

2009-2010

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8 Hampshire Woods Court
Towson, MD 21204
Tel: (410) 321-7466
Fax: (410)887-2922

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Director**
Jeanne P. Gray

Policy Implementation and
Client Protection Counsel
John A. Holtaway

AMERICAN BAR ASSOCIATION

**Center for Professional Responsibility
Policy Implementation Committee**

321 N. Clark Street
Chicago, IL 60610
Phone: (312) 988-5298
Fax: (312) 988-5491
Email: jholtaway@staff.abanet.org

August 10, 2009

Mike Catalano, Clerk
Re: MJP Amendments
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

Re: Petition to amend Tenn. Sup. Ct. R. 8, RPC's 5.5 and 8.5, as well as other provisions of the Rules of the Supreme Court of Tennessee, to adopt rules governing the multijurisdictional practice of law.

Dear Mr. Catalano:

Thank you for the opportunity to comment on proposed amended Tenn. Sup. Ct. R.8, RPC 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law) RPC 8.5 (Disciplinary Authority; Choice of Law). The American Bar Association's Center for Professional Responsibility Policy Implementation Committee (the "Committee") submits these comments regarding the above proposed Rules.

The Committee applauds the work of the Tennessee Bar Association in drafting proposals to amend RPC 5.5 and 8.5. Because of the globalization of business and finance, clients often need lawyers to assist them in transactions in multiple jurisdictions (state and national).

The Committee respectfully recommends that the Tennessee Supreme Court adopt the language contained in ABA Model Rule 5.5(c)(3) and (4), instead of the language contained in proposed amended Tennessee Rule 5.5 (c) (3) and (4).

Proposed amended Tennessee Rule 5.5(c)(3) and (4) reads:

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's representation of an **existing client** in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's representation of an **existing client** in a jurisdiction in which the lawyer is admitted to practice.

ABA Model Rule 5.5 (c) (3) and (4) are identical except that the temporary legal services may arise out of or be related to the **lawyer's practice** in a jurisdiction in which the lawyer is admitted to practice.

We believe that the proposed language unnecessarily limits the opportunity of a citizen of Tennessee to retain the services of lawyers from other jurisdictions where he or she chooses to do so. For example, it would prohibit the hiring of a lawyer from another jurisdiction who has extensive expertise and experience in a particular area of the law, but who is not at a particular point in time representing a client in his home jurisdiction in that same area of law. Permitting multijurisdictional practice by a lawyer solely in those situations in which the particular matter "arises from or is reasonably related to" a specific matter already being handled by the lawyer in her home jurisdiction will do little, if anything, to measurably increase a client's opportunity to retain counsel of choice.

The ABA Model Rules of Professional Conduct use of the more expansive phrase "practice" rather than the lawyer's "representation of an existing client" facilitates the hiring, for example, of a lawyer who, through the course of regular practice in her home state, has developed a recognized expertise in a body of law that is applicable to the client's particular matter. This could include expertise regarding nationally applicable bodies of law, such as federal, international or foreign law. A client may have an interest in retaining a specialist in federal tax, securities or antitrust law, or the law of a foreign jurisdiction, regardless of where the lawyer has been admitted to practice law. On balance, the benefits of this more expansive approach to permitting multijurisdictional practice is more likely to serve the needs of many Tennessee clients.

To date, the highest courts in forty-two United States jurisdictions have amended their Rule 5.5 to allow for the multijurisdictional practice of law on a temporary basis. The majority of those courts has realized the benefit to clients in having the "related to a lawyer's practice" provision in Rules 5.5 (c) (3) and (4) and has adopted that language.

The Committee also recommends that proposed Tennessee Rule 8.5 should contain the last sentence in ABA Model Rule 8.5 (b) (2), which reads: "A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur." This protects a lawyer from being subject to discipline when the lawyer's conduct involves significant contacts with more than one jurisdiction and it is unclear where the predominant effect of the conduct will occur. "Reasonable", when used in reference to a lawyer's actions, denotes the conduct of a reasonably prudent and competent lawyer.

Finally, the Committee wholeheartedly supports the adoption of the in-house counsel rule and major disaster rule proposed in the Petition of the Tennessee Bar Association.

Thank you for allowing our Committee to submit these comments. Please do not hesitate to contact me if we can be of further assistance.

