STATE OF TENNESSEE
DEPARTMENT OF ENVIRONMENT AND CONSERVATION
OFFICE OF GENERAL COUNSEL
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July 29, 2009

Mike Catalano
Appellate Court Clerk
Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

RE: Comment on Proposed Revisions to Supreme Court Rule 8, Rules of Professional Conduct

Dear Mr. Catalano:

In reviewing the above proposal, I noticed what appears to be a typographical error in the first sentence of Comment 2 to RPC 1.6. Quoting from the redline version that compares against the ABA Model Rules, the sentence states, "A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information ~~relating~~relation to the representation." Although the strikethrough indicates the change from "relating" to "relation" was intentional, my opinion is that it should have been left as the Model Rules have it. As well as reading better, the ABA version of the comment is consistent with the text of RPC 1.6(a) and 1.6(a)(3).

Thank you for the opportunity to submit a comment.

Sincerely,

Alan Leiserson
Legal Services Director

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ALSO ADMITTED IN FLORIDA, INDIANA, OHIO
TENNESSEE & DISTRICT OF COLUMBIA

Supreme Court of Tennessee

Comments on Proposed Tennessee Rules of Professional Conduct

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

For more than 20 years I have been a member of the Tennessee Bar and for 35 years a member of the Kentucky Bar (hereafter "KBA"). As a member of the KBA I have served on the KBA's Ethics Committee and have served as a member of the KBA Ethics "Hotline." I served as member of the 1980 KBA Model Rules Committee when Kentucky moved from the Code of Professional Responsibility to the Rules of Professional Conduct and then as a member of the KBA Ethics 2000 Committee which led to Kentucky's adoption of the new (ABA Ethics 2000 edition) Rules of Professional Conduct. It is with these experiences that I ask the Court to consider the following comments regarding proposed changes to Tennessee's Rules of Professional Conduct; specifically, Rule 1.6: Confidentiality of Information and Rule 8.3, Reporting Professional Misconduct.

1. Proposed Rule 1.6(b) Would Permit Disclosure of Confidential Client Information

1.1 Explanation of Rule - Paragraph (b)(2) of Rule 1.6 authorizes disclosure of confidential client information in order to prevent client frauds that are reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services, unless disclosure is prohibited or restricted by RPC 3.3. Paragraph (b)(3) of Rule 1.6 would authorize disclosure of confidential client information in order to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a fraud in furtherance of which the client has used the lawyer's services, unless disclosure is prohibited or restricted by RPC 3.3.

1.2 Reason for Change In Rule - The rationale for this exception to the Rule which otherwise protects client confidences may be found in the American Bar Association Report, as follows: "The Commission recommends that a lawyer be permitted to reveal information relating to the representation to the extent necessary to prevent the client from committing a crime or fraud reasonably certain to result in substantial economic loss, but only when the lawyer's services have been or are being used in furtherance of the crime or fraud. Use of the lawyer's services for

such improper ends constitutes a serious abuse of the client-lawyer relationship. The client's entitlement to the protection of the Rule must be balanced against the prevention of the injury that would otherwise be suffered and the interest of the lawyer in being able to prevent the misuse of the lawyer's services. Moreover, with respect to future conduct, the client can easily prevent the harm of disclosure by refraining from the wrongful conduct is the same as that for paragraph (b)(2); the only difference being that the client no longer can prevent disclosure by refraining from the crime or fraud." The Commission believed that the interests of the affected persons in mitigating or recouping their substantial losses and the interest of the lawyer in undoing a wrong in which the lawyer's services were unwittingly used outweigh the interests of a client who has so abused the client-lawyer relationship.

2. Objections to Rule 1.6(b)'s Permissive Disclosure of Confidential Client Information

2.1 First Objection - Revealing Client Confidences To Prevent Or Mitigate Financial Injury.

2.1(a) The initial ABA Ethics 2000 version of Rule 1.6 did not include an exception that would permit disclosure of client confidences to prevent or mitigate damages affecting financial and property interests. These two exceptions were added at the recommendation of the ABA Task Force on Corporate Responsibility in the wake of the Sarbanes-Oxley Act and the SEC regulations that were adopted after Sarbanes-Oxley. Unfortunately, these new exceptions are much broader than required by the Sarbanes-Oxley Act and are unnecessary in light of the required disclosure provisions of Rule 1.6(c), as follows:

> A lawyer *shall reveal information* relating to the representation of a client to the extent the lawyer reasonably believes disclosure is necessary
>
> (1) to prevent reasonably certain death or substantial bodily harm;
>
> (2) *to comply with an order of a tribunal requiring disclosure, but only if ordered to do so by the tribunal after the lawyer has asserted on behalf of the client all non-frivolous claims that the information sought by the tribunal is protected against disclosure by the attorney-client privilege or other applicable law*; or
>
> (3) *to comply with RPC 3.3, 4.1, or other law*. (Emphasis supplied.)

While the proposed Rule 1.6(b) would make disclosure voluntary, the proposed Rule puts lawyers in the position where in prospective malpractice actions and in public discourse lawyers will be considered to have a responsibility to mitigate or rectify their client's injuries to another's financial interests or property, and this will make lawyers adverse to their clients and will undermine the concept of confidentiality, especially as Rule 1.4(a)(5) requires that lawyers shall consult with their client regarding any relevant limitation on the lawyer's conduct.

2.1(b) The states that have not adopted the new ABA version of Rule 1.6 have made the following arguments:

- First, lawyers will face increased liability and legal inquiries into whether the lawyer "should have known" of the crime or fraud, when in reality the lawyer is likely to have knowledge only in hindsight. In this respect, the proposed rule introduces a "whistle blower" element to the ethics rules that may often pressure the lawyer to disclose for fear of guessing wrong about the client's activities or intentions.
- Second, expanding the circumstances in which the lawyer could disclose client confidences would create an additional impediment to trust between lawyer and client,

reducing the likelihood that the lawyer would be able to counsel the client to abide by the law.

Again, as to the issue of the disclosure being "voluntary," there has already been significant comment that disclosure is mandated because the language of new ABA Rule 1.6 creates a strong imperative for lawyers to disclose in order to prevent and/or rectify financial harm.

2.1(c) The better alternative for Tennessee is illustrated by Illinois Bar Rule 1.6, as follows.

(a) Except when required under Rule 1.6(b) or permitted under Rule 1.6(c), a lawyer shall not, during or after termination of the professional relationship with the client, use or reveal a confidence or secret of the client known to the lawyer unless the client consents after disclosure.

(b) A lawyer shall reveal information about a client to the extent it appears necessary to prevent the client from committing an act that would result in death or serious bodily harm.

(c) A lawyer may use or reveal:

(1) confidences or secrets when permitted under these Rules or required by law or court order,

(2) the intention of a client to commit a crime in circumstances other than those enumerated in Rule 1.6(b); or

(3) confidences or secrets necessary to establish or collect the lawyer's fee or to defend the lawyer or the lawyer's employees or associates against an accusation of wrongful conduct.

The Illinois Rule does not permit disclosure for an injury to the financial interests or property of another, but permits disclosure when required by law or court order. Hence, as the new ABA Rule 1.6 creates an unnecessary level of distrust between the lawyer and client it should be rejected.

2.1(d) Further, the Supreme Court of Kentucky, when implementing a new edition of the Rules of Professional Conduct, which were also based on the ABA Ethics 2000 Commission Report, and its KBA Ethics 2000 Committee Report, considered these very same issues and rejected the suggested ABA edition.

2.2 Second Objection - Use of Lawyer's Services In Furtherance Of Lawyer's Services.

2.2(a) The ABA and TBA proposed Rule 1.6 permits a lawyer to make a disclosure of confidential client information when the lawyer's services were used in "furtherance" of the client's misconduct. However, the Comments do not explain what constitutes the "furtherance" of the lawyer's involvement. The Comments should be expanded to include a discussion that requires a concise nexus to the use of the lawyer's services and the injury that resulted from the client's misconduct.

2.2(b) As a condition precedent to any disclosure it should be necessary for the lawyer to reasonably conclude that (i) the lawyer's services were used by the client to further the client's intentional wrongful misconduct and (ii) the lawyer's services were a significant contributing factor leading to the damages suffered by the innocent victim of the client's wrongful conduct. There must be some nexus between the lawyer's performance of services and the financial loss that is suffered by the innocent victim of the client's wrongful conduct before the lawyer may disclose otherwise confidential client information. The absence of such clarifying advice only

serves to weaken the operation of the Rule, and, therefore, the suggested addition to the Comments should be required.

2.3 Application of Other Disclosure Rules.

2.3(a) Lawyer's Duty to a Tribunal. The elimination of the permissive nature of proposed Rule 1.6 does not affect a lawyer's obligation to a tribunal. Rule 3.3 makes it clear that a lawyer is required to correct false statements made to a tribunal and, as an officer of the court, to ensure the integrity of the judicial process.[1] Hence, in light of the requirement to protect communications to a tribunal and a court's ability to order the release of confidential client information, there is no substantive reason for creating a new exception to the most basic principle of lawyer-client relationships.

2.3(b) Lawyer's Duty to an Entity. Lawyers have duties to organization clients, and pursuant to Rule 1.13 the lawyer may disclose confidential organizational client information to comply with "law."[2]

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[1] Rule 3.3 . . .
(e) If a lawyer knows that the lawyer's client intends to perpetrate a fraud upon the tribunal or otherwise commit an offense against the administration of justice in connection with the proceeding, including improper conduct toward a juror or a member of the jury pool, or comes to know, prior to the conclusion of the proceeding, that the client has, during the course of the lawyer's representation, perpetrated such a crime or fraud, the lawyer shall advise the client to refrain from, or to disclose or otherwise rectify, the crime or fraud and shall discuss with the client the consequences of the client's failure to do so.
(f) If a lawyer, after discussion with the client as required by paragraph (e), knows that the client still intends to perpetrate the crime or fraud, or refuses or is unable to disclose or otherwise rectify the crime or fraud, the lawyer shall seek permission of the tribunal to withdraw from the representation of the client and shall inform the tribunal, without further disclosure of information protected by RPC 1.6, that the lawyer's request to withdraw is required by the Rules of Professional Conduct.
(g) A lawyer who, prior to conclusion of the proceeding, comes to know that the lawyer has offered false tangible or documentary evidence shall withdraw or disaffirm such evidence without further disclosure of information protected by RPC 1.6.
(h) A lawyer who, prior to the conclusion of the proceeding, comes to know that a person other than the client has perpetrated a fraud upon the tribunal or otherwise committed an offense against the administration of justice in connection with the proceeding, and in which the lawyer's client was not implicated, shall promptly report the improper conduct to the tribunal, even if so doing requires the disclosure of information otherwise protected by RPC 1.6.
(i) A lawyer who, prior to conclusion of the proceeding, comes to know of improper conduct by or toward a juror or a member of the jury pool shall report the improper conduct to the tribunal, even if so doing requires the disclosure of information otherwise protected by RPC 1.6.
(j) If, in response to a lawyer's request to withdraw from the representation of the client or the lawyer's report of a perjury, fraud, or offense against the administration of justice by a person other than the lawyer's client, a tribunal requests additional information that the lawyer can only provide by disclosing information protected by RPC 1.6 or 1.9(c), the lawyer shall comply with the request, but only if finally ordered to do so by the tribunal after the lawyer has asserted on behalf of the client all non-frivolous claims that the information sought by the tribunal is protected by the attorney-client privilege.

[2] Rule 1.13(c) provides:
(c) If despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and is likely to result in substantial injury to the organization, the lawyer may withdraw in accordance with RPC 1.16 and may make such disclosures of information relating to the organization's representation only to the extent permitted to do so by RPCs 1.6 and 4.1.

2.3(c) Lawyer's Duty to Others. Lawyers have obligations to others, basically Rule 4.1 requires the lawyer to be truthful in his/her dealings with others and if the client's actions have been fraudulent then the lawyer must act to correct the client's fraud.[3]

3. Rule 8.3: Reporting Professional Misconduct

3.1 I endorse the recommendation that the Court adopt Rule 8.3 because the duty to report misconduct is an important aspect of self-regulation, and is intended to achieve societal goals. However, it is also appropriate to protect a lawyer who makes a report in compliance with the Rule and to encourage a lawyer to make a voluntary report of other acts of misconduct. Hence, Rule 8.3 should be expanded to provide qualified immunity to the lawyer who makes a required report so as to remove the fear of retaliation by the reported lawyer or judge.

3.2 Form of Suggested Additional Rule.

> 8.3(d) A lawyer acting in good faith in the discharge of the lawyer's professional responsibilities required by paragraphs (a) and (b) or when making a voluntary report of other misconduct shall be immune from any action, civil or criminal, and any disciplinary proceeding before the Bar as a result of said report, except for conduct prohibited by Rule 3.4(f).

I thank the Court for considering my comments.

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[3] Rule 4.1 . . .

(b) If, in the course of representing a client in a non-adjudicative matter, a lawyer knows that the client intends to perpetrate a crime or fraud, the lawyer shall promptly advise the client to refrain from doing so and shall discuss with the client the consequences of the client's conduct. If after such discussion, the lawyer knows that the client still intends to engage in the wrongful conduct, the lawyer shall:

(1) withdraw from the representation of the client in the matter; and

(2) give notice of the withdrawal to any person who the lawyer knows is aware of the lawyer's representation of the client in the matter and whose financial or property interests are likely to be injured by the client's criminal or fraudulent conduct. The lawyer shall also give notice to any such person of the lawyer's disaffirmance of any written statements, opinions, or other material prepared by the lawyer on behalf of the client and which the lawyer reasonably believes may be used by the client in furtherance of the crime or fraud.

(c) If a lawyer who is representing or has represented a client in a non-adjudicative matter comes to know, prior to the conclusion of the matter, that the client has, during the course of the lawyer's representation of the client, perpetrated a crime or fraud, the lawyer shall promptly advise the client to rectify the crime or fraud and discuss with the client the consequences of the client's failure to do so. If the client refuses or is unable to rectify the crime or fraud, the lawyer shall:

(1) if currently representing the client in the matter, withdraw from the representation and give notice of the withdrawal to any person whom the lawyer knows is aware of the lawyer's representation of the client in the matter and whose financial or property interests are likely to be injured by the client's criminal or fraudulent conduct; and

(2) give notice to any such person of the lawyer's disaffirmance of any written statements, opinions, or other material prepared by the lawyer on behalf of the client and that the lawyer reasonably believes may be used by the client in furtherance of the crime or fraud.

MBA
MEMPHIS BAR ASSOCIATION

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November 20, 2009

Mike Catalano
Appellate Court Clerk
Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

Re: Comments of Memphis Bar Association to proposed amendments to Supreme Court Rule 8

Dear Mr. Catalano:

Enclosed is the Report of the MBA Professionalism Committee on Proposal to Amend Tennessee Rules of Professional Conduct, which was adopted by the Memphis Bar Association Board of Directors on November 19, 2009. Please accept this report as the MBA's comments to the proposed amendments to Supreme Court Rule 8.

If you have any questions, please call (901.527.3573) or email (afritz@memphisbar.org) me.

Sincerely,

Anne Fritz
Executive Director

REPORT OF THE MBA PROFESSIONALISM COMMITTEE ON PROPOSAL TO AMEND TENNESSEE RULES OF PROFESSIONAL CONDUCT

On May 13, 2009 the Tennessee Bar Association filed a Petition asking the Tennessee Supreme Court to adopt amendments to the Tennessee Rules of Professional Conduct, the ethical rules applicable to Tennessee lawyers. The Tennessee Supreme Court, noting that the TBA's proposed amendments would result in a comprehensive revision of the current Tennessee rules, solicited written comments from judges, lawyers, Bar Associations, members of the public and other interested parties. The deadline for submitting written comments is December 16, 2009.

The Professionalism Committee of the MBA has completed its review and submits the following recommendations to the Memphis Bar Association Board of Directors for its review and. if approved by the Board, to submit the comments to the Tennessee Supreme Court before the December 16, 2009 deadline.

In considering the proposed changes to the Tennessee Rules of Professional Conduct, the Professionalism Committee was aware that most of the revisions came from the revision of the ABA Model Rules of Professional Conduct by its Ethics 2000 Commission completed in 2003 and adopted as the revised ABA Model Rules. Because the Tennessee Rules of Professional Conduct were adopted by the Tennessee Supreme Court in 2002, some of the proposed changes in the ABA Model Rules had already been adopted by the Tennessee Supreme Court. The TBA, nevertheless, charged its ethics committee to consider all of the revised Model Rules and that work culminated in the submission in May 2009 of the proposed changes to the Tennessee Rules.

With the benefit of several years of experience with the revised ABA Model Rules, the TBA Ethics Committee determined that Tennessee would benefit from the changes adopted from the ABA model. In its submission to the Tennessee Supreme Court, the TBA stated that: "Based on a careful review by its standing committee on ethics and professional responsibility the TBA believes that, by and large, these are simply better rules, clearly meriting serious considerations particularly where many other jurisdictions have adopted versions closely patterned after them." Over the last several years, most of the states (over 40) have adopted revised ethics rules based on the new ABA Model Rules.

The MBA Professionalism Committee agrees with the TBA that the new proposed rules offer a significant improvement to the existing Rules of Professional Conduct and should be adopted. The committee has not attempted to rewrite the proposed rules but only to comment on a few of the changes. The committee offers the following comments and recommendations for changes:

A. Scope, Comment 20: This comment seeks a modification indicating that in some circumstances a lawyer's violation of a rule may be evidence of a breach of the applicable standard of conduct. The existing rule states that nothing in the rule should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty. The Committee feels that the language in the scope presently gives good guidance and should be retained. The Committee recognizes that some states may have adopted

		the proposed change but the Committee does not favor putting it in the Tennessee Rules.
B.	RULE 10	Definition of Fiduciary. It is recommended that the Definition of Fiduciary be reinserted. It was supposedly deleted because the rules and comments did not refer to the term; however, the proposed changes in comments12 and 27 of Rule 1.7 use the term. In addition, the duty of lawyer as a fiduciary is commented on in many case decisions and a definition in the rules would appear to be helpful to lawyers.
C.	RULE 1.7	The TBA proposal seeks to modify the exiting rule by adding comments concerning potential conflicts of interest which can occur during representation of a client caused by sexual relations between client and lawyer. The ABA model rules chose to use a black letter rule to guide lawyers as follows: RULE 1.8(j) "A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client/lawyer relationship commenced." The TBA proposal did not adopt a black letter rule but rather inserted three comments in Rule 1.7 to guide lawyers in these circumstances. The MBA Committee believes that the preferable course is the one adopted by the ABA Model Rules in placing the guidance in black letter rule, supported by comments rather than in the selected comments proposed to be inserted in Rule 1.7.
D.	RULE 1.18(c)	This rule on the duties to prospective clients is valuable, however, the use of the terms "client" and "prospective client" are difficult to understand in paragraph "c" and it is recommended that this paragraph be re-worded to clarify the duties sought to be imposed on the lawyer.
E.	RULE 119(b)(5) and Comment 2	This Rule was specially written by the TBA Ethics Committee and is not a part of the ABA Model Rules. While it gives good guidance to lawyers on materials to which a client is entitled, the MBA Committee believes that "attorney notes" should be removed from the list of items to be returned to the client on request. It is the Committee's view that notes taken by the lawyer are personal to the lawyer, and it should remain in the lawyer's discretion whether or not those notes are revealed to anyone, including the client.
F.	RULE 3.7 Comment 3	This Rule deals with the lawyer as a witness. The first sentence in Comment 3 appears to be too restrictive, and it

		is recommended that "the tribunal" in the first sentence be deleted and in its place be substituted "integrity of the proceedings."
G.	Rule 4.4(a)(2)	This rule deals with the tactic of threatening a criminal or lawyer disciplinary violation; however, it strikes from the Rule the concept of refraining from filing such a charge. The MBA Committee believes that the phrase "or refrain from filing" should be retained in the rule.
H.	Rule 7.1	This rule deals with communications from a lawyer and prohibits false or misleading comments by the lawyer. Based on the developing use of blogs by lawyers, it is felt that the rule should be expanded to cover the use and misuse of blogs by lawyers or agents of lawyers.
I.	Rule 2.4 and Rule 8.3	A sentence is proposed to be added to Comment 10 of Rule 2.4 concerning the ethical duty of a lawyer serving as a dispute resolution neutral to report unethical conduct and there is a reference to Rule 8.3. Rule 8.3, however, does not concern alternate dispute resolution and is therefore confusing as a reference. Either change is required in comment 10 of Rule 2.4 - or - Rule 8.3(c) or one of its comments should be expanded.

In conclusion, your Memphis Professionalism Committee believes that the Tennessee Bar Association Ethics Committee has done a superb job in developing the recommended changes to the Tennessee Rules of Professional Conduct and the petition submitted by the TBA to the Tennessee Supreme Court should be adopted after consideration of all of the proposed commentary, including the comments contained in this report.

Respectfully submitted,

Memphis Bar Association Professionalism Committee

Albert C. Harvey, Co-Chair
Prince Chambliss, Co-Chair
Participating Members:
G. Patrick Arnoult
Melissa C. Berry
David M. Cook
Mark Geller
Robert L. Green
Steven W. King
Henry L. Kline
Stephen R. Leffler
Mary Jo Miller
Michael J. Stengel
Patrick Glenn Walker

4813-0751-5396, v. 1

TAPM
TENNESSEE ASSOCIATION OF PROFESSIONAL MEDIATORS

November 20, 2009

Supreme Court of Tennessee
c/o Mike Catalano, Clerk Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

Re: Petition for the Adoption of Amended Rules of Professional Conduct
No. M2009-00979-SC-RL1-RL

Dear Justices:

The Tennessee Association of Professional Mediators ("TAPM") would like to express support for proposed amendments to the Tennessee Rules of Professional Conduct. The TAPM Board of Directors and its membership believe these amendments will improve the overall quality of legal services and general litigation dispute resolution to citizens of our great state. TAPM's diverse membership is comprised of Tennessee Supreme Court Rule 31 Mediators many of whom are attorneys and former judges. Together we applaud the Tennessee Bar Association ("TBA") specifically for submitting the amendment to Comment 5 of Rule 2.1 clarifying the need to discuss dispute resolution methods with clients pursuant to Rule 1.4. It is the position of TAPM that the amended language supports the work of attorneys in our state by offering clarifying language and support in advising their clients.

