From: John Windsor <jwindsor@w-klaw.com>
To: [redacted]
CC: [redacted]
Date: 2/22/2013 2:33 PM m2013-379
Subject: Board of Professional Responsibility, proposed amendment to Rule 8.4

I am completely and vehemently opposed to this proposed amendment.

Lawyers have a right to their opinion regardless of the cowardly, mean or politically correct positions of others. Making it a violation of ethical rules will not charge that person's heart, and will do nothing to protect the community at large.

It is an infringement of our rights under the Federal Constitution/Bill of Rights, and an unnecessary imposition on those who practice in small firms especially (given a grievance to be sought by clients who are unhappy when no other grounds exist - much like the cowardly politicians who inject race in to every discussion. It is nothing more than "do gooders" seeking to impose their will on others, and control those they disagree with, regardless of their rights, and an attempt to elevate a problem they obsess over to the level of some sanctionable offense.

I do not discriminate in any of these areas, and it is not economically in my best interest to do so, anyway. But, I am sick of this type of elevation of special classes to special status, and protection. It divides us and creates discontent where none is justified and mistreats those not in these appointed special classes. I am sick of it, and I am very disappointed this could have even risen to the level of an actual proposal by the BPR, it tells me we need to watch what they are doing very closely in the future.

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No representation is undertaken, either express or implied, absent a written representation agreement and an in person initial meeting, unless waived by the attorney in writing, to any recipient(s) of this email. Emailing or viewing the contents hereof, do not constitute an attorney-client relationship. This electronic message may contain confidential or privileged information. Unless otherwise noted, information is based on Tennessee law, other jurisdictions may vary.
Circular 230 Disclosure: To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. federal tax advice contained in this communication, including attachments, was not written to be used and cannot be used for the purpose of (i) avoiding tax-related penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any tax-related matters addressed herein. If you would like a written opinion upon which you can rely for the purpose of avoiding penalties, please contact us.

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FEB 26 2013
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February 25, 2013

Mike Catalano
Clerk, Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, Tennessee 37219-1407

Re: Docket # M2013-00379-SC-RL1-RL
Amendment to RPC8.4

Dear Mr. Catalano:

Please treat this letter as a written comment opposing the amendment of RPC8.4 to add a new paragraph (H) making it professional misconduct for a lawyer to engage in a professional capacity in certain discriminatory manners. My concerns with this amendment are as follows:

1. This proposal makes bias profession misconduct. Bias unfortunately goes both ways. If I hire an older, more experienced attorney would I not be biased towards that person because of his age. This would seem to be prohibited by the proposed rule, yet very reasonable and supported by the law. Furthermore, if I was able to find a young attorney that came from a wealthy background whose father was an influential businessman, I would be prohibited from hiring that person based on his high socio-economic standing. Law firms in many cases hire individuals because of the capacity for these associates to obtain potential clients. This behavior would now be improper, although clearly legal under the laws of the state of Tennessee.

2. This rule now adds sexual orientation as a protected class. Neither the courts nor the legislature have deemed this a protected class. I do not believe it is appropriate for the Board of Professional Responsibility to enact rules giving protections to groups that have not been granted said protections by the courts or legislature.

3. This rule also adds socio-economic status as a protected class. Neither the courts nor the legislature have deemed this a protected class. I do not believe it is appropriate for the Board of Professional Responsibility to enact rules giving protections to groups that have not been granted said protections by the courts or legislature.

4. By enacting sexual orientation and socio-economic status as a protected class by the Supreme Court, the Supreme Court will probably have to recuse itself from any future court proceedings wherein a litigant may seek extension of the law. I would expect litigation in the forthcoming years. By already deciding this issue before it is properly before the court should result in any Justices supporting this proposal from hearing the case.

5. This rule will be virtually impossible to enforce. I currently have the right to decline representation. I may deem the client's case flawed. I might believe the likelihood of getting paid is slim. However, if I decline a case, I may now be forced to answer constant disciplinary complaints. The Board will not be able to realistically determine my intent.

6. There are no exceptions to the rule. If my firm wanted to specialize in a certain area of practice i.e. representing males in divorce matters, said behavior might likewise be considered a bias towards males. A firm that specializes in elder law, may be deemed to be biased against younger clients. There are many attorneys who have specializations where they represent primarily certain genders, ages, races, etc. These law firms which serve an important role, should be permitted to continue their specialization. Furthermore, I believe certain organizations should be permitted to discriminate based on religion. As an example, if I work for a specific denominations central office, I would generally want individuals of said religious persuasion in the office. Requiring the Southern Baptist Association to hire Muslims or the Middle Tennessee Islamic Center to hire Protestants would seem to be clearly inappropriate. The problem is that the rule by not having reasonable exceptions is fatally flawed.

Based upon the foregoing I oppose in this matter.

Sincerely,

BULLOCK, FLY, HORNSBY & EVANS

Brad W. Hornsby
Attorney at Law

BWH/eb

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FILED
FEB 26 2013
Clerk of the Court

JAMES O. LOCKARD, P.C.**†
JAMES E. BINGHAM †
TODD A. KAPLAN

** ALSO LICENSED IN ARIZONA
† TENNESSEE SUPREME COURT APPROVED MEDIATOR
NOT A PARTNERSHIP

February 25, 2013

Mike Catalano
Clerk, Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

RE: #M2013-00379-SC-RL1-RL

Dear Mr. Catalano,

I would like to strongly discourage adoption of the above amendment to RPC 8.4.

This is unnecessary. I have not noticed a lot of lawyers engaging in the described activity. If this were a real problem, surely we would have heard a cry for help. Looks like someone without a lot to do thought of this. Or perhaps someone with a grudge.

Secondly, these terms are so vague as to be unenforceable. What, for example, is "socio-economic status" and who is going to interpret that?

This seems to be addressed to a small section of the legal community. As with so many government solutions, a broad blanket is thrown out and covers the vast majority of innocents along with the few offenders.

This would create an opportunity for a disgruntled client or opposing party to file a baseless board claim when faced with a bad decision by the court.

Thank you.

Sincerely,

James E. Bingham

JEB/tlm

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February 27, 2013

Mr. Mike Catalano, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

Re: Proposed Amendment to Tennessee Rule of Professional Conduct 8.4 filed February 13, 2013

Dear Mr. Catalano:

As permitted by the Order entered February 13, 2013 in No. M2013-00379-SC-RL1-RL, I have the following comments:

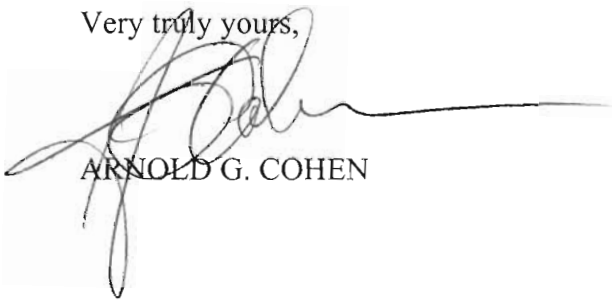
1. As I have long advocated generally, it is appropriate for lawyers to refrain from words and conduct carrying the bias and prejudice referenced in the proposed rule. It will speak better of our profession to the community at large if we, as lawyers, refrain from exhibiting such bias and prejudice. Adhering to such a rule will promote civility and tend to reduce inappropriate divisiveness. Notwithstanding the above and as the language of the proposed Order seems to anticipate, there are times when actions or decisions based on the various conditions or statuses referenced may be appropriate in a lawyer's determination of whether to accept a case and the strategy or strategies to be used in prosecuting a case. Those determinations by the lawyer should be based not on bias and prejudice of the lawyer but, instead, upon that lawyer's reasonable perception and understanding of factors significant to the outcome to be achieved for the benefit of the client. For example, it is reasonable for a lawyer to determine that the client's financial resources are insufficient to support the prosecution of his case. It is reasonable for a lawyer to consider the possible or likely prejudices of a jury or of a decision maker in whether to accept the case and, if accepted, how to pursue resolution of the case. Such decisions should not be based upon the bias or prejudice of the lawyer but may be based upon that lawyer's reasonable beliefs about the biases and prejudices of others.

2. In the event this proposed rule is adopted, it would be highly appropriate, if not necessary, for BPR to also write comments that will guide lawyers in applying the rule. In making such comments I hope that the Board will state that it is never appropriate under this rule for a lawyer to exacerbate or excite the Rule 8.4 prejudices of others for the sake of zealous advocacy. Such a position should be applicable regardless of whether the bias and prejudice is aimed at undermining another party or supporting the lawyer's own client.

