

# THE NATIONAL LEGAL FOUNDATION

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March 21, 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  
Re: Tenn. Sup. Ct. R. 9, section 32  
Tennessee Appellate Courts  
100 Supreme Court Building  
401 7<sup>th</sup> Avenue North  
Nashville, TN 37219-1407

Via email only: [appellatecourtclerk@tncourts.gov](mailto:appellatecourtclerk@tncourts.gov)

Re: No. ADM2017-02244—Comment Letter of The National Legal Foundation and the Congressional Prayer Caucus Foundation Opposing Amending Rule 8, RPC 8.4 of the Rules of the Tennessee Supreme Court by Adopting a New RPC 8.4(g)

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

The National Legal Foundation (NLF), joined by the Congressional Prayer Caucus Foundation, writes in opposition to the adoption of proposed RPC 8.4(g) (“proposed rule”), which substantially follows the ABA Model Rule 8.4(g) (“model rule”). The NLF is a public interest law firm dedicated to the defense of First Amendment liberties. We write on behalf of ourselves and donors and supporters, including those in Tennessee. The NLF has had a significant federal and state court practice since 1985, including representing numerous parties and *amici* before the Supreme Court of the United States and the supreme courts of several states.

The Congressional Prayer Caucus Foundation (CPCF) is an organization established to protect religious freedom, preserve America’s Judeo-Christian heritage, and promote prayer, including as it has traditionally been exercised in Congress and other public places. CPCF reaches across all denominational, socioeconomic, political, racial, and cultural dividing lines. CPCF has an associated national network of citizens, legislators, pastors, business owners, and opinion leaders hailing from thirty-one states, including Tennessee.

We agree with much of what the Christian Legal Society (CLS) expressed in its comments, submitted to the Court on January 31, 2018. Those comments noted the growing body of scholarly and professional criticism focusing on the model rule’s Constitutional deficiencies.

CLS also ably summarized the track record of the model rule to date and its difficulty gaining traction because of its Constitutional infirmities. Those infirmities are regrettably present in the proposed rule submitted by Petitioners.

The model rule, substantially replicated in the proposed rule, purports to put lawyers at the forefront of a cultural movement. Whatever the merits of that widely debated cultural movement in the abstract, what the model rule most certainly attempts is to coopt State bars and judiciaries to undermine basic fairness with respect to Constitutionally protected, sincerely held religious beliefs and ethical standards.

The model rule and comments are a model of poor draftsmanship. The proposed rule and comments adopt some of this infelicitous drafting.<sup>1</sup> Despite the expressed and laudable goal of eliminating harassment and discrimination from the practice of law, the breadth of the language and the overreach of scope suggests that something else is at work.

It is hard to see how the model rule has, as claimed, “fully and artfully” addressed the issues it tackles. Far from being “a legally and constitutionally sound approach to prohibiting discrimination and harassing conduct,” it imposes a speech code on lawyers who may not agree with the ABA leadership’s and other so-called progressives’ sentiment that everyone must conform to their view of how society should be ordered or else be subject to sanction and potentially career-ending actions. This take-no-prisoners attitude is symptomatic of any intolerant ideology, right or left, that wants to shrink the First Amendment’s guarantees to fit the diminutive size of its particular bias.

In considering the merits of the proposed rule, the turbulence encountered on the model rule’s journey thus far is telling. As detailed in the CLS comments (at page 9 of 23, submitted January 31, 2018), numerous jurisdictions have taken action (or declined to take action) based on grave reservations about the wisdom and Constitutionality of the model rule.

Much of the thinking and advocacy that undergird the push for the model rule’s adoption also ignores credible and significant health and social science data that should signal skepticism in approaching the expansive scope of the proposed rule’s language. There is well founded concern that the proposed rule would align the State of Tennessee behind those who are most actively pushing an expansive definition of “sexual orientation,” “gender identity,” and “marital status,” to the degree that any such “discrimination,” broadly defined, will override religious, speech, assembly, and other freedoms.