Furthermore, TAPM is proposing the herein detailed, additional modifications to the Comments of Rule 1.4. These modifications are consistent with the TBA's heretofore described amendments to Rule 2.1 and clarify the amendments currently before you. Enclosed please find a copy of Rule 1.4 as amended by the TBA containing highlighted modifications suggested by TAPM. It is TAPM's contention that the modifications to Comments 3 and 5 of Rule 1.4 more succinctly clarify the duty of attorneys to discuss alternative methods of achieving a client's goals. TAPM prays this Court will consider including these modifications in deliberations of this Petition. This is a unique opportunity for this Court to offer guidance and support to practitioners seeking to advise clients of their dispute resolution choices. We believe the language attached is consistent with the current TBA proposed amendments and in line with national trends. Further, with mediation and other forms of alternative dispute resolution methods playing such a large role in access to justice and resolution of litigated matters, the attached clarifying amendments will well serve the courts and the public, as well as practitioners.

Respectfully Submitted,

Leigh Ann Roberts
TAPM President

Jonathan L. Stein
TAPM, Public Policy Committee Chair

RULE 1.4: COMMUNICATION

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in RPC 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Comment

[1] Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

Communicating with Client

[2] If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. *See* RPC 1.2(a).

[3] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations – depending on both the importance of the action under consideration and the feasibility of consulting with the client – this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases, the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. The duty imposed by paragraph (a)(2) typically requires attorneys to inform their clients of all reasonable means by which the client's goals may be achieved, including methods of Alternative Dispute Resolution such as Arbitration, Mediation and other forms of alternative dispute resolution. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. Client communications, including telephone calls, should be promptly returned or acknowledged.

Explaining Matters

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. Adequate communication should apprise clients of the advantages and disadvantages associated with the reasonable means by which the client's goals may be achieved including litigation, mediation, arbitration and other forms of alternative dispute resolution. For example, an attorney, where appropriate, might compare each process in terms of what party or person possesses decision-making authority, the amount of time and expense involved, and other risks and benefits to each process. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in RPC 1.0(e).

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. *See* RPC 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. *See* RPC 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Withholding Information

[7] In some circumstances, a lawyer may be justified in withholding or delaying transmission of information to the client, including for example, when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Other applicable law, including rules or court orders governing litigation, may provide that information supplied to a lawyer may not be disclosed to the client. RPC3.4(c) directs compliance with such rules or orders.

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE:	)	
	)	
PETITION FOR THE ADOPTION OF AMENDED TENNESSEE RULES OF PROFESSIONAL CONDUCT	)	**No. M2009-00979-SC-RL1-RL**
	)	
	)	

CORRECTION TO THE COMMENTS OF THE TENNESSEE DISTRICT ATTORNEYS GENERAL CONFERENCE

The Tennessee District Attorneys General Conference (TDAGC), by and through its Executive Director, James W. Kirby submits the following correction to its previously submitted comments on proposed amendments to the Tenn. Sup. Ct. R 8, Tennessee Rules of Professional Conduct pending before this Court. On the bottom part of page 2 of the TDAGC's comments, 3.3 was mistakenly cited as the rule commented on. The correct cite should have been 3.2. This section should read as follows (mistaken cite with strike-through, correct cite underlined):

"THE TDAGC URGES RETENTION OF THE CURRENT RULE ~~3.3~~ 3.2

With the proposed RULE ~~3.3~~ 3.2 as amended, the TBA asks that this Court return to the rule sought by the TBA before the Court promulgated the original Rules of Professional Conduct in 2002. The current ~~3.3~~ 3.2 states, "A lawyer shall make reasonable efforts to expedite litigation"."

Respectfully Submitted,

By: _____

James W. Kirby (3775)
Executive Director TDGAC,
District Attorneys General Conference
226 Capitol Blvd., Suite 800
Nashville, TN 37243
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CERTIFICATE OF SERVICE

The undersigned certifies that a true and exact copy of the foregoing has been served upon the individuals and organizations identified in the following by regular U.S. Mail, postage prepaid on 12/11, 2009.

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ARLENE V. SHOEMAKER

December 15, 2009

DEC 15 2009

The Honorable Mike Catalano, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, Tennessee 37219-1407

Re: Comments of Proposed Tennessee Rules of Professional Conduct

Mr. Catalano:

Thank you for the opportunity to comment on the proposed amendments to Tennessee Supreme Court Rule8, Rules of Professional Conduct ("RPC").

I respectfully request that the Tennessee Supreme Court retain current Comment 17 to RPC Rule 1.7. The current comment reads as follows:

> Members of a family may reasonable see joint representation by a single lawyer in a matter affecting the family. Conflict questions may arise in such circumstances. For example, in estate planning, a lawyer may be called upon to prepare wills for family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. *Resolution of conflicts of interest between family members pursuant to this Rule must be consistent with the lawyers duty of undivided loyalty to each client, but the lawyer may take into account the willingness of each individual client to accommodate the interests of the family as a whole or the individual interests of other family members.* In estate administration, the identity of the client may be unclear. Under one view, the client is the fiduciary; under another view, the client is the estate or trust, including its beneficiaries. The lawyer should make clear the relationship to the parties involved. (Emphasis added).

The proposed comments remove the language emphasized above. The current language in Comment 17 gives trust and estate lawyers explicit guidance for resolving conflicts of interest between family members.

Trust and estate lawyers often consider family dynamics when engaging in estate planning involving multiple family members and other related parties. In addition, clients frequently request trust and estate lawyers to represent multiple family members so that the family may benefit from a carefully coordinated estate plan. As expressed by the American College of Trust and Estate Counsel, "[m]ultiple representation is . . . generally appropriate because the interests of the clients in cooperation, including obtaining cost effective representation and achieving common objectives, often clearly predominate over their limited inconsistent interests."[1]

Retaining the emphasized language in Comment 17 explicitly authorizes trust and estate lawyers to consider the desires of cooperative family members in order to represent them in estate planning matters without violating the ethics rules. Removing the emphasized language above may expose trust and estate lawyers to a greater risk of violating the ethical rules, even when they are facilitating healthy and harmonious family estate planning.

Thank you for your consideration of this important matter.

Sincerely,

Anne M. McKinney, P.C.

by

Victoria B. Tillman

VBT:lp

---

[1]ACTEC COMMENTARIES ON THE MODEL RULES OF PROFESSIONAL CONDUCT 91 (4th ed. 2006); *also available at* <http://www.actec.org/public/Commentaries1.7.asp>.

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December 14, 2009

FedEx 12-14

VIA FEDERAL EXPRESS
The Honorable Mike Catalano, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, Tennessee 37219-1407

Re: Comments on Proposed Tennessee Rules of Professional Conduct

Mr. Catalano:

Thank you for the opportunity to comment on the proposed amendments to Tennessee Supreme Court Rule 8, Rules of Professional Conduct ("RPC").

I respectfully request that the Tennessee Supreme Court retain current Comment 17 to RPC Rule 1.7. The current comment reads as follows:

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Retaining the emphasized language in Comment 17 explicitly authorizes trust and estate lawyers to consider the desires of cooperative family members in order to represent them in estate planning matters without violating the ethics rules. Removing the emphasized language above may expose trust and estate lawyers to a greater risk of violating the ethical rules, even when they are facilitating healthy and harmonious family estate planning.

Thank you for your consideration of this important matter.

Respectfully yours,

Angelia Morie Nystrom

Angelia Morie Nystrom

ADM1:lg

[1] ACTEC COMMENTARIES ON THE MODEL RULES OF PROFESSIONAL CONDUCT 91 (4th ed. 2006); *also available at* <http://www.actec.org/public/Commentaries1.7.asp>.

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December 15, 2009

The Honorable Mike Catalano, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

Re: Comments on Proposed Tennessee Rules of Professional Conduct

Mr. Catalano:

I am very surprised by proposed change to Comment 17 to RPC Rule 1.7. I was chair of the TBA Estate Planning and Probate Committee in 1999 – 2000 when these Rules and Comments were adopted by the Tennessee Supreme Court. This was well-reasoned and discussed then. I recall this specific language being favorably discussed with the TBA Committee for the Study of Standards of Professional Conduct.

I respectfully request that the Tennessee Supreme Court retain current Comment 17 to RPC Rule 1.7. The current comment reads as follows:

> Members of a family may reasonably seek joint representation by a single lawyer in a matter affecting the family. Conflict questions may arise in such circumstances. For example, in estate planning, a lawyer may be called upon to prepare wills for family members, such as husband and wife, and, depending on the circumstances, a conflict of interest may arise. *Resolution of conflicts of interest between family members pursuant to this Rule must be consistent with the lawyer's duty of undivided loyalty to each client, but the lawyer may take into account the willingness of each individual client to accommodate the interests of the family as a whole or the individual interests of other family members.* In estate administration, the identity of the client of the client may be unclear. Under one view, the client is the fiduciary; under another view, the client is the estate or trust, including its beneficiaries. The lawyer should make clear the relationship to the parties involved. (Emphasis added).

The proposed comments remove the language emphasized above. The current language in Comment 17 gives trust and estate lawyers explicit guidance for resolving conflicts of interest between family members.

Trust and estate lawyers often consider family dynamics when engaging in estate planning involving multiple family members. In addition, clients frequently request trust

and estate lawyers to represent multiple family members so that the family may benefit from a carefully coordinated estate plan. As expressed by the American College of Trust and Estate Counsel, "[m]ultiple representation is…generally appropriate because the interests of the clients in cooperation, including obtaining cost effective representation and achieving common objectives, often clearly predominate over their limited inconsistent interests."[1]

Retaining the emphasized language in Comment 17 explicitly authorizes trust and estate lawyers to consider the desires of cooperative family members in order to represent them in estate planning matters without violating the ethics rules. Removing the emphasized language above may expose trust and estate lawyers to a greater risk of violating the ethical rules even when they are facilitating healthy and harmonious estate planning.

Thank you for your consideration of this important matter.

Respectfully submitted,

ADAMS AND REESE LLP

Joe M. Goodman
JMG/jbs

[1] ACTEC COMMENTARIES ON THE MODEL RULES OF PROFESSIONAL CONDUCT 91 (4th ed. 2006); *also available at* http://actec.org/public/Commentaries1.7.asp.

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DEC 15 2009

December 15, 2009

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VIA FACSIMILE 615-532-8757

The Honorable Mike Catalano, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, Tennessee 37219-1407

Re: Comments on Proposed Tennessee Rules of Professional Conduct

Mr. Catalano:

Thank you for the opportunity to comment on the proposed amendments to Tennessee Supreme Court Rule 8, Rules of Professional Conduct ("RPC").

I am an elder law attorney, certified as an elder law specialist by the Tennessee Commission on CLE and Specialization.

I respectfully request that the Tennessee Supreme Court retain current Comment 17 to RPC Rule 1.7. The current comment reads as follows:

> Members of a family may reasonably seek joint representation by a single lawyer in a matter affecting the family. Conflict questions may arise in such circumstances. For example, in estate planning, a lawyer may be called upon to prepare wills for family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. *Resolution of conflicts of interest between family members pursuant to this Rule must be consistent with the lawyer's duty of undivided loyalty to each client, but the lawyer may take into account the willingness of each individual client to accommodate the interests of the family as a whole or the individual interests of other family members.* In estate administration, the identity of the client may be unclear. Under one view, the client is the fiduciary; under another view, the client is the estate or trust, including its beneficiaries. The lawyer should make clear the relationship to the parties involved. (Emphasis added).

The proposed comments remove the language emphasized above. The current language in Comment 17 gives trust and estate lawyers explicit guidance for resolving conflicts of interest between family members.

Trust and estate lawyers often consider family dynamics when engaging in estate planning involving multiple family members and other related parties. In addition, clients frequently request trust and estate lawyers to represent multiple family members so that the family may benefit from a carefully coordinated estate plan. As expressed by the American College of Trust and Estate Counsel, "[m]ultiple representation is . . . generally appropriate because the interests of the clients in cooperation, including obtaining cost effective representation and achieving common objectives, often clearly predominate over their limited inconsistent interests."

Retaining the emphasized language in Comment 17 explicitly authorizes trust and estate lawyers to consider the desires of cooperative family members in order to represent them in estate planning matters without violating the ethics rules. Removing the emphasized language above may expose trust and estate lawyers to a greater risk of violating the ethical rules, even when they are facilitating healthy and harmonious family estate planning.

Thank you for your consideration of this important matter.

Respectfully submitted,

William King Self, Jr.

/aw

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December 15, 2009

Facsimile 615-532-8757

The Honorable Mike Catalano, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue, North
Nashville, TN 37219-1407

Dear Mike:

I wish to take this opportunity to comment on the proposed Amendments to the Tennessee Supreme Court Rule 8, Rules of Professional Conduct.

Specifically, I would request that the Tennessee Supreme Court retain current Comment 17 to RPC Rule 1.7, which comment reads as follows:

> Members of a family may reasonably seek joint representation by a single lawyer in a matter affecting the family. Conflict questions may arise in such circumstances. For example, in estate planning, a lawyer may be called upon to prepare wills for family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. *Resolution of conflicts of interest between family members pursuant to this Rule must be consistent with the lawyer's duty of undivided loyalty to each client, but the lawyer may take into account the willingness of each individual client to accommodate the interests of the family as a whole or the individual interests of other family members.* In estate administration, the identity of the client may be unclear. Under one view, the client is the fiduciary; under another view, the client is the estate or trust, including its beneficiaries. The lawyer should make clear the relationship to the parties involved. (Emphasis added).

The proposed comments remove the language emphasized above, and it is my professional opinion that the current language of Comment 17 is important in giving estate planning lawyers guidance for dealing with conflicts of interest that might arise among family members. In many

instances, estate planning lawyers are requested to represent multiple family members so that the family can benefit from a coordinated estate plan and retaining the current language in Comment 17 explicitly authorizes estate planning lawyers to consider the wishes of cooperative family members in order to represent them efficiently in estate planning matters. It is my opinion that removing the emphasized language above may expose estate planning lawyers to a greater risk of violating the ethical rules, even when they are facilitating the estate planning wishes of their clients.

Thank you for your consideration.

With kindest regards, I remain

Very truly yours,

Martha S. L. Black

MSLB:jsa

108 Lauren Drive
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CRIMINAL DEFENSE PERSONAL INJURY
CONSTITUTIONAL RIGHTS

Tuesday, December 15, 2009

Tennessee Supreme Court
511 Union Street, Suite 600
Nashville, Tennessee 37219

DEC 15 2009

Sent via facsimile only to (615) 532-8757

RE: Petition for the Adoption of Amended Tennessee Rules of Professional Conduct, proposed additional rule

To the Honorable Supreme Court of Tennessee:

As permitted by this Court's order entered June 22, 2009, the undersigned respectfully request that an additional provision be added to the proposed amended rules, perhaps as part of the Preamble, section 7; or part of the Scope, section 16; or as a new rule, 1.20, to read substantially as follows:

> Nothing in these Rules of Professional Conduct shall infringe upon, limit or otherwise deny an attorney's freedom to decline or withdraw from representation in any case in which representation would violate the attorney's sincerely held religious beliefs or in any case where the attorney's beliefs could conflict with the zealous and effectual representation of the client.

The rationale is to state within the four corners of these rules themselves that the constitutional protections afforded all citizens of the United States and of the State of Tennessee apply to attorneys in their practice of the law, so that lawyers don't have to consult those external sources and try to determine whether the rules contradict them. This would make clear that these rules are not intended in any way to limit or supplant those constitutional rights as they protect lawyers in their lawful legal practice, regardless of whether parties or tribunals agree or disagree with the attorneys' "sincerely held religious beliefs" and regardless of whether those in disagreement constitute a political majority.

Sincerely,

/s/ Nathan Zale Dowlen

Zale Dowlen, #026816
Zale@DowlenLaw.com

In Re: Petition for the Adoption of Amended Tennessee Rules of Professional Conduct, proposed additional rule

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Respectfully submitted

DEC 15 2009

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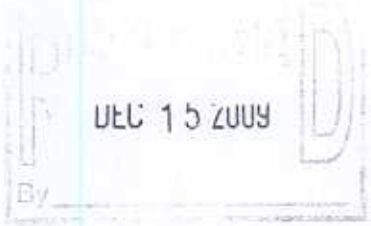
December 15, 2009

VIA FACSIMILE: (615) 532-8757



The Honorable Mike Catalano, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, Tennessee 37219-1407

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Thank you for your consideration of this important matter.

Respectfully submitted,

Nell King Bieger

NKB/ap

[1] ACTEC COMMENTARIES ON THE MODEL RULES OF PROFESSIONAL CONDUCT 91 (4th ed. 2006); *also available at* <http://www.actec.org/public/Commentaries1.7.asp>.

THE LOWRANCE LAW FIRM, P.C.
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DEC 15 2009

December 15, 2009

In Re: Petition for the Adoption of Amended Tennessee Rules of Professional Conduct, proposed additional rule

To the Honorable Supreme Court of Tennessee:

As permitted by this Court's order entered June 22, 2009, the undersigned respectfully request that an additional provision be added to the proposed amended rules, perhaps as part of the Preamble, section 7; or part of the Scope, section 16; or as a new rule1.20, to read substantially as follows:

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The rationale is to state within the four corners of these rules themselves that the constitutional protections afforded all citizens of the United States and of the State of Tennessee apply to attorneys in their practice of the law, so that lawyers don't have to consult those external sources and try to determine whether the rules contradict them. This would make clear that these rules are not intended in any way to limit or supplant those constitutional rights as they protect lawyers in their lawful legal practice, regardless of whether parties or tribunals agree or disagree with the attorneys' "sincerely held religious beliefs" and regardless of whether those in disagreement constitute a political majority.

Respectfully submitted

Name (print) H. David Lowrance
Bar # 8824
Address 107 South Street East
City/Zip Collierville, TN 36017

Christian Legal Society, Chattanooga Chapter
1300 Broad Street, Suite 200
Chattanooga, Tennessee 37402
December 15, 2009

In Re: Petition for the Adoption of Amended Tennessee Rules of Professional Conduct, proposed additional rule

To the Honorable Supreme Court of Tennessee:

As permitted by this Court's order entered June 22, 2009, the undersigned respectfully request that an additional provision be added to the proposed amended rules, perhaps as part of the Preamble, section 7; or part of the Scope, section 16; or as a new rule1.20, to read substantially as follows:

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Our rationale is to state within the four corners of these rules themselves that the constitutional protections afforded all citizens of the United States and of the State of Tennessee apply to attorneys in their practice of the law, so that lawyers don't have to consult those external sources and try to determine whether the rules contradict them. This would make clear that these rules are not intended in any way to limit or supplant those constitutional rights as they protect lawyers in their lawful legal practice, regardless of whether parties or tribunals agree or disagree with the attorneys' "sincerely held religious beliefs" and regardless of whether those in disagreement constitute a political majority.

This is respectfully submitted by the Chattanooga Chapter of the Christian Legal Society, c/o Todd C. McCain, Esq., 1300 Broad Street, Suite 200, Chattanooga, TN 37402, telephone 423/643-4001, President, and by the undersigned as individual members of the bar of the State of Tennessee. Copies are being sent to Gail Ashworth, Esq., President and Mr. Alan Ramseur, Executive Director, respectively of the Tennessee Bar Association. We would suggest that questions or information regarding this submission be directed to Mr. McCain.

Christian Legal Society, Chattanooga Chapter, by: _____
Todd C. McCain, President

Individually by:

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December 15, 2009

DEC 16 2009

VIA FACSIMILE: (615) 532-8757
The Honorable Mike Catalano, Clerk
Tennessee Appellate Courts
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The proposed comments remove the language emphasized above. The current language in Comment 17 gives trust and estate lawyers explicit guidance for resolving conflicts of interest between family members.

^Certified Estate Planning Specialist By The Tennessee Commission On Continuing Legal Education And Specialization

Trust and estate lawyers often consider family dynamics when engaging in estate planning involving multiple family members and other related parties. In addition, clients frequently request trust and estate lawyers to represent multiple family members so that the family may benefit from a carefully coordinated estate plan. As expressed by the American College of Trust and Estate Counsel, "[m]ultiple representation is . . . generally appropriate because the interests of the clients in cooperation, including obtaining cost effective representation and achieving common objectives, often clearly predominate over their limited inconsistent interests."[1]

Retaining the emphasized language in Comment 17 explicitly authorizes trust and estate lawyers to consider the desires of cooperative family members in order to represent them in estate planning matters without violating the ethics rules. Removing the emphasized language above may expose trust and estate lawyers to a greater risk of violating the ethical rules, even when they are facilitating healthy and harmonious family estate planning.

Thank you for your consideration of this important matter.

Respectfully submitted,

Dan W. Holbrook

Marshall H. Peterson

Eddy R. Smith

Donald J. Farinato

William D. Edwards

Heather K. Craig

S:\Forms and Resources\Ethics\ltr ethics rules 12-2009.doc

[1] ACTEC COMMENTARIES ON THE MODEL RULES OF PROFESSIONAL CONDUCT 91 (4th ed. 2006); *also available at* <http://www.actec.org/public/Commentaries1.7.asp>.

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DEC 16 2009

CARLA L. LOVELL

WRITER'S DIRECT DIAL (615) 742-4549
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December 16, 2009

VIA FACSIMILE

The Honorable Mike Catalano, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

Re: Comments on Proposed Tennessee Rules of Professional Conduct

Dear Mr. Catalano:

Thank you for the opportunity to comment on the proposed amendments to Tennessee Supreme Court Rule 8, Rules of Professional Conduct ("RPC").

I respectfully request that the Tennessee Supreme Court retain current Comment 17 to RPC Rule 1.7. The current comment reads as follows:

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The proposed comments remove the language emphasized above. The current language in Comment 17 gives trust and estate lawyers explicit guidance for resolving conflicts of interest between family members.