3. However, there may be cases in which the particular Rule 8.4 status of the client or other party is material to the merits of the case. That circumstance may come up most frequently in cases in which the particular values of a person are at issue or at which the character of the individual is material so as to bring into evidence the individual's religious beliefs. Those kinds of situations need particularly careful treatment because they are probably more subject to abuse than any other status factor. In addition, there are Tennessee and federal constitutional restrictions on what a court may impose upon individuals in the religious arena.

Thank you for your consideration.

Very truly yours,



ARNOLD G. COHEN

AGC:grv

AGC\CohenAGLtr-Mike Catalano, App Ct Clerk

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February 27, 2013

Via U.S. Mail

Mike Catalano, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

Re: M2013-00379-SC-RL1-RL

Dear Mr. Catalano:

Please consider this letter as a comment in opposition to the proposed addition of a new paragraph "H" to Rule of Professional Conduct 8.4.

First, I question why the Board believes such an amendment to Rule 8.4 is necessary. Has there been a pattern of protected classes of individuals unable to have lawyers represent them, or otherwise prejudiced by members of the bar? Has there been a pattern of attorneys displaying bias and prejudice towards non-clients, such as witnesses, vendors, professionals, employees, etc.? Is there empirical evidence that such a rule is needed? Has the Board studied the ethics rules in other jurisdictions and found that the same or similar rules have proven helpful or problematic? Has the Board spoken with attorneys (particularly self-employed attorneys) about their input on this proposed rule? Have the drafters of this proposed rule spent significant time dealing with individual people as clients or potential clients (as opposed to corporate or business clients, wherein individual class characteristics would not come into play)?

Whenever there is a new Rule regarding misconduct, there is of course a new vehicle by which an attorney's credibility, career, law license (and thus livelihood) may be attacked. Therefore, proposed rule drafters should be careful to articulate language that ensures a fair and clear understanding of what is prohibited. Rules should be written so as to avoid placing lawyers in situations where they may be subjected to having to answer unfounded complaints.

At the outset of reading the proposed rule, the basic non-discrimination language appears to be a laudable goal for any professional. However, it is simply not needed in the Rules. This proposed rule appears to be a solution without a problem. It sounds like a proposal that the drafters believed would look and sound good in theory (especially to the public at large), but in practicality is unnecessary and poorly drafted, opening the door for myriad disciplinary problems against unwitting, innocent attorneys. Additionally, the drafters of this rule have naively adopted language (without adequately defining certain terms), which fails to establish (a) guidelines for acceptable conduct or (b) parameters within which the rule will be investigated and/or enforced.

This proposed rule appears to create a unique type of misconduct that focuses on conduct arising from an attorney's inner thoughts or beliefs. This proposal appears to traverse into new areas along the lines of reading the minds of attorneys. Compare this proposal with other types of misconduct, where there is a specific prohibited action or result (i.e., conduct involving deceit, comingling of client monies, disobeying a court order, missing a filing deadline, neglecting a case, doing or neglecting to do something that is "prejudicial to the administration of justice"). How is this proposed rule to be interpreted and enforced? How would this nebulous rule not subject attorneys to an increased potential for unfounded complaints?

To illustrate potential problems with this overly simplistic rule proposal, consider the following scenarios in which an unwitting attorney could be subjected to discipline for misconduct:

1. Attorney declines to handle juvenile cases. The attorney's reasons could include: (a) unfamiliarity with juvenile court; (b) although familiar with juvenile court, he/she simply prefers not to practice in juvenile court; (c) attorney does not have the patience to deal with youthful minds, or (d) any number of different reasons. This attorney would have committed misconduct (discrimination on the basis of age) under the proposed rule.

2. Attorney declines to represent clients in criminal cases, when the clients are undocumented immigrants. Attorney is not proficient in immigration law, and decides to safeguard himself from exposure to deficient representation under *Padilla v. Kentucky*. This attorney would have committed misconduct (discrimination on the basis of national origin) under the proposed rule.

3. Attorney declines to represent an individual with a severe agoraphobia condition, which may properly be considered a disability. The client's condition is so severe, that the client refuses to leave his or her home. The attorney decides that it is not appropriate, efficient, or otherwise befitting the attorney's practice to have to visit clients in their homes.[1] This attorney would have committed misconduct (discrimination on the basis of disability) under the proposed rule.

[1] Replacing "agoraphobia" with any number of other mental or physical illnesses or conditions, which may similarly affect a home-bound person, would yield the same result.

4. Attorney, who speaks only English, declines to represent clients who do not speak English. Attorney's business is not conducive to hiring an interpreter for such cases, and thus politely declines representing non-English speakers. It could be construed that this attorney has committed misconduct (discrimination on the basis of national origin) under the proposed rule.

5. Attorney focuses his or her domestic law practice in representing fathers in child custody disputes. If the attorney has found a niche practice in this area and this proposed rule is adopted, then that attorney must change his or her entire business model to comply with the new rule so as not to discriminate based on sex.

6. Attorney has carved out a niche practice in representing private religious schools of similar beliefs or denomination(s). The attorney has committed misconduct by not representing other schools, which may have no religious affiliation at all, or which may be religiously affiliated but with a different denomination.

7. Attorney is a sole practitioner who works from a small office. The office is not conducive for individuals with certain disabilities (such as a client in a wheelchair) to enter or navigate. Under this proposed rule, the attorney could be committing misconduct.

8. It is unclear under the rule proposal whether an attorney's conduct, "manifesting bias or prejudice", applies only to disparate treatment towards these protected classes, or whether it also includes disparate impact towards these protected classes. If the rule is interpreted to cover disparate impact cases, then there would be many scenarios in which an unwitting attorney could have to answer a complaint for misconduct. Consider an attorney who has found a niche practice of high level estate planning for wealthy estates. Additionally the attorney's office is located in an affluent part of town. The attorney has no ill intent to focus solely on a particular race or class of individuals, but looking at the attorney's clientele perhaps a certain race or class comprises the majority of the clientele. Thus, a reasonable argument could be made that the attorney's practice has had a disparate impact on other protected classes. Some attorneys market solely to specific immigrant groups. Are these attorneys going to be found guilty of misconduct if the Board requests to review their client lists and notices that only certain national origins are represented?

9. With respect to disparate impact on individuals, consider an Assistant District Attorney prosecuting cases on a domestic violence docket. He or she offers plea agreements wherein some of the male defendants agree to sentences that involve more onerous penalties or conditions than those of some of the female defendants. The prosecutor is then subject to a complaint of misconduct for viewing the male and female defendants differently, even if the prosecutor did not display or employ an actual intent to treat them differently. Imagine the District Attorney's Office having to pour through thousands of past cases to present to the Board for examination, and calling upon the individual prosecutors to explain their decisions made in each and every case.

10. Public Defender Offices and Legal Aid entities, which only represent the indigent, would be in violation of the plain language of this proposed rule because they would be discriminating based on economic status. While the rule proposes an exception for "A lawyer who declines to represent a client based on his or her inability to pay the lawyer's fee…", there is not an exception for the lawyers who *only* represent indigent individuals. Surely this is not the intended result of this proposed rule, but this example further illustrates the construction problems that could result from such naively simplistic language.

11. Another problem with the language of this rule is that it does not clarify whether a client's conduct can be imputed to the attorney's conduct. Consider an attorney who is assisting a couple in adopting a child. The couple only wishes to adopt a child of a certain race, national origin, and age. Additionally, the couple does not wish to adopt a child with any disabilities. If the attorney assists the couple, under the plain language of this proposed rule, the attorney could have violated four of the rule's provisions.

12. If a client's conduct or intended course of action can be imputed to the attorney's conduct, then there are numerous situations in which the attorney would violate the proposed rule. For example, consider a private country club that only allows male members (or members of a certain race, religion, or who have attained a certain age) to sit on the board of directors. An attorney who represents that county club in its day to day affairs would be in danger of a complaint of misconduct.

