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IN RE: COMMENT OF BOARD OF PROFESSIONAL  
RESPONSIBILITY OF THE SUPREME COURT OF  
TENNESSEE AND TENNESSEE BAR ASSOCIATION  
IN FURTHER SUPPORT OF JOINT PETITION FOR THE  
ADOPTION OF A NEW TENN. SUP. CT. R. 8, RPC 8.4(g)

Dear Jim:

Attached please find an original and one copy of the Comment of the Board of Professional Responsibility and the Tennessee Bar Association in reference to the above matter.

As always, thank you for your cooperation.

Sincerely,

Joycelyn A. Stevenson  
Executive Director

cc: Jimmie C. Miller, Board of Professional Responsibility  
Sandy Garrett, Board of Professional Responsibility  
Lucian T. Pera, President, Tennessee Bar Association  
Brian S. Faughnan, Chair, Tennessee Bar Association Committee on  
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**FILED**  
MAR 21 2018  
Clerk of the Appellate Courts  
Rec'd By LM

**IN THE SUPREME COURT OF TENNESSEE**

IN RE: )  
)  
)  
PETITION FOR THE ADOPTION OF ) No. ADM2017-02244  
A NEW TENN. SUP. CT. R. 8, RPC 8.4(g) )  
)

**COMMENT OF BOARD OF PROFESSIONAL RESPONSIBILITY OF THE SUPREME  
COURT OF TENNESSEE AND TENNESSEE BAR ASSOCIATION  
IN FURTHER SUPPORT OF JOINT PETITION  
FOR THE ADOPTION OF A NEW TENN. SUP. CT. R. 8, RPC 8.4(g)**

The Board of Professional Responsibility of the Supreme Court of Tennessee (“BPR”) and the Tennessee Bar Association (“TBA”) jointly submit this comment in further support of their joint petition, filed November 15, 2017, to adopt a new Tenn. Sup. Ct. R. 8, RPC 8.4(g) to prohibit discrimination and harassment by lawyers in conduct related to the practice of law:

Specifically, the BPR and the TBA amend 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 made by Professor Josh Blackman of the South Texas College of Law and the Knoxville Bar Association. Professor Blackman’s comment, filed by email on December 11, 2017, included praise for certain aspects of Petitioners’ modifications of the ABA Model Rule and several specific suggestions for further improvement. The Knoxville Bar Association filed its comment on March 14, 2018, and supported enactment of a Tennessee rule that would incorporate these suggested revisions and a separate black-letter revision. Petitioners’ revised proposed language is attached as Exhibit A.

Petitioners have carefully considered each of these suggestions and adopted revisions to the proposal intended to accommodate almost all of these suggestions.

### AMENDMENTS TO PROPOSED LANGUAGE

**I. Clarifying and confirming that the proposed Rule would not affect or limit lawyer decision-making concerning accepting, declining, or withdrawing from representation.**

In the first of two amendments to the proposed black-letter Rule 8.4(g), Petitioners have deleted “in accordance with RPC 1.16,” from the second sentence of the proposed black-letter Rule, as follows:

Original proposed Rule 8.4(g):

This paragraph does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with RPC 1.16.

Revised proposed 8.4(g) (deleted language ~~struck through~~):

This paragraph does not limit the ability of a lawyer to accept, decline, or withdraw from a representation ~~in accordance with RPC 1.16~~.

The original reference to Rule 1.16 was intended to point to the only provision in the Rules of Professional Conduct that *does*, in fact, limit “the ability of a lawyer to accept, decline, or withdraw from a representation. However, some commenters believed that the reference was confusing. Petitioners agree that deleting “in accordance with RPC 1.16” leads to a simpler and clearer rule that has the same meaning as the drafters intended by the original proposed language.

**II. Clarifying and confirming that the “legitimate advice or advocacy” exception to the proposed Rule is not limited by the ban on discrimination or harassment in proposed Rule 8.4(g).**

In the second of two amendments to the proposed black-letter Rule 8.4(g), Petitioners have reformulated the second sentence of the proposed black-letter Rule to avoid an unintended circularity that some commenters saw in the original proposed Rule. The revision is as follows:

Original proposed Rule 8.4(g):

This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

Revised proposed 8.4(g) (deleted language ~~struck through~~; added language underlined):

This paragraph does not preclude legitimate advice or advocacy ~~eonsistent with these Rules~~ that does not violate other Rules of Professional Conduct.

