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Tennessee Again Rejects Anti-Discrimination Ethics Rule

By Mindy Rattan

The Tennessee Supreme Court Apr. 23 rejected a proposed revision to the rules of professional conduct that would have prohibited lawyers from engaging in harassing and discriminatory behavior.

This is the second time in five years the Supreme Court has rejected similar proposals.

The Tennessee Board of Professional Responsibility and the Tennessee Bar Association filed a joint petition in November 2017 seeking to amend the Tennessee Rules of Professional Conduct to include a new subsection (g) within the misconduct rule, Rule 8.4.

The proposal would have incorporated Rule 8.4(g) to the ABA Model Rule of Professional Conduct, which was adopted by an overwhelming majority in of delegates in 2016. That rule prohibits lawyers from harassing and discriminating against others in conduct related to practicing law.

Tennessee's petition sought to add the Model Rule language:

"It is professional misconduct for a lawyer to:…(g) engage 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. This paragraph does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with RPC 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules…"

The petition also proposed revisions to the rule's explanatory comments that address:

- the scope of "[c]onduct related to the practice of law";
- what is meant by harassment and discrimination;
- that the rule doesn't restrict speech or conduct unrelated to the practice of law;
- that limitations on the lawyer's practice or on individual matters doesn't violate the rule; and
- that it's not discrimination or harassment to charge reasonable fees.

For the most part, the proposed comments track the comments adopted by the ABA, with a few notable exceptions.
For instance, a proposed comment clarifies that "legitimate advocacy" includes instances when a lawyer isn't representing a client and in non-traditional settings, but stops short of listing examples. Another proposed comment states that subsection (g) doesn't restrict speech or conduct that isn't related to the practice of law. And charging reasonable fees by itself, the proposed comment says, isn't discriminating against socioeconomic status.

Disciplined for Disagreement?

The proposal generated voluminous comments from law professors, practitioners, and religious groups. Many commenters didn't see the need for such a rule and opposed "big brother" looking over a lawyer's shoulder.

Many comments focused on the restrictions on a lawyer's First Amendment right to free speech. UCLA law professor Eugene Volokh, who teaches classes on free speech and religious freedom, told Bloomberg Law there is a "longstanding tradition of regulating lawyer behavior in interactions within the legal system," which are aimed at least in part at ensuring the "justice system proceeds as smoothly as possible."

But "what's remarkable and what's troublesome" about 8.4(g) is that it applies to social and professional contexts. He asked how can lawyers have an "honest, serious debate" if a lawyer may be subjected to professional discipline for expressing his or her views?

South Texas College of Law constitutional law professor Josh Blackman told Bloomberg Law that lawyers "don't forsake all of [their] free speech rights by becoming an attorney." And the bar doesn't have the same interest in disciplining lawyers for conduct at a bar association dinner or at continuing legal education classes, as it does in disciplining lawyer conduct in a courtroom, deposition or mediation, Blackman said. The rule is a tool "to silence and chill people."

Blackman was recently protested and heckled by students at CUNY Law School for speaking about free speech. Blackman said those kids will be enforcing 8.4(g) in a few years and "if you give these kids a loaded weapon, they'll use it to discipline people who speak things they don't like."

But Rule 8.4(g) has vocal proponents as well. New York University School of Law professional responsibility professor Stephen Gillers advocated for the ABA's adoption of 8.4(g) and said that "[n]o lawyer has a First Amendment right to demean another lawyer (or anyone involved in the legal process)."

Similarly, Tennessee Bar Association President Lucian Pera, a professional responsibility lawyer at Adams and Reese LLP in Memphis, said in a March 2018 article in the *Tennessee Bar Journal* called " Ban Harassment and Discrimination Now," that "[w]e need a rule banning this kind of conduct—discrimination and harassment—by lawyers in their activity as lawyers." He encouraged readers to ask people they trusted if there should be such a rule.

In response to the comments, particularly those from Blackman, the board and Tennessee bar proposed modifications to the revised Rule 8.4(g) on the day the public comment period closed. Those revisions focused on trying to avoid confusion and clarify the legitimate advocacy exception and that the rule does not apply to conduct protected by the First Amendment.

5 Years Ago

In 2013 the board proposed a similar revision to rule 8.4. That proposal prohibited a lawyer "in a professional capacity," from engaging in conduct that manifested bias or prejudice. At the time, the bar did not support such a revision because, according to Pera's article, the rule was "too broad and too narrow" and "would be very difficult to enforce fairly."

After considering the comments received, the court denied the board's petition in May 2013.

State of the Nation

To date, only Vermont has adopted the Model Rule's version of 8.4(g). Many other states have anti-discrimination provisions, but they have been described as being more narrow than 8.4(g).

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