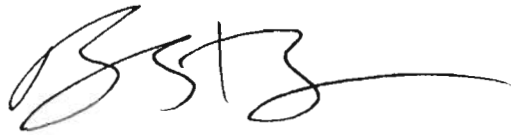
13. An additional complication is that the requisite "bias or prejudice", which is not defined or limited, does not apply solely with respect to the attorney's client (or prospective client). Thus, it could be misconduct for such "bias or prejudice" to be employed against a third party, such as a witness or victim in a case, so long as it was in the attorney's "professional capacity." Additionally, the misconduct analysis would apply to other third parties. It could then be misconduct for an attorney to choose, for example, an accountant based on a prohibited factor. Substitute for "accountant" any type of service professional or vendor (i.e., court reporter, marketing firm, phone service provider, maintenance person, IT consultant, private investigator, interpreter, office decorator, expert witness). For example, if an attorney decides that he or she wishes to hire an accountant who shares similar religious beliefs or values, then that attorney has committed misconduct. The ramifications of this proposed rule, as written, are extensive and absurd.

14. A final complication in this non-exhaustive list includes employment situations. Consider a law office that decides it is in their best interest for their receptionist to be female. Or perhaps the office decides that it wishes to hire a more experienced attorney and thus looks only to older candidates. Would the lawyers within that office be guilty of misconduct?

In sum, there is no evidence that this proposed rule is necessary or even helpful. In fact, its naively simplistic language would have the opposite effect---it would create problems. Specifically, it would allow a barrage of scenarios to place attorneys in positions of having to defend innocent behavior.

Respectfully, I must speak against the Court's adopting of this proposed rule.

With best regards,



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February 26, 2013

Mike Catalano, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

RE: Docket #M2013-00379-SC-RL1-RL

Dear Mr. Catalano,

I am writing this letter as part of the comment process on the Board of Professional Responsibility's ("BPR") proposed amendment to Rule 8, RPC 8.4, of the Rules of the Tennessee Supreme Court to add a new paragraph (h), making it professional misconduct for a lawyer to engage, in a professional capacity, in certain discriminatory conduct. It is my opinion that this proposed revision is overbroad, vague, and unnecessary. It creates a substantial risk of creating undue burdens on attorneys and the Board of Professional Responsibility. Moreover, there is little evidence that this rule change addresses an issue that is a current problem among the bar. **Accordingly, I am opposed to the proposed rule change.**

First, there is a wide gulf between "actions prejudicial to justice" under the current rule and "in a professional capacity" under the proposed rule. This could be so broad as to enable a prospective employee to make an ethics complaint or use the ethics complaint as leverage in settlement discussions, regardless of whether the attorney actually did anything wrong. It gives frivolous complaints much greater bargaining power in any settlement discussion.

Second, neither sexual orientation nor socio-economic status have historically been considered "protected classes" under federal or state law. While it is admirable to not discriminate in a matter that is "prejudicial to justice" as is done under the current rule, modifying the rule to basically force attorneys to place their license on the line with every employment decision or other professional decision is an unnecessary burden and will lead to unintended consequences. For example, suppose an attorney's practice is dealing with high net worth estate planning clients. A male prospective job candidate comes into his office in a tattered drag outfit and reeking of body odor and alcohol. The attorney, realizing that his clients would not appreciate the new employee, refuses to hire him. The proposed rule would allow this individual to lodge an ethics complaint against the attorney based on both his sexual orientation <u>and</u> his socio-economic status. While this is a somewhat ridiculous example, this should not be an area worthy of an ethics complaint.

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"Socio-economic status" is a particularly problematic term. Under some definitions of the term, this vague term includes work experience and education. Every single employment decision is affected by an applicant's work experience and education and therefore every single employment decision is an opportunity for someone to lodge an ethics complaint. This expansion of the rule is overbroad, vague and unworkable. Trying to address these issues in the comments is likewise unworkable. For example, while I recognize that the proposed comment to the rule creates an exception for professional decisions based on not accepting the engagement of someone who is unable to pay, does anyone really think someone lodging this kind of complaint is going to read the comments? Meanwhile the board's time and the attorney's time is wasted responding to frivolous complaints.

The phrases "in a professional capacity" and "legitimate advocacy" are both vague and open to interpretation. Who is to say what constitutes legitimate advocacy? If an attorney has a blog where he rails against homosexual advocates, is he doing so in a professional capacity? Is it legitimate advocacy? What if he is doing it because he wants to be a resource and attract clients that lobby against homosexual causes? Does it matter if the attorney represents an organization like the Family Research Council (a group that lobbies against homosexuals that has been labeled as a "hate group" by the Southern Poverty Law Center)? Should a group like Family Research Council be denied legal assistance because another group deems them to be "illegitimate"? This rule can have a chilling effect on the free speech of attorneys and could make it more difficult for some politically unpopular individuals, organizations or groups to obtain counsel or other assistance.

Beyond the comments above, I personally find the proposed rule change to be insulting to attorneys. The ethics rules should focus on obtaining justice, not legislating social issues. If an attorney breaks a legitimate discrimination law, other ethics rules are already in place to address those issues. This proposed expansion opens the door for all kinds of abuse.

Very truly yours,

Michael S. McKinney
General Counsel
BPR 020206

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AN ASSOCIATION OF ATTORNEYS

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HOWARD W. WILSON, ATTY.
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KRIS OLIVER, ATTY.

SUSAN K. BRADLEY, ATTY.
Rule 31 Listed Family Mediator

March 1, 2013

Mike Catalano
Clerk Tennessee Appellate Courts
100 Supreme Court Building
401 Seventh Avenue North
Nashville, Tennessee 37219-1407

Re: Proposed amendment to Rule 8 RPC 8.4

Dear Mr. Catalano:

I recently read on TBA Today, the Tennessee Board of Professional Responsibility and Supreme Court is considering amending R.P.C. 8.4 to include a rule prohibiting an attorney from conduct that manifests racial and other types of bias or prejudice. While I certainly do not believe in prejudices or biases of any kind, I certainly do subscribe to the idea that we as attorneys should be able to represent individuals who hold those particular values without recourse. Each individual is has a right to seek counsel to support their position regardless of how abhorrent it may seem to those of the general public. I am concerned such amendment to the rule would cause an attorney to turn away an individual who wished to pursue an agenda based upon a bias or prejudice listed in the proposed amendment. While such conduct and behavior is distasteful, I am concerned there will be individuals who are not represented by counsel due to counsel's fear of having that individual's thoughts and actions be implicated to counsel. Furthermore, counsel would not be able to defend his or herself with regard to such representation due to our rules regarding confidentiality. There have been many individuals I have represented over the years with whom I did not agree with our share their opinions; however, I valued the constitutional provision that an individual make seek representation in matters before a tribunal.

While I believe the Court's proposed amendment to the Rule is certainly a thoughtful and considerate provision, I believe it would be very difficult to enforce same as it could not be known if the conduct was that of the attorney or the position of the client. It seems the governing boards have lost faith in us as professionals to act in a decent and civil manner. However, I believe a majority of my colleagues hold those values in high regard and therefore, the proposed amendment is unnecessary and could certainly create some very difficult and confusing positions for attorneys with regard to maintaining confidentiality.

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MAR - 4 2013
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HOWARD W. WILSON, ATTY.
MICHELLE BLAYLOCK-HOWSER, ATTY
KRIS OLIVER, ATTY.

SUSAN K. BRADLEY, ATTY.
Rule 31 Listed Family Mediator

March 1, 2013

Mike Catalano
Clerk Tennessee Appellate Courts
100 Supreme Court Building
401 Seventh Avenue North
Nashville, Tennessee 37219-1407

Re: Proposed amendment to Rule 8 RPC 8.4

Dear Mr. Catalano:

I recently read on TBA Today, the Tennessee Board of Professional Responsibility and Supreme Court is considering amending R.P.C. 8.4 to include a rule prohibiting an attorney from conduct that manifests racial and other types of bias or prejudice. While I certainly do not believe in prejudices or biases of any kind, I certainly do subscribe to the idea that we as attorneys should be able to represent individuals who hold those particular values without recourse. Each individual is has a right to seek counsel to support their position regardless of how abhorrent it may seem to those of the general public. I am concerned such amendment to the rule would cause an attorney to turn away an individual who wished to pursue an agenda based upon a bias or prejudice listed in the proposed amendment. While such conduct and behavior is distasteful, I am concerned there will be individuals who are not represented by counsel due to counsel's fear of having that individual's thoughts and actions be implicated to counsel. Furthermore, counsel would not be able to defend his or herself with regard to such representation due to our rules regarding confidentiality. There have been many individuals I have represented over the years with whom I did not agree with our share their opinions; however, I valued the constitutional provision that an individual make seek representation in matters before a tribunal.