With respect to the categories of “sexual orientation,” “gender identity,” and “marital status,” there are a number of relevant considerations that urge caution in their use in a rule of this sort. We outline several of them below, in part to explain more fully the key difference between

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<sup>1</sup> For example, the final sentence of the Petitioners’ proposed addition of Rule 8.4(g) is circular: “This paragraph does not preclude legitimate advice or advocacy consistent with these Rules . . . ,” and proposed Comment 4 (at 2-3, Exhibit A, “Specific Language Proposed by BPR and TBA (Redlined to Current Tennessee Rule)”) includes this tautology: “Conduct related to the practice of law includes . . . participating in bar association, business[,] or social activities in connection with the practice of law.”

homosexual and transgender *inclinations* and *conduct* and in part to reinforce that the public policy debate on such conduct is not closed but is still being informed by substantial health and social science evidence.<sup>2</sup>

### Religiously Informed Views on Sexual Orientation and Gender Identity

Christians are called to love and serve all persons, including those with a homosexual orientation or those who feel a closer association to the gender other than their biological sex. However, most orthodox Christians (and those of other religions) sincerely believe that their Holy Scriptures (not to mention biology) identify same-sex intercourse and rejection of one's birth gender as both unnatural and immoral. Thus, while Christian lawyers would not (and overwhelmingly do not) refuse to take work from persons who identify themselves as gay or transgender *when the work does not involve supporting that lifestyle* (e.g., representation as a victim of a car accident), many would have ethical qualms in working for such a person or organization if the representation directly or indirectly advanced the cause of such lifestyles or helped entrench their participants in it. It is *not* discrimination on the basis of sexual orientation or gender identity to refuse to approve or support same-sex intercourse or gender "transformations." Rather, it recognizes the difference between personhood and activity. Persons are just as much persons if they never engage in sexual intercourse, of whatever kind.

The orthodox Christian view that separates the person from the offensive activity is not generally accepted by either the LGBT community or, increasingly, administrative and judicial officials. *E.g.*, *Christian Legal Soc'y Chapter v. Martinez*, 130 S. Ct. 2971, 2980 (2010) (recounting state university's labeling of CLS chapter's requirement that leaders not engage in sexual intercourse outside marriage between a man and a woman as "sexual orientation" and "religious" discrimination, although the case was decided on other grounds). Christian attorneys are often representing citizens whose refusals, made for religious reasons, to support the LGBT lifestyle or participate in LGBT events are attacked as "sexual orientation" or "marital status" discrimination. *E.g.*, *In re Klein*, Case Nos. 44-14 *et al.*, Final Order, Ore. Bureau of Labor and Indus. (July 2, 2015); *Masterpiece Cakeshop v. Colo. Civil Rights Comm'n* (2015COA115), cert. granted, 137 S.Ct. 2290 (U.S. June 26, 2017) (No. 16-111) (argued Dec. 5, 2017). The proposed rule, if adopted without change, could be used in similar ways against attorneys acting in accord with their basic constitutional freedoms. And, of course, this could affect not just Christian attorneys, but also those of other faiths, such as Judaism and Islam, that teach the immorality of homosexual conduct.

The view that distinguishes the person from the activity may not be held currently by a majority of the ABA's or even the Tennessee Bar Association's leadership, but it is held by many lawyers in Tennessee and nationwide and is religiously, scientifically, and logically informed. And to some degree, this view has informed legislators at all levels of our government – from federal to

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<sup>2</sup> See, e.g., Mayer & McHugh, "Sexuality and Gender," 50 *The New Atlantis* 8 (Fall 2016), noting (1) that there is limited evidence that social stressors such as discrimination and stigma contribute to the elevated risk of poor mental health outcomes for non-heterosexual and transgender populations and (2) that more high-quality longitudinal studies are necessary for the "social stress model" to be a useful tool for understanding public health concerns.

local – in rejecting the addition of “sexual orientation,” “gender identity,” and “marital status” to their non-discrimination laws and policies.

Obviously, those who sponsor adoption of the model rule are not satisfied with the pace of change across the country. The ABA Ethics Committee in its December 22, 2015, memorandum (“ABA Memorandum”) quoted (at 2) from the “eloquence” of the Oregon New Lawyers Division that “[t]here is a need for a cultural shift in understanding.” In uncritically accepting that there is such a “need” for a “cultural shift” and in seeking to advance it, the proponents of the proposed rule have taken an unwise step that should not be endorsed and followed by Tennessee. At a minimum, Tennessee’s approach to this subject should be more nuanced to recognize and exempt speech and conduct motivated by sincerely held religious beliefs and to clarify exactly what is being proscribed.

### Suggested Revisions to the Proposed Rule

We support the formulation of a black-letter ethics rule addressing inappropriate, invidious discrimination. Such a provision would properly address discrimination based on uncontroversial and Constitutionally protected categories, such as race, religion, national origin, and sex. However, the inclusion of “sexual orientation,” “gender identity,” and “marital status” as nondiscrimination categories is ill-advised unless those terms are more carefully defined and limitations more clearly specified to prevent unconstitutional application of the proposed rule.

