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November 15, 2017

The Honorable James Hivner
Clerk, Tennessee Supreme Court
Supreme Court Building, Room 100
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 Jim:

Attached please find an original and one copy of the Petition 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: Michael U. King, 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
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IN RE:)

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

No. _____

**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)**

The Board of Professional Responsibility of the Supreme Court of Tennessee (“BPR”) and the Tennessee Bar Association jointly petition the Court to prohibit discrimination and harassment by lawyers, in conduct related to the practice of law. Petitioners request that the Court do so by amending Tennessee Supreme Court Rule 8 to add a new subsection (g) to RPC 8.4 and to add new explanatory paragraphs in the Comment to RPC 8.4 in the form attached as Exhibit A. Although not identical to recently-adopted ABA Model Rule 8.4(g) and its accompanying Comment provisions, the amendment proposed by Petitioners BPR and TBA is patterned after that new Model Rule. The specific language for proposed Tennessee RPC 8.4(g) and proposed Comments [3], [4], [4a], [5a], [5b], [5c], and [5d] is specified in Exhibit A. In Petitioners’ view, the language proposed here improves upon the ABA language by, among other things, more clearly protecting the First Amendment rights of lawyers.¹ In support of the

¹ The differences between the language proposed here and the ABA Model Rule are reflected in Exhibit B, which is a redline comparison of the ABA Model Rule and the Petitioners’ proposal.

adoption of this proposed rule to establish clear prohibitions on discrimination and harassment related to the practice of law in our ethics rules, Petitioners further state as follows:

THE NEED FOR PROPOSED RPC 8.4(g)

Petitioners agree with the ABA Standing Committee on Ethics and Professional Responsibility's assertion when it formally proposed revision to the ABA Model Rules to the ABA House of Delegates: "It is in the public's interest. It is in the profession's interest. It makes it clear that discrimination, harassment, bias and prejudice do not belong in conduct related to the practice of law."² Indeed, this has been the formal position of the Board since February 2013 when it proposed adoption of a disciplinary rule on this subject to this Court.

Tennessee today has no clear rule of professional conduct prohibiting lawyers from engaging in discrimination or harassing conduct against people based on characteristics such as race, gender, or sexual orientation.³ Instead, our current Rules of Professional Conduct contain only language in Comment [3] to RPC 8.4 that provides:

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).

² Report of ABA Standing Committee on Ethics and Professional Responsibility Supporting Report 109 at 3 (Aug. 2016), available at https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/final_revised_resolution_and_report_109.authcheckdam.pdf.

³ In contrast to Tennessee lawyers, Tennessee judges are expressly prohibited from engaging in conduct or speech that reflects bias or prejudice based on characteristics quite similar to those listed in proposed RPC 8.4(g). *See* Tenn. Sup. Ct. R. 10, RJC 2.3 (containing one characteristic – political affiliation – not contained in ABA Model Rule 8.4(g) or proposed Rule 8.4(g); omitting one characteristic included in both ABA Model Rule 8.4(g) and proposed Rule 8.4(g) – gender identity). This judicial ethics rule addresses not only the conduct of judges themselves, but their conduct in supervising court personnel and lawyers appearing before them, and also specifically excludes "legitimate reference" to these characteristics when relevant to issues in a proceeding.

Tenn. Sup. Ct. R. 8, RPC 8.4 Comment [3]. As the Board noted to this Court in its 2013 petition for adoption of a black-letter rule on this subject,⁴ the fact that discrimination and harassment are only addressed in a comment poses several significant problems.

First, the Scope section of Tenn. Sup. Ct. R. 8 explains that “Comments do not add obligations to the Rules.” Additionally, no Tennessee case law supports Comment [3]’s interpretation of what constitutes “conduct prejudicial to the administration of justice.”