While I believe the Court's proposed amendment to the Rule is certainly a thoughtful and considerate provision, I believe it would be very difficult to enforce same as it could not be known if the conduct was that of the attorney or the position of the client. It seems the governing boards have lost faith in us as professionals to act in a decent and civil manner. However, I believe a majority of my colleagues hold those values in high regard and therefore, the proposed amendment is unnecessary and could certainly create some very difficult and confusing positions for attorneys with regard to maintaining confidentiality.

I respectfully request the amendment not be adopted as written.

With kindest regards,

Michelle Blaylock-Howser

MBH/lab

From: "Edward T. Brading" <etbrading@bradinglaw.com>
To:
Date: 03/06/2013 9:25 AM
Subject: TN Courts: Submit Comment on Proposed Rules

Submitted on Wednesday, March 6, 2013 - 9:24am
Submitted by anonymous user: [75.137.40.174]
Submitted values are:

Your Name: Edward T. Brading
Your Address: 208 Sunset Drive, Suite 409, Johnson City, Tennessee 37604
Your email address: etbrading@bradinglaw.com
Your Position or Organization: Edward T. Brading, Attorney at Law
Rule Change: Supreme Court Rule 8, Section 8.4
Docket number: M2013-00379-SC-RL1-RL
Your public comments:
The Supreme Court should refuse the BPR's petition and decline to amend RPC 8.4 in accordance with it. A few thoughts:

1. Under proposed RPC 8.4(h), may a lawyer, when speaking or writing in his professional capacity, manifest all the bias and prejudice he wishes on any basis he chooses, even when not engaged in "legitimate advocacy"? Unlike current Comment 3, proposed RPC 8.4(h) prohibits only conduct, not words.

2. Under proposed RPC 8.4(h), may a lawyer refuse to hire a pedophilic process server? The refusal would constitute "conduct, in a professional capacity, manifesting bias or prejudice based on ... sexual orientation."

3. What is "legitimate" advocacy? Does legitimacy hinge on compliance with Rule 11, T.R.Civ.P.? Or does it depend on RPC 3.1? Is "legitimate" synonymous with "meritorious"?

4. Under proposed RPC 8.4(h), may a lawyer join the Napier-Looby Bar Association, the Tennessee Lawyers' Association for Women, or the Christian Legal Society? In his Martindale-Hubbell listing may a lawyer tout that he speaks Spanish or that he focuses his practice on estate planning for high net worth persons? May he obtain certification in this state as an Elder Law Specialist? May he donate to the Legal Aid Society of Middle Tennessee and the Cumberlands? In each of these scenarios the lawyer is engaging, respectively, in "conduct, in a professional capacity, manifesting bias or prejudice based on race, sex, religion, national origin, ... age, ... [and] socio-economic status."

5. Proposed RPC 8.4(h), unlike current Comment 3, is not limited to the course of representation. Moreover, proposed Comment 3 says that a lawyer who declines to represent a person based on the person's inability to pay a fee would not violate proposed RPC 8.4(h), but proposed Comment 3 excludes the factors set forth in proposed RPC 8.4(h). By implication, is a lawyer who declines to represent persons based on those persons' race, sex, etc. committing professional misconduct in every instance? If not, then in which instances is he committing misconduct? Is a lawyer who refuses to prepare a will for a person he suspects of being incompetent engaging in "conduct, in a professional capacity, manifesting bias or prejudice based on ...disability"? Throughout the RPC, lawyers face discipline for taking on cases they should not. Does the BPR now intend to discipline lawyers for the cases they do not take on?

6. Unlike current Comment 3, proposed RPC 8.4(h) prohibits all manifestation of bias or prejudice, not merely knowing manifestation. Would all unintentional, accidental manifestations of bias or prejudice be misconduct? If not, then which ones would be?

At best, the BPR's proposal would turn RPC 8.4 from gauzy to opaque. At worst, the BPR's proposal would be an object lesson in unintended consequences.

The results of this submission may be viewed at:
http://www.tncourts.gov/node/602760/submission/5002

FILED
MAR 28 2013
Clerk of the Courts

Case Style: In Re: Proposed Amendment to Tennessee Rule of Professional Conduct 8.4

Case Number: M2013-00379-SC-RL1-RL

Comes now the Chattanooga Chapter of the Christian Legal Society (CLSC) to state its opposition to the proposed addition of Rule 8.4(h) to the Rules of Professional Conduct of the Rules of the Tennessee Supreme Court (RPC).

I. Proposed Rule 8.4(h) is unnecessary.

The unsupported statement that "[t]he 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" is wholly inadequate to justify this dramatic change in the rules governing our profession. The CLSC is not aware of any statistical or even anecdotal research which indicates that any of the groups referenced in proposed Rule 8.4(h) are currently having difficulty finding representation or otherwise being discriminated against based on their membership in any of the groups listed in the proposed Rule. The one exception to this is those without the ability to pay for such services (i.e., socioeconomic status). However, ironically, the proposed Rule includes a proposed comment, which states that declining to represent someone based on their inability to pay a lawyer's fee does not violate the proposed Rule, such that equalizing access to legal representation on this basis does not appear to be the intent of the same. Moreover, because there is an exception for declining to represent a person based on socioeconomic status, the lack of exceptions for declining to take a client for any of the other reasons listed in the proposed Rule supports the inference that declining to take a client in any such circumstance would constitute a violation of the same.

Our present Bar includes those of many different interests and backgrounds, such that finding a lawyer to represent those of various races, gender, national origin, disabilities, age,

sexual orientation and socio-economic status is not believed to be a problem. Without the proposed Rule, all Tennessee attorneys are free to accept or decline professional engagements as they wish and as their conscience allows. As explained in the following sections, this freedom would actually be *narrowed* rather than *broadened* by the proposed Rule, so as to *limit* rather than *expand* the ability to obtain professional advice and other assistance from attorneys in our State.

II. Proposed Rule 8.4(h) violates lawyers' First Amendment right of free speech and expression under the United States Constitution.

The current Comment [3] to Rule 8.4 is problematic in and of itself, but the proposed elevation of the Comment to a Rule, coupled with the elimination of the three limitations in the Comment ("in the course of representing a client," "knowingly," and "when such actions are prejudicial to the administration of justice") demonstrate that the proposed Rule is unconstitutionally content-based, viewpoint-discriminatory, and overbroad in violation of the First Amendment and the corresponding free speech guarantees in the Tennessee Constitution.

Accordingly, the CLSC respectfully requests that the Court avoid the need for some individual or group of attorneys to have to assert this constitutional violation in the future by simply rejecting this unconstitutional proposed Rule on the front end.

By expanding a comment which currently precludes lawyers only from "**knowingly manifesting**, by words or conduct, bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation or socio-economic status" "in the course of **representing** a client" **when** such actions are **"prejudicial to the administration of justice"** into a proposed Rule which broadly precludes **"any conduct engaged in in their professional capacity,"** the Board is crossing over into violating lawyers' First Amendment right of free speech and expression.

Moreover, the proposed Rule represents the worst form of First Amendment violation, as it is a content-based, viewpoint-discriminatory Rule.

As an initial matter, the use of the term "conduct" in the proposed Rule does not alter the fact that the Rule directly targets attorney speech. Texas v. Johnson, 491 U.S. 397, 406 (1989). (invalidating a statute prohibiting the conduct of flag-burning as a content-based restriction on speech). Almost all actions an attorney takes "in a professional capacity," including declining to represent a potential client, are accomplished through his/her spoken and/or written words.

The proposed Rule is plainly content-based because it covers the attorney's speech relative to certain topics: race, sex, religion, sexual orientation, etc. The proposed Rule is also viewpoint-discriminatory because it targets "bias or prejudice" based on these topics. Thus, an attorney can say something positive about a particular religion, for example, but the attorney's speech is prohibited if he/she were to say something negative about it. This is the only sensible reading of the proposed Rule, for otherwise it would serve no purpose.

The proposed Rule is not going to be able to meet the strict scrutiny standard applicable to content-based, viewpoint-discriminatory restrictions on speech. R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (striking down, as content-based and violative of the First Amendment, the city's "bias-motivated crime" ordinance).

Content-based regulations are presumptively invalid. Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 115 (1991). In order to survive a strict scrutiny analysis, the regulation must be necessary to serve a compelling governmental interest and must do so by the least restrictive means available. The proposed Rule 8.4(h) cannot meet either one of these high standards.

There is no evidence that the proposed Rule serves a compelling governmental interest. As noted above, the mere "opinion of the Board" is the only alleged justification for this infringement on attorney speech. Again, there is no evidence that "bias or prejudice" on the grounds of the Board's selected topics is so pervasive that a person of a certain race, sex, sexual orientation, religion, etc. is unable to obtain legal representation by the attorneys in our State. Real-life experience and common sense in fact leads inexorably to the opposite conclusion.