#### 1. Proposed use of “sexual orientation”

The category of “sexual orientation” should not be included in the text of the rule. It is not a category uniformly recognized throughout the country, and it is subject to misinterpretation and abuse. See Todd A. Salzman & Michael G. Lawler, *The Sexual Person* 150 (2008) (“The meaning of the phrase ‘sexual orientation’ is complex and not universally agreed upon.”)

If used, however, the proposed rule should include an explanation that “sexual orientation” discrimination does not encompass the refusal to approve or support same-sex conduct, be that conduct intercourse, marriage, advocacy, or some other activity. Suitable clarifying language would be along these lines: “The [proposed] rule does not extend to a lawyer’s refusal to approve or support same-sex conduct, refusal to represent an individual in a matter related to such conduct, or expressed opposition to such conduct.”<sup>3</sup>

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<sup>3</sup> That such clarification is needed is demonstrated by *Ward v. Wilbanks*, No. 09-cv-11237, 2010 WL 3026428 (E.D. Mich. July 26, 2010), *rev’d sub nom.*, *Ward v. Polite*, 667 F.3d 727 (6th Cir. 2012), and other recent cases. Ward was dismissed from her graduate counseling program by a state university because, although she did not have objection to counseling homosexual individuals generally, she did not want to counsel them about same-sex marriage, which she believed to be unethical, and sought to refer such counseling to others, instead. The school was not satisfied with this resolution and found her beliefs inconsistent with the American Counseling Association Code of Ethics, which prohibits discrimination on the basis of sexual orientation. The school (and the district court) rejected the distinction between personhood

Without the clarification that “sexual orientation” discrimination does not encompass a lawyer’s refusal to approve or support same-sex *conduct*, refusal to represent an individual in a matter related to such *conduct*, or expressed opposition to such *conduct*, lawyers could be driven out of the practice because of their sincerely held and Constitutionally protected religious beliefs. To use the proposed rule to coerce an attorney to represent clients to support the advancing of conduct that the attorney considers harmful to both the individuals involved and to our society violates several constitutional protections, including compelled speech and assembly.

Finally, if “sexual orientation” is included, the rule also should clarify that the term does not include “gender identity” and that the category of “sex” does not include either “sexual orientation” or “gender identity.” These positions have been put forward in proposed federal regulations by the EEOC in the prior administration, but they are not universally accepted or approved expansions of the category of “sex.” The proposed inclusion of “gender identity” to the categories of “sexual orientation” and “sex” indicates that the terms do not include each other, but this point should be made explicit to address, in part, the vagueness of the term *sexual orientation* (and *gender identity*).

## 2. Proposed use of “gender identity”

“Gender identity” should not be included in the rule as a nondiscrimination category for several reasons.

- *The movement for official acknowledgement that taking transgender actions is “normal,” and that such inclinations should even be encouraged, contrasts with social science studies documenting the dramatic, long-term deleterious effects on those who have elected to have transgender medical procedures performed.*<sup>4</sup> By including this term, the

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(which homosexuals share with all other persons) and conduct (such as same-sex marriage and relations). (The Sixth Circuit did not reach the issue, but reversed because the student was not given the opportunity to show that the refusal to allow her to refer was applied to her in a discriminatory manner due to her speech and faith.) With respect to whether Title VII of the Civil Rights Act of 1964 extends to “sexual orientation,” there is a split among the U.S. Circuit Courts of Appeal. In *Hively v. Ivy Tech Community College*, 853 F.3d 339 (7th Cir. 2017) (*en banc*) and *Zarda v. Altitude Express, Inc.*, 2018 WL 1040820 (2d Cir. 2018) (*en banc*), the overruled prior precedent in their courts and concluded that Title VII’s protected categories include sexual orientation as a subset of discrimination on the basis of sex. In *Evans v. Georgia Regional Hospital*, 850 F.3d 1248 (11th Cir. 2017), however, an Eleventh Circuit panel held that the protected categories under Title VII do not include sexual orientation.