Second, while Rule 8.4 contains no *mens rea* requirement Comment [3] seems to only bar discriminatory conduct “knowingly” performed. Further, while RPC 8.4(d) is clearly *not* limited to circumstances in which a lawyer is representing a client, the language in Comment [3] to RPC 8.4(d) that seeks to bring discriminatory conduct within its coverage *does* limit itself to situations in which a lawyer is representing a client.

Third, Comment [3] is unclear in identifying the misconduct prohibited, simply stating that a lawyer is prohibited from “manifest[ing], by words or conduct, bias or prejudice.” Apart even from its lack of clarity as to just what conduct is prohibited, this language appears to reach pure speech that shows bias or prejudice. That breadth is hard to square with the rights of free speech under the First Amendment that lawyers surely enjoy, especially if this prohibition reaches all of a lawyer’s conduct (not just conduct in the representation of clients), as the black letter of the Rule clearly provides.

Fourth, all of these problems combine to establish an apparent prohibition on certain kinds of biased or prejudiced conduct and speech that is difficult to enforce, not narrowly or accurately tailored to address particular types of misconduct by lawyers, difficult for lawyers to

⁴ Petition of the Board of Professional Responsibility, *In Re: Proposed Amendment to Tennessee Rule of Professional Conduct 8.4*, No. M2013-00379-SC-RLI-AL (Tenn. Feb. 6, 2013.)

use to conform their conduct to permitted conduct, and challenging to use to educate lawyers concerning what is prohibited or permitted conduct.

Indeed, in 2013, based in part on such concerns, the Board petitioned this Court to add to Rule 8.4 a black-letter prohibition on biased or prejudiced lawyer conduct or speech by essentially moving the language now (and then) in Comment [3] up to the black letter of the Rule.⁵ At that time, the Board's Petition noted, "The current version of Rule of Professional Conduct 8.4 does not, in the body of the rule, explicitly prohibit conduct manifesting racial and other kinds of bias and prejudice.... The Board is of the opinion that Rule 8.4 should be broadened to prohibit an attorney's manifestation of bias or prejudice in a professional capacity." 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.

In 2013, the TBA opposed the elevation of Comment [3] from the Comment to Rule 8.4(d) to the black letter of Rule 8.4, for many of the reasons outlined above.⁶ The TBA never took the position that such a rule was not needed; instead, the TBA's primary concern was that the language of the Comment was poorly suited to be adopted as black letter. Of course, at that time, the ABA had not developed current ABA Model Rule 8.4(g), and no model of comparably good drafting to accomplish this purpose had been adopted by any state. This Court denied the Board's 2013 petition.⁷

⁵ Petition of the Board of Professional Responsibility, *In Re: Proposed Amendment to Tennessee Rule of Professional Conduct 8.4*, No. M2013-00379-SC-RLI-AL (Tenn. Feb. 6, 2013).

⁶ Comment of the Tennessee Bar Association, *In Re: Proposed Amendment to Tennessee Rule of Professional Conduct 8.4*, No. M2013-00379-SC-RLI-AL (Tenn. March 28, 2013).

⁷ Order, *In Re: Proposed Amendment to Tennessee Rules of Professional Conduct 8.4*, No. M2013-00379-SC-RLI-AL (Tenn. May 10, 2013).

With the ABA's development of ABA Model Rule 8.4(g), the TBA and the Board believe that the difficult drafting problems associated with the numerous issues raised by a possible rule on this subject have been fully and artfully addressed. Agreeing with the Board that such a rule is needed for the protection of clients and the public, and for the guidance of lawyers, the TBA joins with the Board in recommending to this Court that the ABA model, as slightly modified in this proposal, is a good and needed rule on this subject and should be adopted by this Court to govern the conduct of Tennessee lawyers.