In the view of Petitioners, a clear and strong “legitimate-advice-or-advocacy” exception to proposed Rule 8.4(g) is an absolutely essential element of the proposal. Without it, the proposed Rule should not be adopted. That said, the Petitioners nevertheless believe it is important that this the “legitimate-advice-or-advocacy” exception not be used to excuse or defend speech or conduct that *otherwise* amounts to disciplinary misconduct under the Rule. For example, filing a frivolous pleading in court violates RPC 3.1 (Meritorious Claims and Contentions), but a non-frivolous complaint that violates neither Rule 3.1 nor any other Rule (other than Rule 8.4(g)) should be considered “legitimate advocacy” exempt from the prohibition on discrimination and harassment in proposed Rule 8.4(g).

Some commenters believed, however, that the original formulation meant (or could be read to mean) that no advice or advocacy could be “legitimate,” and thus excepted from the ban on discrimination and harassment, if that advice or advocacy itself was somehow discriminatory or harassing. That was not the intent of the drafters. Therefore, following the suggestion of the Knoxville Bar Association, the revised proposed language limits the internal reference so that it only refers to Rules of Professional Conduct *other than* proposed Rule 8.4(g). Petitioners believe that this amendment clarifies and better expresses the intent of this provision and avoids the circularity perceived by some commenters.

**III. Adding language to proposed Comment [4] to clarify the reach of the “legitimate advice or advocacy” exception.**

In the first of two amendments of the proposed Comments, Petitioners have added a sentence to Comment [4] substantively identical to language suggested by Professor Blackman and the Knoxville Bar Association aimed at addressing the interaction of First Amendment protection of speech and the extension of the prohibition on lawyer discrimination and harassment beyond the representation of clients to all lawyer conduct related to the practice of law.

Professor Blackman suggested that language added by the Petitioners to the ABA version “could be improved by providing some context of what “non-traditional settings” are covered by “conduct related to the practice of law.” Thus, in context, Petitioners have revised proposed Comment [4] to add a sentence substantively identical to language suggested by Professor Blackman and endorsed by the Knoxville Bar Association. That added language, shown in context, is as follows (added language underlined):

[4] Conduct 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. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining, and advancing diverse employees or sponsoring diverse law student organizations. Legitimate 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. For example, legitimate 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.

Petitioners believe that this added language clarifies the interpretation of “conduct related to the practice of law” in a way consistent with the black letter and directly responsive to

numerous comments expressing concern about the reach of the proposed Rule into lawyer speech in public and in venues such as CLE presentations.

**IV. Adding language to proposed Comment [4a] to clarify that the intent of the proposed Rule is that it not reach conduct protected by the First Amendment.**

In the second of two amendments of the proposed Comments, Petitioners have reformulated proposed Comment [4a] to address legitimate criticism that the original proposed language – language drafted by Petitioners to improve the ABA draft – could more clearly recognize the role of the First Amendment in the application of this proposed Rule. Petitioners believe that the proposed Rule does not violate the First Amendment rights of lawyers. That said, to provide those who would be charged with interpreting and applying this language with crystal clear guidance as to its intended application, Petitioners believe that adding express Comment language to this effect would be beneficial. Commenters suggested, however, that this express statement of intent could be improved, and Petitioners agree.

For this reason, the Petitioners have revised Comment [4a] as follows:

**Original Comment [4a]:**

[4a] 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.

**Revised Comment [4a]:**

[4a] 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 revision is again based on language proposed originally by Professor Blackman and endorsed by the Knoxville Bar Association.

Petitioners believe that this amendment more clearly expresses the intent of the drafters and would more clearly guide the Rule's appropriate interpretation and application.

**CONCLUSION**

For all of the reasons set forth in the original Joint Petition and above, the BPR and the TBA jointly request this Court to adopt the amendments to Tenn. Sup. Ct. R. 8, RPC 8.4 that are reflected in Exhibit A, as revised from their original joint proposal. Further, the TBA and the BPR request that the costs of filing this Petition be waived in the public interest and given the purpose for which submitted.

Respectfully submitted,

BOARD OF PROFESSIONAL RESPONSIBILITY  
OF THE SUPREME COURT OF TENNESSEE

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**CERTIFICATE OF SERVICE**

The undersigned certifies that a true and correct copy of the foregoing will be served, within 7 days of the filing of this document, upon the individuals and organizations identified in Exhibit "D" to the petition by regular U.S. Mail, postage prepaid.