<sup>4</sup> Dr. Paul McHugh, former Chief of Psychiatry at Johns Hopkins Hospital, noted that gender identity confusion is a mental disorder that deserves understanding, treatment, and prevention and that the suicide rate among those who had “reassignment” surgery is 20 times higher than that among non-transgender people. Dr. McHugh also noted studies show that 70% - 80% of children who express transgender feelings spontaneously lose such feelings over time. P. McHugh, “Transgender Surgery Isn’t the Solution,” 6/12/14 *Wall St. J.*, available at <http://www.wsj.com/articles/paul-mchugh-transgender-surgery-isnt-the-solution-1402615120>;

proposed rule helps perpetuate a pretense that ignores physical reality and social science results, unfairly and improperly accusing those who do not support transvestitism and gender transfers of “harassment” and “discrimination.”

- *The term “gender identity” is unconstitutionally vague.* This term has no fixed meaning and, by definition, is the product of an individual, subjective determination that may conflict with how the individual objectively appears to others. Moreover, because of its subjectivity, the term is malleable and can even be used by an individual in a temporally inconsistent manner.<sup>5</sup> Needless to say, such ambiguity in the term raises serious vagueness concerns. In fact, the ABA Ethics Committee, which drafted the proposed rule, demonstrated the ambiguity of the term when it stated (December 22, 2015, memorandum, at 5) that the term *gender identity* recognizes that “a new social awareness of the individuality of gender has changed the traditional binary concept of sexuality.” Any “identity” subject to changeable, subjective “individuality” untethered to time or objective biology is, by definition, vague and subject to abuse.

To reiterate, Christians (and others) do not believe those with transgender inclinations are any less persons for having such inclinations, but that is not the same as approving and being able to support or advocate for *actions* taken in furtherance of that inclination or to advance its spread. Christians recognize that they themselves and all other persons take immoral actions. Christians are enjoined by their Scriptures to love and serve all persons, even though they do not approve of the immoral actions persons perform.<sup>6</sup> At a minimum, if the proposed rule is adopted and this phrase is retained, the language suggested above for “sexual orientation” should be expanded to include “gender identity,” to wit: “Paragraph (g) does not include a lawyer’s refusal to approve or support same-sex or gender transfer conduct, refusal to represent an individual in a matter related to such conduct, or expressed opposition to such conduct.”

### 3. Proposed use of “marital status”

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*see also* Cal. Health Interview Study, *reported in* Center for American Progress, “How to Close the LGBT Health Disparities Gap,” [www.americanprogress.org/issues/lgbt/report/2009/12/21/7048](http://www.americanprogress.org/issues/lgbt/report/2009/12/21/7048) (“[t]ransgender adults are much more likely to have suicide ideation” (2% heterosexual; 5% gay; 50% transgender).

<sup>5</sup> “The term [transgender] includes androgynous and gender queer people, drag queens and drag kings, transsexual people, and those who identify as bi-gendered, third gender or two spirit. ‘Gender identity’ refers to one’s inner sense of being female, male, or some other gender.... Indeed, when used to categorically describe a group of people, even all of the terms mentioned above may be insufficient...., individuals may identify as any combination of gender identity referents simultaneously or identify differently in different contexts or communities.” *Self-Determination in a Gender Fundamentalist State: Toward Legal Liberation of Transgender Identities*, 12 *Tex. J. on C.L. & C.R.* 101, 103-04 (2006). *See also DeJohn v. Temple Univ.*, 537 F.3d 301, 381 & n.20 (3d Cir. 2008) (noting fluidity of the term *gender*).

<sup>6</sup> *See John 8:2-11* (New Int’l Version) (story of Jesus not condemning the woman caught in adultery but telling her “leave your life of sin”).

The term *marital status* is hopelessly ambiguous. It is obviously not an inherent condition like race, ethnicity, or sex, but what exactly it covers is unclear, and its meaning is not well settled or accepted.

The ABA Ethics Committee indicated (ABA Memorandum, at 5) that it included this term based on the U.S. Supreme Court's *Obergefell* decision and on "the rise in single parenthood." This explanation provides more questions than answers. If the reference to *Obergefell* is meant to suggest that a lawyer could not discriminate against those in a same-sex marriage, "marital status" adds nothing to "sexual orientation." Moreover, *Obergefell* did not overturn the public policy of many States that still *disfavors* same-sex marriage, even though those States may no longer prohibit a civil ceremony.<sup>7</sup> To the extent "marital status" is intended to cover the same-sex marriage status, it runs directly contrary to the statements of public policy still common and effective throughout this country that *disfavor* same-sex marriage, including Tennessee. Tennessee's Constitution in Article IX ("Miscellaneous Provisions."), section 18, provides, "The historical institution and legal contract solemnizing the relationship of one man and one woman shall be the only legally recognized marital contract in this state. Any policy or law or judicial interpretation, purporting to define marriage as anything other than the historical institution and legal contract between one man and one woman, is contrary to the public policy of this state and shall be void and unenforceable in Tennessee. If another state or foreign jurisdiction issues a license for persons to marry and if such marriage is prohibited in this state by the provisions of this section, then the marriage shall be void and unenforceable in this state."