Moreover, even if such evidence existed, the proposed Rule is not necessary to serve this interest, nor is it the least restrictive means of doing so. Rather, it is a tool to punish lawyers for their speech that, in the view of the Board, expresses "disfavored" opinions on certain topics which have been chosen by the Board.

The lack of narrow tailoring in the proposed Rule is evidenced by its broad expanse: it covers speech and expressive conduct when done "in a professional capacity," not only in the course of representing a client. Further, it covers that conduct even when the conduct is divorced from any impact on "the administration of justice." Finally, the scienter requirement ("knowingly") in the current Comment [3] to Rule 8.4 is eliminated in the proposed Rule, making the sweep of the regulation of First Amendment-protected activity even broader.

Nor does the last sentence of the proposed Rule in any way cure the defects in the remainder of it. The use of the term "legitimate" as a modifier of "advocacy" begs the question of what lawyer speech is permissible ("legitimate"), as opposed to what lawyer speech is prohibited (i.e., "illegitimate"). This obvious question only highlights the viewpoint-discriminatory nature of the proposed Rule, as it is plain that speech demonstrating "bias or prejudice" toward a particular subject matter (e.g., race, religion, sexual orientation, etc.) will be deemed "illegitimate" under the Rule. In other words, lawyers are subject to

punishment/discipline under the Rules if they express disfavored opinions on the topics described in proposed Rule 8.4(h). **Such an unconstitutional rule should be rejected outright.**

Lawyers are called upon to serve in all forms of civic and other capacities – on the boards of religious and non-religious non-profit organizations, as elders or deacons in their church, etc. Many times in these roles we are asked to play a dual role of assisting the organization or church by providing legal advice. Proposed Rule 8.4(h) would impermissibly inhibit our ability to do so. Many religious organizations engage in conduct that others may characterize as "discrimination," but which is, in reality, the exercise of the organizations' sincerely-held religious beliefs. For example, in Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 132 S. Ct. 694 (2012), the United States Supreme Court unanimously rejected the government's attempt to apply federal nondiscrimination laws to override religious associations' leadership decisions, despite a former employee's claim that she was fired in retaliation for asserting the right not to be discriminated against on the basis of disability. The Supreme Court acknowledged that nondiscrimination laws are "undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission." Id. at 710. Constitutional scholars have explained the importance of not affixing the label of "discrimination" to the actions of religious organizations that are merely exercising their basic religious liberty.[1] Similarly, other civic organizations sometimes engage in conduct that some characterize as discrimination, but which is, in reality, the exercise of the organizations' right of expressive association. See e.g., Boy Scouts v. Dale, 540 U.S. 630 (2000).

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[1] See e.g., Richard W. Garnett, *Religious Freedom and the Nondiscrimination Norm*, ch. 4 in Austin Surat, ed., *Legal Responses to Religious Practices in the United States* 194, 198 (Cambridge University Press, 2012). A summary of Professor Garnett's article is found at Richard W. Garnett, *Confusion about Discrimination, The Public Discourse*, Apr. 5, 2012, available at http://www.thepublicdiscourse.com/2012/04/5151/ (last visited March 8, 2013). See also, Douglas Laycock, *Sex, Atheism, and the Free Exercise of Religion*, 88 U. Det. Mercy L. Rev. 407, 428-29 (2011).

The fact that the proposed Rule would prohibit lawyers from assisting a church or other non-profit organization in protecting its constitutional rights to hold its religious or expressive association beliefs and conduct -- as well as from expressing our own positions for or against the same in a dual personal and professional capacity -- would actually *deprive* certain groups and individuals of legal representation by prohibiting "illegitimate" advocacy on behalf of those viewpoints which the Board has characterized as "disfavored." The CLCS again assumes that the purpose of the proposed Rule is just the opposite – to ensure that no one is denied such representation on the basis of their race, sex, religion, national origin, disability, age, sexual orientation or socio-economic status. Yet, as proposed, it would actually have the reverse effect.

Lawyers also are often called upon to address churches, civic and other professional organizations regarding their rights to subscribe to certain beliefs under the First Amendment, even if not formally representing the same. Again, the breadth of the currently proposed Rule would impermissibly inhibit us – in First Amendment terms, "chill" our speech -- in performing these civic functions as well.

III. Proposed Rule 8.4(h) contradicts current state and federal law.

Neither our current state nor federal law protects individuals from discrimination based on "sexual orientation." Accordingly, when merely educating the public regarding the present state of the law, lawyers would be violating proposed Rule 8.4(h). Tennessee employers and landlords are not, for instance, required to prohibit discrimination on the basis of sexual orientation under either state or federal law.

Our State constitution also prohibits gay marriage. Accordingly, by advising pastors or others regarding their ability or requirement to officiate upon request a same-sex marriage ceremony, or advising same-sex couples regarding their eligibility under Tennessee law for

employment, adoption, tax, estate or other benefits, lawyers would again be violating proposed Rule 8.4(h).

The issue of same-sex marriage is admittedly a volatile and emotion-filled one in our and many other States. Because of the fact that lawyers are often called upon to assist in articulating various organizations' – as well as our own – views on such salient issues, which have both legal and moral implications in our communities, even while not formally representing the same, doing so would put us at risk of violating the proposed Rule, as we would still be speaking in our "professional capacity" as lawyers. There are, for example, several attorneys who currently serve in the State legislature or on our city and county commissions, as mayors, etc. In these positions, they are also serving in their "professional capacity" as attorneys, such that advocating either for or against adding protection against discrimination on the basis of "sexual orientation" or other benefits based on the same to our state laws or city or county ordinances would violate the proposed Rule.

IV. If Proposed Rule 8.4(h) is somehow deemed to be necessary and not in violation of both our federal and state constitutions and contradictory to state and federal law, the CLSC would at least request that express language protecting attorneys' sincerely-held religious beliefs also be added to the Rules of Professional Conduct.

The Court may recall that the CLSC filed a similar request regarding the current Comment [3] to Rule 8.4(d). This Comment 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. Legitimate advocacy regarding the foregoing factors does not violate paragraph (d)."

In connection with the proposed addition of this Comment in 2010, the Court heard oral argument on our request for specific language to be included as a new additional Rule or part of

an existing Rule, which would expressly state that the Rules were not intended to infringe upon any attorney's sincerely-held religious beliefs. No such language was included in the final version of the Rules, which included the above-quoted Comment to Rule 8.4(d).

During the 2010 oral argument, those presenting CLSC's position got the impression that the Court may have perceived that our requested language was unnecessary because none of the examples described in the previous Sections would (1) constitute "representing a client" (i.e., speaking in public, advocating a certain position in our local newspaper, as members of our state or local governing bodies, before a local civic group, etc.) and (2) anything that did fall within this prohibited "representation" realm would then be excluded by the "legitimate advocacy" exemption to the Comment.

Based on the broad wording of the current proposed Rule 8.4(h), which seeks on its face to regulate **all conduct engaged in by attorneys in their professional capacity**, **these past exclusions to the present Comment to Rule 8.4(d) would no longer exist**.

Have there been complaints filed with the Board since the above-referenced Comment was approved regarding attorneys' failure to comply with it which would indicate that we now need to convert it into a Rule **which seeks to control this critical aspect of our professional lives**?

Because many of the roles lawyers are asked to perform in our communities do not involve formal "representation," the present exception provided in the proposed Rule regarding "legitimate advocacy" provides no remedy at all to the above-referenced concerns expressed in Sections II. and III. Who will define what is "legitimate?" Or what is "advocacy?" for that matter versus regular free speech – which, as we understand it, is still protected by the First Amendment for lawyers, just as for all others in our country.

The CLCS finds it hard to believe that the Court desires to begin patrolling the line between attorneys' free expression as private citizens and "any conduct engaged in in their professional capacity" by approving and then trying to uphold this proposed Rule.

We would very much like to avoid the inevitable conflicts which are going to arise between each lawyer's personal right to practice law within the dictates of his/her own sincerely-held religious beliefs, first, by advocating against the need for the proposed Rule 8.4(h), and then, in the alternative, if this proposed Rule is somehow deemed to pass constitutional and statutory muster under the strict scrutiny standard referenced above, by requesting that the following language be added as part of the Preamble, section 7; or as part of the Scope, section 16; or as a new rule 1.20., to read substantively as follows:

Nothing in these Rules of Professional Conduct shall infringe upon, limit, or otherwise deny an attorney's freedom to decline or withdraw from representation in any matter in which such representation would violate the attorney's sincerely-held religious beliefs or in any matter where such beliefs could conflict with the zealous and effectual representation of the client. Nor shall these Rules infringe upon, limit, or otherwise deny an attorney's freedom to otherwise act in his or her professional capacity in any way which is consistent with his/her sincerely-held religious beliefs.