Trust and estate lawyers are often considered to be the "family lawyer" and serve a unique role in crafting carefully coordinated estate plans that take into consideration family dynamics. The American College of Trust and Estate Counsel describe this relationship as follows:

> General Nonadversary Character of Estates and Trusts Practice; Representation of Multiple Clients. It is often appropriate for a lawyer to represent more than one member of the same family in connection with their estate plans, more than one beneficiary with common interests in an estate or trust administration matter, co-fiduciaries of an estate or trust, or more than one of the investors in a closely held business. See ACTEC Commentary on MRPC 1.6 (Confidentiality of Information). In some instances the clients may actually be better served by such a representation, which can result in more economical and better coordinated estate plans prepared by counsel who has a better overall understanding of all of the relevant family and property considerations. The fact that the estate planning goals of the clients are not entirely consistent does not necessarily preclude the lawyer from representing them. Advising related clients who have somewhat differing goals may be consistent with their interests and the lawyer's traditional role as the lawyer for the "family". Multiple representation is also generally appropriate because the interests of the clients in cooperation, including obtaining cost effective representation and achieving common objectives, often clearly predominate over their limited inconsistent interests. Recognition should be given to the fact that estate planning is fundamentally nonadversarial in nature and estate administration is usually nonadversarial.[1]

Retention of Comment 17 in its current form will enable trust and estate lawyers to continue to serve families with common interests without fear of violating the ethics rules. Requiring otherwise cooperative family members to execute conflict waivers in order to avoid an ethics violation is a disruptive intrusion into what is traditionally a nonadversarial representation.

Thank you for your consideration of this important matter.

Sincerely,

Carla L. Lovell

Carla L. Lovell

CLL/jjc

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460014.1 03015-001

LAW OFFICES OF JAMES J. McMAHON

ATTORNEYS AT LAW

December 14, 2009

The Honorable Mike Catalano, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, Tennessee 37219-1407

Re: Comments on Proposed Tennessee Rules of Professional Conduct

Mr. Catalano:

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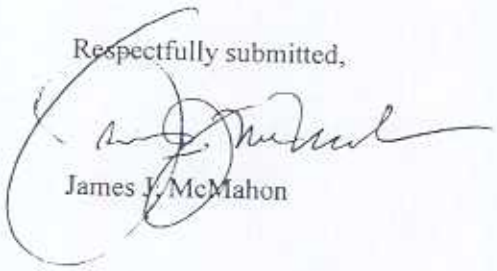
representation and achieving common objectives, often clearly predominate over their limited inconsistent interests."[1]

Retaining the emphasized language in Comment 17 explicitly authorizes trust and estate lawyers to consider the desires of cooperative family members in order to represent them in estate planning matters without violating the ethics rules. Removing the emphasized language above may expose trust and estate lawyers to a greater risk of violating the ethical rules, even when they are facilitating healthy and harmonious family estate planning.

Thank you for your consideration of this important matter.

Respectfully submitted,



James J. McMahon

[1] ACTEC COMMENTARIES ON THE MODEL RULES OF PROFESSIONAL CONDUCT 91 (4th ed. 2006); *also available at* <http://www.actec.org/public/Commentaries1.7.asp>.

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Nashville Bar Association

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ESTABLISHED 1831

December 12, 2009

Supreme Court of Tennessee
c/o Mike Catalano, Clerk Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

Re: Petition for the Adoption of Amended Rules of Professional Conduct
No. M2009-00979-SC-RL1-RL

Dear Justices:

The Nashville Bar Association ("NBA") would like to express support for a proposed amendment to the Tennessee Rules of Professional Conduct. The NBA and its Board Members believe this amendment will improve the quality of overall legal services and general litigation dispute resolution to the citizens of our great state. We applaud the Tennessee Bar Association ("TBA") for submitting the amendment to the language of Comment 5 to Rule 2.1 clarifying the need to discuss dispute resolution methods with clients pursuant to Rule 1.4. The specific portion of Comment 5 to Rule 2.1 is highlighted and attached. It is the position of the NBA that the amended language supports the work of attorneys in our state by offering clarifying language and support in advising their clients.

The NBA asks this Court to consider adopting the proposed revision as suggested by the TBA. This is a unique opportunity for this Court to offer guidance and support to practitioners seeking to advise clients of their dispute resolution choices. With mediation and other forms of alternative dispute resolution methods playing such a large role in access to justice and resolution of litigated matters, it is our position that this amendment will serve the court, our practitioners, and the public.

Respectfully Submitted,

Trey Harwell
NBA Board President

Leigh Ann Roberts by permission
NBA Alternative Dispute Resolution Chair

Jonathan L. Stein
NBA Ethics Committee Member

Rule 2.1 Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Rule 2.1 Advisor - Comment

Scope of Advice

[1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

Offering Advice

[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

Apperson Crump
The Law in Memphis Since 1865

DEC 17 2009

December 15, 2009

The Honorable Mike Catalano, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, Tennessee 37219-1407

Re: Comments on Proposed Tennessee Rules of Professional Conduct

Mr. Catalano:

Thank you for the opportunity to comment on the proposed amendments to Tennessee Supreme Court Rule 8, Rules of Professional Conduct ("RPC").

I respectfully request that the Tennessee Supreme Court retain current Comment 17 to RPC Rule 1.7. The current comment reads as follows:

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The proposed comments remove the language emphasized above. The current language in Comment 17 gives trust and estate lawyers explicit guidance for resolving conflicts of interest between family members.

Trust and estate lawyers often consider family dynamics when engaging in estate planning involving multiple family members and other

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Attorneys at Law
6070 Poplar Avenue
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Memphis, TN 38119-3954

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related parties. In addition, clients frequently request trust and estate lawyers to represent multiple family members so that the family may benefit from a carefully coordinated estate plan. As expressed by the American College of Trust and Estate Counsel, "[m]ultiple representation is . . . generally appropriate because the interests of the clients in cooperation, including obtaining cost effective representation and achieving common objectives, often clearly predominate over their limited inconsistent interests."[1]

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Thank you for your consideration of this important matter.

Respectfully submitted,
APPERSON, CRUMP & MAXWELL PLC

Lynn W. Thompson
#024195

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DEC 17 2009

Paul C. Hayes
(615) 850-8466
paul.hayes@wallerlaw.com

December 16, 2009

VIA FIRST-CLASS MAIL
The Honorable Mike Catalano, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 - 7th Avenue North
Nashville, Tennessee 37219-1407

Re: Comments on Proposed Tennessee Rules of Professional Conduct

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Sincerely,

Paul C. Hayes

Paul C. Hayes

PCH/

---

[1] ACTEC COMMENTARIES ON THE MODEL RULES OF PROFESSIONAL CONDUCT 91 (4th ed. 2006); *also available at* <http://www.actec.org/public/Commentaries1.7.asp>.

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JAMES R. (JOSH) HALL, JR.
Direct Dial: 901.579.3126
Direct Fax: 901.577.4283
E-Mail Address: joshhall@bakerdonelson.com

December 16, 2009

VIA FACSIMILE
615-532-8757

The Honorable Mike Catalano, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, Tennessee 37219-1407

Re: Comments on Proposed Tennessee Rules of Professional Conduct

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Respectfully yours,

James R. (Josh) Hall, Jr.

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MICHEL G. KAPLAN

WRITER'S DIRECT DIAL (615) 742-4572
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December 16, 2009

DEC 16 2009

VIA FAX 615-532-8757 AND FIRST CLASS MAIL

The Honorable Mike Catalano, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, Tennessee 37219-1407

Re: Comments on Proposed Tennessee Rules of Professional Conduct

Dear Mr. Catalano:

I am a Tennessee attorney that actively practices in the area of trusts and estates. In that connection, I have often worked with married individuals and families in a cooperative effort to establish a common estate plan. Accordingly, I along with many other attorneys with significant T & E practices are concerned regarding the proposed amendments to Tennessee Supreme Court Rule 8, Rules of Professional Conduct ("RPC").

I respectfully request that the Tennessee Supreme Court retain current Comment 17 to RPC Rule 1.7. The current comment reads as follows:

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> *General Nonadversary Character of Estates and Trusts Practice; Representation of Multiple Clients.* It is often appropriate for a lawyer to represent more than one member of the same family in connection with their estate plans, more than one beneficiary with common interests in an estate or trust administration matter, co-fiduciaries of an estate or trust, or more than one of the investors in a closely held business. See ACTEC Commentary on MRPC 1.6 (Confidentiality of Information). In some instances the clients may actually be better served by such a representation, which can result in more economical and better coordinated estate plans prepared by counsel who has a better overall understanding of all of the relevant family and property considerations. The fact that the estate planning goals of the clients are not entirely consistent does not necessarily preclude the lawyer from representing them: Advising related clients who have somewhat differing goals may be consistent with their interests and the lawyer's traditional role as the lawyer for the "family". Multiple representation is also generally appropriate because the interests of the clients in cooperation, including obtaining cost effective representation and achieving common objectives, often clearly predominate over their limited inconsistent interests. Recognition should be given to the fact that estate planning is fundamentally nonadversarial in nature and estate administration is usually nonadversarial.

Retention of Comment 17 in its current form will enable trust and estate lawyers to continue to serve families with common interests without fear of violating the ethics rules. Requiring otherwise cooperative family members to execute informed conflict waivers in order to avoid an ethics violation is a disruptive intrusion into what is traditionally a nonadversarial representation and may cause substantial increased expense.

Very truly yours,

Michel G. Kaplan

MGK/am

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DEC 16 2009

LINDA R. KOON

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LKOON@SHERRARDROE.COM

December 16, 2009

The Honorable Mike Catalano, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, Tennessee 37219-1407

Re: Comments on Proposed Tennessee Rules of Professional Conduct

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Thank you for your consideration of this important matter.

Respectfully submitted,

Linda R. Koon

Linda R. Koon

LRK/sg

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ORIGINAL

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE: TENNESSEE RULES OF PROFESSIONAL CONDUCT

COMMENTS SUBMITTED BY THE TENNESSEE DISTRICT PUBLIC DEFENDERS CONFERENCE

The Tennessee District Public Defenders Conference (hereinafter referred to as TDPDC) submits the following comments to the proposed amended Rules of Professional Conduct filed by the Tennessee Bar Association (hereafter referred to as TBA) on May 13, 2009.

The adoption of TBA's proposed rules will have a significant impact on how Public Defenders, as well as other criminal defense attorneys, obtain information, prepare cases, and deal with client file requests.

In some criminal cases in Tennessee, defense counsel obtains information that is in addition to the discovery provided under Rule 16 of the Tennessee Rules of Criminal Procedure. Practices such as "open file" policies furnish defense counsel with access to exculpatory evidence, and help the defense provide more effective representation for either settlement or trial. In addition, independent investigation, criminal records checks, and computer investigation can be invaluable tools.

Against this background, the proposed rules require defense counsel to turn over all investigative records, personal notes, etc., to clients, which could result in access by others in state or local confinement facilities.. This poses a danger to citizens whose personal information should not be "disseminated to the world" (e.g. Social Security numbers, date of birth, addresses, contact information including cell phone numbers, etc.). The proposed rules will impair defense counsel's abilities to gather important and potentially exculpatory information. The new proposal is overly burdensome and requires defense counsel to divulge information contrary to various privacy laws.

I.

RULE 1.4 COMMUNICATION

TDPDC proposes an amendment to the comment to 1.4, previously paragraph 4, proposed paragraph 7, under "withholding information," by removing the new language "or the interests or convenience of another person." TDPDC proposes that the following language be added to the above comment:

> Certain items obtained by means such as discovery, investigation, or subpoena may contain personal information and/or materials that in the discretion of the attorney should not be divulged to the client. Examples include materials for which the client has no valid need but whose release could cause harm to others, including but not limited to information which could cause identity theft or danger to others; or items prohibited from release by court order, discovery agreement, or applicable law.

The reasoning in the comments to the current rule 1.4 (withholding information) shows that there is authority for delaying or withholding client information in certain circumstances. Harm to others should be avoided, especially where there is no valid client interest. Certainly if attorneys are allowed to reveal a confidence of a client to avoid substantial harm to others, (see rule 1.6), attorneys should have the discretion to withhold information or redact certain sensitive information in the file if its release could harm others.

II.

RULE 1.16(d) DECLINING OR TERMINATING REPRESENTATION

TDPDC proposes retaining the language in Rule 1.16(d) which refers to "upon termination of representation of a client" as well as retaining the language "...provided, however, that the lawyer may retain such work product to the extent permitted by law but only if the retention of the work product will not have a materially adverse effect on the client with respect to the subject matter of the representation."

Routinely district public defender offices withdraw as counsel after an adverse final decision in the Court of Criminal Appeals as provided in Rule 14, Rules of Tennessee Supreme Court. This is an example where the case is not being transferred to another attorney, but is

simply closed. The rule should allow the client to get the file (subject to work product exception and the information referred to in section I of these comments) upon request rather than automatically. Otherwise, this could cause an additional expense of time and money to deliver voluminous files (and the lawyer would always have to make backup copies) to a client who did not even want the file.

III.

RULE 1.19 CLIENT FILE MATERIALS

TDPDC opposes proposed Rule 1.19. TDPDC submits that the proposed 1.19 is too broad. If the rule as proposed is enacted, exceptions should be added. The current exception of 1.16(d) should be repeated. The language of TDPDC's proposed comment to Rule 1.4 (see our section I) should be inserted.

SUMMARY

Certain information obtained in investigation and discovery in a criminal matter is "sensitive information." It is needed by defense counsel to properly investigate and prepare the case, but often is beyond what is covered by Rule 16 (Criminal Procedure). Adoption of a blanket rule requiring *everything* in the file to be copied to the client dramatically curtailsdefense counsel's ability to prepare cases and obtain vital information. This is exemplified by a client's file containing sensitive information being accessed by other inmates in confinement facilities.

The TDPDC requests that any new rules of professional responsibility adopted by the court make it clear that attorneys are not required to release information that could cause harm others, (either physical, emotional, or pecuniary) where there is no valid client interest, or where disclosure is otherwise prohibited by law. The work product exception (see current rule 1.16(d)), where retention of work product will not have a materially adverse effect on the client) should also be retained. These safeguards will allow defense counsel to give clients the

materials they need, while protecting innocent third parties and retaining counsel's ability to obtain materials essential to furnishing effective assistance of counsel.

The TDPDC will furnish any requested information, or provide a representative if the Court decides to hold a hearing on the proposed rules, or if the Court requests oral presentations.

Respectfully submitted,

Tennessee District Public Defenders Conference

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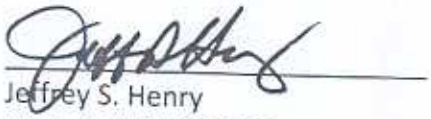
By: 
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MEMORANDUM

DATE: December 14, 2009

TO: Mr. Mike Catalano, Clerk
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100 Supreme Court Building
401 7th Avenue North
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FROM: James R. Dedrick
United States Attorney
Eastern District of Tennessee

Edward M. Yarbrough
United States Attorney
Middle District of Tennessee

Lawrence J. Laurenzi
United States Attorney
Western District of Tennessee

RE: Objections to adoption of Proposed Tennessee Rules 3.8(g) and (h)

We write to express our opposition to adopting proposed Tennessee Rule 3.8(g) and (h) as part of the Tennessee Rules of Professional Conduct. As you know, our offices prosecute all federal crimes in Tennessee, and we therefore have a significant interest in ensuring that any obligations imposed on federal prosecutors are appropriate and consistent with our obligations under federal law.

The United States Department of Justice is very supportive of the goals behind this proposed rule. The Department has always held its attorneys to the highest standard of professional conduct and expects, when exculpatory evidence is obtained by its prosecutors, that evidence will be disclosed as soon as possible. The Department would not countenance the continued incarceration of someone who was convicted and later found to be innocent of the crime of which he or she was convicted. When confronted with credible evidence of a defendant's innocence, therefore, the Department expects its attorneys to disclose this information to the defendant or the court whenever

the information is obtained–pre-trial, during trial, or after conviction. Indeed, the prosecutor's disclosure obligation is abundantly clear in the United States Attorneys' Manual.

Because, however, proposed Tennessee Rule 3.8(g) and (h) are both unnecessary and problematic, we respectfully oppose their inclusion in the Tennessee Rules of Professional Conduct.

Discussion

1. **There is no demonstrated need for the new subsection.** We know of no cases which demonstrate that an innocent prisoner was kept in prison because a prosecutor knew of and suppressed post-conviction evidence of innocence. Tennessee Rule of Professional Conduct 3.8(d) already requires prosecutors to "make timely disclosure to the defense of all evidence or information known to the prosecutor that the prosecutor knows, or reasonably should know, either tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal[.]" Further, Tennessee Rule of Professional Conduct 8.4(d) prohibits lawyers from "engaging in conduct prejudicial to the administration of justice." A prosecutor who is aware that a convicted defendant is actually innocent and suppresses such information could be found to be in violation of Rule 8.4(d). Proposed Tennessee Rule 3.8(g) and (h) are unnecessary.

2. **Few states have followed the ABA's lead with respect to this proposal.** Based on the information we have, it appears that since the ABA promulgated Model Rule 3.8(g) and (h), only two states have adopted new rules based on it: Wisconsin and Delaware. The New York Court of Appeals conclusively rejected a proposal to adopt Rule 3.8(g) and (h). A similar proposed amendment was pending in Louisiana, but the Louisiana Bar Association recently decided to defer consideration of the proposal for at least a few months, based on the negative comments received. A similar proposal in Colorado is pending before its Supreme Court. On October 2, 2009, the North Carolina State Bar Ethics Subcommittee voted to recommend to the Committee that its proposed version of Rule 3.8(g) be rejected entirely. Proposed amendments based on Model Rule 3.8(g) and (h) are likely meeting with a lack of acceptance because state bar disciplinary authorities deem it unnecessary and because they regard it as something more appropriately addressed by legislatures.

3. **There should not be a special rule for prosecutors that applies in cases to which the prosecutor is a complete stranger.** There is no reason why the rules of professional conduct should treat a prosecutor who is a stranger to the case any differently than any other member of the bar. If a prosecutor learns of evidence tending to show the innocence of a defendant previously convicted in a prosecution by an office in which the prosecutor has never served, then he is in the same position as any other lawyer who learns such information, with respect to weighing whether the evidence is new, credible, material, and creates a reasonable likelihood that a convicted defendant did not commit an offense.

4. **Rule 3.8(g) is unclear in many respects which affect the obligations set forth therein.**

First, the proposed rule as currently drafted requires a prosecutor to take action when he knows of "new, credible and material" evidence. It is unclear how a prosecutor who receives information about a case he did not prosecute can determine whether the information is "new, credible and material." Yet the Rule requires the prosecutor to make this determination even if the prosecutor is not aware of the evidence presented, the legal issues raised, or the credibility of the witnesses who testified during the trial. Additionally, by disclosing the evidence, a prosecutor also may be seen to have passed some judgment that the evidence is in fact credible and material, and puts in doubt the actual guilt of the convicted defendant.

Second, the term "knows" is undefined in the proposed Rule. It is defined elsewhere in the Tennessee Rules to mean "actual knowledge of the fact in question." Tennessee Rule 1.0(f). But does "knows of . . . new, credible and material evidence . . ." mean that the prosecutor has heard of new, credible, and material evidence, or rather knows that it actually exists?

Third, we are concerned by the use of the term "material." Tennessee Rule 1.0(o) defines material as "something that a reasonable person would consider important in assessing or determining how to act in a matter." This broad definition may not provide sufficient guidance to prosecutors. In the criminal context, the term "material" is usually only defined in the Brady/Giglio jurisprudence. These cases define evidence as material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." United States v. Bagley, 473 U.S. 667, 682 (1985). In the context of Rule 3.8(g), this latter interpretation is reinforced by the further refinement "creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted[.]" Given that the term "material" may be subject to differing interpretations, the use of the term in the proposed rule would leave a prosecutor uncertain about when disclosure would be required.

Fourth, what does it mean for a prosecutor to "undertake further investigation" or "make reasonable efforts to cause an investigation" into the conviction of a defendant? Prosecutors do not have general investigative powers (such as the power to issue subpoenas post-trial), nor the staff or monetary resources to investigate thousands of claims of "new, credible and material" evidence. Ordering prosecutors to expend their available resources in this fashion may violate separation of powers principles by permitting the judicial branch to direct the executive branch on how to allocate and expend resources.

5. **Rule 3.8(h) is unclear in many respects which affect the obligations set forth therein.**

First, the same concerns regarding the use of "knows" in Rule 3.8(g) apply to Rule 3.8(h). Again, does "knows of clear and convincing evidence" mean that the prosecutor has heard of such evidence, or knows that it actually exists?

Second, and perhaps most troubling, is the rule's mandate that a prosecutor "shall seek to remedy the conviction." This phrase is so vague that it utterly fails to give notice of what a prosecutor is required to do to protect his or her license. Proposed Comment [7] to Tennessee Rule 3.8 (identical to Comment [8] to ABA Model Rule 3.8) attempts to clarify this mandate but falls short. Proposed comment [7] states that "[n]ecessary steps may include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted." The use of the word "may" implies that a prosecutor who is faced with clear and convincing evidence of a defendant's innocence may in some circumstances be required to do more, which could be problematic given that federal prosecutors do not have a legal or procedural mechanism to "remedy" a conviction in the context of existing federal law as discussed below.

6. **Comment [8]'s undefined "good faith" exception.** Although Comment [8] purports to protect prosecutors who have acted in "good faith" in deciding not to act under Rule 3.8(g) or (h), it is unclear whether this is intended to be a subjective standard based on an analysis of the individual prosecutor's intent, or objective standard based on what a reasonable attorney would do in similar circumstances.

7. **Impact on other Rules of Professional Conduct and applicable laws.** The duties imposed by this proposed rule may conflict with the prosecutors' obligations under other rules and, for federal prosecutors, under federal law.

