STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

March 16, 2018

Opinion No. 18-11

American Bar Association's New Model Rule of Professional Conduct Rule 8.4(g)

Question 1

If Tennessee were to adopt the American Bar Association's new Model Rule 8.4(g), or the version of it currently being considered in Tennessee, could Tennessee's adoption of that new Rule constitute a violation of a Tennessee attorney's statutory or constitutional rights under any applicable statute or constitutional provision?

Opinion 1

Yes. Proposed Rule of Professional Conduct 8.4(g) would violate the constitutional rights of Tennessee attorneys and conflict with the existing Rules of Professional Conduct.

ANALYSIS

For the analysis that forms the basis of this opinion, please see the Comment Letter of the Tennessee Attorney General filed with the Tennessee Supreme Court on March 16, 2018, in response to the Court's order of November 21, 2017, soliciting written comments on whether to adopt the amendments to Tennessee Supreme Court Rule 8, Rule of Professional Conduct 8.4, that are being proposed by Joint Petition of the Tennessee Board of Professional Responsibility and the Tennessee Bar Association. A copy of the Comment Letter is attached hereto and incorporated herein.

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Requested by:

The Honorable Mike Carter
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March 16, 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 — Comment Letter of the Tennessee Attorney General Opposing Proposed Amended Rule of Professional Conduct 8.4(g)

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

This letter is being filed in response to the Court's order of November 21, 2017, soliciting written comments on whether to adopt amendments to Tennessee Supreme Court Rule 8, Rule of Professional Conduct 8.4, that were proposed by Joint Petition of the Tennessee Board of Professional Responsibility ("BPR") and the Tennessee Bar Association ("TBA"). Because proposed Rule of Professional Conduct 8.4(g) would violate the constitutional rights of Tennessee attorneys and conflict with the existing Rules of Professional Conduct, the Tennessee Office of the Attorney General and Reporter strongly opposes its adoption.

The proposed amendments to Rule 8.4 and its accompanying comment are "patterned after" ABA Model Rule 8.4(g).[1] That model rule has been widely and justifiably criticized as

[1] Joint Petition of Board of Professional Responsibility of the Supreme Court of Tennessee and Tennessee Bar Association for the Adoption of a New Tenn. Sup. Ct. R. 8, RPC 8.4(g) at 1, *In re Petition for the Adoption of a New Tenn. Sup. Ct. R. 8, RPC 8.4(g)*, No. ADM2017-02244 (Tenn. Nov. 15, 2017) (hereinafter "Joint Petition").

creating a "speech code for lawyers" that would constitute an "unprecedented violation of the First Amendment" and encourage, rather than prevent, discrimination by suppressing particular viewpoints on controversial issues.[2] To date, ABA Model Rule 8.4(g) has been adopted by only one State—Vermont.[3] A number of other States have already rejected its adoption.[4] Although the BPR and TBA assert in their Joint Petition that their Proposed Rule 8.4(g) "improve[s] upon" ABA Model Rule 8.4(g) by "more clearly protecting the First Amendment rights of lawyers," Joint Petition 1, the proposed rule suffers from the same fundamental defect as the model rule: it wrongly assumes that the only attorney speech that is entitled to First Amendment protection is purely private speech that is entirely unrelated to the practice of law. But the First Amendment provides robust protection to attorney speech, even when the speech is related to the practice of law and even when it could be considered discriminatory or harassing. Far from "protecting" the First Amendment rights of lawyers, Proposed Rule 8.4(g) would seriously compromise them.

If adopted, Proposed Rule 8.4(g) would profoundly transform the professional regulation of Tennessee attorneys. It would regulate aspects of an attorney's life that are far removed from protecting clients, preventing interference with the administration of justice, ensuring attorneys' fitness to practice law, or other traditional goals of professional regulation. Especially since there is no evidence that the current Rule 8.4 is in need of revision, there is no reason for Tennessee to adopt such a drastic change. If the TBA and BPR are right that harassing and discriminatory speech is a problem in the legal profession, then the answer is more speech, not enforced silence in the guise of professional regulation.

