rule does not apply to speech on matters of public concern at bar association functions, continuing legal education classes, law school classes, and other similar forums."

b. Revise proposed comment 4[a] as follows: [4a] "~~Section (g) does not restrict any speech or conduct not related to the practice of law, including speech or conduct protected by the First Amendment.~~ This Rule does not apply to conduct protected by the First Amendment, as a lawyer does retain a 'private sphere' where personal opinion, freedom of association, religious expression, and political speech is protected by the First Amendment and not subject to this rule. ~~Thus, a~~ A lawyer's speech or conduct unrelated to the practice of law cannot violate this Section.

c. Revise proposed comment [3] as follows: "Severe or pervasive discrimination and harassment by lawyers in violation of paragraph (g) undermines 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 federal anti-discrimination and anti-harassment statutes and case law ~~may~~ will guide application of paragraph (g)."

(2) Revise the final sentence of paragraph (g) to remove a circular reference, as follows: "This paragraph does not preclude legitimate advice or advocacy ~~consistent with these Rules~~ that does not violate other Rules of Professional Conduct."

With this letter, the KBA is making these requests.

As always, the KBA appreciates the opportunity to comment on proposed Rules promulgated by the Tennessee Supreme Court.

Sincerely,

Keith H. Burroughs, President
Knoxville Bar Association

cc: Marsha Watson, KBA Executive Director
KBA Executive Committee
Hon. John Weaver, Co-Chair, KBA Professionalism Committee
Garry Ferraris, Co-Chair, KBA Professionalism Committee

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March 9, 2018

Tennessee Appellate Courts
Mr. James M. Hivner, Clerk
401 7th Avenue North
Nashville, Tennessee 37219-1407

RE: Tenn. Sup. Ct. R. 8, Proposed Rule 8.4(g)
Docket No. ADM2017-02244

Dear Mr. Hivner:

I hope this letter finds you doing well. I write to provide commentary on the proposed change to Tennessee Supreme Court Rule 8.

My concern stems from my earnest belief in our free speech jurisprudence, State and federal, as well as a healthy respect for the marketplace of ideas. Free communication of thoughts and opinions is an invaluable right; and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty. Article I Section 19 of our own State Constitution provides protection of free speech rights at least as broad as the First Amendment to the United State Constitution. *Doe v. Doe*, 127 S.W.3d 728, 729 (Tenn. 2004); Tenn. Const. art. I, § 19.

I read with interest the column of Lucian Pera ("Mr. Pera"), President of the Tennessee Bar Association (the "TBA"), entitled *Ban Harassment and Discrimination Now* dated March 1, 2018. Mr. Pera relates that the TBA and Tennessee Board of Professional Responsibility (the "TBPR") have, for the first time, filed a joint petition for a rule change on this subject. Mr. Pera further avers that the proposed rule change clarifies the model American Bar Association ("ABA") rule, and states, "We need a rule banning …discrimination and harassment…by lawyers in their activities as lawyers."

Mr. Pera paradoxically suggests the need for a rule change while concurrently saying few lawyers are disciplined under ABA model rule. Given there are relatively few infractions, there should be no need for a rule change. In my time working at the Tennessee General Assembly as a legislative intern, I saw lawmakers ask why legislation was needed. It appears as if the proposed rule change addresses a perceived problem where none exists. I have not personally seen discrimination and harassment of the variety Mr. Pera describes. I have worked with dozens, perhaps hundreds, of attorneys, since I was sworn in and this "problem" has never been an issue.

At Mr. Pera's suggestion, per his column, I spoke with various people and their responses to the question regarding the need for such a change, and their reactions are not as surprising as Mr. Pera suggests. Most say things like, "…I wouldn't want to be represented by someone that felt that way…" or "…people need to be more thick-skinned and stop being offended so easily" or words that effect.

Few disagree with the proposition that inappropriate discrimination and harassment can be harmful to the public. Where I differ with Mr. Pera is in the application of that belief; for my part, our culture does a fine job of marginalizing hateful outliers. Proposed Section 4a states, "Section (g) does not restrict any speech or conduct not related to the practice of law, including speech or conduct protected by the First Amendment…[and]…conduct unrelated to the practice of law cannot violate this section." The rule change ignores this existing marginalization, and common sense because it is monumentally difficult for any lawyer to espouse discriminatory hatred that is not related to their practice of law, and therefore violative of Proposed Section (g). The law is part of who lawyers are. It is even in their name: lawyer.

Most of the lawyers I know are solo practitioners. They live, work, and are active serving in communities of people with diverse backgrounds. In these smaller towns, they are "the lawyer." They represent the law. For many people, small town attorneys are the only exposure they will ever have with the law. Therefore, all of their conduct is seemingly related to the practice of law because they are inextricably intertwined with it, inseparable as a matter of identity. It seems to me, that liberty is not frequently eroded by "…floodgates of unfounded complaints", a concern Mr. Pera addresses in his column. Freedom is chiseled away a little at a time. In summarizing Voltaire, Evelyn Beatrice Hall opined, "I disapprove of what you say, but I will defend to the death your right to say it." Of course, free speech has limits. That lesson was not lost on me in law school, but I am highly suspect of any rule or law that erodes our Constitutional freedoms. The political winds may blow in your favor one day, and then without warning, change; what may be a perceived *need* one day may be a thorn in your flesh the next, however well-meaning the original intent. I value the greatest extent of free speech permissible.

Thank you for taking comments on this subject. If you have any questions for me, please do not hesitate to contact me at your earliest chance. Until then I remain…

Respectfully,

G. Clark Shifflett, III
Attorney at Law

GCS3:gcs3

Dale Bohannon
ATTORNEY

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March 8, 2018

ADM2017-02244

FILED
MAR - 9 2018
Clerk of the Appellate Courts
Rec'd By KJM

Email: appellatecourtclerk@tncourts.gov

James M. Hivner, Clerk
Re: Tenn.Sup.Ct. R. 9, section 32
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

Re: Docket No. ADM 2017-02244
Opposition to Proposed New Rule of Professional Conduct 8.4(g)

Dear Honorable Justices of the Tennessee Supreme Court:

I have practiced law in Tennessee for over 41 years. On many occasions I have represented people who have taken actions or have lifestyles with which I disagree. I have helped them to the best of my ability. Representing them is not an endorsement, encouragement or support of their previous actions or lifestyle. I recognize them to be persons of worth who need help with a legal predicament. However, I cannot in good conscience, and consistent with my faith, represent clients in matters which constitute support or endorsement of actions or lifestyles Scripture tells me are improper.

I am a Christian believer. I am a sinner saved by the great grace of God. I continue to sin and regularly must ask God's forgiveness. Many times I have prayed, "God be merciful to me, the sinner." (See Luke 18:13.)

My faith is inextricably woven with my law practice. Anything I do as a lawyer must be in line with God's word. For example, in my bankruptcy practice I have refused to represent a check cashing company because the 380% or so interest they charge is oppressive to the poor in violation of Scripture.

I lead a Bible study life group at my church. In so doing, I will share what the Bible says about issues and practices in our culture. Sharing what the Bible says about actions and lifestyles and my stated belief that the Bible is true could be said to violate the proposed Rule 8.4(g).

The proposed Rule will give disgruntled clients or potential clients and groups who have the support of then-current political correctness a vehicle to take the law licenses of lawyers who try to conduct their practice with a Biblical world view. In today's culture, both of the Tennessee Bar and the State as a whole, we need more, not fewer, lawyers with a Biblical world view. Proposed Rule 8.4(g) will unconstitutionally inhibit my freedom of speech and the free exercise of my religion. I urge you to reject it.

Sincerely,

Dale Bohannon

DB/la

ADM2017-02244

Lisa Marsh - No. ADM2017-02244 Proposed Rule 8.4 change

From: Larry Magdovitz <Larry@magdovitz.com>
To: "appellatecourtclerk@tncourts.gov" <appellatecourtclerk@tncourts.gov>
Date: 3/9/2018 1:17 PM
Subject: No. ADM2017-02244 Proposed Rule 8.4 change

Dear Jim,

I cannot agree to the changes proposed to Rule 8.4 as proposed by the Tennessee Bar Association.

Love,
Larry

P.S. My TN Bar No is 020869.

Lawrence "Larry" M. Magdovitz, II
Law Offices of Lawrence M. Magdovitz

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(662) 627-5350 x1
(662) 624-4821 *facsimile*

investment plan or arrangement to any taxpayer, and such taxpayer should seek advice on the taxpayer's particular circumstances from an independent tax advisor.

RICHARD D. CROTTEAU
5758 Tallant Road
Ooltewah, TN 37363

ADM2017-02244

March 7, 2018

The Honorable Jeffrey S. Bivins, Chief Justice
The Honorable Cornelia A. Clark, Justice
The Honorable Holly Kirby, Justice
The Honorable Sharon G. Lee, Justice
The Honorable Roger A. Page, Justice

Attn: James M. Hivner, Clerk
Re: Tenn. Sup. Ct. R. 9, section 32
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

Re: No. ADM2017-02244 – Comment Letter Opposing Amending Rule 8, RPC 8.4 of the Rules of the Tennessee Supreme Court by Adopting a New RPC 8.4(g)

Dear Chief Justice Bivins, Justice Clark, Justice Kirby, Justice Lee, and Justice Page:

As a member of the Tennessee Bar Association since 1970, Bar No. 1675, I want to address concern about one aspect of proposed Rule 8.4(g): When is a lawyer acting as a lawyer? Or, what is meant by "in conduct of the practice of law"?

Although other commenters have adequately addressed various impacts of the proposed rule, I am concerned about the question of when is a lawyer not acting as a lawyer? I believe we are lawyers 24/7 and probably "practicing law" even as pro-bono speakers.

When a lawyer is asked to address a civic or church group, he/she is not introduced without mentioning the fact that he or she is a lawyer (perhaps even including the firm with whom he/she is associated with). The topic of sexual revolution and the impact on society of the traditional marriage, adoption, transgender issues, bathroom issues, etc. and what does the Bible say about these sexual topics? What is the Catholic position? What is the evangelical protestant position? These are questions that people want to have addressed.

I am concerned that in a passionate talk on the conservative viewpoint, the biblical viewpoint, the traditional marriage, the highly and most-desired place to place children in an adoption situation, might well raise the issue of discrimination or be perceived to be that by folks who disagree with the traditional viewpoint. It seems to me that in these issues Christians who are also lawyers need to have the ability to speak forthrightly and from a biblical standpoint without being subject to criticism or subject to second-guessing or even discipline on whether or not they had the right to express their viewpoints.

[illegible] D. [illegible]
[illegible] Fullam Road
[illegible], TN 37[illegible]

March 7, 2018

The Honorable Jeffrey S. Bivins, Chief Justice
The Honorable Cornelia A. Clark, Justice
The Honorable Holly Kirby, Justice
The Honorable Sharon G. Lee, Justice
The Honorable Roger A. Page, Justice

Attn: James M. Hivner, Clerk
Re: Tenn. Sup. Ct. R. 9, section 8.[illegible]
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

Re: No. ADM2017-02244 – Comment Letter Opposing Amending Rule 8, RPC 8.4 of the Rules of the Tennessee Supreme Court by Adopting a New ABA [illegible]

Dear Chief Justice Bivins, Justice Clark, Justice Kirby, Justice Lee, and Justice Page:

As a member of the Tennessee Bar Association since 1970, Bar No. [illegible]. I am [illegible] concern about one aspect of proposed Rule 8.4(g). When is a lawyer acting as a lawyer? [illegible] is meant by "in conduct of the practice of law"?

Although other commenters have adequately addressed various aspects of the proposed rule, I am concerned about the question of when is a lawyer not acting as a lawyer [illegible] and probably "practicing law" extends past his or her office.

Often a lawyer is asked to address a class or church group regarding current issues without mentioning the fact that he or she is a lawyer (perhaps even including the firm with whom he/she is associated with). The topic of sexual revolution and the impact on society of the traditional marriage, adoption, transgender issues, bathroom issues, etc. and what does the Bible say about these sexual topics? What is the Catholic position? What is the evangelical protestant position? These are questions that people want to have addressed.

I am concerned that in a presentation or talk on the conservative view [illegible] the best viewpoint (the traditional marriage, the highly and most desired place to place children for adoption) situations might well raise the issue of discrimination or be grounds to [illegible] who disagree with the traditional viewpoint. It seems to me that in these cases [illegible] also lawyers [illegible] to have the ability to speak thoughtfully and from a biblical [illegible] being subject to criticism or subject to sanctions [illegible] had the right to express their viewpoints.

I think the rule should not be adopted.

Thank you for your consideration.

Sincerely,

Richard D. Crotteau

Richard D. Crotteau

TN Bar # 1675

I think the rule should not be adopted.

Thank you for your consideration.

Sincerely,

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March 9, 2018

James M. Hivner, Clerk
Tennessee Appellate Courts
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401 7th Avenue North
Nashville, TN 37219-1407

IN RE: **COMMENT ON JOINT PETITION OF BOARD OF PROFESSIONAL RESPONSIBILITY OF THE SUPREME COURT OF TENNESSEE AND TENNESSEE BAR ASSOCIATION FOR THE ADOPTION OF A NEW TENN. SUP. CT. RULE 8, RPC 8.4 (g)**

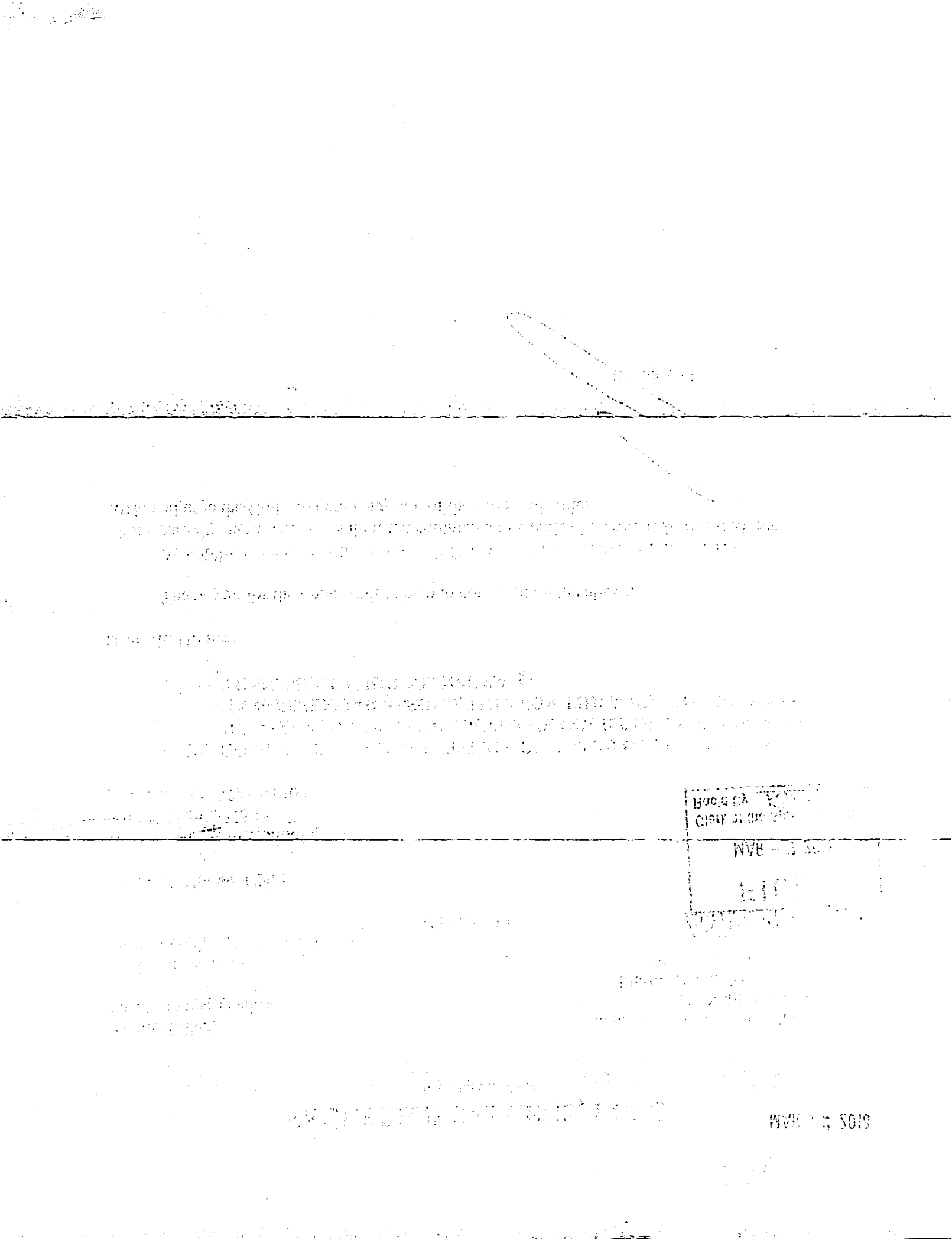
Dear Mr. Hivner,

Thank you for the opportunity given to comment on the above.

As a fellow member of the Tennessee Bar Association House of Delegates, I wholeheartedly agree with the submitted comments of Charles L. Trotter, Jr. dated March 6, 2018, and urge the Court to deny adoption of the proposed Rule.

Sincerely,

Ewing Sellers



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ADM2017-02244

March 6, 2018

James M. Hivner, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

IN RE: COMMENT ON JOINT PETITION OF BOARD OF PROFESSIONAL RESPONSIBILITY OF THE SUPREME COURT OF TENNESSEE AND TENNESSEE BAR ASSOCIATION FOR THE ADOPTION OF A NEW TENN. SUP. CT. R. 8, RPC 8.4 (g)

Dear Mr. Hivner:

I. Introduction

I appreciate the opportunity for comment the Supreme Court has given those of us interested in this issue. I therefore respectfully submit for the Court's consideration the following in opposition to the *Joint Petition.* After this introduction, my comment has five (5) parts and is supported by an exhibit. Next, I submit the perspective from which I comment on the proposal. Third, I offer some background on the proposal. Fourth, I offer a few examples based on my experience and that of others on the Committee. Fifth, I submit some substantive material for the Court's consideration and finally, I offer a conclusion.

As the proposal worked its way through the Tennessee Bar Association Committee on Ethics and Professional Responsibility, I worried as I begin my fifth (5th) decade as a Tennessee lawyer in good standing that my entry into the profession years ago may have been tainted by conduct the joint proposal would now proscribe. When I told the anecdote more fully set out below offering perspective during the work of our Committee, one of the members, an in-house lawyer whose name is certainly not on the sign out front identifying the large institution in Nashville she represents, was moved to exclaim, "That's textbook discrimination!" No, I submit to the Court, it's a choice, and a choice I like to think was made from acumen and enlightened self-interest, instead of bias. I hope the Court will take this opportunity to deny the *Joint Petition* and keep the TBA and the Board of Professional Responsibility on right side of the line between preaching and meddling.

Thank you, again, for the opportunity to comment.

II. Perspective

I joined a small firm as an associate in Huntingdon, Tennessee right out of law school in 1977. I have maintained an office in Carroll County for the private practice of law and lived here since that time. Early in my time at the firm I learned the senior partner responsible for hiring me was an original member of the Board of Professional Responsibility. There were two (2) applicants for that job. The other applicant would today be known by name to some, if not all, the members of this Court. He is an excellent lawyer and a source of enlightenment to me, not to mention a good friend and fishing buddy.

In the Fall of 1977, I was single and had no children. My friend is several years older than I, was a married man, still is, but his children are no longer small. Neither of us were native Tennesseans, and as far as I know, had no connections whatever to Huntingdon or Carroll County. Each of us was, however, urgently looking for a lawyer job to begin earning a living. In hindsight, its hard to say who got the better deal, but I was hired because, as I later learned, I was the more expendable. If the new associate experiment failed, so the thinking went, there would be less fuss involved in sending me on my way than uprooting a young married couple newly moved to town with small children in school.

I am a member of the Tennessee Bar Association since 1977, and served as Speaker of the House of Delegates (herein HOD). I served from 1988 to 1994 as a Hearing Committee Member for the Board of Professional Responsibility. I am a member of the TBA Standing Committee on Ethics and Professional Responsibility and was a member of the original predecessor TBA Committee for the Study of Professional Conduct from its inception in 1995 during the administration of Howard Vogel (herein Committee). I participated as a member of both TBA groups (the HOD and the Committee) in the deliberations on proposed 8.4(g) now the subject of the *Joint Petition*. I expect my participation to continue if the Committee is asked to address the comments before the Court.

I am the proud father of two (2) adult daughters. The older one is a lawyer in good standing practicing as an associate in a large firm in another State. My younger child uses her degree in social work in the Early Head Start/Head Start program in Northwest Tennessee. Both girls have attended oral argument when I have had cases before this Court. Notably, my older daughter while a second-year law student was granted permission by the Court to sit at the counsel table with me. I know first-hand of their encounters with harassment, discrimination, bias and prejudice in their professional lives; and I know first-hand how we dealt with them successfully and will deal with them if they arise in the future. If I ever have to deal with that kind of conduct directed at one of my children again, I do not want to be saddled with the rule embraced in the *Joint Petition.*

My perspective is, therefore, not only that of a father of young professional women, but also that of a small town, courthouse square lawyer (or as some of our TBA/ABA leaders refer to us, "short building" lawyers) actively engaged in the Tennessee Bar Association. I am not an ethics expert, and I am suspicious of a lawyer who talks out of both sides of her mouth,

professing simultaneously the need to protect the public and the profession in general on the one hand, and private clients on the other. None of my practice is devoted to the representation of lawyer clients concerned with or accused of unethical behavior, nor to the promotion and expansion of rules of professional (mis)conduct state-to-state in furtherance of that representation.

III. Background on the Proposal in the TBA Committee and House of Delegates

The Committee considered proposed 8.4(g) in a series of regular conference telephone calls. I participated in all those telephone conference calls and consistently opposed what I and others considered an unwise effort merely to facilitate accusations of ethical misconduct where none otherwise existed.

The Committee's discussions for my part were informed along two (2) lines of reasoning. The first, dearly embraced by the Committee and TBA leadership and prominent in the *Joint Petition,* is the view that the American Bar Association (ABA) is the fount of all wisdom in this area. For those of us whose professional lives are not defined by firm or institutional names other than our own, the proposal before the Court shrinks intolerably the "sphere of private thought and private activity for which lawyers will remain free from regulatory scrutiny." *Joint Petition* 6.

I viewed a video presentation of the ABA House of Delegates debate offered by the Committee/TBA leadership. Actually, there was no debate because there were no competing sides. No Tennessee lawyers spoke. The presentation was more a self-congratulatory testimonial to the ethics *ipse dixit* of the ABA than an informative discussion of the proposal now before the Court. If I had doubts about opposing the proposal, they were removed after I watched the video.

The video has I believe been taken down, but as I recall now, it featured six (6) speakers, two (2) of whom are germane to my comment. One was a gay man who spoke on behalf of the ABA Commission of Sexual Orientation and Gender Identity. The other was a woman who spoke on behalf of the ABA Commission on Women in the Profession. The man described what seemed his life-long personal and professional marginality on account of his sexual orientation, alleviated only by his work in the ABA. He advocated for a rule like the one now proposed to validate himself and make his life better. The woman identified herself as being of a prominent law firm, whereabouts I cannot recall, but not Tennessee. She told an anecdote of a client who was herself a lawyer in a prominent law firm. The client had been sexually assaulted by the opposing lawyer from yet another prominent law firm during the deposition phase of a big civil case. I cannot remember if the assault occurred in the ladies' room on the floor of the building where tall building lawyers take depositions, or in the back of a limousine. I remember a reference to a ladies' room and to a limousine. She advocated for a rule like the one now proposed to keep women lawyers safe from criminal sexual assault at the hands of their colleagues. Neither speaker offered insight into whether a little counseling for the man, or resort

to the criminal justice system, tort law, civil rights law, employment law, ethics rules already on the books, or some other applicable body of law already governing such conduct, by the woman might not be preferable to inflicting on the rest of us regulatory scrutiny of the otherwise private, legal, everyday choices we make in the conduct of our law practices.

It is apparent to me that the ABA proposal as "improved" by the TBA in the *Joint Petition* is like a coin with two (2) heads, or two (2) tails. On the one side, everything on the spectrum from hurt feelings to overt criminal conduct is subject to regulatory scrutiny, regardless whether such is even illegal under applicable law. On the other side, the governing rule is so broad, vacuous and conclusory that anybody has an argument in defense of anything. I left the ABA presentation, and I read the *Joint Petition,* thinking they have less to do with protecting the citizens of Tennessee and the clients of Tennessee lawyers than the predatory lawyers who can pay an ethics expert to opposing the regulatory authority.

The second line of reasoning grew from a simple question posed during a conference call by the smartest, wisest lawyer on our Committee to the representative of the Disciplinary Counsel's office. He asked her whether Disciplinary Counsel's office saw evidence of problems in Tennessee of the kind envisioned by the proposal, such that a rule like the one being discussed was necessary. She said no. The exchange was short and to the point. I was therefore surprised at the statement in the *Joint Petition* in reference to the 2013 proceedings and now, "The Board believed then, and continues to believe now, that a well-drafted black-letter rule on this subject is needed to protect Tennessee clients and citizens and to guide Tennessee lawyers in proper conduct." *Joint Petition 4.*

Disciplinary Counsel's simple acknowledgment during Committee discussions that no problem existed suggests the *Joint Petition* is simply a solution in search of a problem. Were it otherwise, Committee discussions would have been an excellent time to apprise the members of the Disciplinary Counsel's concrete concerns. The *Joint Petition's* verbiage obscures the fact that Tennessee citizens, clients and lawyers are doing just fine with 8.4 the way it is. *Joint Petition 2-5.*

A word or two is also in order about the TBA's so-called "improvement" on the ABA version. I direct the Court's attention to the last grammatical paragraph on Page 6 of the *Joint Petition* which contains the sentence, "...The BPR and the TBA submit that proposed RPC 8.4(g) improves upon ABA Model Rule 8.4(g) by specifically addressing such questions in even stronger terms than the Model Rule to make clear the level of protected First Amendment activity that lawyers *still retain.*" *Joint Petition 6-7 (emphasis supplied).* I suggest if the ABA version needs that much improvement, we ought not to be operating under it anyway. I suggest the "improvement" has less to do with the drafters' concerns over protecting First Amendment activity than with the determination to imitate the ABA and adopt a similar rule regardless of whether it makes sense to the practice of law in Tennessee. Here's how the improvement came about.

The HOD met in January, 2016 at the mid-year TBA meeting. Before the House on that occasion was a resolution by the LGB&T Section of the Tennessee Bar Association. The measure as I recall advocated for gender-neutral language in statutes and sensitivity training for Tennessee judges. After a lengthy debate (unlike the ABA House, there were opposing sides to this one) the measure passed by a single vote, 22 to 21, I believe. After that, I do not know what our Board of Governors did with it.

Nevertheless, over a year later when the Committee was considering the proposal now before the Court, we put it to our leadership that those 21 Tennessee lawyers voting "No" on the LGB&T resolution might have a tough time under the proposed 8.4(g) explaining why they voted the way they did. The new sentence in Comment [4] was put there as I saw it to bandaid the absurd scenario created by the ABA proposal coveted by our leadership in which Tennessee lawyers doing volunteer Bar work potentially violate an ethics rule by opposing some initiative advanced by a TBA constituency consisting of members of a protected class.

In this area, probably more so than any other, one person's *mens rea* is another person's First Amendment freedom. The answer lies not in telling us what First Amendment activity we may *still retain,* but in scrapping a bad idea that will lead to an absurd result. I suspect every one of those 21 lawyers knows well his or her First Amendment rights, without being told by our TBA/ABA leadership. Irony lies in the fact that in its new-found zeal to be better than the ABA, the TBA exception assuring us we still retain the right to some First Amendment activity swallows the essence of the ABA-proposed rule. Truly, the TBA's proposal throws the baby out with the bathwater.

At the end of its discussions, the Committee had no concrete input from the Board of Professional Responsibility and Disciplinary Counsel's office to guide its decision. All we had was the ABA's *ipse dixit* supported by our homegrown ethics experts and the assurance the lawyer regulators would watch out for whatever right to First Amendment activity we still retained. The vote was close, but nevertheless in favor of the proposal. The TBA HOD, however, after vigorous debate among the rank-and-file, defeated the measure when it came before the House at the June, 2017 meeting in Kingsport. I respectfully suggest that the proposal does not enjoy the popularity among the rank-and-file of the Tennessee Bar Association as the *Joint Petition* might have you believe, and the Court would be well-served to take "Petitioner's view" with just a pinch of salt. *Joint Petition 5.*

IV. A Few Examples

One of our Committee of the Memphis tall building ilk certainly spoke for me when he noted the laudatory requirements of state and federal law prohibiting harassment and discrimination under their respective schemes. I would add to that the criminal law where appropriate. Comment [3] cherry picks the substantive law of anti-discrimination and anti-harassment statutes and case law to guide application of 8.4(g), imposes those as ethical requirements for lawyers and then expands the classes of persons protected in a way the State and Federal Law do not do.

The proposal, for example, impacts my relationship with an alcoholic, veteran, sometimes homeless, African-American man who does odd jobs for money around my office, a local veterinarian's office and a local service station. I'm not sure how the veterinary profession defines the practice of veterinary medicine, nor how the service station man sees his role, but proposed Comment [4] to 8.4(g) puts me and those odd jobs around my law office squarely within conduct related to the practice of law because I am operating or managing a law firm. If the African-American man fails repeatedly to show up for work, or fails to perform work paid for in advance, and I terminate him in favor of a younger white kid looking for summer work, and somebody takes issue with it, will I have to look for an ethics expert who understands the burden shifting analysis in employment discrimination law to avoid discipline?

Another example: I attended a meeting at a Nashville law firm on a weekday during normal business hours for the purpose of exchanging discovery material in litigation. I met a gay man employed by the firm whose preferred office attire was a baseball cap, a man's tank-top style T-shirt, hot pants, tube socks and roller skates which he used to propel himself about the premises. Some might find all that flamboyance hilarious. Some might find it offensive. There will likely be some bias or prejudice somewhere towards the roller-skater, particularly if he tries to enter just about any Tennessee courtroom with court in session. Under the proposal, all had better be careful about repeating such a story at a Bar function, lest it be overheard by the few who see harassment and discrimination around every corner.

Finally, although not mine, I found this hypothetical from an urban member of our Committee especially poignant. As posed, a solo lawyer in Backwoods, Tennessee, decides to hire and advertises for an associate. Two (2) applicants come forward, both recent graduates of his law school. One is a single man, and the other a single woman. He discusses the applicants with his wife, and she tells her husband she does not want him practicing law alone with an unmarried woman. So he hires the man.

Backwoods, Tennessee, I imagine, probably does not have a monopoly on married women who feel this way; and I have heard tell of such women married to lawyers in large firms in Memphis, Nashville, Knoxville and Chattanooga, not to mention Jackson, Clarksville and Murfreesboro. The solo lawyer should not have to report himself under 8.3, but if the young woman decides to complain, ("That's textbook discrimination!") the solo practitioner may have some explaining to do, and better be allocating money in the office budget to pay the ethics expert to represent him in holding the line between preaching and meddling.

V. Substantive Material for the Court's Consideration

I am uncomfortable with in-house institutional and large firm private practice lawyers, even ethics experts, advocating rules of professional (mis) conduct for the rest of us, especially when those rules expand the number of ways a lawyer can misbehave and provide opportunities for the private lawyer to gain a client. The Court will note there is no input from the academics who have come and gone from our Committee over the years. For that reason, and also because I agree with what he says, I attach hereto and incorporate herein by reference as **Exhibit A**

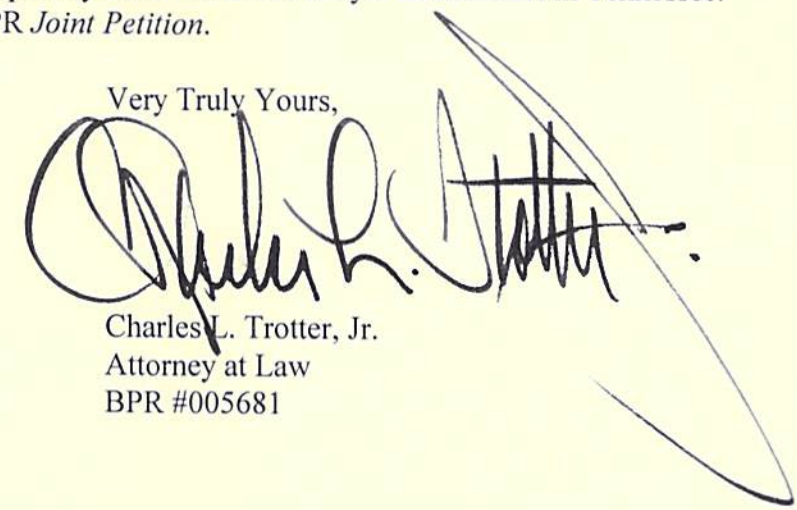
material from Professor Dane S. Ciolino of the Loyola University New Orleans College of Law. In the name of full disclosure, my daughter took his Legal Ethics and Professional Responsibility class when she was in law school. Professor Ciolino in the material offers language for a Rule which is in my view far superior to that put forward by the TBA/BPR. in the *Joint Petition.*

VI. Conclusion

Abraham Lincoln is attributed to the statement, "I feel like the man who was tarred and feathered and ridden out of town on a rail. To the man who asked him how he liked it, he said: 'If it wasn't for the honor of the thing, I'd rather walk.' " The overbroad and ambiguous proposal advocated by the TBA/BPR encroaches on private thought and private activity for those of us who seek to run our law practices with as little notice as possible taken by the Board of Professional Responsibility or ethics experts from anywhere. If it weren't for the honor of having them guide us as Tennessee lawyers in proper conduct, I'd rather just keep 8.4 like it is. *Joint Petition 4.*

While the constitutionality of the proposal is beyond the scope of my comment, I agree with Professor Ciolino that the proposal is unnecessary in light of existing ethics rules, is amply covered by other non-ethics law, and is ambiguous and overbroad. I believe adoption of the proposal will dilute and weaken disciplinary enforcement of lawyer misconduct in Tennessee. I urge the Court to deny the TBA/BPR *Joint Petition.*

Very Truly Yours,



Charles L. Trotter, Jr.
Attorney at Law
BPR #005681

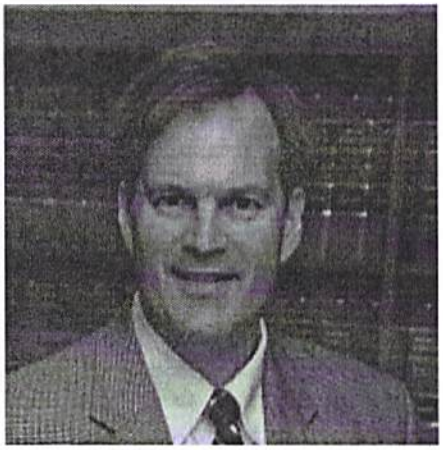
CLTjr/ncc

Encl: Exhibit A

EXHIBIT
tabbies
A

Dane S. Ciolino

Alvin R. Christovich Distinguished Professor of Law


Dane S. Ciolino

Professor Ciolino serves as the Alvin R. Christovich Distinguished Professor of Law at Loyola University New Orleans College of Law (http://law.loyno.edu/bio/dane-s-ciolino). His current scholarly and teaching interests at Loyola include Professional Responsibility, Evidence, Advocacy and Criminal Law.

Professor Ciolino graduated cum laude from Rhodes College in 1985, and magna cum laude from Tulane Law School in 1988, where he was inducted into Order of the Coif and selected as Editor in Chief of the Tulane Law Review. After graduation, he clerked for the United States District Court, Eastern District of Louisiana, and practiced law at Cravath, Swaine & Moore LLP in New York City, and Stone Pigman Walther Wittmann LLC, in New Orleans.

Since joining the faculty at Loyola, Professor Ciolino has served as reporter to the Louisiana State Bar Association Ethics 2000 Committee, as chairperson of a Louisiana Attorney Disciplinary Board Hearing Committee, and as a member of the following Louisiana State Bar Association committees: the Professionalism Committee, the Lawyer & Judicial Codes of Conduct Committee, and the Ethics Advisory Service Committee. His legal ethics e-book, Louisiana Legal Ethics (http://lalegalethics.org/), is located at www.lalegalethics.org (http://lalegalethics.org/).

Degrees

J.D., Tulane University, 1988; B.A., Rhodes College, 1985

Classes Taught

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- Trial Advocacy
- Evidence

- Criminal Law and Procedure

Areas of Expertise

- Legal Ethics and Professional Responsibility
- Criminal Law and Procedure

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Loyola by the Numbers

87% of Loyola's 2017 graduates passed the Louisiana State Bar exam

49% MALE, 51% FEMALE
STUDENT BODY: 495 Students
ENTERING CLASS: 177 Students

New Orleans is ranked #1 in America for Creative Professionals

New Orleans is ranked #1 as America's New Brainpower City by Forbes

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LOUISIANA LEGAL ETHICS
A legal ethics blog of Prof. Dane S. Ciolino

LSBA Makes "No Recommendation" on Adoption of Anti-Discrimination and Anti-Harassment Rule

POSTED ON DECEMBER 3, 2017 BY DANE S. CIOLINO

On November 27, 2017, the LSBA Rules of Professional Conduct Committee reported that it would make "no recommendation" regarding the adoption of a rule prohibiting discrimination and harassment in conduct related to the practice of law. *See* Richard C. Stanley, Letter to LSBA Outreach and Diversity Director (Nov. 27, 2017). This "no recommendation" vote came after more than a year of analysis and discussion in the wake of the ABA's adoption of a model rule addressing these issues.

Background: The 2016 Adoption of ABA Model Rule 8.4(g)

In 2016, the ABA amended Model Rule 8.4 to include a broad anti-discrimination and anti-harassment provision, and three revised comments. The amendment, which was sponsored by several ABA groups,[1] added this new paragraph (g) to the black-letter of Rule 8.4:

> 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.

See ABA Revised Resolution 109 (adopted Aug. 8, 2016).

It is often difficult to have a rational discussion about anti-discrimination and anti-harassment rule making. Some fervently believe that such provisions are yet another example of political correctness run a muck. Others just as fervently believe that such provisions serve to promote inclusiveness and confidence in the legal profession. Irrespective of viewpoint, every lawyer should be concerned about the breadth of the ABA's model rule.

First, the rule and its comments broadly define "harassment" to include *any* "derogatory or demeaning verbal conduct" by a lawyer relating to a person's "race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status." Even words that are not "harmful" meet the definition of "harassment" if they are "derogatory or demeaning" and relate to a designated category of person.

Second, the rule subjects to discipline not only a lawyer who *knowingly* engages in harassment or discrimination, but also a lawyer who *negligently* utters a derogatory or demeaning comment. So, a lawyer who did not *know* that a comment was offensive will be disciplined if the lawyer *should have known* that it was. It will be interesting to see how the "objectively reasonable lawyer" will be constructed for purposes of making this determination.

Third, the rule and its comments subject to discipline not only a lawyer who slings a "derogatory or demeaning comment" directly at another person, but also a lawyer who makes an abstract comment about general types or categories of people. Indeed, in revising comment 4, the ABA expressly deleted language that would have limited the definition of "harassment" to include only derogatory or demeaning conduct directed "towards a person who is, or is perceived to be, a member of one of the groups."

Fourth, the rule subjects to discipline a lawyer who discriminates on the basis of "socioeconomic status." What is that? UCLA Law Professor Eugene Volokh raises this (valid) concern:

> That term isn't defined in the proposed rule, but the one definition I've seen — interpreting a similar ban on socioeconomic-status discrimination in the Sentencing Guidelines — is "an individual's status in society as determined by objective criteria such as education, income, and employment." *United States v. Lopez*, 938 F.2d 1293, 1297 (D.C. Cir. 1991); *see also United States v. Peltier*, 505 F.3d 389, 393 & n.14 (5th Cir. 2007) (likewise treating wealth as an element of socioeconomic status); *United States v. Graham*, 946 F.2d 19, 21 (4th Cir. 1991) (same).

Eugene Volokh, *Banning Lawyers from Discriminating Based on 'Socioeconomic Status' in Choosing Partners, Employees or Experts*, The Volokh Conspiracy (Aug. 10, 2016). Volokh questions whether this rule will prohibit a law firm from preferring lawyers, nonlawyer assistants, and expert witnesses with degrees from high-status educational institutions. *Id.*

Louisiana Considers Adopting an Anti-Discrimination Rule

After considering the ABA's model rule, a subcommittee of the LSBA Rules of Professional Conduct Committee proposed the addition of a new Louisiana Rule 8.4(h), that would have provided as follows:

> It is professional misconduct for a lawyer to: . . . (h) engage in conduct in connection with the practice of law that the lawyer knows or reasonably should know involves discrimination prohibited by law because of race, color, religion, age, gender, sexual orientation, national origin, marital status, or disability. This Rule does not prohibit legitimate advocacy when race, color, religion, age, gender, sexual orientation, national origin, marital status, or disability are issues, nor does it limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16.

See LSBA Rules of Professonal Conduct, Rule 8.4 Subcommittee Report Executive Summary at p. 2 (Mar. 24, 2017); *see also* LSBA Rules of Professional Conduct Committee, Rule 8.4 Subcommittee Report (Mar. 24, 2017) (full report). In July 2017, the LSBA Rules Committee published the subcommittee's proposal and invited written comments on the adoption of a new anti-discrimination standard of professional conduct.

The invitation was well received; the committee received a large number of comments—including an opinion from the Louisiana Attorney General that the proposal was unconstitutional. The comments were overwhelmingly negative.

On October 30, 2017, the committee met in New Orleans to consider the comments received and to discuss adopting the ABA model rule or the subcommittee's proposal. After a long debate, the committee voted 7-4 to make "no recommendation." *See* Richard C. Stanley, Letter to LSBA Outreach and Diversity Director (Nov. 27, 2107). Although the committee's chairperson noted that "it is difficult to summarize the rationale of the lengthy debate in its entirety, the primary arguments made by those opposing the rule" were as follows:

- Existing rules permit ODC to prosecute much of the conduct that would be covered by the proposed rule, "thus making it unnecessary."
- The proposed rule contains ambiguous terms that could engender litigation and create uncertainty.
- The proposed rule may be unconstitutional.

Id. at pp. 1-2.

The committee's decision was a good one. Louisiana clearly should not adopt the ABA's standard. For all of the reasons discussed above, the ABA model rule is fraught with problems.

Moreover, the proposal of the subcommittee was also problematic . Granted, the subcommittee's proposal was less problematic than the new ABA model rule. For example, it did not brand any sort of "harassment" as misconduct, and thereby avoided the myriad problems associated with the ABA anti-harassment standard. However, the subcommittee's proposal still raised serious questions. It branded as "misconduct" purely negligent discrimination. And it inexplicably incorporated some of the ABA's protected classes (race, religion, age, gender, sexual orientation, national origin, marital status, and disability), but excluded others (ethnicity, gender identity, and socioeconomic status).

Conclusion

In my view, Louisiana either should do nothing at all (like what the committee did), or adopt a simpler anti-discrimination standard that is directly tethered to anti-discrimination laws applicable to Louisiana lawyers. Such anti-discrimination laws would include those enacted by the federal government, the State of Louisiana, and local governments. Doing so would avoid the need for the LSBA to "keep up" with changing notions of what personal characteristics are worthy of class protection.[2] Doing so would also avoid imposing discipline on innocent and merely negligent lawyers. Here is my proposed language:

> It is professional misconduct for a lawyer to: . . . (h) engage in conduct in connection with the practice of law that the lawyer knows is unlawful discrimination prohibited by federal, state, or local law. This Rule does not prohibit legitimate advocacy when a protected personal characteristic is relevant to the representation, nor does it limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16.

Ultimately, the Louisiana Supreme Court will decide whether this, or any similar anti-discrimination rule, will become part of the Louisiana Rules of Professional Conduct.

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1. The amendment was sponsored by the ABA's Standing Committee on Ethics and Professional Responsibility, the Section of Civil Rights and Social Justice, the Commission on Disability Rights, the Diversity & Inclusion 360 Commission, the Commission on Racial and Ethnic Diversity in the Profession, the Commission on Sexual Orientation and Gender Identity, and the Commission on Women in the Profession. *See* Lorelei Laird, *Discrimination and Harassment Will be Legal Ethics Violations Under ABA Model Rule*, ABA Journal (Aug. 8, 2016, 6:36 p.m.). ↵
2. For example, my proposal would brand as "misconduct" unlawful conduct based on personal characteristics protected by federal law such as race, color, religion, national origin, age, sex, sexual orientation, gender idenity, pregnancy, citizenship, familial status, disability status, veteran status, and genetic information. ↵

POSTED IN LOUISIANA RULE MAKING

TAGGED 8.4(G), ANTI-DISCRIMINATION, ANTI-HARAASSMENT

2 THOUGHTS ON "LSBA MAKES "NO RECOMMENDATION" ON ADOPTION OF ANTI-DISCRIMINATION AND ANTI-HARASSMENT RULE"

BOBBY DELISE DECEMBER 4, 2017

As a member of the committee sitting ad hoc a number of the members opined

"if not us, who?".

As professionals we should lead the way in our culture.

I greatly respect Professor Ciolino's wisdom and guidance and thank him for his comments.

LUKE LAVERGNE DECEMBER 8, 2017

Hooray for the committee, I am thankful that we still have level headed objective people in our state.

Comments are closed.

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March 7, 2018

Re: Tenn. Sup. Ct. R. 9, section 32

Dear Mr. Hivner:

We write in response to the Supreme Court's request for public comments regarding the proposal to adopt Tennessee R.P.C. 8.4(g). This letter articulates our concerns regarding the unavoidable harm it would do to free speech. Many commenters suggested modifications that would supposedly alleviate the clash between our core constitutional protections and the well-intentioned rule.[1] Our concerns are practical, and take us to a less equivocal place. We, in contrast, do not think *any* governmental agency is competent to determine when words amounts to "harassment or discrimination." Thus, we urge the rejection of the proposed rule in totality as necessary to preserve our delicate constitutional order.

At its core, the rule prohibits "harassment or discrimination" in the practice of law. That includes *verbal* conduct – even at events that would seem to be far removed from the actual practice of law, such as bar associations or social activities. Verbal harassment is, in turn, defined quite broadly to mean anything that "manifests bias or prejudice towards others" and includes "derogatory or demeaning verbal or physical conduct." Our summary conclusion is that this central framework is not workable or compatible with the best traditions of American freedom, no matter how formulated.

No neutral and objective method exists for a governmental agency to determine when words become "harassment or discrimination" based on their content. It will ultimately necessitate someone to make what is nothing more than a judgment call. Those calls will often be purely subjective ones, with the rules determined by the most easily offended

[1] *See, e.g.*, Josh Blackman letter (Dec. 11, 2017) ("This letter provides four recommendations of how the proposed rule can be modified to avoid chilling speech under the First Amendment.").

listener. The censorship of constitutionally protected speech is inevitable, as recent events so well demonstrate.

Consider the case of Simon Tam. He is the lead singer of an all Asian-American dance-rock band, "The Slants." Notwithstanding that he is himself Asian-American and that he deliberately chose the name to drain a stereotype of its poison, a bureaucrat for the Patent and Trademark Office ("PTO") denied him a trademark after bloggers and commentators indicated that they found the term offensive and derogatory.[2] The PTO, which is just another agency that was once empowered – like this rule proposes to do – to judge what speech is too offensive to be countenanced, persisted in its position all the way to the United States Supreme Court.

Fortunately, Simon prevailed. In a firm 8-0 decision, the Supreme Court explicitly rejected the government's attempt to — as is proposed here — censor "speech that demeans on the basis of race, ethnicity, gender, religion, [or] age." According to a unanimous Supreme Court, prohibiting expressions "merely because [they are] offensive . . . strikes at the heart of the First Amendment."[3] Such a law "offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend."[4] The protection of even offensive speech is foundational American freedom.

Because Simon's case was one that stood at the intersection of free speech and the right to earn a living, it is exactly the sort of case we at the Beacon Center would have been interested in taking on a *pro bono* basis. But because of the provocative nature of his band, doing so would have been perilous if this rule were enacted. The accommodations made in the rule for "legitimate advice or advocacy" are of little comfort. This carve-out merely begs the question. What words count as "legitimate advocacy" is no more easily sorted out than what words count as "harassment" in the first place.

Both questions assume that people can readily agree on how to draw such lines. But the drawing of those lines is certainly not mathematical or even obvious.[5] Simon had no idea he was engaged in "harassment" when he named his band. Plainly, Simon's views differed

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[2] *See Matal v. Tam*, 137 S. Ct. 1744, 1754 (2017).

[3] *See id.* at 1763-64.

[4] *Id.* at 1751.

[5] The PTO, for instance, interpreted disparagement in a manner that was anything but intuitive. The PTO discounted Simon's benign and subversive use of the term because of how a listener might react, no matter how irrational. According to the PTO, "[t]he fact that an applicant may be a member of that group or has good intentions underlying its use of a term does not obviate the fact that a substantial composite of the referenced group would find the term objectionable." *Id.* at 1754. Of course, different listeners often have different reactions. The PTO arbitrarily chose the offended listener and not the listener who had a reaction more faithful to Simon's intent. The PTO's selection of which listener mattered embodies a subjectivity that is the enemy of free speech.

with a great number of others who were offended, including those in the government charged with making the call. The proposed rule 8.4(g) comes with no assurances that it can be applied any more evenhandedly.

Moreover, the chilling prospects of this rule are readily apparent, even if the government could be counted on to draw trustworthy lines. Faced with even the possibility of professional sanction, the safest course for an attorney considering taking on Simon's case would be simply to decline the case. Like Mark Twain's proverbial cat who once sat on a hot stove and never again sat on a cold one, lawyers will tend to steer far clear of a line that can trigger even an unfounded professional complaint. That might keep the attorney safe, but such quarter would exclude Simon and the First Amendment.

As the effort to define and use the power of the state to eradicate what can loosely be called "hate speech" gains a toehold, Simon's case becomes part of a growing trend. Another federal agency, the Equal Employment Opportunity Commission, recently ordered an investigation into the wearing of the "don't tread on me insignia," – a revolutionary war flag[6] – as racially offensive.[7] Little speech comes with a guarantee that no one will ever be offended by it. The government should not be enlisted to be an enforcer in these efforts.

A worrisome number of young Americans think that there is such a thing as a hate speech exception to the First Amendment. A national survey of 1,500 undergraduate students determined that over forty percent (40%) believe that hate speech is not protected by the First Amendment. Over half believe it is important for colleges to prohibit offensive or biased viewpoints. Worst of all, twenty percent (20%) believe that *the use of violence to prevent a speaker from speaking is acceptable.*[8] The foundation of our free speech culture is on quaking grounds.

The troubling attitudes reflected in the poll are not in line with the jurisprudence. Every time it gets a chance, the Supreme Court reaffirms that the government has no interest in preventing offensive speech because of how someone might react. Even if it were true that that proposed rule 8.4(g) was an effective response to odious speech, "the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we

---

[6] The so-called "Gadsen Flag" was designed by Christopher Gadsen, a member of the First Continental Congress and a member of the Marine Committee tasked with outfitting the first naval mission of the young war. He presented it to the newly appointed commander-in-chief of the Navy, Esek Hopkin, as a distinctive standard for his flagship. *See* Byron McCandless, *Our Flag Number*, Nat'l Geographic Mag. (Oct. 1917), https://books.google.com/books?id=22s9AAAAYAAJ&pg=PA289#v=onepage&q&f=false

[7] *Shelton D. v. Brennan*, 2016 WL 3351228 (EEOC Doc 0520140441, June, 3, 2016).

[8] *See* John Villasenor, *Views among college students regarding the First Amendment: Results from a new survey* (Sep. 18, 2017), https://www.brookings.edu/blog/fixgov/2017/09/18/views-among-college-students-regarding-the-first-amendment-results-from-a-new-survey/.