For instance, Tennessee Rule 1.6 is implicated. Prosecutors have a client just as other attorneys do, and are obligated to preserve their client's confidences. Federal prosecutors are also governed by a host of other confidentiality requirements, e.g., the Privacy Act of 1974 (5 U.S.C. § 552); Fed. R. Crim. P. 6(e) (grand jury secrecy); and 21 U.S.C. § 6103 (confidentiality of taxpayer information). For example, with respect to records protected by the Privacy Act, 5 U.S.C. § 552a, disclosure would subject the AUSA to criminal penalties, 5 U.S.C. § 552a(i)(1), and the Department of Justice to civil liability, 5 U.S.C. § 552(g)(1). Additionally, Rule 3.8(g) and (h) place an ethical duty on a federal prosecutor that potentially conflicts with 5 U.S.C. § 301, which provides that agency records are owned by the federal agency and cannot be disclosed without agency approval. See Touhy v. Ragan, 340 U.S. 462 (1951); see also United States v. Williams, 170 F.3d 431 (4th Cir. 1999) (holding that defendant in state murder prosecution was required to comply with Justice Department regulation governing production of information to obtain disclosure of FBI files). Rule 3.8(g) and (h) should not attempt to trump these federal laws.

We are further troubled by proposed Comment [6] to Tennessee Rule 3.8, which states, "[c]onsistent with the objectives of Rules 4.2 and 4.3, disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate." However, Rule 4.2 allows ex parte contact with a represented defendant under certain circumstances, such as when it is "authorized by law," and that Rule's prohibition only applies when the person in question is actually represented

by counsel on the matter to be discussed. And in many situations where a disclosure appears to be required under Rule 3.8(g), there may be a question of whether the person in question is still represented by counsel–experience teaches that it is very difficult to determine whether an already convicted and sentenced defendant is still represented by his trial or appellate counsel, has new counsel, or does not have counsel.

Finally, Rule 3.8(g) and (h) are simply not designed to be compatible with existing laws and procedures, altering the balance already struck in existing law without being subjected to the rigors of or accountability to a formal legislative process. Both Tennessee and federal statutes and rules allocate to the defendant the burden of investigating and raising claims of newly discovered evidence. Under federal law, Congress and the courts have placed the responsibility to remedy a conviction on the defendant. Under Federal Rule of Criminal Procedure 33(a), a defendant may move to vacate a judgment and for the grant of a new trial "if the interests of justice so require." There is a three-year time limit on such a motion based on newly discovered evidence. Under 22 U.S.C. § 2255, a defendant may challenge a conviction on constitutional or other legal grounds, but must do so within one year of the judgment of conviction, the occurrence of the constitutional violation, the establishment of the constitutional right, or the date that new facts would be discoverable. Thus, the ability of a federal prosecutor to "remedy the conviction" may be limited by law.

8. **Adopting Rule 3.8(g) and (h) would likely cause a flood of complaints from prisoners with time on their hands and animosity toward prosecutors.** Prosecutors, and their resources, will be diverted from prosecuting crime to investigating convicts' claims of "new" evidence in order to defend their law licenses. The Committee needs to understand that there is a substantial cottage industry generating all manner of post-conviction claims of innocence, "new" evidence claims, claims of perjured testimony, etc. Jail house lawyers spend many hours pandering to their fellow inmates with visions of post-conviction assertions of innocence. Only prosecutors, some defense attorneys, and judges and their staffs see this cottage industry in action. Despite good intentions, the drafters of the proposed rule unfortunately may be handing prisoners and their families and friends a new vehicle with which to take out their frustrations on prosecutors in general. The Committee should carefully consider whether it wants to create a mechanism for disgruntled prisoners to vent their frustrations through the attorney disciplinary process.

Conclusion

For the foregoing reasons, we oppose incorporation of ABA Model Rule 3.8(g) and (h) into the Tennessee Rules of Professional Conduct. If the Committee ultimately concludes that adoption of some variation of these provisions is warranted, we believe that these provisions should be substantially redrafted.

Thank you for this opportunity to comment.

HOLBROOK PETERSON & SMITH, PLLC

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December 15, 2009

VIA FACSIMILE: (615) 532-8757
The Honorable Mike Catalano, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, Tennessee 37219-1407

Re: Comments on Proposed Tennessee Rules of Professional Conduct

Mr. Catalano:

Thank you for the opportunity to comment on the proposed amendments to Tennessee Supreme Court Rule 8, Rules of Professional Conduct ("RPC").

We respectfully request that the Tennessee Supreme Court retain current Comment 17 to RPC Rule 1.7. The current comment reads as follows:

> Members of a family may reasonably seek joint representation by a single lawyer in a matter affecting the family. Conflict questions may arise in such circumstances. For example, in estate planning, a lawyer may be called upon to prepare wills for family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. *Resolution of conflicts of interest between family members pursuant to this Rule must be consistent with the lawyer's duty of undivided loyalty to each client, but the lawyer may take into account the willingness of each individual client to accommodate the interests of the family as a whole or the individual interests of other family members.* In estate administration, the identity of the client may be unclear. Under one view, the client is the fiduciary; under another view, the client is the estate or trust, including its beneficiaries. The lawyer should make clear the relationship to the parties involved. (Emphasis added).

The proposed comments remove the language emphasized above. The current language in Comment 17 gives trust and estate lawyers explicit guidance for resolving conflicts of interest between family members.

Trust and estate lawyers often consider family dynamics when engaging in estate planning involving multiple family members and other related parties. In addition, clients frequently request trust and estate lawyers to represent multiple family members so that the family may benefit from a carefully coordinated estate plan. As expressed by the American College of Trust and Estate Counsel, "[m]ultiple representation is . . . generally appropriate because the interests of the clients in cooperation, including obtaining cost effective representation and achieving common objectives, often clearly predominate over their limited inconsistent interests."[1]

Retaining the emphasized language in Comment 17 explicitly authorizes trust and estate lawyers to consider the desires of cooperative family members in order to represent them in estate planning matters without violating the ethics rules. Removing the emphasized language above may expose trust and estate lawyers to a greater risk of violating the ethical rules, even when they are facilitating healthy and harmonious family estate planning.

Thank you for your consideration of this important matter.

Respectfully submitted,

Dan W. Holbrook

Marshall H. Peterson

Eddy R. Smith

Donald J. Farinato

William D. Edwards

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S:\Forms and Resources\Ethics\ltr ethics rules 12-2009.doc

[1] ACTEC COMMENTARIES ON THE MODEL RULES OF PROFESSIONAL CONDUCT 91 (4th ed. 2006); *also available at* <http://www.actec.org/public/Commentaries1.7.asp>.

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December 16, 2009

VIA FACSIMILE
615-532-8757

The Honorable Mike Catalano, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
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Re: Comments on Proposed Tennessee Rules of Professional Conduct

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Trust and estate lawyers often consider family dynamics when engaging in estate planning involving multiple family members and other related parties. In addition, clients frequently request trust and estate lawyers to represent multiple family members so that the family may benefit from a carefully coordinated estate plan. As expressed by the American College of Trust and Estate Counsel, "[m]ultiple representation is . . . generally appropriate because the interests of the clients in cooperation, including obtaining cost effective representation and achieving common objectives, often clearly predominate over their limited inconsistent interests."[1]

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Thank you for your consideration of this important matter.

Respectfully yours,

James R. (Josh) Hall, Jr.

[1] ACTEC COMMENTARIES ON THE MODEL RULES OF PROFESSIONAL CONDUCT 91 (4th ed. 2006); *also available at* <http://www.actec.org/public/Commentaries1.7.asp>.

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ROGER E. NELL
DISTRICT PUBLIC DEFENDER

November 20, 2009

Mr. Michael Catalano
Tennessee Appellate Courts
100 Supreme Court Building
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Nashville, Tennessee 37219-1407

RE: Tenn. Sup. Ct. Docket M2009-00979-SC-RL1-RL
Amendments to Tennessee Rules of Professional Conduct

Dear Mr. Catalano:

The following are my comments regarding the proposed amendments.

Scope, Current Paragraph 8. "The lawyer's exercise of discretion not to disclose information when permitted to do so by Rule 1.6 should not be subject to reexamination. Permitting such reexamination would be incompatible with the general policy of promoting compliance with law through assurances that communications will be protected against disclosure."

The proposal deletes this paragraph, and I did not see that it was replaced elsewhere in substance. The effect, then, is to open a lawyer's decision not to disclose information that he is permitted not to disclose to re-examination. This is bad policy. I recommend that this paragraph remain in the Rules. Combined with other proposals, this deletion would also tend to make what is permissive, not-so-permissive. See comments below.

Rule 1.3 Comment 2. "A lawyer's work load must be controlled so that each matter can be handled competently."

The proposal, being written in the passive voice, does not specify who does the controlling. I recommend that this comment read:

"A lawyer and supervising lawyer must control the lawyer's workload so that each matter can be handled competently."

Rule 1.3 Comment 4, Last Sentence. "Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See RPC 1.2."

In the case of counsel appointed to represent an indigent citizen, the duty to pursue an appeal, absent a waiver, is imposed by other rules. I recommend revising the final sentence to read:

"Unless mandated by other law, whether the lawyer is obligated to pursue an appeal for the client depends on the scope of representation the lawyer agreed to provide to the client. See RPC 1.2; Tenn. S. Ct. R. 13(e)(5) and 14."

Rule 1.3 Comment 5. "To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. See Tenn. Sup. Ct. R. 9, § 22."

I understand that the RPC, and the comments in particular, are not intended to create a cause of action against an attorney (or, in this case, an attorney's family). Nonetheless, I would not want to create a hook upon which clients of a sole practitioner can hang a claim against that attorney's estate and cause more difficulty for that attorney's family beyond that already attendant to one's passing.

Rule 1.6(b)(2) and (3) and Comments 7 and 18. Permissive disclosure of information to avoid "substantial injury to the financial interests or property of another".

I find fault in the recommendation to carve out a new reason for lawyers to breach the duty of confidentiality. This, combined with the proposed deletion of current paragraph 8 in the Scope, is a decided trend to subject lawyers to civil liability for maintaining client confidences when a client's activity results in financial harm to others, even if that harm is not criminal (which is covered by other rules already).

I also find fault with the wording "substantial injury". I am sure that the majority of the commission reads "substantial" and hears "millions" (of dollars, of course). To many lawyers' clients, however, "substantial" may be "thousands" if not just "hundreds". The magnitude of injury that would trigger a coroporate merger attorney's possible duty to disclose is vastly different than the magnitude of injury that would trigger the majority of attorneys' possible duty.

Advisedly, I write "possible duty" because, even though the rule is written in the permissive, deleting current paragraph 8 of the Scope really makes this provision more of a duty if the attorney is going to be called to answer why he didn't disclose as opposed to why he did disclose.

I recommend rejecting these proposals *in toto*.

Rule 1.6 and Rule 1.19.

There is an inherent tension between the rule and comments designed to expand when an attorney should disclose information and the rule and comments designed to increase a client's access to the file. It appears that the commission has overlooked the possibility (distinct in a criminal law practice) that the client is the one who should be shielded from information that could lead to misuse and injury (financial or otherwise) to other parties.

On the one hand, the proposal says, in sum: "Rat on your client if he is going to harm another person physically or financially." Rule 1.6(b) and (c). On the other hand, the proposal says: "Give your client everything you have even though he can take all that information and harm another person physically (by giving addresses or other information he can use to locate them) or financially (all manner of personal identity information)." Rule 1.19. The way the proposal is written right now, I would be obliged to give my clients their entire file under Rule 1.19 , and then be obliged under Rule 1.6(b) and (c) to turn around and contact everyone connected with that case (witnesses, victims, etc) and say: "Hey, I just gave your address, phone number, physical description, social security number, driver license number, etc. etc. to the dude who might have committed a crime against you or against whom you testified. You might want to take measures to protect yourself. I'm just sayin'." I am sure there are similar contexts in civil practice.

I do believe that the commission forgets from time to time that these rules apply to criminal defense attorneys, too, and that these rules may work absurd results in that context. If the commission and the Court intends to promulgate Rule 1.19, it needs to include a provision that allows an attorney (of any sort of practice) to exercise his or her professional judgment about what should and should not be released to the client. I recommend rejecting proposed Rule 1.19 altogether. At the very least, I suggest adding something along the lines of:

"The lawyer may withhold from the client's file any information that, in the lawyer's professional opinion, is information that a reasonable person would object being released to the client."

I appreciate the opportunity to comment upon the proposals.

Very truly yours,

Roger E. Nell
District Public Defender

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ROGER E. NELL
DISTRICT PUBLIC DEFENDER

November 16, 2009

Mr. Michael Catalano
Tennessee Appellate Courts
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RE: Comments regarding Amendments to Tennessee Rules of Procedure and Evidence – Tenn. Sup. Ct. Docket M2009-01985-SC-RL2-RL

Dear Mr. Catalano:

The following are my comments regarding the proposed amendments.

Tenn. R. App. P. 11(b) and 27(a). When a rule is changed, there is usually some identifiable problem to be fixed. I cannot figure out what that problem is and the proposed comments don't help. My first thought was: "Does the court need us to tell it what their standard of review is?" I don't know that making appellate counsel include that statement adds anything other than words and length to appellate briefs that the judges and their staff would have to wade through. What if counsel is wrong? The rule wouldn't relieve the court of applying the correct standard.

I sat as a military judge on courts-martial for a while. A standing rule of Army courts-martial required counsel to state who had the burden of proof (ie, burdens of going forward and of persuasion) and the applicable standard of proof in each motion counsel filed. They got it right about half the time. That rule didn't help me as a trial judge, I still had to apply the correct standard. I suppose it served as an academic exercise for the trial counsel, but neither trials nor appeals are academic fora. Thus, I found the rule to be useless and an additional waste of ink, paper, and my eyesight. This proposal is similar.

Tenn. R. App. 24(b). Returning the time to prepare and file transcripts to 90 days *vice* 60 days for criminal matters is much needed and will be greatly appreciated by the court reporters.

Tenn. R. Crim. P. 5. I am concerned about proposed Rule 5(e)(3) and am not sure that I understand its intended effect. Some will read the rule and find another form of waiver in it. Some will read it and find a club to force a citizen to conduct a hearing without adequate time to prepare. The proposed comment should further clarify the intended effect.

The commission's comment that the problem of delays (whether perceived or actual; whether caused by the State or the defense) is "pernicious" is injudicious. Delays may be pervasive, but they are not pernicious or even merely malicious. The commission ought to be more circumspect in its comments. I recommend that the word be deleted.

On another note, the proposed rule and the commission's comment thereto states that the court is inconvenienced and prejudiced by delays. Respectfully, a court cannot be inconvenienced or prejudiced. Firstly, if a matter (whether a preliminary hearing or any other proceding) is continued, it is continued by the court itself not the parties, though they may request it. So, if a court is inconvenienced or prejudiced, it is a self-inflicted wound and no rule will ever stop such wounds. Secondly, a court in fulfilling its function, exercising its jurisdiction, ensuring that citizens and the State obtain impartial treatment and fair hearings, in sum, by doing its job, cannot be inconvenienced or prejudiced thereby. I recommend that "and the Court" be deleted from the proposed rule and the comment.

Terminology in the rule needs to be consistent. While the rule names the procedure "preliminary examination", the bench and bar have historically called it a "preliminary hearing", which is what the rule called it before it was called an "examination". The proposed rule change returns to the historical phrase. It is time to eliminate "examination" throughout Rule 5 and call it a "hearing", because that is what it is.

The 2009 amendment changed the trigger for the 30 days to file a motion to dismiss from arrest to arraignment and it is so noted in the comments to the 2009 change. There is no need to carry that comment over to the 2010 comments (1st paragraph, 3d sentence).

I believe that the 2010 comments ought to say that the former rule (i.e., as it exists now) inadvertently omitted "criminal summons" and that "criminal summons" has been included now (1st paragraph, 2d sentence). "Presentment" is currently in the rule and has been for as far back as I have researched.

I appreciate the opportunity to comment upon the proposals.

Very truly yours,

Roger E. Nell
District Public Defender

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December 16, 2009

The Honorable Mike Catalano, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, Tennessee 37219-1407

Re: Comments of Proposed Tennessee Rules of Professional Conduct

Dear Mr. Catalano:

Thank you for the opportunity to comment on the proposed amendments to Tennessee Supreme Court Rule 8, Rules of Professional Conduct ("RPC").

I respectfully request that the Tennessee Supreme Court retain current Comment 17 to RPC Rule 1.7. The current comment reads as follows:

> Members of a family may reasonably see joint representation by a single lawyer in a matter affecting the family. Conflict questions may arise in such circumstances. For example, in estate planning, a lawyer may be called upon to prepare wills for family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. *Resolution of conflicts of interest between family members pursuant to this Rule must be consistent with the lawyers duty of undivided loyalty to each client, but the lawyer may take into account the willingness of each individual client to accommodate the interests of the family as a whole or the individual interests of other family members.* In estate administration, the identity of the client may be unclear. Under one view, the client is the fiduciary; under another view, the client is the estate or trust, including its beneficiaries. The lawyer should make clear the relationship to the parties involved. (Emphasis added.)

The proposed comments remove the language emphasized above. The current language in Comment 17 gives trust and estate lawyers explicit guidance for resolving conflicts of interest between family members.

Trust and estate lawyers often consider family dynamics when engaging in estate planning involving multiple family members and other related parties. In addition, clients frequently request trust and estate lawyers to represent multiple family members so that the family may benefit from a carefully coordinated estate plan. As expressed by the American College of Trust and Estate Counsel, "[m]ultiple representation is . . . generally appropriate because the interests of the clients in cooperation, including obtaining cost effective representation and achieving common objectives, often clearly predominate over their limited inconsistent interests."[1]

Retaining the emphasized language in Comment 17 explicitly authorizes trust and estate lawyers to consider the desires of cooperative family members in order to represent them in estate planning matters without violating the ethics rules. Removing the emphasized language above may expose trust and estate lawyers to a greater risk of violating the ethical rules, even when they are facilitating healthy and harmonious family estate planning.

Thank you for your consideration of this important matter.

Sincerely,

Anne M. McKinney, P.C.

by Anne McK

Anne M. McKinney

AMM:lp

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[1]ACTEC COMMENTARIES ON THE MODEL RULES OF PROFESSIONAL CONDUCT 91 (4th ed. 2006); *also available at* <http://www.actec.org/public/Commentaries1.7.asp>.

THE BOARD OF PROFESSIONAL RESPONSIBILITY'S PROPOSED REVISIONS & CLARIFICATIONS TO THE TBA'S PROPOSED AMENDMENTS TO THE TENNESSEE RULES OF PROFESSIONAL CONDUCT

SCOPE

Current Rule – relevant portion to Board of Professional Responsibility comments:

> [8] The lawyer's exercise of discretion not to disclose information when permitted to do so by Rule 1.6 should not be subject to reexamination. Permitting such reexamination would be incompatible with the general policy of promoting compliance with law through assurances that communications will be protected against disclosure.

TBA Proposal – relevant portion to Board of Professional Responsibility comments:

> ~~[8] The lawyer's exercise of discretion not to disclose information when permitted to do so by Rule 1.6 should not be subject to reexamination. Permitting such reexamination would be incompatible with the general policy of promoting compliance with law through assurances that communications will be protected against disclosure.~~

BOARD OF PROFESSIONAL RESPONSIBILITY COMMENTS:

The Board recommends keeping the language in stricken Scope Comment 8 for clarification of the lawyer's exercise of discretion when electing not to disclose information otherwise permitted by RPC 1.6.

The Board is of the opinion that certain terms contained within the proposed Preamble and Scope should be better defined and made simpler, e.g. "approbate", "vitiate", "obviate", and "abrogate". These Rules should be easily understood not only by the lawyers that are bound by the Rules, but by the public at large.

RPC 1.2 - Scope of the Representation and the Allocation of Authority Between the Lawyer and Client

Current Rule:

> (a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of the representation and may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a

matter. In a criminal case, the lawyer shall abide by the client's decision as to a plea to be entered, whether to waive jury trial, and whether the client will testify.
(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social, or moral views or activities.
(c) A lawyer may limit the scope of a client's representation if the limitation is reasonable under the circumstances and the client gives consent, preferably in writing, after consultation.
(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows or reasonably should know is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.

Relevant Rule Comment(s):

[2] Paragraph (a) recognizes that clients normally defer to the special knowledge and skill of their lawyer. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may instruct the lawyer do so. Although a lawyer, as an agent, normally must abide by the client's instructions with respect to the representation, a lawyer may always refuse to engage in conduct that the lawyer reasonably believes to be unlawful or prohibited by the Rules of Professional Conduct and may take action that the lawyer reasonably believes to be required by law or the Rules of Professional Conduct. Also, if a lawyer has a fundamental disagreement with the client about the client's objectives or the means to be used to accomplish them, the lawyer may withdraw from the representation. See RPC 1.16.

TBA Proposal – relevant portions to Board of Professional Responsibility comments:

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of ~~the~~ representation and, as required by RPC 1.4, shall consult with the client about the means by which the client's objectives are to be accomplished. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal, and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might

be adversely affected. ~~Law defining the lawyer's scope of authority in litigation varies among jurisdictions. [2] Paragraph (a) recognizes that clients normally defer to the special knowledge and skill of their lawyer. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may instruct the lawyer do so. Although a lawyer, as an agent, normally must abide by the client's instructions with respect to the representation, a lawyer may always refuse to engage in conduct that the lawyer reasonably believes to be unlawful or prohibited by the Rules of Professional Conduct and may take action that the lawyer reasonably believes to be required by law or the Rules of Professional Conduct. Also, if a~~ Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See RPC 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See RPC 1.16(a)(3).

BOARD OF PROFESSIONAL RESPONSIBILITY COMMENTS:

The Board has concerns that the proposed additional language in subpart (a) requiring consultation with the client regarding the means toward the client's objectives in addition to the language in proposed Comment 2 regarding withdrawal or termination when fundamental disagreements arise between the lawyer and client leaves a question as to who controls the means toward a client's objectives. This has traditionally been the role of the attorney, but the proposed Rule appears to blur that line. The Board requests a clarification of the Rule in that regard.