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[2] Letter from Edwin Meese III and Kelly Shackelford to ABA House of Delegates (Aug. 5, 2016), https://firstliberty.org/wp-content/uploads/2016/08/ABA-Letter_08.08.16.pdf. *See also, e.g.*, Eugene Volokh, *A speech code for lawyers, banning viewpoints that express 'bias,' including in law-related social activities*, The Volokh Conspiracy (Aug. 10, 2016, 8:53 AM), http://reason.com/volokh/2016/08/10/a-speech-code-for-lawyers-bann; John Blackman, *A Pause for State Courts Considering Model Rule 8.4(g): The First Amendment and Conduct Related to the Practice of Law*, 30 Geo. J. Legal Ethics 241 (2017); Ronald Rotunda, *The ABA Decision to Control What Lawyers Say: Supporting "Diversity" But Not Diversity of Thought,* The Heritage Foundation (Oct. 6, 2016), https://www.heritage.org/report/the-aba-decision-control-what-lawyers-say-supporting-diversity-not-diversity-thought.

[3] *ABA Model Rule 8.4(g) and the States,* Christian Legal Society, https://www.christianlegalsociety.org/resources/aba-model-rule-84g-and-states (last visited Mar. 6, 2018).

[4] Order, *In re Proposed Amendments to Rule 8.4 of the Rules of Professional Conduct*, No. 2017-000498 (S.C. June 20, 2017), https://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2017-06-20-01; Order, *In re Amendments to Rule of Professional Conduct 8.4*, No. ADKT526 (Nev. Sep. 25, 2017).

I. Problematic Features of Proposed Rule 8.4(g)

In their current form, the Rules of Professional Conduct do not expressly prohibit discrimination or harassment by attorneys. Rather, Rule 8.4(d) provides that it is "professional misconduct" to "engage in conduct that is prejudicial to the administration of justice." Tenn. Sup. Ct. R. 8, RPC 8.4(d). And comment 3 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." *Id.* at RPC 8.4(d), cmt. 3. Comment 3 also makes clear that "[l]egitimate advocacy representing the foregoing factors does not violate paragraph (d)." *Id.*

Proposed Rule 8.4(g) would establish a new black-letter rule that subjects Tennessee attorneys to professional discipline for "engag[ing] in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, or socioeconomic status in conduct related to the practice of law." Comment 3 to the proposed rule would define "harassment" and "discrimination" to include not only "physical conduct," but also "verbal . . . conduct"—better known as speech.

Several problematic features of the proposed rule warrant highlighting. First, the proposed rule would apply not only to speech and conduct that occurs in the course of representing a client or appearing before a judicial tribunal, but also to speech and conduct that is merely "*related to the practice of law*." (emphasis added). Comment 4 to the proposed rule explains that "[c]onduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers, and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law." Far from cabining the scope of the proposed rule, comment 4 leaves no doubt that the proposed rule would apply to virtually any speech or conduct that is even tangentially related to an individual's status as a lawyer, including, for example, a presentation at a CLE event, participation in a debate at an event sponsored by a law-related organization, the publication of a law review article, and even a casual remark at dinner with law firm colleagues.[5] Such speech or conduct would be "professional misconduct" even if it in no way prejudices the administration of justice.

[5] Indeed, the report that recommended adoption of Model Rule 8.4(g) to the ABA House of Delegates explained that the rule would regulate any "conduct lawyers are permitted or required to engage in because of their work as a lawyer," including "activities such as law firm dinners and other nominally social events at which lawyers are present solely because of their association with their law firm or in connection with their practice of law." Report to the House of Delegates 9, 11 (May 31, 2016), https://www.americanbar.org/content/dam/aba/administrative/ professional_ responsibility/scepr_report_to_hod_rule_8_4_amendments_05_31_2016_resolution_and_report_ posting.authcheckdam.pdf.