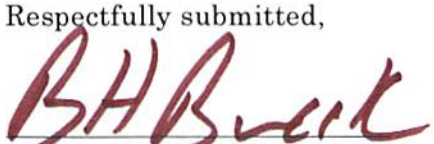
hate.'"[9] While the goal of promoting respect and diversity are noble, it must not come at the expense of our dearly won liberties. The poll's findings reinforce how truly urgent it is that we are especially solicitous of the space free speech needs to flourish. That is a "safe space" that everyone benefits from.

Stated bluntly, Free speech requires a culture. If we do not protect it then we will lose it. The obligation to cultivate our free speech culture should *begin* with the bar. The bar ought to be the place most willing to tolerate controversial speech. If that means allowing a frontier where even objectionable ideas might be free to roam, then so be it. We should not be willing to, like Roper in *A Man for All Seasons*, cut down every law in England just to get at the devil. If attorneys embrace the notion that bureaucrats are able to identify what words constitute verbal harassment and are empowered to stop it, then what hope is there of educating today's students? The First Amendment was, after all, drafted by a group of people who were, in the main, attorneys.

We should call this proposed rule by its name: censorship. Censorship never works, if for no other reason than the government is not competent to judge in any reliable way when speech crosses the line from "legitimate" and into "harassment." Endless examples – including those described above – demonstrate this. Inevitably, no matter how carefully censorship starts, the walls will close in and we will lose something we cherish. Suddenly, even Revolutionary War flags and dance bands become targets of the censorious impulse when we allow the offended listener to dictate the rules.

For these reasons, the rule cannot be saved. We appreciate your careful consideration of our concerns. Please do not hesitate to let us know if we can be of any further assistance in this regard.

Respectfully submitted,



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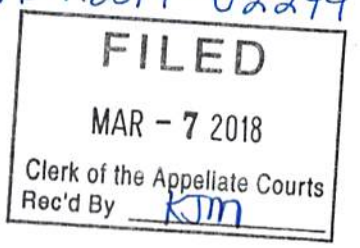
[9] *Tam*, 137 S. Ct. at 1764 (quoting *United States v. Schwimmer*, 379 U.S. 644, 655, 49 S. Ct. 448, 73 L. Ed. 889 (1929) (Holmes, J., dissenting)).

ADM2017-02244



From: Matt Sexton <mrmattsexton@yahoo.com>
To: <appellatecourtclerk@tncourts.gov>
Date: 3/7/2018 9:52 AM
Subject: Docket No. ADM 2017-02244.

Dear Sir or Madam:

Please make it known that I oppose the proposed rule change in reference to the docket number in the subject line. I agree with the brief in opposition filed by the Christian Legal Society. The proposed adoption of the proposed rule would stifle lawyers' free speech rights and will likely invite costly first amendment suits.

Many Thanks,

Matthew Sexton
BPR#027526

Sent from my iPhone

Wimberly Lawson
Wright Daves & Jones, PLLC
Attorneys & Counselors at Law

1420 Neal Street
Suite 201
PO Box 655
Cookeville, TN 38503-0655
931-372-9123 tel
931-372-9181 fax

Jeffrey G. Jones, Firm Managing Member
jjones@wimberlylawson.com

February 28, 2018

James M. Hivner, Clerk
Re: Tenn. Sup. Ct. R. 9, Section 32
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

Re: *In Re: Petition for the Adoption of a New Tenn. Sup. Ct. R. 8, RPC 8.4(g)*
No. ADM2017-02244

Dear Mr. Hivner:

This letter is in response to the Tennessee Supreme Court's Order requesting comments on the Petition for the Adoption of a New Rule of Professional Conduct 8.4(g). For the reasons set out below, the law firm of Wimberly Lawson Wright Daves & Jones, PLLC opposes the proposed amendments to Rule 8.4 and respectfully requests the Court reject the Petition.

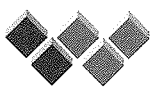
Wimberly Lawson Wright Daves & Jones, PLLC is a full-service labor and employment law firm representing management exclusively on all matters related to traditional labor and employment law, including laws prohibiting discrimination in the workplace such as the Tennessee Human Rights Act, Title VII of the Civil Rights of 1964, and claims arising under 42 U.S.C. § 1983. Our clients range from small family owned businesses to large multi-national companies. We also represent non-profit organizations, churches, and faith-based organizations.

The proposed amendments to Rule 8.4 mirror the amendments properly rejected by the Court in 2013. While the stated purpose of the amendment to prohibit discrimination "in the practice of law" may be laudable, the proposal before the Court is structured to limit attorney's free speech and free exercise rights, promote a single viewpoint on the highly contentious issues of human sexuality, marriage, and the family, and restrict client access to competent legal counsel who will zealously advocate on their behalf on these unsettled issues. Additionally, the proposed Rule defines "discrimination and harassment" to include "harmful verbal or physical conduct that manifest bias or prejudice towards others," suggesting that hurt

feelings, an unwillingness to agree with another's position, or any number of comments or decisions having nothing to do with client representation or affecting the administration of justice could give rise to an accusation that an attorney has violated the new Rule 8.4(g). As such, subjecting attorneys to discipline and claims of unethical conduct for speech and expressions of views or opinions deemed "verbally harmful" undermines the practice of law and does harm to the administration of justice, the very thing the current Rule is designed to protect.

Comment [3] to current Rule 8.4 prohibits "knowing" "bias or prejudice" while "in the course of representing a client" where such "bias or prejudice" is "prejudicial to the administration of justice." The current Rule does not seek to regulate private speech, counseling or advice, or conduct such as presentations, bar association participation, blog posts, or other advocacy or opinion by an attorney in his or her capacity as an attorney, what the proposed amendment classifies as "the practice of law." In seeking to greatly expand the scope of the Rule, the Petition fails to provide any basis on why the current Rule needs to be amended and does not identify any systemic "discrimination" the Court should address through an amendment to Rule 8.4. As such, the Court is asked to greatly expand the reach of Rule 8.4 without any justification, an expansion that could be used to subject attorneys to disciplinary claims based on writings, speeches, and advocacy for positions that a disagreeing party may view as discriminatory on a classification listed in the amended Rule.

Further, while the Petition notes ambiguity in the current Comment [3] to Rule 8.4, the amendment does nothing to provide clarity. Rather, it expands the Rule beyond representation of a client having a prejudicial impact on the administration of justice and covers anything "related to the practice of law," a term that is not clearly defined in the proposed amendment. Rather, "conduct related to the practice of law" is defined very broadly by including any conduct such as "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.*" Proposed Comment [4] (emphasis added). This circular definition appears to make any speech or conduct taken in an attorney's capacity as an attorney something that is "related to the practice of law." This very issue was reviewed and rejected by the State of Louisiana based on well-founded constitutional concerns. *See* State of Louisiana Attorney General Opinion No. 14-0114 issued September 8, 2017. Contrary to the Petition's representations, proposed Comment [4a] does not solve the constitutional problems created by the proposed amendment.



The requested amendment proposes that "substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g)," a proposal that leaves attorneys in a difficult position. Under federal anti-discrimination statutes, sexual orientation and gender identify, for example, are not protected classifications. Yet, the United States Equal Employment Opportunity Commission advocates that sexual orientation discrimination and gender identity discrimination are the same as sex discrimination, while the United States Department of Justice rejects that position. Indeed, the two federal agencies are on opposite sides of this issue in *Zarda v. Altitude Express,* Case No. 15-3775 pending in the United States Court of Appeals for the Second Circuit. While previously unanimous on this issue, the federal courts of appeal have recently become divided on how Title VII should be interpreted when it comes to discrimination based on sexual orientation. *Compare Hively v. Ivy Tech Community College of Indiana*, Case No. 15-1720 (7th Cir. 2017) (en banc) with *Evans v. Georgia Regional Hospital*, Case No. 15-15234 (11th Cir. 2017). Of course, Tennessee law does not address discrimination based on sexual orientation or gender identity. *See* Tenn. Code Ann. § 4-21-102(20). Accordingly, it remains ambiguous at best how an attorney is to know when his or her personal views or religious convictions on these issues run afoul of the new Rule 8.4(g).

The proposed Rule also limits when potentially discriminatory speech is permissible. Under Comment [4], the Rule will provide that "Lawyers may engage in conduct undertaken *to promote* diversity and inclusion without violating this Rule." (emphasis added). Accordingly, attorneys who make discriminatory or disparaging remarks against people of a religious faith who hold to traditional and long-standing views on human sexuality, marriage, and the family are arguably protected, but attorneys advocating to or on behalf of a client who holds such traditional or religious views are potentially in violation of the Rule because they are not "promoting diversity and inclusion." Even though Comment [4] to the new Rule protects "legitimate advocacy" on such issues, there is no guidance on whether a reviewing body would find out-of-favor views "legitimate" even though protected by the First Amendment. Of course, proposed Comment [4a] would provide no First Amendment protections to speech or conduct "related to the practice of law."

What makes the practice of law indispensable to the administration of justice is that attorneys may advocate and promote ideas, philosophies, and viewpoints without fear of reprisal. Over the course of history, the law has developed based on healthy debate and zealous advocacy from an independent Bar. Attorneys participate in business, social advocacy, legislative bodies, governmental agencies, non-profit organizations, churches, synagogues, mosques, and other houses of worship, and as citizens. They are trained to analyze issues and articulate various points of view, often on behalf of their clients, but also on behalf of themselves even though some may take offense with their opinion or position. The

proposed amendments to Rule 8.4 undermine this healthy debate essential to the development of jurisprudence consistent with the Constitution and beneficial to a free society. It does so by enshrining politically charged terms and ideas over which there is no general consensus and seeks to regulate speech and conduct in all aspects of an attorney's life well beyond the courtroom. Tennessee attorneys should remain free to speak and advocate on issues that shape our legal system and shape our society.

Our firm respectfully requests the Court reject the Petition for the Adoption of a New Rule of Professional Conduct 8.4(g).

Sincerely,

Jeffrey G. Jones, Firm Managing Member
For the Firm

ADM2017-02244

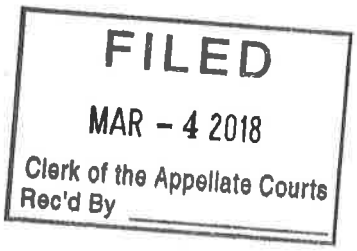
From: Jennifer King <jennifer@kingplc.com>
To: "appellatecourtclerk@tncourts.gov" <appellatecourtclerk@tncourts.gov>
Date: 3/4/2018 5:28 PM
Subject: Amendment to Rule 8

This is completely unnecessary to add a rule that prohibits discrimination or harassment by attorneys. This rule will result in the public and potential clients determining when an attorney has discriminated against them. This is a very slippery slope. How will harassment be determined? So many people are so sensitive to any constructive criticism so what does it even mean? It seems that we are just bowing down to the current political climate of today.

Sincerely,

Jennifer King

Sent from my iPhone



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March 2, 2018

James M. Hivner, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Ave North
Nashville, TN 37219-1407

ADM2017-02244

FILED
MAR - 2 2018
Clerk of the Appellate Courts
Rec'd By _____

RE: Tenn. Supp. Ct. R. 9, Section 32
Comments on Proposed Rule 8.4(g)

Mr. Hivner:

Please let this letter serve as my comments on the proposed amendment to Tenn. Sup. Ct. R. 8.4(g). First, I think we are in a current climate where we are quick to add new rules and regulations where they are not necessary. I do not believe this behavior is a problem amongst the members of the Tennessee Bar and even if is, the current Rules of Professional Conduct are well equipped to handle the matter. I believe the rule change serves little purpose and is more driven by the current political/social temperament than anything else.

Second and more importantly, I believe this will hinder an attorney's ability zealously advocate for his client. Anytime an attorney sends legitimate written discovery or questions a party in a deposition in a way in which the person opines is invasive or harassing, said attorney will be subject to a board complaint. The language that it does not preclude "advocacy consistent with these Rules" provides me with little solace. Given the fact that there are no required filing fees for a person to pay to file a complaint, it will mean more time and energy on the part of the innocent attorney to answer frivolous claims. The same can be true for those attorneys who refuse to take on a case for little or no compensation. I see this rule being ripe for abuse from individuals who decide the attorney is discriminating against them because he/she will not take a case on for free.

Based upon those opinions, I strongly urge against the adoption of the proposed RPC 8.4. Thank you for your time and have a great day.

Sincerely,

Jay Dustin King

JDK

appellatecourtclerk - Comments on Proposed RPC 8.4(g)

From: Dusty King <dusty@kingplc.com>
To: "'appellatecourtclerk@tncourts.gov'" <appellatecourtclerk@tncourts.gov>
Date: 3/2/2018 10:54 AM
Subject: Comments on Proposed RPC 8.4(g)
Attachments: KING.pdf

Please see attached.

KING AND KING PLC
ATTORNEYS AT LAW

Jay Dustin King, Attorney At Law
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appellatecourtclerk - Tenn. Sup. Ct. R. 8, Proposed Rule 8.4(g), Docket No. ADM2017-02244

From: Joseph Harvey <joseph_b_harvey2@yahoo.com>
To: "appellatecourtclerk@tncourts.gov" <appellatecourtclerk@tncourts.gov>
Date: 3/2/2018 8:42 AM
Subject: Tenn. Sup. Ct. R. 8, Proposed Rule 8.4(g), Docket No. ADM2017-02244

Dear Mr. Hivner:

Please accept this comment on the proposed revisions to Tennessee Supreme Court Rule 8, and specifically the proposed addition of new subsection 8.4(g).

The proposed revisions should be rejected for multiple reasons.

1. No Evidence Of Any Need

First, the proposed rule is not needed. Although Mr. Pera asserted in his article in the TBA Journal that "The experience of our lawyer regulator has convinced it that there is a need for [the] rule," no specific information or data has been provided to support that conclusion. The Court should not accept a new, sweeping, and controversial rule without any factual support for its necessity other than "take our word for it."

In fact, Mr. Pera's article in the TBA Journal advocating for the proposed rule demonstrates that the rule is not needed. In arguing that the rule will not open the floodgates for complaints, Mr. Pera states that "only a very small number of lawyers have been disciplined under their rules." If only a few lawyers have been disciplined, the the rule does not address any pervasive, widespread problems. On the other side of the scale, for the reasons discussed further below, a broad interpretation of the rule will have a chilling effect on legitimate political speech and activity. If the rule is not needed to eliminate a serious and pervasive problem, which would be evidenced by many instances of disciplinary action, then its benefits do not outweigh the negative effects (which negative effects were the reason for refusing to adopt the rule the first time it was proposed).

Also, the TBA and BPR's Petition gives the impression that there are no laws that would prohibit discrimination or harassment by lawyers. That is simply not the case. There are currently numerous laws in place to prohibit lawyers from engaging in unlawful discrimination and harassment. Many lawyers, like all employers, are covered by myriad civil rights laws including Title VII of the Civil Rights Acts of 1964, the Age Discrimination in Employment Act of 1967, the Americans with Disabilities Act of 1991, the Tennessee Human Rights Act, and the Tennessee Disability Act, just to name a few. And there is currently a system to enforce those laws for lawyers who violate their prohibition on harassment and discrimination. The implication that lawyers can simply harass and discriminate on the basis of race, sex, religion, or other characteristic without any consequence is misleading.

In the absence of any data or evidence that the rule is needed or would remedy a pervasive problem, the motivation for the proposed rule appears to be nothing more than symbolic "virtue signaling," which is not a valid reason to adopt it. In the absence of any real evidence or data supporting a need for the rule, the proposed rule should not be adopted.

2. The Rule Has the Potential To Be Interpreted Broadly and Abused for Political Purposes

The new rule purports to prohibit "discrimination" and "harassment" based on a list of personal characteristics. The rule does not, however, define what constitutes discrimination or harassment based on those characteristics. There are too many examples to cite of instances when people of all professions have been branded "racist" or "sexist" for holding legitimate political or religious views. The words "racism" and "sexism" have been expanded beyond their legitimate definitions and used as a bludgeon to beat political opponents into submission. For example, the proposed rule would appear to prohibit a lawyer from opposing same sex marriage, a position that was nearly universally accepted for 2,000 years and expressed by Barack Obama in

2008 when he was running for President. Anyone holding that opinion now is likely to be called a "bigot." Others have been called "racist" for nothing more than belonging to one of the two major political parties or wearing a red hat. The "racist" label has been applied to a row of trees, Disney movies, Dr. Seuss, Halloween costumes, proper grammar, expecting people to show up on time, and the U.S. flag. (citations available on request). Likewise, a scholarly memo supported by citations to scientific research explaining the legitimate, nondiscriminatory reasons for the disproportionate presence of men in the tech industry resulted in the memo's author being branded a "sexist," shunned by his peers, and then terminated from his employment.

As an example of the chilling effect the rule could have on legitimate expression, I had to think twice about sending this comment for fear that it would be called racist and sexist "hate speech" simply because it opposes an unnecessary and problematic rule and despite the absence of any language that could reasonably be interpreted in that manner.

In short, laws currently in place are adequate to address any discrimination or harassment by lawyers, there is no evidence supporting a need for the proposed rule, the evidence suggests that the rule is not needed to address a pervasive problem, and the negative effects of the rule far outweigh the benefits. Tennessee does not need a new ethical rule that will have little practical effect other than to be used as a tool to threaten political opponents with ethical complaints.

For these reasons, the proposed rule 8.4(g) should not be adopted.

Sincerely,

Joseph B. Harvey

THE SUPREME COURT OF TENNESSEE

IN RE:	**PROPOSED ADOPTION OF**	)	ADM 2017-02244
	A NEW TENN. SUP. CT. R. 8	)	
	RPC 8.4(g)	)	

Joint Comment of 71 Tennessee Attorneys Opposing Adoption of Proposed New Rule of Professional Conduct 8.4(g)

This Joint Comment, submitted by 71 Tennessee licensed attorneys, opposes Tennessee's adoption of the newly proposed Rule 8.4(g) and Comments thereto, for the reasons set forth herein.

I. The Rule

A. Tennessee's Current Rule

Tennessee's current Rule of Professional Conduct 8.4 provides, in pertinent part, as follows:

It is professional misconduct for a lawyer to: . . . (d) engage in conduct that is prejudicial to the administration of justice.

Comment [3] A lawyer who, in the course of representing a client, knowingly manifests, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d).

B. The New Proposed Rule 8.4(g) and Comments

Adopting the proposed new Rule 8.4(g) would amend Tennessee Rule 8.4 by amending subsection (g) and its comments. The amended Rule 8.4(g) and Comments would read as follows:

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.

Comment [3] *– Discrimination and harassment by lawyers in violation of paragraph (g) undermines 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).*

Comment [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. 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. Legitimate advocacy protected by Section (g) includes advocacy in any*

conduct related to the practice of law, including circumstances where a lawyer is not representing a client and outside traditional settings where a lawyer acts as an advocate, such as litigation.

Comment [4a] *– Section (g) does not restrict any speech or conduct not related to the practice of law, including speech or conduct protected by the First Amendment. Thus, a lawyer's speech or conduct unrelated to the practice of law cannot violate this Section.*

Comment [5a] *A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g).*

Comment [5b] *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.*

Comment [5c] *Lawyers also should be mindful of their professional obligations under RPC 6.1 to provide legal services to those who are unable to pay, and their obligation under RPC 6.2 not to avoid appointments from a tribunal except for good cause. Nevertheless, a lawyer does not engage in conduct that harasses or discriminates based on socioeconomic status merely by charging and collecting reasonable fees and expenses for a representation.*

Comment [5d] *A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. See RPC 1.2(b).*

II. The Objections

A. The New Rule Is Unconstitutional.

1. Attorney Speech is Constitutionally Protected

There is no question but that citizens do not surrender their First Amendment speech rights when they become attorneys. Indeed, the ABA itself recently acknowledged this in an amicus brief it filed in the case of *Wollschlaeger, et al. v. Governor of the State of Florida, et al.* (11th Circuit). In its brief the ABA denied that a law regulating speech should receive less scrutiny merely because it regulates "professional speech." "*On the contrary*" – the ABA stated – "*much speech by . . . a lawyer . . . falls at the core of the First Amendment. The government should not, under the guise of regulating the profession, be permitted to silence a perceived 'political agenda' of which it disapproves. That is the central evil against which the First Amendment is designed to protect.*" "*Simply put*" – the ABA stated – "*states should not be permitted to suppress ideas of which they disapprove simply because those ideas are expressed by licensed professionals in the course of practicing their profession . . . Indeed,* – the ABA stated – *the Supreme Court has never recognized 'professional speech' as a category of lesser protected expression, and has repeatedly admonished that no new such classifications be created.*" In support of its position, the ABA cited *NAACP v. Button*, 371 U.S. 415 (1963) for the proposition that "*notwithstanding the State's 'interest in the regulation of the legal profession,' a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights.*" See also *Ramsey v. Board of Professional Responsibility of the Supreme Court of Tennessee*, 771 S.W.2d 116, 121 (Tenn. 1989)(an attorney's statements that were disrespectful and in bad taste were nevertheless protected speech and use of professional disciplinary rules to sanction the attorney would constitute a significant impairment of the attorney's First Amendment rights. "[W]*e must ensure that lawyer discipline, as found in Rule 8 of the Rules of this Court, does not create a chilling effect on First Amendment rights*"); *Standing Committee on Discipline of U.S. Dist. Court for Central District of California v. Yagman*, 55 F.3d 1430, 1444 (9th Cir. 1995)(the substantive evil must be extremely serious and

the degree of imminence must be extremely high before an attorney's utterances can be punished under the First Amendment).

In short, attorneys do not surrender their constitutional rights when they enter the legal profession, and the state may not ignore attorneys' constitutional rights under the guise of professional regulation.

2. Many Authorities Have Expressed Concerns About The Constitutionality Of The Proposed Rule

Many authorities have pointed out constitutional infirmities of the ABA Model Rule 8.4(g), upon which the proposed Tennessee Rule is expressly based (indeed, the proposed Tennessee Rule follows the ABA Model Rule verbatim, except for the following modifications: (1) the proposed Tennessee Rule adds the following language to Comment [4] "*Legitimate advocacy protected by Section (g) includes advocacy in any conduct related to the practice of law, including circumstances where a lawyer is not representing a client and outside traditional settings where a lawyer acts as an advocate, such as litigation*" and (2) the proposed Tennessee Rule adds a new Comment [4a] which provides "*Section [g] does not restrict any speech or conduct not related to the practice of law, including speech or conduct protected by the First Amendment. Thus a lawyer's speech or conduct unrelated to the practice of law cannot violate this Section.*").

When the ABA opened up the new Model Rule for comment, a total of 481 comments were filed – and of those 481 comments, 470 of them opposed the new Rule, many on the grounds that the new Rule would be unconstitutional.

Indeed, the ABA's own Standing Committee on Attorney Discipline, as well as the Professional Responsibility Committee of the ABA Business Law Section, warned the ABA that

the new Rule may violate attorneys' First Amendment speech rights.

And prominent legal scholars, such as UCLA constitutional law professor Eugene Volokh and former U.S. Attorney General Edwin Meese, III, have opined that the new Rule is constitutionally infirm. "*A Speech Code for Lawyers, Banning Viewpoints that Express 'Bias,' Including in Law-Related Social Activities,*" Eugene Volokh, The Washington Post, August 10, 2016 and http://firstliberty.org/wp-content/uploads/2016/08/ABA-Letter_08.08.16.pdf.

Attorney General Meese wrote that the new Rule constitutes "*a clear and extraordinary threat to free speech and religious liberty*" and "*an unprecedented violation of the First Amendment.*" http://firstliberty.org/wp-content/uploads/2016/08/ABA-Letter_08.08.16.pdf

In addition, the authors of several law review articles have concluded that Model Rule 8.4(g) – and other Rules like it – may violate attorneys' First Amendment rights. See, for example, *New Model Rule of Professional Conduct 8.4(g): Legislative History, Enforceability Questions, and a Call For Scholarship*, Andrew F. Halaby and Brianna L. Long, 41 J. Legal Prof. 201, 2016-2017 (the new Model Rule 8.4(g) has due process and First Amendment free expression infirmities); *Reply: A Pause for State Courts Considering Model Rule 8.4(g), The First Amendment and "Conduct Related to the Practice of Law*," Josh Blackman, 30 Geo. J. Legal Ethics 241 (2017)(Model Rule 8.4(g) constitutes an unjustified incursion into constitutionally protected speech); *Discriminatory Lawyers In A Discriminatory Bar: Rule 8.4(G) Of The Model Rules Of Professional Responsibility*, Caleb C. Wolanek, 40 Harv. J. L. & Pub. Policy 773 (June 2017)(Model Rule 8.4(g) goes too far and implicates the First Amendment). See, also, *Lawyers Lack Liberty: State Codification of Comment 3 of Rule 8.4 Impinge On Lawyers' First Amendment Rights,* Lindsey Keiser, 28 Geo. J. Legal Ethics 629 (Summer 2015)(rule violates attorneys' Free Speech rights) and *Attorney Association: Balancing Autonomy and Anti-Discrimination*, Dorothy

Williams, 40 J. Leg. Prof. 271 (Spring 2016)(rule violates attorneys' Free Association rights).

In fact, in several states that have already considered adopting the new Model Rule, important professional stakeholders have rejected it. For example, the Illinois State Bar Association has taken an official position opposing the Rule; the Pennsylvania Supreme Court Disciplinary Board is opposing the Rule; the South Carolina Bar's Committee on Professional Responsibility as well as the Louisiana District Attorneys Association are opposing the new Rule; and the North Dakota Supreme Court Joint Commission on Attorney Standards has rejected the Rule.

Further, the National Lawyers Association's Commission for the Protection of Constitutional Rights has issued a Statement that ABA Model Rule 8.4(g) would violate an attorney's free speech, free association, and free exercise rights under the First Amendment to the U.S. Constitution. https://www.nla.org/nla-task-force-publishes-statement-on-new-aba-model-rule-8.4g/ (With respect to the constitutional issues raised by the new Model Rule, the attorneys filing this Joint Comment agree with the discussion, analysis and conclusions set forth in the National Lawyers Association's Statement, and have adopted, restated, and in some respects expanded upon much of that discussion and analysis in this Joint Comment.)

In addition, the Montana legislature has adopted a Joint Resolution determining that it would be an unconstitutional act of legislation and violate the First Amendment rights of Montana citizens for the Supreme Court of Montana to enact the ABA Model Rule 8.4(g) in Montana. Senate Joint Resolution 15.

Finally, the Attorneys General of the States of Texas, South Carolina, and Louisiana have all issued official Opinions that a court would likely conclude that the ABA Model Rule 8.4(g) constitutes an unconstitutional restriction on the free speech, free exercise of religion, and freedom

of association of attorneys, is unconstitutionally overbroad, and void for vagueness. Opinion No. KP-0123, Attorney General of Texas, December 20, 2016; 14 SC AG Opinion, May 1, 2017; Opinion 17-0114, Attorney General of Louisiana, September 8, 2017.

Of course, the new Rule would not only threaten attorneys' First Amendment constitutional rights, but also attorneys' constitutional rights under the Tennessee Constitution. See, for example, Tennessee Constitution, Article I, Section 19 ("The free communication of thoughts and opinions, is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty. . .").

3. The Proposed Rule is Unconstitutionally Vague

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Vague laws offend several important values, among which are the following:

First, due to the fact that we assume that people are free to steer between lawful and unlawful conduct, we insist that laws give people of ordinary intelligence a reasonable opportunity to know what is prohibited, so that they may act accordingly. Vague laws may trap the innocent by not providing fair warning. *Grayned*, supra, at 108.

Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to state agents for enforcement on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. *Grayned*, supra, at 108-109.

And third, where a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms. Uncertain meanings inevitably lead

citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked. *Grayned*, supra, at 109.

The language of the proposed Rule 8.4(g) violates all these principles.

(a) The Term "Harassment" is Unconstitutionally Vague. The proposed Rule prohibits attorneys from engaging in *harassment* on the basis of any of the protected classes. But the term "harassment" is not defined in the Rule, is subject to varied interpretations, and no standard is provided to determine whether conduct is or is not harassing.

Does expressing disagreement with someone's religious beliefs constitute harassment based on religion? Can merely being offended by an attorney's conduct or expressions constitute harassment? Can a single act constitute harassment, or must there be a series of acts? In order to constitute harassment, must the offending behavior consist of words, or could body language constitute harassment?

Many courts have expressly determined that the term "harass" is unconstitutionally vague. See, for example, *Kansas v. Bryan*, 910 P.2d 212 (Kan. 1996)(holding that the term "harasses," without any sort of definition or objective standard by which to measure the prohibited conduct, was unconstitutionally vague). See also *Are Stalking Laws Unconstitutionally Vague or Overbroad*, 88 Nw. U. L. Rev. 769, 782 (1994)(the definition of "harass" is a constitutionally problematic provision due to the vagueness of the term "harass.").

Because the term "harassment" as used in the proposed Rule is vague, it presents all three problems condemned by the U.S. Supreme Court – (1) it does not provide attorneys with sufficient notice as to what behavior is proscribed; (2) it allows those charged with enforcing the Rules of Professional Conduct to enforce the Rule

arbitrarily and selectively; and (3) its vagueness will chill the speech of attorneys who, not knowing where harassment begins and ends, will be forced to censor their free speech rights in an effort to avoid inadvertently violating the Rule.

But it gets worse. Comment [3] to the proposed Rule provides that harassment includes *derogatory or demeaning verbal or physical conduct.* What exactly is encompassed by the words "derogatory" and "demeaning"? Courts have found these terms to be unconstitutionally vague. *Hinton v. Devine*, 633 F.Supp. 1023 (E.D. Pennsylvania 1986)(the term "derogatory" without further definition is unconstitutionally vague); *Summit Bank v. Rogers*, 206 Cal.App.4th 669 (Cal.App. 2012)(statute prohibiting statements that are "derogatory to the financial condition of a bank" is facially unconstitutional due to vagueness).

(b) The Term "Discrimination" is Unconstitutionally Vague. It is certainly true that many statutes and ordinances prohibit discrimination, in a variety of contexts. But it is also true that such statutes and ordinances do not – as does the proposed Rule – merely prohibit "discrimination" and leave it at that. Rather, they spell out what specific behavior constitutes discrimination.

For example, Title VII does not merely provide that it shall be an unlawful employment practice for an employer to discriminate against persons on the basis of race, color, religion, sex, or national origin. Rather, Title VII sets forth in detail what employers are prohibited from doing. Title VII provides that "*It shall be an unlawful employment practice for an employer: (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such*

individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive, or tend to deprive, any individual of employment opportunities or otherwise adversely affect his status as an employee, on the basis of such individual's race, color, religion, sex or national origin." 42 U.S.C. § 2000e-2.

Likewise, the federal Fair Housing Act does not simply provide that one may not discriminate in housing based on race, color, religion, familial status, or national origin. It provides a description of what, specifically, is being prohibited: "[I]*t shall be unlawful (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin. . . (d) To represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available. (e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, handicap, familial status, or national origin.*" 42 U.S.C. § 3604. And the Act provides precise definitions of important terms used in the Act, such as "*dwelling*," "*person*," "*to rent*," and "*familial status*." 42 U.S.C. § 3602.

Unlike other non-discrimination enactments, however, the proposed Rule simply states that "*It is professional misconduct for a lawyer to: . . . (g) engage in conduct that the lawyer knows or reasonably should know is . . . 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" – leaving to the attorney's imagination what sorts of behavior might be encompassed in that proscription.

Indeed, proposed Comment [3] to the proposed Rule 8.4(g) states that the term "discrimination" includes "*harmful* verbal or physical conduct that *manifests bias or prejudice towards others.*" The term "harmful" – in the context of attorney speech and conduct – is unconstitutionally vague because attorneys cannot determine with any degree of reasonable certainty what speech and conduct may be included or excluded from that category of speech or conduct. See *U.S. v Wunsch*, 84 F.3d 1110 (9th Cir. 1996)(rule of professional conduct requiring attorneys to "abstain from all offensive personality" was unconstitutionally vague because it would be impossible for an attorney to know when such behavior would be offensive enough to invoke the statute).

(c) The Phrase "conduct related to the practice of law" is Unconstitutionally Vague.

Whereas the current Rule applies only to attorney conduct while the attorney is representing a client – a relatively narrow and reasonably determinable aspect of a lawyer's activities – the proposed new Rule applies to any verbal or physical conduct of an attorney that is in any way "*related to the practice of law.*" What speech and conduct is related to the practice of law and what speech and conduct is unrelated to the practice of law, however, is vague and not easily or readily determinable.

In fact, it merits notice at this point that, not only is the phrase "related to the practice of law" vague, it clearly extends to conduct far beyond the Tennessee statutory definition of "practice of law." TCA §23-3-101(3) defines the "practice of law" to mean "*the appearance as an advocate in a representative capacity or the drawing of*

papers, pleading or documents or the performance of any act in such capacity in connection with proceedings pending or prospective before any court, commissioner, referee or any body, board, committee or commission constituted by law or having authority to settle controversies, or the soliciting of clients directly or indirectly to provide such services."

But Comment [4] of the new proposed Rule makes clear that the Rule's concept of conduct "related to the practice of law" extends far beyond the statutory definition. Indeed, the proposed Rule's definition of "conduct related to the practice of law" is nearly limitless, including within it "*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.*" And that list is an explicitly non-exclusive list. Other attorney speech and conduct are also included – but no attorney could determine with any degree of reasonable certainty what such unidentified speech and conduct may be.

So who can say with any degree of certainty where conduct related to the practice of law ends? For example, does the phrase include comments made by an attorney while attending a birthday celebration for a law firm co-worker; or a statement made by an attorney at a cocktail party the attorney is attending, at least in part, in order to make connections that will hopefully result in future legal work; or comments an attorney makes while teaching a religious liberty class at the attorney's church?

Because no attorney, with any degree of certainty, can determine what speech or behavior is or is not "related to the practice of law," the proposed Rule is

unconstitutionally vague.

If attorneys face professional discipline for engaging in certain proscribed behavior, they are entitled to know precisely what behavior is being proscribed, and should not be left to guess what the proscription might encompass. Anything less is a deprivation of due process.

Because of the vagueness of several of the proposed Rule's important terms, the proposed Rule 8.4(g) is unconstitutional.

4. The Proposed Rule is Unconstitutionally Overbroad.

Even if an enactment is otherwise clear and precise in what conduct it proscribes, the law may nevertheless still be unconstitutionally overbroad if its reach prohibits constitutionally protected conduct. *Grayned*, supra, at 114.

It is clear that the proposed Rule is not only unconstitutionally vague, it is also unconstitutionally overbroad because, although it may apply to attorney speech and conduct that might be unprotected – such as speech or conduct that actually prejudices the administration of justice or that would clearly render an attorney unfit to practice law – the proposed new Rule 8.4(g) would also sweep within its orbit lawyer speech that is clearly protected by the First Amendment, such as speech that might be offensive, disparaging, or hurtful but that would not prejudice the administration of justice nor render the attorney unfit.

It does not take a constitutional scholar to recognize that "harmful verbal conduct" and "derogatory or demeaning verbal conduct" sweep into their ambit speech that is clearly constitutionally protected. Speech is not unprotected merely because it is harmful, derogatory or demeaning. In fact, offensive, disagreeable, and even hurtful speech is exactly the sort of speech

the First Amendment protects. *Snyder v. Phelps*, 562 U.S. 443, 458 (2011). See also, *Texas v. Johnson*, 491 U.S. 397, 414 (1989)("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"). See also *Joseph Matal, Interim Director, United States Patent And Trademark Office v. Simon Shiao Tam*, 582 U.S. ____ (2017)(the government's attempt to prevent speech expressing ideas that offend strikes at the heart of the First Amendment).

And courts have found terms such as "derogatory" and "demeaning" unconstitutionally overbroad. *Hinton v. Devine*, supra (the term "derogatory information" is unconstitutionally overbroad); *Summit Bank v. Rogers*, supra (statute defining the offense of making or transmitting an untrue "derogatory" statement about a bank is unconstitutionally overbroad because it brushes constitutionally protected speech within its reach and thereby creates an unnecessary risk of chilling free speech). See also *Saxe v. State College Area School Dist.*, 240 F.3d 200, 215 (3rd Cir. 2001)(school anti-harassment policy that banned any unwelcome verbal conduct which offends an individual because of actual or perceived race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics is facially unconstitutional).

The broad reach of the proposed Rule is well illustrated by the example that Senior Ethics Counsel Lisa Panahi and Ethics Counsel Ann Ching of the Arizona State Bar give in their article "Rooting Out Bias in the Legal Profession: The Path to ABA Model Rule 8.4(g), " *Arizona Attorney*, January 2017, page 34. They state that an attorney could be professionally disciplined under the new Rule for telling an offensive joke at a law firm dinner party. Distinguished Professor of Jurisprudence at Chapman University, Fowler School of Law, Ronald Rotunda, provides another example of the broad reach of the new Rule. He writes: "*If one lawyer tells*

another, at the water cooler or a bar association meeting on tax reform, 'I abhor the idle rich. We should raise capital gains taxes,' he has just violated the ABA rule by manifesting bias based on socioeconomic status." *The ABA Decision to Control What Lawyers Say: Supporting "Diversity" But Not Diversity of Thought*, Ronald D. Rotunda, Legal Memorandum No. 191, The Heritage Foundation, October 6, 2016, p. 4.

But the speech in both these examples would clearly be constitutionally protected. The fact that such constitutionally protected speech would violate the proposed Rule demonstrates that the new Rule is unconstitutionally overbroad.

And it is irrelevant whether such speech would ever actually be prosecuted by disciplinary authorities under the proposed new Rule. The fact that a lawyer *could* be disciplined for engaging in such speech would, in and of itself, chill lawyers' speech – the very danger the overbreadth doctrine is designed to prevent.

For these reasons, the new Model Rule would not pass constitutional muster.

5. The Proposed Rule Will Constitute An Unconstitutional Content-Based Speech Restriction.

By only proscribing speech that is derogatory, demeaning, or harmful toward members of certain designated classes, the Rule will constitute an unconstitutional content-based speech restriction. *American Freedom Defense Initiative v. Metropolitan Transp. Authority*, 880 F.Supp.2d 456 (S.D.N.Y. 2012)(ordinance prohibiting demeaning advertisements only on the basis of race, color, religion, national origin, ancestry, gender, age, disability or sexual orientation is an unconstitutional content-based violation of the First Amendment).

Indeed, the U.S. Supreme Court recently reiterated this principle in a case that is directly

relevant when considering the constitutional infirmities of the proposed new Rule. In *Matal v. Tam*, supra, the Court found that a Lanham Act provision prohibiting the registration of trademarks that may "disparage" or bring a person "into contempt or disrepute" to be *facially* unconstitutional, because such a disparagement provision – even when applied to a racially derogatory term – ". . . *offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend.*" In a concurring opinion, Justice Kennedy described the constitutional infirmity of the disparagement provision as "viewpoint discrimination" – "an 'egregious form of content discrimination,' which is 'presumptively unconstitutional.'" The problem, he pointed out, was that under the disparagement provision, "an applicant may register a positive or benign mark but not a derogatory one" and that "This is the essence of viewpoint discrimination." Likewise, under the proposed new Rule 8.4(g), attorneys may engage in positive or benign speech, but not "derogatory," "demeaning," or "harmful" speech. Under the Supreme Court's *Tam* decision, this is the essence of viewpoint discrimination, and presumptively unconstitutional.

Professor Rotunda provides a concrete example of how the new ABA Rule may constitute an unconstitutional content-based speech restriction. He explains: "*At another bar meeting dealing with proposals to curb police excessiveness, assume that one lawyer says, 'Black lives matter.' Another responds, 'Blue lives [i.e., police] matter, and we should be more concerned about black-on-black crime.' A third says, 'All lives matter.' Finally, another lawyer says (perhaps for comic relief), 'To make a proper martini, olives matter.' The first lawyer is in the clear; all of the others risk discipline.*" *The ABA Decision to Control What Lawyers Say: Supporting "Diversity" But Not Diversity of Thought*, Ronald D. Rotunda, Legal Memorandum No. 191, The Heritage Foundation, October 6, 2016, p. 4.

In other words, whether a lawyer has or has not violated the Rule will be determined solely

by reference to the *content* of the attorney's speech. Under the proposed Rule, a lawyer who speaks against same-sex marriage may be in violation of the Rule for engaging in speech that constitutes discrimination on the basis of sexual orientation, while a lawyer who speaks in favor of same-sex marriage would not be. That is a classic example of an unconstitutional content-based speech restriction.

Indeed, in some states that have modified their Rules in ways similar to the new proposed Rule, such Rules are already being enforced as free-standing speech codes. See, for example, *In the Matter of Stacy L. Kelley*, 925 N.E.2d 1279 (Indiana Supreme Court 2010), in which an Indiana attorney was professionally disciplined merely for asking someone if they were "gay"; and *In the Matter of Daniel C. McCarthy*, 938 N.E.2d 698 (Indiana 2010) in which an attorney had his license suspended for applying a racially derogatory term to himself.

6. The Proposed Rule Will Violate Attorneys' Free Exercise of Religion and Free Association Rights.

The proposed new Rule 8.4(g) will also violate attorneys' free exercise of religion and freedom of association rights. As an illustration of this problem, Professor Rotunda posits the example of Catholic attorneys who are members of the St. Thomas More Society, an organization of Catholic lawyers and judges. If the St. Thomas More Society should host a CLE program in which members discuss and, based on Catholic teaching, voice objection to the Supreme Court's same-sex marriage rulings, Professor Rotunda explains that those attorneys may be in violation of the Rule because they have engaged in conduct related to the practice of law that could be considered discrimination based on sexual orientation. Indeed – he points out – attorneys might be in violation of the new Rule merely for being members of such an organization. *The ABA*

Decision to Control What Lawyers Say: Supporting "Diversity" But Not Diversity of Thought, Ronald D. Rotunda, Legal Memorandum No. 191, The Heritage Foundation, October 6, 2016, pp. 4-5. But, clearly, that speech and an attorney's membership in such an organization are both constitutionally protected. The fact that the Rule may prohibit either indicates that the Rule will be unconstitutional.

Because the proposed new Rule 8.4(g) is clearly unconstitutional, it should be rejected.

7. The Proposed Rule's Comment [4a] Does Not Cure The Rule's Constitutional Infirmities.

The Petitioners try to address the proposed Rule's clearly unconstitutional provisions by inserting Comment [4a] into the Rule, which provides: "*Section (g) does not restrict any speech or conduct not related to the practice of law, including speech or conduct protected by the First Amendment. Thus, a lawyer's speech or conduct unrelated to the practice of law cannot violate this Section.*" Several observations relating to this new Comment [4a] are in order.

First, the very fact that the Petitioners deemed it necessary to add such a Comment is an admission that they recognize that the proposed new Rule does, in fact, impinge upon attorneys' free speech rights. If it didn't, there would be no need for Comment [4a]. Comment [4a] is essentially stating that the Rule *could* be applied in such a way as to violate an attorney's First Amendment rights, but if it ever is, the attorney can raise a First Amendment defense. That is not very comforting to attorneys. But more importantly, it's not a defense to the Rule's constitutional infirmities.

Second, Comment [4a] adds nothing to the Rule. It is axiomatic that the Rule may not violate an attorney's First Amendment rights by prohibiting speech that is constitutionally

protected. That is true, with or without Comment [4a]. If it's true even without Comment [4a] – which it is – then Comment [4a] adds nothing to the Rule.

Third, Comment [4a] is illusory. Comment [4a] provides that "Section (g) does not restrict any speech or conduct *not related to the practice of law, including speech or conduct protected by the First Amendment.*" In other words, the Rule provides that speech or conduct protected by the First Amendment is protected, as long as such speech or conduct is not related to the practice of law. But Rule 8.4(g), by its terms, only applies to speech and conduct related to the practice of law. So – of course – speech not related to the practice of law is not prohibited, regardless of whether or not such speech is protected by the First Amendment. Therefore, Comment [4a] only appears to provide some sort of protection to attorneys. In actuality, it does not. Comment [4a] is illusory.

The absurdity of Comment [4a] is clear when one boils the Comment down to its essential meaning – which is that the Rule is unenforceable to the extent it is unconstitutional. And since the Rule is unconstitutional, it is unenforceable.

Tennessee should not adopt an unconstitutional and unenforceable Rule.

B. Only One State Has Adopted A Rule Similar To The Proposed Rule. The Supreme Court of South Carolina Has Expressly Rejected Such A Rule.

Vermont is the only state to have adopted ABA Model Rule 8.4(g), while the South Carolina Supreme Court has expressly rejected it. *Order*, Supreme Court of South Carolina, Appellate Case No. 2017-000498 (6-20-2017).

In fact, the majority of states have *no* black letter anti-discrimination rule in their Rules of Professional Conduct at all. And in those states that do have black letter anti-discrimination

provisions in their Rules, no state's rule (other than Vermont's) is even comparable to the new Model Rule or the Rule being proposed here in Tennessee.

For example, aside from Vermont, none of the jurisdictions with black letter anti-discrimination rules extends its non-discrimination rule to "conduct related to the practice of law" – as the proposed Rule does. Seven of those jurisdictions limit their coverage to conduct "in the representation of a client" or "in the course of employment" after having been retained (Florida, Idaho, Nebraska, Missouri, North Dakota, Oregon and Washington State). Eight states limit the applicability of their non-discrimination rules to conduct toward other counsel, litigants, court personnel, witnesses, judges, and others involved in the legal process (Colorado, Florida, Idaho, Michigan, Nebraska, and Washington State). California limits its provision to "the management and operation of a law practice." Massachusetts, New Jersey and Ohio limit their Rules to conduct "in a professional capacity." Massachusetts limits its Rule to conduct "before a tribunal." New York limits its Rule to "the practice of law." And D.C. limits its Rule to employment discrimination only.

Likewise, other than Vermont, no state's rule prohibits – as the proposed Rule does - "harmful," "derogatory," or "demeaning" speech or conduct.

Further, eight states (California, Iowa, Minnesota, New Jersey, New York, Illinois, Ohio, and Washington State) limit their anti-discrimination rules to "unlawful" discrimination or discrimination "prohibited by law." Indeed, of those eight states, half of them (California, Illinois, New Jersey, and New York) actually require that, before any disciplinary claim can even be filed, a tribunal of competent jurisdiction *other than a disciplinary tribunal* must have found that the attorney has actually violated a federal, state, or local anti-discrimination statute or ordinance.

And unlike the new Rule 8.4(g) being proposed in Tennessee, eight of the states with black letter anti-discrimination rules require that the alleged discrimination actually either prejudice the administration of justice or render the attorney unfit to practice law (Florida, Illinois, Maryland, Minnesota, Nebraska, North Dakota, Rhode Island, and Washington State).

Further, unlike the proposed Rule – which has a "know or reasonably should know" standard – four states with black letter rules require the discriminatory conduct to be "knowing," "intentional" or "willful" (Maryland, New Jersey, New Mexico, and Texas).

Michigan's "non-discrimination" rule is more of a civility rule, prohibiting only "discourteous" or "disrespectful" conduct.

And, unlike the new Rule being proposed in Tennessee, Texas expressly excludes from its anti-discrimination rule a lawyer's decisions whether or not to represent a particular person.

So, should Tennessee adopt the proposed new Rule 8.4(g), it will have adopted a Rule that impinges on attorney conduct in ways, and far more extensively, than almost any other state has seen fit to do.

There are good reasons no state other than Vermont has adopted a Rule like the new ABA Model Rule and the Rule being proposed in Tennessee – and good reasons why the South Carolina Supreme Court has expressly rejected it. Tennessee would be wise to reject the new proposed Rule 8.4(g) as well.

C. The Proposed Rule Would, For The First Time, Sever The Rules From Any Legitimate Interests Of The Legal Profession.

The legal profession has a legitimate interest in proscribing attorney conduct that – if not proscribed – would either adversely affect an attorney's fitness to practice law or that would

prejudice the administration of justice. Tennessee's current Rule 8.4 recognizes this principle by prohibiting attorneys from engaging in seven types of conduct, all of which might either adversely impact an attorney's fitness to practice law or would prejudice the administration of justice. Those types of conduct are:

(a) Violating the Rules of Professional Conduct;

(b) Committing criminal acts that reflect adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) Engaging in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) Engaging in conduct that is prejudicial to the administration of justice;

(e) Stating or implying an ability to influence a tribunal or governmental agency or official on grounds unrelated to the merits of the matter under consideration;

(f) Knowingly assisting a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; and

(g) knowingly fail to comply with a final court order entered in a proceeding in which the lawyer is a party, unless the lawyer is unable to comply or is seeking in good faith to determine the validity of the order..

The first proscribed conduct – violating the Professional Conduct Rules – is self-explanatory and obvious, since the Rules are enacted for the precise purpose of regulating the conduct of attorneys as attorneys. The Rules would hardly serve their purpose if an attorney's violation of them did not constitute professional misconduct.

The second and third proscriptions are targeted at attorney conduct which directly impacts the attorney's ability to be entrusted with the professional obligations with which all attorneys are entrusted – namely, to serve their clients and the legal system with honesty and trustworthiness.

But – revealingly – those Rules do not proscribe conduct that, although perhaps not praiseworthy, does not warrant the conclusion that the attorney engaging in such conduct is unfit to practice law. Indeed, it is worth noting that Rule 8.4(b) does not even conclude that all *criminal* conduct is a violation of the Rules of Professional Conduct. Instead, the Rule proscribes only criminal conduct "*that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects.*" As Comment [2] to Tennessee's Rule 8.4 explains: "*Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. . . Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category.*" (our emphasis).

The fourth type of proscribed conduct is conduct that would prove prejudicial to the administration of justice. Historically, conduct falling within the parameters of this proscription has been limited to misconduct that would seriously interfere with the proper and efficient functioning of the judicial system. For example, the Supreme Court of Oregon analyzed this provision and determined that prejudice to the administration of justice referred to actual harm or injury to judicial proceedings. See, for example, *In re Complaint as to the Conduct of David R. Kluge*, 66 P.3d 492 (Or. 2003), which held that to establish a violation of this Rule it must be shown that the accused lawyer's conduct occurred during the course of a judicial proceeding or a proceeding with the trappings of a judicial proceeding. And in *In re Complaint as to the Conduct of Eric Haws*, 801 P.2d 818, 822-823 (Or. 1990), the court noted that the Rule encompasses attorney conduct such as failing to appear at trial; failing to appear at depositions; interfering with

the orderly processing of court business, such as by bullying and threatening court personnel; filing appeals without client consent; repeated appearances in court while intoxicated; and permitting a non-lawyer to use a lawyer's name on pleadings. See also, *Iowa Supreme Court Attorney Disciplinary Board v. Wright*, 758 N.W.2d 227, 230 (Iowa 2008)(Generally, acts that have been deemed prejudicial to the administration of justice have hampered the efficient and proper operation of the courts or of ancillary systems upon which the courts rely); *Rogers v. The Mississippi Bar*, 731 So.2d 1158,1170 (Miss. 1999)(For the most part this rule has been applied to those situations where an attorney's conduct has a prejudicial effect on a judicial proceeding or a matter directly related to a judicial proceeding); *In re Hopkins*, 677 A.2d 55, 60-61 (D.C.Ct.App. 1996)(In order to be prejudicial to the administration of justice, an attorney's conduct must (a) be improper, (b) bear directly upon the judicial process with respect to an identifiable case or tribunal, and (c) must taint the judicial process in more than a *de minimus* way, that is, at least potentially impact upon the process to a serious and adverse degree); and *In re Karavidas*, 999 N.E.2d 296, 315 (Ill. 2013)(In order for an attorney to be found guilty of having prejudiced the administration of justice, clear and convincing proof of actual prejudice to the administration of justice must be presented). See also *Ramsey v. Board of Professional Responsibility of the Supreme Court of Tennessee*, 771 S.W.2d 116 (Tenn. 1989)(district attorney who fails to abide by court orders and fails to respond to questions from court while appearing before court, and who slams courtroom doors during hearings, has acted in a manner prejudicial to administration of justice); *Board of Professional Responsibility of the Supreme Court of Tennessee v. Slavin*, 145 S.W.3d 538 (Tenn. 2004)(attorney who used peer review process to systematically harass and intimidate administrative law judges engaged in conduct prejudicial to the administration of justice); *Beard v. Board of Professional Responsibility*, 288 S.W.3d 838 (Tenn. 2009)(attorney's filing of

proposed final order with errors and failure to correct the errors was prejudicial to the administration of justice); *Bailey v. Board of Professional Responsibility*, 441 S.W.3d 223 (Tenn. 2014)(unprofessional conduct that threatens to disrupt a courtroom may constitute prejudice to the administration of justice); *Standing Committee on Discipline of U.S. Dist. Court for Central District of California v. Yagman*, 55 F.3d 1430, 1444 (9th Cir. 1995)(because an attorney's statements did not pose a clear and present danger to the proper functioning of the courts, it was error for the court to sanction the attorney for interfering with the administration of justice). Therefore, this provision, too, is directed at attorney conduct that exposes the judicial process itself to serious harm.

