

#2016-009

May The Tennessee Supreme Court Rejects ABA Model Rule 8.4(g)

2018

Topics: Professional Responsibility & Legal Education ·
State Courts · Free Speech & Election Law



Sponsors: Religious Liberties Practice Group



Kim Colby

On April 23, the Supreme Court of Tennessee denied a petition to adopt a slightly modified version of ABA Model Rule 8.4(g). The Court had held a public comment period on the petition, which was filed by the Tennessee Bar Association and the Tennessee Board of Professional Responsibility. During the comment period, the Court received over 400 pages of public comment.

The Tennessee Attorney General filed a comment letter with the Court, explaining that a black-letter rule based on ABA Model Rule 8.4(g) “would violate the constitutional rights of Tennessee attorneys and conflict with the existing Rules of Professional Conduct.” The comment letter was incorporated into Attorney General Opinion No. 18-II (Mar. 16, 2018), which noted that ABA Model Rule 8.4(g) “has been widely and justifiably criticized as 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.”

Noting the rule’s application to “‘verbal . . . conduct’ – better known as speech,” Tennessee Attorney General Slatery’s comments concluded that “any speech or conduct that could be considered ‘harmful’ or ‘derogatory or demeaning’ would constitute professional misconduct within the meaning of the proposed rule.” He highlighted “several problematic features” of the proposed rule, including:

1. “[T]he 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.”
2. “[T]he proposed rule would prohibit . . . a significant amount of speech and conduct that is not currently prohibited under federal or Tennessee antidiscrimination statutes.”
3. “[T]he 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.”

The Attorney General warned that the proposed rule “would profoundly transform the professional regulation of Tennessee attorneys.” This transformation would occur because the rule “would regulate aspects of any 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.” That is, the ABA Model Rule 8.4(g) takes attorney regulation far beyond the traditional province of the rules of professional conduct.