Respectfully,

Barbara Kerr Howe, Chair
CPR Policy Implementation Committee



TENNESSEE BAR
ASSOCIATION

PRESIDENT

Gail Vaughn Ashworth
200 Fourth Avenue North
1100 Noel Place
Nashville, Tennessee 37219
(615) 254-0400
FAX (615) 254-0459
Email: gail@gideonwiseman.com

PRESIDENT-ELECT

Sam Elliott
320 McCallie Avenue
Chattanooga, Tennessee 37402
(423) 756-5171
FAX (423) 266-1605
Email: selliot@gpice.com

VICE PRESIDENT

Danny Van Horn
6075 Poplar Avenue
Suite 500
Memphis, Tennessee 38119
(901) 680-7331
FAX (901) 680-7201
Email: danny.vanhorn@butlersnow.com

TREASURER

Richard Johnson
511 Union Street
Suite 2700
Nashville, Tennessee 37219
(615) 850-8151
FAX (615) 244-6804
Email: rjohnson@wallerlaw.com

SECRETARY

Jason Pannu
201 Fourth Ave North
Suite 1500
Nashville, TN 37219-8615
(615)259-1366
Fax: (615)259-1389
Email: jpannu@lewisking.com

IMMEDIATE PAST PRESIDENT

George T. Lewis

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GENERAL COUNSEL

William L. Harbison, Nashville

EXECUTIVE DIRECTOR

Allan F. Ramsaur, Nashville
Email: aramsaur@tnbar.org

August 10, 2009

The Honorable Michael Catalano
Clerk, Tennessee Supreme Court
Supreme Court Building, Room 100
401 Seventh Avenue North
Nashville, TN 37219

IN RE: COMMENT OF THE TENNESSEE BAR
ASSOCIATION ON "REVISED PROPOSAL"
NO. M2008-01404-SC-RL1-RL

Dear Mike:

Attached for filing please find an original and six copies of a Comment in reference to the above new matter.

As always, thank you for your cooperation. I remain,

Very truly yours,

Allan F. Ramsaur
Executive Director

cc: Gail Vaughn Ashworth, President, Tennessee Bar Association
William L. Harbison, General Counsel, Tennessee Bar Association
Brian S. Faughnan, Chair, Standing Committee on Ethics &
Professional Responsibility

Service List

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Tennessee Bar Center
221 Fourth Avenue North, Suite 400
Nashville, Tennessee 37219-2198
(615) 383-7421 • (800) 899-6993
FAX (615) 297-8058
www.tba.org

IN THE SUPREME COURT OF TENNESSEE

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IN RE:)
)
PETITION FOR THE ADOPTION OF)
RULES GOVERNING THE)
MULTIJURISDICTIONAL PRACTICE)
OF LAW)

No. M2008-01404-SC-RL1-RL

COMMENT OF THE TENNESSEE BAR ASSOCIATION ON "REVISED PROPOSAL"

In 2008, the Tennessee Bar Association ("TBA") filed a petition asking the Tennessee Supreme Court to adopt certain proposed amendments to Tenn. Sup. Ct. R. 8, RPCs 5.5 and 8.5, as well as other provisions of the Rules of the Supreme Court of Tennessee ("TBA Petition"). Those proposed amendments were designed to address issues relating to the multijurisdictional practice of law. On December 10, 2008, this Court published the TBA Petition, soliciting written comments concerning the TBA's proposed amendments.

On June 12, 2009, this Court entered an Order publishing a revised version of the proposed amendments included in the TBA Petition ("Revised Proposal"), indicating that it was considering adopting the Revised Proposal and soliciting written comments from judges, lawyers, bar associations, members of the public, and any other interested parties.

The TBA now submits this comment in response to the Court's invitation.

**THE TBA STRONGLY SUPPORTS THE ADOPTION
OF THE REVISED PROPOSAL EXCEPT FOR
THREE SPECIFIC ASPECTS**

The TBA Petition articulated the TBA's strong belief that the time has come for Tennessee to join the broad movement of jurisdictions in the direction of permitting, but

expressly and intelligently regulating, the multijurisdictional practice of law (“MJP”). The TBA Petition emphasized that the uncertainty associated with the recognized phenomenon of MJP, coupled with the fact that Tennessee has no authority addressing the problem, imposes a growing burden on clients with legal needs in Tennessee and upon the lawyers chosen by those clients. The TBA strongly supports the overwhelming majority of the proposed revisions to the Rules that are under consideration by the Court, and the TBA believes that the Court’s willingness to adopt the proposed approach to the multijurisdictional practice of law that the Court has under consideration would bring Tennessee much more into the mainstream on issues regarding MJP.