And the last three proscriptions in Tennessee's current Rule also target what is clearly attorney conduct that, if engaged in, would adversely affect the integral operation of the judicial system – namely, improperly influencing a government agency or official, knowingly assisting a judge or judicial officer in conduct that violates the rules of judicial conduct or other law, or refusing to comply with a valid court order against the attorney.

In short, Tennessee's Rule 8.4 has always – heretofore – been solely concerned with attorney conduct that might adversely affect an attorney's fitness to practice law or that seriously interferes with the proper and efficient operation of the judicial system.

The proposed new Rule 8.4(g), however, takes Rule 8.4 in a completely new and different direction because, for the first time, the new Rule would subject attorneys to discipline for engaging in speech and conduct that neither adversely affects the attorney's fitness to practice law nor seriously interferes with the proper and efficient operation of the judicial system. Indeed, because the new Rule would not require *any* showing that the proscribed conduct prejudice the administration of justice or that such conduct adversely affects the offending attorney's fitness to

practice law, the new Rule will constitute a free-floating non-discrimination provision – the only restriction on which will be that the conduct be "related to the practice of law."

To fully appreciate what this departure from the historic principles of attorney regulation will mean, we need only look to the two Indiana cases cited above - *In the Matter of Stacy L. Kelley*, 925 N.E.2d 1279 (Indiana 2010) and *In the Matter of Daniel C. McCarthy*, 938 N.E.2d 698 (Indiana 2010). In neither case did the offending conduct have any demonstrable prejudicial effect on the administration of justice or render the attorneys unfit to practice law. It was deemed sufficient that the attorneys had simply used certain offensive language.

Strikingly, if the proposed new Rule is adopted, an attorney could actually engage in *criminal* conduct without violating the Rules – because Rule 8.4(b) only applies to a lawyer's "*criminal acts that reflect adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects*" or that involve "*moral turpitude*" – but could be disciplined merely for engaging in politically incorrect speech. See, for example, *Formal Opinion Number 124 (Revised) – A Lawyer's Use of Marijuana* (October 19, 2015)(a lawyer's use of marijuana, which would constitute a federal crime, does not necessarily violate Colo.R.P.C. 8.4(b).

Such a dramatic departure from the historic regulation of attorney conduct in Tennessee should not be taken lightly. It would represent an entirely new and precedent-setting intrusion on the professional autonomy, freedom of speech, and freedom of association of Tennessee's attorneys.

Because the proposed new Rule 8.4(g) constitutes an extreme and dangerous departure from the principles and purposes historically underlying Tennessee's Rule 8.4 and the legitimate interests of professional regulation, it should be rejected.

D. The Proposed Rule Will Invade The Historically Recognized Right And Duty Of Attorneys To Exercise Professional Autonomy In Choosing Whether To Engage In Legal Representation.

The most important decision for any attorney – perhaps the greatest expression of a lawyer's professional and moral autonomy – is the decision whether to take a case, whether to decline a case, or whether to withdraw from representation once undertaken.

If the proposed new Model Rule 8.4(g) is adopted, however, attorneys will be subject to professional discipline for acting in accordance with their professional and moral judgment when making decisions about whether to accept, reject, or withdraw from certain cases – because, under the proposed Rule, attorneys will be affirmatively precluded from declining certain clients or cases. They will, in other words, be forced to take cases or clients they might have otherwise declined.

Proponents of the proposed Rule contend that the new Rule will not require an attorney to accept any client or case the attorney does not want to accept – pointing to the language of the new Rule that provides: "*This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16.*"

But Rule 1.16 does not even address the question of what clients or cases an attorney *may* decline. It only addresses the question of which clients and cases an attorney *must* decline. What Rule 1.16 addresses are three circumstances in which an attorney is *prohibited* from representing a client, namely: (a) if the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client, (b) the lawyer is discharged, or (c) the representation will result in violation of the Rules of Professional Conduct or other law. None of these has anything whatever to do with an attorney's decision not to represent a client *because the attorney does not want to represent the client.* It only addresses the opposite situation – namely, in what circumstances an

attorney who otherwise *wants* to represent a client *may not* do so. So what might appear, to someone unfamiliar with Rule 1.16, to be some sort of safe harbor that would preserve an attorney's right to exercise his or her discretion to decline clients and cases, is no such thing.

In addition, it is now clear from Vermont's adoption of the new Model Rule – which contains the same language as the Rule being proposed in Tennessee – that the Rule will, in fact, apply to an attorney's client selection decisions. In its *Reporter's Notes* to its adoption of the new Rule 8.4(g), the Vermont Supreme Court explicitly states that Rule 1.16's provisions about declining or withdrawing from representation "*must also be understood in light of Rule 8.4(g)*" so that refusing or withdrawing from representation "*cannot be based on discriminatory or harassing intent without violating that rule.*" In other words, if an attorney declines or withdraws from representation for an allegedly *discriminatory* reason, the attorney violates Rule 8.4(g). See also, NY *Eth. Op. 1111* (N.Y. St. Bar. Assn. Comm. Prof. Eth.), 2017 WL 527371)("*Rule 8.4(g) . . . may limit a lawyer's freedom to decline representation.*")

This is another alarming departure from the professional principles historically enshrined in Tennessee's Rules of Professional Conduct and its predecessors, which have, before now, always respected the attorney's freedom and professional autonomy when it comes to choosing who to represent and what cases to accept.

Although the Rules *have* placed restrictions on which clients attorneys may *not* represent (see, for example, Rule 1.7 which precludes attorneys from representing clients or cases in which the attorney has a conflict of interest, and Rule 1.16(a) which requires attorneys to decline or withdraw from representation when representation would compromise the interests of the client), never before have the Tennessee Rules required attorneys to *take* cases the attorney decides – for whatever reason – he or she does not want to take, or to represent clients the attorney decides – for

whatever reason – he or she does not want to represent. (Although Rule 6.2 prohibits attorneys from seeking to avoid court appointed representation, even that Rule allows attorneys to decline such appointments "for good cause" – including because the attorney finds the client or the client's cause repugnant.)

Indeed, up until now, the principle that attorneys were free to accept or decline clients or cases at will, for any or no reason, prevailed universally. See, for example, *Modern Legal Ethics*, Charles W. Wolfram, p. 573 (1986)("*a lawyer may refuse to represent a client for any reason at all – because the client cannot pay the lawyer's demanded fee; because the client is not of the lawyer's race or socioeconomic status; because the client is weird or not, tall or short, thin or fat, moral or immoral.*").

There are, of course, good reasons why the profession has left to the attorney the professional decision as to which cases the attorney will accept and which the attorney will decline and which clients the attorney will or will not represent. The reasons underlying this historically longstanding respect for attorneys' professional autonomy are twofold.

First, the Rules themselves respect an attorney's personal ethics and moral conscience. See, for example, Rule Preamble [8] ("*Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience*"), and [10] ("*Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system, and to the lawyer's own interest in remaining an ethical person . . . Such issues must be resolved through the exercise of sensitive professional and moral judgment . . .*").

If a lawyer is required to accept a client or a case to which the attorney has a moral objection, however, the Rules would have the effect of forcing the attorney to violate his or her

personal conscience. The Rules have never before done that.

And second, the Rules impose upon attorneys a professional obligation to represent their clients zealously (Rule 1.3, Comment [1]), and without personal conflicts (Rule 1.7(a)(2)). A lawyer's ability to do that, however, would be compromised should the lawyer have personal or moral objections to a client or a client's case

Although, as noted above, Rule 6.2 prohibits attorneys from seeking to avoid accepting cases that are appointed to them by judicial tribunals, the Rule explicitly recognizes that good cause to refuse such appointments includes the situation where the client or cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client (Rule 6.2(c)) – an acknowledgement in the Rules themselves that a lawyer's personal view of a client or a case can be expected to adversely affect the attorney's ability to provide zealous and effective representation.

To force an attorney to accept a client or case the attorney does not want, and then require the attorney to provide zealous representation to that client, is both unfair to the attorney – because doing so places conflicting obligations upon the lawyer – and to the client, because every client deserves an attorney who is not subject to or influenced by any interests which may, directly or indirectly, adversely affect the lawyer's ability to zealously, impartially, and devotedly represent the client's best interests (see, for example, 1.7(a)(2), which prohibits an attorney from representing a client if there is a significant risk that the representation will be materially limited by a personal interest of the lawyer).

It must be acknowledged that human nature is such that an attorney who – for whatever reason – has an aversion to a client or a case will not be able to represent that client or case as well as could an attorney who has no such aversion. For that reason, recognizing an attorney's

unfettered freedom to choose which clients and cases to accept and which to decline serves the best interests of the client.

This is not only a self-evident principle, in conformance with universal human experience, but is also well attested in the lives of some of our greatest lawyers. For example, it was well known that Abraham Lincoln was not an effective lawyer unless he had a personal belief in the justice of the case he was representing. "Fellow lawyers testified that Mr. Lincoln needed to believe in a case to be effective." An Honest Calling: The Law Practice of Abraham Lincoln, Mark A. Steiner, Northern Illinois University Press (2006).

Indeed, as noted above, the Rules themselves recognize this principle in that Rule 6.2(c) itself recognizes that a client or cause that is repugnant to the attorney may impair the lawyer's ability to represent the client.

Should a gay attorney be forced to represent the Westboro Baptist Church? Should an African American attorney be forced to represent a member of the KKK? Should a Jewish lawyer be forced to represent a neo-Nazi? And, if so, would these attorneys be able to provide zealous representation to these clients? To pose these questions is sufficient to answer them, in the negative. And yet that is exactly what the proposed new Rule 8.4(g) would do. (If you doubt this, ask yourself whether, under the new Rule, an adoption attorney who has sincerely held religious beliefs against same-sex couples adopting children, would be allowed – for that reason – to decline representation of same-sex couples seeking to adopt, or whether the attorney, by declining that representation, would be held to have discriminated against the same-sex couple on the basis of sexual orientation? We think the answer is obvious, and that proponents of the Rule would admit that such an attorney would be in danger of professional prosecution under the new Rule.)

For these reasons, too, proposed Rule 8.4(g) should be rejected.

E. The Proposed Rule Conflicts with Other Professional Obligations and Rules of Professional Conduct.

Another significant problem with the proposed new Rule 8.4(g) is that it conflicts with other professional obligations and Rules of Professional Conduct. For example:

1. Rule 1.7 Conflicts of Interest – Rule 1.7 provides that: "*(a) . . . a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: . . . (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or* ***by a personal interest of the lawyer***" (our emphasis).

And Restatement (Third) of the Law Governing Lawyers §125 (2000) clarifies that: "*A conflict under this Section need not be created by a financial interest. . .* ***Such a conflict may also result from a lawyer's deeply held religious, philosophical, political, or public-policy belief***" (our emphasis).

So – on the one hand the proposed new Rule appears to require an attorney to accept clients and cases, despite the fact that such clients or cases might run counter to the attorney's deeply held religious, philosophical, political, or public policy principles; while at the same time Rule 1.7 provides that accepting a client or a case – when the client or case runs counter to the attorney's beliefs – would violate Rule 1.7's Conflict of Interest prohibitions!

How is that conflict to be resolved?

2. Rule 1.3. Rule 1.3 requires that a lawyer must act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. Rule 1.3, Comment [1].

"Zeal" means "*a strong feeling of interest and enthusiasm that makes someone very eager*

or determined to do something." Synonyms are "passion" and "fervor". Merriam-Webster.com.

But how would an attorney be able to *zealously* represent a client whose case runs counter to the attorney's deeply held religious, political, philosophical, or public policy beliefs?

Under the proposed new Rule, the attorney may not be allowed to reject a case or client she might otherwise reject – due to the attorney's personal beliefs – but then must also represent that client with passion and fervor, enthusiastically and in an eager and determined manner.

Is that humanly possible? We would submit that it is not. And we believe that is exactly why the Rules provide that, if a lawyer cannot do that – for whatever reason – even a discriminatory one – they should not take the case.

How is that conflict to be resolved?

3. Rule 6.2 Accepting Appointments: Rule 6.2 provides that "*A lawyer shall not seek to avoid appointment by a tribunal to represent a person* ***except for good cause****: such as: . . . (c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client*" (our emphasis).

Although this Rule is technically applicable only to court appointments, it's important to what we're discussing here because it contains a principle that should be equally – if not more – applicable to an attorney's voluntary client-selection decisions. Namely, the Rule recognizes that a client or cause may be so repugnant to a lawyer that the lawyer-client relationship would be impaired or the lawyer's ability to represent the client be adversely affected.

Indeed, Comment [1] to Rule 6.2 sets forth this general principle that "*A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant.*"

Note that Rule 6.2 does not concern itself with *why* the attorney finds the client or cause repugnant – because that's irrelevant. The only relevant issue is whether the attorney – for

whatever reason – cannot provide the client with zealous representation because the lawyer finds the client or cause repugnant. If not, the attorney must not – for the client's sake – take the case. Clients deserve that.

4. Rule 1.16: Declining or Terminating Representation.

Rule 1.16(a)(1) provides that: *(a) . . . a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (1) the representation will result in the violation of the rules of professional conduct or other law.*

In that regard, we've already seen that Rule 1.7 would prohibit an attorney from representing a client who – due to the lawyer's personal beliefs – the lawyer could not represent without a personal conflict of interest interfering with that representation. To do so would constitute a violation of the Rules of Professional Conduct. But Vermont's adoption of the new Rule confirms that the new Rule will require attorneys to accept clients and cases that – due to the attorney's personal beliefs about the client or the case – the attorney would otherwise have to decline.

So, this Rule too is in conflict with the new Rule.

Which Rule is going to prevail when they conflict?

Indeed, the fact that the proposed new Rule conflicts with other Professional Rules reveals and highlights a basic problem with the proposed Rule – and that is that the proposed Rule is an attempt to impose upon the legal profession a non-discrimination construct that is, in its basic premises, inconsistent with who attorneys are and what they professionally do. It is an attempt to force a round peg into a square hole.

In considering the proposed Rule, we must remember that the non-discrimination template

on which the proposed Rule is based is taken from the context of public accommodation laws – non-discrimination laws that are imposed in the context of merchants and customers – where a merchant sells a product or service to a customer who the merchant does not know and will probably never see again. A transient and impersonal commercial transaction.

But attorneys are not mere merchants, and clients are not mere customers.

Unlike mere merchants – who usually have only distant impersonal commercial relationships with their customers – attorneys have *fiduciary relationships* with their clients.

Attorneys are made privy to the most confidential of their client's information, and are bound to protect those confidentialities. That's not true between a merchant and a customer.

Attorneys are bound to take no action that would harm their clients. That is not true between a merchant and a customer.

And an attorney's relationship with his or her clients is often a long-term relationship, oftentimes lasting months, or even years. That is rarely true between a merchant and a customer.

And once an attorney is in an attorney-client relationship, unlike a merchant the attorney oftentimes may not unilaterally sever that relationship.

So it's one thing to say a *merchant* may not pick and choose his *customers*. It's entirely another to say a *lawyer* may not pick and choose her *clients*.

No lawyer should be required to enter into what is, by definition, a fiduciary, and what could turn out to be a long-term, relationship with a client the attorney does not want – whatever the reason.

(The peculiar nature of the attorney-client relationship also refutes the Petitioners' suggestion that, because non-discrimination provisions are imposed upon judges, such provisions should also be imposed upon attorneys generally. *Joint Petition*, Footnote 3. Judges play a very

different role in the legal system than do attorneys. Judges, by the very nature of their judicial function, are to be objective and unbiased – that is, not favoring any particular side of a dispute before them. Attorneys, on the other hand, are not expected to be either objective or unbiased. Indeed, attorneys are expected to be biased – on their client's behalf – advocating for their client's positions and trying to persuade the judge to agree with them, and to disagree with the opposing party. For that reason, although judges are to avoid even the appearance of being biased, attorneys are not so constrained. In fact, in a very real sense, attorneys are expected – or even required – to be biased, in their clients' favor. Judicial rules of behavior and attorney rules of behavior do not serve the same purposes and – for that reason – are not comparable.)

Because the effect of adopting the proposed new Rule 8.4(g) would be to impose professional obligations upon Tennessee's lawyers that conflict with other professional rules, and that are incompatible with the very nature of the attorney-client relationship, the proposed new Rule 8.4(g) should be rejected.

F. The New Model Rule Will Harm Clients

A primary purpose of the Rules is to protect the public, by ensuring that attorneys represent their clients competently and without personal interests that will adversely affect the attorney's ability to provide clients with undivided and zealous representation. It recognizes the principle that the client's best interest is never to have an attorney who – for any reason – cannot zealously represent them or who has a personal conflict of interest with the client.

The proposed new Rule, however, will force an attorney to represent clients who the attorney cannot represent zealously or who, on account of the attorney's personal beliefs about the client or the case, will not be able to represent without a personal conflict of interest. In that

respect, the proposed Rule will harm clients.

Indeed, the proposed new Rule, if adopted, would introduce insidious deception into the attorney-client relationship because – in order to avoid violating the Rule – some attorneys will be led to conceal their personal animosities from clients, thereby saddling clients with attorneys who – if the client knew of the attorney's animosities – the client would not retain.

For these reasons the proposed new Rule 8.4(g) will harm clients and should be rejected.

G. There Is No Need For the Proposed Rule Because Rule 8.4 Already Contains Provisions Sufficient To Address Discrimination.

Given the fact, as addressed above, that the only legitimate interest the bar has in proscribing attorney conduct is in proscribing conduct that either renders an attorney unfit to practice law or that prejudices the administration of justice, Tennessee's current Rules of Professional Conduct are already sufficient to address serious cases of harassment or discrimination.

First, Rule 8.4(d) already prohibits any and all attorney conduct that prejudices the administration of justice. As noted above, alleged harassment or discrimination that does not prejudice the administration of justice may be regrettable, but it is not a fit subject for professional discipline. So because the existing Rule 8.4(d) is already adequate to address all cases of attorney harassment or discrimination that prejudices the administration of justice, the new Rule is unnecessary.

Further, many of the circumstances the proposed new Rule 8.4(g) might address are already addressed by other laws. For example, to the extent the proposed Rule addresses harassment or discrimination in the legal workplace, such behavior is already addressed in Title VII at the federal

level as well as in this state's non-discrimination laws. And to the extent a law practice would constitute a public accommodation, discrimination in that context is covered by this state's public accommodation laws as well as a myriad of local public accommodation non-discrimination laws. And harassing and discriminatory judicial behavior is already addressed in the Code of Judicial Ethics. Therefore, the proposed new Rule is unnecessary.

Indeed, by creating another entirely new layer of non-discrimination and non-harassment rules on top of those that already exist outside the Code of Professional Conduct, the proposed new Rule, if adopted, would burden professional disciplinary authorities with having to process duplicative cases – that is, cases that are, at the same time, also being processed under some other non-discrimination statute or ordinance, such as Title VII – and could actually subject attorneys to inconsistent obligations and results. Indeed, some states have recognized the importance of this issue by (a) prohibiting only "unlawful" harassment or discrimination and (b) requiring that any claim against an attorney for unlawful discrimination be brought for adjudication before a tribunal other than a disciplinary tribunal before being brought before a disciplinary tribunal. See, for example, Illinois Rules of Professional Conduct Rule 8.4(j) and New York Rules of Professional Conduct Rule 8.4(g).

For these reasons, too, the proposed new Rule 8.4(g) should be rejected.

H. There Is No Demonstrated Need For The New Model Rule.

It is striking to note that the proponents of the proposed new Rule provide no evidence that harassment or invidious discrimination actually exists to any significant degree in Tennessee's legal profession or that – if it does exist – it is such a serious and widespread problem that the already existing plethora of other discrimination statutes and ordinances are insufficient

– and that the Rules must be amended and attorneys' professional and constitutional rights infringed – to address it.

Indeed, despite an entire section in the Petition entitled "*The Need For Proposed RPC 8.4(g)*" – which goes on for over three pages – absolutely *no* evidence is presented of *any* case of actual harassment or discrimination by a Tennessee attorney. One could be excused for questioning the need for a new Rule in the absence of any evidence that such a Rule is needed.

Where *is* the evidence that the legal profession in Tennessee is so rife with harassment and invidious discrimination that the Rules of Professional Conduct simply *must* be amended to address the problem?

Those who would support this effort to amend Rule 8.4 would have us believe that – despite the lack of any actual evidence that attorneys are, in fact, pervasively engaged in invidious harassment and discrimination, many of their fellow lawyers are so vile and depraved that, unless the professional disciplinary authorities are armed with a new precedent-setting tool enabling them to encroach upon the sanctity of all lawyers' professional autonomy, not to mention their personal consciences and constitutional rights, dictating to attorneys who they must represent and which cases they must accept and disciplining them for using politically incorrect speech – lawyers, on the whole, cannot be trusted to behave honorably. We, who join this Comment, have greater respect for and confidence in our fellow members of Tennessee's legal profession. And we take it upon ourselves – perhaps a bit presumptuously – to speak on their behalf.

I. The Proposed Rule Will Result in the Suppression of Politically Incorrect Speech While Protecting Politically Correct Speech.

Comment [4] to the proposed new Rule contains an explicit exception for "*conduct undertaken*

to promote diversity and inclusion" and Comment [5b] allows lawyers to limit their practice to certain clientele, as long as that clientele are "*members of underserved populations*" (whatever that means).

These exceptions to the proposed new Rule illustrate that the proposed Rule is not going to be a Rule of general applicability and equal application.

Rather, it will allow attorneys who are discriminating in politically *correct* ways to continue that discrimination – but will prohibit attorneys from discriminating in politically *incorrect* ways.

Here's how it will work: If an attorney engages in discriminatory conduct that furthers a *politically correct* interest, the disciplinary authority will find that the discrimination is undertaken to promote diversity or inclusion, or to serve an underserved population – and for that reason does not violate the Rule. However, if an attorney engages in discriminatory conduct that furthers a *politically incorrect* interest, the state will prosecute that attorney for violating the Rule.

This phenomenon has already been seen in other similar contexts. For example, a Civil Rights Commission in Colorado prosecuted a Christian baker for declining to bake a wedding cake for a same-sex couple, but refused to prosecute any of the three bakers who refused to bake a cake for a Christian, finding that the first constituted illegal discrimination but that the others did not. The reason underlying this disparate treatment was obvious – in the first the complaining party was a member of a politically favored class, while in the other three the complaining party was a member of a disfavored one.

These nefarious exceptions built into the proposed Rule – decrying discrimination generally, while at the same time explicitly approving of it as long as the discrimination furthers an approved interest – reveals that the proposed Rule's interest in prohibiting discrimination is not a compellingly general and neutral interest, but rather a narrow and politically motivated interest.

No state should adopt a Rule constructed so as to punish certain viewpoints while protecting and advancing others – in fact, to do so would itself be unconstitutional.

J. The Proposed Rule Will Trespass On Attorney Conscience Rights.

Comment [5] of the proposed new Rule provides that "*A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities.*"

At first glance, this provision might appear to assist attorneys, by getting them "off the hook" – so to speak – from having to worry about becoming morally complicit in a client's behavior. But, in fact, that's precisely the problem with the Rule. By adopting this Rule the state is presuming to take on the role of the attorney's spiritual advisor because it preemptively deprives attorneys of the claim that representing a client will make them complicit in a client's behavior – a judgment appropriately made by the attorney, not the state - and which will limit attorneys' ability to assert religious or moral considerations in making client selection and strategy decisions.

The proposed new Rule purportedly attempts to absolve attorneys from any moral culpability they may incur in representing a client. The U.S. Constitution forbids government from doing this. The state cannot dictate to a citizen what does or does not – or should or should not – violate the citizen's conscience. And the state certainly may not place itself between its citizens and their God by purporting to absolve citizens of their sins.

If an attorney sincerely believes that representing a client or being involved in a case makes the attorney morally complicit in the client's cause or behavior – and for that reason the lawyer cannot represent the client without violating the attorney's conscience – the state may not determine otherwise or purport to "absolve" the attorney of the moral complicity.

Indeed, by preemptively depriving attorneys of the claim that representing a client will make

them complicit in a client's behavior, the very purpose of this provision of the proposed Rule appears to be to foreclose attorneys from being able to assert religious or moral considerations in making client selection decisions, thereby forcing attorneys to either act against their conscience or face professional discipline.

No state should adopt a Rule that would do that.

III. Conclusion

For all the foregoing reasons, Tennessee should reject the proposed new Rule 8.4(g) and its Comments.

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TENNESSEE DISTRICT ATTORNEYS GENERAL CONFERENCE

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ADM2017-02244

February 26, 2018

The Honorable James Hivner
Clerk, Tennessee Supreme Court
401 7th Avenue North
Nashville, TN 37219

In Re: Joint Petition of Board of Professional Responsibility of the Supreme Court of Tennessee and Tennessee Bar Association for the Adoption of a New Tenn. Sup. Ct. R .8, RPC 8.4(g)

Dear Mr. Hivner:

In a joint petition, the Tennessee Board of Professional Responsibility (TBPR) and the Tennessee Bar Association (TBA) have requested the Supreme Court to amend Tennessee Supreme Court Rule 8 by adding a new subsection to Rule of Professional Conduct 8.4 that is aimed at prohibiting discrimination and harassment by lawyers. The Joint Petition opines that adoption of the proposed amendment is necessary to establish clear prohibitions on discrimination and harassment related to the practice of law.

For the reasons set forth below, the Tennessee District Attorneys General Conference opposes adoption of the proposed amendment to Rule 8. Although well-intentioned, the proposed rule is overly broad and vague, and quite likely unconstitutional. Even though it is not identical to the recently adopted American Bar Association (ABA) Model Rule 8.4 (g), the proposed amendment is clearly patterned after it and retains much of the same language. Since its adoption by the ABA and the subsequent push to have other states follow suit, the new rule has been met with severe criticism and outright rejection by many of the states who have considered it.

The Attorney General of Texas issued an opinion that found the rule infringed on numerous constitutional rights, was void for vagueness, and was not necessary. *See*, Tex. Att'y Gen. Op. KP-0123, 2016 WL 743186 (December 20, 2016). South Carolina and Louisiana have recently echoed these sentiments in their consideration of similar amendments to their respective rules. *See,* State of Louisiana, Opinion 17-0114 (Sept. 8, 2017).

There is no question that harassment and discrimination are illegal, immoral, and should not be tolerated by anyone in the legal profession. However, the understandable intentions of the TBA and the BPR to prevent such conduct is an unfortunate example of the "perfect being the enemy of the good." Apparently the TBA House of Delegates realized that this was the case since the House did not approve the changes now being recommended by the BPR and the TBA Board.

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There are currently a wealth of federal and state laws and regulations that prohibit harassment and discrimination. These laws and regulations provide specific remedies to individuals who suffer harassment and discrimination. Given this current government oversight, it seems duplicitous to require the BPR to address alleged violations as well.

Every government and most private law offices have postings throughout, publicizing the fact that discrimination and harassment is illegal and instructing individuals how to seek redress for violations. Further, regulated anti-discrimination and harassment training is continually required of all government employees. These current laws, regulations, and policies apply to all employees, not just attorneys.

In addition to the many criminal and civil, federal and state laws, the current Rules of Professional Conduct (8.4(d)) appropriately prohibits the conduct addressed by the proposed rule. The current rule states:

> It is professional misconduct for a lawyer to...(d) engage in conduct that is prejudicial to the administration of justice; ...
>
> Comment [3]: A lawyer who, in the course of representing a client, knowingly manifests, by words or conduct, bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation, or socio-economic status violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d)...
>
> Comment [9]: "In both their professional and personal activities, lawyers have special obligations to demonstrate respect for the law and legal institutions...

The current rule applies to "professional" conduct that is "prejudicial to the administration of justice" and "in the course of representing a client." These are regulations that are reasonably and determinately connected to the profession sought to be regulated.

The proposal of the BPR and the TBA interjects the BPR into matters covered by existing legal remedies, and, as to government officials, political and electoral remedies. In addition, the proposal saddles the BPR with the evaluation of employment disputes and personal conduct, such as at "social activities in connection with the practice of law."

The BPR and TBA Board of Governors have expanded the concept of "the practice of law" to one without a clear definition, and thus no limit, as to what actions would be "in connection with the practice of law." The BPR would be obligated to investigate allegations covering significantly more

conduct than under current rules. Complaints of ethics violations often come to the BPR with limited information and support beyond mere allegations. This would impose a significant personal expense on an attorney to defend alleged conduct which may have occurred not only in the workplace, but virtually anywhere.

The proposal seeks to proscribe conduct "related to the practice of law" but not conduct in the actual practice of law:

> "This paragraph does not limit the ability of a lawyer to accept...representation" and does not preclude "legitimate advice or advocacy." And "legitimate advocacy ... includes any conduct related to the practice of the law including circumstances where a lawyer is not representing a client and *outside the traditional settings where a lawyer acts as an advocate*...." (Emphasis added).

The lack of clarity continues in regards to what constitutes "legitimate" advocacy. The proposal states that "[t]he substantive law of anti-discrimination and anti-harassment statutes and case law *may* guide" (emphasis added) which, of course, also means it *may* not guide.

Pursuing this amendment making attorneys vulnerable to allegations of such malleable, undefined, non-legislated thoughts and acts, while at the same time giving attorneys convicted beyond a reasonable doubt of violating expressly defined criminal laws a professional pass,[1] is not consistent. This far-reaching, untethered proposal vests in the BPR the jurisdiction to determine its own responsibility to influence and potentially punish actions a lawyer considers within the lawyer's discretion or even an actual duty.

Unlike private attorneys, the work of prosecutors is done for the most part in the open. Prosecutors do most of their work in court and on the record and, as a result, their work becomes a public record subject to review by any member of the public.

Under the proposal of the TBA Board of Governors and the BPR, prosecutors would be required to justify any action, or failure to act, that occurred in any case or matter coming before the prosecutor, on a mere allegation that the motivation driving the action was based on race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status. For that matter, any government lawyer would be similarly impacted.

---

[1] The current Rules do not "professionally" require that attorneys follow all criminal laws. Comment [2] states: "Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice." [Emphasis added]

The spate of public outcry by various social activist groups about prosecutors prosecuting or declining to prosecute cases (such as police shootings) based on the race of the victim or perpetrator of crime, would likely draw public calls for the BPR to act against prosecutors. Review of such matters would not seem to be the role of the BPR, but the BPR would essentially be forced to undertake such an investigation under this proposal.

For example, if a prosecutor did not believe there was a reasonable likelihood that a jury would find guilt beyond a reasonable doubt, an indictment would not be sought. An unhappy victim could complain to the BPR alleging bias covered by the proposed rule that could prompt the BPR to initiate a charge against multiple attorneys on the prosecution team.

Absent some direct statement or writing expressly declaring the prosecutor's state of mind, the BPR's determination to investigate and bring charges would be necessarily subjective. Since no two criminal cases are ever the same, and in offices that handle hundreds of thousands of cases, a prosecutor will always be subject to the BPR's "conclusion" that a decision was made based on [some sort of discrimination] and not for an otherwise valid concern.

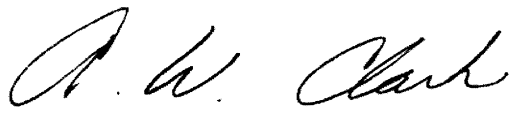
The burden, and the great personal expense, would thus be shifted at the onset to the accused lawyer to fully defend the thoughts in his or her mind – to the unreviewable discretion of the BPR. Merely upon the opening of a BPR investigation, most attorneys specializing in ethics matters would recommend that the lawyer subject to the investigation retain counsel.

This proposal would seem to put the BPR in the role of thought police and make prosecutors particularly vulnerable. This vulnerability to BPR action would be unbound by any statute of limitation, thus inviting cunning allegations strategically timed to influence elections, litigation, or other events.

Although the motivation behind the Joint Petition is certainly well-intentioned, the proposed amendment to Rule 8 is neither wise nor necessary. As a result, the District Attorneys for the State of Tennessee oppose adoption of this amendment.

Sincerely,

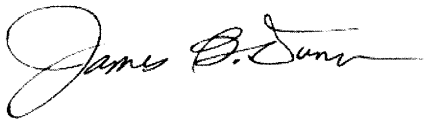
Jerry N. Estes
Executive Director



Anthony Clark, District Attorney General
1st Judicial District

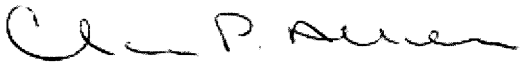
Barry Staubus, District Attorney General
2nd Judicial District

Dan Armstrong, District Attorney General
3rd Judicial District



James Dunn, District Attorney General
4th Judicial District

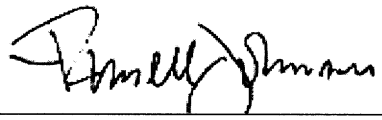
Mike Flynn, District Attorney General
5th Judicial District



Charme Allen, District Attorney General
6th Judicial District

Dave Clark, District Attorney General
7th Judicial District

Jared Effler, District Attorney General
8th Judicial District



Russell Johnson, District Attorney General
9th Judicial District

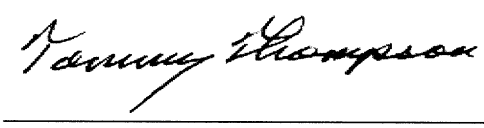
Stephen Crump, District Attorney General
10th Judicial District

Neil Pinkston, District Attorney General
11th Judicial District

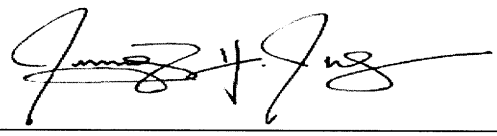
Mike Taylor, District Attorney General
12th Judicial District

Bryant Dunaway, District Attorney General
13th Judicial District

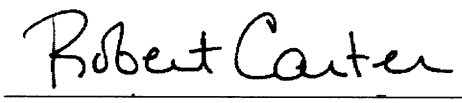
Craig Northcott, District Attorney General
14th Judicial District



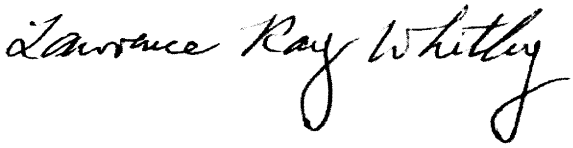
Tom Thompson, District Attorney General
15th Judicial District



Jennings Jones, District Attorney General
16th Judicial District



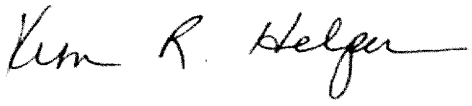
Robert Carter, District Attorney General
17th Judicial District



Ray Whitley, District Attorney General
18th Judicial District

John Carney, District Attorney General
19th Judicial District

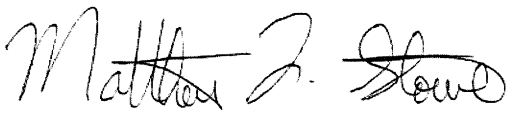
Glenn Funk, District Attorney General
20th Judicial District



Kim Helper, District Attorney General
21st Judicial District

Brent Cooper, District Attorney General
22nd Judicial District

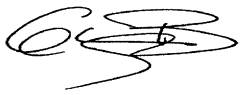
Ray Crouch, District Attorney General
23rd Judicial District



Matt Stowe, District Attorney General
24th Judicial District

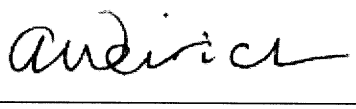
Mark Davidson, District Attorney General
25th Judicial District

Thomas Thomas, District Attorney General
27th Judicial District

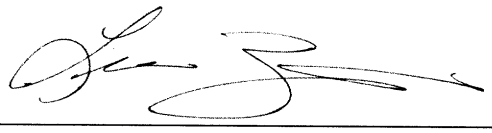


Garry Brown, District Attorney General
28th Judicial District

Danny Goodman, District Attorney General
29th Judicial District



Amy Weirich, District Attorney General
30th Judicial District



Lisa Zavogiannis, District Attorney General
31st Judicial District

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February 23, 2018

The Honorable Jeffrey S. Bivins, Chief Justice
The Honorable Cornelia A. Clark, Justice
The Honorable Holly Kirby, Justice
The Honorable Sharon G. Lee, Justice
The Honorable Roger A. Page, Justice

Attn: James M. Hivner, Clerk
Re: Tenn. Sup. Ct. R. 9, section 32
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

IN RE: PETITION FOR THE ADOPTION OF A NEW TENN. SUP. CT. R. 8, RPC 8.4(g)

No. ADM2017-02244, In the Supreme Court of Tennessee

To the Honorable Justices of the Supreme Court:

This letter is written to oppose adopting the proposed Rule 8.4(g) in Tennessee. Many scholars have argued cogently why proposed Rule 8.4(g) should not be adopted. In particular, the Christian Legal Society, of which I am a member, has already submitted to the Court an impressive summary of arguments against adopting the Rule.

I write to urge the Court to consider carefully the arguments set forth so ably by the CLS. Although I am sure you already have a copy of the CLS letter, I enclose another copy for your review. But I also write to add my own opposition, and to give a more personal perspective.

My wife and I are members of Lookout Mountain Presbyterian Church. My wife is the Director of Sanctuary Worship and Music at LMPC. Our church is affiliated with the Presbyterian Church in America. The PCA is not a fly by night splinter group; many churches across the USA are affiliated with the PCA, including many churches in Tennessee. The PCA adheres to many Biblical tenets that would subject me to discipline under the proposed rule if I said them aloud in the hearing of someone who might be offended by them.

One core Biblical concept is the general principle that I am not supposed to act one way at church and act differently elsewhere. And I may not like some of the Biblical principles, but I am compelled by faith and conscience to believe them anyway. Although many find it to be outdated, the Bible specifically addresses many issues relating to human conduct, including sexuality. Modern science often seems to be at odds with some of those Biblical principles, but I honestly have no choice but to follow clear Biblical teachings no matter what anyone else says. My sincerely-held beliefs would doubtlessly be offensive to some individuals who have markedly different views on such things.

The Declaration of Independence posited unabashedly that our nation's right to be independent from England was rooted in "the Laws of Nature and of Nature's God." It further stated that we are "endowed by [our] Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."

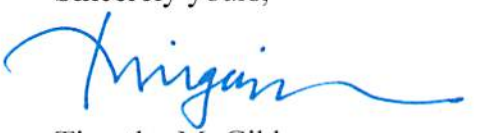
The First Amendment to the Constitution enshrines the idea that I am free to believe, and to express and debate freely, the principles I espouse, even those of faith. The proposed Rule 8.4(g) creates a class of ideas that I may not express out of fear that someone may be offended by them. As such, it is clearly a content-based prior restraint on free speech.

I certainly hope my views do not offend anyone. But these views, and even this letter expressing these views, may fall within conduct and viewpoints proscribed by Rule 8.4(g).

Finally, a comment to my colleagues in leadership at the TBA. I have twice chaired the TBA's Construction Section, so I have been involved in the TBA for many years and have not merely sat on the sideline. It disappoints me to see the TBA endorse an attempt to regulate the free speech rights of lawyers. I am not a member of the ABA for this same reason (among others). Paraphrasing former President Ronald Reagan, I did not leave the ABA, the ABA left me.

Thank you for the opportunity to present a more personal point of view in opposition to Rule 8.4(g).

Sincerely yours,



Timothy M. Gibbons

TMG/mms

cc: Mr. Lucian Pera

CHRISTIAN LEGAL SOCIETY

Seeking Justice with the Love of God

January 31, 2018

The Honorable Jeffrey S. Bivins, Chief Justice
The Honorable Cornelia A. Clark, Justice
The Honorable Holly Kirby, Justice
The Honorable Sharon G. Lee, Justice
The Honorable Roger A. Page, Justice

Attn: James M. Hivner, Clerk
Re: Tenn. Sup. Ct. R. 9, section 32
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

Re: No. ADM2017-02244 – Comment Letter of Christian Legal Society Opposing Amending Rule 8, RPC 8.4 of the Rules of the Tennessee Supreme Court by Adopting a New RPC 8.4(g)

Dear Chief Justice Bivins, Justice Clark, Justice Kirby, Justice Lee, and Justice Page:

This comment letter is filed pursuant to the Order of the Supreme Court of Tennessee, dated November 21, 2017, which solicits written comments on whether to adopt proposed RPC 8.4(g). Because RPC 8.4(g) would operate as a speech code for Tennessee attorneys, Christian Legal Society opposes its adoption.

Proposed RPC 8.4(g) essentially replicates the highly criticized and deeply flawed ABA Model Rule 8.4(g), as adopted by the American Bar Association at its annual meeting in San Francisco, California, in August 2016. The proponents of proposed RPC 8.4(g) acknowledge in their Petition to this Court that proposed RPC 8.4(g) "is patterned after" ABA Model Rule 8.4(g).[1]

ABA Model Rule 8.4(g) has been condemned by numerous scholars as a speech code for lawyers.[2] Fortunately, it can only operate in those states in which the highest court adopts it, and

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[1] Joint Petition of Board of Professional Responsibility of the Supreme Court of Tennessee and Tennessee Bar Association for the Adoption of a New Tenn. Sup. Ct. R. 8, RPC 8.4(g) [hereinafter "Pet."] at 1, http://www.tba.org/sites/default/files/filed_tsc_rule_8_rpc_8.4_g.pdf.

[2] For example, Professor Eugene Volokh of UCLA School of Law, a nationally recognized First Amendment expert, discusses why ABA Model Rule 8.4(g) would impose a speech code on lawyers in a Federalist Society video at https://www.youtube.com/watch?v=AfpdWmlOXbA. Professor Volokh debated a proponent of ABA Model Rule 8.4(g) at the Federalist Society National Student Symposium in March 2017. https://www.youtube.com/watch?v=b074xW5kvB8&t=50s. Highly respected constitutional scholar and ethics expert, Professor Ronald Rotunda, and Texas Attorney General Ken Paxton debated two leading proponents of Model Rule 8.4(g) at the Federalist Society National Lawyers Convention in November 2017. https://www.youtube.com/watch?v=V6rDPjqBcQg. Professor Rotunda also has written a lengthy memorandum about the Rule's threat to lawyers' First Amendment rights. Ronald D. Rotunda, "*The ABA Decision to Control*

to date, only the Vermont Supreme Court has adopted it. Because the rule took effect in Vermont less than five months ago, no empirical evidence yet exists as to the effect its implementation will have on attorneys.

This Court should reject proposed RPC 8.4(g) because its extremely broad scope will irreparably harm Tennessee attorneys' First Amendment rights. But at a minimum, this Court should wait to see whether the widespread prediction that ABA Model Rule 8.4(g) will operate as a speech code for attorneys is borne out by what happens in another state. Otherwise Tennessee attorneys will be the laboratory subjects for the ill-conceived experiment that ABA Model Rule 8.4(g) represents. There is no reason to impose on Tennessee attorneys a rule rife with risk, when a wise and readily available option for this Court is to wait to see whether other states adopt ABA Model Rule 8.4(g), and then to observe its impact on attorneys in those states.

Proposed RPC 8.4(g) is so deeply flawed that its proponents, in their Petition to this Court urging its adoption, find it necessary to state that "proposed Rule 8.4(g) leaves *a sphere of private thought and private activity* for which lawyers will remain free from regulatory scrutiny."[3] A "sphere of private thought" may be the best that lawyers living under a totalitarian regime can hope for; but lawyers who live in a free society should rightly insist upon the freedom to speak their thoughts publicly and without fear in their social activities, their workplaces, and the public square. Proposed RPC 8.4(g) would drastically curtail that freedom.

A rule that is so broad in scope and so vague in meaning that its proponents feel the need to reassure the lawyers who will be regulated by it that they will be left "a sphere of private thought and private activity . . . free from regulatory scrutiny" is a rule that this Court should reject. A lawyer's license to practice law should not depend on whether he or she – either unwittingly or intentionally -- steps outside of a nebulous, undefined "sphere of private thought and private activity."

Nor is there need for haste because current Comment [3], which already accompanies RPC 8.4(d), adequately meets any need. There is no pressing reason to revisit this Court's recent decision in 2013 to retain current Comment [3] rather than adopt a black-letter rule. Current Comment [3] satisfactorily meets any need without creating new threats to attorneys' freedom of speech.

In 2013, in contrast to its current posture, the Tennessee Bar Association opposed adoption of a black-letter rule. Its reasons for opposition to a black-letter rule remain as valid today as they were a scant five years ago. In its comment letter to this Court, dated March 27, 2013, the TBA "explain[ed] how it is possible to be staunchly opposed to invidious discriminatory conduct of any sort and yet steadfastly opposed" to adding a new black-letter rule

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What Lawyers Say: Supporting 'Diversity' But Not Diversity of Thought," The Heritage Foundation, Oct. 6, 2016, http://thf-reports.s3.amazonaws.com/2016/LM-191.pdf.

[3] Pet. at 6.

to RPC 8.4.[4] Specifically, "[t]he TBA believe[d] that when this Court originally adopted Comment [3] more than a decade ago it made the right decision."[5]

The TBA 2013 Comment Letter focused on three flaws that, five years later, are embedded in proposed RPC 8.4(g):

1. Disciplinary liability for speech: The TBA in 2013 was opposed to "replac[ing] the language 'in the course of representing a client' [the scope of current Comment [3]] with the more expansive 'in a professional capacity.'"[6] But this is precisely what proposed RPC 8.4(g) would do if adopted. Proposed RPC 8.4(g) would supplant current Comment [3] and its limited scope of "in the course of representing a client" with the much broader scope of "in conduct related to the practice of law." As the TBA 2013 Comment Letter explained, the expansive scope of "in a professional capacity" "would appear to subject a lawyer to potential disciplinary liability" on several new fronts, including: "(1) service in the General Assembly; (2) speaking in public, including at CLEs; (3) advertising their legal services; and (4) authoring and publishing books/treatises, articles, or opinion columns."[7]

In 2013, the TBA recognized that, if adopted, the expansive scope of "in a professional capacity" "could result, for example, in any number of constitutional challenges regarding the First Amendment rights of lawyers."[8] The TBA asked whether "a lawyer-legislator [could] be subjected to discipline under [the proposed 2013 rule] for introducing a bill to prohibit (or permit) the display of religious symbols on public property?"[9] The TBA asked whether "a divorce lawyer [could] be subjected to discipline for broadcasting advertisements indicating that they only represent one gender in divorce proceedings?"[10] Five years later, these same threats to Tennessee attorneys' freedom of speech would materialize if proposed RPC 8.4(g) were adopted because, as Comment [4] accompanying proposed RPC 8.4(g) explicitly states, "conduct related to the practice of law" includes "bar association, business *or social activities* in connection with the practice of law." See pp. 10-16, *infra*, for a more detailed discussion.

2. Disciplinary liability for employment decisions: The TBA in 2013 recognized that "a lawyer who makes a decision whether to hire (or not hire) someone also would likely qualify as engaging in conduct in their professional capacity."[11] As a result, a lawyer could be subject "to potential disciplinary liability for a decision not to hire a job applicant and could do so even

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[4] Comment of the Tennessee Bar Association in re: Proposed Amendment to Tennessee Rule of Professional Conduct 8.4, No. M2013-00379-SC-RL1-RL, Mar. 27, 2013, [hereinafter "TBA 2013 Comment Letter"] at 1, http://www.tba.org/sites/default/files/Rule%208%204%20Comment%203-28-13.pdf.
[5] *Id.* at 2.
[6] *Id.*
[7] *Id.* at 3.
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*

in instances where federal laws addressing bias or prejudice in making employment decisions would not otherwise apply."[12] Again, proposed RPC 8.4(g)'s Comment [4] confirms the TBA's concern because it explicitly states that "conduct related to the practice of law includes . . . operating or managing a law firm or practice."

3. Negligence standard for disciplinary liability: The TBA in 2013 opposed language that would punish "conduct that, unknown to the lawyer, manifests bias or prejudice."[13] But proposed RPC 8.4(g) would punish a lawyer for conduct that he or she does not realize is discrimination or harassment.[14] Proposed RPC 8.4(g) implements a negligence standard that hangs like the sword of Damocles over the head of every Tennessee attorney.

At bottom, current Comment [3] strikes the appropriate balance between the public interest and Tennessee attorneys' First Amendment rights. In contrast, proposed RPC 8.4(g) threatens Tennessee attorneys' First Amendment rights. The reasons for the TBA's opposition in 2013 remain equally valid today.

Tennessee should not become the second state, in company only with Vermont, to adopt the newly minted, deeply flawed ABA Model Rule 8.4(g). Instead, it should wait to see if other states choose to roll the dice with ABA Model Rule 8.4(g) and learn from other states' experience before adopting a new black-letter rule that will chill Tennessee attorneys' speech.

I. This Court Should Retain Current Comment [3] Rather than Adopt the Deeply Flawed Proposed RPC 8.4(g).

A. A comparison of the texts of current Comment [3] and proposed RPC 8.4(g) leaves no doubt that proposed RPC 8.4(g) should be rejected.

A mere five years ago, in 2013, this Court considered whether to adopt a black-letter rule that was significantly narrower than the proposed RPC 8.4(g) before the Court today. After deliberation, this Court wisely chose to retain current Comment [3] rather than impose a black-letter rule on Tennessee attorneys. Current Comment [3] largely tracked the Comment [3] that accompanied ABA Model Rule 8.4(d) from 1998 to August 2016. Current Comment [3] reads as follows:

> [3] A lawyer who, in the course of representing a client, knowingly manifests, by words or conduct, bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation or socio economic status, violates paragraph (d) when such actions are prejudicial

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[12] *Id.*

[13] *Id.* at 2.

[14] In a puzzling reversal, the Tennessee Bar Association in its Petition now criticizes current Comment [3] because it "seems to only bar discriminatory conduct 'knowingly' performed." Pet. at 3.

> to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d).

Compare the narrow scope of current Comment [3] to the breadth of proposed RPC 8.4(g) and its accompanying comments, which read as follows:

> "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 RPC 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.
>
> "Comment:
>
> ***
>
> "[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 practice; and participating in bar association, business or social activities in connection with the practice of law. 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. Legitimate advocacy protected by Section (g) includes advocacy in any conduct related to the practice of the law, including circumstances where a lawyer is not representing a client and outside traditional settings where a lawyer acts as an advocate, such as litigation.
>
> "[4a] Section (g) does not restrict any speech or conduct not related to the practice of law, including speech or conduct protected by the First Amendment. Thus, a lawyer's speech or conduct unrelated to the practice of law cannot violate this Section.
>
> "[5a] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g).
>
> "[5b] 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.
>
> "[5c] Lawyers should be mindful of their professional obligations under RPC 6.1 to provide legal services to those who are unable to pay, and their obligation under RPC 6.2 not to avoid appointments from a tribunal except for good cause. Nevertheless, a lawyer does not engage in conduct that harasses or discriminates based on socioeconomic status merely by charging and collecting reasonable fees and expenses for a representation.
>
> "[5d] A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. See RPC 1.2(b)."