Second, the proposed rule would prohibit a broad range of "harassment or discrimination," including a significant amount of speech and conduct that is not currently prohibited under federal or Tennessee antidiscrimination statutes. To the extent that federal antidiscrimination laws apply to attorneys engaged in speech or conduct related to the practice of law, they generally apply only in the employment and education contexts and prohibit discrimination only on the basis of race, color, national origin, religion, sex, age, or disability. *See* 20 U.S.C. § 1681 (Title IX); 29 U.S.C. § 623 (ADEA); 29 U.S.C. § 794 (Rehabilitation Act); 42 U.S.C. § 2000d (Title VI); 42 U.S.C. § 2000e-2 (Title VII); 42 U.S.C. § 12112 (ADA). The Tennessee Human Rights Act similarly applies only in certain limited areas, including employment, and prohibits discrimination only on the basis of "race, creed, color, religion, sex, age or national origin." Tenn. Code Ann. § 4-21-401. Under both federal and state antidiscrimination laws, moreover, the only discrimination or harassment that is actionable in the employment context is that which results in a materially adverse employment action or is sufficiently severe and pervasive to create a hostile work environment. *See, e.g., White & Burlington N. & Santa Fe Ry. Co.*, 364 F.3d 789, 795 & n.1 (6th Cir. 2004) (en banc) (explaining that "not just any discriminatory act by an employer constitutes discrimination under Title VII"); *Frye v. St. Thomas Health Servs.*, 227 S.W.3d 595, 602, 610 (Tenn. Ct. App. 2007). And the only harassment that is actionable in the education context is that which is sufficiently severe and pervasive to effectively bar a student from receiving educational benefits. *See, e.g., Doe v. Miami Univ.*, 882 F.3d 579, 590 (6th Cir. 2018). Federal and state antidiscrimination laws also explicitly protect religious freedom by exempting religious organizations from their ambit. *See, e.g.*, 42 U.S.C. § 2000e-1(a); Tenn. Code Ann. § 4-21-405.

Proposed Rule 8.4(g) would reach well beyond federal and state antidiscrimination laws. For one thing, the proposed rule would prohibit any and all "harassment or discrimination"—even that which does not result in any tangible adverse consequence and is not sufficiently severe or pervasive to create a hostile environment. The proposed amendments to comment 3, which attempt to clarify what constitutes "harassment or discrimination," do nothing to alleviate this concern. The proposed comment simply states that "discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others," and "[h]arassment includes sexual harassment and derogatory or demeaning verbal or physical conduct." In other words, any speech or conduct that could be considered "harmful" or "derogatory or demeaning" would constitute professional misconduct within the meaning of the proposed rule. And while proposed comment 3 states that "[t]he substantive law of antidiscrimination and anti-harassment statutes and case law *may* guide application of paragraph (g)" (emphasis added), there is no requirement that the scope of Proposed Rule 8.4(g) be limited in that manner.

Even more troubling, Proposed Rule 8.4(g) would prohibit "harassment or discrimination" on the basis of characteristics that are not expressly covered by federal and state antidiscrimination laws—namely, "sexual orientation, gender identity, marital status, [and] socioeconomic status." It is no secret that individuals continue to hold diverse views on issues related to sexual orientation and gender identity, and those who hold traditional views on sexuality and gender frequently do so because of sincerely held religious beliefs. As the U.S. Supreme Court recognized in *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015), for example, many who consider "same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises." By deeming as "professional misconduct" any speech that someone may view as "harmful" or "derogatory or demeaning" toward homosexuals or transgender individuals,

Proposed Rule 8.4(g) would prevent attorneys who hold traditional views on these issues from "engag[ing] those who disagree with their view in an open and searching debate," *Obergefell*, 135 S. Ct. at 2607.

Unlike Title VII and the Tennessee Human Rights Act, Proposed Rule 8.4(g) includes no exception to protect religious freedom. Comment 4a to the proposed rule gives a nod to the First Amendment by stating that paragraph (g) "does not restrict any speech or conduct not related to the practice of law, including speech or conduct protected by the First Amendment." As explained below, however, nearly all speech and conduct that is "related to the practice of law" is also protected by the First Amendment, so that explanatory comment in fact does nothing to protect attorneys' First Amendment rights.

Third, Proposed Rule 8.4(g) would prohibit not only speech and conduct "that the lawyer knows . . . is harassment or discrimination," but also that which the lawyer "reasonably should know is harassment or discrimination." In other words, the proposed rule would subject an attorney to professional discipline for uttering a statement that was not actually known to be or intended as harassing or discriminatory, simply because someone might construe it that way.

II. Proposed Rule 8.4(g) Would Violate the U.S. and Tennessee Constitutions and Conflict with the Rules of Professional Conduct.

