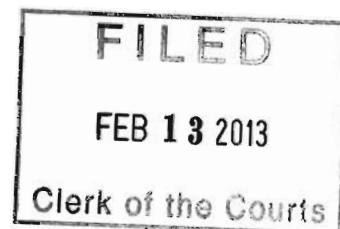


IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE



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

No. M2013-00379-SC-RL1-RL - Filed: February 13, 2013

ORDER

On February 6, 2013, the Board of Professional Responsibility (“BPR”) filed a petition asking the Court to amend 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. The BPR’s petition and proposed amendment are set out in the Appendix to this order.

The Court hereby publishes the BPR’s proposed amendment for public comment and solicits written comments from the bench, the bar, and the public. Written comments shall be received by the Clerk no later than Monday, April 1, 2013. Written comments should be addressed to:

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

and should reference the docket number set out above.

The Clerk shall provide a copy of this order to LexisNexis and to Thomson Reuters. In addition, this order shall be posted on the Tennessee Supreme Court’s website.

IT IS SO ORDERED.

PER CURIAM

APPENDIX

***Petition of the Board of Professional Responsibility
to Amend Tenn. Sup. Ct. R. 8, RPC 8.4***

(filed February 6, 2013)

FILED
FEB - 6 2013
Clerk of the Courts

IN THE SUPREME COURT OF TENNESSEE

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

No. M2013-00379-SC-RLI-AL

PETITION OF THE BOARD OF PROFESSIONAL RESPONSIBILITY

The Petitioner, the Board of Professional Responsibility, respectfully petitions this Court to amend Rule of Professional Conduct 8.4 by adding a subsection prohibiting lawyers from engaging in conduct, in a professional capacity, manifesting bias or prejudice based on race or other enumerated factors.

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 or prejudice. Comment [3] to Rule 8.4, however, states:

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).

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. Therefore, the Board submits the attached proposed revision to Rule 8.4, attached as Exhibit 1, which creates new subsection 8.4(h), prohibiting lawyers from engaging in conduct,

in a professional capacity, manifesting bias or prejudice based on race or other factors. The proposed revision also replaces Comment [3] with a comment clarifying that a lawyer who declines to represent a person based on his or her inability to pay the lawyer's fee does not violate Rule 8.4 (h).

RESPECTFULLY SUBMITTED

Lela Hollabaugh By SG with permission

LELA M. HOLLABAUGH (#014894)
Chairman of the Board of Professional
Responsibility of the Supreme Court of
Tennessee

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Sandy Garrett

SANDY GARRETT (#013863)
Chief Disciplinary Counsel of the Board of
Professional Responsibility of the Supreme
Court of Tennessee

10 Cadillac Drive, Suite 220
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Tel: 615-361-7500

Certificate of Service

I certify that the foregoing has been mailed to Allan F. Ramsaur, Esq., Executive Director, Tennessee Bar Association, 221 4th Ave. N., Ste. 400, Nashville, Tennessee by U.S. mail, on this the 5th day of February, 2013.

By: Lela Hollabaugh By SG w/ permission
LELA M. HOLLABAUGH (#014894)
Chairman of the Board

By: Sandy Garret
SANDY L. GARRET (#013863)
Chief Disciplinary Counsel

PROPOSED REVISION

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; or
- (g) knowingly fail to comply with a final court order entered in a proceeding in which the lawyer is a party, unless the lawyer is unable to comply 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; or
- (h) engage in conduct, in a professional capacity, manifesting bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation, or socio-economic status. Legitimate advocacy respecting the foregoing factors does not violate this provision.

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] A lawyer who declines to represent a person based on his or her inability to pay the lawyer's fee does not violate paragraph (h).

~~[3] A lawyer who, in the course of representing a client, knowingly manifests, by words or conduct, bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation, or socio-economic status violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d).~~

[4] 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.

[5] 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.

[6] 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.

[7] 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.

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

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

DEFINITIONAL CROSS-REFERENCES

"Fraud" *See* RPC 1.0(d)

"Knowingly" *See* RPC 1.0(f)

"Tribunal" *See* RPC 1.0(m)