The CLSC believes the addition of the new Rule proposed in this Section IV. into the RPC will expressly acknowledge the constitutional rights of our attorneys state-wide, safeguard the consciences of all members of the Tennessee Bar, and be in the best interest of our clients and the public at large. **This new Rule will only be necessary, however, if our primary position that the proposed Rule 8.4(h) should be rejected outright as a violation of these rights is not accepted by the Court**.

Under the First Amendment to the Constitution of the United States, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Furthermore, under the Constitution of the State of Tennessee, "all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience"

and "no human authority can, in any case whatever, control or interfere with the rights of conscience."

Furthermore, it is common practice -- and best practice -- for nondiscrimination laws to include protections for religiously motivated conduct. For example, Tennessee nondiscrimination law provides exemptions for religious employers, see *T.C.A.* § 4-21-405, and even non-religious employers when religion is a bona fide occupational qualification, see *T.C.A.* § 4-21-406. See also *T.C.A.* § 4-21-806. The leading federal nondiscrimination law, Title VII, also explicitly provides that religious associations' use of religious criteria in their employment decisions does not violate Title VII's prohibition on religious discrimination in employment. In three separate provisions, Title VII exempts religious associations from its general prohibition on religious discrimination in employment. Pursuant to 42 *U.S.C.* § 2000e-1(a), Title VII does not apply to religious associations "with respect to the employment of individuals of a particular religion to perform work connected with the carrying on" of the associations' activities. Pursuant to 42 *U.S.C.* § 2000e-2(e)(2), an educational institution may "employ employees of a particular religion" if it is controlled by a religious association or if its curriculum "is directed toward the propagation of a particular religion." Pursuant to 42 *U.S.C.* § 2000e-2(e)(1), any employer may hire on the basis of religion "in those certain instances where religion . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."

The rationale of the CLSC thus is to state within the four corners of the RPC that the constitutional protections reserved by all citizens of the United States and of the State of Tennessee remain with licensed attorneys in their practice of law, so that attorneys will not find it necessary to consult or refer to these constitutions, or other external sources, while defending

themselves against a grievance. Inclusion of the new Rule proposed in this Section IV. would make clear that the RPC are not intended in any way to limit or supplant the constitutional rights of attorneys in their lawful legal practice, regardless of whether particular parties or tribunals agree or disagree with a particular attorney's sincerely-held religious beliefs and regardless of whether those in disagreement constitute a political majority.

It is the intent of the CLSC not only to protect the rights of all Tennessee attorneys to the free exercise of their religious conscience, but also to provide for the highest level of advocacy for our clients. An attorney who finds him/herself in a situation where the zealous and legal advocacy on behalf of a client causes him/her to be at odds with his/her conscience, as dictated by his/her sincerely-held religious beliefs, will find him/herself in a situation that is utterly untenable. Either the conscience of the attorney will be violated or the cause of the client will suffer.

For this reason, all attorneys in our State also must continue to have the express right to decline representation where they perceive a situation in which the representation of the potential client would cause him/her to have to violate his/her conscience – just as they currently are free to – and in fact must decline – representation which poses an external conflict of interest or other issue which is precluded by the RPC. Forcing our attorneys to accept such representation is not in the best interest of the client any more than forcing them to accept a known external conflict of interest would be. A conflict of conscience would be as, if not more, prejudicial to a client than the external conflicts the RPC currently precludes. All of these outcomes would be detrimental to the legal system as a whole. All efforts thus should be undertaken to prevent this type of internal conflict from arising in the first place – just as the RPC currently prohibits attorneys from accepting work which involves unwaivable external conflicts.

For all of these reasons, we would respectfully request that the Court reject proposed Rule 8.4(h), or, in the alternative, add the above language to the Rules of Professional Conduct as well, in light of the concerns relating to this proposed Rule which have been addressed herein.

CLSC also would respectfully request to be heard concerning this matter through oral argument before the Court. A separate motion requesting the same is also being filed herewith.

Thank you for your attention to and consideration of each of these requests.

Respectfully submitted,

By: _____

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President of the Chattanooga Chapter of the
Christian Legal Society

CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been mailed to Allan F. Ramsaur, Esq., Executive Director, Tennessee Bar Association, 221 4th Avenue, N., Suite 400, Nashville, Tennessee; Lela M. Hollabaugh, Bradley Arant Boult Cummings LLP, 1600 Division Street, Suite 700, Nashville, Tennessee 37203; and Sandy Garrett, 10 Cadillac Drive, Suite 220, Brentwood, Tennessee 37027 by regular U.S. Mail on this 27th day of March, 2013.

_____

RECEIVED
MAR 28 2013

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE: PROPOSED AMENDMENT TO TENNESSEE RULE OF PROFESSIONAL CONDUCT 8.4

No. M2013-00379-SC-RL1-RL

COMMENT OF THE TENNESSEE BAR ASSOCIATION

The Tennessee Bar Association ("TBA"), by and through its President, Jacqueline B. Dixon; Chair, TBA Standing Committee on Ethics and Professional Responsibility, Brian S. Faughnan; General Counsel, Paul C. Ney; and Executive Director, Allan F. Ramsaur, in response to this Court's Order entered February 13, 2013, submits the following comment in opposition to the Petition filed by the Board of Professional Responsibility ("BPR") seeking to have the Court amend Tenn. Sup. Ct. R. 8, RPC 8.4:

The TBA is a membership organization comprised of, and representing, lawyers from varied, diverse backgrounds who hold a varied and diverse range of opinion and viewpoints on many politically-charged topics. As such, the TBA respectfully submits that there is likely no better voice than the TBA to explain how it is possible to be staunchly opposed to invidious discriminatory conduct of any sort and yet steadfastly opposed to the BPR's proposal to add RPC 8.4(h) to the Tennessee Rules of Professional Conduct.

Tennessee's current version of RPC 8.4(d) and Comment [3] thereto is nearly identical to the approach contained in the ABA Model Rules.[1] Specifically, under that approach, the black

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[1] The only difference between the two is that Comment [3] to ABA Model Rule 8.4 has an additional sentence stating that "[a] trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule." ABA Model Rules of Professional Conduct 8.4 cmt. [3].

letter of the ethics rules prohibit lawyers from "engag[ing] in conduct that is prejudicial to the administration of justice." Tenn. Sup. Ct. R. 8, RPC 8.4(d). One type (but not the only type) of conduct by a lawyer that can violate RPC 8.4(d) is elaborated upon in a comment, stating 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. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d).

Tenn. Sup. Ct. R. 8, RPC 8.4 cmt. [3]. The TBA believes that when this Court originally adopted Comment [3] more than a decade ago it made the right decision. Further, nowhere in the BPR petition is any explanation offered as to why the BPR believes there is a need to to change the way the ethics rules address this topic.

Although the TBA has no doubt that the Petition is motivated by good intentions, the adoption of the BPR's proposal would still pave a road to a highly undesirable ultimate destination. The BPR's proposal uses the existing language of Comment [3] to current RPC 8.4 as its starting point for its new RPC 8.4(h) but also makes two changes to that language that result in the TBA's opposition. The first problematic change is to replace the language "in the course of representing a client" with the more expansive "in a professional capacity." The second problematic change, and one that serves to exacerbate the first, is the deletion of the word "knowingly" that modifies the verb "manifests" in the existing comment to RPC 8.4. Thus, under the plain language of the BPR's proposed RPC 8.4(h), even conduct that, unknown to the lawyer, manifests bias or prejudice based on someone's race, sex, religion, national origin, disability, age, sexual orientation, or socio-economic status would create a risk of disciplinary action.

The proposal does not seek to define what conduct by a lawyer would qualify as being undertaken "in a professional capacity," but it seems likely that a wide array of activities that can be undertaken by people who are lawyers would qualify. A few activities engaged in by lawyers that readily spring to mind as examples include: (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. The BPR's proposal would appear to subject a lawyer to potential disciplinary liability for conduct involved in any of those four spheres of activity if someone perceived them to be "manifesting bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation, or socio-economic status."