B. Proposed RPC 8.4(g) would impose a significantly heavier burden on Tennessee attorneys than does current Comment [3].

The scope of RPC 8.4(g) is significantly broader than current Comment [3] in several critical aspects, including:

1. Proposed RPC 8.4(g) is substantially broader in the conduct it regulates: Current Comment [3] is limited to when a lawyer is acting "in the course of representing a client,"

whereas proposed RPC 8.4(g) applies when a lawyer is acting "in conduct related to the practice of law," which is defined as broadly as possible to include not only "representing clients," but also "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." (Emphasis supplied.) As detailed below at pp. 10-16, proposed RPC 8.4(g) would apply to *almost everything that a lawyer does, including his or her social activities* that are arguably related to the practice of law. It would also apply to *anyone* that a lawyer interacts with during any conduct arguably related to the practice of law.

2. Proposed RPC 8.4(g) is not limited to conduct that is "prejudicial to the administration of justice": Current Comment [3] requires that a lawyer's actions be "prejudicial to the administration of justice" before professional misconduct can be found. Proposed RPC 8.4(g) abandons this traditional limitation on a finding of professional misconduct, leaving a lawyer subject to disciplinary liability even though his or her conduct has not prejudiced the administration of justice, which greatly expands the regulatory reach of the proposed rule.

3. Proposed RPC 8.4(g) dispenses with the mens rea requirement of current Comment [3]: Current comment [3] requires that a lawyer "knowingly" manifest bias or prejudice, whereas proposed RPC 8.4(g) adopts a negligence standard by including "reasonably should know." A lawyer could violate proposed RPC 8.4(g) without even realizing he or she has done so. This change is particularly perilous because the list of words and conduct that are deemed "discriminatory" or "harassing" is ever expanding in novel and unanticipated ways.

4. Proposed RPC 8.4(g) adds three new protected categories: Current Comment [3] already protects "race, sex, religion, national origin, disability, age, sexual orientation, or socio-economic status." Proposed RPC 8.4(g) would add gender identity, marital status, and ethnicity to protect eleven different characteristics of individuals.

II. Only the Vermont Supreme Court has adopted ABA Model Rule 8.4(g).

When the ABA adopted Model Rule 8.4(g) in 2016, it claimed that "as has already been shown in the jurisdictions that have such a rule, it will not impose an undue burden on lawyers."[15] *But this claim is factually incorrect because ABA Model Rule 8.4(g) has not been adopted by any state bar, except Vermont.* Vermont's implementation of ABA Model Rule 8.4(g) began less than five months ago, on September 18, 2017.

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[15] *See, e.g.*, Letter from John S. Gleason, Chair, Center for Professional Responsibility Policy Implementation Committee, to Chief Justice Pleicones, Chief Justice, Supreme Court of South Carolina, September 29, 2016, *available at* https://www.scbar.org/media/filer_public/f7/76/f7767100-9bf0-4117-bfeb-c1c84c2047eb/hod_materials_january_2017.pdf, at 56-57.

As a result, no empirical evidence exists to support the claim that ABA Model Rule 8.4(g) "will not impose an undue burden on lawyers." Tennessee should not become the testing ground for this deeply flawed rule.

Despite the ABA's claim to the contrary, ABA Model Rule 8.4(g) does not replicate any prior black-letter rule adopted by a state supreme court. Before 2016, twenty-four states and the District of Columbia had adopted some version of a black-letter rule dealing with "bias" issues.[16] *But each of these black-letter rules is narrower than ABA Model Rule 8.4(g).*

Basic differences exist between state black-letter rules and ABA Model Rule 8.4(g):

- Many states' black-letter rules apply only to *unlawful discrimination* and require that another tribunal first find that an attorney has engaged in unlawful discrimination before the disciplinary process can be initiated.

- Many states limit their rules to "conduct in the course of representing a client," in contrast to ABA Model Rule 8.4(g)'s expansive scope of "conduct related to the practice of law."

- Many states require that the misconduct be prejudicial to the administration of justice.

- Almost no state black-letter rule enumerates all eleven of the ABA Model Rule 8.4(g)'s protected characteristics.

- No black-letter rule utilizes ABA Model Rule 8.4(g)'s "circular non-protection" for "legitimate advocacy . . . consistent with these rules."

Thirteen states, including Tennessee, have adopted a comment, rather than a black-letter rule, dealing with "bias" issues. Fourteen states have adopted neither a black-letter rule nor a comment addressing "bias" issues.

Because no state, except Vermont five months ago, has adopted ABA Model Rule 8.4(g), it has no track record in any state. Empirical evidence demonstrating a need in Tennessee for the adoption of the proposed rule has not been provided. Current Comment [3] already adequately addresses any need.

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[16] Anti-Bias Provisions in State Rules of Professional Conduct, App. B, ABA Standing Comm. on Ethics and Prof. Responsibility, Working Discussion Draft Revisions to Model Rule 8.4, Language Choices Narrative, July 16, 2015, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/language_choice_narrative_with_appendices_final.authcheckdam.pdf .

III. Official Bodies in Illinois, Maine, Montana, Pennsylvania, Texas, and South Carolina Have Rejected Model Rule 8.4(g), and Nevada and Louisiana Have Abandoned Efforts to Impose It on Their Attorneys.

In several states, the state supreme court, state legislature, state attorney general, state bar association, professional ethics committee, or supreme court disciplinary counsel has already officially opposed adoption of ABA Model Rule 8.4(g).

Two state supreme courts have officially rejected adoption of ABA Model Rule 8.4(g). In June 2017, the Supreme Court of **South Carolina** became the first state supreme court to take official action regarding ABA Model Rule 8.4(g) when it rejected adoption of the rule.[17] The Court acted after the House of Delegates of the South Carolina Bar, as well as the South Carolina Attorney General, recommended against its adoption.[18] On November 30, 2017, the Supreme Court of **Maine** announced it had "considered, but not adopted, the ABA Model Rule 8.4(g)."[19]

On September 25, 2017, the Supreme Court of **Nevada** granted the request of the Board of Governors of the State Bar of Nevada to withdraw its petition urging adoption of Model Rule 8.4(g).[20] In a letter to the Court, dated September 6, 2017, the State Bar President explained that "the language used in other jurisdictions was inconsistent and changing," and therefore, "the Board of Governors determined it prudent to retract [the Petition] with reservation to refile [it] when, and if the language in the rule sorts out in other jurisdictions."

In December 2016, the **Texas** Attorney General issued an opinion opposing ABA Model Rule 8.4(g). The Texas Attorney General stated that "if the State were to adopt Model Rule 8.4(g), its provisions raise serious concerns about the constitutionality of the restrictions it would place on members of the State Bar and the resulting harm to the clients they represent."[21]

On December 2, 2016, the Disciplinary Board of the Supreme Court of **Pennsylvania** explained that ABA Model Rule 8.4(g) was too broad:

> It is our opinion, after careful review and consideration, that the breadth of ABA Model Rule 8.4(g) will pose difficulties for already resource-strapped disciplinary authorities. The Model Rule . . . subjects to discipline not only a lawyer who knowingly engages in harassment or discrimination, but also a

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[17] http://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2017-06-20-01.

[18] http://2hsvz0l74ah31vgcm16peuy12tz.wpengine.netdna-cdn.com/wp-content/uploads/2017/05/McCravy-J.-OS-10143-FINAL-Opinion-5-1-2017-01331464xD2C78-01336400xD2C78.pdf.

[19] http://www.courts.maine.gov/rules_adminorders/rules/proposed/mr_prof_conduct_proposed_amend_2017-11-30.pdf at 2 (announcing comment period on alternative language).

[20] https://www.nvbar.org/wp-content/uploads/ADKT-0526-withdraw-order.pdf.

[21] https://www.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2016/kp0123.pdf.

> lawyer who negligently utters a derogatory or demeaning comment. A lawyer who did not know that a comment was offensive will be disciplined if the lawyer should have known that it was.[22]

On December 10, 2016, the **Illinois** State Bar Association Assembly "voted overwhelmingly to oppose adoption of the rule in Illinois."[23]

On April 12, 2017, the **Montana** Legislature adopted a joint resolution expressing its view that ABA Model Rule 8.4(g) would unconstitutionally infringe on the constitutional rights of Montana citizens, and urging the Montana Supreme Court not to adopt ABA Model Rule 8.4(g).[24] The impact of Model Rule 8.4(g) on "the speech of legislative staff and legislative witnesses, who are licensed by the Supreme Court of the State of Montana to practice law, when they are working on legislative matters or testifying about legislation before Legislative Committees" greatly concerned the Montana Legislature.[25]

On October 30, 2017, the **Louisiana** Rules of Professional Conduct Committee, which had spent a year studying a proposal to adopt a version of Model Rule 8.4(g), voted "not to recommend the proposed amendment to Rule 8.4 to either the House of Delegates or to the Supreme Court."[26]

It is instructive that, after examining more closely ABA Model Rule 8.4(g), official bodies in numerous states have concluded that it is too flawed to impose on attorneys. The great advantage of a federalist system is that one state can reap the benefit of other states' trial-and-error. Prudence counsels a course of waiting to see whether states (besides Vermont) adopt ABA Model Rule 8.4(g), and then observing the effects of its real-life implementation on attorneys in those states.

IV. Proposed RPC 8.4(g)'s Expansive Scope Threatens All Attorneys' First Amendment Rights.

In August 2016, the American Bar Association's House of Delegates adopted a new disciplinary rule, ABA Model Rule 8.4(g), making it professional misconduct for a lawyer to engage in harassment or discrimination in conduct related to the practice of law on the basis of eleven protected characteristics.[27] Unfortunately, in adopting the new model rule, the ABA

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[22] http://www.pabulletin.com/secure/data/vol46/46-49/2062.html.

[23] https://iln.isba.org/blog/2016/12/15/isba-assembly-oks-futures-report-approves-ube-and-collaborative-law-proposals.

[24] http://leg.mt.gov/bills/2017/BillPdf/SJ0015.pdf.

[25] *Id.* at 3.

[26] https://www.lsba.org/BarGovernance/CommitteeInfo.aspx?Committee=01fa2a59-9030-4a8c-9997-32eb7978c892.

[27] The rule is found at American Bar Association Standing Committee on Ethics and Professional Responsibility, Section of Civil Rights and Social Justice Commission on Disability Rights, Diversity & Inclusion 360 Commission,

largely ignored over 450 comment letters,[28] most opposed to the rule change. Even the ABA's own Standing Committee on Professional Discipline filed a comment letter questioning whether there was a demonstrated need for the rule change and raising concerns about its enforceability (although the Committee dropped its opposition immediately prior to the August 8th vote).[29]

ABA Model Rule 8.4(g) poses a serious threat to attorneys' First Amendment rights; therefore, its clone, proposed RPC 8.4(g), should be rejected. If adopted, proposed RPC 8.4(g) would have a chilling effect on Tennessee attorneys' free speech, religious exercise, assembly, and expressive association in the workplace and the broader public square.[30]

A. Proposed RPC 8.4(g) Would Operate as a Speech Code for Attorneys.

There are many areas of concern with the proposed rule. Perhaps the most troubling is the likelihood that it will be used to chill lawyers' expression of disfavored political, social, and religious viewpoints on a multitude of issues. Because lawyers often are the spokespersons and leaders in political, social, or religious movements, a rule that can be employed to discipline a lawyer for his or her speech on such issues should be rejected as a serious threat to freedom of speech, free exercise of religion, and freedom of political belief.

Two highly respected constitutional scholars have written about their concerns regarding the chilling effect of ABA Model Rule 8.4(g) on attorneys' freedom of speech. Professor Ronald Rotunda has written a treatise on American constitutional law,[31] as well as the ABA's treatise on

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Commission on Racial and Ethnic Diversity in the Profession, Commission on Sexual Orientation and Gender Identity, Commission on Women in the Profession, Report to the House of Delegates accompanying Revised Resolution 109, Aug. 2016, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/final_revised_resolution_and_report_109.authcheckdam.pdf.

[28] American Bar Association website, Comments to Model Rule 8.4, http://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/modruleprofconduct8_4/mr_8_4_comments.html.

[29] Letter from Ronald R. Rosenfeld, Chair ABA Standing Committee On Professional Responsibility, to Myles Lynk, Chair of the ABA Standing Committee On Ethics and Professional Responsibility, Mar. 10, 2016, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/20160310%20Rosenfeld-Lynk%20SCPD%20Proposed%20MRPC%208-4%20g%20Comments%20FINAL%20Protected.authcheckdam.pdf.

[30] The Attorney General of Texas issued an opinion that "if the State were to adopt Model Rule 8.4(g), its provisions raise serious concerns about the constitutionality of the restrictions it would place on members of the State Bar and the resulting harm to the clients they represent." Texas A.G. Op. No. KP-0123, 2016 WL 7433186 (Dec. 20, 2017), https://www.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2016/kp0123.pdf.

[31] See, *e.g.*, AMERICAN CONSTITUTIONAL LAW: THE SUPREME COURT IN AMERICAN HISTORY, VOLUME I – INSTITUTIONAL POWERS (West Academic Publishing, St. Paul, MN. 2016); AMERICAN CONSTITUTIONAL LAW: THE SUPREME COURT IN AMERICAN HISTORY, VOLUME II – LIBERTIES (West Academic Publishing, St. Paul, MN. 2016); Principles of Constitutional Law (Thomson/West, St. Paul, Minnesota, 5th ed. 2016) (with John E. Nowak).

legal ethics.[32] He initially wrote about the problem ABA Model Rule 8.4(g) poses for lawyers' speech in a *Wall Street Journal* article entitled "The ABA Overrules the First Amendment,"[33] where he explained that:

> In the case of rule 8.4(g), the standard, for lawyers at least, apparently does not include the First Amendment right to free speech. Consider the following form of "verbal" conduct when one lawyer tells another, in connection with a case, "I abhor the idle rich. We should raise capital gains taxes." The lawyer has just violated the ABA rule by manifesting bias based on socioeconomic status.

Professor Rotunda also wrote a lengthy critique of ABA Model Rule 8.4(g) for the Heritage Foundation, entitled "The ABA Decision to Control What Lawyers Say: Supporting 'Diversity' But Not Diversity of Thought."[34] His analysis is essential to understanding the threat that the new rule poses to attorneys' freedom of speech.

At the Federalist Society's 2017 National Lawyers Convention, Professor Rotunda and Texas Attorney General Ken Paxton participated in a panel discussion with former ABA President Paulette Brown and Professor Stephen Gillers on ABA Model Rule 8.4(g).[35] In the opinion of many, the proponents of the rule failed to provide adequate responses to the free speech concerns it creates.

Influential First Amendment scholar and editor of the daily legal blog, *The Volokh Conspiracy*, UCLA Professor Eugene Volokh has similarly warned that the new rule is a speech code for lawyers in a two-minute video released by the Federalist Society.[36] In a debate at the Federalist Society's 2017 National Student Symposium, Professor Volokh demonstrated the flaws of Model Rule 8.4(g), despite the rule's proponent's unsuccessful attempts to gloss over its flaws.[37]

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[32] *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility* (ABA-Thomson Reuters, Eagan, Minn., 14th ed. 2016). In their April 2017 update to the *Deskbook*, Professor Rotunda and Professor John S. Dzienkowski provide extensive criticism of ABA Model Rule 8.4(g). *Legal Ethics, Law. Deskbk. Prof. Resp.* (2017-2018 ed.), §§8.4-2(j)-1 – 8.4-2(j)-6.

[33] Ron Rotunda, "*The ABA Overrules the First Amendment: The legal trade association adopts a rule to regulate lawyers' speech*," *The Wall Street Journal*, Aug. 16, 2016, http://www.wsj.com/articles/the-aba-overrules-the-first-amendment-1471388418.

[34] Ronald D. Rotunda, "*The ABA Decision to Control What Lawyers Say: Supporting 'Diversity' But Not Diversity of Thought*," The Heritage Foundation, Oct. 6, 2016, http://thf-reports.s3.amazonaws.com/2016/LM-191.pdf.

[35] https://www.youtube.com/watch?v=V6rDPjqBcQg.

[36] https://www.youtube.com/watch?v=AfpdWmlOXbA.

[37] https://www.youtube.com/watch?v=cOivGxOUx4g.

Professor Volokh has also given examples of potential violations of Model Rule 8.4(g):

> Or say that you're at a lawyer social activity, such as a local bar dinner, and say that you get into a discussion with people around the table about such matters — Islam, evangelical Christianity, black-on-black crime, illegal immigration, differences between the sexes, same-sex marriage, restrictions on the use of bathrooms, the alleged misdeeds of the 1 percent, the cultural causes of poverty in many households, and so on. One of the people is offended and files a bar complaint.
>
> Again, you've engaged in "verbal . . . conduct" that the bar may see as "manifest[ing] bias or prejudice" and thus as "harmful." This was at a "social activit[y] in connection with the practice of law." The state bar, if it adopts this rule, might thus discipline you for your "harassment."[38]

These scholars' red flags should not be ignored. The proposed rule would create a multitude of potential problems for attorneys who serve on nonprofit boards, speak on panels, teach at law schools, or otherwise engage in public discussions regarding current political, social, and religious questions.[39]

1. By expanding its coverage to include all "conduct related to the practice of law," proposed RPC 8.4(g) encompasses nearly everything a lawyer does, including conduct and speech protected by the First Amendment.

Proposed RPC 8.4(g) raises troubling new concerns for every Tennessee attorney because it explicitly applies to all "conduct related to the practice of law." Its accompanying Comment [3] makes clear that "conduct" encompasses "speech," when it states that "discrimination includes harmful *verbal* or physical conduct that manifests bias or prejudice towards others" and that "[h]arassment includes . . . derogatory or demeaning *verbal* or physical conduct." (Emphasis supplied.)

Accompanying Comment [4] explicitly delineates the extensive reach of proposed RPC 8.4(g): "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,

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[38] Eugene Volokh, "A Speech Code for Lawyers, Banning Viewpoints that Express 'Bias,' including in Law-Related Social Activities," The Washington Post, Aug. 10, 2016, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/10/a-speech-code-for-lawyers-banning-viewpoints-that-express-bias-including-in-law-related-social-activities-2/?tid=a_inl&utm_term=.f4beacf8a086.

[39] *See also,* TBA 2013 Comment Letter at 3.

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." (Emphasis supplied.)

As already discussed at pp. 4-7, *supra*, proposed RPC 8.4(g) greatly expands upon current Comment [3]. Proposed RPC 8.4(g) is much broader in scope than current Comment [3], which applies only to conduct "in the course of representing a client." Instead, proposed RPC 8.4(g) applies to all "conduct related to the practice of law," including "business or social activities in connection with the practice of law." This is a breathtaking expansion of the scope of current Comment [3]. Furthermore, current Comment [3] speaks in terms of "actions when prejudicial to the administration of justice." By deleting that qualifying phrase, proposed RPC 8.4(g) also greatly expands the reach of the rule into attorneys' lives.

Indeed the substantive question becomes, what conduct does proposed RPC 8.4(g) *not* reach? Virtually everything a lawyer does is "conduct related to the practice of law." Swept up in the rule are dinners, parties, golf outings, conferences, and any other business or social activity that lawyers attend. Arguably, the rule includes all of a lawyer's "business or social activities" because there is no real way to delineate between those "business or social activities" that are related to the practice of law and those that are not. Quite simply, much of a lawyer's social life can be viewed as business development and opportunities to cultivate relationships with current clients or gain exposure to new clients.

Activities likely to fall within the proposed RPC 8.4(g)'s scope include:

- presenting CLE courses at conferences or through webinars
- teaching law school classes as a faculty or adjunct faculty member
- publishing law review articles, blogposts, and op-eds
- giving guest lectures at law school classes
- speaking at public events
- participating in panel discussions that touch on controversial political, religious, and social viewpoints
- serving on the boards of various religious or other charitable institutions
- lending informal legal advice to nonprofits
- serving at legal aid clinics
- serving political or social action organizations
- lobbying for or against various legal issues
- serving one's congregation
- serving one's alma mater if it is a religious institution of higher education
- serving religious ministries that assist prisoners, the underprivileged, the homeless, the abused, substance abusers, and other vulnerable populations
- serving on the board of a fraternity or sorority
- volunteering with or working for political parties

- working with social justice organizations
- any pro bono work that involves advocating for or against controversial socioeconomic, religious, social, or political issues

Recall that in its 2013 Comment Letter the TBA observed that the expansive scope of "in a professional capacity" "would appear to subject a lawyer to potential disciplinary liability" on several new fronts, including: "(1) service in the General Assembly; (2) speaking in public, including at CLEs; (3) advertising their legal services; and (4) authoring and publishing books/treatises, articles, or opinion columns."[40] Proposed RPC 8.4(g) would make a lawyer subject to disciplinary liability for a host of expressive activities.

2. Attorneys could be subject to discipline for guidance they offer when serving on the boards of their congregations, religious schools and colleges, or other religious ministries.

Many lawyers sit on the boards of their congregations, religious schools and colleges, and other religious nonprofit ministries. These ministries provide incalculable good to people in their local communities, as well as nationally and internationally. These ministries also face innumerable legal questions and regularly turn to the lawyers serving as volunteers on their boards for pro bono guidance.

As a volunteer on religious institutions' boards, a lawyer may not be "representing a client," but may nonetheless be engaged in "conduct related to the practice of law." For example, a lawyer may be asked to help craft her church's policy regarding whether its clergy will perform marriages or whether it will host receptions for weddings that are contrary to its religious beliefs. A religious college may ask a lawyer who serves on its board of trustees to review its housing policy or its student code of conduct. Drafting and reviewing legal policies may qualify as "conduct related to the practice of law," but surely a lawyer should not fear being disciplined for volunteer legal work she performs for her church or her alma mater.

By chilling attorneys' speech, the rule is likely to do real harm to religious institutions and their good works in their communities. A lawyer should not have to worry about whether her volunteer work treads too closely to the vague line of "conduct related to the practice of law," yet proposed RPC 8.4(g) creates such concerns. Because proposed RPC 8.4(g) seems to prohibit lawyers from providing counsel, whether paid or volunteer, in these contexts, the rule will have a stifling and chilling effect on lawyers' free speech and free exercise of religion when serving their congregations and religious institutions.

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[40] TBA 2013 Comment Letter at 3. *See also*, the Joint Resolution of the Montana Legislature, http://leg.mt.gov/bills/2017/BillPdf/SJ0015.pdf.

3. Attorneys' public speech on political, social, cultural, and religious topics would be subject to discipline.

Lawyers often are asked to speak to community groups, classes, and other audiences about current legal issues of the day. They frequently participate in panel discussions about the pros and cons of various legal questions regarding sensitive social and political issues. Of course, lawyers are asked to speak *because they are lawyers*. A lawyer's speaking engagements often have a dual purpose of increasing the lawyer's visibility and creating new business opportunities.

Writing -- "Verbal conduct" includes written communication. Is a law professor or adjunct faculty member subject to discipline for a law review article that explores controversial topics or expresses unpopular viewpoints? Must lawyers forswear writing blogposts or letters to the editor because someone may file a complaint with the bar? If so, public discourse and civil society will suffer from the ideological paralysis that proposed RPC 8.4(g) will impose on lawyers.

Speaking -- It would seem that all public speaking by lawyers on legal issues falls within proposed RPC 8.4(g)'s prohibition. But even if some public speaking were to fall outside the parameters of "conduct related to the practice of law," how is a lawyer to know which speech is safe and which will subject him to potential discipline? May a lawyer participate in a panel discussion only if all the lawyers on the panel speak in favor of the inclusion of various protected characteristics in a nondiscrimination law being debated in the state legislature? Is a lawyer subject to discipline if she testifies before a city council against amending a nondiscrimination law to add any or all the protected characteristics listed in proposed RPC 8.4(g)? Is a candidate for office subject to discipline for socio-economic discrimination if she proposes that only low-income students be allowed to participate in government tuition assistance programs?

The proposed rule creates a cloud of doubt that will inevitably chill lawyers' public speech on one side of these current political and social issues, while simultaneously creating no disincentive for lawyers who speak on the opposing side of these controversies. Sadly, we live at a time when many people, including lawyers, are willing to suppress the free speech of those with whom they disagree. At a time when freedom of speech needs more breathing space, not less, proposed RPC 8.4(g) chills attorneys' speech.

4. Attorneys' membership in religious, social, or political organizations would be subject to discipline.

Proposed RPC 8.4(g) raises severe doubts about the ability of lawyers to participate in political, social, or religious organizations that promote traditional values regarding sexual conduct and marriage. For example, in 2015, the California Supreme Court adopted a

disciplinary rule that prohibits all California state judges from participating in Boy Scouts because of the organization's teaching regarding sexual conduct.[41]

Would proposed RPC 8.4(g) subject lawyers to disciplinary action for participating with their children in youth organizations that teach traditional values regarding sexual conduct or marriage? Would it subject lawyers to disciplinary action for belonging to political organizations that advocate for laws that promote traditional values regarding sexual conduct and marriage?

Proposed RPC 8.4(g) raises additional concerns about whether an attorney may be disciplined for her membership in a religious organization that chooses its leaders according to its religious beliefs, or that holds to the religious belief that marriage is only between a man and a woman, or numerous other religious beliefs implicated by proposed RPC 8.4(g).[42] Some have gone so far as to claim that the right of a religious group to choose its leaders according to its religious beliefs is "discrimination."

B. Proposed RPC 8.4(g) Would Institutionalize Viewpoint Discrimination Against Many Lawyers' Public Speech on Current Political, Religious, and Social Issues.

As seen in Comment [4] that accompanies proposed RPC 8.4(g), the rule would explicitly protect some viewpoints over others by allowing lawyers to "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." Because "conduct" includes "verbal conduct," the proposed rule would impermissibly favor speech that "promote[s] diversity and inclusion" over speech that does not.

That is the very definition of viewpoint discrimination. The government cannot pass laws that allow citizens, including lawyers, to express one viewpoint on a particular subject but penalize citizens, including lawyers, for expressing an opposing viewpoint on the same subject. It is axiomatic that viewpoint discrimination is "an egregious form of content discrimination," and that "[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."[43] Yet proposed RPC 8.4(g) explicitly promotes one viewpoint over others.

Even more importantly, whether speech or action does or does not "promote diversity and inclusion" completely depends on the beholder's subjective beliefs. Where one person sees

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[41] Calif. Sup. Ct., Media Release, "Supreme Court Eliminates Ethics Exception that Permitted Judges to Belong to Nonprofit Youth Organizations that Discriminate," Jan. 23, 2015, http://www.courts.ca.gov/documents/sc15-Jan_23.pdf.

[42] https://www.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2016/kp0123.pdf.

[43] *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995).

inclusion, another may see exclusion. Where one person sees the promotion of diversity, another may equally sincerely see the promotion of uniformity.

Because enforcement of proposed RPC 8.4(g) gives governmental officials unbridled discretion to determine which speech is permissible and which is impermissible, which speech "promote[s] diversity and inclusion" and which does not, the rule clearly countenances viewpoint discrimination based on governmental officials' subjective biases. Courts have recognized that giving any government official unbridled discretion to suppress citizens' free speech is unconstitutional viewpoint discrimination.[44]

C. Who determines whether advocacy is "legitimate" or "illegitimate" under proposed RPC 8.4(g)?

Proposed RPC 8.4(g) cursorily states that it "does not preclude *legitimate* advice or advocacy *consistent with these rules*." But the qualifying phrase "consistent with these rules" makes proposed RPC 8.4(g) utterly circular. Like the proverbial dog chasing its tail, proposed RPC 8.4(g) protects "legitimate advice or advocacy" only if it is "consistent with" proposed RPC 8.4(g). That is, speech is permitted by proposed RPC 8.4(g) if it is permitted by proposed RPC 8.4(g).

The epitome of an unconstitutionally vague rule, proposed RPC 8.4(g) violates the Fourteenth Amendment as well as the First Amendment. Again, who decides which speech is "legitimate" and which speech is "illegitimate"? By what standards? By whose standards? It is not good for the profession, or for a robust civil society, for lawyers to be potentially subject to disciplinary action every time they speak or write on a topic that may cause someone who disagrees to file a disciplinary complaint to silence them.

D. Proposed RPC 8.4(g)'s threat to free speech is compounded by the fact that it utilizes a negligence standard rather than a knowledge requirement.

As Professor Dane Ciolino, an ethics law professor at Loyola University New Orleans College of Law, has explained:

> [ABA Model Rule 8.4(g)] subjects to discipline not only a lawyer who *knowingly* engages in harassment or discrimination, but also a lawyer who *negligently* utters a derogatory or demeaning comment. So, a lawyer who did not *know* that a comment was offensive will be disciplined if the lawyer *should have known* that it was. It will be interesting to see how the

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[44] *See, e.g., Child Evangelism Fellowship v. Montgomery Cty. Pub. Sch.*, 457 F.3d 376, 384 (4th Cir. 2006); *DeBoer v. Village of Oak Park*, 267 F.3d 558, 572-574 (7th Cir. 2001).

> 'objectively reasonable lawyer' will be constructed for purposes of making this determination.[45]

E. The Two Sentences Added to Ameliorate Proposed RPC 8.4(g)'s Damage to Attorneys' Free Speech Are Meaningless.

Proposed RPC 8.4(g) is a speech code for Tennessee lawyers. In its Petition urging adoption of proposed RPC 8.4(g), the Tennessee Bar Association claims that it has added two sentences which will adequately protect Tennessee attorneys' First Amendment rights. But a cursory reading of the added sentences demonstrates that claim to be false.

Sentence #1: Comment [4a] to proposed RPC 8.4(g) would add this sentence: "Section (g) does not restrict any speech or conduct *not* related to the practice of law, including speech or conduct protected by the First Amendment. Thus, a lawyer's speech or conduct *unrelated* to the practice of law cannot violate this Section." (Emphasis supplied.)

This sentence plainly provides no protection for attorneys' speech because, by its very terms, proposed RPC 8.4(g) applies to "conduct related to the practice of law." By contrast, Comment [4a] speaks only of "speech or conduct *not* related to the practice of law." (Emphasis supplied.) Therefore, Comment [4a] is meaningless.

Sentence #2: Proposed Comment [4] would add this sentence: "*Legitimate* advocacy protected by Section (g) includes advocacy in any conduct related to the practice of the law, including circumstances where a lawyer is not representing a client and outside traditional settings where a lawyer acts as an advocate, such as litigation." (Emphasis supplied.)

Yet again, this is an empty sentence that provides no protection for attorneys' free speech. It begs the question of what is "*legitimate* advocacy" and, equally importantly, who decides whether a lawyer's words are protected "*legitimate* advocacy" or unprotected "*illegitimate* advocacy." A rule that gives government officials unbridled discretion to determine which speech is "legitimate advocacy" and which speech is "illegitimate advocacy," which speech is "permissible" and which is "impermissible," is unconstitutional viewpoint discrimination.[46]

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[45] Prof. Dane S. Ciolino, "LSBA Seeks Public Comment on Proposed Anti-Discrimination Rule of Professional Conduct," *Louisiana Legal Ethics*, Aug. 6, 2017, https://lalegalethics.org/lsba-seeks-public-comment-on-proposed-anti-discrimination-rule-of-professional-conduct/ (original emphasis). *See also,* TBA 2013 Comment Letter at 2.

[46] *See, e.g., Child Evangelism Fellowship v. Montgomery Cty. Pub. Sch.*, 457 F.3d 376, 384 (4th Cir. 2006); *DeBoer v. Village of Oak Park*, 267 F.3d 558, 572-574 (7th Cir. 2001).

V. The Vermont Supreme Court has Interpreted ABA Model Rule 8.4(g) as Limiting a Lawyer's Ability to Accept, Decline, or Withdraw from a Representation in accordance with Rule 1.16.

The Vermont Supreme Court adopted ABA Model Rule 8.4(g), including its provision that it "does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16." But the Vermont Supreme Court explained in its accompanying Comment [4] that "[t]he optional grounds for withdrawal set out in Rule 1.16(b) must also be understood in light of Rule 8.4(g). They cannot be based on discriminatory or harassing intent without violating that rule." It further explained that, under the mandatory withdrawal provision of Rule 1.16(a), "a lawyer should withdraw if she or he concludes that she or he cannot avoid violating Rule 8.4(g)."[47] The Vermont Supreme Court's Comment [4] creates reasonable doubt that Rule 1.16 provides adequate protection for attorneys' ability to accept, decline, or withdraw from a representation.

The New York State Bar Association Committee on Professional Ethics issued an opinion in January 2017 that concluded that "[a] lawyer is under no obligation to accept every person who may wish to become a client *unless the refusal to accept a person amounts to unlawful discrimination.*"[48] (Emphasis supplied.) The facts before the Committee, were that a lawyer had been requested to represent a claimant against a religious institution. Because the lawyer was of the same religion as the institution, he or she was unwilling to represent the claimant against the institution. Calling the definition of "unlawful discrimination" for purposes of New York's Rule 8.4(g) a question of law beyond its jurisdiction, the Committee declined to "opine on whether a lawyer's refusal to represent a prospective client in a suit against the lawyer's own religious institution constitutes 'unlawful discrimination'" for purposes of New York's Rule 8.4(g).[49]

VI. Bar Officials in California and Pennsylvania Have Expressed Grave Reservations About Whether State Bars Have the Resources to Act as Tribunals of First Resort for Employment Claims Against Attorneys and Law Firms.

In 2013, the Tennessee Bar Association was concerned that a black-letter rule could subject a lawyer "to potential disciplinary liability for a decision not to hire a job applicant and could do so even in instances where federal laws addressing bias or prejudice in making employment decisions would not otherwise apply."[50] For that reason, in addition to others, the TBA opposed supplanting current Comment [3] with a black-letter rule.

Similarly, a recent memorandum outlining Pennsylvania's proposed Rule 8.4(g) correctly identified two defects of ABA Model Rule 8.4(g). The memorandum identified the first defect to

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[47] https://www.vermontjudiciary.org/sites/default/files/documents/PROMULGATEDVRPrP8.4(g).pdf.
[48] NY Eth. Op. 1111, N.Y. St. Bar Assn. Comm. Prof. Eth., 2017 WL 527371 (Jan. 7, 2017).
[49] *Id.*
[50] TBA 2013 Comment Letter at 3.

be the rule's "potential for Pennsylvania's lawyer disciplinary authority to become the tribunal of first resort for workplace harassment or discrimination claims against lawyers."[51] The second defect was that "after careful review and consideration … the breadth of ABA Model Rule 8.4(g) will pose difficulties for already resource-strapped disciplinary authorities."[52]

Likewise, California State Bar authorities have voiced serious concern when considering whether to modify their disciplinary rule to something more akin to the ABA Model Rule 8.4(g). California's current Rule 2-400 requires that a separate judicial or administrative tribunal first have found that a lawyer committed unlawful discrimination before disciplinary charges can be brought. According to Justice Lee Smalley Edmon, the presiding justice of the Second District, Division Three of the California Courts of Appeals and the Chair of the State Bar's Second Commission for the revision of the Rules of Professional Conduct, "[t]he proposed elimination of current Rule 2-400(C)'s pre-discipline adjudication requirement has raised concerns among some members of the commission and the Board of Trustees concerning due process, the increased demands on State Bar resources that may result, and questions regarding any evidentiary or preclusive effects a State Bar Court decision may have in other proceedings."[53] For that reason, she explained, an alternative was being offered to leave in place Rule 2-400(C)'s requirement that an attorney cannot be disciplined for unlawful discrimination unless a court, other than the State Bar Court, has found that the attorney engaged in unlawful discrimination under state or federal law and any appeal is final and leaves the finding of unlawful discrimination standing.

An official for the California State Bar Court noted that the Commission should seriously reflect upon the differences between the State Bar Court's adjudicatory process and the state civil courts' adjudicatory processes.[54] In the words of the State Bar Court official, "the unique nature of the State Bar Court and its own Rules of Procedure differ significantly from Superior Court civil proceedings."[55] First, discovery is significantly more limited in State Bar Court proceedings. Second, the rules of evidence are different. "State Bar Court proceedings are not conducted according to the Evidence Code as applied in civil cases."[56] Any relevant evidence must be admitted, and hearsay evidence may be used. Third, "[i]n disciplinary proceedings, attorneys are not entitled to a jury trial."[57]

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[51] "Proposed Amendments to the Pennsylvania Rules of Professional Conduct Relating to Misconduct," 46 Pa.B. 7519 (Dec. 3, 2016), https://www.pabulletin.com/secure/data/vol46/46-49/2062.html.
[52] *Id.*
[53] Justice Lee Smalley Edmon, "*Wanted: Input on Proposed Changes to the Rules of Professional Conduct*," California Bar Journal, August 2016, http://calbarjournal.com/August2016/Opinion/LeeSmalleyEdmon.aspx.
[54] Commission Provisional Report and Recommendation: Rule 8.4.1 [2-400], at 9, http://ethics.calbar.ca.gov/Portals/9/documents/2d_RRC/Public%20Comment%20X/RRC2%20-%208.4.1%20[2-400]%20-%20Rule%20-%20DFT5%20(02-19-16)%20w-ES-PR.pdf.
[55] *Id.*
[56] *Id.*
[57] *Id.*

The California Commission Provisional Report noted other concerns raised by removing the pre-discipline adjudication requirement. It described the problems with the requirement's deletion as follows:

> Eliminating current rule 2-400's threshold requirement that a court of competent jurisdiction has found that the alleged unlawful conduct had occurred raises substantial concerns, including due process, . . . lack of [the State Bar's Office of Chief Trial Counsel] resources and expertise to prosecute the charge effectively, and the potential that disciplinary proceedings would be used as the testing ground for new theories of discrimination, or as leverage in otherwise unrelated civil disputes between lawyers and former clients.[58]

A lawyer's loss of his or her license to practice law is a heavy penalty and demands a stringent process, one in which the standards for enforcement are rigorous and respectful of the attorneys' rights, as well as the rights of others. Comment [3] that accompanies RPC 8.4(d) already provides a carefully crafted balance and should be retained.

Conclusion

Proposed RPC 8.4(g) is so deeply flawed that its proponents, in their Petition to this Court urging its adoption, find it necessary to state that "proposed Rule 8.4(g) leaves *a sphere of private thought and private activity* for which lawyers will remain free from regulatory scrutiny."[59] A "sphere of private thought" may be the best that lawyers living under a totalitarian regime can hope for; but lawyers who live in a free society should rightly insist upon the freedom to speak their thoughts publicly and without fear in their social activities, their workplaces, and the public square. Because proposed RPC 8.4(g) would drastically curtail that freedom, this Court should reject it.

At a minimum, this Court should wait to see whether the widespread prediction that ABA Model Rule 8.4(g) will operate as a speech code for attorneys is borne out by its implementation in other states. There is no reason to make Tennessee attorneys laboratory subjects in the ill-conceived experiment that proposed RPC 8.4(g) represents. This is particularly true because sensible alternatives are readily available, such as waiting to see whether any other states adopt ABA Model Rule 8.4(g) and observing its impact on attorneys in those states. A decision to reject proposed 8.4(g) can always be revisited after other states have served as its testing ground.

Christian Legal Society thanks the Court for ordering this public comment period and considering these comments.

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[58] *Id.* at 13.
[59] Pet. at 6.

Respectfully submitted,
/s/ David Nammo
David Nammo
CEO & Executive Director
Christian Legal Society
8001 Braddock Road, Ste. 302
Springfield, Virginia 22151
(703) 642-1070
dnammo@clsnet.org

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ADM2017-02244

DENNIS R. McCLANE
DMCCLANE@WMBAC.COM

February 16, 2018

Mr. James M. Hivner, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

Re: Supreme Court of Tennessee, Petition for the Adoption of a New Tennessee Supreme Court Rule 8, Rules of Professional Conduct 8.4(g), No. ADM 2017-02244

Dear Mr. Hivner:

I write to comment concerning the proposal that the Tennessee Supreme Court adopt a new RPC 8.4(g). I write individually, on my own behalf, not on behalf of my firm or any of its other members. Please provide these comments to the members of the Court. I oppose the adoption of proposed RPC 8.4(g).

I am quite disappointed that the Board of Professional Responsibility of the Supreme Court of Tennessee and the Tennessee Bar Association filed the joint petition for the adoption of a new RPC 8.4(g). In my opinion, the proposed rule is unnecessary, is not justified by the current state of the legal profession, and goes far beyond reasonable regulation of the profession.

Associate Professor Josh Blackman of South Texas College of Law Houston has submtited a letter dated commenting on the proposed rule, with a copy of his article from the Georgetown Journal of Legal Ethics titled *Reply: A Pause for State Courts Considering Model Rule 8.4(g), The First Amendment and "Conduct Related to the Practice of Law."* I have read Associate Professor Blackman's article, as well as the article by Steven Gillers to which Associate Professor Blackman replies, *A Rule to Forbid Bias and Harrassment in Law Practice: A Guide for State Courts Considering Model Rule 8.4(g)*, and other commentaries and analyses of this issue. I find Associate Professor Blackman's analysis persuasive, and reflective of my views on Model Rule 8.4(g), summarized by Professor Blackman as follows: "The scope of Rule 8.4(g) is unprecedented in how far it goes beyond regulating conduct related to the practice of law, conduct related to the lawyer's fitness to practice or conduct prejudicial to the administration of

justice." Similarly, I agree with the comments of David Nammo of the Christian Legal Society made by letter dated January 31, 2018.

Proposed Rule 8.4(g) reflects an unwarranted intrusion into the private lives and speech of attorneys. It would impose a speech code on Tennessee lawyers, and seriously threaten their First Amendment free speech, religious exercise, assembly, and association rights. The proposed rule clearly takes a political position, authorizing the punishment of some views on hot button issues such as diversity, same-sex marriage, gender identity and immigration, while adopting views on the other side of those subjects. That is viewpoint discrimination and should not be what the bar associations and disciplinary authorities are about.

I am fully cognizant of the considerable momentum that this Model Rule 8.4(g) movement has gathered in some quarters, but I hope our Supreme Court will reject the proposed change.

Thank you for your consideration.

Very truly yours,

Dennis R. McClane
BPR No. 4653

DRM:db

cc: Michael U. King, Esq., BPR
Sandy Garrett, Esq., BPR
Lucian T. Pera, Esq., TBA
Edward D. Lanquist, Esq., TBA
Joycelyn A. Stevenson, Esq., TBA
Brian S. Faughnan, Esq., TBA

appellatecourtclerk - Comment concerning proposed change to Supreme Court Rule 8.4(g)

From: Pablo Varela <varela.pablo@gmail.com>
To: <appellatecourtclerk@tncourts.gov>
Date: 2/15/2018 3:21 PM
Subject: Comment concerning proposed change to Supreme Court Rule 8.4(g)

Hello.

I would like to add my comments in opposition to the adoption of currently proposed Supreme Court Rule 8.4(g). The proposed rule is unnecessary as there are no scenarios that current ethics rules do not cover., Further, the proposed amended rule and comments demonstrates the drafter's overreach to foster some imaginary need for a "culture shift" within the Tennessee legal community. Further, I add my name in support of the additional comments in opposition submitted by the Christian Legal Society of Tennessee.

Sincerely,

Pablo Adrian Varela TN BPR # 29436

ADM2017-02244

ADM2017-02244

320 McCallie Avenue
Chattanooga, Tennessee 37402

February 9, 2018

The Honorable Jeffrey S. Bivins, Chief Justice
The Honorable Cornelia A. Clark, Justice
The Honorable Holly Kirby, Justice
The Honorable Sharon G. Lee, Justice
The Honorable Roger A. Page, Justice

Attn: James M. Hivner, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

IN RE: PETITION FOR THE ADOPTION OF A NEW TENN. SUP. CT. R. 8, RPC 8.4(g)

No. ADM2017-02244, In the Supreme Court of Tennessee

To the Honorable Justices of the Supreme Court:

I write to express my opposition to the referenced petition, jointly filed by the Tennessee Bar Association and the Tennessee Board of Professional Responsibility on November 15, 2017. In doing so, I hereby adopt the substantive reasoning set forth in the letter dated January 31, 2018 from Mr. David Nammo of the Christian Legal Society. However, with the Court's indulgence, I will add some personal thoughts to Mr. Nammo's comments.

In my view, there is no demonstrated need for this change. To my knowledge, there have been no incidents of "harassment" of such an egregious nature within the Tennessee bar that would require disciplinary action, at least none that could not be adequately addressed by the existing Rule 8(g).

The Petition claims that the proposed rule has taken into account the objections raised, primarily on First Amendment grounds, to the ABA rule. Yet, it adopts the ABA's language, and claims to avoid the ABA version's draconian effect on free speech by means of the comments to the rule. This approach ignores Paragraph 23 of the Preamble to the Tennessee Rules of Professional Conduct which provides that while "[c]omments are intended as guides to interpretation, [] the text of each Rule is authoritative."

The proposed rule protects characteristics that as a matter of public policy have not been recognized by the Tennessee General Assembly, or, indeed, this Court. Ironically, every

species of what is deemed to be diversity seems to be protected by the rule, ***except*** diversity of thought.

Most alarmingly, the concept of "conduct related to the practice of law" is impermissibly overbroad. As a former officer of the TBA, I might find myself in a hospitality room at the association's annual meeting, thereby interacting with lawyers and engaging what would be deemed a social event in connection with the practice of law. In the course of that time, it is possible that I might express some of the thoughts set forth below which are, I believe, still more or less in the mainstream in Tennessee.

That marriage is only appropriate for male/female relationships (essentially the same stance Barak Obama took in 2008). Is that sexual orientation harassment?

That the First Amendment should protect the rights of those with deeply held religious beliefs not to bake a cake celebrating a gay marriage. Sexual orientation? Marital status?

That transgenderism is a mental disorder (gender dysphoria is listed in the DSM-5). Gender identity?

That I prefer not to have a genetic male who identifies himself as a woman in the same public restroom with my daughters. Sexual orientation? Gender identity?

Or I could simply voice approval of an article that appeared in the *Philadelphia Inquirer* on August 9, 2017, in which two law professors argue that many of the ills of today's society are curable by returning to the "bourgeois culture" of the mid-20th century.

> That culture laid out the script we all were supposed to follow: Get married before you have children and strive to stay married for their sake. Get the education you need for gainful employment, work hard, and avoid idleness. Go the extra mile for your employer or client. Be a patriot, ready to serve the country. Be neighborly, civic-minded, and charitable. Avoid coarse language in public. Be respectful of authority. Eschew substance abuse and crime.[1]

In advocating these concepts around other lawyers, am I guilty of harassment on the basis of socioeconomic status? Sex? Race? Marital status? Religion? Illustrating the danger of publically approving what in many circles are (hopefully) still considered virtues, Professor Wax's law school's chapter of the National Lawyers Guild "condemned" the statement of her views, claiming: "Professor Wax's statements amount to an explicit and implicit endorsement of white supremacy. Silence in the face of such dangerous ideas is unacceptable–particularly when they come from someone with Professor Wax's academic credentials." Eighteen law professors

[1]Amy Wax and Larry Alexander, "Paying the price for breakdown of the country's bourgeois culture," *Philadelphia Inquirer*, August 9, 2017.

published an article that stated they were all for "academic freedom," but nonetheless condemned the article that extolled these simple values as "racist and classist."[2]

The danger of a lawyer with political beliefs similar to those of the National Lawyers Guild or the eighteen professors overhearing statements of this nature and concluding they were "harassed" by the expression of these views, which, even at this late date, are simply not out of the ordinary among a great many of the members of the bar of this Court, is too great. No Tennessee lawyer should be afraid to articulate his views on political, cultural or religious matters when among other lawyers.

And once a Tennessee lawyer can be disciplined or even lose his or her law license over what amounts to diversity of thought, the danger of this rule being weaponized by a zealous "activist" of a different political stripe cannot be discounted. The courts have long recognized that charges of disciplinary rule violations can improperly be used as a litigation tactic. See ***Manning v. Waring, Cox, James, Sklar & Allen***, 849 F.2d 222, 224 (6th Cir. 1988).

The proposed rule "leaves," as stated in the petition, a "sphere of private thought" for Tennessee lawyers. That facially inoffensive statement is a chilling and outrageous corruption of fundamental precept of liberty that "[t]he free communication of thoughts and opinions, is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty." Article I, Section 19, Tennessee Constitution. This Court is the ultimate arbiter of the wide range of freedom of speech Article I, Section 19 confers, and on that basis, if no other, should firmly reject the proposed amendment.

I am authorized to state that former Chief Justice William M. Barker joins in this comment.

Respectfully,

Sam D. Elliott
TBA President, 2010-2011
BPR# 9431

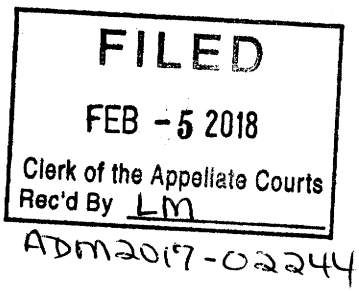
cc: Hon. William M. Barker

[2]"Law professors argue colleagues' 'bourgeois' ideal is racist and classist," *Philly Voice*, August 24, 2018 http://www.phillyvoice.com/law-professors-argue-colleagues-bourgeois-ideal-is-racist-and-classist/

appellatecourtclerk - No. ADM2017-02244 – Comment Letter Opposing Amending Rule of Professional Conduct 8.4(g)

From: John Kea <jkea@southernbaptistfoundation.org>
To: "appellatecourtclerk@tncourts.gov" <appellatecourtclerk@tncourts.gov>
Date: 2/5/2018 11:57 AM
Subject: No. ADM2017-02244 – Comment Letter Opposing Amending Rule of Professional Conduct 8.4(g)

February 5, 2018



The Honorable Jeffrey S. Bivins, Chief Justice
The Honorable Cornelia A. Clark, Justice
The Honorable Holly Kirby, Justice
The Honorable Sharon G. Lee, Justice
The Honorable Roger A. Page, Justice

Attn: James M. Hivner, Clerk
Re: Tenn. Sup. Ct. R. 9, section 32
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

Re: No. ADM2017-02244 – Comment Letter Opposing Amending Rule of Professional Conduct 8.4

Dear Chief Justice Bivins, Justice Clark, Justice Kirby, Justice Lee, and Justice Page:

This comment is filed pursuant to the Order of the Supreme Court of Tennessee, dated November 21, 2017, which solicits written comments on whether to adopt proposed Rule of Professional Conduct 8.4(g). I oppose adoption of the proposed rule.

The legal basis of my opposition is set forth in substance in the comment letters submitted by the Christian Legal Society and Alliance Defending Freedom. Without needless repetition, I affirm these detailed opposition letters and believe the concerns they raise regarding the deficiencies of the proposed rule are manifest. Though current Rule 8.4(g) may indeed need revision and expansion to address specific concerns, the proposed amendment is not a legally viable or ethically prudent option.

From a personal professional perspective, I serve as General Counsel of the national foundation of the largest evangelical denomination in the United States, and as a national and local board member of the Christian Legal Society. In these roles, I frequently speak at conferences, seminars and meetings sponsored by religious organizations and provide legal guidance from a Biblical perspective to the institutions and individuals regarding a variety of legal and cultural issues. As such, each day I must integrate Christian beliefs, legal standards and ethical mandates. I earnestly

endeavor to be respectful, caring and fair to all people—legally, ethically, morally and spiritually—and believe it is possible to champion equal protection for all while simultaneously maintaining freedom of expression and religious free exercise for diverse viewpoints. One side of this balance, for me and I suspect numerous other Tennessee attorneys, will be outright constrained, or at a minimum significantly "chilled," if the proposed RPC 8.4(g) is adopted.

I thank the Court for ordering this public comment period and for considering my opposition to the proposed rule.