The Revised Proposal would provide a framework for distinguishing permitted and prohibited MJP and would identify certain circumstances in which lawyers admitted in other U.S. jurisdictions could lawfully and ethically provide legal services on a temporary basis in Tennessee. The proposed amendments would also adopt a rational, middle-ground approach to permitting in-house counsel licensed only in another jurisdiction to represent their employer client without necessarily having to obtain a full Tennessee license by adopting a registration framework for corporate counsel. The Revised Proposal also importantly includes a vital amnesty component to encourage in-house lawyers already practicing in Tennessee to come into full compliance with Tennessee law, in a manner that pays appropriate respect to the bar admission processes of other coordinate U.S. jurisdictions, while establishing and preserving Tennessee’s ability to regulate lawyers practicing on a non-temporary basis within its borders. The Revised Proposal would also make crystal clear, through proposed revisions to RPC 8.5, that any lawyer availing herself of these opportunities under revised RPC 5.5 would subject herself to the disciplinary authority of this Court and its Board of Professional Responsibility.

Over the last twelve months or so, this Court has made great strides in improving access to justice in Tennessee through a number of valuable initiatives. This Court's emphasis on access to justice continues by addressing MJP issues reflected in the Revised Proposal, both with respect to the Court's inclusion of a provision that would permit in-house lawyers who would be practicing in Tennessee pursuant to the new registration provisions to also provide certain *pro bono* services through established *pro bono* referral services and the Court's willingness to embrace the proposed "Katrina" rule.

The Court's proposed revised rules, by including a provision patterned after the ABA Model Court Rule on Provision of Legal Services Following Determination of Major Disaster (also referred to as the "Katrina" rule), would further support increased access to justice in two significant ways. First, the proposed revised rule would expressly authorize, in the event of a major disaster, lawyers licensed outside Tennessee to render *pro bono* services in Tennessee on a temporary basis; and second, the proposed revised rule would expressly authorize a lawyer displaced from the area of a major disaster, and not licensed in Tennessee, to temporarily practice in Tennessee in order to maintain his or her practice and serve his or her clients in the affected jurisdiction.

In addition to the above-mentioned improvements that would flow from adoption of the Revised Proposal, the addition of paragraph (f) to RPC 5.5 that would expressly require client disclosure and informed consent when a lawyer provides legal services in Tennessee under paragraph (c) or (d) of revised RPC 5.5 is a very client-friendly improvement upon the TBA's proposal regarding MJP. The TBA supports the Court's adoption of such a provision.

However, there are three specific aspects of the Revised Proposal with which the TBA disagrees.

THE TBA RESPECTFULLY RECOMMENDS
THREE SPECIFIC ASPECTS OF THE REVISED PROPOSAL NOT BE ADOPTED

There are three items included in the Revised Proposal that the TBA recommends the Court not adopt:

- First, the TBA urges that the Court should not replace the phrase “arise out of or are reasonably related to the lawyer’s practice” in the TBA’s Petition RPC 5.5(c)(3) with “arise out of or are reasonably related to the lawyer’s representation of an existing client.”
- Second, the TBA urges the Court not to delete the last sentence of the proposed RPC 8.5(b) in the TBA’s Petition that provides very limited protection for lawyers not licensed in Tennessee who conform their conduct to the ethical rules of another jurisdiction reasonably believed to be the location where the predominant effect of their conduct will take place.
- Third, the TBA believes the Court should not seek to use ethics rules, which are explicitly stated to be about disciplinary regulation of lawyers and not about civil causes of action, to impose personal jurisdiction for civil claims against lawyers by clients and third parties as in the Proposed Revisions to RPC 5.5(g).

1. The Court Should Not Replace “reasonably related to the lawyer’s practice” with “reasonably related to representation of an existing client.”

The Court’s proposed replacement of “reasonably related to the lawyer’s practice” with “reasonably related to the lawyer’s representation of an existing client,” may effectively make it unethical for a lawyer to undertake the kind of due diligence otherwise expected of lawyers investigating a potential representation before agreeing to be engaged by a potential client located in Tennessee.

For example, if an individual residing in Tennessee asked an out-of-state lawyer to travel to Tennessee to meet with that client in order to discuss a potential representation of that person, the out-of-state lawyer would appear to have to refrain from going to Tennessee to have such a meeting because, at that point, the out-of-state lawyer would not have an existing client, but rather only a prospective client. Instead, that lawyer might have to either make a decision about

whether to take on the representation without thoroughly investigating the situation or would have to potentially insist that the Tennessee resident travel to the out-of-state lawyer's office for such a meeting. Such an approach would impose serious, impractical restrictions that would severely impact a lawyer's dealings with prospective clients.