Adoption of the proposed RPC 8.4(h) could result, for example, in any number of constitutional challenges regarding the First Amendment rights of lawyers. Could a lawyer-legislator be subjected to discipline under RPC 8.4(h) for introducing a bill to prohibit (or permit) the display of religious symbols on public property? Could a divorce lawyer be subjected to discipline for broadcasting advertisements indicating that they only represent one gender in divorce proceedings?

In addition, 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. The BPR's proposal 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.

Perhaps most troubling of all, the decision by a lawyer whether to agree to represent a prospective client inherently amounts to an act undertaken in the lawyer's professional capacity. As such, the BPR's proposal would subject a lawyer to potential disciplinary liability with

respect to decisions about whether or not to ever agree to take on a person or entity as a client. This fact seems beyond dispute given that the BPR thought it necessary to add a proposed new Comment [3] that essentially provides a "safe harbor" for attorneys who decline to represent a prospective client on the basis that they cannot afford to pay the lawyer. Ostensibly, the BPR recognized that without such a protection, lawyers who decline to represent someone who cannot afford their services could be subject to disciplinary complaints for being biased or prejudiced against the prospective client based on their "socio-economic status."

Yet, as a result of the expansive BPR proposal, decisions by lawyers to turn down representation of prospective clients not based on a lack of resources would not be afforded protection. Thus, a lawyer who turned down a prospective client, for example, because they did not agree with their cause on a politically-charged issue – imagine a client who, for example, wanted to pay a particular lawyer to oppose or defend a challenge to the constitutionality of Tennessee's ban on same-sex marriage but the lawyer is unwilling because they strongly disagree with whichever side of that issue the prospective client wishes to advance – could now be subject to potential disciplinary liability for that decision.[2]

CONCLUSION

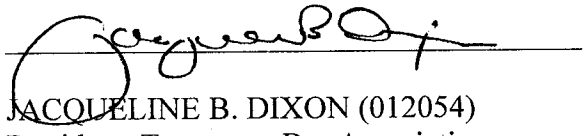
The TBA believes that Tennessee's ethics rules presently take the correct approach to the topic of bias and prejudice by recognizing the problem as one in which lawyers, as officers of the court, engaged in conduct that damages the administration of justice. RPC 8.4(d) and comment [3] together, patterned as they are after the ABA Model Rules, appropriately highlight for the Bar and the public alike that intentional discrimination by words or conduct on the part of a

[2] To the extent the BPRs proposal could be argued to encourage lawyers to take on causes they do not agree with, the TBA submits that existing RPC 1.2(b) takes a much better and more measured approach by making clear that "[a] lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social, or moral views or activities." Tenn. Sup. Ct. R. 8, RPC 1.2(b).

lawyer when representing a client can be prejudicial to the administration of justice in violation of RPC 8.4(d). The TBA submits that the guidance provided in Comment [3] of the current ethics rules does not foreclose the imposition of discipline, for example, against a lawyer who knowingly manifests racial prejudice, other than in the representation of a client, when the lawyer's conduct is still prejudicial to the administration of justice.

Nevertheless, if the Court is inclined to think that some clarification is needed as to the scope of what kind of discriminatory conduct by lawyers is a breach of the ethics rules, the TBA strongly believes that the BPR's proposed RPC 8.4(h) is not the right path for any clarification to take as it would create far more problems that it would ever solve and should not be adopted by this Court.

RESPECTFULLY SUBMITTED,

By: 

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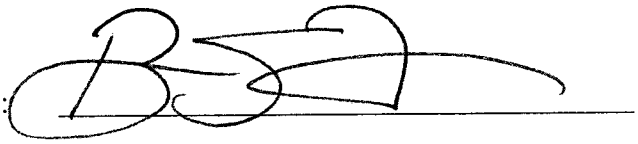
By: 

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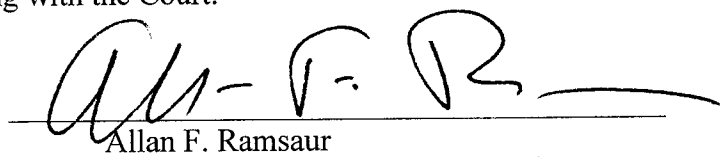
CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing has been served upon the individuals and organizations identified in Exhibit "A" by regular U.S. Mail, postage prepaid within seven (7) days of filing with the Court.



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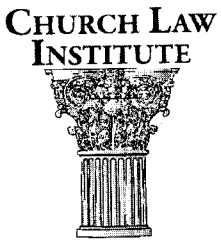

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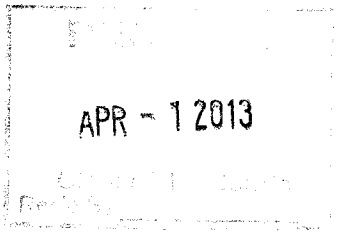

Re: Supreme Court Rule 8, Section 8.4
Proposed Rule Change
M2013–00379-SC-RL1-RL

Requiring an attorney to choose between freely practicing their chosen profession and violating a cardinal tenet of their religious beliefs places an impermissible burden upon freedom of religion - -

Dear Mr. Catalano:

This letter shall serve as a comment on the proposed change to Tennessee Supreme Court Rule 8, Section 8.4. I write on behalf of the Church Law Institute, an organization for which I serve as founder and Senior Counsel. Church Law Institute ("CLI") is a legal and educational organization that provides churches and church leaders with a comprehensive resource of legal counsel, education, advice and referral on legal issues in all aspects of church ministry. Our staff attorneys, as well as those who serve as affiliate attorneys for CLI both in Tennessee and across the country, share a common commitment to the advancement of religious liberty and the protection of those constitutional freedoms embodied in the Free Exercise Clause of the First Amendment. Because we believe that the proposed change to Rule 8 undermines the core values of free exercise and the right of conscience shared by many attorneys across the State of Tennessee, we oppose this proposed modification.

OBJECTIONS TO PROPOSED CHANGE TO TENN.SUP.CT RULE 8, SECTION 8.4

1. The Threat of Disciplinary Sanctions Upon Attorneys Who Object To Same-Sex Marriage on the Basis of Sincerely Held, Religious Beliefs Creates An Unconstitutional Conflict Of Having To Choose Between Exposure To Bar Sanctions Or Violating The Dictates Of Their Consciences And Religious Beliefs.

A state places an impermissible burden upon religion freedom when it forces people of faith to choose between adhering to their sincerely held religious beliefs and receiving a benefit offered

by the state. This is true regardless of whether the government conditions receipt of an important benefit upon conduct proscribed by religious faith or denies such a benefit because of conduct mandated by religious belief; while the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial. *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 101 S. Ct. 1425, 67 L. Ed. 2d 624 (1981). It is beyond rational debate that the earned privilege to engage in the practice of law is an important and highly cherished government benefit bestowed by the state upon those who satisfy the requirements for admission to the bar.

Attorneys are often called upon to fulfill a unique role as advocates in our system of jurisprudence. We are appointed by the courts to represent as *guardians ad litem* children and mentally impaired individuals in the context of conservatorships, adoptions, divorce and to represent defendants in criminal cases. In fulfilling this duty, attorneys may be called upon to represent unpopular clients, and even those whose system of values and beliefs differ from their own. While mere disagreement with a client's moral judgments are an insufficient basis for withdrawal[1], when an attorney is called upon to advance a position that is diametrical to their core, personal religious beliefs, this conflict rises to a constitutional dimension.

Historically, Tennessee courts have recognized that attorneys faced with this conflict have an obligation to bring this to the attention of the court in a motion to withdraw. In *State v. Jones*, 726 S.W. 2d 515, 518-519 (Tenn. 1987), the Supreme Court upheld a contempt citation against an attorney who refused to accept a court-ordered appointment based on his interpretation of a formal ethics opinion, even where counsel's refusal was not disrespectful, unreasoning or contumacious. Procedurally, the Supreme Court held that in order for an attorney to avoid contempt for refusal to obey an order of appointment perceived to be erroneous, it was necessary for counsel to seek dissolution of the order in the appellate courts. *Id.* at 517.

There are several contexts in which attorneys who hold sincerely religious-based objections to same-sex marriage may be called upon to represent individuals in a factual context that implicates these beliefs. One classic example is an attorney may be appointed to serve as *guardian ad litem* in the context of a custody dispute between divorced parents, one of whom has joined a same-sex marriage. If the attorney holds, as a tenet of his sincere religious beliefs that such marriages are contrary to biblical mandate, then his ability to serve as a disinterested advocate in this scenario is compromised. Again, this is not merely a matter of personal predilection, but religious belief and practice - - a position that is entitled to the highest level of constitutional protection under the First Amendment Free Exercise Clause.