  
\_\_\_\_\_  
JOYOELYN A. STEVENSON



# **EXHIBIT A TO COMMENT OF BPR AND TBA**

Comparison of Specific *Revised* Language Proposed by BPR and TBA  
to Current Tennessee Rule  
(*as revised March 21, 2018, as part of Comment*)

**Comparison of Specific *Revised* Language Proposed by BPR and TBA  
to Current Tennessee Rule**

(as revised March 21, 2018, as part of Comment;  
deleted language ~~struckthrough~~; added language underlined)

**RULE 8.4: MISCONDUCT**

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence a tribunal or a governmental agency or official on grounds unrelated to the merits of, or the procedures governing, the matter under consideration;
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;
- (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. This paragraph does not preclude legitimate advice or advocacy that does not violate other Rules of Professional Conduct; or
- (gh) knowingly fail to comply with a final court order entered in a proceeding in which the lawyer is a party, unless the lawyer is unable to comply with the order or is seeking in good faith to determine the validity, scope, meaning, or application of the law upon which the order is based.

**Comment**

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so

through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. Although under certain circumstances a single offense reflecting adversely on a lawyer's fitness to practice --such as a minor assault -- may not be sufficiently serious to warrant discipline, a pattern of repeated offenses, even ones that are of minor significance when considered separately, can indicate indifference to legal obligation.

[3] Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g). 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. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d).

[4] Conduct 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. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining, and advancing diverse employees or sponsoring diverse law student organizations. Legitimate 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. For example, legitimate 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.

[4a] 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.

[5a] A trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g).

[5b] A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer’s practice or by limiting the lawyer’s practice to members of underserved populations in accordance with these Rules and other law.

[5c] Lawyers should be mindful of their professional obligations under RPC 6.1 to provide legal services to those who are unable to pay, and their obligation under RPC 6.2 not to avoid appointments from a tribunal except for good cause. Nevertheless, a lawyer does not engage in conduct that harasses or discriminates based on socio-economic status merely by charging and collecting reasonable fees and expenses for a representation.

[5d] A lawyer’s representation of a client does not constitute an endorsement by the lawyer of the client’s views or activities. See RPC 1.2(b).

[64] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of RPC 1.2(d) concerning a good faith challenge to the validity, scope, meaning, or application of the law apply to challenges of legal regulation of the practice of law.

[75] Paragraph (c) prohibits lawyers from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. Such conduct reflects adversely on the lawyer’s fitness to practice law. In some circumstances, however, prosecutors are authorized by law to use, or to direct investigative agents to use, investigative techniques that might be regarded as deceitful. This Rule does not prohibit such conduct.

[86] The lawful secret or surreptitious recording of a conversation or the actions of another for the purpose of obtaining or preserving evidence does not, by itself, constitute conduct involving deceit or dishonesty. See RPC 4.4.

[97] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer’s abuse of public office can suggest an inability to fulfill

the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director, or manager of a corporation or other organization.

[108] Paragraph (f) precludes a lawyer from assisting a judge or judicial officer in conduct that is a violation of the rules of judicial conduct. A lawyer cannot, for example, make a gift, bequest, favor, or loan to a judge, or a member of the judge's family who resides in the judge's household, unless the judge would be permitted to accept, or acquiesce in the acceptance of such a gift, bequest, or loan in accordance with Canon 4, Section D(5) of the Code of Judicial Conduct.

[119] In both their professional and personal activities, lawyers have special obligations to demonstrate respect for the law and legal institutions. Normally, a lawyer who knowingly fails to obey a court order demonstrates disrespect for the law that is prejudicial to the administration of justice. Failure to comply with a court order is not a disciplinary offense, however, when it does not evidence disrespect for the law either because the lawyer is unable to comply with the order or the lawyer is seeking in good faith to determine the validity, scope, meaning, or application of the law upon which the order is based.

#### DEFINITIONAL CROSS-REFERENCES

"Fraud" *See* RPC 1.0(d)

"Knowingly" and "knows" *See* RPC 1.0(f)

"Reasonably should know" *See* RPC 1.0(j)

"Tribunal" *See* RPC 1.0(m)

**EXHIBIT B TO  
COMMENT OF BPR AND TBA**

Comparison of Specific *Revised* Language Proposed by BPR and TBA  
To ABA Model Rule of Professional Conduct 8.4(g)  
*(as revised March 21, 2018, as part of Comment)*

**Comparison of Specific Revised Language Proposed by BPR and TBA  
To ABA Model Rule of Professional Conduct 8.4(g)  
(as revised March 21, 2018, as part of Comment)**

**RULE 8.4: MISCONDUCT**

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~~ that does not violate other Rules of Professional Conduct.

**Comment**

\* \* \*

[3] Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).

[4] Conduct 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. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations. For example, legitimate 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.

[4a] 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.

[5a] A trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g).

[5b] A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer’s practice or by limiting the lawyer’s practice to members of underserved populations in accordance with these Rules and other law.

