STATE OF TENNESSEE

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April 2, 2018

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

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

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

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

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

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

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

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

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

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

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

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

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

Sincerely,

Herbert H. Slatery III
Attorney General and Reporter

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