Further, this type of overly restrictive language, focusing as it does on the need for an "existing client," also would appear to preclude a lawyer from being able to provide the kind of services that a lawyer might otherwise readily provide to a former client located in Tennessee where the amount of time involved does not justify the administrative burden (for example, opening a new file relating to the fleeting services provided to the former client) for a lawyer to seek to establish a new engagement with that former client.

The TBA Petition identified for the Court a source of comprehensive information regarding the adoption patterns of jurisdictions as to MJP reforms -- the ABA Center for Professional Responsibility's website, at <http://www.abanet.org/cpr/mjp/home.html>. There are a number of charts available at that site, now updated as of July 1, 2009, reflecting the jurisdictions that have adopted MJP reforms identical, or similar, to ABA Model Rule 5.5. The number of such jurisdictions has continued to increase since the time of filing of the TBA Petition.

As of July 1, 2009, in addition to the 11 jurisdictions identified in the TBA Petition, 3 more jurisdictions (Alaska, Illinois, and Vermont) have now adopted a rule identical to ABA Model Rule 5.5. Further, in addition to the 24 jurisdictions identified in the TBA petition, 4 more jurisdictions have adopted a rule that is similar to ABA Model Rule 5.5, including one jurisdiction, Wisconsin, that has adopted a rule that is substantively identical to ABA Model Rule 5.5 and that includes the "reasonably related to the lawyer's practice" language.

For purposes of this comment, and in order to focus on the adoption of the specific language in question, the TBA has examined the precise language of the rules adopted in the pertinent jurisdictions and can represent to the Court that the count of jurisdictions that now that have adopted a version of Rule 5.5 that uses the language “reasonably related to the lawyer’s practice” has increased from 25 (as of the filing of the TBA Petition) to 29.¹ By way of comparison, there are only 8 jurisdictions² that have opted to change that language to “reasonably related to representation of an existing client” as the Revised Proposal indicates this Court is now considering.

While the judgment of the ABA and other jurisdictions’ high courts is instructive, the TBA does not urge this Court’s to adopt the “reasonably related to the lawyer’s practice” language solely because it is the ABA Model Rule approach or because doing so would place Tennessee in harmony with the majority of U.S. jurisdictions on this question. Rather, the TBA strongly urges the Court to reject this proposed language and adopt the language of the ABA Model Rule because it believes that the language now being considered by this Court would not be an improvement on the language of the ABA Model Rule and adopted by a significant majority of U.S. jurisdictions. On the merits, on sound policy reasons, the ABA and 29 jurisdictions have, in the TBA’s opinion gotten it right.

2. The Court Should Not Delete The Last Sentence From The TBA Petition’s RPC 8.5(b).

¹ Those 29 jurisdictions are: Alabama, Alaska, Arizona, Arkansas, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, New Hampshire, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Utah, Vermont, Washington, and Wisconsin.

Those 8 jurisdictions are: Connecticut, Idaho, Kentucky, Maine, New Jersey, North Carolina, South Carolina, and Virginia.

Although it provides only very limited protection for lawyers not licensed in Tennessee, the TBA believes that the last sentence of proposed RPC 8.5(b) included in the TBA's Petition is a very important and appropriate provision to include in a revised RPC 8.5. Further, the TBA is unaware of any reason to believe that dropping this provision is necessary to prevent any abuse or to protect Tennessee citizens. The nature of this provision is not a vast exception that runs the risk of swallowing the rule nor something that could provide a basis for a "pure heart, empty head" excuse for lawyer misconduct.

Rather, the TBA's proposed language for RPC 8.5(b) only serves to prevent a lawyer from being disciplined here in Tennessee if the lawyer reasonably believed the predominant effect of her conduct would be in another jurisdiction *and* the lawyer's conduct actually did conform to that particular jurisdiction's ethics rules. Thus, it seems unlikely that inclusion of this provision would result in any real-world instances of lawyers being able to engage in unethical conduct causing real harm to a Tennessee client for which they would not be ultimately still subject to Tennessee's disciplinary jurisdiction.