As a result of these and other problematic features, Proposed Rule 8.4(g) would violate the U.S. and Tennessee Constitutions and conflict with the spirit and letter of the existing Rules of Professional Conduct.

A. Proposed Rule 8.4(g) Would Infringe on Tennessee Attorneys' Rights to Free Speech, Freedom of Association, Free Exercise of Religion, and Due Process.

Proposed Rule 8.4(g) would clearly violate the First Amendment rights of Tennessee attorneys, including their rights to free speech, freedom of expressive association, and the free exercise of religion, and equivalent protections under the Tennessee Constitution.[6]

The First Amendment prohibits the government from regulating protected speech or expressive conduct based on its content unless the regulation is the least restrictive means of achieving a compelling government interest. *See Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 799 (2011). That most exacting level of scrutiny would apply to Proposed Rule 8.4(g) because it regulates speech and expressive conduct that is entitled to full First Amendment protection based on viewpoint.

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[6] The Tennessee Constitution also protects the rights to free speech, freedom of expressive association, and free exercise of religion. *See* Tenn. Const. art. I, § 19 (right to free speech); Tenn. Const. art. I. § 3 (right to free exercise of religion). This Court has held that these rights are at least as broad as those guaranteed by the First Amendment to the U.S. Constitution. *See, e.g., S. Living, Inc. v. Celauro*, 789 S.W.2d 251, 253 (Tenn. 1990); *Carden v. Bland*, 288 S.W.2d 718, 721 (Tenn. 1956).

Expression that would be deemed discrimination or harassment on the basis of one of the categories included in Proposed Rule 8.4(g) is entitled to robust First Amendment protection, even though listeners may find such expression harmful or offensive. *See Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 206 (3d Cir. 2001) (Alito, J.) ("[T]here is . . . no question that the free speech clause protects a wide variety of speech that listeners may consider deeply offensive, including statements that impugn another's race or national origin or that denigrate religious beliefs."). The U.S. Supreme Court has made clear that, save for a few narrowly defined and historically recognized exceptions such as obscenity and fighting words, the "'the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.'" *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017) (plurality opinion) (quoting *Street v. New York*, 394 U.S. 576, 592 (1969)); *see also, e.g., Brown*, 564 U.S. at 791, 798 (noting that "disgust is not a valid basis for restricting expression"); *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) ("[S]peech cannot be restricted simply because it is upsetting . . . ."); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) ("[T]he Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." (internal quotation marks omitted)). Indeed, the very "point of all speech protection . . . is to shield just those choices of content that in someone's eyes are misguided, or even hurtful." *Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Boston, Inc.*, 515 U.S. 557, 574 (1995); *see also Texas v. Johnson*, 491 U.S. 397, 408 (1989) ("[A] principal function of free speech under our system of government is to invite dispute." (internal quotation marks omitted)).

The fact that the speech at issue is that of attorneys does not deprive it of protection under the First Amendment. As a general matter, the expression of attorneys is entitled to full First Amendment protection, even when the attorney is acting in his or her professional capacity. *See, e.g., In re Primus*, 436 U.S. 412, 432-38 (1978) (applying strict scrutiny to invalidate on First Amendment grounds discipline imposed on attorney for informing welfare recipient threatened with forced sterilization that ACLU would provide free legal representation). Courts have permitted the government to limit the speech of attorneys in only narrow circumstances, such as when the speech pertains to a pending judicial proceeding or otherwise prejudices the administration of justice. *See Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1072 (1991); *Mezibov v. Allen*, 411 F.3d 712, 717 (6th Cir. 2005); *Bd. of Prof'l Responsibility v. Slavin*, 145 S.W.3d 538, 549 (Tenn. 2004).[7]

[7] Courts have also applied a lower level of scrutiny to regulations that implicate only the commercial speech of attorneys. *See, e.g., Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 622-24 (1995); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978). Proposed Rule 8.4(g) cannot be defended on that ground, because it reaches non-commercial speech. Some courts have also suggested that regulations of "professional speech" should be subject to a lower level of scrutiny. *See, e.g., Pickup v. Brown*, 740 F.3d 1208, 1225-29 (9th Cir. 2013). But neither the U.S. Supreme Court, the Sixth Circuit, nor the Tennessee Supreme Court has so held. In any event, Proposed Rule 8.4(g) is not limited to "professional speech"—that is, personalized advice to a paying client, *see, e.g., Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor and City Council of Balt.*, 879 F.3d 101, 109 (4th Cir. 2018)—but instead reaches speech or conduct that is merely "related to the practice of law."