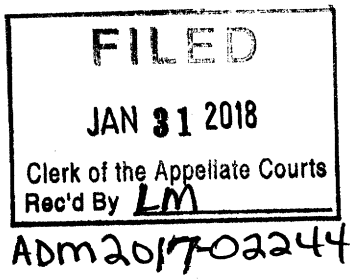
Respectfully submitted,

John L. Kea, II, BPR No. 016770
Executive Vice President & General Counsel
The Southern Baptist Foundation
901 Commerce Street, Suite 600
Nashville, TN 37203
(615) 254-8823
(615) 255-1832 fax
www.southernbaptistfoundation.org
www.mylegacyoffaith.org

NOTE: My email has changed to jkea@southernbaptistfoundation.org. Please note this change in your records.

Lisa Marsh - Fwd: TN Courts: Submit Comment on Proposed Rules

From: Jim Hivner <jim.hivner@tncourts.gov>
To: <Lisa.Marsh@tncourts.gov>
Date: 1/31/2018 3:16 PM
Subject: Fwd: TN Courts: Submit Comment on Proposed Rules



Sent from my iPhone

Begin forwarded message:

From: "Cheryl Rumage Estes" <cestes@lewisthomason.com>
Date: January 31, 2018 at 2:56:15 PM CST
To: "Jim Hivner" <Jim.Hivner@tncourts.gov>
Subject: TN Courts: Submit Comment on Proposed Rules

Submitted on Wednesday, January 31, 2018 - 3:56pm
Submitted by anonymous user: [99.44.45.125]
Submitted values are:

Your Name: Cheryl Rumage Estes
Your Address: 5061 Barry Road
Your email address: cestes@lewisthomason.com
Your Position or Organization: Attorney
Rule Change: Rule 8: Rules of Professional Conduct
Docket number: ADMIN 2017-02244
Your public comments: I think this rule places unconstitutional restrictions on members, is an attempt to expand judicially the definition of protected class in order to circumvent the Tennessee legislature, is a threat to an attorney's First Amendment rights, and threatens an attorney's membership in religious and political organizations.

The results of this submission may be viewed at:
http://www.tncourts.gov/node/602760/submission/21884

appellatecourtclerk - RE: Docket No. ADM2017-02244; Comment Letter Opposing Adoption of ABA Model Rule 8.4(g) as New Tenn. Sup. Ct. R. 8, RPC 8.4(g)

From: "Sandra I. Schefcik" <micah6.8@estillnaz.org>
To: <appellatecourtclerk@tncourts.gov>
Date: 1/31/2018 5:27 PM
Subject: RE: Docket No. ADM2017-02244; Comment Letter Opposing Adoption of ABA Model Rule 8.4(g) as New Tenn. Sup. Ct. R. 8, RPC 8.4(g)

Dear Chief Justice Bivins, Justice Clark, Justice Kirby, Justice Lee and Justice Page:

Please consider this email as my opposition to the proposed adoption of ABA Model Rule 8.4 (g). This comment email is filed pursuant to the Order of the Supreme Court of Tennessee, dated November 21, 2017, which "solicits written comments from the bench, the bar, and the public." For many reasons, as discussed below, I oppose adoption of ABA Model Rule 8.4(g) because of the damage it will do to attorneys' First Amendment rights. As a licensed attorney in Tennessee, please consider the following:

1. This **proposed Rule is too broad in scope and so vague in meaning** that its proponents feel necessary to defend it by a statement that it will not interfere with "private thought and private activity". I beg to differ.
2. **Free speech is at issue.** Should I disagree with an issue involving sex, religion, sexual orientation, or gender identity, I may be censored by the Board of Professional Responsibility, publicly, privately, suspension of my law license or even disbarment. The issues that I enumerate above are issues that I have strong convictions. Should I voice those convictions at a Bar function, refuse to take a client, or speak up at a law conference, I would hope that I would not be silenced. Yet, I may be silenced by implementation of this proposed rule.
3. **Freedom of religion is at issue**. As a Christian, my Biblical view and world view do not agree with same-sex marriage, homosexuality or transgender identity. This is my religious right. Yet, implementation of the proposed rule recognizes these "classes" as somehow protected classes.
4. **Several states have refused to adopt the proposed rule** and several other states have issued opinions through their Supreme Courts or their Attorney Generals that oppose or question the constitutionality of the restrictions such a rule would place on their Bar members.

Therefore, I respectively request that the proposed ABA Model Rule 8.4 (g) not be adopted for those reasons as set out hereinabove.

Respectively Submitted,

Sandra I. Schefcik
Attorney at Law
105 Flower Lane Drive
Estill Springs, Tennessee 37330

931-649-3867
931-649-3410 Fax
micah6.8@estillnaz.org
www.estillnaz.org

appellatecourtclerk - No. ADM2017-02244 -- Christian Legal Society Comment Letter Opposing Adoption of New RPC 8.4(g)

From: Kim Colby <kcolby@clsnet.org>
To: "appellatecourtclerk@tncourts.gov" <appellatecourtclerk@tncourts.gov>
Date: 1/31/2018 9:01 PM
Subject: No. ADM2017-02244 -- Christian Legal Society Comment Letter Opposing Adoption of New RPC 8.4(g)
Cc: David Nammo <dnammo@clsnet.org>
Attachments: Christian Legal Society Comment Letter ADM2017-02244 Filed.pdf

---

Dear Mr. Hivner:

On behalf of David Nammo, Executive Director and CEO of the Christian Legal Society, I am submitting the attached comment letter of the Christian Legal Society opposing amending Rule 8, RPC 8.4 of the Rules of the Tennessee Supreme Court by adopting a new RPC 8.4(g). Please provide copies of the letter to the justices of the Supreme Court of Tennessee and otherwise make it publicly available in the same manner other comment letters submitted on this matter are made public.

Thank you for your assistance in this matter.

Best,

Kim Colby
Director, Center for Law & Religious Freedom
Christian Legal Society
(703) 894-1087
kcolby@clsnet.org

CHRISTIAN LEGAL SOCIETY

Seeking Justice with the Love of God

January 31, 2018

The Honorable Jeffrey S. Bivins, Chief Justice
The Honorable Cornelia A. Clark, Justice
The Honorable Holly Kirby, Justice
The Honorable Sharon G. Lee, Justice
The Honorable Roger A. Page, Justice

FILED
JAN 31 2018
Clerk of the Appellate Courts
Rec'd By _____

Attn: James M. Hivner, Clerk
Re: Tenn. Sup. Ct. R. 9, section 32
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

Re: No. ADM2017-02244 – Comment Letter of Christian Legal Society Opposing Amending Rule 8, RPC 8.4 of the Rules of the Tennessee Supreme Court by Adopting a New RPC 8.4(g)

Dear Chief Justice Bivins, Justice Clark, Justice Kirby, Justice Lee, and Justice Page:

This comment letter is filed pursuant to the Order of the Supreme Court of Tennessee, dated November 21, 2017, which solicits written comments on whether to adopt proposed RPC 8.4(g). Because RPC 8.4(g) would operate as a speech code for Tennessee attorneys, Christian Legal Society opposes its adoption.

Proposed RPC 8.4(g) essentially replicates the highly criticized and deeply flawed ABA Model Rule 8.4(g), as adopted by the American Bar Association at its annual meeting in San Francisco, California, in August 2016. The proponents of proposed RPC 8.4(g) acknowledge in their Petition to this Court that proposed RPC 8.4(g) "is patterned after" ABA Model Rule 8.4(g).[1]

ABA Model Rule 8.4(g) has been condemned by numerous scholars as a speech code for lawyers.[2] Fortunately, it can only operate in those states in which the highest court adopts it, and

[1] Joint Petition of Board of Professional Responsibility of the Supreme Court of Tennessee and Tennessee Bar Association for the Adoption of a New Tenn. Sup. Ct. R. 8, RPC 8.4(g) [hereinafter "Pet."] at 1, http://www.tba.org/sites/default/files/filed_tsc_rule_8_rpc_8.4_g.pdf.

[2] For example, Professor Eugene Volokh of UCLA School of Law, a nationally recognized First Amendment expert, discusses why ABA Model Rule 8.4(g) would impose a speech code on lawyers in a Federalist Society video at https://www.youtube.com/watch?v=AfpdWmlOXbA. Professor Volokh debated a proponent of ABA Model Rule 8.4(g) at the Federalist Society National Student Symposium in March 2017. https://www.youtube.com/watch?v=b074xW5kvB8&t=50s. Highly respected constitutional scholar and ethics expert, Professor Ronald Rotunda, and Texas Attorney General Ken Paxton debated two leading proponents of Model Rule 8.4(g) at the Federalist Society National Lawyers Convention in November 2017. https://www.youtube.com/watch?v=V6rDPjqBcQg. Professor Rotunda also has written a lengthy memorandum about the Rule's threat to lawyers' First Amendment rights. Ronald D. Rotunda, "*The ABA Decision to Control*

to date, only the Vermont Supreme Court has adopted it. Because the rule took effect in Vermont less than five months ago, no empirical evidence yet exists as to the effect its implementation will have on attorneys.

This Court should reject proposed RPC 8.4(g) because its extremely broad scope will irreparably harm Tennessee attorneys' First Amendment rights. But at a minimum, this Court should wait to see whether the widespread prediction that ABA Model Rule 8.4(g) will operate as a speech code for attorneys is borne out by what happens in another state. Otherwise Tennessee attorneys will be the laboratory subjects for the ill-conceived experiment that ABA Model Rule 8.4(g) represents. There is no reason to impose on Tennessee attorneys a rule rife with risk, when a wise and readily available option for this Court is to wait to see whether other states adopt ABA Model Rule 8.4(g), and then to observe its impact on attorneys in those states.

Proposed RPC 8.4(g) is so deeply flawed that its proponents, in their Petition to this Court urging its adoption, find it necessary to state that "proposed Rule 8.4(g) leaves *a sphere of private thought and private activity* for which lawyers will remain free from regulatory scrutiny."[3] A "sphere of private thought" may be the best that lawyers living under a totalitarian regime can hope for; but lawyers who live in a free society should rightly insist upon the freedom to speak their thoughts publicly and without fear in their social activities, their workplaces, and the public square. Proposed RPC 8.4(g) would drastically curtail that freedom.

A rule that is so broad in scope and so vague in meaning that its proponents feel the need to reassure the lawyers who will be regulated by it that they will be left "a sphere of private thought and private activity . . . free from regulatory scrutiny" is a rule that this Court should reject. A lawyer's license to practice law should not depend on whether he or she – either unwittingly or intentionally -- steps outside of a nebulous, undefined "sphere of private thought and private activity."

Nor is there need for haste because current Comment [3], which already accompanies RPC 8.4(d), adequately meets any need. There is no pressing reason to revisit this Court's recent decision in 2013 to retain current Comment [3] rather than adopt a black-letter rule. Current Comment [3] satisfactorily meets any need without creating new threats to attorneys' freedom of speech.

In 2013, in contrast to its current posture, the Tennessee Bar Association opposed adoption of a black-letter rule. Its reasons for opposition to a black-letter rule remain as valid today as they were a scant five years ago. In its comment letter to this Court, dated March 27, 2013, the TBA "explain[ed] how it is possible to be staunchly opposed to invidious discriminatory conduct of any sort and yet steadfastly opposed" to adding a new black-letter rule

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What Lawyers Say: Supporting 'Diversity' But Not Diversity of Thought," The Heritage Foundation, Oct. 6, 2016, http://thf-reports.s3.amazonaws.com/2016/LM-191.pdf.

[3] Pet. at 6.

to RPC 8.4.[4] Specifically, "[t]he TBA believe[d] that when this Court originally adopted Comment [3] more than a decade ago it made the right decision."[5]

The TBA 2013 Comment Letter focused on three flaws that, five years later, are embedded in proposed RPC 8.4(g):

1. Disciplinary liability for speech: The TBA in 2013 was opposed to "replac[ing] the language 'in the course of representing a client' [the scope of current Comment [3]] with the more expansive 'in a professional capacity.'"[6] But this is precisely what proposed RPC 8.4(g) would do if adopted. Proposed RPC 8.4(g) would supplant current Comment [3] and its limited scope of "in the course of representing a client" with the much broader scope of "in conduct related to the practice of law." As the TBA 2013 Comment Letter explained, the expansive scope of "in a professional capacity" "would appear to subject a lawyer to potential disciplinary liability" on several new fronts, including: "(1) service in the General Assembly; (2) speaking in public, including at CLEs; (3) advertising their legal services; and (4) authoring and publishing books/treatises, articles, or opinion columns."[7]

In 2013, the TBA recognized that, if adopted, the expansive scope of "in a professional capacity" "could result, for example, in any number of constitutional challenges regarding the First Amendment rights of lawyers."[8] The TBA asked whether "a lawyer-legislator [could] be subjected to discipline under [the proposed 2013 rule] for introducing a bill to prohibit (or permit) the display of religious symbols on public property?"[9] The TBA asked whether "a divorce lawyer [could] be subjected to discipline for broadcasting advertisements indicating that they only represent one gender in divorce proceedings?"[10] Five years later, these same threats to Tennessee attorneys' freedom of speech would materialize if proposed RPC 8.4(g) were adopted because, as Comment [4] accompanying proposed RPC 8.4(g) explicitly states, "conduct related to the practice of law" includes "bar association, business *or social activities* in connection with the practice of law." See pp. 10-16, *infra*, for a more detailed discussion.

2. Disciplinary liability for employment decisions: The TBA in 2013 recognized that "a lawyer who makes a decision whether to hire (or not hire) someone also would likely qualify as engaging in conduct in their professional capacity."[11] As a result, a lawyer could be subject "to potential disciplinary liability for a decision not to hire a job applicant and could do so even

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[4] Comment of the Tennessee Bar Association in re: Proposed Amendment to Tennessee Rule of Professional Conduct 8.4, No. M2013-00379-SC-RL1-RL, Mar. 27, 2013, [hereinafter "TBA 2013 Comment Letter"] at 1, http://www.tba.org/sites/default/files/Rule%208%204%20Comment%203-28-13.pdf.
[5] *Id.* at 2.
[6] *Id.*
[7] *Id.* at 3.
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*

in instances where federal laws addressing bias or prejudice in making employment decisions would not otherwise apply."[12] Again, proposed RPC 8.4(g)'s Comment [4] confirms the TBA's concern because it explicitly states that "conduct related to the practice of law includes . . . operating or managing a law firm or practice."

3. Negligence standard for disciplinary liability: The TBA in 2013 opposed language that would punish "conduct that, unknown to the lawyer, manifests bias or prejudice."[13] But proposed RPC 8.4(g) would punish a lawyer for conduct that he or she does not realize is discrimination or harassment.[14] Proposed RPC 8.4(g) implements a negligence standard that hangs like the sword of Damocles over the head of every Tennessee attorney.

At bottom, current Comment [3] strikes the appropriate balance between the public interest and Tennessee attorneys' First Amendment rights. In contrast, proposed RPC 8.4(g) threatens Tennessee attorneys' First Amendment rights. The reasons for the TBA's opposition in 2013 remain equally valid today.

Tennessee should not become the second state, in company only with Vermont, to adopt the newly minted, deeply flawed ABA Model Rule 8.4(g). Instead, it should wait to see if other states choose to roll the dice with ABA Model Rule 8.4(g) and learn from other states' experience before adopting a new black-letter rule that will chill Tennessee attorneys' speech.

I. This Court Should Retain Current Comment [3] Rather than Adopt the Deeply Flawed Proposed RPC 8.4(g).

A. A comparison of the texts of current Comment [3] and proposed RPC 8.4(g) leaves no doubt that proposed RPC 8.4(g) should be rejected.

A mere five years ago, in 2013, this Court considered whether to adopt a black-letter rule that was significantly narrower than the proposed RPC 8.4(g) before the Court today. After deliberation, this Court wisely chose to retain current Comment [3] rather than impose a black-letter rule on Tennessee attorneys. Current Comment [3] largely tracked the Comment [3] that accompanied ABA Model Rule 8.4(d) from 1998 to August 2016. Current Comment [3] reads as follows:

> [3] A lawyer who, in the course of representing a client, knowingly manifests, by words or conduct, bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation or socio economic status, violates paragraph (d) when such actions are prejudicial

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[12] *Id.*
[13] *Id.* at 2.
[14] In a puzzling reversal, the Tennessee Bar Association in its Petition now criticizes current Comment [3] because it "seems to only bar discriminatory conduct 'knowingly' performed." Pet. at 3.

> to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d).

Compare the narrow scope of current Comment [3] to the breadth of proposed RPC 8.4(g) and its accompanying comments, which read as follows:

> "It is professional misconduct for a lawyer to:
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> ***
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> "(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 RPC 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.
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> "Comment:
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> ***
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> "[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).
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> "[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 practice; and participating in bar association, business or social activities in connection with the practice of law. 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. Legitimate advocacy protected by Section (g) includes advocacy in any conduct related to the practice of the law, including circumstances where a lawyer is not representing a client and outside traditional settings where a lawyer acts as an advocate, such as litigation.
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> "[4a] Section (g) does not restrict any speech or conduct not related to the practice of law, including speech or conduct protected by the First Amendment. Thus, a lawyer's speech or conduct unrelated to the practice of law cannot violate this Section.
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> "[5a] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g).
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> "[5b] 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.
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> "[5c] Lawyers should be mindful of their professional obligations under RPC 6.1 to provide legal services to those who are unable to pay, and their obligation under RPC 6.2 not to avoid appointments from a tribunal except for good cause. Nevertheless, a lawyer does not engage in conduct that harasses or discriminates based on socioeconomic status merely by charging and collecting reasonable fees and expenses for a representation.
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> "[5d] A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. See RPC 1.2(b)."

B. Proposed RPC 8.4(g) would impose a significantly heavier burden on Tennessee attorneys than does current Comment [3].

The scope of RPC 8.4(g) is significantly broader than current Comment [3] in several critical aspects, including:

1. Proposed RPC 8.4(g) is substantially broader in the conduct it regulates: Current Comment [3] is limited to when a lawyer is acting "in the course of representing a client,"

whereas proposed RPC 8.4(g) applies when a lawyer is acting "in conduct related to the practice of law," which is defined as broadly as possible to include not only "representing clients," but also "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." (Emphasis supplied.) As detailed below at pp. 10-16, proposed RPC 8.4(g) would apply to *almost everything that a lawyer does, including his or her social activities* that are arguably related to the practice of law. It would also apply to *anyone* that a lawyer interacts with during any conduct arguably related to the practice of law.

2. Proposed RPC 8.4(g) is not limited to conduct that is "prejudicial to the administration of justice": Current Comment [3] requires that a lawyer's actions be "prejudicial to the administration of justice" before professional misconduct can be found. Proposed RPC 8.4(g) abandons this traditional limitation on a finding of professional misconduct, leaving a lawyer subject to disciplinary liability even though his or her conduct has not prejudiced the administration of justice, which greatly expands the regulatory reach of the proposed rule.

3. Proposed RPC 8.4(g) dispenses with the mens rea requirement of current Comment [3]: Current comment [3] requires that a lawyer "knowingly" manifest bias or prejudice, whereas proposed RPC 8.4(g) adopts a negligence standard by including "reasonably should know." A lawyer could violate proposed RPC 8.4(g) without even realizing he or she has done so. This change is particularly perilous because the list of words and conduct that are deemed "discriminatory" or "harassing" is ever expanding in novel and unanticipated ways.

4. Proposed RPC 8.4(g) adds three new protected categories: Current Comment [3] already protects "race, sex, religion, national origin, disability, age, sexual orientation, or socio-economic status." Proposed RPC 8.4(g) would add gender identity, marital status, and ethnicity to protect eleven different characteristics of individuals.

II. Only the Vermont Supreme Court has adopted ABA Model Rule 8.4(g).

When the ABA adopted Model Rule 8.4(g) in 2016, it claimed that "as has already been shown in the jurisdictions that have such a rule, it will not impose an undue burden on lawyers."[15] *But this claim is factually incorrect because ABA Model Rule 8.4(g) has not been adopted by any state bar, except Vermont.* Vermont's implementation of ABA Model Rule 8.4(g) began less than five months ago, on September 18, 2017.

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[15] *See, e.g.*, Letter from John S. Gleason, Chair, Center for Professional Responsibility Policy Implementation Committee, to Chief Justice Pleicones, Chief Justice, Supreme Court of South Carolina, September 29, 2016, *available at* https://www.scbar.org/media/filer_public/f7/76/f7767100-9bf0-4117-bfeb-c1c84c2047eb/hod_materials_january_2017.pdf, at 56-57.

As a result, no empirical evidence exists to support the claim that ABA Model Rule 8.4(g) "will not impose an undue burden on lawyers." Tennessee should not become the testing ground for this deeply flawed rule.

Despite the ABA's claim to the contrary, ABA Model Rule 8.4(g) does not replicate any prior black-letter rule adopted by a state supreme court. Before 2016, twenty-four states and the District of Columbia had adopted some version of a black-letter rule dealing with "bias" issues.[16] *But each of these black-letter rules is narrower than ABA Model Rule 8.4(g).*

Basic differences exist between state black-letter rules and ABA Model Rule 8.4(g):

- Many states' black-letter rules apply only to *unlawful discrimination* and require that another tribunal first find that an attorney has engaged in unlawful discrimination before the disciplinary process can be initiated.

- Many states limit their rules to "conduct in the course of representing a client," in contrast to ABA Model Rule 8.4(g)'s expansive scope of "conduct related to the practice of law."

- Many states require that the misconduct be prejudicial to the administration of justice.

- Almost no state black-letter rule enumerates all eleven of the ABA Model Rule 8.4(g)'s protected characteristics.

- No black-letter rule utilizes ABA Model Rule 8.4(g)'s "circular non-protection" for "legitimate advocacy . . . consistent with these rules."

Thirteen states, including Tennessee, have adopted a comment, rather than a black-letter rule, dealing with "bias" issues. Fourteen states have adopted neither a black-letter rule nor a comment addressing "bias" issues.

Because no state, except Vermont five months ago, has adopted ABA Model Rule 8.4(g), it has no track record in any state. Empirical evidence demonstrating a need in Tennessee for the adoption of the proposed rule has not been provided. Current Comment [3] already adequately addresses any need.

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[16] Anti-Bias Provisions in State Rules of Professional Conduct, App. B, ABA Standing Comm. on Ethics and Prof. Responsibility, Working Discussion Draft Revisions to Model Rule 8.4, Language Choices Narrative, July 16, 2015, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/language_choice_narrative_with_appendices_final.authcheckdam.pdf .

III. Official Bodies in Illinois, Maine, Montana, Pennsylvania, Texas, and South Carolina Have Rejected Model Rule 8.4(g), and Nevada and Louisiana Have Abandoned Efforts to Impose It on Their Attorneys.

In several states, the state supreme court, state legislature, state attorney general, state bar association, professional ethics committee, or supreme court disciplinary counsel has already officially opposed adoption of ABA Model Rule 8.4(g).

Two state supreme courts have officially rejected adoption of ABA Model Rule 8.4(g). In June 2017, the Supreme Court of **South Carolina** became the first state supreme court to take official action regarding ABA Model Rule 8.4(g) when it rejected adoption of the rule.[17] The Court acted after the House of Delegates of the South Carolina Bar, as well as the South Carolina Attorney General, recommended against its adoption.[18] On November 30, 2017, the Supreme Court of **Maine** announced it had "considered, but not adopted, the ABA Model Rule 8.4(g)."[19]

On September 25, 2017, the Supreme Court of **Nevada** granted the request of the Board of Governors of the State Bar of Nevada to withdraw its petition urging adoption of Model Rule 8.4(g).[20] In a letter to the Court, dated September 6, 2017, the State Bar President explained that "the language used in other jurisdictions was inconsistent and changing," and therefore, "the Board of Governors determined it prudent to retract [the Petition] with reservation to refile [it] when, and if the language in the rule sorts out in other jurisdictions."

In December 2016, the **Texas** Attorney General issued an opinion opposing ABA Model Rule 8.4(g). The Texas Attorney General stated that "if the State were to adopt Model Rule 8.4(g), its provisions raise serious concerns about the constitutionality of the restrictions it would place on members of the State Bar and the resulting harm to the clients they represent."[21]

On December 2, 2016, the Disciplinary Board of the Supreme Court of **Pennsylvania** explained that ABA Model Rule 8.4(g) was too broad:

> It is our opinion, after careful review and consideration, that the breadth of ABA Model Rule 8.4(g) will pose difficulties for already resource-strapped disciplinary authorities. The Model Rule . . . subjects to discipline not only a lawyer who knowingly engages in harassment or discrimination, but also a

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[17] http://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2017-06-20-01.

[18] http://2hsvz0l74ah31vgcm16peuy12tz.wpengine.netdna-cdn.com/wp-content/uploads/2017/05/McCravy-J.-OS-10143-FINAL-Opinion-5-1-2017-01331464xD2C78-01336400xD2C78.pdf.

[19] http://www.courts.maine.gov/rules_adminorders/rules/proposed/mr_prof_conduct_proposed_amend_2017-11-30.pdf at 2 (announcing comment period on alternative language).

[20] https://www.nvbar.org/wp-content/uploads/ADKT-0526-withdraw-order.pdf.

[21] https://www.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2016/kp0123.pdf.

> lawyer who negligently utters a derogatory or demeaning comment. A lawyer who did not know that a comment was offensive will be disciplined if the lawyer should have known that it was.[22]

On December 10, 2016, the **Illinois** State Bar Association Assembly "voted overwhelmingly to oppose adoption of the rule in Illinois."[23]

On April 12, 2017, the **Montana** Legislature adopted a joint resolution expressing its view that ABA Model Rule 8.4(g) would unconstitutionally infringe on the constitutional rights of Montana citizens, and urging the Montana Supreme Court not to adopt ABA Model Rule 8.4(g).[24] The impact of Model Rule 8.4(g) on "the speech of legislative staff and legislative witnesses, who are licensed by the Supreme Court of the State of Montana to practice law, when they are working on legislative matters or testifying about legislation before Legislative Committees" greatly concerned the Montana Legislature.[25]

On October 30, 2017, the **Louisiana** Rules of Professional Conduct Committee, which had spent a year studying a proposal to adopt a version of Model Rule 8.4(g), voted "not to recommend the proposed amendment to Rule 8.4 to either the House of Delegates or to the Supreme Court."[26]

It is instructive that, after examining more closely ABA Model Rule 8.4(g), official bodies in numerous states have concluded that it is too flawed to impose on attorneys. The great advantage of a federalist system is that one state can reap the benefit of other states' trial-and-error. Prudence counsels a course of waiting to see whether states (besides Vermont) adopt ABA Model Rule 8.4(g), and then observing the effects of its real-life implementation on attorneys in those states.

IV. Proposed RPC 8.4(g)'s Expansive Scope Threatens All Attorneys' First Amendment Rights.

In August 2016, the American Bar Association's House of Delegates adopted a new disciplinary rule, ABA Model Rule 8.4(g), making it professional misconduct for a lawyer to engage in harassment or discrimination in conduct related to the practice of law on the basis of eleven protected characteristics.[27] Unfortunately, in adopting the new model rule, the ABA

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[22] http://www.pabulletin.com/secure/data/vol46/46-49/2062.html.

[23] https://iln.isba.org/blog/2016/12/15/isba-assembly-oks-futures-report-approves-ube-and-collaborative-law-proposals.

[24] http://leg.mt.gov/bills/2017/BillPdf/SJ0015.pdf.

[25] *Id.* at 3.

[26] https://www.lsba.org/BarGovernance/CommitteeInfo.aspx?Committee=01fa2a59-9030-4a8c-9997-32eb7978c892.

[27] The rule is found at American Bar Association Standing Committee on Ethics and Professional Responsibility, Section of Civil Rights and Social Justice Commission on Disability Rights, Diversity & Inclusion 360 Commission,

largely ignored over 450 comment letters,[28] most opposed to the rule change. Even the ABA's own Standing Committee on Professional Discipline filed a comment letter questioning whether there was a demonstrated need for the rule change and raising concerns about its enforceability (although the Committee dropped its opposition immediately prior to the August 8th vote).[29]

ABA Model Rule 8.4(g) poses a serious threat to attorneys' First Amendment rights; therefore, its clone, proposed RPC 8.4(g), should be rejected. If adopted, proposed RPC 8.4(g) would have a chilling effect on Tennessee attorneys' free speech, religious exercise, assembly, and expressive association in the workplace and the broader public square.[30]

A. Proposed RPC 8.4(g) Would Operate as a Speech Code for Attorneys.

There are many areas of concern with the proposed rule. Perhaps the most troubling is the likelihood that it will be used to chill lawyers' expression of disfavored political, social, and religious viewpoints on a multitude of issues. Because lawyers often are the spokespersons and leaders in political, social, or religious movements, a rule that can be employed to discipline a lawyer for his or her speech on such issues should be rejected as a serious threat to freedom of speech, free exercise of religion, and freedom of political belief.

Two highly respected constitutional scholars have written about their concerns regarding the chilling effect of ABA Model Rule 8.4(g) on attorneys' freedom of speech. Professor Ronald Rotunda has written a treatise on American constitutional law,[31] as well as the ABA's treatise on

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Commission on Racial and Ethnic Diversity in the Profession, Commission on Sexual Orientation and Gender Identity, Commission on Women in the Profession, Report to the House of Delegates accompanying Revised Resolution 109, Aug. 2016, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/final_revised_resolution_and_report_109.authcheckdam.pdf.

[28] American Bar Association website, Comments to Model Rule 8.4, http://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/modruleprofconduct8_4/mr_8_4_comments.html.

[29] Letter from Ronald R. Rosenfeld, Chair ABA Standing Committee On Professional Responsibility, to Myles Lynk, Chair of the ABA Standing Committee On Ethics and Professional Responsibility, Mar. 10, 2016, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/20160310%20Rosenfeld-Lynk%20SCPD%20Proposed%20MRPC%208-4%20g%20Comments%20FINAL%20Protected.authcheckdam.pdf.

[30] The Attorney General of Texas issued an opinion that "if the State were to adopt Model Rule 8.4(g), its provisions raise serious concerns about the constitutionality of the restrictions it would place on members of the State Bar and the resulting harm to the clients they represent." Texas A.G. Op. No. KP-0123, 2016 WL 7433186 (Dec. 20, 2017), https://www.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2016/kp0123.pdf.

[31] See, *e.g.*, AMERICAN CONSTITUTIONAL LAW: THE SUPREME COURT IN AMERICAN HISTORY, VOLUME I – INSTITUTIONAL POWERS (West Academic Publishing, St. Paul, MN. 2016); AMERICAN CONSTITUTIONAL LAW: THE SUPREME COURT IN AMERICAN HISTORY, VOLUME II – LIBERTIES (West Academic Publishing, St. Paul, MN. 2016); Principles of Constitutional Law (Thomson/West, St. Paul, Minnesota, 5th ed. 2016) (with John E. Nowak).

legal ethics.[32] He initially wrote about the problem ABA Model Rule 8.4(g) poses for lawyers' speech in a *Wall Street Journal* article entitled "The ABA Overrules the First Amendment,"[33] where he explained that:

> In the case of rule 8.4(g), the standard, for lawyers at least, apparently does not include the First Amendment right to free speech. Consider the following form of "verbal" conduct when one lawyer tells another, in connection with a case, "I abhor the idle rich. We should raise capital gains taxes." The lawyer has just violated the ABA rule by manifesting bias based on socioeconomic status.

Professor Rotunda also wrote a lengthy critique of ABA Model Rule 8.4(g) for the Heritage Foundation, entitled "The ABA Decision to Control What Lawyers Say: Supporting 'Diversity' But Not Diversity of Thought."[34] His analysis is essential to understanding the threat that the new rule poses to attorneys' freedom of speech.

At the Federalist Society's 2017 National Lawyers Convention, Professor Rotunda and Texas Attorney General Ken Paxton participated in a panel discussion with former ABA President Paulette Brown and Professor Stephen Gillers on ABA Model Rule 8.4(g).[35] In the opinion of many, the proponents of the rule failed to provide adequate responses to the free speech concerns it creates.

Influential First Amendment scholar and editor of the daily legal blog, *The Volokh Conspiracy*, UCLA Professor Eugene Volokh has similarly warned that the new rule is a speech code for lawyers in a two-minute video released by the Federalist Society.[36] In a debate at the Federalist Society's 2017 National Student Symposium, Professor Volokh demonstrated the flaws of Model Rule 8.4(g), despite the rule's proponent's unsuccessful attempts to gloss over its flaws.[37]

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[32] *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility* (ABA-Thomson Reuters, Eagan, Minn., 14th ed. 2016). In their April 2017 update to the *Deskbook*, Professor Rotunda and Professor John S. Dzienkowski provide extensive criticism of ABA Model Rule 8.4(g). *Legal Ethics, Law. Deskbk. Prof. Resp.* (2017-2018 ed.), §§8.4-2(j)-1 – 8.4-2(j)-6.

[33] Ron Rotunda, "*The ABA Overrules the First Amendment: The legal trade association adopts a rule to regulate lawyers' speech*," *The Wall Street Journal,* Aug. 16, 2016, http://www.wsj.com/articles/the-aba-overrules-the-first-amendment-1471388418.

[34] Ronald D. Rotunda, "*The ABA Decision to Control What Lawyers Say: Supporting 'Diversity' But Not Diversity of Thought*," The Heritage Foundation, Oct. 6, 2016, http://thf-reports.s3.amazonaws.com/2016/LM-191.pdf.

[35] https://www.youtube.com/watch?v=V6rDPjqBcQg.

[36] https://www.youtube.com/watch?v=AfpdWmlOXbA.

[37] https://www.youtube.com/watch?v=cOivGxOUx4g.

Professor Volokh has also given examples of potential violations of Model Rule 8.4(g):

> Or say that you're at a lawyer social activity, such as a local bar dinner, and say that you get into a discussion with people around the table about such matters — Islam, evangelical Christianity, black-on-black crime, illegal immigration, differences between the sexes, same-sex marriage, restrictions on the use of bathrooms, the alleged misdeeds of the 1 percent, the cultural causes of poverty in many households, and so on. One of the people is offended and files a bar complaint.
>
> Again, you've engaged in "verbal . . . conduct" that the bar may see as "manifest[ing] bias or prejudice" and thus as "harmful." This was at a "social activit[y] in connection with the practice of law." The state bar, if it adopts this rule, might thus discipline you for your "harassment."[38]

These scholars' red flags should not be ignored. The proposed rule would create a multitude of potential problems for attorneys who serve on nonprofit boards, speak on panels, teach at law schools, or otherwise engage in public discussions regarding current political, social, and religious questions.[39]

1. **By expanding its coverage to include all "conduct related to the practice of law," proposed RPC 8.4(g) encompasses nearly everything a lawyer does, including conduct and speech protected by the First Amendment.**

Proposed RPC 8.4(g) raises troubling new concerns for every Tennessee attorney because it explicitly applies to all "conduct related to the practice of law." Its accompanying Comment [3] makes clear that "conduct" encompasses "speech," when it states that "discrimination includes harmful *verbal* or physical conduct that manifests bias or prejudice towards others" and that "[h]arassment includes . . . derogatory or demeaning *verbal* or physical conduct." (Emphasis supplied.)

Accompanying Comment [4] explicitly delineates the extensive reach of proposed RPC 8.4(g): "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,

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[38] Eugene Volokh, "A Speech Code for Lawyers, Banning Viewpoints that Express 'Bias,' including in Law-Related Social Activities," The Washington Post, Aug. 10, 2016, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/10/a-speech-code-for-lawyers-banning-viewpoints-that-express-bias-including-in-law-related-social-activities-2/?tid=a_inl&utm_term=.f4beacf8a086.

[39] *See also,* TBA 2013 Comment Letter at 3.

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." (Emphasis supplied.)

As already discussed at pp. 4-7, *supra*, proposed RPC 8.4(g) greatly expands upon current Comment [3]. Proposed RPC 8.4(g) is much broader in scope than current Comment [3], which applies only to conduct "in the course of representing a client." Instead, proposed RPC 8.4(g) applies to all "conduct related to the practice of law," including "business or social activities in connection with the practice of law." This is a breathtaking expansion of the scope of current Comment [3]. Furthermore, current Comment [3] speaks in terms of "actions when prejudicial to the administration of justice." By deleting that qualifying phrase, proposed RPC 8.4(g) also greatly expands the reach of the rule into attorneys' lives.

Indeed the substantive question becomes, what conduct does proposed RPC 8.4(g) *not* reach? Virtually everything a lawyer does is "conduct related to the practice of law." Swept up in the rule are dinners, parties, golf outings, conferences, and any other business or social activity that lawyers attend. Arguably, the rule includes all of a lawyer's "business or social activities" because there is no real way to delineate between those "business or social activities" that are related to the practice of law and those that are not. Quite simply, much of a lawyer's social life can be viewed as business development and opportunities to cultivate relationships with current clients or gain exposure to new clients.

Activities likely to fall within the proposed RPC 8.4(g)'s scope include:

- presenting CLE courses at conferences or through webinars
- teaching law school classes as a faculty or adjunct faculty member
- publishing law review articles, blogposts, and op-eds
- giving guest lectures at law school classes
- speaking at public events
- participating in panel discussions that touch on controversial political, religious, and social viewpoints
- serving on the boards of various religious or other charitable institutions
- lending informal legal advice to nonprofits
- serving at legal aid clinics
- serving political or social action organizations
- lobbying for or against various legal issues
- serving one's congregation
- serving one's alma mater if it is a religious institution of higher education
- serving religious ministries that assist prisoners, the underprivileged, the homeless, the abused, substance abusers, and other vulnerable populations
- serving on the board of a fraternity or sorority
- volunteering with or working for political parties

- working with social justice organizations
- any pro bono work that involves advocating for or against controversial socioeconomic, religious, social, or political issues

Recall that in its 2013 Comment Letter the TBA observed that the expansive scope of "in a professional capacity" "would appear to subject a lawyer to potential disciplinary liability" on several new fronts, including: "(1) service in the General Assembly; (2) speaking in public, including at CLEs; (3) advertising their legal services; and (4) authoring and publishing books/treatises, articles, or opinion columns."[40] Proposed RPC 8.4(g) would make a lawyer subject to disciplinary liability for a host of expressive activities.

2. Attorneys could be subject to discipline for guidance they offer when serving on the boards of their congregations, religious schools and colleges, or other religious ministries.

Many lawyers sit on the boards of their congregations, religious schools and colleges, and other religious nonprofit ministries. These ministries provide incalculable good to people in their local communities, as well as nationally and internationally. These ministries also face innumerable legal questions and regularly turn to the lawyers serving as volunteers on their boards for pro bono guidance.

As a volunteer on religious institutions' boards, a lawyer may not be "representing a client," but may nonetheless be engaged in "conduct related to the practice of law." For example, a lawyer may be asked to help craft her church's policy regarding whether its clergy will perform marriages or whether it will host receptions for weddings that are contrary to its religious beliefs. A religious college may ask a lawyer who serves on its board of trustees to review its housing policy or its student code of conduct. Drafting and reviewing legal policies may qualify as "conduct related to the practice of law," but surely a lawyer should not fear being disciplined for volunteer legal work she performs for her church or her alma mater.

By chilling attorneys' speech, the rule is likely to do real harm to religious institutions and their good works in their communities. A lawyer should not have to worry about whether her volunteer work treads too closely to the vague line of "conduct related to the practice of law," yet proposed RPC 8.4(g) creates such concerns. Because proposed RPC 8.4(g) seems to prohibit lawyers from providing counsel, whether paid or volunteer, in these contexts, the rule will have a stifling and chilling effect on lawyers' free speech and free exercise of religion when serving their congregations and religious institutions.

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[40] TBA 2013 Comment Letter at 3. *See also*, the Joint Resolution of the Montana Legislature, http://leg.mt.gov/bills/2017/BillPdf/SJ0015.pdf.

3. Attorneys' public speech on political, social, cultural, and religious topics would be subject to discipline.

Lawyers often are asked to speak to community groups, classes, and other audiences about current legal issues of the day. They frequently participate in panel discussions about the pros and cons of various legal questions regarding sensitive social and political issues. Of course, lawyers are asked to speak *because they are lawyers*. A lawyer's speaking engagements often have a dual purpose of increasing the lawyer's visibility and creating new business opportunities.

Writing -- "Verbal conduct" includes written communication. Is a law professor or adjunct faculty member subject to discipline for a law review article that explores controversial topics or expresses unpopular viewpoints? Must lawyers forswear writing blogposts or letters to the editor because someone may file a complaint with the bar? If so, public discourse and civil society will suffer from the ideological paralysis that proposed RPC 8.4(g) will impose on lawyers.

Speaking -- It would seem that all public speaking by lawyers on legal issues falls within proposed RPC 8.4(g)'s prohibition. But even if some public speaking were to fall outside the parameters of "conduct related to the practice of law," how is a lawyer to know which speech is safe and which will subject him to potential discipline? May a lawyer participate in a panel discussion only if all the lawyers on the panel speak in favor of the inclusion of various protected characteristics in a nondiscrimination law being debated in the state legislature? Is a lawyer subject to discipline if she testifies before a city council against amending a nondiscrimination law to add any or all the protected characteristics listed in proposed RPC 8.4(g)? Is a candidate for office subject to discipline for socio-economic discrimination if she proposes that only low-income students be allowed to participate in government tuition assistance programs?

The proposed rule creates a cloud of doubt that will inevitably chill lawyers' public speech on one side of these current political and social issues, while simultaneously creating no disincentive for lawyers who speak on the opposing side of these controversies. Sadly, we live at a time when many people, including lawyers, are willing to suppress the free speech of those with whom they disagree. At a time when freedom of speech needs more breathing space, not less, proposed RPC 8.4(g) chills attorneys' speech.

4. Attorneys' membership in religious, social, or political organizations would be subject to discipline.

Proposed RPC 8.4(g) raises severe doubts about the ability of lawyers to participate in political, social, or religious organizations that promote traditional values regarding sexual conduct and marriage. For example, in 2015, the California Supreme Court adopted a

disciplinary rule that prohibits all California state judges from participating in Boy Scouts because of the organization's teaching regarding sexual conduct.[41]

Would proposed RPC 8.4(g) subject lawyers to disciplinary action for participating with their children in youth organizations that teach traditional values regarding sexual conduct or marriage? Would it subject lawyers to disciplinary action for belonging to political organizations that advocate for laws that promote traditional values regarding sexual conduct and marriage?

Proposed RPC 8.4(g) raises additional concerns about whether an attorney may be disciplined for her membership in a religious organization that chooses its leaders according to its religious beliefs, or that holds to the religious belief that marriage is only between a man and a woman, or numerous other religious beliefs implicated by proposed RPC 8.4(g).[42] Some have gone so far as to claim that the right of a religious group to choose its leaders according to its religious beliefs is "discrimination."

B. Proposed RPC 8.4(g) Would Institutionalize Viewpoint Discrimination Against Many Lawyers' Public Speech on Current Political, Religious, and Social Issues.

As seen in Comment [4] that accompanies proposed RPC 8.4(g), the rule would explicitly protect some viewpoints over others by allowing lawyers to "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." Because "conduct" includes "verbal conduct," the proposed rule would impermissibly favor speech that "promote[s] diversity and inclusion" over speech that does not.

That is the very definition of viewpoint discrimination. The government cannot pass laws that allow citizens, including lawyers, to express one viewpoint on a particular subject but penalize citizens, including lawyers, for expressing an opposing viewpoint on the same subject. It is axiomatic that viewpoint discrimination is "an egregious form of content discrimination," and that "[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."[43] Yet proposed RPC 8.4(g) explicitly promotes one viewpoint over others.

Even more importantly, whether speech or action does or does not "promote diversity and inclusion" completely depends on the beholder's subjective beliefs. Where one person sees

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[41] Calif. Sup. Ct., Media Release, "Supreme Court Eliminates Ethics Exception that Permitted Judges to Belong to Nonprofit Youth Organizations that Discriminate," Jan. 23, 2015, http://www.courts.ca.gov/documents/sc15-Jan_23.pdf.

[42] https://www.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2016/kp0123.pdf.

[43] *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995).

inclusion, another may see exclusion. Where one person sees the promotion of diversity, another may equally sincerely see the promotion of uniformity.

Because enforcement of proposed RPC 8.4(g) gives governmental officials unbridled discretion to determine which speech is permissible and which is impermissible, which speech "promote[s] diversity and inclusion" and which does not, the rule clearly countenances viewpoint discrimination based on governmental officials' subjective biases. Courts have recognized that giving any government official unbridled discretion to suppress citizens' free speech is unconstitutional viewpoint discrimination.[44]

C. Who determines whether advocacy is "legitimate" or "illegitimate" under proposed RPC 8.4(g)?

Proposed RPC 8.4(g) cursorily states that it "does not preclude *legitimate* advice or advocacy *consistent with these rules*." But the qualifying phrase "consistent with these rules" makes proposed RPC 8.4(g) utterly circular. Like the proverbial dog chasing its tail, proposed RPC 8.4(g) protects "legitimate advice or advocacy" only if it is "consistent with" proposed RPC 8.4(g). That is, speech is permitted by proposed RPC 8.4(g) if it is permitted by proposed RPC 8.4(g).

The epitome of an unconstitutionally vague rule, proposed RPC 8.4(g) violates the Fourteenth Amendment as well as the First Amendment. Again, who decides which speech is "legitimate" and which speech is "illegitimate"? By what standards? By whose standards? It is not good for the profession, or for a robust civil society, for lawyers to be potentially subject to disciplinary action every time they speak or write on a topic that may cause someone who disagrees to file a disciplinary complaint to silence them.

D. Proposed RPC 8.4(g)'s threat to free speech is compounded by the fact that it utilizes a negligence standard rather than a knowledge requirement.

As Professor Dane Ciolino, an ethics law professor at Loyola University New Orleans College of Law, has explained:

> [ABA Model Rule 8.4(g)] subjects to discipline not only a lawyer who *knowingly* engages in harassment or discrimination, but also a lawyer who *negligently* utters a derogatory or demeaning comment. So, a lawyer who did not *know* that a comment was offensive will be disciplined if the lawyer *should have known* that it was. It will be interesting to see how the

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[44] *See, e.g., Child Evangelism Fellowship v. Montgomery Cty. Pub. Sch.*, 457 F.3d 376, 384 (4th Cir. 2006); *DeBoer v. Village of Oak Park*, 267 F.3d 558, 572-574 (7th Cir. 2001).

> 'objectively reasonable lawyer' will be constructed for purposes of making this determination.[45]

E. The Two Sentences Added to Ameliorate Proposed RPC 8.4(g)'s Damage to Attorneys' Free Speech Are Meaningless.

Proposed RPC 8.4(g) is a speech code for Tennessee lawyers. In its Petition urging adoption of proposed RPC 8.4(g), the Tennessee Bar Association claims that it has added two sentences which will adequately protect Tennessee attorneys' First Amendment rights. But a cursory reading of the added sentences demonstrates that claim to be false.

Sentence #1: Comment [4a] to proposed RPC 8.4(g) would add this sentence: "Section (g) does not restrict any speech or conduct *not* related to the practice of law, including speech or conduct protected by the First Amendment. Thus, a lawyer's speech or conduct *unrelated* to the practice of law cannot violate this Section." (Emphasis supplied.)

This sentence plainly provides no protection for attorneys' speech because, by its very terms, proposed RPC 8.4(g) applies to "conduct related to the practice of law." By contrast, Comment [4a] speaks only of "speech or conduct *not* related to the practice of law." (Emphasis supplied.) Therefore, Comment [4a] is meaningless.

Sentence #2: Proposed Comment [4] would add this sentence: "*Legitimate* advocacy protected by Section (g) includes advocacy in any conduct related to the practice of the law, including circumstances where a lawyer is not representing a client and outside traditional settings where a lawyer acts as an advocate, such as litigation." (Emphasis supplied.)

Yet again, this is an empty sentence that provides no protection for attorneys' free speech. It begs the question of what is "*legitimate* advocacy" and, equally importantly, who decides whether a lawyer's words are protected "*legitimate* advocacy" or unprotected "*illegitimate* advocacy." A rule that gives government officials unbridled discretion to determine which speech is "legitimate advocacy" and which speech is "illegitimate advocacy," which speech is "permissible" and which is "impermissible," is unconstitutional viewpoint discrimination.[46]

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[45] Prof. Dane S. Ciolino, "LSBA Seeks Public Comment on Proposed Anti-Discrimination Rule of Professional Conduct," *Louisiana Legal Ethics*, Aug. 6, 2017, https://lalegalethics.org/lsba-seeks-public-comment-on-proposed-anti-discrimination-rule-of-professional-conduct/ (original emphasis). *See also,* TBA 2013 Comment Letter at 2.

[46] *See, e.g., Child Evangelism Fellowship v. Montgomery Cty. Pub. Sch.*, 457 F.3d 376, 384 (4th Cir. 2006); *DeBoer v. Village of Oak Park*, 267 F.3d 558, 572-574 (7th Cir. 2001).

V. The Vermont Supreme Court has Interpreted ABA Model Rule 8.4(g) as Limiting a Lawyer's Ability to Accept, Decline, or Withdraw from a Representation in accordance with Rule 1.16.

The Vermont Supreme Court adopted ABA Model Rule 8.4(g), including its provision that it "does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16." But the Vermont Supreme Court explained in its accompanying Comment [4] that "[t]he optional grounds for withdrawal set out in Rule 1.16(b) must also be understood in light of Rule 8.4(g). They cannot be based on discriminatory or harassing intent without violating that rule." It further explained that, under the mandatory withdrawal provision of Rule 1.16(a), "a lawyer should withdraw if she or he concludes that she or he cannot avoid violating Rule 8.4(g)."[47] The Vermont Supreme Court's Comment [4] creates reasonable doubt that Rule 1.16 provides adequate protection for attorneys' ability to accept, decline, or withdraw from a representation.

The New York State Bar Association Committee on Professional Ethics issued an opinion in January 2017 that concluded that "[a] lawyer is under no obligation to accept every person who may wish to become a client *unless the refusal to accept a person amounts to unlawful discrimination.*"[48] (Emphasis supplied.) The facts before the Committee, were that a lawyer had been requested to represent a claimant against a religious institution. Because the lawyer was of the same religion as the institution, he or she was unwilling to represent the claimant against the institution. Calling the definition of "unlawful discrimination" for purposes of New York's Rule 8.4(g) a question of law beyond its jurisdiction, the Committee declined to "opine on whether a lawyer's refusal to represent a prospective client in a suit against the lawyer's own religious institution constitutes 'unlawful discrimination'" for purposes of New York's Rule 8.4(g).[49]

VI. Bar Officials in California and Pennsylvania Have Expressed Grave Reservations About Whether State Bars Have the Resources to Act as Tribunals of First Resort for Employment Claims Against Attorneys and Law Firms.

In 2013, the Tennessee Bar Association was concerned that a black-letter rule could subject a lawyer "to potential disciplinary liability for a decision not to hire a job applicant and could do so even in instances where federal laws addressing bias or prejudice in making employment decisions would not otherwise apply."[50] For that reason, in addition to others, the TBA opposed supplanting current Comment [3] with a black-letter rule.

Similarly, a recent memorandum outlining Pennsylvania's proposed Rule 8.4(g) correctly identified two defects of ABA Model Rule 8.4(g). The memorandum identified the first defect to

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[47] https://www.vermontjudiciary.org/sites/default/files/documents/PROMULGATEDVRPrP8.4(g).pdf.
[48] NY Eth. Op. 1111, N.Y. St. Bar Assn. Comm. Prof. Eth., 2017 WL 527371 (Jan. 7, 2017).
[49] *Id.*
[50] TBA 2013 Comment Letter at 3.

be the rule's "potential for Pennsylvania's lawyer disciplinary authority to become the tribunal of first resort for workplace harassment or discrimination claims against lawyers."[51] The second defect was that "after careful review and consideration ... the breadth of ABA Model Rule 8.4(g) will pose difficulties for already resource-strapped disciplinary authorities."[52]

Likewise, California State Bar authorities have voiced serious concern when considering whether to modify their disciplinary rule to something more akin to the ABA Model Rule 8.4(g). California's current Rule 2-400 requires that a separate judicial or administrative tribunal first have found that a lawyer committed unlawful discrimination before disciplinary charges can be brought. According to Justice Lee Smalley Edmon, the presiding justice of the Second District, Division Three of the California Courts of Appeals and the Chair of the State Bar's Second Commission for the revision of the Rules of Professional Conduct, "[t]he proposed elimination of current Rule 2-400(C)'s pre-discipline adjudication requirement has raised concerns among some members of the commission and the Board of Trustees concerning due process, the increased demands on State Bar resources that may result, and questions regarding any evidentiary or preclusive effects a State Bar Court decision may have in other proceedings."[53] For that reason, she explained, an alternative was being offered to leave in place Rule 2-400(C)'s requirement that an attorney cannot be disciplined for unlawful discrimination unless a court, other than the State Bar Court, has found that the attorney engaged in unlawful discrimination under state or federal law and any appeal is final and leaves the finding of unlawful discrimination standing.