As with the above language in RPC 5.5, the last sentence in the TBA's proposed revised RPC 8.5(b) is also taken directly from the language of the ABA Model Rules and has also been widely adopted by the great majority of U.S. jurisdictions. As with the aspect of RPC 5.5 discussed above, the TBA has reviewed the rules identified in the charts provided by the ABA to determine the number of jurisdictions that have adopted a rule that includes this language taken from ABA Model Rule 8.5(b). To date, 30 jurisdictions have adopted a version of RPC 8.5 that includes this language (or language that is substantively identical to): "A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the

lawyer reasonably believes the predominant effect of the lawyer's conduct will occur."³ By way of contrast, only 5 jurisdictions that have chosen to adopt a rule patterned after ABA Model Rule 8.5(b), have specifically chosen to delete that language from their version of the rule.⁴

Furthermore, and perhaps more significantly, given the adoption pattern among American jurisdictions of this provision, it seems clear that Tennessee's rejection of the kind of limited protection that is currently afforded Tennessee lawyers by 30 other jurisdictions would likely be read by courts, disciplinary authorities, and lawyers from Tennessee and elsewhere as a strong signal that this Court intends a much stricter enforcement of this Rule against lawyers outside of Tennessee than other jurisdictions intend as to Tennessee lawyers. The TBA does not believe that sending this kind of message would be good public policy for Tennessee.

3. The Revised Proposal RPC 5.5(g) Appears to Be At Odds With The Purpose of the Ethics Rules and Unnecessary In Light of Existing Tennessee Law Regarding the Scope of Personal Jurisdiction.

There already exist a number of statutory provisions governing the exercise of personal jurisdiction in Tennessee, see, e.g., Tenn. Code Ann. § 20-2-214(a)(6). Those statutes, and decisions by this Court, make clear that personal jurisdiction in Tennessee extends to the fullest scope permitted by constitutional due process. See, e.g., Masada Inv. Corp. v. Allen, 697 S.W.2d 332, 334 (Tenn. 1985). It is difficult to imagine a set of circumstances in which a lawyer, not licensed in Tennessee, would perform legal services in Tennessee, be alleged to have caused harm to a Tennessee citizen through performing those legal services, and not already be

³ Those 30 jurisdictions are: Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Georgia, Idaho, Illinois, Iowa, Kentucky, Louisiana, Maine, Maryland, Minnesota, Missouri, Nebraska, New Hampshire, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Washington, and Wisconsin.

⁴ Those 5 jurisdictions are: Florida, Indiana, New Jersey, Virginia, and Wyoming.

subject to personal jurisdiction in the Tennessee courts as a result of the existing long-arm statute. Thus, proposed RPC 5.5(g) may, at its heart, be a solution in search of a problem.

Nevertheless, even if there were reason to be concerned that such a scenario could be imagined and that RPC 5.5(g) would address a real problem regarding the limits of personal jurisdiction under Tennessee law, the TBA suggests that using the ethics rules to address a question of personal jurisdiction is not the appropriate answer.

Using the ethics rules to explicitly establish a basis for proving personal jurisdiction over a lawyer for purposes of a civil claim against that lawyer would be inconsistent with what the ethics rules indicate they are, and are not, about. See Tenn. Sup. Ct. R. 8, Scope [6] (“The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. *They are not designed to be a basis for civil liability*” (emphasis added).)⁵

CONCLUSION

For all of the above reasons, the TBA asks the Court to adopt the Revised Proposal without the three changes identified herein as follows: (1) the Court should return the proposal to

⁵ The TBA also has some concerns regarding the appropriateness of the Court’s adoption of this provision where the legislature has, by adoption of Tenn. Code Ann. § 20-2-214(a)(6), adopted a regime for personal jurisdiction in Tennessee.

On the one hand, would a New York lawyer properly representing a New York client in a California arbitration who was authorized by proposed Tennessee RPC 5.5(c)(3) to interview a Tennessee witness and take a deposition in Tennessee automatically be subject to personal jurisdiction in Tennessee for a malpractice suit by her client by this proposed language? In this circumstance, the proposed language might attempt to extend jurisdiction beyond the long-arm statute, and perhaps the Constitution.

On the other hand, is there a risk that this proposed language might be seen as an attempt to inappropriately narrow the reach of the long-arm statute? For example, could a non-Tennessee lawyer whose presence and activities in Tennessee were not in compliance with proposed RPC 5.5 argue in trying to defeat personal jurisdiction over a claim by a Tennessee resident that the natural implication of the proposed language is that there should be no exercise of personal jurisdiction over her?

The TBA believes that such scenarios provide another argument for deferring these questions to be developed by case law construing the existing long-arm statute.

the use of the phrase “reasonably related to the lawyer’s practice;” (2) the Court should re-insert the TBA Petition’s last sentence for RPC 8.5(b) to maintain limited protection for lawyers not licensed in Tennessee who conform their conduct to the rules of another jurisdiction that is reasonably believed to be the place where their conduct will have its predominant effect; and (3) the Court should not adopt the proposed RPC 5.5(g) regarding personal jurisdiction as to civil claims against lawyers.