This Court's decision in *Ramsey v. Board of Professional Responsibility*, 771 S.W.2d 116 (Tenn. 1989), is particularly instructive. There, a District Attorney General's law license was suspended because he made remarks to the media that were critical of the judicial system. This Court held that the disciplinary sanctions violated the First Amendment because the attorney's remarks, though "disrespectful and in bad taste," were protected expression. *Id.* at 122. This Court made clear that "[a] lawyer has every right to criticize court proceedings and the judges and courts of this State after a case is concluded," as long as those statements are not false. *Id.* at 122. Were the rule otherwise, this Court explained, it would "close the mouths of those best able to give advice, who might deem it their duty to speak disparagingly." *Id.* at 121. Proposed Rule 8.4(g) is not limited to speech and conduct that pertains to a pending judicial proceeding or that actually prejudices the administration of justice; rather, it reaches all speech and conduct in any way "related to the practice of law"—speech that is entitled to full First Amendment protection.

Proposed Rule 8.4(g) would not only regulate speech that is protected by the First Amendment, but it would also do so on the basis of viewpoint. But "it is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995). "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." *Id.* at 829 (referring to "[v]iewpoint discrimination" as "an egregious form of content discrimination"). Proposed Rule 8.4(g) discriminates based on viewpoint because it would permit certain expression that is laudatory of a person's race, sex, religion, or other protected characteristic, while prohibiting expression that is "derogatory or demeaning" of that characteristic. Indeed, proposed comment 4 makes clear that "[l]awyers may engage in conduct undertaken to *promote* diversity and inclusion without violating this Rule." (emphasis added). Like the trademark disparagement clause that the U.S. Supreme Court invalidated on First Amendment grounds in *Matal*, Proposed Rule 8.4(g) "mandat[es] positivity." 137 S. Ct. at 1766 (Kennedy, J., concurring in part and concurring in the judgment).

Because Proposed Rule 8.4(g) would regulate protected speech based on its viewpoint, it would be "presumptively unconstitutional" and could be upheld only if it were narrowly tailored to further a compelling government interest. *Rosenberger*, 515 U.S. at 830. But the proposed rule could not satisfy that exacting scrutiny. Even assuming that the government has a compelling interest in preventing discrimination in particular contexts such as employment or education, *see Saxe*, 240 F.3d at 209, or in protecting the administration of justice, Proposed Rule 8.4(g) is not narrowly tailored to further those interests because it would reach all speech and conduct in any way "related to the practice of law," regardless of the particular context in which the expression occurs or whether it actually interferes with the administration of justice.

Indeed, the Joint Petition does not establish empirically or otherwise any actual need for the proposed rule. The section of the Joint Petition titled "the need for proposed rule 8.4(g)" does not document any instances of harassment or discrimination brought to the attention of the BPR or TBR. Nor does it explain in what way discriminatory or harassing speech by attorneys harms the legal profession or the administration of justice. It simply agrees with the ABA House of Delegates' ipse dixit that the proposed rule is "in the public's interest" and "in the profession's interest." Joint Petition 2 (internal quotation marks omitted).

Even if discrete applications of Proposed Rule 8.4(g) could be upheld—for example, a discriminatory comment made during judicial proceedings that actually prejudices the administration of justice—the rule would still be subject to facial invalidation because it is unconstitutionally overbroad. A law may be invalidated under the First Amendment overbreadth doctrine "if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473 (2010) (internal quotation marks omitted). The "reason for th[at] special rule in First Amendment cases is apparent: An overbroad statute might serve to chill protected speech." *Bates v. State Bar of Ariz.*, 433 U.S. 350, 380 (1977). A person "might choose not to speak because of uncertainty whether his claim of privilege would prevail if challenged." *Id.* The overbreadth doctrine "reflects the conclusion that the possible harm to society from allowing unprotected speech to go unpunished is outweighed by the possibility that protected speech will be muted." *Id.*