An official for the California State Bar Court noted that the Commission should seriously reflect upon the differences between the State Bar Court's adjudicatory process and the state civil courts' adjudicatory processes.[54] In the words of the State Bar Court official, "the unique nature of the State Bar Court and its own Rules of Procedure differ significantly from Superior Court civil proceedings."[55] First, discovery is significantly more limited in State Bar Court proceedings. Second, the rules of evidence are different. "State Bar Court proceedings are not conducted according to the Evidence Code as applied in civil cases."[56] Any relevant evidence must be admitted, and hearsay evidence may be used. Third, "[i]n disciplinary proceedings, attorneys are not entitled to a jury trial."[57]

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[51] "Proposed Amendments to the Pennsylvania Rules of Professional Conduct Relating to Misconduct," 46 Pa.B. 7519 (Dec. 3, 2016), https://www.pabulletin.com/secure/data/vol46/46-49/2062.html.
[52] *Id.*
[53] Justice Lee Smalley Edmon, "*Wanted: Input on Proposed Changes to the Rules of Professional Conduct*," California Bar Journal, August 2016, http://calbarjournal.com/August2016/Opinion/LeeSmalleyEdmon.aspx.
[54] Commission Provisional Report and Recommendation: Rule 8.4.1 [2-400], at 9, http://ethics.calbar.ca.gov/Portals/9/documents/2d_RRC/Public%20Comment%20X/RRC2%20-%208.4.1%20[2-400]%20-%20Rule%20-%20DFT5%20(02-19-16)%20w-ES-PR.pdf.
[55] *Id.*
[56] *Id.*
[57] *Id.*

The California Commission Provisional Report noted other concerns raised by removing the pre-discipline adjudication requirement. It described the problems with the requirement's deletion as follows:

> Eliminating current rule 2-400's threshold requirement that a court of competent jurisdiction has found that the alleged unlawful conduct had occurred raises substantial concerns, including due process, . . . lack of [the State Bar's Office of Chief Trial Counsel] resources and expertise to prosecute the charge effectively, and the potential that disciplinary proceedings would be used as the testing ground for new theories of discrimination, or as leverage in otherwise unrelated civil disputes between lawyers and former clients.[58]

A lawyer's loss of his or her license to practice law is a heavy penalty and demands a stringent process, one in which the standards for enforcement are rigorous and respectful of the attorneys' rights, as well as the rights of others. Comment [3] that accompanies RPC 8.4(d) already provides a carefully crafted balance and should be retained.

Conclusion

Proposed RPC 8.4(g) is so deeply flawed that its proponents, in their Petition to this Court urging its adoption, find it necessary to state that "proposed Rule 8.4(g) leaves *a sphere of private thought and private activity* for which lawyers will remain free from regulatory scrutiny."[59] A "sphere of private thought" may be the best that lawyers living under a totalitarian regime can hope for; but lawyers who live in a free society should rightly insist upon the freedom to speak their thoughts publicly and without fear in their social activities, their workplaces, and the public square. Because proposed RPC 8.4(g) would drastically curtail that freedom, this Court should reject it.

At a minimum, this Court should wait to see whether the widespread prediction that ABA Model Rule 8.4(g) will operate as a speech code for attorneys is borne out by its implementation in other states. There is no reason to make Tennessee attorneys laboratory subjects in the ill-conceived experiment that proposed RPC 8.4(g) represents. This is particularly true because sensible alternatives are readily available, such as waiting to see whether any other states adopt ABA Model Rule 8.4(g) and observing its impact on attorneys in those states. A decision to reject proposed 8.4(g) can always be revisited after other states have served as its testing ground.

Christian Legal Society thanks the Court for ordering this public comment period and considering these comments.

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[58] *Id.* at 13.
[59] Pet. at 6.

Respectfully submitted,
/s/ David Nammo
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appellatecourtclerk - Proposed Amendment to Rule 8, RPC 8.4

ADM2017-02244

From: James Bingham <binglaw@comcast.net>
To: <appellatecourtclerk@tncourts.gov>
Date: 1/26/2018 11:35 AM
Subject: Proposed Amendment to Rule 8, RPC 8.4

Definitely not. This will give opposing counsel a weapon to use which is outside the facts and the law of the case. Many frivolous and false allegations will be made to attempt to slant the case against a lawyer. This kind of stuff is academic malarkey.

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ADM2017-02244

FILED
JAN 19 2018
Clerk of the Appellate Courts
Rec'd By _____

House of Representatives
State of Tennessee

Mr. William Lamberth
State Representative
44TH Legislative District

COUNTIES REPRESENTED
Sumner County

NASHVILLE

Committees:
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January 18, 2018

To Whom It May Concern,

As a Tennessee lawmaker and a Tennessee attorney, I do not support the 8.4(g) revision proposed by both the Tennessee Bar Association (TBA) and the Tennessee Board of Professional Responsibility (TBPR).

The wording of the proposed 8.4(g) rule would create a "carve out" provision applying to attorneys, which would limit the attorney's freedom of speech as it relates to historically held fundamental Judeo-Christian beliefs regarding sexual orientation and gender identity. If an attorney held fundamental Jewish, Christian or Muslim beliefs, that attorney could not speak or act on those beliefs if someone deemed that belief and relating action to be harassment. Hence, the attorney would have less protection than the average citizen due to their profession. I do not believe that this state has ever intended to bind someone to a situation which violates their religious beliefs or speech. Tennessee has never restricted a person's religious beliefs to the confines of their place of worship, but that is exactly what this proposed provision does.

Furthermore, the State Legislature has been proactive in protecting the above-mentioned rights for counselors and college students. This proposed rule is also contrary to the will of the people of Tennessee who have long held free market principles to be sacrosanct. Therefore, the proposed revision is simply inconsistent with the laws and direction of Tennessee when it comes to protecting Freedom of Religion and Freedom of Speech. No attorney should ever discriminate against another person for any reason, but current ethical rules and criminal laws provide ample protections against behavior that we would all find repugnant. This proposed rule is a solution in search of a problem and I respectfully request that the Court decline to implement the proposed rule change.

William Lamberth
Tennessee State Representative

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January 17, 2018

James M. Hivner, Clerk
Re: Tenn. Sup. Ct. R. 9, section 32
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, Tennessee 37219-1407
appellatecourtclerk@tncourts.gov

Sent via US Mail and Email

RE: Case: ADM2017-02244
Issue: Rule 8.4(g) revision

Dear Supreme Court:

The following is my response to the proposal by the Tennessee Bar Association (TBA) and the Tennessee Board of Professional Responsibility (BPR):

SHORT RESPONSE

This initiative has nothing to do with ethics. This is viewpoint discrimination. This is a politically motivated effort on the part of the LGBTQI initiative. This proposal is about coercing LGBTQI accepted speech as deemed appropriate by the ABA Model Rules Committee. No form of the ABA 8.4(g) model rule or it's progeny can overcome the Tennessee Constitution's and Legislation's mandates as to freedom of speech.

What is particularly disturbing about this initiative at hand is that the Board of Professional Responsibility is a co-petitioner. I do not believe the Board of Professional Responsibility should be involved in political activism.

The proposal should be respectfully and summarily DENIED.

"Learn to do good. Seek justice. Help the oppressed. Defend the cause of orphans. Fight for the rights of widows."
Isaiah 1:17 NLT

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INDEPTH RESPONSE

INTRODUCTION

Jesus Christ and the life lessons espoused in the teachings of the Bible are the basis for how I live my life and conduct my law practice. Many other attorneys can echo the same life perspective. Our faith is not simply something confined to our private lives, nor is our practice as an attorney confined to Monday through Friday, 9:00 to 5:00.

I recommend the Biblical teachings and principles to all I come into contact with. I am happy to share story after story of how Jesus has set me free from sin issues in my own life. I will be happy to share with anyone how He has healed me from childhood trauma. I will be happy to share the Good News of how He continues to work in and through my marriage, my parenting, my law practice and my life. These are stories I am currently able to share with my clients, when the conversation or circumstances warrant the discussion.

My law practice and my faith are inseparable. I do not leave my faith in church on Sunday morning or at home when I leave for the office or court each morning. Likewise, I do not leave the practice of law in my office at the end of the day, or in the courtroom at the end of a trial. I am an Attorney and Counselor at Law. One cannot separate my religious beliefs from my practice of law. The general public sees me as an attorney. Everything I say is considered by the general public to be within the course and scope of my being an attorney.

When I quote various scripture, I am at risk, under this proposal, of losing my law license. Examples of these scriptures are as follows:

> Scripture on our general purpose on this earth:
> Jesus replied: "'**Love the Lord your God** with all your heart and with all your soul and with all your mind.' This is the first and greatest commandment. And the second is like

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it: '**Love your neighbor as yourself**.' All the Law and the Prophets hang on these two commandments."
Matthew 22: 37-40 New International Version (NIV) **[emphasis added]**

Scripture regarding what marriage is:
"Haven't you read," he replied, "that at the beginning the Creator '**made them male and female**,' and said, 'For this reason a **man will leave his father and mother and be united to his wife**, and the two will become one flesh' So they are no longer two, but one flesh. Therefore what God has joined together, let no one separate."
Matthew 19: 4-6 NIV **[emphasis added]**

Scripture regarding the place of sin, including sexuality, in our culture:
"Instead, you yourselves cheat and do wrong, and you do this to your brothers and sisters. Or do you not know that wrongdoers will not inherit the kingdom of God? Do not be deceived: Neither the **sexually immoral nor idolaters nor adulterers nor men who have sex with men, nor thieves nor the greedy nor drunkards nor slanderers nor swindlers will inherit the kingdom of God**. And that is what some of you were. But you were washed, you were sanctified, you were justified in the name of the Lord Jesus Christ and by the Spirit of our God. "
I Corinthians 6: 8-11 NIV **[emphasis added]**

Scripture regarding how I should deal with individuals I encounter on a daily basis:
"Then we will no longer be infants, tossed back and forth by the waves, and blown here and there by every wind of teaching and by the cunning and craftiness of people in their deceitful scheming. Instead, **speaking the truth in love**, we will grow to become in every respect the mature body of him who is the head, that is, Christ. From him the whole body, joined and held together by every supporting ligament, grows and builds itself up in love, as each part does its work.

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So I tell you this, and insist on it in the Lord, that you must **no longer live as the Gentiles do, in the futility of their thinking**. They are **darkened in their understanding and separated from the life of God because of the ignorance that is in them due to the hardening of their hearts. Having lost all sensitivity, they have given themselves over to sensuality so as to indulge in every kind of impurity, and they are full of greed. "** Ephesians 4:14-19 NIV **[emphasis added]**

Until this proposal, the above have been constitutionally protected statements. The push to change the Tennessee Rule of Ethics 8.4 would make several of these verse unethical for me to utter as an attorney in most every situation I find myself. This provision by the TBA and the BPR is an effort to coerce and suppress speech that they do not like. Speech that has been historically constitutionally protected speech. This initiative is viewpoint discrimination.

APPLICATION

The proposed rule states, in part (**emphasis added**):

"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 ... **sexual orientation, gender identity, marital status**... in **conduct related to the practice of law**..."

Comment:

[3] "...Such discrimination includes **harmful** verbal ... conduct that **manifests bias or prejudice** towards others. **Harassment** includes sexual harassment and **derogatory or demeaning verbal ... conduct**. .... 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**

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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..."

[4a] "Section (g) **does not restrict any speech or conduct not related to the practice of law**, including speech or conduct protected by the First Amendment. Thus, a lawyer's speec (sp) or conduct unrelated to the practice of law cannot violate this Section."

[5d] "A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. See RPC 1.2(b)."

With regard to the rule (g) itself:

1. The words "Harassment or discrimination" are similar to the word "beauty." It's often defined by the one perceiving "harassment or discrimination." In our modern time of "safe spaces" and "micro aggressions", this is overly broad.

2. "Sexual orientation, gender identity, marital status" are also quite troubling. The concepts of "Sexual Orientation" and "Gender Identity" for some individuals are extremely fluid and can change during the course of the day. There is no objective standard for this. Hence, it is an overly broad slippery slope.

3. "Marital status" is troubling. This is not just problematic in the wake of *Obergefell*, but also as we face this ever-changing landscape of those who continue to attack the traditional institution of marriage with polymorphous marriage, polygamy and the like.

4. Finally, "conduct related to the practice of law" is also troubling. My bar card does not have hours and days of operation. All those around me always see me as an attorney. Even writing this response is "conduct related to the practice of law".

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With regard to the comments:

[3] How do you determine "harmful"? Criminal conviction? Civil conviction? Or merely hurt feelings?

Life is composed of "bias or prejudice". This whole initiative is biased toward the LGBTQI initiative and prejudiced against traditional "Faith Community" values, which is not limited to Christians.

"Derogatory or demeaning verbal ... conduct .." is constitutionally protected speech. Neither the 1st Amendment nor the Tennessee Constitution says that it only protects speech everyone likes. Isn't that a simple law school constitutional law *Cohen* analysis?

[4] "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..." – based on this, there simply is no time that an attorney could speak of the Biblical truths that the LGBTQI community find offensive. This weaves into every element of an attorney's life.

[4a] "Unrelated to the practice of law..." it is a complete fiction to propose that anything in an attorney's life is "unrelated to the practice of law". The general public always sees us as an attorney.

[5d] "A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. See RPC 1.2(b)." To properly advocate for a client, an attorney has to believe in the "cause". Conversely, no attorney can properly advocate for a cause that they completely disagree with. Make all the rules you want, people cannot properly advocate for initiatives they disagree with. Hence, our cases are also our speech and deserve the appropriate freedoms. We are not actors. We are counselor at law. Hence, everything within us reflects our professional representation.

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VIOLATIONS BY THIS PROVISION

The effort at hand, which is to "Tennesseeize" the ABA Model Rule 8.4 (g), violates both the 1st Amendment and the Tennessee Constitution's privileges of traditional Christian, Jewish and Muslim attorneys.

I. 1st Amendment

I anticipate many of the responses in opposition to this proposal will address the 1st Amendment issues. I also anticipate those 1st Amendment responses will be authored by individuals much more skilled than I am at addressing how this proposal violates the 1st Amendment. I agree with those who opine that this provision violates the 1st Amendment. I defer to their scholarly wisdom and writing on that topic. I will focus on the Tennessee Constitution, statute and caselaw.

II. Tennessee Constitution and Caselaw

The Tennessee Constitution Article I, Section 3 states:

"That all men have a **natural and indefeasible right to worship Almighty God according to the dictates of their own conscience**; that no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any minister against his consent; **that no human authority can, in any case whatever, control or interfere with the rights of conscience**; and that **no preference shall ever be given, by law**, to any religious establishment or mode of worship." **Emphasis added**.

The Tennessee Constitution Article I, Section 4 states:

"That **no political or religious test**, other than an oath to support the Constitution of the United States and of this state, **shall ever be required as a qualification to any office or public trust** under this state." **Emphasis added.**

This proposal violates both provisions. It violates Section 3 in essentially the same manner as it violates the 1st Amendment. I have a right to express my faith and its tenants through my day-to-day

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practice of law. Here in Tennessee, that appears to be valued. Specifically, we have the Tennessee Faith and Justice Alliance. How is it possible that we can tie the vocal chords of the faith-ased attorneys on key issues of their faith and expect them to be able to assist clients in matters relating to those religious tenants? To quote Justice Clark:

> "**Faith communities are a natural fit with our efforts to help those in need find access to legal advice**," said Tennessee Supreme Court Justice Cornelia A. Clark. "And with our goal of helping more lawyers find more occasions to provide pro bono services, this is the **ideal opportunity for attorneys to put faith in action in their own worship communities.**"
> http://www.tncourts.gov/press/2013/02/05/faith-based-initiative-seeks-align-pro-bono-attorneys-their-worship-communities **Emphasis Added**

It simply makes no sense to ask and motivate faith-based initiatives to work within both their professional and spiritual calling and then to tell them that they cannot speak of <u>all</u> their doctrinal truths.

Planned Parenthood of Middle Tenn. v. Sundquist tells us that there is a long tradition of the Tennessee Constitution providing greater protection for freedoms, specifically religious, than the US Constitution.

> "In contrast, the guarantee of worship under the Tennessee Constitution exists in its own paragraph constituting eighty-one words. It characterizes mankind's right to worship as "a natural and indefeasible right" and declares "that no human authority can, in any case whatever, control or interfere with the rights of conscience." Tenn. Const. art I, § 3. **This Court has said that the language of this section, when compared to the guarantee of religious freedom contained in the federal constitution, is a stronger guarantee of religious freedom.**" *Planned Parenthood of Middle Tenn. v. Sundquist,* 38 S.W. 3d 1, 13 (2000) citing *Carden v. Bland,* 199 Tenn. 665, 288 S.W.2d 718, 721 (1956). **[emphasis added]**

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Furthermore, *Ramsey v. BD. OF PRO. RESP.*, 771 SW 2d 116 (Tenn 1989) tells us "...**we must ensure that lawyer discipline, as found in Rule 8 of the Rules of this Court, does not create a chilling effect on First Amendment rights.**" at 121 **[emphasis added].** However, this is exactly the result of the proposed rule change.

Hence, shouldn't we be mindful of the Tennessee Constitution as well as the 1st Amendment? Based on the case above, our inquiry into the legality of this provision should both start and stop with the Tennessee Constitution.

This proposal also violates Section 4 of Article I of the Tennessee Constitution in that it essentially establishes a test for those who wish to practice law in Tennessee. If you don't alter your speech to fit the LGBTQI politically correct agenda, then you have committed a per se ethical violation. Is this any different than how the cake bakers, florists and photographers have been prosecuted for their beliefs throughout the country?

III. Tenn. Code Ann. § 16-3-403

Tenn. Code Ann. § 16-3-403 states:

"The rules prescribed by the supreme court pursuant to § 16-3-402 shall not abridge, enlarge or modify any substantive right, and shall be consistent with the constitutions of the United States and Tennessee."

This proposal abridges and modifies the substantive right of an attorney's freedom of speech. This proposal is not consistent with the constitution of either Tennessee or the United States.

IV. The Preamble to Rule 8: Rule of Professional Conduct

The Preamble to the Rules of Professional Conduct as prescribed by this court states:

"[8] Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is

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also guided by **personal conscience** and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession, and to exemplify the legal profession's ideals of public service." **Emphasis Added.**

This Honorable Court encourages attorneys to be guided by their "personal conscience" in the furtherance of the profession of law. The new proposed rule attempts to dictate the boundaries of "personal conscience" to fit within the LGBTQI's proscribed politically correct boundaries. It seems to be inconsistent to instruct an attorney to follow "personal conscience" and then dictate their speech. Hence, this provision is inconsistent with Tennessee case law, statute and Constitution. This provision does not survive a Tennessee analysis in order to get to a federal analysis. It fails based solely on Tennessee Constitutional, case law and statutory analysis.

FREEDOM OF SPEECH IN GENERAL

When one removes an attorney's freedom of speech, haven't you really removed it from everyone? Isn't this effort akin to removing weapons of war from the military? Freedom of speech for those who would litigate the freedom of speech for the general public should be of tantamount concern for a free society. A great quote on the subject is:

"Freedom is a fragile thing and is never more than one generation away from extinction. It is not ours by inheritance; it must be fought for and defended constantly by each generation, for it comes only once to a people."

RONALD REAGAN (Inaugural Address as Governor of California, January 5, 1967)

CONCERNS AS TO BOARD OF PROFESSIONAL RESPONSIBILITY INVOLVEMENT

The Board's Mission Statement is:

"To assist the Court in protecting the public from harm from unethical lawyers by administering the disciplinary process; to assist the public by providing information

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about the judicial system and the disciplinary system for lawyers; and, to assist lawyers by interpreting and applying the Court's disciplinary rules."
http://www.tbpr.org/about-the-board/mission-statement

The statement includes "assist", "protecting", "administering", "interpreting" and "applying". At no point does the Mission Statement include "advocating" or "politics". However, in the petition at hand, the Board of Professional Responsibility is advocating for an extreme political agenda. The Board is also pitting itself against freedom of speech, specifically of faith-oriented attorneys.

I am involved with the Board. I like the Board. However, I find this extreme move to be gravely concerning. This appears to be far beyond the Board's role in the legal community. The Board is effectively the arbiter of attorney ethics. In this situation, it is picking sides in an extremist political agenda.

CONCLUSION

This situation is similar to the one dicussed in Acts 5. The scriptures state:
"The apostles were brought in and made to appear before the Sanhedrin to be questioned by the high priest. "We gave you strict orders not to teach in this name," he said. "Yet you have filled Jerusalem with your teaching and are determined to make us guilty of this man's blood."
Peter and the other apostles replied: **"We must obey God rather than human beings!** The God of our ancestors raised Jesus from the dead—whom you killed by hanging him on a cross. God exalted him to his own right hand as Prince and Savior that he might bring Israel to repentance and forgive their sins. We are witnesses of these things, and so is the Holy Spirit, whom God has given to those who obey him." Acts 5:27-32 NIV **[emphasis added]**

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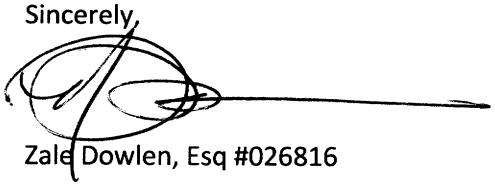
I must obey God. Only one (1) other state has adopted the new 8.4(g) while many states have declined accepting it, including Illinois. If Tennessee decides to adopt this provision, it will be number two (2). As in Ephesians 4:14-19 NIV, listed above, I will continue to speak the truth in love even if Tennessee becomes number two (2).

When you silence an attorney of faith, aren't you also silencing every person, organization and group of faith that attorney has or would represent? Is Tennessee really considering silencing our faith based community? How does that line up with any of the above statutory, constitiuonal or case law precident above? It doesn't. If the Honorable Court decides to adopt this proposal, it will be in stark contrast to the overall direction of Tennessee.

This provision violates both the Federal and the Tennessee Constitutions. This provision also violates Tenn. Code Ann. § 16-3-403 and caselaw. This provision is clearly government coerced and suppressed speech. This proposed provision should be DENIED.

Sincerely,



Zale Dowlen, Esq #026816

"Learn to do good. Seek justice. Help the oppressed. Defend the cause of orphans. Fight for the rights of widows."
Isaiah 1:17 NLT

appellatecourtclerk - Comment on Proposed Rule 8.4(g)

From: "Garry J. Rhoden" <GRhoden@thefloridafirm.com>
To: "appellatecourtclerk@tncourts.gov" <appellatecourtclerk@tncourts.gov>
Date: 1/16/2018 2:16 PM
Subject: Comment on Proposed Rule 8.4(g)

ADM2017-02244

My name is Garry Rhoden.

My BPR number is 024815.

Please accept this as my opposition to Proposed New Rule 8.4(g) and Comments.

Best wishes.

Garry J. Rhoden
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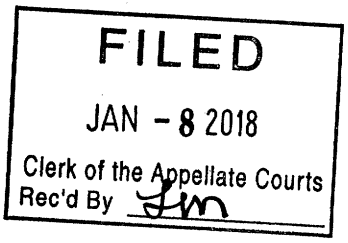
appellatecourtclerk - Comment on Docket No. ADM2017-02244

From: "D.E. Barker" <diezba@gmail.com>
To: <appellatecourtclerk@tncourts.gov>
Date: 1/8/2018 12:38 PM
Subject: Comment on Docket No. ADM2017-02244
Attachments: 2018-01-08 Supreme Court of Tennessee -- In re Comment Letter against ABA Model Rule adoption.pdf

January 8, 2017



James M. Hivner, Clerk

Re: Tenn. Sup. Ct. R. 9, section 32

Tennessee Appellate Courts

100 Supreme Court Building

401 7th Avenue North

Nashville, TN 37219-1407

Dear Mr. Hivner:—

Attached, please find a PDF file containing a Comment Letter on ABA Model Rule 8.4(g), Docket No. ADM2017-02244.

If there is an error in transmission, please notify me via my contact information, below.

Respectfully submitted,

The Rev. Mr. D. E. Barker, Esq.

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January 8, 2018

VIA ELECTRONIC MAIL*
The Honorable Jeffrey S. Bivins, Chief Justice
The Honorable Cornelia A. Clark, Associate Justice
The Honorable Holly Kirby, Associate Justice
The Honorable Sharon G. Lee, Associate Justice
The Honorable Roger A. Page, Associate Justice

Attn: James M. Hivner, Clerk
Re: Tenn. Sup. Ct. R. 9, section 32 Tennessee Appellate Courts
100 Supreme Court Building
401 Seventh Avenue North
Nashville, Tennessee 37219-1407

In re: No. ADM2017-02244 – Comment Letter Opposing Adoption of ABA Model Rule 8.4(g) as New Tenn. Sup. Ct. R. 8, RPC 8.4(g)

Dear Chief Justice Bivins, Justice Clark, Justice Kirby, Justice Lee, and Justice Page:—

This comment letter is filed pursuant to the Order of the Supreme Court of Tennessee, dated November 21, 2017, which "solicits written comments from the bench, the bar, and the public." For many reasons, as both a member of the Tennessee Bar and a Roman Catholic minister, I deeply oppose adoption of ABA Model Rule 8.4(g) because of the damage it will do to Tennessean attorneys' First Amendment rights.**

At the outset, I would note that the proposed Model Rule 8.4(g) is so deeply flawed that its proponents, in their Petition to this Court urging its adoption, find it necessary to state that "proposed Rule 8.4(g) leaves a sphere of private thought and private activity for which lawyers will remain free from regulatory scrutiny." (Pet. at 6). When a rule is so broad in scope and so vague in meaning that its proponents feel such a

* Sent to appellatecourtclerk@tncourts.gov on January 8, 2018.

** With few exceptions, the substantive content of this Comment Letter is taken from a Draft Comment Letter written by the Christian Legal Society, of which I have been a member. My submission of their letter is by way of endorsement of their analysis.

statement is necessary to its defense, that rule is a bad rule. Such a rule should not be imposed on Tennessee attorneys whose ability to practice law depends on not unwittingly stepping out of the vague, undefined "sphere of private thought and private activity" that the proposed Rule 8.4(g) does not subject to "regulatory scrutiny." As the Petition itself illustrates, proposed Rule 8.4(g) is truly a speech code for lawyers and should be rejected by this Court.

My background. I was admitted to the Bar of this State in 2008, and I have remained a member since that time. Beginning in 2011, I left the active practice of law in order to pursue a calling to the Roman Catholic priesthood. Since then, I have been pursuing the course of formation and education required by the Catholic Church for those who aspire to receive the Sacrament of Holy Orders in the presbyteral rank. Though I am writing in a personal capacity, and in no way represent my parish, the Diocese of Nashville, or the Holy See, my views and opinions are guided and formed by not only my deeply-held religious faith, but also by my training and experience as a Tennessee attorney.

I. This Court Should Not Adopt the Deeply Flawed ABA Model Rule 8.4(g) but Instead Should Keep the Current Comment [3] Accompanying Rule 8, RPC 8.4(d).

As recently as 2013, this Court considered whether to adopt a black-letter rule significantly narrower than the Model Rule 8.4(g) currently under consideration. At the end of its deliberations, this Court wisely chose to adopt current Comment [3] to RPC 8.4 rather than a black-letter rule. In adopting Comment [3], this Court took, with only minor modifications, the ABA's Comment [3] that accompanied ABA Model Rule 8.4(d) from 1998 to August 2016.

The current Comment [3] to RPC 8.4 prohibits bias and prejudice that are prejudicial to the administration of justice by an attorney in the course of representing a client and reads as follows:

> [3] A lawyer who, in the course of representing a client, knowingly manifests, by words or conduct, bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation or socio-economic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d).

Given the Court's recent adoption of Comment [3], as well as the fact that there has been no empirical showing of a need for revisiting the recent decision to adopt Comment[3] rather than a black-letter rule, Tennessee should not become only the second state to adopt the new, deeply flawed ABA Model Rule 8.4(g). Current Comment [3] strikes the appropriate balance between the public interest and Tennessee attorneys' First Amendment rights. In contrast, Model Rule 8.4(g) threatens attorneys' First Amendment rights.

II. This Court Should Not Subject Tennessee Attorneys to a Rule that Has No Track Record in Any State.

The ABA claims that "as has already been shown in the jurisdictions that have such a rule, it will not impose an undue burden on lawyers."[1] But this claim is factually incorrect: ABA Model Rule 8.4(g) has not been adopted by any state bar, excepting Vermont, which only began its implementation on September 18, 2017. Therefore, no empirical evidence exists to support the ABA's claim that Model Rule 8.4(g) "will not impose an undue burden on lawyers." This Court should not make Tennessee the testing ground for the deeply flawed Model Rule 8.4(g).

Furthermore, despite the ABA's claim to the contrary, ABA Model Rule 8.4(g) is not a duplicate of any prior rule of professional conduct adopted by a state bar or state supreme court. Twenty-four states and the District of Columbia have adopted black-letter rules dealing with "bias" issues.[2] But each of these black-letter rules differs from ABA Model Rule 8.4(g), being in some significant way narrower than that rule.

Examples of the differences between state black-letter rules and Model Rule 8.4(g)'s expansive scope include:

- Many states' black-letter rules apply only to unlawful discrimination and require that another tribunal find that an attorney has engaged in unlawful discrimination before the disciplinary process can be initiated.

- Many states limit their rules to "conduct in the course of representing a client," in contrast to Model Rule 8.4(g)'s expansive scope of "conduct related to the practice of law."

- Many states require that the misconduct be prejudicial to the administration of justice.

- Almost no state black-letter rule enumerates all eleven of the Model Rule 8.4(g)'s protected characteristics.

- No black-letter rule utilizes Model Rule 8.4(g)'s "circular non-protection" for "legitimate advocacy . . . consistent with these rules."

Thirteen states, including Tennessee, have adopted a comment dealing with "bias" issues, but not a black-letter rule. Fourteen states have neither adopted a rule nor a comment addressing "bias" issues.

---

1 Letter from John S. Gleason, Chair, Center for Professional Responsibility Policy Implementation Committee, to Chief Justice Pleicones, Chief Justice, Supreme Court of South Carolina, September 29, 2016, at 1.

2 Anti-Bias Provisions in State Rules of Professional Conduct, App. B, ABA Standing Comm. on Ethics and Professional Responsibility, Working Discussion Draft Revisions to Model Rule 8.4, Language Choices Narrative, July 16, 2015, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/language_choice_narrative_with_appendices_final.authcheckdam.pdf.

Because no state, except Vermont as of September 2017, has adopted ABA Model Rule 8.4(g), the proposed rule has no track record whatsoever. Nor is there empirical evidence demonstrating a need in Tennessee for the adoption of the proposed rule. Nor does the proposed rule solve a problem that is not already adequately addressed by application of the current Comment [3] that accompanies RPC 8.4.

III. This Court should not adopt Model Rule 8.4(g) because official bodies in Illinois, Maine, Montana, Pennsylvania, Texas, and South Carolina have urged rejection of Model Rule 8.4(g), while Nevada and Louisiana recently abandoned efforts to adopt it.

In June 2017, the Supreme Court of **South Carolina** became the first state supreme court to take official action regarding Model Rule 8.4(g) when it rejected adoption of the rule. http://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2017-06-20-01. The Court acted on the recommendation of the House of Delegates of the South Carolina Bar, as well as the South Carolina Attorney General. http://2hsvz0l74ah31vgcm16peuy12tz.wpengine.netdna- cdn.com/wp-content/uploads/2017/05/McCravy-J.-OS-10143-FINAL-Opinion-5-1-2017-01331464xD2C78-01336400xD2C78.pdf.

On November 30, 2017, the Supreme Court of **Maine** announced that it had not adopted ABA Model Rule 8.4(g), when it announced a comment period on a entirely different version. http://www.courts.maine.gov/rules_adminorders/rules/proposed/mr_prof_conduct_proposed_am end_2017-11-30.pdf ("Maine has considered, but not adopted, the ABA Model Rule 8.4(g).")

In December 2016, the **Texas** Attorney General issued an opinion opposing ABA Model Rule 8.4(g). The Texas Attorney General opined that "if the State were to adopt Model Rule 8.4(g), its provisions raise serious concerns about the constitutionality of the restrictions it would place on members of the State Bar and the resulting harm to the clients they represent." https://www.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2016/kp0123.pdf.

On December 2, 2017, the Disciplinary Board of the Supreme Court of **Pennsylvania** explained that Model Rule 8.4(g) was too broad:

> It is our opinion, after careful review and consideration, that the breadth of ABA Model Rule 8.4(g) will pose difficulties for already resource-strapped disciplinary authorities. The Model Rule . . . subjects to discipline not only a lawyer who knowingly engages in harassment or discrimination, but also a lawyer who negligently utters a derogatory or demeaning comment. A lawyer who did not know that a comment was offensive will be disciplined if the lawyer should have known that it was.

http://www.pabulletin.com/secure/data/vol46/46-49/2062.html.

On December 10, 2017, the **Illinois** State Bar Association Assembly "voted overwhelmingly to oppose adoption of the rule in Illinois." https://iln.isba.org/blog/2016/12/15/isba-assembly-oks-futures-report-approves-ube-and- collaborative-law-proposals.

On April 12, 2017, the **Montana** Legislature adopted a joint resolution expressing its view that Model Rule 8.4(g) would unconstitutionally infringe on the constitutional rights of Montana citizens, and urging the Montana Supreme Court not to adopt Model Rule 8.4(g). http://leg.mt.gov/bills/2017/BillPdf/SJ0015.pdf. The impact of Model Rule 8.4(g) on "the speech of legislative staff and legislative witnesses, who are licensed by the Supreme Court of the State of Montana to practice law, when they are working on legislative matters or testifying about legislation before Legislative Committees" greatly concerned the Montana Legislature. Mont. Legis. Jt. Res. 3.

On September 25, the Supreme Court of **Nevada** granted the request of the Board of Governors of the State Bar of Nevada to withdraw its petition urging adoption of Model Rule 8.4(g). https://www.nvbar.org/wp-content/uploads/ADKT-0526-withdraw-order.pdf. In a letter to the Court, dated September 6, 2017, the State Bar President explained that "the language used in other jurisdictions was inconsistent and changing," therefore, "the Board of Governors determined it prudent to retract [the Petition] with reservation to refile [it] when, and if the language in the rule sorts out in other jurisdictions."

On October 30, 2017, the **Louisiana** Rules of Professional Conduct Committee, which had spent a year studying a proposal to adopt a version of Model Rule 8.4(g), voted "not to recommend the proposed amendment to Rule 8.4 to either the House of Delegates or to the Supreme Court." https://www.lsba.org/BarGovernance/CommitteeInfo.aspx?Committee=01fa2a59-9030-4a8c- 9997-32eb7978c892.

IV. This Court Should Not Adopt Model Rule 8.4(g) Because its Expansive Scope Threatens All Attorneys' First Amendment Rights.

In August 2016, the American Bar Association's House of Delegates adopted a new disciplinary rule, Model Rule 8.4(g), making it professional misconduct for a lawyer to engage in harassment or discrimination in conduct related to the practice of law on the basis of eleven protected characteristics.[3] Unfortunately, in adopting the new model rule, the ABA largely ignored over 450 comment letters,[4] most opposed to the rule change. The ABA's own Standing Committee on Professional Discipline filed a comment letter[5]

3 The rule is found at American Bar Association Standing Committee on Ethics and Professional Responsibility, Section of Civil Rights and Social Justice Commission on Disability Rights, Diversity & Inclusion 360 Commission, Commission on Racial and Ethnic Diversity in the Profession, Commission on Sexual Orientation and Gender Identity, Commission on Women in the Profession, Report to the House of Delegates accompanying Revised Resolution 109, Aug. 2016, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/final_revised_resolution_an d_report_109.authcheckdam.pdf.

4 American Bar Association website, Comments to Model Rule 8.4, http://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/modruleprofconduct8_4/mr_8_4_comments.html.

5 Letter from Ronald R. Rosenfeld, Chair ABA Standing Committee On Professional Responsibility, to Myles Lynk, Chair of the ABA Standing Committee On Ethics and Professional Responsibility, Mar. 10, 2016,

questioning whether there was a demonstrated need for the rule change and raising concerns about its enforceability (although the Committee dropped its opposition immediately prior to the August 8th vote).

The ABA's new Model Rule 8.4(g) poses a serious threat to attorneys' First Amendment rights and should be rejected. If adopted, the proposed rule would have a chilling effect on attorneys' ability to engage in free speech, religious exercise, assembly, and expressive association in the workplace and the broader public square.[6]

A. Model Rule 8.4(g) Operates as a Speech Code for Attorneys.

There are many areas of concern with the proposed rule. Perhaps the most troubling is the likelihood that it will be used to chill lawyers' expression of disfavored political, social, and religious viewpoints on a multitude of issues. Because lawyers often are the spokespersons and leaders in political, social, or religious movements, a rule that can be employed to discipline a lawyer for his or her speech on such issues should be rejected as a serious threat to freedom of speech, free exercise of religion, and freedom of political belief.

Two renowned constitutional scholars have written about their concerns regarding the chilling effect of ABA Model Rule 8.4(g) on attorneys' freedom of speech. Professor Ronald Rotunda has written a treatise on American constitutional law,[7] as well as the ABA's treatise on legal ethics.[8] He demonstrated the problem Model Rule 8.4(g) poses for lawyers' speech in a Wall Street Journal article entitled "The ABA Overrules the First Amendment."[9] He explained that:

> In the case of rule 8.4(g), the standard, for lawyers at least, apparently does not include the First Amendment right to free speech. Consider the following form of "verbal" conduct when one lawyer tells another, in connection with a case, "I abhor the idle rich. We should raise capital gains taxes." The lawyer has just violated the ABA rule by manifesting bias based on socioeconomic status.

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http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/20160310%20Rosenfeld-Lynk%20SCPD%20Proposed%20MRPC%208- 4%20g%20Comments%20FINAL%20Protected.authcheckdam.pdf.

6 The Attorney General of Texas recently issued an opinion that "if the State were to adopt Model Rule 8.4(g), its provisions raise serious concerns about the constitutionality of the restrictions it would place on members of the State Bar and the resulting harm to the clients they represent." Texas A.G. Op. No. KP-0123, 2016 WL 7433186 (Dec. 20, 2017), https://www.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2016/kp0123.pdf.

7 See, *e.g.*, AMERICAN CONSTITUTIONAL LAW: THE SUPREME COURT IN AMERICAN HISTORY, VOLUME I – INSTITUTIONAL POWERS (West Academic Publishing, St. Paul, MN. 2016); AMERICAN CONSTITUTIONAL LAW: THE SUPREME COURT IN AMERICAN HISTORY, VOLUME II – LIBERTIES (West Academic Publishing, St. Paul, MN. 2016); Principles of Constitutional Law (Thomson/West, St. Paul, Minnesota, 5th ed. 2016) (with John E. Nowak).

8 *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility* (ABA-Thomson Reuters, Eagan, Minn., 14th ed. 2016).

9 Ron Rotunda, "The ABA Overrules the First Amendment: The legal trade association adopts a rule to regulate lawyers' speech," *The Wall Street Journal*, Aug. 16, 2016, http://www.wsj.com/articles/the-aba-overrules-the-first- amendment-1471388418.

Professor Rotunda also recently published an extensive critique of Model Rule 8.4(g), entitled "The ABA Decision to Control What Lawyers Say: Supporting 'Diversity' But Not Diversity of Thought."[10] His analysis is essential to understanding the threat that the new rule poses to attorneys' freedom of speech.

On November 20, 2017, at the Federalist Society's National Convention, Professor Rotunda participated in a panel with former ABA President Paulette Brown and Professor Stephen Gillers on Model Rule 8.4(g). htpps://www.youtube.com/watch?v=V6rDPjqBcQg.

Influential First Amendment scholar and editor of the daily legal blog, The Volokh Conspiracy, UCLA Professor Eugene Volokh has similarly described the new rule as a speech code for lawyers, explaining:[11]

> Or say that you're at a lawyer social activity, such as a local bar dinner, and say that you get into a discussion with people around the table about such matters — Islam, evangelical Christianity, black-on-black crime, illegal immigration, differences between the sexes, same-sex marriage, restrictions on the use of bathrooms, the alleged misdeeds of the 1 percent, the cultural causes of poverty in many households, and so on. One of the people is offended and files a bar complaint.
>
> Again, you've engaged in "verbal . . . conduct" that the bar may see as "manifest[ing] bias or prejudice" and thus as "harmful." This was at a "social activit[y] in connection with the practice of law." The state bar, if it adopts this rule, might thus discipline you for your "harassment."

In a two-minute video released by the Federalist Society, Professor Volokh explains why Model Rule 8.4(g) is a speech code. In a debate at the Federalist Society's National Student Symposium in March 2017, Professor Volokh demonstrated the flaws of Model Rule 8.4(g) despite his opponent's attempts to gloss over them. https://www.youtube.com/watch?v=cOivGxOUx4g.

These significant red flags raised by leading First Amendment scholars should not be ignored. The proposed rule would create a multitude of potential problems for attorneys who serve on nonprofit boards, speak on panels, teach at law schools, or otherwise engage in public discussions regarding current political, social, and religious questions.

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10 Ronald D. Rotunda, "The ABA Decision to Control What Lawyers Say: Supporting 'Diversity' But Not Diversity of Thought," The Heritage Foundation, Oct. 6, 2016, http://thf-reports.s3.amazonaws.com/2016/LM-191.pdf.

11 Eugene Volokh, "A Speech Code for Lawyers, Banning Viewpoints that Express 'Bias,' including in Law-Related Social Activities," *The Washington Post*, Aug. 10, 2016, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/10/a-speech-code-for-lawyers-banning- viewpoints-that-express-bias-including-in-law-related-social-activities-2/?tid=a_inl&utm_term=.f4beacf8a086.

1. **By expanding its coverage to include all "conduct related to the practice of law," the proposed Rule 8.4(g) encompasses nearly everything a lawyer does, including conduct and speech protected by the First Amendment.**

Proposed Rule 8.4(g) raises troubling new concerns for every attorney because it explicitly applies to all "conduct related to the practice of law." Comment [4] to ABA Model Rule 8.4(g) explicitly delineates Model Rule 8.4(g)'s extensive reach: "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." (Emphasis supplied.)

Note that Model Rule 8.4(g) greatly expands upon its predecessor Comment [3] that accompanied ABA Model Rule 8.4(d) from 1998 through July 2016, which is the current Comment [3] to Tennessee RPC 8.4. First, the proposed Model Rule 8.4(g) has an accompanying comment that makes clear that "conduct" encompasses "speech," when it states that "discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others." (Emphasis supplied.) Second, Model Rule 8.4(g) is much broader in scope than its predecessor Comment [3], which applied only to conduct "in the course of representing a client." Instead, the ABA's Model Rule 8.4(g) applies to all "conduct related to the practice of law," including "business or social activities in connection with the practice of law." As discussed below, this is a breathtaking expansion of the scope of former ABA Comment [3], which is the current Comment [3] that accompanies RPC 8.4 in this Court's Rules of Professional Conduct. Third, the predecessor ABA Comment [3] speaks in terms of "actions when prejudicial to the administration of justice." By deleting that qualifying phrase, the new Rule 8.4(g) also greatly expands the reach of the rule into attorneys' lives.

Indeed, the substantive question becomes, what conduct does Rule 8.4(g) not reach? Virtually everything a lawyer does is "conduct related to the practice of law." Swept up in the rule are dinners, parties, golf outings, conferences, and any other business or social activity that lawyers attend. Most likely, the rule includes all "business or social activities in connection with the practice of law" because there is no real way to delineate between the two. Much of a lawyer's social life can be viewed as business development and opportunities to cultivate relationships with current clients or gain exposure to new clients.

For example, activities likely to fall within the proposed Rule 8.4(g)'s scope include:

- presenting CLE courses at conferences or through webinars
- teaching law school classes as a faculty or adjunct faculty member
- publishing law review articles, blogposts, and op-eds
- giving guest lectures at law school classes
- speaking at public events
- participating in panel discussions that touch on controversial political,

religious, and social viewpoints
- serving on the boards of various religious or other charitable institutions
- lending informal legal advice to nonprofits
- serving at legal aid clinics
- serving political or social action organizations
- lobbying for or against various legal issues
- serving one's congregation
- serving one's alma mater if it is a religious institution of higher education
- serving religious ministries that assist prisoners, the underprivileged, the homeless, the abused, substance abusers, and other vulnerable populations
- serving on the boards of fraternities or sororities
- volunteering with or working for political parties
- working with social justice organizations
- any pro bono work that involves advocating for or against controversial socioeconomic, religious, social, or political issues

2. Attorneys could be subject to discipline for guidance they offer when serving on the boards of their congregations, religious schools and colleges, or other religious ministries.

Many lawyers sit on the boards of their congregations, religious schools and colleges, and other religious nonprofit ministries. These ministries provide incalculable good to people in their local communities, as well as nationally and internationally. These ministries also face innumerable legal questions and regularly turn to the lawyers serving as volunteers on their boards for pro bono guidance.

As a volunteer on religious institutions' boards, a lawyer may not be "representing a client," but may nonetheless be engaged in "conduct related to the practice of law." For example, a lawyer may be asked to help craft her church's policy regarding whether its clergy will perform marriages or whether it will host receptions for weddings that are contrary to its religious beliefs. A religious college may ask a lawyer who serves on its board of trustees to review its housing policy or its student code of conduct. Drafting and reviewing legal policies may qualify as "conduct related to the practice of law," but surely a lawyer should not fear being disciplined for volunteer legal work she performs for her church or her alma mater.

By chilling attorneys' speech, the rule is likely to do real harm to religious institutions and their good works in their communities. A lawyer should not have to worry about whether her volunteer work treads too closely to the vague line of "conduct related to the practice of law," yet ABA Model Rule 8.4(g) creates such concerns. Because ABA Model Rule 8.4(g) seems to prohibit lawyers from providing counsel, whether paid or volunteer, in these contexts, the rule will have a stifling and chilling effect on lawyers' free speech and free exercise of religion when serving their congregations and religious institutions.

3. Attorneys' public speech on political, social, cultural, and religious topics would be subject to discipline.

Lawyers often are asked to speak to community groups, classes, and other audiences about current legal issues of the day. They frequently participate in panel discussions about the pros and cons of various legal questions regarding sensitive social and political issues. Of course, lawyers are asked to speak because they are lawyers. A lawyer's speaking engagements often have a dual purpose of increasing the lawyer's visibility and creating new business opportunities.

Writing -- "Verbal conduct" includes written communication. Is a law professor or adjunct faculty member subject to discipline for a law review article that explores controversial topics or expresses unpopular viewpoints? Must lawyers forswear writing blogposts or letters to the editor because someone may file a complaint with the bar? If so, public discourse and civil society will suffer from the ideological paralysis that Model Rule 8.4(g) will impose on lawyers.

Speaking -- It would seem that all public speaking by lawyers on legal issues falls within Model Rule 8.4(g)'s prohibition. But even if some public speaking were to fall outside the parameters of "conduct related to the practice of law," how is a lawyer to know which speech is safe and which will subject him to potential discipline? May a lawyer participate in a panel discussion only if all the lawyers on the panel speak in favor of the inclusion of various protected categories in a nondiscrimination law being debated in the state legislature? Is a lawyer subject to discipline if she testifies before a city council against amending a nondiscrimination law to add any or all the protected characteristics listed in Model Rule 8.4(g)? Is a candidate for office subject to discipline for socio-economic discrimination if she proposes that only low-income students be allowed to participate in government tuition assistance programs?

The proposed rule creates a cloud of doubt that will inevitably chill lawyers' public speech on one side of these current political and social issues, while simultaneously creating no disincentive for lawyers who speak on the opposing side of these controversies. Sadly, we live at a time when many people, including lawyers, are willing to suppress the free speech of those with whom they disagree. At a time when freedom of speech needs more breathing space, not less, Model Rule 8.4(g) chills attorneys' speech.

4. Attorneys' membership in religious, social, or political organizations may be subject to discipline.

Model Rule 8.4(g) raises severe doubts about the ability of lawyers to participate in political, social, or religious organizations that promote traditional values regarding sexual conduct and marriage. For example, in 2015, the California Supreme Court adopted a disciplinary rule that prohibits all California state judges from participating in Boy Scouts because of the organization's teaching regarding sexual conduct.[12]

12 Calif. Sup. Ct., Media Release, "Supreme Court Eliminates Ethics Exception that Permitted Judges to Belong to Nonprofit Youth Organizations that Discriminate," Jan. 23, 2015, *available at*

Would ABA Model Rule 8.4(g) subject lawyers to disciplinary action for participating with their children in youth organizations that teach traditional values regarding sexual conduct or marriage? Would it subject lawyers to disciplinary action for belonging to political organizations that advocate for laws that promote traditional values regarding sexual conduct and marriage?

ABA Model Rule 8.4(g) raises additional concerns about whether an attorney may be disciplined for her membership in a religious organization that chooses its leaders according to its religious beliefs or that holds to the religious belief that marriage is only between a man and a woman or numerous other religious beliefs implicated by the rule's strictures. See Texas A.G. Op., https://www.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2016/kp0123.pdf. Bear in mind that some government officials claim that the right of a religious group to choose its leaders according to its religious beliefs is "religious discrimination."

B. ABA Model Rule 8.4(g) Would Institutionalize Viewpoint Discrimination Against Many Lawyers' Public Speech on Current Political, Religious, and Social Issues.

As seen in the ABA's Comment [4], ABA Model Rule 8.4(g) explicitly protects some viewpoints over others by allowing lawyers to "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." Because "conduct" includes "verbal conduct," the proposed rule would impermissibly favor speech that "promote[s] diversity and inclusion" over speech that does not.

That is the very definition of viewpoint discrimination. The government cannot pass laws that allow citizens, including lawyers, to express one viewpoint on a particular subject but penalize citizens, including lawyers, for expressing an opposing viewpoint on the same subject. It is axiomatic that viewpoint discrimination is "an egregious form of content discrimination," and that "[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). Yet Model Rule 8.4(g) explicitly promotes one viewpoint over others.

Even more importantly, what speech or action does or does not "promote diversity and inclusion" completely depends on the beholder's subjective beliefs. Where one person sees inclusion, another may see exclusion. Where one person sees the promotion of diversity, another may equally sincerely see the promotion of uniformity.

Because enforcement of Model Rule 8.4(g) gives governmental actors unbridled discretion to determine which speech is permissible and which is impermissible, which speech "promote[s] diversity and inclusion" and which does not, the rule clearly countenances viewpoint discrimination based on governmental actors' subjective biases. Courts have recognized that giving any government official such unbridled discretion to

http://www.courts.ca.gov/documents/sc15-Jan_23.pdf.

suppress citizens' free speech is unconstitutional. *See, e.g.*, *Child Evangelism Fellowship* v. *Montgomery Cty. Pub. Sch.*, 457 F.3d 376, 384 (4th Cir. 2006); *DeBoer v. Village of Oak Park*, 267 F.3d 558, 572-574 (7th Cir. 2001).