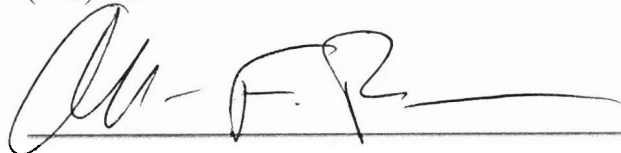
Respectfully Submitted,

By: /s/ by permission

Gail Vaughn Ashworth (10656), President
Tennessee Bar Association
Gideon & Wiseman
1100 Noel Place
200 Fourth Avenue North
Nashville, TN 37219-2144
(615) 254-0400

By: /s/ by permission

William L. Harbison (7012), General Counsel
Tennessee Bar Association
Sherrard & Roe, PLC
424 Church Street, Suite 2000
Nashville, TN 37219
(615) 742-4200




Allan F. Ramsaur (5764), Executive Director
Tennessee Bar Association
Tennessee Bar Center
221 Fourth Avenue, North, Suite 400
Nashville, TN 37219
(615) 383-7421

By: /s/ by permission

Brian S. Faughnan (19379), Chair
Committee on Ethics & Professional Responsibility
Tennessee Bar Association
Adams and Reese LLP
80 Monroe Avenue, Suite 700
Memphis, TN 38103
(901) 524-5280

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 A by regular U.S. Mail, postage prepaid.



Allan F. Ramsaur

Hardin County Bar Assn	Damon Campbell Obion County Bar Assn PO Box 427 317 S. Third St. Union City TN 38281	Michael Davis Morgan County Bar Assn PO Box 756 Wartburg TN 37887
Marcy Adcock Warren County Bar Assn PO Box 349 309 W. Morfrord St. Suite 105 Mc Minnville TN 37111	William Cockett Johnson County Bar Assn PO Box 108 Mountain City TN 37683-0108	Kyle Dodd Giles County Bar Assn PO Box 409 211 W Madison St Putlaski TN 38478
Bill Allen Anderson County Bar Assn 136 S Illinois Ave Ste 104 136 S. Illinois Ave. Suite 104 Oak Ridge TN 37830	Daryl Colson Overton County Bar Assn 211 N Church St Livingston TN 38570	William Douglas Lauderdale County Bar Assn P O Box 489 109 N Main St Ripley TN 38063
Keith Alley Loudon County Bar Assn 902 East Broadway Street 902 East Broadway Street Lenoir City TN 37771	Keith Colston Rutherford-Cannon County Bar Assn P. O. Box 1336 106 East College St Murfreesboro TN 37130	Joseph Ford Franklin County Bar Assn 17 S College St Winchester TN 37398
Peter Alliman Monroe County Bar Assn 135 College St Madisonville TN 37354	Bratten Cook DeKalb County Bar Assn 104 N 3rd St Smithville TN 37166	Andrew Frazier Benton County Bar Assn P O Box 208 116 E Main Camden TN 38320
Karen Beyke Williamson County Bar Assn 4137 Jansome Lane 4137 Jansome Lane Franklin TN 37064	Suzanne Cook Washington County Bar Assn 100 Med Tech Parkway Suite 110 Johnson City TN 37604	James Hayes Putnam County Bar Assn PO BOX 3294 2105 Old COOKEVILLE TN 38502
Mark Blakley Scott County Bar Assn P O Box 240 Huntsville TN 37756	Jerred Creasy Dickson County Bar Assn 230 N Main St Dickson TN 37055	Jason Holly Carter County Bar Assn 420 Railroad Street Elizabethton TN 37643
Ben Boston Lawrence County Bar Assn P O Box 357 235 Waterloo St Lawrenceburg TN 38464	Terri Crider Gibson County Bar Assn P.O. Box 160 1302 Main Street Humboldt TN 38343	John Holt Robertson County Bar Assn 121 5th Ave W Springfield TN 37172
Lee Bowles Marshall County Bar Assn 520 N Ellington Pkwy Lewisburg TN 37091	Creed Daniel Grainger County Bar Assn P O Box 6 Courthouse Sq 115 Marshall Ave Rutledge TN 37861	Carmon Hooper Haywood County Bar Assn P O Box 55 10 S Court Square Brownsville TN 38012
Daniel Boyd Hawkins County Bar Assn P. O. Box 298 155 East Main St Rogersville TN 37857	Brad Davidson Cocke County Bar Assn 317 East Main Street Newport TN 37821	Mike Jenne Bradley County Bar Assn PO Box 161 260 N Ocoee St Cleveland TN 37364