The Board delved into this issue in Tennessee Formal Ethics Opinion 96-F-140. There, a devout Roman Catholic attorney who routinely practiced before the Juvenile Court raised the

[1] In Tennessee Formal Ethics Opinion 84-F-73, this issue was addressed in the context of a first degree murder case.

question of whether he could ethically decline a court appointment to represent minors who elected to petition the Juvenile Court for waivers of the parental consent requirement to obtain abortions.

In its analysis of this case, the Board failed to conduct the necessary level of scrutiny required under the Free Exercise Clause, and consequently reached a decision that is decidedly at odds with well-settled constitutional jurisprudence. The Board instead applied the same level of deference to the attorney's religious-based objection as that typically accorded to mere conscientious objection.

> Counsel also alleges that he is a devout Catholic and cannot, under any circumstances, advocate a point of view ultimately resulting in what he considers to be the loss of human life. The religious beliefs are so compelling that counsel fears his own personal interests will subject him to conflicting interests and impair his independent professional judgment in violation of DR 5-101(A). In other words, counsel contends his status is akin to that of a conscientious objector, who is opposed to participation in abortion in any form. Although counsel's religious and moral beliefs are clearly fervently held, EC 2-29 exhorts appointed counsel to refrain from withdrawal where a person is unable to retain counsel, except for compelling reasons. Compelling reasons as contemplated by this EC do not include such factors as: ...the repugnance of the subject matter of the proceeding, the identity or position of a person involved in the case, the belief of the lawyer that the defendant in a criminal proceeding is guilty, or the belief of the lawyer regarding the merits of the civil case.
>
> Tennessee Formal Ethics Opinion 96-F-140 (Tenn.Bd.Prof.Resp.), 1996 WL 340719, 3-4.

No single Supreme Court decision is cited by the Board in its analysis of whether an attorney's protected right of free exercise should trump a court's insistence that he serve in a case that compels him to take a position in derogation of his sincerely held religious beliefs.

Had the Board in Tennessee Formal Ethics Opinion 96-F-140 made a searching inquiry of controlling U.S. Supreme Court authority on this issue, it would have instead found that an individual's sincerely held religious beliefs are entitled to far greater protection than the mere "repugnance of the subject matter" or a "belief in the guilt or innocence of the client".

Starting with the seminal case of *Sherbert v. Verner*, 374 U.S. 398, 402-03, 83 S. Ct. 1790, 1793, 10 L. Ed. 2d 965 (U.S.S.C. 1963), the Supreme Court held:

> The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs as such, *Cantwell v. Connecticut*, 310 U.S. 296, 303, 60 S.Ct. 900, 903, 84 L.Ed. 1213. Government may neither compel affirmation of a repugnant belief, *Torcaso v. Watkins*, 367 U.S. 488, 81 S.Ct. 1680, 6 L.Ed.2d 982; nor penalize or discriminate against individuals or groups

> because they hold religious views abhorrent to the authorities, *Fowler v. Rhode Island*, 345 U.S. 67, 73 S.Ct. 526, 97 L.Ed. 828; nor employ the taxing power to inhibit the dissemination of particular religious views, *Murdock v. Pennsylvania,* 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292; *Follett v. McCormick*, 321 U.S. 573, 64 S.Ct. 717, 88 L.Ed. 938; *cf. Grosjean v. American Press Co.*, 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660.

It is no a defense to this proposed ethics rule that the practice of law is not a right, but a privilege. As the Court pointed out in *Sherbert*:

> Nor may the South Carolina court's construction of the statute be saved from constitutional infirmity on the ground that unemployment compensation benefits are not appellant's 'right' but merely a 'privilege.' It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege. 6 *American Communications Ass'n v. Douds*, 339 U.S. 382, 390, 70 S.Ct. 674, 679, 94 L.Ed. 925; *Wieman v. Updegraff*, 344 U.S. 183, 191-192, 73 S.Ct. 215, 218-219, 97 L.Ed. 216; *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 155-156, 66 S.Ct. 456, 461, 90 L.Ed. 586.

Likewise, in *Speiser v. Randall*, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460, the Court emphasized that conditions upon public benefits cannot be sustained if they so operate, whatever their purpose, as to inhibit or deter the exercise of First Amendment freedoms. In *Speiser*, the Court struck down a condition which limited the availability of a tax exemption to those members of the exempted class who affirmed their loyalty to the state government granting the exemption.

> To condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties.

Sherbert v. Verner, 374 U.S. 398, 406, 83 S. Ct. 1790, 1794-95, 10 L. Ed. 2d 965 (1963).

The proposed rule is constitutionally infirm inasmuch as it conditions an attorney's freedom to practice his or her profession upon the willingness to violate a cardinal principle of religious faith.

2. The Proposed Rule Is Impermissibly Vague And Has An Impermissible Chilling Effect Upon An Attorney's Constitutionally Protected Right of Free Expression.

The proposed wording of Rule 8.4(h) contains three operative clauses. An attorney commits misconduct when he or she:

a) engages in conduct,

b) in a professional capacity,

c) manifesting bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation, or socio-economic status.

The only limited exception to this prohibition is if the attorney is engaged in "legitimate advocacy respecting the foregoing factors. . ."

The proposed rule, as drafted, has an impermissible chilling effect upon attorney free speech and advocacy. In essence, it creates a regime that allows the Board to select what political speech is "legitimate" and therefore politically safe by applying vague and ambiguous tests. If an attorney wants to avoid the possibility of disciplinary action, he or she must either refrain from speaking or ask the Board to issue an advisory opinion approving of the political speech in question. Presumably, then government officials pore over each word of a text to see if, in their judgment, it accords with their subjective opinion regarding what is or is not "legitimate". To quote from *Citizens United v. Fed. Election Comm'n,* 558 U.S. 310, 130 S.Ct 876, 896, 175 L.Ed.2d 753 (2010),"(t)his is an unprecedented governmental intervention into the realm of free speech."

It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys. *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 96, 92 S.Ct. 2286, 2290, 33 L.Ed.2d 212 (1972). Likewise in the realm of private speech or expression, government regulation may not favor one speaker over another. *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804, 104 S.Ct. 2118, 2128, 80 L.Ed.2d 772 (1984). Discrimination against speech because of its message is presumed to be unconstitutional. *See Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 641–643, 114 S.Ct. 2445, 2458–2460, 129 L.Ed.2d 497 (1994). Our Supreme Court has held that 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." *See R.A.V. v. St. Paul*, 505 U.S. 377, 391, 112 S.Ct. 2538, 2547, 120 L.Ed.2d 305 (1992). Viewpoint discrimination is thus an egregious form of content discrimination. Likewise, 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." *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46, 103 S.Ct. 948, 955, 74 L.Ed.2d 794 (1983) and *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 828-29, 115 S. Ct. 2510, 2516, 132 L. Ed. 2d 700 (1995).

CONCLUSION

The proposed change to Tenn.Sup.Crt Rule 8, Section 8.4 offends two fundamental constitutional protections afforded by the First Amendment: the free exercise of religion and freedom of expression. Based on the reasons and authorities cited herein, the Church Law Institute respectfully calls upon the Board to reject this proposed rule change in its present form.

Sincerely,

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Re: Proposed Amendments to Tennessee Rule of Professional Conduct 8.4
Docket No. M2013-00379-SC-RL1-RL

Dear Mr. Catalano:

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. I write in my personal capacity, not on behalf of my firm, any of my partners or any of our clients.

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." With its restrictions on freedom of speech and expression, as well as its impermissible vagueness, it is 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, in a professional capacity, manifesting bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status." 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 in any "professional capacity." 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 could be subject to discipline under the proposed rule, if that opinion coincided with the opinion publicly held until recently by the President of the United States.

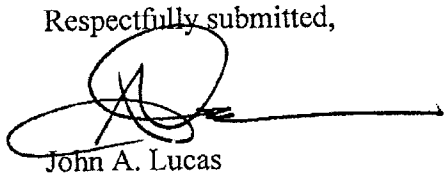
Similarly, an attorney specializing in domestic relations law who "manifests a bias" based on sex by acknowledging that he or she prefers to represent women, rather than men, would violate the proposed Rule.

Examples 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 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.

Respectfully submitted,



John A. Lucas

Jal/mkc

[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.