C. A Troubling Gap Exists Between Protected and Unprotected Speech Under ABA Model Rule 8.4(g).

Model Rule 8.4(g) cursorily states that it "does not preclude legitimate advice or advocacy consistent with these rules." But the qualifying phrase "consistent with these rules" makes Rule 8.4(g) utterly circular. Like the proverbial dog chasing its tail, Rule 8.4(g) protects "legitimate advice or advocacy" only if it is "consistent with" Rule 8.4(g). That is, speech is permitted by Rule 8.4(g) if it is permitted by Rule 8.4(g).

This circularity itself compounds the threat that Model Rule 8.4(g) poses to attorneys' freedom of speech. The epitome of an unconstitutionally vague rule, Rule 8.4 violates the Fourteenth Amendment as well as the First Amendment. Again, who decides what speech is legitimate? By what standards? It is not good for the profession or for a robust civil society for lawyers to be potentially subject to disciplinary action every time they speak or write on a topic that may cause someone who disagrees to file a disciplinary complaint to silence the attorney.

D. Model Rule 8.4(g)'s threat to free speech is compounded by the fact that it utilizes a negligence standard rather than a knowledge/intent requirement.

As Professor Dane Ciolino, an ethics law professor at Loyola University New Orleans College of Law, has explained:

> [ABA Model Rule 8.4(g)] subjects to discipline not only a lawyer who knowingly engages in harassment or discrimination, but also a lawyer who negligently utters a derogatory or demeaning comment. So, a lawyer who did not know that a comment was offensive will be disciplined if the lawyer should have known that it was. It will be interesting to see how the 'objectively reasonable lawyer' will be constructed for purposes of making this determination.

Prof. Dane S. Ciolino, "LSBA Seeks Public Comment on Proposed Anti-Discrimination Rule of Professional Conduct," *Louisiana Legal Ethics*, Aug. 6, 2017, https://lalegalethics.org/lsba-seeks-public-comment-on-proposed-anti-discrimination-rule-of-professional-conduct/ (original emphasis).

V. This Court Should Not Adopt Model Rule 8.4(g) Because the Two Sentences Added by the Tennessee Bar Association as Attempts to Remedy Model Rule 8.4(g)'s Damage to Attorneys' Speech Rights Provide No Additional Protection.

Model Rule 8.4(g) is a speech code for lawyers, threatening their First Amendment rights in myriad ways. In its Petition urging adoption of Model Rule 8.4(g), the Tennessee Bar Association claims that two sentences which it added will adequately protect Tennessee attorneys' First Amendment rights. But even the most cursory reading of these two sentences proves that claim to be false.

Sentence #1: Proposed Comment [4a] would add to proposed Model Rule 8.4(g) this sentence: "Section (g) does not restrict any speech or conduct not related to the practice of law, including speech or conduct protected by the First Amendment. Thus, a lawyer's speech or conduct unrelated to the practice of law cannot violate this Section." (Pet., Ex. A at 3).

This sentence obviously provides no added protection because Model Rule 8.4(g) applies to "conduct related to the practice of law." Its text does not claim to apply to "conduct not related to the practice of law. Therefore, a sentence to protect "speech or conduct not related to the practice of law" does nothing to cabin the damage done by Model Rule 8.4(g) because of the broad scope of "conduct related to the practice of law." The sentence is meaningless.

Sentence #2: Proposed Comment [4] would add this sentence: "Legitimate advocacy protected by Section (g) includes advocacy in any conduct related to the practice of the law, including circumstances where a lawyer is not representing a client and outside traditional settings where a lawyer acts as an advocate, such as litigation." (Pet., Ex. A at 2). Again, this is an empty sentence. It begs the question of what is "legitimate advocacy" and who decides whether a lawyer's words are protected "legitimate advocacy" or unprotected "illegitimate advocacy."

VI. Model Rule 8.4(g) has been interpreted in at least one state to override a lawyer's ability to accept, decline, or withdraw from a representation in accordance with Rule 1.16.

The only state to have adopted Model Rule 8.4(g), Vermont, included its assurance that the rule "does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16." But the Vermont Supreme Court explained in its accompanying Comment 4 that "[t]he optional grounds for withdrawal set out in Rule 1.16(b) must also be understood in light of Rule 8.4(g). They cannot be based on discriminatory or harassing intent without violating that rule." It also explained that, under the mandatory withdrawal provision of Rule 1.16(a), "a lawyer should withdraw if she or he concludes that she or he cannot avoid violating Rule 8.4(g)." https://www.vermontjudiciary.org/sites/default/files/documents/PROMULGATEDVRPrP 8.4(g). pdf. The Vermont Supreme Court's interpretation of that language in its Comment

4 creates reasonable doubt that Rule 1.16 provides adequate protection for attorneys' ability to accept, decline, or withdraw from a representation.

VII. Bar Officials in California and Pennsylvania Have Expressed Grave Reservations About Whether State Bars Have the Resources to Become the Tribunal of First Resort for Employment Claims Against Attorneys and Law Firms.

California State Bar authorities voiced serious concern last year when considering whether to modify their disciplinary rule to something more akin to the ABA Model Rule 8.4(g). California's current Rule 2-400 requires that a separate judicial or administrative tribunal have found that a lawyer committed unlawful discrimination before disciplinary charges can be brought. According to Justice Lee Smalley Edmon, the presiding justice of the Second District, Division Three of the California Courts of Appeals and the Chair of the State Bar's Second Commission for the revision of the Rules of Professional Conduct, "[t]he proposed elimination of current Rule 2-400(C)'s pre-discipline adjudication requirement has raised concerns among some members of the commission and the Board of Trustees concerning due process, the increased demands on State Bar resources that may result, and questions regarding any evidentiary or preclusive effects a State Bar Court decision may have in other proceedings."[13] For that reason, she explained, an alternative was being offered to leave in place Rule 2-400(C)'s requirement that an attorney cannot be disciplined for unlawful discrimination unless a court, other than the State Bar Court, has found that the attorney engaged in unlawful discrimination under state or federal law and any appeal is final and leaves the finding of unlawful discrimination standing.

Similarly, an official for the California State Bar Court noted that the Commission should seriously reflect upon the differences between the State Bar Court's adjudicatory process and the state civil courts' adjudicatory processes.[14] In the words of the State Bar Court official, "the unique nature of the State Bar Court and its own Rules of Procedure differ significantly from Superior Court civil proceedings."[15] First, discovery is significantly more limited in State Bar Court proceedings. Second, the rules of evidence are different. "State Bar Court proceedings are not conducted according to the Evidence Code as applied in civil cases."[16] Any relevant evidence must be admitted, and hearsay evidence may be used. Third, "[i]n disciplinary proceedings, attorneys are not entitled to a jury trial."[17]

The California Commission Provisional Report noted other concerns raised by removing the pre-discipline adjudication requirement. It described the problems with the requirement's deletion as follows:

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13 Justice Lee Smalley Edmon, "Wanted: Input on Proposed Changes to the Rules of Professional Conduct," *California Bar Journal*, Aug. 2016, http://calbarjournal.com/August2016/Opinion/LeeSmalleyEdmon.aspx.

14 Comm'n Provisional Report & Recommendation: Rule 8.4.1 [2-400], at 9, http://ethics.calbar.ca.gov/Portals/9/documents/2d_RRC/Public%20Comment%20X/RRC2%20-%208.4.1%20[2-400]%20-%20Rule%20-%20DFT5%20(02-19-16)%20w-ES-PR.pdf.

15 *Id.*

16 *Id.*

17 *Id.*

> Eliminating current rule 2-400's threshold requirement that a court of competent jurisdiction has found that the alleged unlawful conduct had occurred raises substantial concerns, including due process, . . . lack of [the State Bar's Office of Chief Trial Counsel] resources and expertise to prosecute the charge effectively, and the potential that disciplinary proceedings would be used as the testing ground for new theories of discrimination, or as leverage in otherwise unrelated civil disputes between lawyers and former clients.[18]

Similarly, a recent memorandum outlining Pennsylvania's Proposed Rule 8.4(g) correctly identified two defects of ABA Model Rule 8.4(g) that Pennsylvania's Proposed Rule 8.4(g) would avoid.[19] Pennsylvania's proposed rule would adopt a rule like several states have, including Illinois, Iowa, and California, that requires that a judicial or administrative tribunal, other than a state bar tribunal, find that an attorney committed unlawful discrimination before the state bar may entertain a disciplinary complaint against the attorney. The memorandum identifies the first defect of ABA Model Rule 8.4(g) to be its "potential for Pennsylvania's lawyer disciplinary authority to become the tribunal of first resort for workplace harassment or discrimination claims against lawyers." Mem. at 2. Second, as the Memorandum concluded, "after careful review and consideration ... the breadth of ABA Model Rule 8.4(g) will pose difficulties for already resource-strapped disciplinary authorities."[20]

Conclusion

The threat of losing one's license to practice law is a heavy penalty and demands a stringent process, one in which the standards for enforcement are rigorous and respectful of the attorneys' rights, as well as the rights of others. Comment [3] of the Tennessee Rules of Professional Conduct already provides a carefully crafted balance between the need to prevent discrimination and the need to respect attorneys' due process and First Amendment rights.

Because adoption of the ABA Proposed Model Rule 8.4(g) would have a chilling effect on attorneys' First Amendment rights, it should not be adopted. Attorneys must remain free to engage in speech, religious exercise, assembly, and expressive association in their workplaces and the public square.

Because no state, except Vermont in September 2017, has adopted ABA Model Rule 8.4(g), it has no track record. Nor is there any empirical evidence showing a need to adopt the excessively broad ABA Model Rule 8.4(g).

For all of these reasons, I uge that the ABA Model Rule 8.4(g) not be adopted. Thank you for your consideration of these comments.

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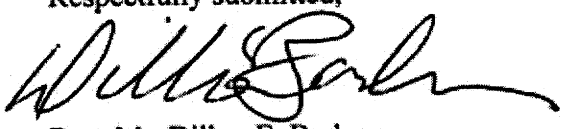
18 Comm'n Report at 13.

19 "Proposed Amendments to the Pennsylvania Rules of Professional Conduct Relating to Misconduct," 46 Pa.B. 7519 (Dec. 3, 2016) ["Memorandum"].

20 *Id.*

Respectfully submitted,



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* The foregoing comment letter is submitted in the writer's personal capacity as a Tennessee attorney and does not necessarily reflect the views, opinions, or positions of St. Edward Parish, the Diocese of Nashville, or the Holy See.

appellatecourtclerk - No. ADM2017-02244

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Subject: No. ADM2017-02244
Attachments: NLA Model Rule 8.4g Statement-c.pdf

Dear Mr. James M. Hivner,

In response to the Supreme Court of Tennessee's order of November 21, 2017 regarding the petition for adoption of RPC 8.4(g), the National Lawyers Association submits the attached written comment against adoption of this model rule for your consideration. If you could please provide a response that this comment was received I would greatly appreciate it. Thank you.

Best regards,

Joshua McCaig
NLA President

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NATIONAL LAWYERS ASSOCIATION

COMMISSION FOR THE PROTECTION OF CONSTITUTIONAL RIGHTS

STATEMENT ON ABA MODEL RULE 8.4(g)

The National Lawyers Association

The National Lawyers Association ("NLA") is a 501(c)(6) non-profit, non-partisan professional membership association founded in 1993 comprised of lawyers, legal scholars, professors, law students and other legal and policy professionals committed to expanding liberty, increasing individual freedom, promoting justice, and strengthening the rule of law in America. Since its founding, the NLA's membership has included thousands of attorneys in all 50 states.

On behalf of its members, the NLA's Commission for the Protection of Constitutional Rights established a special Task Force to closely examine the language of new Model Rule 8.4(g), the findings of which are summarized below. Based on this review, the NLA finds that Model Rule 8.4(g), if adopted by any state and enforced against any attorney, would violate the free speech, free association, and free exercise rights of that state's attorneys under the First Amendment to the Constitution of the United States.

The New ABA Model Rule 8.4(g)

The American Bar Association's House of Delegates adopted the ABA Model Rules of Professional Conduct, formerly known as the Model Rules of Professional Responsibility, in 1983. The Rules serve as models for the ethics rules of most states. In fact, the Model Rules have been adopted, in some form or another, by every state except California, as well as by the District of Columbia. Periodically, the ABA amends the Rules and encourages states to adopt the amended language as part of the states' Rules of Professional Conduct.

Given the fact that an attorney's violation of a state's ethics Rules has real consequences, which vary from state to state, but which can range from a reprimand to disbarment, it is critical that the constitutionality of any proposed amendment of the Rules be closely evaluated prior to state adoption - for once adopted by a state, the Rules have the force and effect of law.

On August 8, 2016, the American Bar Association's House of Delegates amended Model Rule 8.4 – the Attorney Misconduct Rule – of the Model Rules of Professional Conduct by adding a subsection (g) to the Rule.

The language of Model Rule 8.4(g) reads:

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 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 also adopted three new Model Comments to the new Rule 8.4(g).

Model Comment [3] attempts to clarify what the new Model Rule means by prohibiting "discrimination" and "harassment." According to Comment [3], discrimination includes "harmful verbal...conduct that manifest bias or prejudice toward others." "Harassment includes...derogatory or demeaning verbal....conduct."

Model Comment [4] provides examples of the type of attorney speech and conduct which is "related to the practice of law." According to the Comment, such conduct includes, but is not limited to, "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."

FINDINGS OF THE NLA TASK FORCE ON MODEL RULE 8.4(g)

In accordance with its mandate, the NLA Task Force on Model Rule 8.4(g) focused only on the potential constitutional violations of the new Rule. The Task Force's findings are limited specifically to constitutional analysis. Other problems with the Rule, including that it, for the first time, expands attorney regulation and discipline into areas unconnected with prejudice to the administration of justice or conduct that renders an attorney unfit, and that it infringes upon attorneys' professional autonomy, are not addressed, only because such issues are outside the Task Force's mandate.

A. Model Rule 8.4(g) violates attorneys' First Amendment right to freedom of speech

Lawyers do not surrender their constitutional rights when they enter the legal profession. *In re Primus*, 436 U.S. 412, 432-33 (1978). See also *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1054 (1991)(disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment); *Shapero v. Ky. Bar Ass'n*, 486 U.S. 466, 469 (1988) (the First Amendment applies to state bar disciplinary actions through the Fourteenth Amendment).

Although decisions of the United States Supreme Court have held that an attorney's free speech rights may be circumscribed to some extent in the courtroom during a judicial proceeding, as well as outside the courtroom when speaking about a pending case, *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1071 (1991), Model Rule 8.4(g) extends far beyond the context of a judicial proceeding. It purports to restrict all speech that constitutes

"discrimination" or "harassment" whenever such speech is – however attenuated – "related to the practice of law." Model Comment [3] makes clear that this includes any so-called "harmful," "derogatory," or "demeaning" speech.

But speech is not unprotected merely because it is unpopular, harmful, derogatory or demeaning. In fact, offensive, disagreeable, and even hurtful speech is exactly the sort of speech the First Amendment protects. *Snyder v. Phelps*, 562 U.S. 443, 458 (2011). See also, *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"). Therefore, if an attorney engages in speech - although unpopular, derogatory, demeaning, or offensive – but the speech does not prejudice the administration of justice or render the attorney unfit, such speech is constitutionally protected.

"All ideas having even the slightest redeeming social importance - unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion - fall within the full protection of the First Amendment." *Roth v. United States*, 354 U.S. 476, 484 (1957). Contrary to these basic free speech principles, Model Rule 8.4(g) would severely restrict attorneys' ability to engage in meaningful debate on a range of important social and political issues.

Furthermore, by only proscribing speech that is unpopular, derogatory, demeaning, or harmful *toward members of certain designated classes*, the new Model Rule constitutes an unconstitutional content-based speech restriction. *American Freedom Defense Initiative v. Metropolitan Transp. Authority*, 880 F.Supp.2d 456 (S.D.N.Y. 2012) (ordinance prohibiting demeaning advertisements only on the basis of race, color, religion, national origin, ancestry, gender, age, disability or sexual orientation is an unconstitutional content-based violation of the First Amendment).

For example, under the new Rule a lawyer who speaks against same-sex marriage may be in violation of the Rule for engaging in speech that manifests discrimination on the basis of sexual orientation, while a lawyer who speaks in favor of same-sex marriage would certainly not be in violation of the Rule. That is a classic example of an unconstitutional content-based speech restriction.

"Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995).

Distinguished Professor of Jurisprudence at Chapman University, Fowler School of Law, Ronald Rotunda, provides a concrete example of how the new Model Rule may constitute an unconstitutional content-based speech restriction. He explains: "*At a . . .bar meeting dealing with proposals to curb police excessiveness, assume that one lawyer says, 'Black lives matter.'*

Another responds, 'Blue lives [i.e., police] matter, and we should be more concerned about black-on-black crime.' A third says, 'All lives matter.' Finally, another lawyer says (perhaps for comic relief), 'To make a proper martini, olives matter.' The first lawyer is in the clear; all of the others risk discipline." *The ABA Decision to Control What Lawyers Say: Supporting "Diversity" But Not Diversity of Thought*, Ronald D. Rotunda, Legal Memorandum No. 191, The Heritage Foundation, October 6, 2016.

In other words, whether a lawyer has or has not violated the new Model Rule will be determined solely by reference to the content of the speaker's speech. Although attorneys may be speaking on the same subject matter, whether their speech violates the Rule will depend entirely upon the content of their speech. Some of the attorneys will be immune, based solely upon the content of their speech. Others could be prosecuted, based solely upon the content of their speech.

Indeed, in the few states that have already modified their respective Rule 8.4 in similar ways, such Rules are being enforced as clearly unconstitutional free-standing speech codes. See, for example, *In the Matter of Stacy L. Kelley*, 925 N.E.2d 1279 (Indiana Supreme Court 2010), in which an Indiana attorney was professionally disciplined for asking someone if they were "gay," and *In the Matter of Daniel C. McCarthy*, 938 N.E.2d 698 (Indiana 2010) in which an attorney had his license suspended for applying a racially derogatory term to himself.

B. Model Rule 8.4(g) violates attorneys' First Amendment right to free exercise of religion

Model Rule 8.4(g) would also infringe upon an attorney's First Amendment right to free exercise of religion. For example, in the same-sex marriage context, the U.S. Supreme Court has emphasized that "religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned." *Obergefell v. Hodges*, 135 S. Ct. 25 84, 2607 (2015).

The new Model Rule, however, would discipline attorneys for expressing their religiously based opinions concerning same-sex marriage.

Professor Rotunda posits the example of Catholic attorneys who are members of an organization of Catholic lawyers and judges, like the Catholic Bar Association. If the Catholic Bar Association should host a CLE program in which members discuss and, based on Catholic teaching, voice objection to the Supreme Court's same-sex marriage rulings, those attorneys may be in violation of the Rule because they have engaged in conduct related to the practice of law that could be considered discrimination based on sexual orientation. Indeed – he points out – attorneys might be in violation of the new Rule merely for being members of such an organization. *The ABA Decision to Control What Lawyers Say: Supporting "Diversity" But Not Diversity of Thought*, Ronald D. Rotunda, Legal Memorandum No. 191, The Heritage

Foundation, October 6, 2016, pp. 4-5. And yet, such speech and the right to belong to the Catholic Bar Association would both be constitutionally protected.

By prohibiting both, the new Rule would constitute an unconstitutional infringement on not only the free speech and free association rights of attorneys, but their free exercise rights as well.

C. Model Rule 8.4(g) violates attorneys' First Amendment right to freedom of association

"[I]mplicit in the right to engage in activities protected by the First Amendment [is] a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. U.S.. Jaycees*, 468 U.S. 609, 622 (1984). "This right is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas." *Boy Scouts of America v. Dale*, 530 U.S. 640, 647-48 (2000). The First Amendment protects rights of association and assembly.

The new Model Rule 8.4(g), however, would violate attorneys' constitutionally protected rights to associate freely.

Under the new Rule an attorney could not belong to a legal organization, such as the Christian Legal Society, that requires its attorney members to acknowledge and agree with a Christian Statement of Faith, because belonging to such an organization would constitute conduct related to the practice of law and that "discriminates" against attorneys based on their religion. https://clsnet.org/page.aspx?pid=367. The Christian Legal Society also has a Community Life Statement in which members "renounce unbiblical behaviors, including . . . immoral conduct such as . . . engaging in sexual relations other than within a marriage between one man and one woman." https://clsnet.org/page.aspx?pid=494. An attorney belonging to such an organization would violate the new Model Rule because, again, such would constitute conduct related to the practice of law, and would "discriminate" on the basis of marital status and, some may argue, sexual orientation.

Nor would the new Model Rule allow attorneys to be members of the Catholic Bar Association, which requires its attorney members to be practicing Catholics because, again, belonging to such an organization would constitute conduct related to the practice of law and that "discriminates" against attorneys based on their religion.

Clearly, however, attorneys have a constitutional right to freely associate with other attorneys in pursuit of a wide variety of ends – including religious ends. The new Model Rule would clearly violate that right.

D. Model Rule 8.4(g) is unconstitutionally vague

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Vague laws offend several important values, among which are the following:

First, due to the fact that we assume that people are free to steer between lawful and unlawful conduct, we insist that laws give people of ordinary intelligence a reasonable opportunity to know what is prohibited, so that they may act accordingly. Vague laws may trap the innocent by not providing fair warning. *Grayned*, supra, at 108.

Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to state agents for enforcement on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. *Grayned*, supra, at 108-109.

And third, where a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked. *Grayned*, supra, at 109.

The language of Rule 8.4(g) violates all these principles.

(a) The term "harassment" is unconstitutionally vague. The new Model Rule prohibits attorneys from engaging in harassment of anyone on the basis of one of the protected classes. But the term "harassment" is not defined in the Rule, is subject to varied interpretations, and no standard is provided to determine whether conduct is or is not harassing.

Does expressing disagreement with someone's religious beliefs constitute harassment based on religion? Can merely being offended by an attorney's conduct or expressions constitute harassment? Can a single act constitute harassment, or must there be a series of acts? In order to constitute harassment, must the offending behavior consist of words, or could body language constitute harassment?

Many courts have expressly determined that the term "harass" is unconstitutionally vague. See, for example, *Kansas v. Bryan*, 910 P.2d 212 (Kan. 1996) (holding that the term "harasses," without any sort of definition or objective standard by which to measure the prohibited conduct, was unconstitutionally vague). *See also Are Stalking Laws Unconstitutionally Vague Or Overbroad*, 88 Nw. U. L. Rev. 769, 782 (1994) (the definition of "harass" is a constitutionally problematic provision due to the vagueness of the term "harass.").

Because the term "harass" is vague, it presents all three problems condemned by the U.S. Supreme Court – (1) it does not provide attorneys with sufficient notice as to what behavior is proscribed; (2) it allows those charged with enforcing the Rules of Professional Conduct to

enforce the Rule arbitrarily and selectively; and (3) its vagueness will chill the speech of attorneys who, not knowing where harassment begins and ends, will be forced to censor their free speech rights in an effort to avoid inadvertently violating the Rule.

The new Comments to the Rule attempt to define the term "harassment," but in doing so actually raise additional concerns. For example, Comment [3] to the new Rule provides that harassment includes *derogatory or demeaning verbal or physical conduct.* Unfortunately, rather than clarifying (let alone limiting) the meaning of the term "harassment," the terms "derogatory" and "demeaning" present the same vagueness issues as the term they are intended to define. Indeed, because it is not clear what speech is encompassed by the words "derogatory" and "demeaning," courts have found those terms to be unconstitutionally vague. *Hinton v. Devine*, 633 F.Supp. 1023 (E.D. Pennsylvania 1986) (the term "derogatory" without further definition is unconstitutionally vague); *Summit Bank v. Rogers*, 206 Cal.App.4th 669 (Cal.App. 2012) (statute prohibiting statements that are "derogatory to the financial condition of a bank" is facially unconstitutional due to vagueness).

(b) The term "discrimination" is unconstitutionally vague. It is certainly true that many statutes and ordinances prohibit discrimination, in a variety of contexts. But it's also true that such statutes and ordinances do not – as does the new Model Rule – merely prohibit "discrimination" and leave it at that. Rather, they spell out what specific behavior constitutes discrimination.

For example, Title VII does not merely provide that it shall be an unlawful employment practice for an employer to discriminate against persons on the basis of race, color, religion, sex, or national origin. Rather, Title VII sets forth in detail what employers are prohibited from doing. Title VII provides that "It shall be an unlawful employment practice for an employer: (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive, or tend to deprive, any individual of employment opportunities or otherwise adversely affect his status as an employee, on the basis of such individual's race, color, religion, sex or national origin." 42 U.S.C. § 2000e-2.

Likewise, the federal Fair Housing Act does not simply provide that one may not discriminate in housing based on race, color, religion, familial status, or national origin. It provides a description of what, specifically, is being prohibited: "[I]t shall be unlawful (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin. . . (d) To represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available. (e) For profit, to induce

or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, handicap, familial status, or national origin." 42 U.S.C. § 3604. And the Act provides precise definitions of important terms used in the Act, such as "dwelling," "person," "to rent," and "familial status." 42 U.S.C. § 3602.

Unlike other non-discrimination enactments, however, the new Model Rule simply states that "It is professional misconduct for a lawyer to: . . . (g) knowingly . . . discriminate against persons, 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" – leaving to the attorney's imagination what sorts of speech and behavior might be encompassed in that proscription.

Making matters worse, Model Comments [3] to Model Rule 8.4(g) states that the term "discrimination" includes "harmful verbal or physical conduct that manifests bias or prejudice towards others." The term "harmful" – in the context of attorney speech and conduct – is unconstitutionally vague because attorneys cannot with any degree of reasonable certainty determine what speech and conduct may be prohibited and what may be allowed.

(c) The phrase "conduct related to the practice of law" is unconstitutionally vague. Whereas the previous Model Rule applied only to attorney conduct while the attorney is acting in the course of representing a client – a relatively narrow and reasonably determinable aspect of a lawyer's activities – the new Rule applies to any conduct of an attorney that is in any way "*related to the practice of law.*" What conduct is related to the practice of law and what conduct is unrelated to the practice of law, however, is vague and not readily determinable.

The new Comment [4] attempts to provide guidance as to what the phrase "related to the practice of law" means. But not only is the Comment's definition nearly limitless – including within it *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* – but its list of activities related to the practice of law is an expressly non-exclusive list. Activities other than those expressly included in the Comment could also qualify as being in connection with the practice of law. But what those activities may be is difficult to determine. For example, does the phrase include comments made by an attorney while attending a birthday celebration for a law firm co-worker; or a statement made by an attorney at a cocktail party that the attorney is attending – at least in part – in order to make connections that will hopefully result in future legal work; or comments an attorney makes while serving on the governing board of the attorney's church and to whom the board periodically looks for church-related legal advice?

Because no attorney, with any reasonable degree of certainty, can determine what speech

or conduct is or is not "related to the practice of law," the new Rule is unconstitutionally vague.

E. Model Rule 8.4(g) is unconstitutionally overbroad

Even if an enactment is otherwise clear and precise in what conduct it proscribes, the law may nevertheless still be unconstitutionally overbroad if its reach prohibits constitutionally protected conduct. *Grayned*, supra, at 114.

It is clear that the new Model Rule is not only unconstitutionally vague, it is also unconstitutionally overbroad because, although it may apply to attorney conduct that might be unprotected – such as conduct that actually and significantly prejudices the administration of justice or that would clearly render an attorney unfit to practice law – Model Rule 8.4(g) would also sweep within its orbit lawyer speech that is clearly protected by the First Amendment, such as speech that might be unpopular, offensive, disparaging, or hurtful but that would not prejudice the administration of justice nor render the attorney unfit.

The terms "harmful verbal conduct" and "derogatory or demeaning verbal conduct" sweep into their ambit much speech that is clearly constitutionally protected. As noted above, speech is not unprotected merely because it is harmful, derogatory or demeaning. *Snyder v. Phelps*, supra at 458. In fact, that is precisely the sort of speech that is constitutionally protected. Speech that no one finds offensive needs no protection.

Courts have found terms such as "derogatory" and "demeaning" unconstitutionally overbroad. *Hinton v. Devine*, *supra* (the term "derogatory information" is unconstitutionally overbroad); *Summit Bank v. Rogers*, *supra* (statute defining the offense of making or transmitting an untrue "derogatory" statement about a bank is unconstitutionally overbroad because it brushes constitutionally protected speech within its reach and thereby creates an unnecessary risk of chilling free speech). *See also Saxe v. State College Area School Dist.*, 240 F.3d 200, 215 (3rd Cir. 2001) (school anti-harassment policy that banned any unwelcome verbal conduct which offends an individual because of actual or perceived race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics is facially unconstitutional).

And it is irrelevant whether such speech would ever actually be prosecuted by disciplinary authorities under the new Rule. The fact that a lawyer *could* be disciplined for engaging in such speech would, in and of itself, chill lawyers' speech – the very danger the overbreadth doctrine is designed to prevent.

CONCLUSION

After carefully reviewing the new ABA Model Rule 8.4(g) and its Comments, the National Lawyers Association finds that the new ABA Model Rule 8.4(g), if adopted by any state and enforced against any attorney, would violate an attorneys' free speech, free association, and free exercise rights under the First Amendment to the Constitution of the United States. Therefore, the National Lawyers Association recommends that no state adopt Model Rule 8.4(g), and that any state that might have adopted Model Rule 8.4(g) take all steps necessary to repeal and remove subsection (g) from its Rules of Professional Conduct.

Dated: March 7, 2017

NLA CPCR Task Force Members:

Rebecca Messall

Joshua McCaig

Bradley Abramson

Joe Miller

Gualberto Garcia Jones

Andrew Bath

Marsha I. Stiles

Joseph Meissner

appellatecourtclerk - Comment Regarding proposed Amendment to RPC 8.4(g)

ADM2017-02244

FILED

DEC 29 2017

Clerk of the Courts

Rec'd By _____

From: Alex Clark <alex.clark@atwoodandmoore.com>
To: "appellatecourtclerk@tncourts.gov" <appellatecourtclerk@tncourts.gov>
Date: 12/29/2017 4:15 PM
Subject: Comment Regarding proposed Amendment to RPC 8.4(g)

To whom it may concern,

The duty held by those who have chosen to practice law is a solemn one. A duty in which there is no place for discrimination of any kind. That the RPC currently utilizes mere comment to directly address the many forms of discrimination cannot be allowed to continue. The proposed rule addresses in clear language to whom and under what conditions discrimination occurs. At the same time it protects free speech rights of attorneys speaking outside conduct related to the practice of law. I humbly ask the Court to approve the proposed language.

Yours truly,

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appellatecourtclerk - Model Rule 8.4(g) ADM2017-02244

From: <james@heartfieldlaw.com>
To: <appellatecourtclerk@tncourts.gov>
Date: 12/26/2017 1:30 PM
Subject: Model Rule 8.4(g)

Dear Mr. Hivner,

I am writing to provide my strong objection to the proposed adoption of Model Rule 8.4(g). In my humble, as a practicing Tennessee attorney for the past 28 years, I believe this proposed Rule will unduly and improperly infringe upon my First Amendment rights of free speech and cannot envision how or why the Court would seriously entertain adopting this Rule. As such, my official public comment is that this Rule should not be adopted in Tennessee, and I appreciate your recording the same and passing along to the Court.

Thank you and best wishes for a fulfilling 2018.

James Heartfield
TN Bar 013824

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appellatecourtclerk - Docket No. ADM2017-02244

From: Robert Pautienus <robert@fidelislawfirm.com>
To: "appellatecourtclerk@tncourts.gov" <appellatecourtclerk@tncourts.gov>
Date: 12/27/2017 5:10 PM
Subject: Docket No. ADM2017-02244

December 27, 2017

The Honorable Jeffrey S. Bivins, Chief Justice
The Honorable Cornelia A. Clark, Associate Justice
The Honorable Holly Kirby, Associate Justice
The Honorable Sharon G. Lee, Associate Justice
The Honorable Roger A. Page, Associate Justice

Attn: James M. Hivner, Clerk:
I am opposed to the adoption of ABA Model Rule 8.4(g) as the new Tenn. Sup. Ct. R. 8, RPC 8.4(g). Based on my review of the proposed language and possible application of it, I see a myriad of situations in my practice where I would be placed in an ethical dilemma of possibly committing professional misconduct, simply by representing clients and offering professional advice and counsel that could be perceived as discrimination by one of the numerous classifications listed. The last two sentences of the proposed rule, particularly the last sentence, provide less clarity and more ambiguity. I urge you to leave the current standard in place without any amendments.

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under federal law or (B) promoting, marketing, or recommending to another party any transaction or matter addressed in this communication (or any attachment).

Lisa Marsh - Re: Tenn. Sup. Ct. R. 9, section 32 Tennessee Appellate Courts

ADM2017-02244

From: Josh Blackman <jblackman@stcl.edu>
To: <appellatecourtclerk@tncourts.gov>
Date: 12/11/2017 6:25 PM
Subject: Re: Tenn. Sup. Ct. R. ~~9, section 32~~ Tennessee Appellate Courts
Attachments: Tennessee-Letter.pdf; Blackman_Final.PDF

Dear Mr. Hivner:

I write in response to the Supreme Court of Tennessee's request for public comments concerning the proposal to adopt a new RPC 8.4(g). I recently published an article about Model Rule 8.4(g), titled *Reply: A Pause for State Courts Considering Model Rule 8.4(g), The First Amendment and "Conduct Related to the Practice of Law,"* in Volume 30 of the Georgetown Journal of Legal Ethics. For your convenience, I have attached a copy of the article, which can also be downloaded at https://ssrn.com/abstract=2888204.

Sincerely,

Josh Blackman

ADM2017-02244

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Re: Tenn. Sup. Ct. R. 9, section 32 Tennessee Appellate Courts

December 11, 2017

Dear Mr. Hivner:

I write in response to the Supreme Court of Tennessee's request for public comments concerning the proposal to adopt a new RPC 8.4(g). I recently published an article about Model Rule 8.4(g), titled *Reply: A Pause for State Courts Considering Model Rule 8.4(g), The First Amendment and "Conduct Related to the Practice of Law,"* in Volume 30 of the GEORGETOWN JOURNAL OF LEGAL ETHICS. For your convenience, I have attached a copy of the article, which can also be downloaded at https://ssrn.com/abstract=2888204. This letter provides four recommendations of how the proposed rule can be modified to avoid chilling speech under the First Amendment.

The proposed RPC 8.4(g) adopts ABA Model Rule 8.4(g) and comment [3] in their entirety. There are three additions, which I applaud.

First, the proposed comment [4] offers a definition of the phrase "legitimate advocacy" for the proposed RPC 8.4(g):

> Legitimate advocacy protected by Section (g) includes advocacy in any conduct related to the practice of the law, including circumstances where a lawyer is not representing a client and outside traditional settings where a lawyer acts as an advocate, such as litigation.

This comment could be improved by providing some context of what those non-traditional settings are. This sentence, which I suggest in my article, would suffice: "For example, this Rule does not apply to speech on matters of public concern at bar association functions, continuing legal education classes, law school classes, and other similar forums.'" This addition would clarify that an attorney's speech in the context of a lecture, debate, or CLE class, on a matter of public concern, would not amount to disciplinable conduct.

Second, proposed comment [4a] includes additional protections for free speech. It provides:

> [4a] Section (g) does not restrict any speech or conduct not related to the practice of law, including speech or conduct protected by the First Amendment. Thus, a lawyer's speech or conduct unrelated to the practice of law cannot violate this Section.

I also applaud this addition. It could be improved even further by replacing the first sentence with one used in an earlier draft of ABA Model Rule 8.4(g) from 2015, but was ultimately removed (see pp. 248-49 of my article). The comment provides: "This Rule does not apply to conduct protected by the First Amendment, as a lawyer does retain a 'private sphere'

where personal opinion, freedom of association, religious expression, and political speech is protected by the First Amendment and not subject to this rule." Making this change would clarify that not only are values of free speech protected, but also those of freedom of association, as well as freedom of exercise.

Third, proposed comment [5b] excludes a provision that was included in ABA Model Rule 8.4(g):

> A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a).

Rather, comment [5d] expands on this sentiment by clarifying that charging fees does not amount to discrimination on the basis of socioeconomic status:

> Nevertheless, a lawyer does not engage in conduct that harasses or discriminates based on socioeconomic status merely by charging and collecting reasonable fees and expenses for a representation.

I applaud this addition, which retains the right of an attorney to set "reasonable fees," without fear of a bar complaint.

Beyond these three revisions, this letter offers a **fourth** recommendation: the proposed comment [3] should be amended to clarify that for discrimination or harassment to fall within Rule 8.4(g), it must be "severe or pervasive." Along these same lines, the rule should stress that the law of antidiscrimination and anti-harassment statutes "will," and not "may" guide application of the paragraph. There is a well-established body of federal caselaw that disciplinary committees should rely on when determining if there has been discrimination or harassment. This tweak would also put all parties on notice of the relative burdens of proof. Here is a proposed redline of the revised comment [3]:

> *"Severe or pervasive"* discrimination and harassment by lawyers in violation of paragraph (g) undermines 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 *federal* antidiscrimination and anti-harassment statutes and case law ~~may~~ *will* guide application of paragraph (g).

Making the revisions suggested in this letter will allow the Tennessee Supreme Court to pursue the important purpose behind Rule 8.4(g), but do so consistently with the First Amendment.

It would be my pleasure to provide any further insights to inform your deliberations.

Sincerely,

Josh Blackman
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Reply: A Pause for State Courts Considering Model Rule 8.4(g)

The First Amendment and "Conduct Related to the Practice of Law"

JOSH BLACKMAN*

ABSTRACT

In August 2016, the American Bar Association approved Model Rule of Professional Conduct 8.4(g). Under the amendment, it is misconduct for an attorney 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, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law." Comment [4] explains that "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." The Model Rule is just that—a model, which does not apply in any jurisdiction. Now the project goes to the states, as state courts consider whether to adopt Rule 8.4(g).

Professor Stephen Gillers analyzes the new provision in this Issue with A Rule to Forbid Bias and Harassment in Law Practice: A Guide for State Courts Considering Model Rule 8.4(g). *This reply urges state courts to pause before adopting Rule 8.4(g) in light of its First Amendment implications.*

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INTRODUCTION

In August 2016, the American Bar Association (ABA) approved Model Rule of Professional Conduct 8.4(g). Under the amendment, it is misconduct for an attorney 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, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law."[1] Comment [4] explains that:

> 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.[2]

The model rule is just that—a model that does not apply in any jurisdiction. Now the project goes to the states, as state courts consider whether to adopt Rule 8.4(g).

Professor Stephen Gillers analyzes the new provision in this Issue with *A Rule to Forbid Bias and Harassment in Law Practice: A Guide for State Courts*

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1. STANDING COMM. ON ETHICS & PROF'L RESPONSIBILITY ET AL., REPORT TO THE HOUSE OF DELEGATES 1 (Aug. 8, 2016), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/final_revised_resolution_and_report_109.authcheckdam.pdf [https://perma.cc/K2XB-T76E] [hereinafter 2016 ABA REPORT].

2. *Id.* at 2.

Considering Model Rule 8.4(g).[3] This reply urges state courts to pause before adopting Rule 8.4(g) in light of its First Amendment implications. (Professor Gillers was given an opportunity to reply to my Article, but declined to do so.)[4]

Part I focuses on how Rule 8.4(g) extends a disciplinary committee's jurisdiction to "conduct related to the practice of law" for speech that can be deemed "harassment." Lectures given at CLE events, or dinner-time conversation at a bar association function, would now be subject to discipline if the speaker reasonably should know someone would find it "derogatory." The threat of sanction will inevitably chill speech on matters of public concern. Neither the rule nor its comments express any awareness of this novel intrusion into the private spheres of an attorney's professional life.

Part II compares the operation of Rule 8.4(g) with previous ABA model rules, as well as state-adopted anti-bias regimes. Rule 8.4(g) is unprecedented, as it extends a disciplinary committee's jurisdiction to conduct merely "related to the practice of law," with only the most tenuous connection to representation of clients, a lawyer's fitness, or the administration of justice.

Part III discusses Rule 8.4(g)'s chilling effects. Though courts have generally upheld the regulation of attorney speech in the context of the practice of law, as the expression becomes more attenuated from the bar association's traditional purposes, the state interest becomes far less compelling. In this sense, past precedents upholding disciplinary actions for attorney speech are largely unhelpful. Rule 8.4(g) sweeps in a vast amount of speech on matters of public concern, and imposes an unlawful form of viewpoint discrimination. At bottom, the defenders of the model rule can only urge us to trust the disciplinary committees. The First Amendment demands more. This Article concludes by offering three simple tweaks to the comments accompanying Rule 8.4(g) that would still serve the drafters' purposes, but provide stronger protection for free speech.

I. MODEL RULE 8.4(G)

Rule 8.4(g)'s overarching purpose was to eliminate discrimination and harassment in "conduct related to the practice of law." Part I analyzes how the rule's design to eradicate "verbal" harassment sweeps in vast amounts of speech protected by the First Amendment.

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3. Professor Gillers notes his personal connection with the promulgation of the rule. Stephen Gillers, *A Rule to Forbid Bias and Harassment in Law Practice: A Guide for State Courts Considering Model Rule 8.4(g)*, 30 GEO. J. LEGAL ETHICS 195, 197 n.2 (2017) ("My wife, Barbara S. Gillers, was a member of the Standing Committee on Ethics and Professional Responsibility, the sponsor of the amendment. I say this in the spirit of full disclosure.").

4. *See id.* at 195 n.*.

A. "CONDUCT RELATED TO THE PRACTICE OF LAW"

Rule 8.4(g)'s drafters were well intentioned. During a two-hour hearing held in February 2016, several witnesses expressed their concerns about sexual harassment that occurs during the practice of law, and in particular at after-hours social functions.[5] Attorney Wendi Lazar of New York, for example, acknowledged that "no one wants to engage in the . . . private aspects of a lawyer['s]," life, but stressed that she was "concerned that so much sexual harassment and bullying against women actually takes place on the way home from an event or in a limo traveling on the way back from a long day of litigation."[6] Ms. Lazar explained "that to say that these events are *social events* as opposed to professional events is" not accurate, as a more narrow definition would allow misconduct to go unpunished.[7]

Laurel Bellows, a past president of the ABA, offered anecdotes of sexual harassment occurring at a "Christmas party," or when a male partner asks a female associate to "dinner after the deposition is over," followed by a "social invitation" to "come to my room."[8] Ms. Bellows asked, rhetorically, "[i]s that in relation to the practice of law?" She suggested that the rule should govern conduct that is more than "simply related to the *technical* practice of law." The ABA's report, justifying the final version of Rule 8.4(g), cited the "substantial anecdotal information" provided to the Standing Committee of "sexual harassment" at "activities such as law firm dinners and other nominally social events at which lawyers are present solely because of their association with their law firm or in connection with their practice of law."[9] Read against this history, Rule 8.4(g) and comment [4] were crafted to allow disciplinary boards to punish lawyers who engage in sexual harassment at social activities that are not strictly connected with the attorney-client relationship or the operation of a law practice.

B. "HARASSMENT"

Rule 8.4(g) and comment [4], however, accomplish far, far more than punishing sexual harassment.[10] As a threshold matter, the rule does not proscribe only sexual harassment, but it also extends to the far broader category of

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5. *See* ABA House of Delegates, Tr. of Proceedings, Feb. 7, 2016, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/february_2016_public_hearing_transcript.pdf [https://perma.cc/WNZ3-BA4Y] [hereinafter 2016 ABA HOD Proceedings].

6. *Id.* at 39.

7. *Id.* at 42.

8. *Id.* at 62.

9. 2016 ABA REPORT, *supra* note 1, at 11.

10. Joseph J. Martins, a law professor at Liberty University, submitted a comment addressing the likely unintended consequences of this rule. "The overbreadth and vagueness of the draft language imperils First Amendment liberties and the right to practice law itself. I cannot imagine this was the intent of the Committee, but the language of the proposed amendments leads me to this conclusion nonetheless." Joseph J. Martins, *Re: Proposed ABA Model Rule of Professional Conduct 8.4(g) and Comment [3]* (Mar. 11, 2016), http://www.

"harassment," which comment [3] defines to include "derogatory or demeaning verbal . . . conduct." Black's Law Dictionary defines "demeaning" as "[e]xhibiting less respect for a person or a group of people than they deserve, or causing them to feel embarrassed, ashamed, or scorned."[11] "Derogatory," not included in Black's, is defined by the Oxford Living Dictionary as "[s]howing a critical or disrespectful attitude."[12] Random House defines "derogatory" as "tending to lessen the merit or reputation of a person or thing; disparaging; depreciatory."[13] In the abstract, speech that satisfies *any* of these definitions is entirely protected by the First Amendment, and does not fall into any of the special exceptions to free speech, such a "fighting words" or "incitement."[14] As then-Judge Alito observed, there is no "categorical harassment exception" to the First Amendment.[15]

The courts have generally permitted the imposition of damages for verbal—that is, non-physical—sexual harassment in the employment context so long as the speech was so "severe or pervasive" that it created an "offensive work environment."[16] While comment [3] to Model Rule 8.4(g) explains that the "substantive law of antidiscrimination and anti-harassment statutes and case law *may* guide application of paragraph (g),"[17] it does not impose a requirement of severity or pervasiveness. A single "harassing" comment could result in

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americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/martins_3_11_16.authcheckdam.pdf [https://perma.cc/SW9N-YPLW].

11. *Demeaning*, BLACK'S LAW DICTIONARY (10th ed. 2014).

12. *Derogatory*, OXFORD LIVING DICTIONARIES, https://en.oxforddictionaries.com/definition/derogatory [https://perma.cc/U28W-PXB8] (last visited Apr. 20, 2017).

13. *Derogatory*, RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY (2d ed. 1998).

14. *See* Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 791 (2011) ("These limited areas—such as obscenity, incitement, and fighting words—represent 'well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.'") (citations omitted).

15. Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 204 (3d Cir. 2001). It is worth noting that there is much uncertainty in the law concerning how the First Amendment limits hostile environment law; these laws may not be constitutional in the first instance. *See* DeAngelis v. El Paso Mun. Police Officers Ass'n, 51 F.3d 591, 596–97 (5th Cir. 1995) ("Where pure expression is involved, Title VII steers into the territory of the First Amendment . . . . Whether such applications of Title VII are necessarily unconstitutional has not yet been fully explored. The Supreme Court's offhand pronouncements are unilluminating.") (citations omitted). For purposes of this analysis of Rule 8.4(g), I will assume such a regime that polices verbal harassment, as distinguished from sexual harassment or discrimination, is constitutional. If it is not, then no tweaks will save the model rule from facial invalidation.

16. *See, e.g.*, Faragher v. City of Boca Raton, 524 U.S. 775, 787–88 (1998) ("[I]n order to be actionable under the statute, a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so. We directed courts to determine whether an environment is sufficiently hostile or abusive by 'looking at all the circumstances,' including the 'frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.' Most recently, we explained that Title VII does not prohibit 'genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex.' A recurring point in these opinions is that 'simple teasing,' offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'") (citations omitted).

17. 2016 ABA REPORT, *supra* note 1, at 2.

discipline. Further, the rule expressly extends beyond the work environment. Rule 8.4(g) and comment [4] provide a near-infinite number of fora where speech can be give rise to discipline.

Lectures and debates hosted by bar associations that offer Continuing Legal Education (CLE) credits are necessarily held "in connection with the practice of law." Lawyers are required to attend such classes to maintain their law licenses. It is not difficult to imagine how certain topics could reasonably be found by attendees to be "derogatory or demeaning" on the basis of one of the eleven protected classes in Rule 8.4(g). Consider several examples:

- *Race*—A speaker discusses "mismatch theory," and contends that race-based affirmative action should be banned because it hurts minority students by placing them in education settings where they have a lower chance of success.
- *Gender*—A speaker argues that women should not be eligible for combat duty in the military, and should continue to be excluded from the selective service requirements.
- *Religion*—A speaker states that the owners of a for-profit corporation who request a religious exemption from the contraceptive mandate are bigoted and misogynistic.
- *National Origin*—A speaker contends that the plenary power doctrine permits the government to exclude aliens from certain countries that are deemed dangerous.
- *Ethnicity*—A speaker states that *Korematsu v. United States* was correctly decided, and that during times of war, the President should be able to exclude individuals based on their ethnicity.
- *Disability*—A speaker explains that people with mental handicaps should be eligible for the death penalty.
- *Age*—A speaker argues that minors convicted of murder can constitutionally be sentenced to life without parole.
- *Sexual Orientation*—A speaker contends that *Obergefell v. Hodges* was incorrectly decided, and that the Fourteenth Amendment does not prohibit classifications on the basis of sexual orientation.
- *Gender Identity*—A speaker states that Title IX cannot be read to prohibit discrimination on the basis of gender identity, and that students should be assigned to bathrooms based on their biological sex.
- *Marital Status*—A speaker remarks over dinner that unmarried attorneys are better candidates for law firms because they will be able to dedicate more time to the practice.
- *Socioeconomic Status*—A speaker posits that low-income individuals who receive public assistance should be subject to mandatory drug testing.

For each topic—chosen for its deliberate provocativeness—a speaker "reasonably should know" that someone at the event could find the remarks disparaging

towards one of the eleven protected groups. A person whose marriage was legalized by *Obergefell*, or who gained access to a bathroom of choice under an interpretation of Title IX, or who immigrated from a country subject to an immigration ban, or who was admitted to college under an affirmative action plan, could plausibly feel demeaned by such arguments. Lest you think these charges are implausible, consider the tempestuous reaction to Justice Scalia's discussion of mismatch theory during oral arguments in *Fisher v. University of Texas at Austin*.[18] CLE lectures on any of these eleven topics would each be entirely protected by the First Amendment, yet could still give rise to liability under Rule 8.4(g). These eleven examples should reveal another fairly obvious result: speech on the right side of the political spectrum would disproportionately give rise to liability.[19] We will return to this unconstitutional form of viewpoint discrimination in Part III.

Further, comment [4] provides an even greater number of fora that could be deemed "connected to the practice of law." For example, dinners hosted by bar associations or similar legal groups, such as the Federalist Society or the NAACP, are "social activities" with a connection to the practice of law. If any of these eleven topics were discussed at the dinner table of such events, an attendee who felt demeaned could file a bar complaint.[20]

Additionally, teaching a law school class could be deemed "conduct related to the practice of law," as in virtually all states, attending an accredited law school is a prerequisite to becoming an attorney. The report accompanying the final

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18. *See, e.g.*, Stephen Dinan, *Scalia Accused of Embracing 'Racist' Ideas for Suggesting 'Lesser' Schools for Blacks*, WASH. TIMES (Dec. 10, 2015), http://www.washingtontimes.com/news/2015/dec/10/antonin-scalia-accused-of-embracing-racist-ideas-f/ [https://perma.cc/V6CX-DWHY]; Lauren French, *Pelosi: Scalia Should Recuse Himself from Discrimination Cases*, POLITICO (Dec. 11, 2015, 12:56 PM), http://www.politico.com/story/2015/12/nancy-pelosi-antonin-scalia-216680 [https://perma.cc/BCL5-VGWY]; Joe Patrice, *Scientists Agree: Justice Scalia Is a Racist Idiot*, ABOVE THE LAW (Dec. 14, 2015, 9:58 AM), http://abovethelaw.com/2015/12/scientists-agree-justice-scalia-is-a-racist-idiot/ [https://perma.cc/9GA8-2NGT]; David Savage, *Justice Scalia Under Fire for Race Comments During Affirmative Action Argument*, L.A. TIMES (Dec. 10, 2015, 2:40 PM), http://www.latimes.com/nation/la-na-scalia-race-20151210-story.html [https://perma.cc/U3T2-CBAE]; Debra Cassens Weiss, *Was Scalia's Comment Racist?*, A.B.A. J. (Dec. 10, 2015, 7:32 AM), http://www.abajournal.com/news/article/was_scalias_comment_racist_some_contend_blacks_may_do_better_at_slower_trac/ [https://perma.cc/G7DH-U5H3].