Caroline Knight
Cumberland County Bar Assn
28 W Fifth Street
Crossville TN 38555

Craig Northcott
Coffee County Bar Assn
1301 E. Carroll St.
Tullahoma TN 37388

Lois Shults-Davis
Unicoi County Bar Assn
PO Box 129
111 Gay Street
Erwin TN 37650

W. Lamberth
Sumner County Bar Assn
113 W Main St 3rd Fl
Gallatin TN 37066

Russ Parkes
Maury County Bar Assn
102 West 7th St
Columbia TN 38401

Todd Siroky
Jackson-Madison County Bar Assn
P.O. Box 1147
209 E Main St
Jackson TN 38302

Gregory Leffew
Roane County Bar Assn
PO Box 63
109 North Front Avenue
Rockwood TN 37854

Adam Parrish
Fifteenth Judicial District Bar Assn
110 S Cumberland
Lebanon TN 37087

David Stanifer
Claiborne County Bar Assn
PO Box 217
1735 Main St
Tazewell TN 37879

Matt Maddox
Carroll County Bar Assn
P O Box 827
19695 E Main St
Huntingdon TN 38344

David Pollard
Campbell County Bar Assn
PO Box 436
Liberty And Church
Jacksboro TN 37757

Richard Swanson
Hamblen County Bar Assn
717 W Main St Ste 100
Morristown TN 37814

Don Mason
Kingsport Bar Assn
433 E Center St Ste 201
Kingsport TN 37660

Michael Pugh
Montgomery County Bar Assn
118 Franklin St
Clarksville TN 37040

James Taylor
Rhea County Bar Assn
1374 Railroad St Ste 400
Dayton TN 37321

Hansel McCadams
Paris-Henry County Bar Assn
PO Box 627
100 Court Square
Huntingdon TN 38344

Jason Randolph
Jefferson County Bar Assn
P O Box 828
Dandridge TN 37725

Harriet Thompson
Hardeman County Bar Assn
P O Box 600
205 East Market St.
Bolivar TN 38008

James McKenzie
Twelfth Judicial District Bar Assn
1475 Market St Rm 202
Dayton TN 37321

Dora Salinas
Cheatham County Bar Assn
104 Frey St
104 Frey St
Ashland City TN 37015

David Tipton
Bristol Bar Assn
PO Box 787
Bristol TN 37620

William Mitchell
White County Bar Assn
112 South Main Street
Sparta TN 38583

Randall Self
Lincoln County Bar Assn
P O Box 501
131A E Market St
Fayetteville TN 37334

Billy Townsend
Decatur, Lewis,
Perry, Wayne Counties Bar Assn
26 West Linden Ave
Hohenwald TN 38462

David Myers
Union County Bar Assn
P O Box 13
105 Monroe St
Maynardville TN 37807

Charles Sexton
Sevier County Bar Assn
111 Commerce St
Sevierville TN 37862

Jeffery Washburn
Weakley County Bar Assn
P.O. Box 199
117 N. Poplar St.
Dresden TN 38225

Timothy Naifeh
Lake County Bar Assn
227 Church St
Tiptonville TN 38079

Todd Shelton
Greene County Bar Assn
100 S Main St
Greeneville TN 37743

John White
Bedford County Bar Assn
P O Box 169
111 North Spring St Ste 202
Shelbyville TN 37162

Robert White
Blount County Bar Assn
371 Ellis Ave
Maryville TN 37804

John Lee Williams
Humphreys County Bar Assn
102 S Court Square
102 South Court Square
Waverly TN 37185

Matthew Willis
Dyer County Bar Assn
PO Box H
322 Church Ave. N.
Dyersburg TN 38025

Tish Wilsdorf
Hickman County Bar Assn
820 Hwy 100
121 Cabin Dr.
Centerville TN 37033

Donald Winder
McMinn-Meigs County Bar Assn
PO Box 628
10 W Madison Ave
Athens TN 37371

James Witherington
Tipton County Bar Assn
P O Box 922
205 S Main Street
Covington TN 38019

Adele Anderson
Tennessee Board of Law Examiners
"401 Church Street, Suite 2200"
Nashville TN 37243

Walter Crouch
Federal Bar Assn-Nashville Chapter
P O Box 198966
511 Union St Suite 2700
Nashville TN 37219

Deb House
ETLAW
502 S. Gay Street Suite 404
Knoxville TN 37902

Barri Bernstein
Tennessee Bar Foundation
618 Church St Suite 120
Nashville TN 37219

Deans-Campbell
Ben Jones Chapter - National Bar Association
40 S. Main Ste. 2250
Memphis TN 38103

Nancy Jones
Board of Professional Responsibility
1101 Kermit Drive Suite 730
Nashville TN 37217