RPC 1.4 - Communication

Current Rule:

(a) A lawyer shall keep a client reasonably informed about the status of a matter and comply with reasonable requests for information within a reasonable time.
(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Relevant Rule Comment(s):

[1] Reasonable communication between the lawyer and the client is necessary for the client to effectively participate in the representation. When a decision about the representation must be made by the client, the lawyer must consult with and secure the client's consent prior to taking action. Thus, a lawyer who

receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case should promptly inform the client of its substance, unless prior discussions with the client have left it clear that the proposal would be unacceptable. With respect to the decisions for which the client's prior consent is not required by Rule 1.2, the lawyer's responsibility is to keep the client reasonably informed. In some situations—depending on both the importance of the action under consideration and the feasibility of consulting with the client—this duty will require consultation prior to taking the action. In other circumstances, such as during a trial when an immediate decision must be made, practical exigency may also require a lawyer to act for a client without prior consultation. In such cases, and in other situations in which the client has impliedly or expressly delegated authority to the lawyer to take action without prior consultation, the lawyer must nonetheless act reasonably to keep the client informed of actions the lawyer has taken on the client's behalf.

[3] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or has a mental disability. See RPC 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs, and ordinarily, the lawyer should address communications to the appropriate officials of the organization. See RPC 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client. Practical exigency may also require a lawyer to act for a client without prior consultation.

TBA Proposal – relevant portions to Board of Professional Responsibility comments:

(a) A lawyer shall ~~keep a~~;
(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

[3] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations – depending on both the importance of the action under consideration and the feasibility of consulting with the client – this duty will require consultation prior to taking ~~the~~ action. In other circumstances, such as during a trial when an immediate decision must be made, ~~practical~~the exigency of the situation may ~~also~~ require ~~a~~the lawyer to act ~~for a client~~ without prior consultation. In such cases, ~~and in other situations in which the client has impliedly or expressly delegated authority to the lawyer to take action without prior consultation,~~ the lawyer must nonetheless act reasonably to ~~keep~~inform the client ~~informed~~ of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

BOARD OF PROFESSIONAL RESPONSIBILITY COMMENTS:

(a)(2) & Comment 3: See concerns as set forth above in RPC 1.2.

RPC 1.5 - Fees

Current Rule:

(a) A lawyer's fee and charges for expenses shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
(3) the fee customarily charged in the locality for similar legal services;
(4) the amount involved and the results obtained;
(5) the time limitations imposed by the client or by the circumstances;
(6) the nature and length of the professional relationship with the client;
(7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
(8) whether the fee is fixed or contingent;
(9) prior advertisements or statements by the lawyer with respect to the fees the lawyer charges; and
(10) whether the fee agreement is in writing.
(b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.
(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing, signed by the client, and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of litigation, settlement, trial, or appeal; other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and whether there was a recovery, and showing the remittance, if any, to the client and the method of its determination.
(d) A lawyer shall not enter into an arrangement for, charge, or collect:
(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or the award of custodial rights, or upon the amount of alimony or support, or the value of a property division or settlement, unless the matter relates solely to the collection of

arrearages in alimony or child support or the enforcement of an orderdividing the marital estate and the fee arrangement is disclosed to the court; or

(2) a contingent fee for representing a defendant in a criminal case.

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or, by written consent of the client, each lawyer assumes joint responsibility for the representation; and

(2) the client is advised of and does not object to the participation of all the lawyers involved; and

(3) the total fee is reasonable.

Relevant Rule Comment(s):

[2] A lawyer may require advance payment of a fee, but he or she is obliged to return any unearned portion. See RPC 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(j). However, a fee paid in property instead of money may be subject to special scrutiny because it involves questions concerning both the value of the services and the lawyer's special knowledge of the value of the property. If the property belongs to the client, the lawyer will also have to comply with the requirements of Rule 1.8(a).

TBA Proposal – relevant portions to Board of Professional Responsibility comments:

(a) A lawyer~~'s fee and charges~~ shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses ~~shall be reasonable~~. The factors to be considered in determining the reasonableness of a fee include the following:

~~(9) prior advertisements or statements by the lawyer with respect to the fees the lawyer charges; and~~

(b) ~~When the lawyer has not regularly represented the client.~~The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

[~~2~~4] A lawyer may require advance payment of a fee, but ~~he or she~~ is obliged to return any unearned portion. See RPC 1.16(d). The obligation to return any portion of a fee does not apply, however, if the lawyer charges a reasonable non-refundable retainer by which the lawyer is compensated for being available to

represent the client in one or more matters. Nor does the obligation to return any portion of a fee apply if the client agrees to pay to the lawyer at the outset of the representation a reasonable fixed fee for the representation. Such fees are earned fees so long as the lawyer remains available to provide the services called for by the retainer or for which the fixed fee was charged. Lawyers should take special care to assure that clients understand the implications of agreeing to pay a non-refundable retainer or a fixed fee payable in advance, and such agreements should be memorialized in a writing, preferably signed by the client.

BOARD OF PROFESSIONAL RESPONSIBILITY COMMENT:

The Board recommends keeping the stricken language in the current subpart (a)(9) to prevent unjustified client expectations as to a lawyer's advertised fee. The Board encounters this most often relating to "free consultations" that are later charged for in some fashion.

The Board recommends that the last sentence in proposed subpart (b) require a writing if the lawyer's fee changes after the representation of the client has begun.

The Board recommends that the word "must" or "shall" be substituted for the word "should" used twice in the last sentence in proposed Comment 4 regarding non-refundable retainers. Issues surrounding the comprehension by clients of a lawyer's non-refundable fee are common subjects for complaints in this office.

RPC 1.6 - Confidentiality

Current Rule:

(a) Except as provided below, a lawyer shall not reveal information relating to the representation of a client unless the client consents after consultation, except that the lawyer may make such disclosures as are impliedly authorized by the client in order for the lawyer to carry out the representation.
(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes disclosure is necessary:
(1) to prevent the client or another person from committing a crime, including a crime that is reasonably certain to result in substantial injury to the financial interest or property of another, unless disclosure is prohibited or restricted by RPC 3.3;
(2) to secure legal advice about the lawyer's compliance with these Rules; or
(3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

(c) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes disclosure is necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to comply with an order of a tribunal requiring disclosure, but only if ordered to do so by the tribunal after the lawyer has asserted on behalf of the client all non-frivolous claims that the information sought by the tribunal is protected against disclosure by the attorney- client privilege or other applicable law; or

(3) to comply with RPC 3.3, 4.1, or other law.

Relevant Rule Comment(s):

[2] The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client, but it also encourages people to seek early legal assistance.

[4] A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

TBA Proposal – relevant portions to Board of Professional Responsibility comments:

(a) ~~Except as provided below, a~~ A lawyer shall not reveal information relating to the representation of a client unless:

(3) the disclosure is limited to information relating to the representation of a client which has already been made public and the disclosure is made in such a way that there is no reasonable likelihood of adverse effect to the client; or

[2] ~~The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client, but it also encourages people to seek early legal assistance.~~A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relation to the representation. See RPC 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. ~~[3]~~ Almost without exception, clients come to lawyers in order to determine ~~what~~ their rights ~~are~~ and what is, in the ~~maze~~ complex of laws and regulations, deemed to be legal and correct. ~~The common law recognizes that the client's confidences must be protected from~~

~~disclosure.~~ Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

BOARD OF PROFESSIONAL RESPONSIBILITY COMMENTS:

The Board is of the opinion that proposed subpart (a)(3) is problematic since the word "public" is not defined. The Board had concerns about whether, for example, non-recorded information during a court proceeding would be considered "public" if the hearing were open to the public. Although recognizing it might be difficult, the Board requests clarification in the definition of the word "public".

The word "relation" should be "relating" in proposed Comment 2.

RPC 1.7 - Conflict of Interest: General Rule

Current Rule:

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
(2) each client consents in writing after consultation.
(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
(1) the lawyer reasonably believes the representation will not be adversely affected; and
(2) the client consents in writing after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.
(c) A lawyer shall not represent more than one client in the same criminal case, unless
(1) the lawyer demonstrates to the tribunal that good cause exists to believe that no conflict of interest prohibited under this Rule presently exists or is likely to exist; and
(2) each client consents in writing after consultation concerning the implications of the common representation, along with the advantages and risks involved.

Relevant Rule Comment(s):

[5] A client may consent to representation notwithstanding a conflict. However, as indicated in paragraph (a)(1) with respect to representation directly adverse to a

client, and paragraph (b)(1) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such an agreement or provide representation on the basis of the client's consent. When more than one client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.

[12] Ordinarily, a lawyer may not act as an advocate against a client the lawyer represents in some other`` matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as an advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both clients consent upon consultation. By the same token, government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation.

[13] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action in behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken by the lawyer on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include where the cases are pending; whether the issue is substantive or procedural; the temporal relationship between the matters; the significance of the issue to the immediate and long- run interests of the clients involved; and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

[19] Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the

question when there is reason to infer that the lawyer has neglected the responsibility. Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment.

TBA Proposal – relevant portions to Board of Professional Responsibility comments:

(c) A lawyer shall not represent more than one client in the same criminal case or juvenile delinquency proceeding, unless

(2) each client ~~consents in writing after consultation concerning the implications of the common representation, along with the advantages and risks involved~~ gives informed consent.

~~[12] Ordinarily, a lawyer may not act as an advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as an advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both clients consent upon consultation. By the same token, government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation.~~

[13] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See RPC 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payor who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, obtaining informed consent, confirmed in writing, from the client.

[14] ~~[5] A client~~Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph ~~(a)(1) with respect to representation directly adverse to a client, and paragraph (b)(1) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances~~.b), some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such an agreement or provide representation on

the basis of the client's consent. When the lawyer is representing more than one client ~~is involved~~, the question of ~~conflict~~consentability must be resolved as to each client. ~~Moreover, there may be circumstances where it is~~

[15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if, in the circumstances, the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See RPC 1.1 (competence) and RPC 1.3 (diligence).

[16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest.

[17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediationis not a proceeding before a "tribunal" under RPC 1.0(m)), such representation may be precluded by paragraph (b)(1).

~~[19] Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment.~~

BOARD OF PROFESSIONAL RESPONSIBILITY COMMENTS:

The Board recommends keeping the stricken language in (c)(2) as it provides a clear explanation of the required information.

The Board has concerns about the capacity of a juvenile to give his or her informed consent to a lawyer representing a co-defendant under proposed subpart (c)(2). The Board is of the opinion that a juvenile does not have the capacity to make such a decision and recommends that informed

consent be given by an adult without an interest who has decision-making authority over the juvenile.

The Board has concerns about stricken Comment 12 and a lawyer's duty of loyalty. The Board recommends keeping the stricken language to clarify a lawyer's role in conflicts within an enterprise or governmental relationship.

The Board believes that "consentable", "consentability", and "nonconsentable" are not proper words and should be changed to "subject to consent", "the ability to consent", and "not subject to consent" respectively. These terms are interspersed within proposed Comments 13-17. The Board recognizes that the proposed words are used by the ABA Model Rules and makes its recommendation regardless.

The Board has concerns about stricken Comment 19 and the responsibilities involved in raising conflicts issues. The Board recommends keeping the stricken language to clarify the responsibilities of those facing a potential conflicts issue.

RPC 1.9 - Conflict of Interest: Former Client

Current Rule:

> (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client, unless the former client consents in writing after consultation.
> (b) Unless the former client consents in writing after consultation, a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by RPC 1.6 and 1.9(c) that is material to the matter.
> (c) Unless the former client consents after consultation, a lawyer who has formerly represented a client in a matter, or whose present or former firm has formerly represented a client in a matter, shall not thereafter:
> (1) use information relating to the representation to the disadvantage of the former client except as these Rules otherwise permit or require with respect to a client, or when the information has become generally known; or
> (2) reveal information relating to the representation of the former client except as these Rules otherwise permit or require with respect to a client.

TBA Proposal – relevant portions to Board of Professional Responsibility comments:

> [8a] Whether information is generally known depends on all circumstances relevant in obtaining the information. Information contained in books or records in

public libraries, public-record depositaries such as government offices, or in publicly accessible electronic-data storage is generally known if the particular information is obtainable through publicly available indexes and similar methods of access. Information is not generally known when a person interested in knowing the information could obtain it only by means of special knowledge or substantial difficulty or expense. Special knowledge includes information about the whereabouts or identity of a person or other source from which the information can be acquired, if those facts are not themselves generally known. A lawyer may not, however, justify adverse use or disclosure of client information simply because the information has become known to third persons, if it is not otherwise generally known. Even if permitted to disclose information relating to a former client's representation, a lawyer should not do so unnecessarily.

BOARD OF PROFESSIONAL RESPONSIBILITY COMMENTS:

The Board has concerns about proposed Comment 8a and permissible instances where a lawyer may reveal confidential information of a client that is "generally known". The proposed Comment appears to diminish a lawyer's obligation of confidentiality by giving specific examples of "generally known" information that is permissible for disclosure purposes.

RPC 1.14 - Client Under a Disability

Current Rule:

(a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
(b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.

Relevant Rule Comment(s):

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or has a mental disorder or disability, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, an incapacitated person may have no power to make legally binding decisions. Nevertheless, a client lacking legal competence often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. Furthermore, to an increasing extent the law recognizes intermediate degrees of competence. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal

proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

[2] The fact that a client has a disability does not diminish the lawyer's obligation to treat the client with attention and respect. If the person has no guardian or legal representative, the lawyer often must act as a de facto guardian. Even if the person does have a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

TBA Proposal – relevant portions to Board of Professional Responsibility comments:

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or ~~has~~suffers from a diminished mental ~~disorder or disability~~capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a~~n~~ severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client ~~lacking legal competence~~with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. ~~Furthermore, to an increasing extent the law recognizes intermediate degrees of competence.~~ For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

[2] The fact that a client ~~has~~suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. ~~If~~ Even if the person has ~~no guardian or legal representative, the lawyer often must act as a de facto guardian. Even if the person does have~~ a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

BOARD OF PROFESSIONAL RESPONSIBILITY COMMENTS:

The Board is of the opinion that using "suffers" or "suffers from" in proposed Comments 1 and 2 to describe one's diminished capacity or disability is inappropriate and recommends refraining from the use of such language, regardless of the ABA's use. The stricken word "has" should remain.

RPC 1.16 - Declining and Terminating Representation

Current Rule:

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of the client if:

(1) the representation will result in a violation of the Rules of Professional Conduct or other law; or

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from the representation of a client if the withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

(1) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(2) the client has used the lawyer's services to perpetrate a crime or fraud;

(3) a client insists upon pursuing an objective or taking action that the lawyer considers repugnant or imprudent;

(4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(5) the representation will result in an unanticipated and substantial financial burden on the lawyer or has been rendered unreasonably difficult by the client;

(6) other good cause for withdrawal exists; or

(7) after consultation with the lawyer, the client consents in writing to the withdrawal of the lawyer.

(c) When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of the representation of a client, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, including:

(1) giving reasonable notice to the client so as to allow time for the employment of other counsel;

(2) promptly surrendering papers and property of the client and any work product prepared by the lawyer for the client and for which the lawyer has been compensated;

(3) promptly surrendering any other work product prepared by the lawyer for the client, provided, however, that the lawyer may retain such work product to the extent permitted by other law but only if the retention of the work product will not have a materially adverse affect on the client with respect to the subject matter of the representation;

(4) promptly refunding to the client any advance payment for expenses that have not been incurred by the lawyer; and

(5) promptly refunding any advance payment for fees that have not been earned.

TBA Proposal – relevant portions to Board of Professional Responsibility comments:

(d) ~~Upon termination of the representation of a client, a~~ A lawyer who is discharged by a client, or withdraws from representation of a client, shall, ~~take steps~~ to the extent reasonably practicable, take steps to protect ~~a~~the client's interests, ~~including:~~such as~~(1)~~ giving reasonable notice to the client, ~~so as to~~ allowing time for the employment of other counsel, and cooperating with any successor counsel engaged by the client.;~~(2)~~ Further, after discharge or withdrawal, a lawyer shall promptly surrender~~ing~~ all client file materials, as defined in RPC 1.19(b), and ~~papers and property of the client and any work product prepared by the lawyer for the client and for which the lawyer has been compensated;(3) promptly surrendering any other work product prepared by the lawyer for the client, provided, however, that the lawyer may retain such work product to the extent permitted by other law but only if the retention of the work product will not have a materially adverse affect on the client with respect to the subject matter of the representation;(4)~~ promptly refund~~ing to the client~~ any advance payment of fees ~~f~~or expenses that has~~ve~~ not been earned or incurred ~~by the lawyer; and (5) promptly refunding any advance payment for fees that have not been earned.~~ With respect to any work product prepared by the lawyer for the client that is not defined as client file materials under RPC 1.19, the lawyer may, if permitted by other law, refuse to surrender such work product if such a refusal will not have a materially adverse effect on the client with respect to the subject matter of the representation.

BOARD OF PROFESSIONAL RESPONSIBILITY COMMENTS:

The Board is of the opinion that the stricken word "including" should remain in proposed subpart (d) instead of the phrase "such as" to make the steps that a lawyer shall take upon withdrawal or discharge more of a requirement and less of an option. In conjunction with such change, the Board also recommends that each step be numbered similar to the current Rule, i.e. (1) giving reasonable notice to the client, allowing time for the employment of other counsel, (2) cooperating with any successor counsel engaged by the client, (3) promptly surrendering all client file materials, as defined in RPC 1.19(b), and (4) promptly refunding any advance payment of fees for expenses that have not been earned or incurred. The TBA committee chair agrees with the numbering proposal.

RPC 1.18 - New Rule - Duties to Prospective Client

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as RPC 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).
(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or;

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter; and

(ii) written notice is promptly given to the prospective client.

(e) When no client-lawyer relationship ensues, a prospective client is entitled, upon request, to have the lawyer return all papers and property in the lawyer's possession, custody, or control that were provided by the prospective client to the lawyer in connection with consideration of the prospective client's matter.

[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's discussions with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients. TBA Proposal for Amendments to the Tennessee Rules of Professional Conduct:

[2] Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a "prospective client" within the meaning of paragraph (a).

[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-

lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by RPC 1.9, even if the client or lawyer decides not to proceed with the representation. This duty exists regardless of how brief the initial conference may be.

[4] In order to avoid acquiring information from a prospective client that could be significantly harmful if used in the matter, a lawyer considering whether or not to undertake a new matter should limit the initial interview to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under RPC 1.7, then consent from all affected present clients must be obtained before accepting the representation.

[5] With the informed consent of the prospective client, a lawyer and a prospective client can agree in advance that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See RPC 1.0(e) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

[6] Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter.

[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in RPC 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. See RPC 1.0(k) and comment [8]-[10] (requirements for screening procedures).

[8] Notice, including a general description of the subject matter about which the lawyer was consulted, and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent. TBA Proposal for Amendments to the Tennessee Rules of Professional Conduct:

[9] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see RPC 1.1. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see RPC 1.15.

TBA Proposal – relevant portions to Board of Professional Responsibility comments:

> (c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).
>
> [5] With the informed consent of the prospective client, a lawyer and a prospective client can agree in advance that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See RPC 1.0(e) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.
>
> [6] Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter.

BOARD OF PROFESSIONAL RESPONSIBILITY COMMENTS:

The Board is not in favor of the word "significantly" as used in proposed subpart (c) and Comment 6, and recommends its deletion from the proposed Rule. The word leaves too much room for interpretation.

The Board is not in favor of the language contained in proposed Comment 5 and recommends deletion of the Comment. The Board is of the opinion that there are occasions where conflicts should not be subject to waiver even with the consent of a potential client.

RPC 2.2 - Lawyer Serving as an Intermediary Between Clients

Current Rule:

> (a) A lawyer represents clients as an intermediary when the lawyer provides impartial legal advice and assistance to two or more clients who are engaged in a candid and non-adversarial effort to accomplish a common objective with respect to the formation, conduct, modification, or termination of a consensual legal relation between them.
> (b) A lawyer shall not represent two or more clients as an intermediary in a matter unless:

(1) as between the clients, the lawyer reasonably believes that the matter can be resolved on terms compatible with the best interests of each of the clients, that each client will be able to make adequately informed decisions in the matter, that there is little risk of material prejudice to the interest of any of the clients if the contemplated resolution is unsuccessful, and that the intermediation can be undertaken impartially;

(2) the lawyer's representation of each of the clients, or the lawyer's relationship with each, will not be adversely affected by the lawyer's responsibilities to other clients or third persons, or by the lawyer's own interests;

(3) the lawyer consults with each client about:

(i) the lawyer's responsibilities as an intermediary;

(ii) the implications of the intermediation (including the advantages and risks involved, the effect of the intermediation on the attorney-client privilege, and the effect of the intermediation on any other obligation of confidentiality the lawyer may have);

(iii) any circumstances that will materially affect the lawyer's impartiality between the clients; and

(iv) the lawyer's representation in another matter of a client whose interests are directly adverse to the interests of any one of the clients; and any interests of the lawyer, the lawyer's other clients, or third persons that will materially limit the lawyer's representation of one of the clients; and

(4) each client consents in writing to the lawyer's representation and each client authorizes the lawyer to disclose to each of the other clients being represented in the matter any information relating to the representation to the extent that the lawyer reasonably believes is required to comply with RPC 1.4.

(c) While representing clients as an intermediary, the lawyer shall:

(1) act impartially to assist the clients in accomplishing their common objective;

(2) as between the clients, treat information relating to the intermediation as information protected by RPC 1.6 that the lawyer has been authorized by each client to disclose to the other clients to the extent the lawyer reasonably believes necessary for the lawyer to comply with RPC 1.4; and

(3) shall consult with each client concerning the decisions to be made with respect to the intermediation and the considerations relevant in making them, so that each client can make adequately informed decisions.

(d) A lawyer shall withdraw from service as an intermediary if:

(1) any of the clients so requests;

(2) any of the clients revokes the lawyer's authority to disclose to the other clients any information that the lawyer would be required by RPC 1.4 to reveal to them; or

(3) any of the other conditions stated in paragraph (b) are no longer satisfied.

(e) If the lawyer's withdrawal is required by paragraph (d)(2) the lawyer shall so advise each client of the withdrawal, but shall do so without any further disclosure of information protected by RPC 1.6.