Because Proposed Rule 8.4(g) would apply to any "harassment or discrimination" on the basis of a protected characteristic, including a single comment that someone may find "harmful" or "derogatory or demeaning," that is in any way "related to the practice of law," including remarks made at CLE events, debates, and in other contexts that do not involve the representation of a client or interaction with a judicial tribunal,[8] it would sweep in a substantial amount of attorney speech that poses no threat to any government interest that might conceivably justify the statute. Even if the BPR may ultimately decide not to impose disciplinary sanctions on the basis of such speech, or a court may ultimately invalidate on First Amendment grounds any sanction imposed, the fact that the rule on its face would apply to speech of that nature would undoubtedly chill attorneys from engaging in speech in the first place. But this Court has cautioned that "we must ensure that lawyer discipline, as found in Rule 8 of the Rules of [Professional Conduct], does not create a chilling effect on First Amendment Rights." *Ramsey*, 771 S.W.2d at 121.

Proposed Rule 8.4(g) also suffers from a related problem: the terms "harassment," "discrimination," "reasonably should know," "related to the practice of law," and "legitimate advice or advocacy" are impermissibly vague under the Due Process Clause. "A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). To comport with the requirements of due process, a regulation must "provide a person of ordinary intelligence fair notice of what is prohibited.'" *Id.* (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008)). But how is an attorney to know whether certain speech or conduct will be deemed harassing or discriminatory under the rule? Or whether certain speech or conduct will be deemed sufficiently "related to the practice of law" to fall within the ambit of the proposed rule? Determining whether an attorney "knows" or "reasonably should know" that the speech is harassing or discriminatory would require speculating about whether someone might view the speech as "harmful" or "derogatory or demeaning." Is an attorney who participates in a debate on income inequality engaging in discrimination based on socioeconomic status when he makes a negative remark about the "one percent"? How about an attorney who comments at a CLE on

[8] Even statements made by an attorney as a political candidate or a member of the General Assembly could be deemed sufficiently "related to the practice of law" to fall within the scope of Proposed Rule 8.4(g). So too could statements made by an attorney in his or her capacity as a member of the board of a nonprofit or religious organization.

immigration law that illegal immigration is draining public resources? Is that attorney discriminating on the basis of national origin? The vagueness of the proposed rule only exacerbates its chilling effect on attorney speech. *See id.* at 254.

Clarity of regulation is important not only for regulated parties, but also "so that those enforcing the law do not act in an arbitrary or discriminatory way." *Id.* at 253; *see also Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 532 (Tenn. 1993) ("[T]he more important aspect of the vagueness doctrine is not actual notice, but . . . the requirement that a legislature establish minimum guidelines to govern law enforcement"). The lack of clarity in Proposed Rule 8.4(g)'s terms creates a substantial risk that determinations about whether expression is prohibited will be guided by the "personal predilections" of enforcement authorities rather than the text of the rule. *Kolender v. Lawson*, 461 U.S. 352, 356 (1983) (internal quotation marks omitted). In fact, the proposed rule would effectively require enforcement authorities to be guided by their "personal predilections" because whether a statement is "harmful" or "derogatory or demeaning" depends on the subjective reaction of the listener. *See, e.g., Dambrot v. Cen. Mich. Univ.*, 55 F.3d 1177, 1184 (6th Cir. 1995) (invalidating university "discriminatory harassment" policy on vagueness grounds because "in order to determine what conduct will be considered 'negative' or 'offensive' by the university, one must make a subjective reference"). Especially in today's climate, those subjective reactions can vary widely. *See id.* (observing that "different people find different things offensive").

Proposed Rule 8.4(g) would also infringe on the First Amendment right of Tennessee attorneys to engage in expressive association. The First Amendment protects an individual's "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647 (2000). That right is "crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas." *Id.* at 647-48. Proposed Rule 8.4(g) is sufficiently broad that even membership in an organization that espouses views that some may consider "harmful" or "derogatory or demeaning" could be deemed "conduct related to the practice of law" that is "harassing or discriminatory." In this respect, the proposed rule is far broader than Rule 3.6 of the Code of Judicial Conduct. The latter rule prohibits a judge from "hold[ing] membership in any organization that practices invidious discrimination on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation," but comment 4 to the rule makes clear that "[a] judge's membership in a religious organization as a lawful exercise of the freedom of religion is not a violation" of the rule. Tenn. Sup. Ct. R. 10, CJC 3.6(A) & cmt. 4. Proposed Rule 8.4(g), by contrast, is not limited to "invidious" discrimination and contains no exception for membership in a religious organization.