Doug Blaze
University of Tennessee College of Law
1505 W. Cumberland Ave
Knoxville TN 37923

Doug Dooley
Tennessee Defense Lawyers Assn
801 Broad Street 3rd Floor
Chattanooga TN 37402

Suzanne Keith
Tennessee Association for Justice
1903 Division St
Nashville TN 37203

Beth Brooks
East Shelby County Bar Assn
2299 Union Ave
Memphis TN 38104

Melanie Grand
Lawyers Association for Women
P O Box 190583
Nashville TN 37219

Kaz Kikkawa
Tennessee Asian Pacific American Bar As:
c/o Branstetter, Stranch & Jennings, PLLC
One Park Plaza 1-4-E
Nashville TN 37203

Hewitt Chatman
Ballard-Taylor Bar Association
511 Algie Neely Rd
Denmark TN 38391

Chris Guthrie
Vanderbilt University School of Law
131 21st Ave. South Room 108
Nashville TN 37203

Joe Loser
Nashville School of Law
4013 Armory Oaks Drive
600 Linden Square
Nashville TN 37204

Randy Chism
Tennessee Commission CLE
PO Box 250
127 S First St
Union City TN 38281

Jennifer Hagerman
Association for Women Attorneys
130 North Court Avenue
Memphis TN 38103

Lorna McClusky
TN Assn of Criminal Defense Lawyers
3074 East Rd
Memphis TN 38128

Erik Cole
Tennessee Alliance for Legal Services
50 Vantage Way Suite 250
Nashville TN 37228

Trey Harwell
Nashville Bar Association
150 4th Ave N Ste 2000
Nashville TN 37219

Arthur Quinn
Memphis Bar Association
1661 International PI Ste 300
Memphis TN 38103

Isaac Conner
Napier-Looby Bar Assn
PO Box 198615
424 Church Street, Suite 2500
Nashville TN 37219

Amy Hollars
Tennessee Lawyers Assn for Women
P.O. Box 68
1010 E Main St
Livingston TN 38570

Mario Ramos
TN Assn of Spanish Speaking Attnys
611 Commerce St Suite 3119
Nashville TN 37203

Isaac Conner
Tennessee Alliance for Black Lawyers
PO Box 198615
424 Church Street, Suite 2500
Nashville TN 37219

Lynda Hood
Chattanooga Bar Association
801 Broad St Suite 420 Pioneer Bldg
Chattanooga TN 37402

Allan Ramsaur
Tennessee Bar Association
221 4th Ave N Suite 400
Nashville TN 37219

Thomas Ramsey
Knoxville Bar Association
5616 Kingston Pike Ste. 301
Knoxville TN 37919

Lisa Smith
Tennessee Lawyers Assn for Women
P. O. Box 331214
Nashville Tennessee 37203

Candice Reed
Lawyers Assn for Women
Marion Griffin Rep
112 Westwood Place Suite 350
Brentwood TN 37027

Barry Steelman
Chattanooga Bar Association
914 Dunsinane Rd
Signal Mountain TN 37377

Wayne Ritchie
Tennessee Association for Justice
PO Box 1126
606 W Main Ave Ste 300
Knoxville TN 37901

Libby Sykes
Administrative Offices of the Courts
511 Union St Suite 600
Nashville TN 37219

Chantelle Roberson
S.L. Hutchins Chapter - National Bar Assn.
832 Georgia Avenue Ste 1000
Chattanooga TN 37402

George Underwood
William Henry Hastie Chapter - National Bar As
800 South Gay Street Suite 1400
Knoxville TN 37929

Katy Russell
SETLAW
P. O. Box 151
Chattanooga TN 37401

Jack Vaughn
Lawyers Fund for Client Protection
215 E Sullivan St
Kingsport TN 37660

Tom Scott
Board of Professional Responsibility
550 W Main St Ste 601
Knoxville TN 37902

Ricky Wilkins
Tennessee Board of Law Examiners
66 Monroe Ave Ste 103
Memphis TN 38103

Dave Shearon
Tennessee Commission CLE
6041 Frontier Ln 6041 Frontier Ln
Nashville TN 37211

Marsha Wilson
Knoxville Bar Association
P O Box 2027
505 Main St Suite 50
Knoxville TN 37901

Barbara Short
TN Assn of Criminal Defense Lawyers
810 Broadway Suite 501
Nashville TN 37203

Gigi Woodruff
Nashville Bar Association
315 Union Street Suite 800
Nashville TN 37201

H. Smith
Cecil C. Humphreys School of Law
3715 Central Avenue
Memphis TN 38152