Relevant Rule Comment(s):

[11] In acting as an intermediary between clients, the lawyer is required to consult with the clients on the implications of doing so and may proceed only upon consent based on such a consultation. The consultation should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances. This consent must be in writing.

TBA Proposal – relevant portions to Board of Professional Responsibility comments:

(b) A lawyer shall not represent two or more clients as an intermediary in a matter unless:

(3) the lawyer discusses~~consults~~ with each client ~~about~~:

(i) the lawyer's responsibilities as an intermediary;

(ii) the implications of the intermediation (including the advantages and risks involved, the effect of the intermediation on the attorney-client privilege, and the effect of the intermediation on any other obligation of confidentiality the lawyer may have);

(iii) any circumstances that will materially affect the lawyer's impartiality between the clients; and

(iv) the lawyer's representation in another matter of a client whose interests are directly adverse to the interests of any one of the clients; and any ~~interests of the lawyer, the lawyer's other clients, or third persons that will materially limit the lawyer's representation of one of the clients~~responsibility of the lawyer to a former client or a third person, and any personal interest of the lawyer, or the representation, responsibilities, or personal interests of a lawyer associated with the lawyer in a firm, that presents a significant risk of materially limiting the lawyer's representation of a client the lawyer will serve as an intermediary; and

(c) While representing clients as an intermediary, the lawyer shall:

(3) shall discuss~~consult~~ with each client ~~concerning~~ the decisions to be made with respect to the intermediation and the considerations relevant in making them, so that each client can make adequately informed decisions.

[11] In acting as an intermediary between clients, the lawyer is required to discuss ~~consult~~ with the clients ~~on~~ the implications of doing so and may proceed only upon informed consent, confirmed in writing ~~based on such a consultation.~~ The discussion ~~consultation~~ should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances. ~~This consent must be in writing.~~

BOARD OF PROFESSIONAL RESPONSIBILITY COMMENTS:

The Board is not in favor of the use of the word "discuss" in place of the word "consult" in proposed subpart (b)(3), (c)(3), and Comment 11, and recommends using the word "consult". The word "consult" connotes the use of legal opinion and advice and comports to the proposed Rule so long as the information given is impartial pursuant to proposed subpart (c)(1). In addition, the Board recommends retaining the definition of "consult" in RPC 1.0, Definitions.

Also, the word "shall" should be omitted from the beginning of (c)(3) before the proposed word "discuss" because it is redundant.

RPC 3.1 - Meritorious Claims and Contentions

Current Rule:

> A lawyer shall not bring or defend or continue with the prosecution or defense of a proceeding, or assert or controvert or continue to assert or controvert an issue therein, unless after reasonable inquiry the lawyer has a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.
>
> Relevant Rule Comment(s):
>
> [3] Although this Rule does not preclude a lawyer for a defendant in a criminal matter from defending the proceeding so as to require that every element of the case be established, the defense lawyer must not file frivolous motions and must give notice to the prosecution if the lawyer decides to abandon an affirmative defense that the lawyer had previously indicated would be presented in the case.
>
> [4] Prior to filing a complaint in a civil matter, a lawyer should act reasonably to promote settlement of the matter in dispute, including consultation with the client about the use of mediation or other alternative means of dispute resolution.

TBA Proposal – relevant portions to Board of Professional Responsibility comments:

> [3] The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter ~~from defending the proceeding so as to require that every element of the case be established, the defense lawyer must not file frivolous motions and must give notice to the~~

~~prosecution if the lawyer decides to abandon an affirmative defense that the lawyer had previously indicated would be presented in the case.~~ to present a claim or contention that otherwise would be prohibited by this Rule.

~~[4] Prior to filing a complaint in a civil matter, a lawyer should act reasonably to promote settlement of the matter in dispute, including consultation with the client about the use of mediation or other alternative means of dispute resolution.~~

BOARD OF PROFESSIONAL RESPONSIBILITY COMMENTS:

The Board recommends keeping the stricken language in Comment 3 to clarify what a lawyer may and may not do in the representation of a defendant in a criminal matter.

The Board recommends keeping the stricken language currently in Comment 4 to promote settlement between parties to a dispute, but moving the language to the RPC Preamble to reflect a general comment on the practice of law at large.

RPC 3.4 - Fairness to the Opposing Party and Counsel

Current Rule:

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act; or
(b) falsify evidence, counsel or assist a witness to offer false or misleading testimony; or
(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists; or
(d) in pretrial procedure, make a frivolous discovery request or fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party; or
(e) in trial,
(1) allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence;
(2) assert personal knowledge of facts in issue except when testifying as a witness; or
(3) state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or
(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information; or

(g) request or assist any person to take action that will render the person unavailable to appear as a witness by way of deposition or at trial; or

(h) offer an inducement to a witness that is prohibited by law; or pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent on the content of his testimony or the outcome of the case. A lawyer may advance, guarantee, or acquiesce in the payment of:

(1) expenses reasonably incurred by a witness in attending or testifying;

(2) reasonable compensation to a witness for that witness's loss of time in attending or testifying; or

(3) a reasonable fee for the professional services of an expert witness.

BOARD OF PROFESSIONAL RESPONSIBILITY COMMENTS:

The Board recommends the addition to proposed subpart (c) the language contained in prior Rule DR 7-106(A) that states: "A lawyer shall not disregard or advise the client to disregard a standing rule of a tribunal or a ruling made in the course of a proceeding, but may take appropriate steps in good faith to test the validity of such rule or ruling." This is an area that confronts the Board regularly, and the recommendation will promote a better understanding by the practitioner in this situation, regardless of the fact that it is language from a past rule.

RPC 3.8 - Special Responsibilities of a Prosecutor

Current Rule:

The prosecutor in a criminal matter:

(a) shall refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause; and

(b) shall make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel; and

(c) shall not advise an unrepresented accused to waive important pretrial rights; and

(d) shall make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, shall disclose to the defense and, if the defendant is proceeding *pro se*, to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and

(e) shall:

(1) exercise reasonable care to prevent employees of the prosecutor's office from making an extrajudicial statement that the prosecutor would be prohibited from making under RPC 3.6; and

(2) discourage investigators, law enforcement personnel, and other persons assisting or associated with the prosecutor in a criminal matter from making an extrajudicial statement that the prosecutor would be prohibited from making under RPC 3.6; and

(f) shall not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a client or former client unless the prosecutor reasonably believes:

(1) the information sought is not protected from disclosure by any applicable privilege;

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) there is no other feasible alternative to obtain the information.

Relevant Rule Comment(s):

[5] See RPC 3.6 for the rules governing extrajudicial statements by prosecutors and other lawyers participating in the investigation or litigation of a matter.

TBA Proposal – relevant portions to Board of Professional Responsibility comments:

[5] ~~See~~Paragraph (f) supplements RPC~~ule~~ 3.6 ~~for the rules governing extrajudicial statements by prosecutors and other lawyers participating in the investigation or litigation of a matter~~, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with RPC 3.6(b) or 3.6(c). Paragraph (f) is only intended to apply prior to the conclusion of a proceeding. A proceeding has concluded when a final judgment in the proceeding has been affirmed on appeal or the time for appeal has passed.

[8] A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of paragraphs (g) and (h), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.

BOARD OF PROFESSIONAL RESPONSIBILITY COMMENTS:

The Board is of the opinion that the term "opprobrium" in proposed Comment 5 should be better defined and made simpler, regardless of the ABA's use. (See the Board's comments to the Preamble above).

The Board recommends that proposed Comment 8 be moved to the body of the Rule as subpart (i). The Board is of the opinion that the language should be part of the Rule due to the serious nature of consequences involved in the new prosecutorial requirements. In addition, the words "does not constitute a violation" indicates controlling authority, which is more suited to inclusion in a rule and not a comment.

RPC 4.1 - Truthfulness and Candor in Statements to Others

Current Rule:

TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

Rule 4.1

TRUTHFULNESS AND CANDOR IN STATEMENTS TO OTHERS

(a) In the course of representing a client, a lawyer shall not knowingly make a false statement of material fact or law to a third person.
(b) If, in the course of representing a client in a non-adjudicative matter, a lawyer knows that the client intends to perpetrate a crime or fraud, the lawyer shall promptly advise the client to refrain from doing so and shall consult with the client about the consequences of the client's conduct. If after such consultation, the lawyer knows that the client still intends to engage in the wrongful conduct, the lawyer shall:
(1) withdraw from the representation of the client in the matter; and
(2) give notice of the withdrawal to any person who the lawyer knows is aware of the lawyer's representation of the client in the matter and whose financial or property interests are likely to be injured by the client's criminal or fraudulent conduct. The lawyer shall also give notice to any such person of the lawyer's disaffirmance of any written statements, opinions, or other material prepared by the lawyer on behalf of the client and which the lawyer reasonably believes may be used by the client in furtherance of the crime or fraud.
(c) If a lawyer who is representing or has represented a client in a non-adjudicative matter comes to know, prior to the conclusion of the matter, that the client has, during the course of the lawyer's representation of the client, perpetrated a crime or fraud, the lawyer shall promptly advise the client to rectify the crime or fraud and consult with the client about the consequences of

the client's failure to do so. If the client refuses or is unable to rectify the crime or fraud, the lawyer shall:

(1) if currently representing the client in the matter, withdraw from the representation and give notice of the withdrawal to any person whom the lawyer knows is aware of the lawyer's representation of the client in the matter and whose financial or property interests are likely to be injured by the client's criminal or fraudulent conduct; and

(2) give notice to any such person of the lawyer's disaffirmance of any written statements, opinions, or other material prepared by the lawyer on behalf of the client and that the lawyer reasonably believes may be used by the client in furtherance of the crime or fraud.

Relevant Rule Comment(s):

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts or law. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. A misrepresentation can also occur by a failure to act.

TBA Proposal – relevant portions to Board of Professional Responsibility comments:

TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS
RULE~~ule~~ 4.1: TRUTHFULNESS ~~AND CANDOR~~ IN STATEMENTS TO OTHERS

(b) If, in the course of representing a client in a non-adjudicative matter, a lawyer knows that the client intends to perpetrate a crime or fraud, the lawyer shall promptly advise the client to refrain from doing so and shall discuss ~~consult~~ with the client ~~about~~ the consequences of the client's conduct. If after such discuss~~consultation~~, the lawyer knows that the client still intends to engage in the wrongful conduct, the lawyer shall:

(1) withdraw from the representation of the client in the matter; and

(2) give notice of the withdrawal to any person who the lawyer knows is aware of the lawyer's representation of the client in the matter and whose financial or property interests are likely to be injured by the client's criminal or fraudulent conduct. The lawyer shall also give notice to any such person of the lawyer's disaffirmance of any written statements, opinions, or other material prepared by the lawyer on behalf of the client and which the lawyer reasonably believes may be used by the client in furtherance of the crime or fraud.

(c) If a lawyer who is representing or has represented a client in a non-adjudicative matter comes to know, prior to the conclusion of the matter, that the client has, during the course of the lawyer's representation of the client, perpetrated a crime or fraud, the lawyer shall promptly advise the client to rectify the crime or fraud and discuss ~~consult~~ with the client ~~about~~ the consequences of

the client's failure to do so. If the client refuses or is unable to rectify the crime or fraud, the lawyer shall:

(1) if currently representing the client in the matter, withdraw from the representation and give notice of the withdrawal to any person whom the lawyer knows is aware of the lawyer's representation of the client in the matter and whose financial or property interests are likely to be injured by the client's criminal or fraudulent conduct; and

(2) give notice to any such person of the lawyer's disaffirmance of any written statements, opinions, or other material prepared by the lawyer on behalf of the client and that the lawyer reasonably believes may be used by the client in furtherance of the crime or fraud.

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts ~~or law~~. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. ~~A misrepresentation can also occur by a failure to act.~~ Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see RPC 8.4.

BOARD OF PROFESSIONAL RESPONSIBILITY COMMENTS:

The Board recommends keeping the stricken word "CANDOR" in the caption of the Rule. The Board is of the opinion that the word "candor" connotes fairness and sincerity, which is different from the definition of "truthfulness".

The Board is not in favor of the use of the word "discuss" in place of the word "consult" in subparts (b) and (c), and recommends using the word "consult". As stated previously, the Board recommends retaining the definition of "consult" in RPC 1.0, Definitions.

The Board recommends keeping the stricken language "or law" in the first sentence of proposed Comment 1. The Board is of the opinion that there is no affirmative duty for a lawyer to inform an opposing party of relevant law in a particular matter. This is congruent with the language in subpart (a). The TBA committee chair agrees with this recommendation.

The Board recommends that the use of the word "omission" in proposed Comment 1 be clarified to only include omissions from statements made to a third party as opposed to the omission in providing information not communicated to said third party. In other words, omitting relevant information in communications to third parties that would be misleading would be an unauthorized omission. However, an omission could not occur under the Rule in the absence of any communication made by a lawyer.

RPC 4.2 - Communication With a Person Represented by Counsel

Current Rule:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.
>
> Relevant Rule Comment(s):
>
> [5] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the subject matter of the representation. For example, the existence of a controversy between a government agency and a private party, or between two private parties, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter, such as additional or different unlawful conduct not within the subject matter of the representation. Nor does this Rule preclude a lawyer from communicating with a person who seeks a second opinion about a matter in which the person is represented by another lawyer. Also, parties to a matter may communicate directly with each other.

TBA Proposal – relevant portions to Board of Professional Responsibility comments:

> [~~5~~4] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the ~~subject matter of the~~ representation. For example, the existence of a controversy between a government agency and a private party, or between two ~~private parties~~organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter, such as additional or different unlawful conduct not within the subject matter of the representation. Nor does this Rule preclude ~~a lawyer from communicating with a person who seeks a second opinion about a matter in which the person is represented by another lawyer. Also, parties~~communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. See RPC 8.4(a). Parties to a matter may communicate directly with each other~~.~~ , and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.

BOARD OF PROFESSIONAL RESPONSIBILITY COMMENTS:

The Board recommends keeping the stricken language in proposed Comment 4 concerning communication with a person who seeks a second opinion to clarify a lawyer's authority in speaking with a represented person when said person seeks a second opinion about their case.

RPC 4.4 - Respect for the Rights of Third Persons

Current Rule:

In representing a client, a lawyer shall not:

> (a) use means that have no substantial purpose other than to embarrass, delay, or burden a third person or knowingly use methods of obtaining evidence that violate the legal rights of such a person; or
> (b) threaten to present a criminal charge, or to offer or to agree to refrain from filing such a charge, for the purpose of obtaining an advantage in a civil matter.

TBA Proposal – relevant portions to Board of Professional Responsibility comments:

> (a) In representing a client, a lawyer shall not:
> (~~b~~2) threaten to present a criminal or lawyer disciplinary charge~~, or to offer or to agree to refrain from filing such a charge,~~ for the purpose of obtaining an advantage in a civil matter.

BOARD OF PROFESSIONAL RESPONSIBILITY COMMENTS:

The Board recommends keeping the stricken language in subpart (a)(2) to clarify that the threat of refraining from presenting a criminal or disciplinary charge to gain an advantage in a civil matter should be equally prohibited since it can result in coercion and/or duress without the actual filing of a charge.

RPC 5.3 - Responsibilities Regarding Nonlawyer Assistants

Current Rule:

With respect to a nonlawyer employed, retained by, or associated with a lawyer:

> (a) a partner and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the nonlawyer's conduct is compatible with these Rules;

(b) a lawyer having direct supervisory authority over a nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with these Rules; and

(c) a lawyer shall be responsible for the conduct of a nonlawyer if the conduct would be a violation of these Rules if engaged in by a lawyer, and if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer:

(i) is a partner or has comparable managerial authority in a law firm in which the person is employed or has direct supervisory authority over the nonlawyer, and

(ii) knows of the nonlawyer's conduct at a time when its consequences can be avoided or mitigated, but fails to take reasonable remedial action.

TBA Proposal – relevant portions to Board of Professional Responsibility comments:

(c) a lawyer shall be responsible for ~~the~~ conduct of a nonlawyer ~~if the conduct~~that would be a violation of ~~these~~the Rules of Professional Conduct if engaged in by a lawyer~~, and~~ if:

(2) the lawyer~~:(i)~~ is a partner or has comparable managerial authority in ~~a~~the law firm in which the person is employed, or has direct supervisory authority over the nonlawyer, and ~~(ii)~~ knows of the nonlawyer's conduct at a time when its consequences can be avoided or mitigated~~,~~ but fails to take reasonable remedial action.

BOARD OF PROFESSIONAL RESPONSIBILITY COMMENTS:

The Board recommends the use of the word "nonlawyer" in place of the word "person" in proposed subpart (c)(2) to make the Rule congruent. The TBA committee chair agrees with this recommendation.

RPC 7.3 - Solicitation and Other Communications Directed to Specifically Identified Recipients

Current Rule:

(a) If a significant motive for the solicitation is the lawyer's pecuniary gain, a lawyer shall not solicit professional employment by in-person, live telephone, or real-time electronic contact from a prospective client who has not initiated the contact with the lawyer and with whom the lawyer has no family or prior professional relationship.

(b) A lawyer shall not solicit professional employment by in-person, live telephone, or real-time electronic contact, or by a writing, recording, telegram, facsimile, computer transmission or other mode of communication directed to a

specifically identified recipient who has not initiated the contact with the lawyer if:

(1) the person solicited has made known to the lawyer a desire not to be contacted by the lawyer; or

(2) the communication constitutes overreaching, coercion, duress, harassment, undue influence, intimidation, or fraud; or

(3) a significant motive for the solicitation is the lawyer's pecuniary gain and the communication concerns an action for personal injury, worker's compensation, wrongful death, or otherwise relates to an accident or disaster involving the person to whom the communication is addressed or a member of that person's family, unless the accident or disaster occurred more than thirty (30) days prior to the mailing or transmission of the communication or the lawyer has a family or prior professional relationship with the person solicited.

(c) If a significant motive for the solicitation is the lawyer's pecuniary gain, a lawyer shall not send or dispatch a communication soliciting professional employment from a specifically identified recipient who has not initiated a contact with the lawyer and with whom the lawyer has no family or prior professional relationship, unless the communication complies with the following requirements:

(1) Each communication, including envelopes and self-mailing brochures or pamphlets, shall include the words "This is an advertisement" as follows:

(a) In written communications sent by mail, telegraph, facsimile, or computer transmission, the required wording shall appear in conspicuous print size on the outside envelope, if any, and at the beginning and end of the written material. If the written communication is a self-mailing brochure or pamphlet, the required wording shall appear on the address panel of the brochure or pamphlet.

(b) In video communications, the required wording shall appear conspicuously in the communication for at least five seconds at the beginning and five seconds at the end of the communication and the required wording of the audio portion of the video communication shall be presented as required in subsection (c)(1)(c) below.

(c) In audio communications, the required wording shall be presented at both the beginning and end of the communication in a tone, volume, clarity and speed of delivery at least equivalent to the clearest quality tone, volume, clarity and speed used elsewhere in the communication.

(2) A lawyer shall not state or imply that a communication otherwise permitted by these rules has been approved by the Tennessee Supreme Court or the Board of Professional Responsibility.

(3) If a contract for representation is mailed with the communication, the top of each page of the contract shall be marked "SAMPLE" and the words "DO NOT SIGN" shall appear on the client signature line.

(4) Written communications shall not be in the form of or include legal pleadings or other formal legal documents.

(5) Communications delivered to prospective clients shall be sent only by regular U.S. mail and not by registered, certified, or other forms of restricted delivery, or by express delivery or courier.

(6) Any communication seeking employment by a specific prospective client in a specific matter shall comply with the following additional requirements:

(i) The communication shall disclose how the lawyer obtained the information prompting the communication;

(ii) The subject matter of the proposed representation shall not be disclosed on the outside of the envelope (or self-mailing brochure) in which the communication is delivered; and

(iii) The first sentence of the communication shall state, "If you have already hired or retained a lawyer in this matter, please disregard this message."

(7) A copy of each written, audio, video, or electronically transmitted communication sent to a specific recipient shall be filed with the Board of Professional Responsibility within three days after the dispatch of the communication. At the same time, the lawyer dispatching the communication shall also file the name of the person contacted and the person's address, telephone number, or telecommunication address to which the communication was sent. If communications identical in content are sent to two or more persons, the lawyer may comply with this requirement by filing a single copy of the communication together with a list of the names and addresses of the persons to whom the communications were sent. If the lawyer periodically sends the identical communication to additional persons, lists of the additional names and addresses shall be filed with the Board of Professional Responsibility no less frequently than monthly.

(d) Unless the subject matter of the communication is restricted to matters of general legal interest or to an announcement of an association or affiliation with another lawyer that complies with the requirements of RPC 7.5, a lawyer who sends newsletters, brochures, and other similar communications to persons who have not requested the communication or with whom the lawyer has no family or prior professional relationship shall comply with the requirements of paragraph (c) above.

Relevant Rule Comment(s):

[4] There is far less likelihood that a lawyer would engage in abusive practices against an individual with whom the lawyer has a prior personal or professional relationship or where the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Consequently, the prohibitions in RPC 7.3(a) and 7.3(b)(3) are not applicable in those situations.