To the extent the ABA included "marital status" based on the implication that there is some kind of invidious discrimination against single parents, the support mustered for that was exactly zero. The reason why representation (or employment at a law firm) would be refused because a person is single but has a child goes unarticulated and its occurrence unproven. Nondiscrimination categories should not be proliferated without cause.

A broad reading of *marital status* could also intrude in law firm hiring decisions. Relational skills are of major importance in both client contacts and in the close working quarters of a law firm. If someone has been divorced repeatedly, it is a possible indicator of relational difficulties, failures to honor commitments, and other immaturities in that person. Would asking about the facts and circumstances of such a personal history, and/or basing a non-hiring decision in part on it, be "harassment" or "knowing discrimination" on the basis of "marital status?" Would that be true if the person's marital history was well known to the recruiter and in the community, and she based her refusal to hire in part on that knowledge? After all, the practice of law is not just a "big city" profession; it is also practiced in scores of small communities.

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<sup>7</sup> In this respect, the right of a same-sex couple to a civil marriage parallels the right of a woman to a pre-viability abortion. Although such abortions may not be prohibited by governments, *see Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), the Supreme Court has repeatedly upheld the right of federal, state, and municipal governments to disfavor abortion and not to fund the practice. *E.g.*, *Webster v. Reproductive Health Serv.*, 492 U.S. 490 (1989); *Williams v. Zbarez*, 448 U.S. 358 (1980); *Harris v. McRae*, 448 U.S. 297 (1980); *Poelker v. Doe*, 432 U.S. 519 (1977); *Maher v. Roe*, 432 U.S. 464 (1977); *Beal v. Doe*, 432 U.S. 438 (1977).

On its face, it is also conceivable that “marital status” discrimination would include, for example, when a Christian attorney, for religious reasons, refused to craft a prenuptial agreement for previously divorced individuals because the lawyer held the belief that the Bible disallows most remarriage after divorce if the divorced spouse is still alive. Similarly, would a family law attorney who refuses for religious reasons to assist a same-sex couple adopt a child have engaged in improper “marital status” discrimination?

The “marital status” category is simply too vague, pliable, and potentially subject to abuse to be used in the proposed rule. It fails due process analysis and could intrude on many decisions and actions that are constitutionally protected.

### Conclusion

For the reasons detailed above, we encourage the Supreme Court of Tennessee to reject adoption of this proposed rule. If the rule is adopted, we recommend the following revisions to the current text:

- Remove “sexual orientation” and “gender identity” as nondiscrimination categories. At a minimum:
  - add additional language to the rule that “this rule does not include a lawyer’s refusal to approve or support same-sex or gender transfer conduct, refusal to represent an individual in a matter related to such conduct, or expressed opposition to such conduct;” and
  - add language to the rule that “the terms *sex* and *sexual orientation* do not overlap with each other and that neither of those terms overlaps with the term *gender identity*.”
- Remove “marital status” as a nondiscrimination category.

Christians do, indeed, believe that all people are created equal by God, and they also believe that God has set moral absolutes for behavior for those he has created, including that life is sacred from conception to natural death, that sexual intercourse is only ethical when between a man and woman married to each other, and that violating God’s moral norms does not bring true liberty either to an individual or to a culture. Social science amply supports the wisdom of these religious principles.

The text of the proposed rule is susceptible of being used to attack those who sincerely hold religiously based views on and object to what they understand to be sexual libertinism. This is no idle threat, as the desire of some in the LGBT movement is quite evident to punish and drum out of the public conversation any who disagree with them and who express their religious beliefs that homosexual and transgender conduct are immoral and deleterious to our civil society, as well as to the individuals involved. The Tennessee Supreme Court should not provide a platform for such actions by adopting this proposed rule.

Thank you for the opportunity to provide these comments and for your consideration of them.

Sincerely,

Steven W. 

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President, The National Legal Foundation  
Senior Legal Advisor, Congressional Prayer Caucus Foundation