ANALYSIS OF PROPOSED RPC 8.4(g)

At the time that the ABA adopted its Model Rule 8.4(g) in August 2016, 25 U.S. jurisdictions had adopted black-letter rules barring discriminatory conduct.⁸ Even a cursory review of these rules reveals a wide variety of approaches. Having all these approaches before it, the ABA Standing Committee on Ethics and Professional Responsibility spent more than three years drafting, consulting, and re-drafting what became ABA Model Rule 8.4(g). In Petitioners' view, that work product has now provided a vastly superior starting point for Tennessee's attempt to craft a rule on this subject.

In Petitioners' view, proposed RPC 8.4(g) provides a legally and constitutionally sound approach to prohibiting discriminatory and harassing conduct within our profession. Importantly, proposed RPC 8.4(g) also expressly and strongly protects zealous advocacy and activity on behalf of clients and in all other law-related activities, such as bar association, law reform, and political activity aimed at the legal system. The proposed Rule also expressly acknowledges and

⁸ 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, 198, 208-11 (2017). These 25 jurisdictions include the District of Columbia; the other 25 U.S. jurisdictions have no rule on this subject. Twelve states (including Tennessee) have only a comment. Fourteen states have neither a rule nor a comment. *See id.* at 198 nn. 11-13.

protects the legitimate First Amendment rights of lawyers. 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.

As with Model Rule 8.4(g), the proposal submitted by the TBA and the BPR would:

- Establish that a lawyer engages in professional misconduct by harassing, or discriminating against, people based on a list of enumerated protected characteristics, such as race, sex, or religion.
- Add one more characteristic, gender identity, to the existing list of ten protected characteristics set out in current Comment [3].⁹
- Elucidate this prohibition using clear and defined terms and focusing on conduct rather than speech.
- Provide a clear explanation, as well as offering helpful examples, for what qualifies as “conduct related to the practice of law.”
- Provide protection for lawyers engaged in legitimate advocacy for a client or providing legitimate advice to a client.
- Provide protection for lawyers with respect to decisions about whether to accept, decline, or withdraw from the representation of a client.
- Provide protection for the ability of a lawyer to charge and collect reasonable fees and expenses for representing clients without being subjected to discipline for discriminating on the basis of socio-economic status.
- Provide protection for lawyers to limit the scope or subject matter of their practice, engage in conduct seeking to promote diversity and inclusion, and even to limit his or her practice to members of underserved populations.

To the extent that Model Rule 8.4(g) has been subject to public criticism, such criticism has largely surrounded whether it provides sufficient protections for lawyers to exercise First Amendment rights in the form of protected speech. 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

⁹ These characteristics closely parallel those identified in a similar Tennessee judicial ethics rule, Tennessee RJC 2.3. *See supra* n. 4.

even stronger terms than the Model Rule to make clear the level of protected First Amendment activity that lawyers would still retain. Along those lines, the attached proposal:

- Adds a new sentence to Comment [4] which reads: "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."
- Adds a new Comment [4a] which reads: "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."

CONCLUSION

For all of the reasons set forth above, the BPR and the TBA jointly petition this Court to adopt the amendments to Tenn. Sup. Ct. R. 8, RPC 8.4 that are reflected Exhibit A. 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,

BOARD OF PROFESSIONAL RESPONSIBILITY OF THE SUPREME COURT OF TENNESSEE

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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 C to the petition by regular U.S. Mail, postage prepaid.


JOYCELYN STEVENSON

EXHIBIT A

SPECIFIC LANGUAGE PROPOSED BY BPR AND TBA
(REDLINED TO CURRENT TENNESSEE RULE)

COMPARISON TO EXISTING TENN. RULE

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; or

(gh) 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.

[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 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.

[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.

[108] 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.

[911] 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

COMPARISON OF
LANGUAGE PROPOSED BY BPR AND TBA TO
ABA MODEL RULE OF PROFESSIONAL CONDUCT
8.4(G)

COMPARISON TO ABA MODEL RULE 8.4(g) AND COMMENTS

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

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. 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] A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligations under RPCule 6.1 to provide legal services to those who are unable to pay, and their obligation under RPCule 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 RulePC 1.2(b).