~~[5c] A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers should also be mindful of their professional obligations under RulePC 6.1 to provide legal services to those who are unable to pay, and their obligation under RulePC 6.2 not to avoid appointments from a tribunal except for good cause. See Rule 6.2(a), (b) and (c). Nevertheless, a lawyer does not engage in conduct that harasses or discriminates based on socio-economic status merely by charging and collecting reasonable fees and expenses for a representation.~~

[5d] A lawyer’s representation of a client does not constitute an endorsement by the lawyer of the client’s views or activities. See RulePC 1.2(b).

\* \* \*



# **EXHIBIT C TO COMMENT OF BPR AND TBA**

Comparison of Specific *Revised* Language Proposed by BPR and TBA  
to Original Language Proposed by BPR and TBA  
(as revised March 21, 2018, as part of Comment)

**Comparison of Specific *Revised* Language Proposed by BPR and TBA  
to Original Language Proposed by BPR and TBA**  
(as revised March 21, 2018, as part of Comment;  
deleted language ~~struckthrough~~; added language underlined)

**RULE 8.4: MISCONDUCT**

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence a tribunal or a governmental agency or official on grounds unrelated to the merits of, or the procedures governing, the matter under consideration;
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;
- (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~~ that does not violate other Rules of Professional Conduct; or
- (h) knowingly fail to comply with a final court order entered in a proceeding in which the lawyer is a party, unless the lawyer is unable to comply with the order or is seeking in good faith to determine the validity, scope, meaning, or application of the law upon which the order is based.

**Comment**

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. Although under certain circumstances a single offense reflecting adversely on a lawyer's fitness to practice --such as a minor assault -- may not be sufficiently serious to warrant discipline, a pattern of repeated offenses, even ones that are of minor significance when considered separately, can indicate indifference to legal obligation.

[3] Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).

[4] Conduct 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. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining, and advancing diverse employees or sponsoring diverse law student organizations. Legitimate 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. For example, legitimate 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.

[4a] ~~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. 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.~~ Thus, a lawyer’s speech or conduct unrelated to the practice of law cannot violate this Section.

[5a] A trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g).

[5b] A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer’s practice or by limiting the lawyer’s practice to members of underserved populations in accordance with these Rules and other law.

[5c] Lawyers should be mindful of their professional obligations under RPC 6.1 to provide legal services to those who are unable to pay, and their obligation under RPC 6.2 not to avoid appointments from a tribunal except for good cause. Nevertheless, a lawyer does not engage in conduct that harasses or discriminates based on socio-economic status merely by charging and collecting reasonable fees and expenses for a representation.

[5d] A lawyer’s representation of a client does not constitute an endorsement by the lawyer of the client’s views or activities. *See* RPC 1.2(b).

[6] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of RPC 1.2(d) concerning a good faith challenge to the validity, scope, meaning, or application of the law apply to challenges of legal regulation of the practice of law.

[7] Paragraph (c) prohibits lawyers from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. Such conduct reflects adversely on the lawyer’s fitness to practice law. In some circumstances, however, prosecutors are authorized by law to use, or to direct investigative agents to use, investigative techniques that might be regarded as deceitful. This Rule does not prohibit such conduct.

[8] The lawful secret or surreptitious recording of a conversation or the actions of another for the purpose of obtaining or preserving evidence does not, by itself, constitute conduct involving deceit or dishonesty. *See* RPC 4.4.

[9] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer’s abuse of public office can suggest an inability to fulfill

the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director, or manager of a corporation or other organization.

[10] Paragraph (f) precludes a lawyer from assisting a judge or judicial officer in conduct that is a violation of the rules of judicial conduct. A lawyer cannot, for example, make a gift, bequest, favor, or loan to a judge, or a member of the judge's family who resides in the judge's household, unless the judge would be permitted to accept, or acquiesce in the acceptance of such a gift, favor, bequest, or loan in accordance with Canon 4, Section D(5) of the Code of Judicial Conduct.

[11] In both their professional and personal activities, lawyers have special obligations to demonstrate respect for the law and legal institutions. Normally, a lawyer who knowingly fails to obey a court order demonstrates disrespect for the law that is prejudicial to the administration of justice. Failure to comply with a court order is not a disciplinary offense, however, when it does not evidence disrespect for the law either because the lawyer is unable to comply with the order or the lawyer is seeking in good faith to determine the validity, scope, meaning, or application of the law upon which the order is based.

#### **DEFINITIONAL CROSS-REFERENCES**

"Fraud" *See* RPC 1.0(d)

"Knowingly" and "knows" *See* RPC 1.0(f)

"Reasonably should know" *See* RPC 1.0(j)

"Tribunal" *See* RPC 1.0(m)

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