Because Proposed Rule 8.4(g) includes no exception for speech or conduct that is motivated by one's religious beliefs, it would also interfere with attorneys' First Amendment right to the free exercise of religion. Indeed, by expressly prohibiting harassment or discrimination based on "sexual orientation" and "gender identity," the proposed rule appears designed to target those holding traditional views on controversial matters such as sexuality and gender—views that are often "based on decent and honorable religious or philosophical premises," *Obergefell*, 135 S. Ct. at 2602. It is well settled that the Free Exercise Clause protects not only the right to believe, but also the right to act according to those beliefs. *See, e.g., Emp't Div., Dep't of Human Res. of*

Or. v. Smith, 494 U.S. 872, 877 (1990) (explaining that "the 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts"). While gathering for worship with a particular religious group is unlikely to be deemed conduct "related to the practice of law," serving as a member of the board of a religious organization, participating in groups such as the Christian Legal Society, or even speaking about how one's religious beliefs influence one's work as an attorney may well be. The proposed rule may also violate Tennessee's Religious Freedom Restoration Act, which prohibits the government from "substantially burden[ing] a person's free exercise of religion even if the burden results from a rule of general applicability," unless the burden is the least restrictive means of furthering a compelling government interest. Tenn. Code Ann. § 4-1-407(c).

The Joint Petition asserts that Proposed Rule 8.4(g) addresses the First Amendment concerns that have plagued ABA Model Rule 8.4(g) by adding an additional sentence to comment 4 and a new comment 4a. Joint Petition 6-7. But these supposed improvements in fact do nothing to increase protection for attorneys' First Amendment rights. The new sentence in comment 4 provides that "[l]egitimate advocacy protected by Section (g) includes advocacy in any conduct related to the practice of the law, including circumstances where a lawyer is not representing a client and outside traditional settings where a lawyer acts as an advocate, such as litigation." But proposed section (g) itself states only that "[t]his paragraph does not preclude legitimate advice or advocacy *consistent with these Rules*." (emphasis added). So even if "legitimate advocacy" includes advocacy both in the course of representing a client and in other contexts, such advocacy is allowed only if it is otherwise consistent with Proposed Rule 8.4(g)—i.e., only if it does not constitute harassment or discrimination based on a protected characteristic. That circular exception is no exception at all. Moreover, the proposed rule nowhere defines what constitutes "legitimate" advocacy; the BPR would presumably get to draw the line between legitimate and illegitimate advocacy, creating a further risk that advocacy of controversial or politically incorrect positions would be deemed harassment or discrimination that constitutes professional misconduct.

Proposed comment 4a is likewise of no help. It provides that "Section (g) does not restrict any speech or conduct not related to the practice of law, including speech or conduct protected by the First Amendment. Thus, a lawyer's speech or conduct unrelated to the practice of law cannot violate this Section." All that comment 4a does, in other words, is reiterate that the proposed rule reaches all speech and conduct that *is* related to the practice of law. But that is the very feature of the proposed rule that gives rise to many of its First Amendment problems. The comment rests on the same erroneous premise as the proposed rule itself: that attorney speech and conduct that *is* related to the practice of law is *not* protected by the First Amendment. As explained above, that is simply not the case. Attorney speech, even speech that is connected with the practice of law, ordinarily is entitled to full First Amendment protection.

The Joint Petition asserts that Proposed Rule 8.4(g) is consistent with the First Amendment because it "leaves a sphere of *private thought and private activity* for which lawyers will remain free from regulatory scrutiny." Joint Petition 6 (emphasis added). That statement is alarming. It makes clear that the goal of the proposed rule is to *subject* to regulatory scrutiny all attorney expression that is in any way connected with the practice of law. That approach is wholly inconsistent with the First Amendment.