TBA Proposal – relevant portions to Board of Professional Responsibility comments:

(a) ~~If a significant motive for the solicitation is the lawyer's pecuniary gain, a~~A lawyer shall not ~~solicit professional employment by in-~~by in-person, live telephone, or real-time electronic contact ~~from a prospective client who has not initiated the contact with the lawyer and with whom the lawyer has no~~solicit professional employment from a potential client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

(2) has a family, close personal, or prior professional relationship with the lawyer; or

(c) If a significant motive for the solicitation is the lawyer's pecuniary gain, a lawyer shall not send ~~or dispatch a communication~~a written, recorded, or electronic communication soliciting professional employment from a specifically identified recipient who ~~has not initiated a contact with the lawyer~~ is not a person specified in paragraphs (a)(1) or (a)(2) or (a)(3)~~and with whom the lawyer has no family or prior professional relationship~~, unless the communication complies with the following requirements:

(1) The words "Advertising Material" appear on the outside of the envelope, if any, and at the beginning and ending of any recorded or electronic communication.~~Each communication, including envelopes and self-mailing brochures or pamphlets, shall include the words "THIS IS AN ADVERTISEMENT" as follows:~~

~~(ia) In written communications sent by mail, telegraph, facsimile, or computer transmission, the required wording shall appear in conspicuous print size on the outside envelope, if any, and at the beginning and end of the written material. If the written communication is a self-mailing brochure or pamphlet, the required wording shall appear on the address panel of the brochure or pamphlet.~~

~~(iib) In video communications, the required wording shall appear conspicuously in the communication for at least five seconds at the beginning and five seconds at the end of the communication and the required wording of the audio portion of the video communication shall be presented as required in subsection (c)(1)(c) below.~~

~~(iiic) In audio communications, the required wording shall be presented at both the beginning and end of the communication in a tone, volume, clarity and speed of delivery at least equivalent to the clearest quality tone, volume, clarity and speed used elsewhere in the communication.~~

(5) Communications delivered to prospective clients shall be sent only by regular U.S. mail and not by registered, certified, or other forms of restricted delivery, or by express delivery or courier.

(6) Any communication seeking employment by a specific prospective client in a specific matter shall comply with the following additional requirements:

(i) The communication shall disclose how the lawyer obtained the information prompting the communication;

(ii) The subject matter of the proposed representation shall not be disclosed on the outside of the envelope (or self-mailing brochure) in which the communication is delivered; and

(iii) The first sentence of the communication shall state, "IF YOU HAVE ALREADY HIRED OR RETAINED A LAWYER IN THIS MATTER, PLEASE DISREGARD THIS MESSAGE."

[4] There is far less likelihood that a lawyer would engage in abusive practices against an individual with whom the lawyer has a family, close personal, or prior ~~personal or~~ professional relationship, or ~~where~~in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer. Consequently, the ~~prohibitions~~general prohibition in RPC~~ule~~ 7.3(a) and the requirements of RPC 7.3(~~b~~)(~~3~~c) are not applicable in those situations. Also, paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee, or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries.

BOARD OF PROFESSIONAL RESPONSIBILITY COMMENTS:

The Board recommends adding the word "legal" before the phrase "professional relationship" in proposed subpart (a)(2) and Comment 4.

The Board recommends that proposed subpart (c)(1) retain the stricken language (except for the first stricken sentence), in addition to the new language. The Board is concerned that omitting the former language regarding "conspicuous" information leaves the advertising rules subject to abuse.

The Board recommends the use of the word "potential" in place of the word "prospective" in proposed subparts (c)(5) and (c)(6) to make the Rule congruent. The TBA committee chair agrees with this recommendation.

RPC 7.6 - Intermediary Organizations

Current Rule:

(a) An intermediary organization is a lawyer-advertising cooperative, lawyer referral service, prepaid legal insurance provider, or a similar organization the business or activities of which include the referral of its customers, members, or beneficiaries to lawyers for the performance of fee-generating legal services or the payment for or provision of legal services to the organization's customers, members, or beneficiaries in matters for which the organization does not bear ultimate responsibility. A tribunal appointing or assigning lawyers to represent parties before the tribunal or a government agency performing such functions on behalf of a tribunal is not an intermediary organization under this Rule. [As amended by Order filed December 10, 2003, and effective February 1, 2004.]

(b) A lawyer shall not seek or accept a referral of a client, or compensation for representing a client, from an intermediary organization if the lawyer knows or reasonably should know that:

(1) The organization:
(i) is owned or controlled by the lawyer, a law firm with which the lawyer is associated, or a lawyer with whom the lawyer is associated in a firm; or
(ii) is engaged in the unauthorized practice of law; or
(iii) engages in marketing activities that are false or misleading or are otherwise prohibited by the Board of Professional Responsibility; or
(iv) has not registered with the Board of Professional Responsibility and complied with all requirements imposed by the Board; or
(2) The lawyer will be unable to represent the client in compliance with these rules. [As amended by Order filed April 29, 2003, and effective June 1, 2003.

BOARD OF PROFESSIONAL RESPONSIBILITY COMMENTS:

The Board recommends a statutory fix here to provide a penalty provision for intermediary organizations that fail to comply with the proposed Rule. This would be enforced by the Tennessee Attorney General's office, similar to the unauthorized practice of law.

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

DEC 0 1 2009

IN RE:	)	
	)	
PETITION FOR THE ADOPTION OF	)	**No. M2009-00979-SC-RL1-RL**
AMENDED TENNESSEE RULES OF	)	
PROFESSIONAL CONDUCT	)	

COMMENTS OF THE TENNESSEE DISTRICT ATTORNEYS GENERAL CONFERENCE

The Tennessee District Attorneys General Conference (TDAGC), by and through its President, the Honorable J. Michael Taylor, District Attorney General for the 12th Judicial District; its representative on the Tennessee Bar Association (TBA) Board of Governors, the Honorable D. Michael Dunavant, District Attorney General for the 25th Judicial District, its Executive Director, James W. Kirby and its representative on the TBA Committee on Ethics and Professional Responsibility, John W. Gill Jr., Special Counsel, District Attorney General's Office for the 6th Judicial District in response to the Court's invitation to the bench, the bar, and the public to submit comments concerning proposed amendments to Tenn. Sup. Ct. R 8, Tennessee Rules of Professional Conduct.

The TDAGC has actively participated, through its representation on the Board of Governors and on the TBA Standing Committee on Ethics and Professional Responsibility and its predecessor, the TBA Committee for the Study of Standards of Professional Conduct, for almost fifteen years, assisting the Court in the transition from the old Code of Professional Conduct to the use of the American Bar Association Model Rules as the guide in form and substance. Members of the Committee practicing in every area of the law participated on all the rules, not just those having the greatest impact on the each member's area of practice. The discussions and debates were sometimes intense. When there were differences on the Committee, compromises were usually reached, and when there were serious concerns, they were frequently accommodated.

However, it should be noted that the recommendations of the Committee to the TBA and the TBA to the Court and the Rules of Professional Conduct adopted by this Court in 2002 did not slavishly followed the ABA Model Rules or the TBA recommendations and this Court made some changes, after listening to comments, arguments and following its own best judgment.

THE TDAGC URGES THE ADOPTION OF PROPOSED RULE 3.8(g) & (h)

The TDAGC strongly supports the adoption of it terms "the innocence provisions", proposed Rule 3.8(g) and (h) and proposed Comments [6], [7] and [8], which provide guidance to the application of these sections. This support was made known to the TBA Board of Governors at the time they were considering this change. The TDGAC is dedicated to preventing mistaken convictions and rectifying the very few mistaken convictions that occur. The TDAGC believes the addition for proposed paragraphs (g) and (h) to Rule 3.8, Special Responsibilities Of A Prosecutor, sets a clear standard for prosecutors and will increase confidence in our criminal justice system. In addition and just as importantly these amendments will lead to a greater understanding of the unique role of prosecutors to seek the truth over and above winning a case.

THE TDAGC URGES RETENTION OF THE CURRENT RULE 3.3

With the proposed RULE 3.3 as amended, the TBA asks that this Court return to the rule sought by the TBA before the Court promulgated the original Rules of Professional Conduct in 2002. The current 3.3 states, "A lawyer shall make reasonable efforts to expedite litigation". The Rule proposed by the TBA in 2002 and now adds "consistent with the interest of the client". This Court, after hearing oral arguments for several organizations including the TDAGC, declined to adopt the "interest of the client" standard in 20002. The TDAGC's argument then as now is: 1) delay in litigation is a factor that engenders much of the criticism and ill repute of the justice system in Tennessee, as well as nationally; 2) delay adds cost in money and time to the court system and to litigants and witnesses; 3) delay, for the sake of delay, is often of significant advantage to clients; 4) the literal meaning of the proposed Rule places the interests of a litigant

over the interests of justice; 5) the meaning of the proposed Rule is in conflict with the meaning of the proposed Comment to the Rule, which states delays should not be sought for advantage but only due to reasonable and unavoidable circumstances.

Presumably, the reasoning of the TDAGC in its opposition to the "interest of the client" standard had some effect on this Court decision in 2002 to strike that portion of the TBA's proposal when the current rules were adopted. That reasoning is just as compelling today. The current and proposed Comment makes it clear that there are reasonable justifications for delay and give examples. The current and the proposed comments are in harmony with the current rule but in conflict with the proposed changes. However, the TDAGC does support the proposed amendments to the current Comment as an improvement. But, at the same time, the improvements to the Comment bring its logic even more in conflict with the rule itself if the proposed "interest of the client" standard is adopted

THE TDAGC SEEKS A DELAY IN ADOPTING OF RULE 1.19

Proposed RULE 1.19: CLIENT FILE MATERIALS is new to Tennessee and not a part of the ABA Model Rules. While it is reasonable that Tennessee lawyers could use guidance in dealing with client files, whether or not such guidance is a matter of ethics rules is open to question. There are unintended consequences to such a totally new rule addressing every case every lawyer has.

Public Defenders and some criminal defense lawyers raised the red flag on one of the unintended consequences in this proposed rule, which the TDAGC had overlooked. A significant number of Public Defenders and criminal defense lawyers regularly excise from files to be turned over to their clients sensitive information such as non-public addresses of witnesses, information that might identify informants and that could be used by a few of their clients to do harm or intimidate witnesses or potential witnesses. In addition, Public Defenders and criminal defense lawyers often have access to confidential/non-public personal information from background checks they have run on witnesses and others during their investigations. Social Security numbers, financial data are examples of such information. Do we want to require lawyers to allow defendants, perhaps serving time in prison, to have access to this information that could be sold in a prison setting to persons intent on Identify Theft or other fraud, or used to allow them to gain revenge on persons who assisted in their prosecution?

Therefore, the TDAGC requests this Court to delay adopting proposed RULE 1.19 until further review to determine what modifications to the Rule can address these concerns and the question of whether or not this is an appropriate subject of an ethics rule.

Prologue

Before this Court adopted the Rules of Professional Conduct in 2002, there were numerous and often voluminous comments submitted by members of the bar. Most of the changes to the Rules since that time have been to address very specific issues often affecting relatively few lawyers, and those affected have usually had the opportunity for substantial input in the drafting of TBA's proposals. The amendments now before the Court, while still only a mere fraction of the changes wrought by the adoption of the 2002 rules, represent a complete review of all of Tennessee's Rules of Professional Responsibility. At this time, there are only two comments posted on the Court's website. Perhaps, like the TDAGC, other groups or lawyers are coming in at the last hour. On the other hand, because Tennessee lawyers are familiar and comfortable with the Rules and because most previous amendments have been limited, the proposed amendments before the Court may well not have received the amount of attention from the bench and bar to give this Court the degree of perspective it may desire. All this is a way of saying that changes to every single individual rule do not require immediate action by the Court when acting on the bulk of the amendments and further consideration may be appropriate on some.

The TDGAC is generally supportive of the amendments proposed to our Rules. There are provisions in the current Rules from 2002 that the TDAGC believed to be improvident, but those battles were lost and it is appropriate to move on. Hopefully, these comments will assist the Court as it considers proposed amendments to our Rules. We appreciate the Court's consideration.

Respectfully Submitted,

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TENNESSEE BAR ASSOCIATION

May 14, 2010

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

IN RE: PETITION FOR THE ADOPTION OF AMENDED TENNESSEE RULES OF PROFESSIONAL CONDUCT

Dear Mike:

Attached for filing please find an original and six copies of the Further Submission of the Tennessee Bar Association Pursuant to the April 21, 2010 Order regarding the above matter.

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

Very truly yours,

Allan F. Ramsaur
Executive Director

cc: Gail Vaughn Ashworth, TBA President
Sam Elliott, TBA President Elect
George T. Lewis, TBA Immediate Past President
William L. Harbison, TBA General Counsel
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IN THE SUPREME COURT OF TENNESSEE

IN RE:	)	
	)	
PETITION FOR THE ADOPTION OF AMENDED TENNESSEE RULES OF PROFESSIONAL CONDUCT	)	No. M2009-00979-SC-RL1-RL
	)	
	)	

FURTHER SUBMISSION OF THE TENNESSEE BAR ASSOCIATION PURSUANT TO APRIL 21, 2010 ORDER

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On April 21, 2010, this Court issued an Order identifying the issues for which the Court desires to hear oral argument on June 1, 2010. The Tennessee Bar Association ("TBA") is grateful for the opportunity to present oral argument to the Court. In that Order, the Court indicated that additional written comments or briefing regarding any of the identified issues could be submitted on or before Friday, May 14, 2010. Pursuant to that Order, the TBA makes the following written submission and respectfully states as follows:

1. The TBA Submits That There Is No Need for Argument as to Issue 14.

With respect to the Court's Issue 14, the TBA is grateful to the Court for highlighting the omission of "close personal relationships" from the proposed revisions to RPC 7.3(b)(3). That omission was entirely unintentional. The TBA submits that the same exception for "close personal relationships" in proposed RPC 7.3(a)(2) should be reflected in RPC 7.3(b)(3). The TBA has consulted with the Chief Disciplinary Counsel for the Board of Professional Responsibility and is authorized to relay that the BPR agrees with the TBA that because this was an inadvertent omission, there would be no need for oral argument.

2. The TBA Submits That Issues 7 and 9 Should Be Consolidated for Purposes of Oral Argument.

The Order listed the issue regarding RPC 1.16(d) raised in public comments by the Tennessee District Public Defenders Conference ("PDs Conference") and one District Public Defender individually as Issue 7 in its Order. The Order listed questions regarding the TBA's proposed new RPC 1.19 on client file materials as Issue 9 in its Order. The TBA believes that these two issues should be consolidated into one issue for purposes of oral argument given that the concerns of the PDs Conference as to RPC 1.16(d) are inextricably intertwined with the proposed new RPC 1.19 on client file materials. The TBA has consulted with the Chief Disciplinary Counsel for the Board of Professional Responsibility and is authorized to relay

that the BPR agrees with the TBA that Issues 7 and 9 should be consolidated for purposes of oral argument on June 1, 2010.

3. As to Issue 6, the TBA Proposes to Correct An Inadvertent Error in the TBA's Proposal as to Comment [13] to RPC 1.10.

During the process of consulting about the issues above with Chief Disciplinary Counsel for the BPR, the TBA was made aware that its proposal as to the language in Comment [13] to RPC 1.10 inadvertently included the language "mediator, or other third party neutral" in the first sentence of that comment. The TBA is grateful for having this error brought to its attention. Given the TBA's proposal with respect to continuing to have the rules address mediators and other third party neutrals through RPC 2.4 and not RPC 1.12, the TBA's intention as to the first sentence of Comment [13] to RPC 1.10 was for it to read: "The disqualification of lawyers associated in a firm with a former judge or arbitrator is governed by RPC 1.12." Because that language is relevant to Issue 6 identified by the Court in its Order, the TBA considered it important to address in this written submission. The TBA apologizes for this error and any confusion it may have created for the Court.

Respectfully submitted,

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May 14, 2010

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Appellate Court Clerk
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RE: Supplemental Comments in Response to Proposed Revisions & Clarifications to the TBA's Proposed Amendments to the Tennessee Rules of Professional Conduct

Dear Mr. Catalano:

Enclosed are the original and one (1) copy of the Board of Professional Responsibility's Supplemental response to the Tennessee Bar Association's Proposed Amendments to the Tennessee Rules of Professional Conduct, as requested by the Court in its April 21, 2010 Order. Please file the original.

Respectfully,

Nancy S. Jones

Nancy S. Jones
Chief Disciplinary Counsel

NSJ:db

encls.

c: Allan Ramsaur (w/enclosures)
Brian Faughnan (w/enclosures)

COMES THE BOARD OF PROFESSIONAL RESPONSIBILITY PURSUANT TO THE ORDER OF THE SUPREME COURT FILED APRIL 21, 2010, AND SUBMITS ADDITIONAL COMMENTS TO THE TBA PETITION FOR THE ADOPTION OF AMENDED TENNESSEE RULES OF PROFESSIONAL CONDUCT.

ISSUE 2: RPC 1.2: Scope of Representation and Allocation of Authority Between Client and Lawyer-The Board of Professional Responsibility ("BPR"), in its written comments, raised concerns about the proposed changes in RPC 1.2(a) and recommended clarifying that paragraph, as well as Comment 2. The Court asks the TBA to present its position regarding this issue and asks the BPR to present its concerns with more specificity and to make any suggestions to clarify the paragraph.

The BPR incorporates herein its comments previously submitted.

Proposed RPC 1.2(a) provides:

> (a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of ~~the~~ representation and, as required by RPC 1.4, shall consult with the client about the means by which the client's objectives are to be accomplished. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify.

Proposed RPC 1.4(a) provides that "[a] lawyer shall; (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished."

ABA Lawyer's Manual on Professional Conduct provides:

> With regard to the means employed to accomplish the objectives of the representation, Model Rule 1.2 states only that "as required by Rule 1.4," the lawyer "shall consult with the client." The rule does not say who gets to decide if they disagree. Comment [2] explains that this omission is deliberate, but it also provides some guidance.
>
> "On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may

implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3)." [Essentially identical to proposed comment [2] to RPC 1.2.]

As stated in the comment, the question of who decides may ultimately be a matter of substantive law, such as agency law, contract law, or statute. When the lawyer and client disagree, agency principles may require the lawyer to defer the client's wishes. State v. White, 508 S.E.2d 253 (N.C. 1998) (in criminal matters, although tactical decisions are normally for lawyer to make, in the event of an absolute impasse client's wishes control in accordance with principal-agent nature of relationship).

Id. at 31:305

In a criminal case, a client's right to make decisions is determined not only by the ethics rules and criminal law but also by constitutional requirements. Rule 1.2 provides that the client decides the "plea to be entered, whether to waive jury trial and whether the client will testify." This is consistent with a criminal defendant's right to make decision about issues courts have characterized as fundamental or substantive because they derive from constitutional guarantees. (citations omitted)

Id. at 31:308

On the other hand, decisions that involve tactics and trial strategy are reserved for the professional judgment of the criminal defense lawyer after consultation with the client. (citations omitted)

Although the line between substantive and tactical issues may at times be difficult to draw, courts have deferred to the lawyer's judgment in a wide variety of matters. (citations omitted)

Id. at 31:309

ABA Annotated Model Rules of Professional Conduct (Sixth Edition), pp. 33-34 provides:

Some courts have found that in the event of a disagreement, the client's judgment should prevail even in the matters of tactics, procedure, or the drafting of documents. See, e.g., State v. Ali, 407 S.E.2d 183 (N.C. 1991) (when counsel and fully informed criminal defendant client reach absolute impasse regarding tactical decisions, client's wishes must control, in accordance with principal-agent nature

of relationship); See also Olson v. Fraase, 421 N.W.2d 820 (N.D. 1988) (lawyer had duty to follow client's reasonable instructions to prepare documents to create joint tendency, despite honest belief that instructions not in client's best interest); Olfe v. Gordon, 286 N.W.2d 573 (Wis. 1980) (lawyer may not ignore client's wish to obtain certain type of collateral); Pa. Ethics Op. 97-48 (1997) (lawyer who thinks client is mistaken in wanting to take particular legal action is obligated to either follow client's instructions or withdraw from representation).

Most cases in Tennessee which address whether it is the attorney or client who has authority to make strategic or tactical decisions are criminal post-conviction cases. Citing Sp. Ct. R. 8, Code of Professional Responsibility, Ethical Consideration (EC) 7-7 and 7-8; Zagorski v. State, 983 S.W.2d 54 (Tenn. 1998), held "[w]hen a competent defendant knowingly and voluntarily chooses a lawful course of action or defense strategy, counsel is essentially bound by this decision." Id. at 658-659. See also State v. Halton, 2002 Tenn.Crim.App. Lexis 572 (citing Zagorski, ". . .it is well established that a criminal defendant has the exclusive authority to make substantive decisions concerning the presentation of his defense"); Griffin v. State, 2004 Tenn.Crim.App. Lexis 624. Tennessee Formal Ethics Opinion 99-F-73(a) was amended following the Zagorski decision and recited language also recited in Zagorski at 661, "...we must preserve a competent defendant's right to make the ultimate decision in his or her case once having been fully informed of the rights and the potential consequences involved."

Givens v. Mullikin, 75 S.W.3d 383, 396 (Tenn. 2002), a civil case, cited Zagorski and EC 7-7 of the Code of Professional Responsibility in stating ". . .that the client retains 'exclusive authority' to direct all areas of the representation that affect the merits of the case or substantially prejudice his or her rights."

On the other hand, Dellinger v. State, 279 S.W.3d 282, 295 (Tenn. 2009) cited Thompson v. State, 958 S.W.2d 156, 162 (Tenn.Crim.App. 1997) and Adkins v. State, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994) in stating "[o]n a claim of ineffective assistance, 'the petitioner is not entitled to the benefit of hindsight, may not second-guess a reasonably based trial strategy, and cannot criticize a sound but unsuccessful tactical decisions made during the course of the proceeding' ". Vaughn v. State, 202 S.W.3d 106, 121 (Tenn. 2006) cited Cooper v. State, 847 S.W.2d 521, 528 (Tenn.Crim.App. 1992) in stating "[t]actical choices made by counsel are given deference, and the court must not measure trial counsel deficiency by '20-20' hindsight." Adkins and Vaughn have been cited dozens of times for these propositions.

It has generally been the rule or assumed to be the rule that tactical and/or strategic decisions are for the attorney to decide. As can be seen by review of the foregoing sources and cases, that rule is subject to question. Either the attorney or the client must make such decisions. The addition of the language to RPC 1.2(a) requiring consultation with the client as required by RPC 1.4 cast further doubt on whether such decisions fall within the province of decisions which the attorney may decide. A clear statement of the rule would be helpful.

ISSUE 3: RPC 1.6: Confidentiality of Information-Why is paragraph (a)(3)- which is not contained in the ABA Model Rule 1.6-needed? Can the TBA provide specific factual examples? Is paragraph (a)(3) too vague for purposes of disciplinary enforcement? Does Comment 8a to RPC 1.9 relate to RPC 1.6(a)(3) and, if so, how do those two items affect each other?

The BPR incorporates herein its comments previously submitted.