19. *See* Eugene Volokh, *A Speech Code for Lawyers, Banning Viewpoints that Express 'Bias,' Including in Law-Related Social Activities*, WASH. POST (Aug. 10, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/10/a-speech-code-for-lawyers-banning-viewpoints-that-express-bias-including-in-law-related-social-activities-2 [https://perma.cc/HEJ7-CLBH] ("And, of course, the speech restrictions are overtly viewpoint-based: If you express pro-equality viewpoints, you're fine; if you express the contrary viewpoints, you're risking disciplinary action.").

20. *See id.* ("Or say that you're at a lawyer social activity, such as a local bar dinner, and say that you get into a discussion with people around the table about such matters—Islam, evangelical Christianity, black-on-black crime, illegal immigration, differences between the sexes, same-sex marriage, restrictions on the use of bathrooms, the alleged misdeeds of the 1 percent, the cultural causes of poverty in many households, and so on. One of the people is offended and files a bar complaint.").

resolution also discusses how "lawyers engage in mentoring."[21] In many cases, teaching embraces forms of "mentoring" that are connected to bar exam preparation. Admittedly, this reading of the rule is somewhat tenuous. However, speaking from personal experience, students in my classes from various walks of life have found offensive lectures on a host of these topics.[22] The prospect of a bar complaint, where the Associate Dean's response does not provide enough solace, could be appealing to aggrieved students. The important question is not whether a student's reaction is "reasonable," but whether a professor should "reasonably" know a student will be triggered by disrespectful speech.

The rule could even apply to an attorney speaking at career day at his child's Catholic school about the role of faith in the practice of law.[23] Whether or not such complaints lead to any disciplinary action, the threat of liability would chill speech during a CLE debate, over dinner, and in the classroom.

C. "PROTECTED BY THE FIRST AMENDMENT"

The most striking aspect of the adoption of Model Rule 8.4(g) is how little awareness the ABA expressed about the boundless scope of prohibited speech.[24] Neither the rule nor the comments even reference the First Amendment. Charitably, such concerns simply may not have been on the drafters' minds, as they focused primarily on "substantial anecdotal information" provided to the Standing Committee about sexual harassment at after-hours events. Addressing such misconduct, which would also violate well-established employment law, was their primary target. But there is reason to suspect that there was a deliberate effort to include otherwise-protected speech as well.

An earlier draft of comment [3] from December 2015 stressed that the rule "does not apply to conduct unrelated to the practice of law or conduct protected by the First Amendment."[25] The accompanying report "ma[d]e clear that a lawyer does retain a 'private sphere' where personal opinion, freedom of association, religious expression, and political speech is protected by the First

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21. 2016 ABA REPORT, *supra* note 1, at 10.

22. Josh Blackman, *My (Rejected) Proposal for the AALS President's Program on Diversity*, JOSH BLACKMAN'S BLOG (Nov. 15, 2016), http://joshblackman.com/blog/2016/11/15/my-rejected-proposal-for-the-aals-presidents-program-on-diversity-the-effect-of-model-rule-of-professional-conduct-8-4g-and-law-school-pedagogy-and-academic-freedom/ [https://perma.cc/ZSL3-8TQ3].

23. Lindsey Keiser, Note, *Lawyers Lack Liberty: State Codifications of Comment 3 of Rule 8.4 Impinge on Lawyers' First Amendment Rights*, 28 GEO. J. LEGAL ETHICS 629, 637–38 (2015).

24. Gillers devotes two sentences, all descriptive, to the scope of the new 8.4(g). Gillers, *supra* note 3, at 219 ("Not only would this language apply to client matters that are not before a tribunal, such as negotiation or counseling, it would also apply to a lawyer's words or conduct toward others in his or her law office and at professional meetings or on bar committees. It would cover a lawyer who made unwelcome sexual overtures to a subordinate lawyer or a legal assistant.").

25. STANDING COMM. ON ETHICS & PROF'L RESPONSIBILITY, AM. BAR ASS'N, NOTICE OF PUBLIC HEARING 14 (2015), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/rule_8_4_amendments_12_22_2015.pdf [https://perma.cc/US3Z-F9BJ].

Amendment and not subject to the Rule."[26] The Standing Committee stressed that this provision "is a useful clarification," and "would appropriately address" some of the "possible First Amendment challenges" that may arise when "state court[s] adopted similar black letter provisions."[27] I wholeheartedly endorsed this analysis as I read through the rule's record chronologically.

Several comments that were supportive of Model Rule 8.4(g) praised the inclusion of this First Amendment proviso, as it assuaged concerns about possible constitutional infirmities. Myles Lynk, a member of the Standing Committee on Ethics and Professional Responsibility, endorsed comment [3]'s explicit reference to the First Amendment as "a useful clarification" that "avoid[s] other possible ambiguities."[28] The ABA's Standing Committee on Professional Discipline worried that even with this provision, the language was "overbroad," and questioned whether it "would withstand constitutional scrutiny" as it may "result in infringement upon lawyers' exercise of their First Amendment rights."[29] Other groups that opposed Rule 8.4(g), such as the Christian Legal Society, took little solace in this proviso, but appreciated its inclusion.

During the February 2016 hearing, however, Laurel Bellows, a past president of the ABA, took the opposite position. Including that provision, Bellows contended, would make it unduly difficult to mete out punishment because it "take[s] away" from the purpose of the rule.[30] She explained, "We know that the constitution governs," and the New York rule[31] "does not have any exception for conduct that might be protected by the First Amendment."[32] As a result, Bellows urged the Standing Committee to excise that provision.

Her argument is something of a non sequitur. New York Rule of Professional Conduct 8.4(g) applies only to the "practice of law," not "conduct related to the practice of law," and is limited to "discrimination," and not the more nebulous speech acts embraced by "harassment."[33] Attorneys, when engaged in the

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26. *Id.* at 5.

27. *Id.*

28. STANDING COMM. ON SEXUAL ORIENTATION & GENDER IDENTITY, AM. BAR ASS'N, PROPOSED AMENDMENT TO ABA MODEL RULE OF PROFESSIONAL CONDUCT 8.4, app. c (Feb. 7, 2016), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/sogi_comments_2_7_16.authcheckdam.pdf [https://perma.cc/Z76E-TNRC].

29. Letter from Arnold R. Rosenfeld, Chair, Am. Bar Ass'n Standing Comm. on Prof'l Discipline, to Myles V. Lynk, Chair, Am. Bar Ass'n Standing Comm. on Ethics & Prof'l Responsibility, at 4 (Oct. 8, 2015), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/20160310%20Rosenfeld-Lynk%20SCPD%20Proposed%20MRPC%208-4%20g%20Comments%20FINAL%20Protected.authcheckdam.pdf [https://perma.cc/4UW4-RKB2].

30. *See* 2016 ABA HOD Proceedings, *supra* note 5, at 63.

31. N.Y. RULES OF PROF'L CONDUCT R. 8.4(g) (2017) ("A lawyer or law firm shall not . . . unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment on the basis of age, race, creed, color, national origin, sex, disability, marital status or sexual orientation.").

32. 2016 ABA HOD Proceedings, *supra* note 5, at 63–64.

33. *Id.* at 39–40.

"practice of law," admittedly have severely constrained First Amendment rights. Ultimately, Bellows' position prevailed, and the proviso was *removed* in the second draft. Neither the final rule, nor the comments, nor the ratified report, makes any reference to the First Amendment.[34] This regrettable omission was deliberate.

II. ANTI-BIAS PROVISIONS BEFORE MODEL RULE 8.4(G)

The scope of Rule 8.4(g) is unprecedented in how far it goes beyond regulating conduct related to the practice of law, conduct related to a lawyer's fitness to practice, or conduct prejudicial to the administration of justice. Part II will analyze how Model Rules 8.4(a)–(f) operated before the amendment, and document how the states have narrowly tailored their anti-bias disciplinary provisions.

A. MISCONDUCT PROHIBITED BY THE MODEL RULES

The first seven sections of the *Model Rules of Professional Conduct* govern the responsibilities, duties, and restrictions on attorneys when they are practicing law or representing clients. Rules 1.0–1.18 define the various attributes of the client-lawyer relationship, including conflicts of interest and duties owed to clients. Rules 2.1–2.4 discuss the attorney's role as a counselor. Rules 3.1–3.9 prescribe an attorney's responsibilities as an advocate before tribunals and other fora. Rules 4.1–4.4 establish how an attorney must transact with people other than clients. Rules 5.1–5.7 govern an attorney's responsibilities as part of a law firm or association. Rules 6.1–6.5 center around an attorney's commitment to public service, including pro bono work. Rules 7.1–7.6 focus on how an attorney can convey information about legal services, such as through advertising to, and solicitation of, clients. If an attorney violates any of these rules, he or she is in violation of Rule 8.4(a).[35]

The remainder of Rule 8.4, however, governs conduct that is increasingly more attenuated from the actual practice of law. Rule 8.4(b) states that it is misconduct to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." Not *all* criminal acts are misconduct—only those that "reflect[] adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." In a sense, white-collar crimes, more so than violent crimes, warrant this disapprobation. Rule 8.4(c)

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34. Gillers writes that an attorney "remains free to argue that as applied to his or her conduct the rule is unconstitutional . . . whether or not the rule says, for example, 'subject to the First Amendment.'" Gillers, *supra* note 3, at 231.

35. MODEL RULES OF PROF'L CONDUCT R. 8.4(a) (2016) ("It is professional misconduct for a lawyer to . . . violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.").

provides that it is misconduct to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Thus, even if an action is not criminal, so long as it "involv[es] dishonesty, fraud, deceit, or misrepresentation," it warrants disciplinary action. Indeed, Rule 8.4(c) swallows up virtually all of the conduct that satisfies 8.4(b), and then some. These two provisions articulate a standard that a lawyer's actions, even when unconnected with the practice of law, must at all times promote honesty and trustworthiness, so there is no doubt about his or her fitness to practice law.

Rule 8.4(d) states that lawyers cannot "engage in conduct that is prejudicial to the administration of justice." For example, the ABA's May 2016 report on the proposed Model Rule 8.4(g) cited *Neal v. Clinton*.[36] In this Arkansas case, former-President Clinton was suspended from the practice of law for five years because "he gave knowingly evasive and misleading discovery responses concerning his relationship with Ms. Lewinsky." This conduct, the court found, was "prejudicial to the administration of justice," even though Mr. Clinton was not even engaged in the practice of law.[37] More pressingly, Clinton lied under oath, which would arguably also run afoul of Model Rule 8.4(c).

Rule 8.4(e) prohibits lawyers from "stat[ing] or imply[ing] an ability to influence improperly a government agency or official." Finally, Rule 8.4(f) prohibits "knowingly assist[ing] a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct." Rules 8.4(e) and 8.4(f) are in large respects duplicative of 8.4(d). Each concern conduct—including speech—that undermines the neutrality and fairness of our legal system, even if not engaged in during the course of a representation.

Prior to amending Rule 8.4 in August 2016, the *Model Rules* generally prohibited three heads of conduct: (1) conduct during the practice of law or representing a client; (2) conduct that reflects on a lawyer's fitness to practice law; and (3) conduct prejudicing the administration of justice.[38] Model Rule 8.4(g), which covers "conduct related to the practice of law," including speech at "bar association[s]" and "social activities," represents an unprecedented expansion of the disciplinary committee's jurisdiction over the private lives and speech of attorneys.

During the February 2016 hearing over Model Rule 8.4(g), Ben Strauss, a past-president of the Delaware State Bar Association, warned that "[w]e need to be a little bit careful in terms of how we get involved in the life of people that are *not related to the delivery of legal services* which is ultimately what we're all

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36. 2016 ABA REPORT, *supra* note 1, at 9 n.19 (citing Neal v. Clinton, No. CIV 2000-5677, 2001 WL 34355768 (Ark. Cir. Ct. Jan. 19, 2001)).

37. *Clinton*, 2001 WL 3435576, at *2.

38. *See generally* RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 8.4-2 (2016–17 ed.).

about."[39] Myles Lynk, the Chairman of the Standing Committee, promptly replied, "I know you're familiar with [Model Rule] 8.4(c)," which provides that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Lynk continued, "so the rules do contemplate that some conduct which is unrelated to the practice of law can constitute professional misconduct." The ABA included a virtually identical argument in its written report, stating "[s]uch conduct need not be related to the lawyer's practice of law, but may reflect adversely on the lawyer's fitness to practice law or involve moral turpitude."[40]

This position, however, disregards the three categories that were traditionally limited by the *Model Rules*. Rule 8.4(g) opens up for liability an entirely new realm of conduct unrelated to the actual practice of law or a lawyer's fitness to practice, and not connected with the administration of justice. Along these lines, Mr. Strauss concisely responded that "the behavior which constitutes misconduct is one that goes to the character that impacts on the person's ability to deliver legal services," while this rule regulated mere "social behavior."[41] He added that "the purposes of the new rule might be different."[42] Indeed it was different. The Delawarean cautioned that "there is a certain risk" when we "go[] overboard to the point where the vast majority of our membership may think we've gone too far."[43]

The ABA acknowledged that the new Rule 8.4(g) is indeed "broader than the current provision,"[44] but insisted that the "change is necessary."[45] The final resolution concluded, "ethics rules should make clear that the profession will not tolerate harassment and discrimination in any conduct related to the practice of law." Beyond serving as "officers of the court" and "managers of their law practices," the ABA resolved, lawyers are "public citizens" with a "special responsibility for the administration of justice." This notion of an attorney as a *public citizen* is derived from Preamble [6] to the *Model Rules*. Critically, by its own terms, the Preamble still treats as private almost the entirety of an attorney's interactions. Preamble [6] speaks of the attorney's duty as a public citizen to include seeking "improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession." It does not, and cannot, reach constitutionally protected speech that demeans others at bar-related functions.

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39. 2016 ABA HOD Proceedings, *supra* note 5, at 72–73 (emphasis added).

40. 2016 ABA REPORT, *supra* note 1, at 9–10.

41. *See* 2016 ABA HOD Proceedings, *supra* note 5, at 73.

42. *Id.*

43. *Id.* at 34.

44. 2016 ABA REPORT, *supra* note 1, at 10. Professor Gillers agrees that no state has a rule "as broad as the new ABA rule." Gillers, *supra* note 3, at 198.

45. 2016 ABA REPORT, *supra* note 1, at 10.

The strongest textual hook for the ABA in Preamble [6] is an attorney's duty to "further the public's . . . confidence in the rule of law." The report, and several instances of the model rule's legislative history, suggest that the drafters were concerned about what message the bar sends to the public when attorneys misbehave. For example, the conclusion of the resolution states, "As the premier association of attorneys in the world, the ABA should lead antidiscrimination, anti-harassment, and diversity efforts not just in the courtroom, but *wherever it occurs* in conduct by lawyers related to the practice of law. *The public expects no less of us*."[46] This may be a laudable goal, but it is important to recognize how far afield such concerns are from Rule 8.4(a)–(f), and what the states have traditionally adopted. State courts that consider this rule should be very careful about relying on public perception of attorney behavior as an impetus for the overregulation of what has *long* been considered private speech.

B. STATE ANTI-BIAS PROVISIONS

Over the past two decades, nearly three dozen jurisdictions have amended their local version of Rule 8.4 to prohibit discrimination, harassment, or other forms of bias against specifically defined groups.[47] With few exceptions, these rules *only* govern conduct within the three heads of conduct reached by Model Rule 8.4(a)–(f). First, the narrowest category regulated bias *during the representation of a client* or *in the practice of law*. This standard is set by fifteen states in their rules,[48] and ten states in their comments.[49] Second, a far broader standard

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46. *Id.* at 15 (emphasis added). Gillers makes a similar point. Gillers, *supra* note 3, at 200. ("Second, adoption of Rule 8.4(g) tells the public that the legal profession will not tolerate this conduct, not solely when aimed at other lawyers, but at anyone. The rule tells the public who we are.").

47. *See* 2016 ABA REPORT, *supra* note 1, at 5.

48. CAL. RULES OF PROF'L CONDUCT R. 2-400(B) (2015) ("In the management or operation of a law practice"); COLO. RULES OF PROF'L CONDUCT R. 8.4(g) (2016) ("engage in conduct, in the representation of a client"); D.C. RULES OF PROF'L CONDUCT R. 9.1 (2007) ("in conditions of employment"); FLA. RULES OF PROF'L CONDUCT R. 4-8.4(d) (2017) ("engage in conduct in connection with the practice of law"); IDAHO RULES OF PROF'L CONDUCT R. 4.4(a) (2014) ("[i]n representing a client"); IOWA RULES OF PROF'L CONDUCT R. 32:8.4(g) (2015) ("in the practice of law"); MASS. RULES OF PROF'L CONDUCT R. 3.4(i) (2013) ("in appearing in a professional capacity before a tribunal"); MICH. RULES OF PROF'L CONDUCT R. 6.5(a) (2015) ("involved in the legal process"); N.J. RULES OF PROF'L CONDUCT R. 8.4(g) (2016) ("engage, in a professional capacity"); N.M. RULES OF PROF'L CONDUCT R. 16-300 (2009) ("In the course of any judicial or quasi-judicial proceeding before a tribunal"); N.Y. RULES OF PROF'L CONDUCT R. 8.4(g) (2017) ("in the practice of law"); OHIO RULES OF PROF'L CONDUCT R. 8.4(g) (2016) ("in a professional capacity"); OR. RULES OF PROF'L CONDUCT R. 8.4(a)(7) (2015) ("in the course of representing a client"); TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 5.08 (2016) ("in connection with an adjudicatory proceeding"); VT. RULES OF PROF'L CONDUCT R. 8.4(g) (2009) ("in hiring, promoting or otherwise determining the conditions of employment of that individual").

49. DEL. LAWYERS' RULES OF PROF'L CONDUCT R. 8.4 cmt. 3 (2013) ("in the course of representing a client"); IDAHO RULES OF PROF'L CONDUCT R. 8.4 cmt. 3 (2014) ("in the course of representing a client"); ME. RULES OF PROF'L CONDUCT R. 8.4 cmt. 3 (2014) ("a lawyer who, in the course of representing a client"); N.C. RULES OF PROF'L CONDUCT R. 8.4 cmt. 5 (2015) ("anyone associated with the judicial process"); S.C. RULES OF PROF'L CONDUCT R. 8.4 cmt. 3 (2015) ("in the course of representing a client"); S.D. RULES OF PROF'L CONDUCT R. 8.4 cmt. 3 (2004) ("in the course of representing a client"); TENN. RULES OF PROF'L CONDUCT R. 8.4 cmt. 3 (2016)

regulates bias that implicates a *lawyer's fitness to practice law*, whether or not it occurs in the practice of law. Only two states impose this standard in their rules.[50] (Such a provision would be largely duplicative of Model Rules 8.4(b) and 8.4(c).) Third, the broadest, most nebulous standard at issue prohibits bias that would *prejudice the administration of justice*. This standard, which can reach conduct entirely outside the client-lawyer relationship or the practice of law, is imposed by seven states.[51] None of these jurisdictions provide a precedent for the new Model Rule 8.4(g).

Three jurisdictions have adopted far broader scopes to their anti-bias provisions. First, Indiana regulates such misconduct when "engage[d] . . . in a *professional capacity*."[52] Second and third, Washington state and Wisconsin both regulate such misconduct that is committed "in connection with the *lawyer's professional activities*."[53] None of these rules define "professional capacity" or "professional activities." A note in the *Georgetown Journal of Legal Ethics* explained that the rule from Wisconsin—and by extension, the other two—is "extraordinarily broad and loses its main justification of why attorney speech needs to be restricted at all," which is "[p]reserving the administration of justice."[54] Yet, these three provisions still have a concrete nexus to delivering legal services,[55] and do not purport to reach "social activities," such as bar-sponsored dinners that are merely "connected with the practice of law." Model Rule 8.4(g) is unprecedented in its scope. Efforts to cite precedents from these states as evidence that Model Rule 8.4(g) would not censor protected speech are unavailing.

("in the course of representing a client"); UTAH RULES OF PROF'L CONDUCT R. 8.4 cmt. 3 (2013) ("in the course of representing a client"); W. VA. RULES OF PROF'L CONDUCT R. 8.4 cmt. 3 (2015) ("in the course of representing a client"); WYO. RULES OF PROF'L CONDUCT R. 8.4 cmt. 3 (2014) ("in the course of representing a client").

50. ILL. RULES OF PROF'L CONDUCT R. 8.4(j) (2016) ("conduct that reflects adversely on the lawyer's fitness as a lawyer"); MINN. RULES OF PROF'L CONDUCT R. 8.4(h) (2015) ("reflects adversely on the lawyer's fitness as a lawyer").

51. ARIZ. RULES OF PROF'L CONDUCT R. 8.4(d) (2004) ("prejudicial to the administration of justice"); ARK. RULES OF PROF'L CONDUCT R. 8.4(d) (2016) ("conduct that is prejudicial to the administration of justice"); CONN. RULES OF PROF'L CONDUCT R. 8.4(4) (2006) ("conduct that is prejudicial to the administration of justice"); MD. ATTORNEY'S RULES OF PROF'L CONDUCT R. 19-308.4(e) (2016) ("when acting in a professional capacity . . . when such action is prejudicial to the administration of justice"); NEB. RULES OF PROF'L CONDUCT R. 8.4(d) (2016) ("engage in conduct that is prejudicial to the administration of justice . . . [when] employed in a professional capacity"); N.D. RULES OF PROF'L CONDUCT R. 8.4(f) (2006) ("engage in conduct that is prejudicial to the administration of justice"); R.I. RULES OF PROF'L CONDUCT R. 8.4(d) (2007) ("engage in conduct that is prejudicial to the administration of justice").

52. IND. RULES OF PROF'L CONDUCT R. 8.4(g) (2016) (emphasis added).

53. WASH. RULES OF PROF'L CONDUCT R. 8.4(g) (2015) (emphasis added); WISC. RULES OF PROF'L CONDUCT 8.4(i) (2017) (emphasis added).

54. Keiser, Note, *supra* note 23, at 636.

55. *See* Gillers, *supra* note 3, at 199–200 n.18 (citing cases from Indiana, Washington, and Wisconsin).

III. RULE 8.4(G) AND THE FIRST AMENDMENT

The ABA's report accompanying Rule 8.4(g) provides only the most cursory First Amendment analysis. As discussed in Part II, without any explanation, the final report deleted both comments and analysis from an earlier draft that explicitly protected the freedom of speech. In his article, Professor Gillers provides what he admits is a "brief" analysis of the First Amendment issues implicated by the new Model Rule 8.4(g). Due to the new rule's intrusion into the private spheres of attorneys' speech and conduct, a "brief" discourse does not suffice.

Gillers' First Amendment analysis centers around whether Rule 8.4(g) would survive a facial challenge. "An overbreadth claim is likely to fail," we are told, in light of the Supreme Court's difficult-to-satisfy test for invalidating overbroad statutes.[56] A void-for-vagueness challenge will fail, Gillers writes, "[s]o long as the rule is drafted in a way that seeks to define only the conduct or speech that will and constitutionally can be the basis of discipline."[57] These analyses are premature in an article titled *A Guide for State Courts Considering Model Rule 8.4(g)*. The far more important question presented to state courts is whether they are willing to adopt a new model rule designed to root out harassment and discrimination, which also prohibits speech outside the delivery of legal services. This is a profound policy question that the ABA elided and that Professor Gillers considers a mere afterthought.[58]

Part III will analyze this vague standard's chilling effects on speech, how the rule sweeps in a range of constitutionally protected speech, and how the comments establish an invalid form of viewpoint discrimination. Next, three tweaks to Rule 8.4(g) are offered that would still maintain the drafters' intent, while providing protection for free expression. This Article will close with an admonition that state courts should not be content to simply trust disciplinary committees to exercise discretion.

A. THE CHILLING EFFECT OF RULE 8.4(G)

Professor Gillers accurately notes that courts have upheld numerous efforts by state bar associations to discipline various forms of attorney speech. He writes that provisions of the *Model Rules* "subordinate[] the right to speak in order to protect the fairness of and public confidence in the legal system . . . ."[59] When confronted with language "even more general" than *harassment* "that offers even less notice of the forbidden conduct," Gillers observes, void-for-vagueness

56. *Id.* at 235 (quoting Virginia v. Hicks, 539 U.S. 113, 119–20 (2003) (emphasis in original)).

57. *Id.* at 236 (citing United States v. Wunsch, 84 F.3d 1110, 1116 (9th Cir. 1996)).

58. *Id.* at 230–31 ("Any lawyer charged with violating Rule 8.4(g) remains free to argue that as applied to his or her conduct the rule is unconstitutional.").

59. *Id.* at 235.

challenges have failed.[60] For example, a New York court censured a lawyer who, during a deposition, "called the opposing female lawyer a 'bitch,' described her with anatomical references ('c___' and 'a_____'), and told her to 'go home and have babies.'"[61] On appeal, the court concluded that such speech uttered in a legal proceeding was "conduct that adversely reflects on the lawyer's fitness as a lawyer."[62] Indeed, as Gillers points out, the concept of conduct that "adversely reflects" a lawyer's fitness is quite capacious, though it too has been upheld in the face of constitutional challenges.[63] The court stressed that "'[b]road standards governing professional conduct are permissible and indeed often necessary' where it is almost impossible to enumerate every offense for which an attorney ought to be removed or disciplined."[64]

These precedents, however, do not resolve the question at hand, as they considered challenges in the context of disciplinary actions that related to the representation of a client, a lawyer's fitness for practice, or the administration of justice—all conduct within the state bar's competencies.

Constitutional scrutiny amounts to a balance of the means and the ends.[65] As the government's interest becomes more compelling, the rule's tailoring need not be as narrow. Conversely, when the government's interest becomes less compelling, narrow tailoring becomes essential. "Governing professional conduct" is a compelling interest within a bar association's core jurisdiction.[66] Here, the government's authority is at its apex, and narrow tailoring is not as critical. "Broad standards," to use the phrasing of the New York court, suffice.

However, when conduct is merely "related to the practice of law," which includes speech at social events, the government's interest becomes far less compelling, as it is outside the traditional regulatory functions of bar associations. In other words, when the nexus between the legal practice and the speech at issue becomes more attenuated, the disciplinary committee's authority to regulate an attorney's expressions becomes weaker.[67] As a result, narrow tailoring becomes critical to salvage the sanction's constitutionality. Stated differently, the same capacious standard of "harassment" could constitutionally support a

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60. *Id.* at 236.

61. *Id.* at 237–38 (citing *In re* Schiff, No. HP 22/92 (Departmental Disc. Comm. N.Y. Sup. Ct. Feb. 2, 1993)).

62. *Id.* at 216 n.80 (citing *In re* Schiff, 599 N.Y.S.2d 242 (1993)).

63. *See id.* (citing *In re* Holley, 729 N.Y.S.2d 128, 132 (N.Y. App. Div. 2001)).

64. *Id.*

65. *See, e.g.*, Bernal v. Fainter, 467 U.S. 216, 219 (1984) ("In order to withstand strict scrutiny, the law must advance a compelling state interest by the least restrictive means available.").

66. *In re Holley*, 729 N.Y.S.2d at 220.

67. In its report, the ABA cited only "substantial *anecdotal* information" about "sexual harassment" at "activities such as law firm dinners and other nominally social events at which lawyers are present solely because of their association with their law firm or in connection with their practice of law" (emphasis added). That conjectural standard does not satisfy the lofty standard needed to establish a *compelling* state interest. 2016 ABA REPORT, *supra* note 1, at 11.

punishment for an incident during a deposition, but *not* during a bar association dinner or CLE lecture. Context matters for the First Amendment.

Because no jurisdiction has ever attempted to enforce a speech code over social activities merely "connected with the practice of law," there are no precedents to turn to in order to assess such a regime's constitutionality. (Professor Gillers fails to acknowledge this gap in his otherwise thorough analysis.) While discrimination and sexual harassment do have established bodies of case law that can be referred to,[68] longstanding ethics rules do not penalize harassment by itself in the context of private speech at various social functions. In such fora, the government's interest is at its nadir, and tailoring must be extremely narrow to survive judicial scrutiny. Even before Rule 8.4(g) was adopted, attorneys often found themselves "in the midst of that recurring inquiry into when lawyer conduct has a sufficient nexus with fitness to practice law that it ought to be a basis for lawyer discipline, even when it is marginal to the direct representation of clients."[69] Now discipline can be imposed for conduct merely related to the practice of law, and totally unrelated to the direct representation of any clients.

It is against this backdrop that the chilling effects of Rule 8.4(g) must be assessed. As drafted, the rule could discipline a wide range of speech on matters of public concern at events with only the most dubious connection with the practice of law. Though these laws may survive a facial challenge, they are quite vulnerable to individual challenges. Gillers takes solace that an attorney "remains free to argue that as applied to his or her conduct the rule is unconstitutional."[70] I am not so sanguine. If a jurisdiction adopts Rule 8.4(g), some lucky attorney can become a test case with his or her livelihood on the line. This is not a mere academic exercise.

States must be very careful about adopting this novel new approach to discipline that may end up censoring speech on matters of public concern, only to have those actions reversed by the courts.

B. THE BROAD SWEEP OF RULE 8.4(G)

The comments to Rule 8.4(g) provide several examples of the various fora where the regime would apply, such as "social activities" or "bar association" functions. However, the long-deliberated rule does not offer examples of the types of speech that could be deemed "harassment." Professor Gillers does. He writes, "[n]o lawyer has a First Amendment right to demean another *lawyer* (or

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68. *See* Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791 (1992).

69. Donald R. Lundberg, *Of Telephonic Homophobia and Pigeon-Hunting Misogyny: Some Thoughts on Lawyer Speech*, RES GESTAE, June 2010, at 22, 23, http://lawyerfinder.indybar.org/_files/11th%20Hour/D.LundbergReRule8.4.pdf [https://perma.cc/VT9M-NQVN].

70. Gillers, *supra* note 3, at 230–31.

anyone else involved in the *legal process*)."[71] Gillers adds, "[t]here is no First Amendment right, for example, to call a *female opponent* 'a c__,' or to mock *another lawyer's* accent, or to use a racial epithet in addressing an *opposing party*." Finally, he observes that "[t]here is no constitutional right to sexually harass an *employee or a client*." Gillers asks, rhetorically, "[w]hy should identical biased words or conduct be forbidden in litigation but allowed in all other *work* lawyers do?"[72]

As my added emphases reveal, Gillers only discusses disciplinable speech uttered *during* the practice of law, such as statements to opposing counsel, clients, or employees. These are activities squarely within the state bar's longstanding and traditional interest in regulating the legal profession. In this entreaty, he does not reference the far more novel concept that speech at "social activities," which is merely "related" to the practice of law, could be subject to discipline. As speech bears a weaker and weaker connection to the delivery of legal services, the bar's justification in regulating it becomes less and less compelling. The bar lacks a sufficiently compelling interest to censor an attorney who makes a remark deemed "demeaning" at a CLE lecture, or makes a comment viewed as "derogatory" at the dinner table during a bar association gala. These are the sorts of problems that can be resolved by refusing to re-invite offending speakers—not by threatening to suspend or revoke a lawyer's license. Here, the nexus between the bar's mission to regulate the practice of law is far too attenuated to justify this incursion into constitutionally protected speech.

To return to Gillers' rhetorical question, the Constitution expressly protects "biased words" that can usually be prohibited in the course of litigation.[73] Demeaning speech, as opposed to *defamatory* conduct, is constitutionally protected. In *FCC v. Pacifica*, the Supreme Court recognized "cunt," one of George Carlin's seven dirty words, as protected by the First Amendment.[74] (Some may find a reading of the appendix in *Pacifica* to be "demeaning" toward women.) In *Snyder v. Phelps*, the Supreme Court upheld the right of funeral protestors to hold signs that said "God Hates Fags."[75] *R.A.V. v. City of St. Paul* invalidated a city's law that prohibited "arous[ing] anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."[76] Comments that would constitute sexual harassment in the workplace are perfectly lawful if uttered in public. A private sphere must remain in a lawyer's life, when it is

71. *Id.* at 237 (emphasis added).

72. *Id.* at 220 (emphasis added).

73. In certain cases, cursing is especially appropriate during the course of litigation. *See* Josh Blackman, *Collective Liberty*, 67 HASTINGS L.J. 623, 642 n.127 (2016) (recounting how counsel in *Cohen v. California*, against the wishes of Chief Justice Burger, used the word "fuck" during oral arguments at the Supreme Court).

74. 438 U.S. 726, 751 (1978) ("The original seven words were shit, piss, fuck, *cunt*, cocksucker, motherfucker, and tits.") (emphasis added).

75. *See* 562 U.S. 443, 460–61 (2011).

76. *See* 505 U.S. 377, 391 (1992).

separate from the practice of law or representing a client, and does not reflect on a lawyer's fitness or prejudice the administration of justice.

Finally, there is a separation of powers element of this analysis. It is not surprising that disciplinary actions for speech fall within three heads: (1) conduct during the practice of law or representing a client; (2) conduct that reflects on a lawyer's fitness to practice; and (3) conduct prejudicing the administration of justice. State bar associations are chartered to supervise these regulatory purposes.[77] Disciplinary committees do not have boundless discretion over all aspects of an attorney's life. Like all administrative agencies, bar associations only have the authority that the relevant state legislature or court-of-last resort has delegated. When a bar association attempts to regulate conduct that is beyond its jurisdiction, the action is *ultra vires*. Beyond the First Amendment implications of Rule 8.4(g), state courts should consider whether bar associations even have the statutory authority to assert jurisdiction over speech that is increasingly attenuated from the practice of law. It is not enough to proclaim that "*[t]he public expects no less of us*."[78] The law demands more. As a matter of the separation of powers under state constitutional law, Rule 8.4(g) may also be impermissible.

C. COMMENT FOUR'S IMPOSITION OF VIEWPOINT DISCRIMINATION

Comment [4] to Rule 8.4(g) provides, in part, that "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" (emphasis added). Though well-intentioned, this provision explicitly sanctions one perspective on a divisive issue—affirmative action—while punishing those who take the opposite perspective. This comment amounts to an unconstitutional form of viewpoint discrimination. Consider a debate hosted by a bar association about affirmative action. One speaker *promotes* racial preferences

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77. *See, e.g.*, *About the Bar*, VA. STATE BAR, http://www.vsb.org/site/about [https://perma.cc/5UES-RKNP] (last visited Jan. 26, 2017) ("The mission of the Virginia State Bar, as an administrative agency of the Supreme Court of Virginia, is to regulate the legal profession of Virginia; to advance the availability and quality of legal services provided to the people of Virginia; and to assist in improving the legal profession and the judicial system."); *Our Mission*, STATE BAR OF TEX., https://www.texasbar.com/Content/NavigationMenu/AboutUs/OurMission/default.htm [https://perma.cc/6GQM-V7MJ] (last visited Jan. 26, 2017) ("The mission of the State Bar of Texas is to support the administration of the legal system, assure all citizens equal access to justice, foster high standards of ethical conduct for lawyers, enable its members to better serve their clients and the public, educate the public about the rule of law, and promote diversity in the administration of justice and the practice of law."); *About the Bar*, FLA. BAR, http://www.floridabar.org/TFB/TFBOrgan.nsf/043adb7797c8b9928525700a006b647f/90c2ad07d0bd71fc85257677006a8401?OpenDocument [https://perma.cc/NN3T-TC3J] (last visited Jan. 26, 2017) ("To inculcate in its members the principles of duty and service to the public, to improve the administration of justice, and to advance the science of jurisprudence.").

78. Gillers makes a similar point at Gillers, *supra* note 3, at 200 ("Second, adoption of Rule 8.4(g) tells the public that the legal profession will not tolerate this conduct, not solely when aimed at other lawyers, but at anyone. The rule tells the public who we are.").

as a means to advance diversity. His speech would be entirely protected under Rule 8.4(g). Another speaker *critiques* racial preferences in light of mismatch theory. His speech would *not* be protected under Rule 8.4(g). This is a blatant instance of preferring one perspective over another. That the ABA sought to include this provision suggests that there was a concern that bar complaints could be filed over speech about affirmative action, or other diversity measures, that some could find "demeaning." But not for other types of speech about affirmative action.

Beyond speech about diversity, Rule 8.4(g) will disproportionately affect speech on the right side of the ideological spectrum. Speech supporting a right to same-sex marriage will not be considered "derogatory"; speech critiquing it will. Speech supporting an interpretation of Title IX that permits bathroom assignments based on gender identity will not be considered "demeaning"; speech critiquing it will. Speech opposing immigration policy that excludes people based on their nationality will not be considered discriminatory; speech endorsing it will. A range of theories would be silenced under the threat of an unconstitutionally vague standard of "harassment." Experiences with political correctness and speech codes on college campuses provide a roadmap of the sorts of speech that complaints filed under Rule 8.4(g) would likely target.[79]

D. "WE WOULD HAVE TO JUST TRUST THEM"

I will begin this concluding section by chronicling a debate that should have occurred before the adoption of Rule 8.4(g), but alas, was only held months after

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79. *See generally* Scott Jaschik, *If You Say You're Sorry*, INSIDE HIGHER ED (Mar. 25, 2016), https://www.insidehighered.com/news/2016/03/25/marquette-suspends-controversial-faculty-blogger-requires-him-apologize [https://perma.cc/F8BE-M54U] ("McAdams, however, has maintained that he was being punished for his opinions that are free speech. He also maintained that Marquette shouldn't be attacking him, given that he is defending an undergraduate's views against gay marriage that are consistent with Roman Catholic teachings."); Adam Liptak, *Students' Protests May Play Role in Supreme Court Case on Race in Admissions*, N.Y. TIMES (Dec. 1, 2015), http://www.nytimes.com/2015/12/02/us/politics/justices-to-rule-once-again-on-race-in-college-admissions.html?_r=0 [https://perma.cc/NY6T-Z8WW] ("The justices are almost certainly paying close attention to the protests, including those at Princeton, where three of them went to college, and at Yale, where three of them went to law school. At both schools, there have been accusations that protesters, many of them black, have tried to suppress the speech of those who disagree with them. Others welcomed the protests as part of what they called a healthy debate."); Jessica Murphy, *Toronto Professor Jordan Peterson Takes on Gender-Neutral Pronouns*, BBC NEWS (Nov. 4, 2016), http://www.bbc.com/news/world-us-canada-37875695 [https://perma.cc/4C5T-4MEV] ("Dr. Peterson was especially frustrated with being asked to use alternative pronouns as requested by trans students or staff, like the singular 'they' or 'ze' and 'zir,' used by some as alternatives to 'she' or 'he.' In his opposition, he set off a political and cultural firestorm that shows no signs of abating. At a free speech rally mid-October, he was drowned out by a white noise machine. Pushing and shoving broke out in the crowd. He says the lock on his office door was glued shut. At the same time, the University of Toronto said it had received complaints of threats against trans people on campus. His employers have warned that, while they support his right to academic freedom and free speech, he could run afoul of the Ontario Human Rights code and his faculty responsibilities should he refuse to use alternative pronouns when requested. They also said they have received complaints from students and faculty that his comments are 'unacceptable, emotionally disturbing and painful' and have urged him to stop repeating them.").

its approval. During the 2016 Federalist Society National Lawyers Convention, Professors Eugene Volokh and Deborah Rhode debated how the new rule interacted with the First Amendment.[80] The event was moderated by Judge Jennifer Walker Elrod of the U.S. Court of Appeals for the Fifth Circuit. Along similar lines to the analysis in this Article, Professor Volokh worried that complaints could be filed against a speaker at a CLE event who critiques the Supreme Court's decision in *Obergefell v. Hodges*.[81] He charged that Rule 8.4(g) amounts to a "deliberate[] . . . attempt to suppress particular derogatory views in a wide-range of conduct, expressly including social and . . . bar association activities." Volokh stressed that what the drafters of the rule "are getting is exactly what they are intending. They are intending to suppress particular views in these kinds of debates."

Professor Rhode was not particularly concerned with the potential for abuse. From her experiences, disciplinary committees "don't have enough resources to go after people who steal from their clients' trust fund accounts."[82] She found "wildly out of touch with reality" the "notion that they are going to start policing social conferences and go after people who make claims about their own views about" religion or sexual orientation. Rhode added that "many people who are in bar disciplinary agencies care a lot about First Amendment values," and "[b]ar associations don't want to set off their members and go down those routes." An aggrieved party could "file a complaint," she acknowledged, but "we can say that about pretty much anything in this country, right?" But such complaints would go nowhere, Rhode maintained, because "we as a profession have the capacity to deal with occasional abuses." She concluded her remarks, "We're a profession that knows better than that." Rhode paused. "I would hope."

Moments later, Judge Elrod asked whether Professor Rhode's position "would depend on a trust . . . that the organizations would not be going after people that they don't like, such as . . . conservatives." She asked, "We would have to just trust them?" The Federalist Society luncheon, packed with right-of-center lawyers, laughed aloud. Professor Rhode interjected that Rule 8.4(g) did not depend on trusting the disciplinary crowds alone. "And the Courts!" she added. "My god, I never thought I'd be saying this at a Federalist Society conference, the Rule of Law people, it's still out there!" Professor Rhode concluded, "I don't think we'd see a lot of toleration for those aberrant complaints." In other words, trust the bar such that the rules would not be abused.

Professor Gillers takes a similar "trust-us" approach to Rule 8.4(g). "We can be confident that the kind of biased or harassing speech that will attract the attention

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80. The Federalist Soc'y, *Ninth Annual Rosenkranz Debate: Hostile Environment Law and the First Amendment*, YOUTUBE (Nov. 20, 2016), https://www.youtube.com/watch?v=MYsNkMw32Eg&t=5s [https://perma.cc/7Y32-HPG7].

81. *Id.* (https://www.youtube.com/watch?v=MYsNkMw32Eg&t=5s#t=49m58s).

82. *Id.* (https://www.youtube.com/watch?v=MYsNkMw32Eg&t=5s#t=52m10s).

of disciplinary counsel," he writes, "will not enjoy First Amendment protection."[83] Or stated in the converse, he is confident that disciplinary committees will not target speech that is protected by the First Amendment. This argument, on its own terms, is a non sequitur, because speech often loses its First Amendment protections if it is uttered during the delivery of legal services. In other words, if the disciplinary committee successfully targets such speech, it will be *because* in this context it lacks First Amendment protections. This argument elides the threshold question of what speech is within a bar association's jurisdiction.

Further, Professor Gillers cites a series of cases to illustrate the types of speech that have resulted in punishment. None of these cases, however, support Professor Gillers' conclusion as they *all* concern speech uttered during the delivery of legal services—often at depositions—and each involved anti-bias provisions that are far more narrow than Rule 8.4(g). First, in *Florida Bar v. Martocci*, a lawyer was disciplined where "[t]he entire record" in a marriage dissolution case was "replete with evidence of Martocci's verbal assaults and sexist, racial, and ethnic insults."[84] The Florida rule at issue applied with respect to "conduct in connection with the practice of law." Second, in *In re Kratz*, a lawyer, acting in his capacity as the district attorney, was disciplined for "sending deliberate, unwelcome, and unsolicited sexually suggestive text messages to S.V.G., a domestic abuse crime victim and witness, while prosecuting the perpetrator of the domestic abuse crime."[85] Third, in *In re Griffith*, an adjunct law professor, who was supervising law students in a clinic, engaged in physical conduct of a sexual nature with a student.[86] This harassment, the court found was "in connection with professional activities." Fourth, in *In re McGrath*, an attorney "sent two ex parte communications to the judge disparaging the opposing party based upon her national origin."[87] Professor Gillers also cites several more cases involving harassing comments made during depositions.[88]

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83. Gillers, *supra* note 3, at 235.

84. *See, e.g.*, 791 So. 2d 1074, 1077 (2001).

85. 851 N.W.2d 219, 223 (Wis. 2014) (disciplining district attorney for sending a victim text messages suggesting that the two have sexual contact).

86. 838 N.W.2d 792, 792 (2013). A different analysis would likely apply under Minnesota law with respect to a doctrinal class that was not connected with the delivery of legal services. However, under the capacious standard set by Rule 8.4(g), all professors that engage in "mentoring" while teaching a class required to sit for the bar exam could be subject to discipline. *See supra* text accompanying note 21.

87. 280 P.3d 1091, 1093 (Wash. 2012).

88. Claypole v. Cty. of Monterey, No. 14-cv-02730-BLF, 2016 WL 145557, at *5 n.37 (N.D. Cal. Jan. 12, 2016) ("At a contentious deposition, when Plaintiffs' counsel asked Bertling not to interrupt her, Bertling told her, '[D]on't raise your voice at me. It's not becoming of a woman or an attorney who is acting professionally under the rules of professional responsibility'"); Cruz-Aponte v. Caribbean Petroleum Corp., 123 F. Supp. 3d 276, 279 (D.P.R. 2015); Laddcap Value Partners, LP v. Lowenstein Sandler P.C., No. 600973-2007, 2007 WL 4901555, at *2–7 (N.Y. Sup. Ct. 2007); Principe v. Assay Partners, 586 N.Y.S.2d 182, 184 (Sup. Ct. 1992); *In re* Monaghan, 743 N.Y.S.2d 519, 520 (App. Div. 2002); Mullaney v. Aude, 730 A.2d 759, 761–62 (Md. Ct. Spec. App. 1999); *In re* Schiff, 599 N.Y.S.2d 242 (App. Div. 1993).

It is unremarkable that *all* of these cases involve speech uttered during the delivery of legal services, and not during social activities merely connected to the practice of law. Rule 8.4(g) broke new ground by explicitly expanding a disciplinary committee's jurisdiction from the "practice of law," to "social activities," while simultaneously deleting a comment that expressly protected the First Amendment. I was unable to find a single case, in any jurisdiction, where a lawyer was sanctioned for a derogatory comment made at a social function. I doubt such a case exists, as no other state has previously permitted such discipline. The unprecedented nature of Rule 8.4(g) does not leave me confident that it will be enforced in a constitutional manner.

In any event, if such concerns are indeed "wildly out of touch with reality," then state courts should pause before adopting Model Rule 8.4(g) and its comments in their entirety. Professor Gillers writes that "[d]rafting demands precision and the elimination of ambiguity so far as words allow. Mathematical precision is not possible. We must strive to draft a rule that identifies the behavior we mean to forbid and not the behavior we do not."[89] He's right. With three slight tweaks to comments [3] and [4], the rule would have a far more narrowly tailored application to avoid censoring constitutionally protected speech, while still serving its intended purpose of rooting out sexual harassment.

- First, the amendments should clarify that for discrimination or harassment to fall within Rule 8.4(g), it must be "severe or pervasive." Along these same lines, stress that the law of antidiscrimination and anti-harassment statutes "will," and not "may" guide application of the paragraph. There is a well-established body of federal caselaw that disciplinary committees *should* rely on when determining if there has been discrimination or harassment.[90] This tweak would also put all parties on notice of the relative burdens of proof.
- Second, the exclusion for speech about promoting diversity was no doubt well-intentioned, but it creates an explicit form of viewpoint discrimination that cannot withstand a constitutional challenge. It should be eliminated.
- Third, I restored the exact language from the December 2015 comment and its accompanying report concerning the First Amendment and an attorney's "private sphere" of conduct. To make the point strikingly clear, I specified that speech on "matters of public concern" cannot give rise to liability.

89. Gillers, *supra* note 3, at 201.

90. *See, e.g.*, Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64–67 (1986).

Here, an edited version of the comments, with insertions bolded:

> [Comment 3] ***"Severe or pervasive"*** discrimination and harassment by lawyers in violation of paragraph (g) undermines 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 ***federal*** antidiscrimination and anti-harassment statutes and case law ~~may~~ ***will*** guide application of paragraph (g).
>
> [Comment 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.**~~ ***Paragraph (g) does not apply to conduct protected by the First Amendment, as a lawyer does retain a "private sphere" where personal opinion, freedom of association, religious expression, and political speech is protected by the First Amendment and not subject to this rule. For example, paragraph (g) does not apply to speech on matters of public concern at bar association functions, continuing legal education classes, law school classes, and other similar forums.***

This revised rule would permit disciplinary actions for lawyers that engage in forms of severe or pervasive verbal harassment at social activities and bar functions, but it would also amply protect speech on matters of public concern that listeners may find "demeaning" or "derogatory."

CONCLUSION

During her remarks at the Federalist Society conference, Professor Rhode admitted that she viewed Rule 8.4(g) as "a largely symbolic gesture," and that "the reason why proponents wanted it in the Code was as a matter of educating the next generation of lawyers as well as a few practitioners in this one about *other* values besides First Amendment expression." Her answer is quite revealing. Even before Rule 8.4(g) was adopted, attorneys who engaged in sexual harassment and other forms of discrimination were already subject to liability under federal, state, and local employment law, which extend beyond the actual workplace. As a practical matter, Rule 8.4(g) amounts to little more than a pile-on. In addition to facing injunctive relief or monetary fines from civil suits,

lawyers can now potentially lose their law licenses for misconduct. In this sense, the new model rule—a product of zealous advocacy by disparate interest groups over the course of two decades—is indeed little more than a "largely symbolic gesture."

What Rule 8.4(g) does accomplish is "educating the next generation of lawyers" about what sorts of speech are permitted, and what sorts of speech are not. Professor Rhode's candor, acknowledging that there are "*other* values besides First Amendment expression," is refreshing after slogging through the entire administrative record of Rule 8.4(g). But if this was only a project of education, state bars could have accomplished it by launching a public relations campaign and distributing brochures. Of course, the rule is about much more than education. Failure to comply results in disciplinary action that can destroy an attorney's livelihood. This sanction is not a trivial matter. At bottom, this rule, and its expansion of censorship to social activities with only the most tenuous connection with the delivery of legal services, is not about education. It is about reeducation.

State courts should pause before adopting this rule, and think carefully about the primacy of our first freedom.

Lisa Marsh - Fwd: New rule 8

From: appellatecourtclerk
To: Lisa Marsh
Date: 11/30/2017 1:38 PM
Subject: Fwd: New rule 8

ADM2017-02244

>>> Myers Morton <Myers.Morton@knoxcounty.org> 11/30/2017 11:38 AM >>>
Clerk Hivner:

Thank you for the opportunity to comment.

I only observe that your proposed new rule 8(g) appears to assume that discrimination on the basis of sexual orientation and gender identity is illegal.

"...Plaintiff Shirit Pankowsky is identified in the Complaint as a rising senior at Martin Luther King, Jr. High School, a public academic magnet school in Davidson County, and the president and founder of the school's Gay/Straight Alliance. Plaintiff Pankowsky claims that HB600, by limiting the term "discriminatory practices" to its definition set forth in the **Tennessee Human Rights—which does not include gender identity or sexual orientation-based discrimination**—voided protections previously guaranteed by the Metropolitan Nashville Public Schools' Policy on Bullying and Harassment, which stated:..." (Emphasis supplied.)

Howe v. Haslam, 2013 Tenn. App. LEXIS 425, *12

I have not researched this issue completely. I only noticed this annotation recently.

May I pose a query?

If a father who is a lawyer blocks/forbids/excludes a male person dressed up as a woman from entering a woman's bathroom where his young daughter is, can he be disbarred or somehow punished as a result?

What does "socioeconomic status" mean?

Thank you again.

J. Myers Morton, BPR# 013357

Cell 865-680-8424

ADM2017-02244

Lisa Marsh - Fwd: Proposed Amendment to Rule 8

FILED
NOV 22 2017
Clerk of the Courts
Rec'd By _____

From: appellatecourtclerk
To: Jim Hivner; Lisa Marsh
Date: 11/22/2017 3:15 PM
Subject: Fwd: Proposed Amendment to Rule 8

>>> "Greg Hall" <ghall@wghlaw.net> 11/22/2017 3:59 PM >>>
I am opposed to the proposed revisions to Rule 8 as the language is overly broad and the issues sought to be addressed are adequately covered by the existing Rule. (BPR #014875)

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