B. Proposed Rule 8.4(g) Would Conflict with the Rules of Professional Conduct.

In addition to violating the constitutional rights of Tennessee attorneys, Proposed Rule 8.4(g) would also conflict in numerous respects with the spirit and letter of the existing Rules of Professional Conduct. Most fundamentally, the proposed rule would disregard the traditional goals of professional regulation by "open[ing] up for liability an entirely new realm of conduct unrelated to the actual practice of law or a lawyer's fitness to practice, and not connected with the administration of justice." Blackman, *supra*, at 252. Even violations of criminal law are left unregulated by the Rules of Professional Conduct when they do not "reflect[] adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects." Tenn. Sup. Ct. R. 8, RPC 8.4(b). But Proposed Rule 8.4(g) would subject attorneys to professional discipline for speech or conduct that violates neither federal nor state antidiscrimination laws and has no bearing on fitness to practice law or the administration of justice.

The proposed rule also threatens to interfere with an attorney's broad discretion to decide which clients to represent. While the proposed rule states that it "does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with RPC 1.16," the latter rule only addresses the circumstances in which an attorney is *required* to decline or withdraw from representation. An attorney who would prefer not to represent a client because the attorney disagrees with the position the client is advocating, but is not required under Rule 1.16 to decline the representation, may be accused of discriminating against the client under Proposed Rule 8.4(g) Take, for example, an attorney who declines to represent a corporate executive because the attorney believes corporate executives are responsible for the rising income inequality in our country. Would that attorney have discriminated based on socioeconomic status? While the attorney may be able to contend that his or her personal views concerning the client's wealth created a "conflict of interest" that prevented representation under the Rule of Professional Conduct 1.7, it is far from clear how the seeming tension between that rule and Proposed Rule 8.4(g) would be resolved.

The proposed rule may also chill attorneys from representing clients who wish to advocate positions that could be considered harassment or discrimination based on a protected characteristic, or at least from doing so zealously as required by the Rules of Professional Conduct. The proposed rule states that it "does not preclude legitimate advice or advocacy consistent with these Rules," but, as noted above, the "consistent with these Rules" qualifier renders that circular exception meaningless. Comment 5d to the proposed rule states that "[a] lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities." While that clarification may provide some comfort that an attorney's representation of a client will not be deemed harassment or discrimination, it is largely duplicative of existing Rule of Professional Conduct 1.2 and, if anything, adds to the uncertainty regarding whether an attorney's decision *not* to represent a client could subject the attorney to discipline.

More generally, the proposed rule infringes on the ability of attorneys to practice law in accordance with their religious, moral, and political beliefs. Yet the Rules of Professional Conduct make clear that lawyers should be "guided by personal conscience" and informed by "moral and ethical considerations." Tenn. Sup. Ct. R. 8, RPC Preamble and Scope; *see also id.* at RPC 2.1

("In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation.").

* * *

Because Proposed Rule 8.4(g) would violate the constitutional rights of Tennessee attorneys and conflict with the existing Rules of Professional Conduct, it is incumbent on the Office of the Attorney General to urge this Court to reject its adoption.[9] The existing Rules of Professional Conduct are sufficient to provide for the discipline of attorneys whose expressions of "bias or prejudice" are in fact "prejudicial to the administration of justice." Tenn. Sup. Ct. R. 8, RPC 8.4, cmt. 3. And existing federal and state antidiscrimination laws may provide recourse for individuals who are subjected to discrimination or harassment by attorneys in the workplace or in educational institutions. To the extent that the Joint Petition seeks to suppress speech on controversial issues such as same-sex marriage or gender identity, it is directly contrary to the First Amendment principle that the remedy for speech with which one disagrees is "more speech, not enforced silence." *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). "Society has the right and civic duty to engage in open, dynamic, rational discourse." *United States v. Alvarez*, 567 U.S. 709, 728 (2012). As members of a highly educated profession, attorneys are uniquely equipped to engage in informed debate on these and other important issues. Such debate should be encouraged, not silenced.

Sincerely,

Herbert H. Slatery III
Attorney General and Reporter

[9] The Attorneys General of Louisiana, South Carolina, and Texas have likewise concluded that ABA Model Rule 8.4(g) would violate the First Amendment and Due Process Clause. *See* La. Att'y Gen. Op. 17-0114 (Sept. 8, 2017); S.C. Att'y Gen. Op. on Constitutionality of ABA Model Rule 8.4(g) (May 1, 2017); Tex. Att'y Gen. Op. KP-0123 (Dec. 20, 2016).