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
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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:

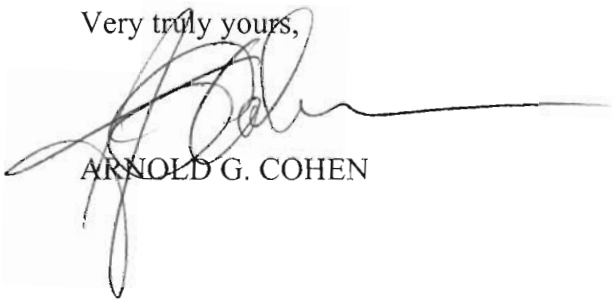
1. As I have long advocated generally, it is appropriate for lawyers to refrain from words and conduct carrying the bias and prejudice referenced in the proposed rule. It will speak better of our profession to the community at large if we, as lawyers, refrain from exhibiting such bias and prejudice. 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

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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
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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.

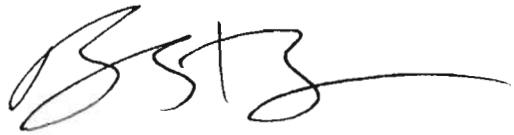
13. An additional complication is that the requisite "bias or prejudice", which is not defined or limited, does not apply solely with respect to the attorney's client (or prospective client). Thus, it could be misconduct for such "bias or prejudice" to be employed against a third party, such as a witness 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

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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