Proposed RPC 1.6(a)(3) provides that a lawyer shall not reveal information relating to the representation of a client unless:

> (3) the disclosure is limited to information relating to the representation of a client which has already been made public and the disclosure is made in such a way that there is no reasonable likelihood of adverse effect to the client; or

(emphasis added)

Proposed RPC 1.6(a)(3) is not a provision of the ABA Model Rules. Proposed RPC 1.6(a)(3) diverges from ABA Model Rule 1.6 and current Tennessee RPC 1.6. by providing a "public" exception to the definition of confidentiality. No definition of the word "public" is provided by the proposed rules or comments. The only discussion of public is contained in proposed comment [5a], "paragraph (a)(3) provides that a lawyer is not prohibited from disclosing information relating to the representation of a client that has already been made public as long as the disclosure is made in such a way that there is no reasonable likelihood of adverse affect to the client." (emphasis added)

ABA Model Rule 1.6(a) and Tennessee RPC 1.6(a) provide that "a lawyer shall not reveal information relating to the representation of a client, unless the client consents after consultation. . ." Comment [5] to RPC 1.6 provides that the confidentiality rule "applies not only to matters communicated in confidence by the client, but also to all information relating to the representation, whatever its source." Neither the ABA Model Rule 1.6 nor the current RPC 1.6 provide that matters which are public or of public record are not confidential and may be revealed. ABA Lawyer's Manual on Professional Conduct, 55:310 provides:

> Neither Model Rule 1.6's prohibition against revealing "information relating to the representation of a client" nor Model Code DR 4-101's protection of client confidences or secrets makes any exception for information that has been previously disclosed or is publicly available. (citations omitted)

See also, ABA Model Rules of Professional Conduct Annotated (Sixth Edition), pp 97-98.

Proposed RPC 1.9(c) Conflict of Interest; Former Client, provides:

> A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter

> reveal information relating to the representation or use such information to the disadvantage of the former client unless (1) the former client gives informed consent, confirmed in writing, or (2) these Rules would permit or require the lawyer to do so with respect to a client, or (3) the information has become generally known.

(emphasis added)

Proposed RPC 1.9(c) also diverges from ABA Model Rule 1.9(c) and current Tennessee RPC 1.9(c), which provide:

> Unless the former client consents after consultation, a lawyer who has formerly represented a client in a matter, or whose present or former firm has formerly represented a client in a matter, shall not thereafter:
>
> > (1) use information relating to the representation to the disadvantage of the former client except as the Rules otherwise permit or require with respect to a client, or when the information has become generally known; or
> >
> > (2) reveal information relating to the representation of the former client except as these Rules otherwise permit or require with respect to a client.

(emphasis added)

By their specific terms, ABA Model Rule 1.9(c) and the current Tennessee RPC 1.9(c) permit disclosure of "generally known" information only for the use of information relating to the representation to the disadvantage of the former client. RPC 1.9(c)(1). "Generally known" is not an exception to revealing information relating to the representation of a former client. RPC 1.9(c)(2). Proposed RPC 1.9(c) expands the exception of the disclosure of "generally known" information to both the use and revealing of information relating to the representation of the former client.

Proposed comment [8] to RPC 1.9 also provides that "generally known information" may be revealed and used as follows:

> Paragraph (c) provides that information acquired by the lawyer in the course of representing a client may not subsequently be revealed by the lawyer or used by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using or disclosing generally known information about that client when later representing another client.

(emphasis added)

Proposed comment [8a] to RPC 1.9 defines or explains the meaning of "generally known," as follows:

> Whether information is generally known depends on all circumstances relevant in obtaining the information. Information contained in books or records in public libraries, public-record depositaries such as government offices, or in publicly accessible electronic-data storage is generally known if the particular information is obtainable through publicly available indexes and similar methods of access. Information is not generally known when a person interested in knowing the information could obtain it only by means of special knowledge or substantial difficulty or expense. Special knowledge includes information about the whereabouts or identity of a person or other source from which the information can be acquired, if those facts are not themselves generally known. A lawyer may not, however, justify adverse use or disclosure of client information simply because the information has become known to third persons, if it is not otherwise generally known. Even if permitted to disclose information relating to a former client's representation, a lawyer should not do so unnecessarily.

The definition of "generally known" provided in RPC 1.9, cmt. [8a] is not a comment of the ABA Model Rules. The definition was taken from the Restatement of the Law, The Law Governing Lawyers, §59, p 458. Restatement §59 provides that "generally known" information is an exception to confidentiality, even to current clients.

As explained in proposed comment [8a], "generally known" includes information found in public records. As will be addressed below at ABA Lawyer's Manual on Professional Conduct 55:2006, simply because a matter is of public record doesn't necessarily make it "generally known." Although there is contrary authority, and as stated above, information which is part of the public record has generally not been excepted from confidentiality. RPC 1.6(a). See ABA Model Rules Annotated, pp 33-34; ABA/BNA Lawyer's Manual on Professional Conduct, 55:310.

ABA Lawyer's Manual on Professional Conduct provides with respect to "generally known" as follows:

> If information disclosed to the lawyer in the earlier representation has become generally known-for example, in public filings or records-by the time of the subsequent adverse representation, the lawyer may try to convince the court that this prevents a finding that the representations are substantially related. Arguably, no need exists in this situation to protect the former client from the lawyer's possible use of the information in the current representation. (citations omitted)
>
> The Restatement builds the "generally known" exception into its definition of "substantially related." See Restatement of the Law Governing Lawyers § 132(2) (2000) (matters are substantially related if substantial risk exists that current

representation will involve use of information acquired in the course of prior representation, "unless that information has become generally known"). See also Model Rule 1.9 cmt. [3] ("Information that has been disclosed to the public or to the other parties adverse to the former client ordinarily will not be disqualifying").

This view, however, probably will be embraced by a court only if it believes the proscription against subsequent adverse representation is concerned solely with preservation of client secrets. The court may focus more on loyalty and conclude that the lawyer's duty to the former client did not disappear simply because the information in question has become public or has been disclosed in another proceeding. (citations omitted)

Id. at 51:228-229

"Generally Known" Information. Although Model Rule 1.6 contains no exception for information that has become generally known, Model Rule 1.9 (Duties to Former Clients) does mention it, albeit not with respect to disclosure of information. Model Rule 1.9(c) prohibits both the disclosure and adverse use of information relating to the representation of a former client. With regard to the adverse use of information relating to the representation of a former client, Model Rule 1.9(c)(1) exempts information that has become "generally known." However, there is no similar exception when it comes to the disclosure of information about a former client. Model Rule 1.9(c)(2).

Id. at 55:311

Note that the ban on *revealing* a former client's confidential information remains in effect even though the information has become public knowledge. Model Rule 1.6.

Id. At 55:2006

The ban on adverse use of a former client's confidential information expires once the information has become generally known. Comment [8] to Model Rule 1.9 explains that the exception for generally known information prevents the ban on subsequent adverse use from becoming a general rule of disqualification: "the fact that a lawyer once served a client does not preclude the lawyer from using generally known information about that client when later representing another client." (citations omitted)

Information does not necessarily qualify as generally known merely because it is a matter of public record. According to Nassau County (N.Y.) Ethics Op. 96-7 (1996):

> Where, as here, the information at issue is merely the fact that a crime was committed and a former client incarcerated, it does not

> necessarily follow that the occurrence is one of general knowledge. While the majority of criminal convictions and incarceration situations are matters of "public record," unless the crime is particularly infamous, the public is generally unaware of the work of the criminal courts in our state. Thus, in most situations, a criminal conviction may be in the public record but not so generally known as to trigger permissible usage of confidence and secrets.

Id. at 55:2006. (emphasis added)

If "generally known" is the equivalent of "public," as excepted from confidentiality by proposed RPC 1.6(a)(3), public records would become an exception to confidentiality owed to current clients. Such would be a departure from ABA Model Rule 1.6 and current Tennessee Rule 1.6, and represents a substantial change in the interpretation and application of RPC 1.6. If that is not what is intended by proposed RPC 1.6(a)(3), such cannot be determined from the proposed rule. Because "public" is not defined with respect to RPC 1.6(a)(3), it is conceivable that "public" information which is proposed to be revealed regarding current clients may be broader than "generally known" information permitted to be disclosed regarding former clients by proposed RPC 1.9(c) and comment [8a]. Greater protection from disclosure of confidential information would, thereby, be afforded to former clients than to current clients. On the other hand, "public" may be narrower than "generally known." One simply cannot know. Attorneys seeking to interpret, understand, apply and comply with the rules and disciplinary counsel attempting to interpret, advise and enforce the rules need to know the scope of information which is confidential and, conversely, not confidential, not only because of the confidentiality protections afforded clients, but because of the substantial impact which confidentiality has on the determination of potential or actual conflicts of interest. RPC 1.7 and 1.9

The "generally known" exception to RPC 1.9(c) should not be expanded.

"Public" information should not be excepted from confidentiality by proposed RPC 1.6(a)(3), and if it is, the extent and breadth of that exception should be defined and limited such that it cannot be interpreted to include information not intended to be permitted to be revealed.

ISSUE 4: RPC 1.7: Conflict of Interest: Current Clients-The BPR, in its written comments, stated its opposition to the deletion of current Comment [19]. The Court asks the TBA to present its position regarding the issue and asks the BPR to present with more specificity its reason(s) for recommending the retention of the Comment.

The BPR incorporates herein its comments previously submitted.

Comment [19] is not in the ABA Model Rules of Professional Conduct. Comment [19] provides that resolving questions of conflict is primarily the responsibility of the attorney. It further provides that adversary counsel can raise the issue of conflict of interest. If comment [19] is deleted, these propositions are not otherwise stated in rules or comments. There is no reason which dictates deletion of a useful and instructive comment simply because it is not a part of the ABA Model Rules.

ISSUE 5: RPC 1.10. Imputation of Conflicts of Interest: General Rule-The Court asks the TBA to present argument regarding its proposed deletion of existing RPC 1.10(d) and asks the BPR to present its position regarding this issue.

The BPR has not previously provided written comment regarding RPC 1.10.

Tennessee Formal Ethics Opinion 89-F-118 adopted screening as a mechanism by which imputed disqualification of firm members of a disqualified/conflicted attorney may be avoided. The Supreme Court addressed the issue of screening in Clinard v. Blackwood, 46 S.W.3d 177 (Tenn. 2001). The Court, relying on the appearance of impropriety standard of the prior Code of Professional Responsibility, determined that screening was not appropriate when an attorney who had changed firms had been substantially involved in the case while at the prior firm. The Court stated:

> . . . Also, by permitting the Waller firm to represent the Clinards in this case, the public would be left to conclude at best that the judiciary favors considerations of attorney mobility over client confidentiality and at worst that Tennessee attorneys are free to disregard ethical considerations for sake of better employment opportunities.

Id. at p. 188.

Despite the fact that the "appearance of impropriety" standard was not included in the 2003 Rules of Professional Conduct, those rules incorporated the Clinard v. Blackwood standard into RPC 1.10(d). See comment [9] to current RPC 1.10. RPC 1.10(d) provides:

> (d) The procedures set forth in paragraph (c) may not be used to avoid imputed disqualification of the firm, if
>
> > (1) the disqualified lawyer was substantially involved in the representation of a former client; and
> >
> > (2) the lawyer's representation of the former client was in connection with an adjudicative proceeding that is directly adverse to the interests of a current client of the firm; and
> >
> > (3) the proceeding between the firm's current client and the lawyer's former client is still pending at the time the lawyer changes firms.

Proposed RPC 1.10 deletes current RPC 1.10(d) and would permit screening regardless of the disqualified attorney's prior involvement in the case.

The ABA Lawyer's Manual on Professional Responsibility 51:2105 provides:

> A growing number of states-nearly half as of 2009-have incorporated the concept of screening into their own ethics rules of governing imputation of conflicts when lawyers change firms.
>
> Some states have adopted a broad screening rule, similar to the screening provision in Model Rule 1.10, that gives firms wide leeway to employ screening measures as a means to avoid imputation of conflicts from a lawyer's prior practice at another private firm. This group includes Delaware, Illinois, Kentucky, Maryland, Montana, Michigan, North Carolina, Oregon, Pennsylvania, Rhode Island, Utah, and Washington.
>
> Other jurisdictions have adopted rules that allow screening when lawyers change firms, but only in limited circumstances such as when the lawyer's prior role was not substantial, the lawyer did not have primary responsibility in the prior representation, or the lawyer did not gain information in the prior representation that would be significant or material to the current representation. This group includes Arizona, Colorado, Indiana, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Tennessee and Wisconsin.
>
> Not all states are jumping in the bandwagon, however. Of those jurisdictions that have revised their versions of Rule 1.10 in recent years, quite a few have declined to relax their anti-screening stance. This group includes Alabama, Arkansas, Connecticut, Florida, Idaho, Iowa, Kansas, Louisiana, Maine, Mississippi, Missouri, Nebraska, New Hampshire, New York, South Carolina, South Dakota, Virginia and Wyoming.
>
> The balance of views among the states on the issue of screening is continually shifting as a growing number of jurisdictions update their rules based upon a review of the ABA Ethics 2000 Commission's work. And given the ABA's embrace of screening Model Rule 1.10 in 2009, additional states are likely at some point to add a screening provision to their own imputed disqualification rules.

The deletion of RPC 1.10(d) would move Tennessee from the group of states which has a substantial involvement component to screening permitted by RPC 1.10(c) and would return Tennessee to the group of states which have no such component. Despite the fact that "appearance of impropriety" standard was not adopted in the of the Rules of Professional Conduct, the above quoted reasoning of this Court in Clinard v. Blackwood is still, nonetheless, applicable.

ISSUE 6: RPC 1.12. Former Judge or Arbitrator-The TBA's proposed RPC 1.12, like Tennessee's current RPC 1.12, omits mediators and third-party neutrals from the rule; ABA Model however, includes mediators and third-party neutrals. The Court asks the TBA to present argument as to whether the Tennessee's RPC 1.12 should include mediators and third-party neutrals, and, if so, the effect of such inclusion on the other RPCs.

The BPR has not previously provided written comment regarding RPC 1.12.

ABA Model Rule 1.12 includes arbitrators and third party neutrals. ABA Model Rule 1.12 extended application to mediators and other third party neutrals in 2002. Current Tennessee RPC 1.12 nor proposed RPC 1.12 are applicable to arbitrators and third party neutrals. As opposed to the ABA Model Rule, the continuing obligation of third party neutrals is addressed in Tennessee by RPC 2.4(e)(2), as follows:

Upon termination of a lawyer's service as a dispute resolution neutral, the lawyer:

* * *

(2) shall afford each party to the dispute the protections afforded a client by Rules 1.6, 1.8(b), and 1.9.

The ABA chooses to treat former arbitrators and third party neutrals in the same manner as former judges and arbitrators in Model Rule 1.12. The Tennessee rule, on the other hand, treats former third party neutrals in the same manner as former attorneys. The Tennessee approach is in line with the majority of decisional law. ABA Lawyer's Manual on Professional Conduct 91:4506. The BPR does not take issue with this approach.

It should be noted, however, that proposed comment [13] to proposed RPC 1.10 states, "the disqualification of lawyers associated in a firm with a former judge, arbitrator, mediator or other third party neutral is governed by RPC 1.12," even though proposed RPC 1.12 does not address mediators and third party neutrals.

ISSUE 8: RPC 1.17: Sale of Law Practice-The Court asks the TBA to present oral argument concerning the following questions: In the context of the TBA's proposal, "area of law practice" appears to refer to a *subject* area of law practice (not a geographic area)-is that correct? What are the policy reasons behind the American Bar Association's inclusion of the sale of an "area of practice" in Model Rule 1.17, and is there a real need for such a rule in Tennessee? How often would the TBA expect the sale of an area of practice to occur in Tennessee, and what are actual examples of such sales? Are the terms "area of practice" and "geographical area" too vague for purposes of disciplinary enforcement? The Court also requests that the BPR present its view on this issue.

The BPR has not previously provided written comment regarding RPC 1.17.

ABA Annotated Model Rules of Professional Conduct (Sixth Edition) provides:

> The Rule as originally adopted required that the entire practice be sold to a single purchaser, and that the selling lawyer completely cease practicing law. The rationale was that purchasers could otherwise take only the most profitable cases in a practice, and leave "less desirable" clients unrepresented.
>
> These requirements, however, were not tailored properly to accomplish this purpose, and were removed in 2002. The Ethics 2000 Commission gives this explanation for the change:
>
> > The Commission believes that the present requirement is unduly restrictive and potentially disserves clients. While it remains important to ensure the disposition of the entire caseload, it is not necessary to require that all cases must be sold to a single buyer. For example, it may make better sense to allow the sale of family-law cases to a family lawyer and bankruptcy cases to a bankruptcy lawyer. Common sense would suggest the lawyer should sell the cases to the most competent practitioner and not be limited by such a "single buyer" rule, and paragraph (b) has been redrafted accordingly.
>
> American Bar Association, A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2005, at 372 (2006).

Id. at 259. See also ABA Lawyer's Manual on Professional Conduct 91:811.

The BPR does not take issue with proposed RPC 1.17.

ISSUE 9: RPC 1.19: Client File Materials-The Court asks the TBA to present oral argument concerning its proposed RPC 1.19, especially in light of the fact that the ABA Model Rules do not contain a comparable rule. The Memphis Bar Association, the DAs Conference, the PDs Conference, and one District Public Defender each filed written comments expressing various concerns with proposed RPC 1.19. The Court requests that the Memphis Bar Association, the DAs Conference and the PDs conference present their respective positions regarding the proposed rule. Although the BPR did not file written comments concerning this proposed rule, the Court asks the BPR to present its position regarding the proposal.

In presenting their oral arguments, the parties should address, without limitation to raising other issues concerning this proposed rule, the following questions: Should the lawyer be given the discretion to remove certain information, for the protection of others, before giving the file to the client? How does RPC 1.4, Comment 7, affect the obligation under RPC 1.19 to turn over the clients' file "upon request," but RPC 1.16(d)(4) could be read as requiring the lawyer to automatically turn over the client file- are those two provisions consistent? Could the definition of "client file materials" in RPC 1.19 be narrowed to address the PDs Conference's concerns?

The BPR has not previously provided written comment regarding RPC 1.19.

Generally 1.16(d) addresses requirements of attorneys who have been dismissed or withdrawn from further representation. RPC 1.19 addresses providing files to clients generally. Comment [7] to RPC 1.4 appears to be directed to clients whom the attorney is continuing to represent. With respect to RPC 1.4, cmt. [7], the ABA Annotated Model Rules of Professional Conduct (Sixth Edition) provides, in part:

> . . . The Comment gives as an example the case of a lawyer withholding a psychiatric diagnosis of a client if the examining psychiatrist indicates that disclosure would be harmful to the client. However, the Comment also states that the lawyer may not withhold information merely to serve the interests or convenience of the lawyer or a third person. See, e.g., D.C. Ethics Op. 327 (2005) (lawyer representing multiple defendants who all waived client-lawyer confidentiality vis-à-vis co-defendants may not withhold material information because one client later changes his mind); N.D. Ethics Op. 97-12 (1997) (lawyer may avoid disclosing client's psychological records to client if lawyer reasonably believes that disclosure would result in substantial harm to client or others; lawyer should urge the client to discuss records directly with psychologist, with or without a lawyer present); cf. In re Disciplinary Action against Howe, 626 N.W.2d 650 (N.D. 2001) (although retainer agreement stated lawyer would send "itemized bills from time to time," lawyer did not send bill for more than two years and then used non-payment as excuse for discontinuing representation).

Id. at 60.

The BPR does not take issue with proposed RPC 1.19.

ISSUE 12: RPC 3.8: Special Responsibilities of a Prosecutor - The TBA includes in its proposed RPC 3.8 new paragraphs (g) and (h), regarding wrongful convictions. The three United States Attorneys in Tennessee jointly filed a written comment opposing these provisions. The Court asks the TBA to present argument concerning 3.8(g) and (h) and asks a representative of the United States Attorneys to present argument concerning their opposition to those proposals. The Court also asks the DAs Conference, the PDs Conference and the BPR to present their respective positions on this topic. The parties should address the following questions, without limitation as to raising other issues on this topic: Should any form of 3.8(g) and (h) be adopted? If so, should the scope of 3.8(g) and (h) be narrowed to cover only wrongful convictions in the prosecutor's territorial jurisdiction?

The BPR has not previously provided written comment regarding RPC 3.8.

The BPR will not offer a written comment regarding this issue.

The BPR does not take issue with proposed RPC 3.8(g)(h).

ISSUE 13: RPC 7.3: Solicitation of Potential Clients - In RPC 7.3(a)(2), the BPR suggests changing "prior professional relationship" to "prior legal professional relationship." The Court asks the TBA and the BPR to argue their respective positions concerning this issue.

The BPR incorporates herein its comments previously submitted.

Proposed RPC 7.3(a) provides:

> (a) ~~If a significant motive for the solicitation is the lawyer's pecuniary gain, a~~A lawyer shall not ~~solicit professional employment by in-~~by in-person, live telephone, or real-time electronic contact ~~from a prospective client who has not initiated the contact with the lawyer and with whom the lawyer has no~~solicit professional employment from a potential client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:
>
> (1) is a lawyer; or
>
> (2) has a family, close personal, or prior professional relationship with the lawyer; or
>
> (3) has initiated a contact with the lawyer.

ABA Model Rule 7.3(a) provides:

> (a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:
>
> (1) is a lawyer; or
>
> (2) has a family, close personal, or prior professional relationship with the lawyer.

ABA comment [4] to RPC 7.3 provides:

> There is far less likelihood that a lawyer would engage in abusive practices against an individual who is a former client, or with whom the lawyer has a close personal or family relationship, or in a situation in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain.

It appears from the ABA comment [4] that reference to "prior professional relationship" is making reference only to former clients.

ISSUE 15: RPC 7.3: Solicitation of Potential Clients - The BPR, in its written comments, recommended retaining the three subparagraphs (detailing the "mechanics" of the required disclosures) in the *current* RPC 7.3(c)(l). The Court asks the TBA and the BPR to argue their respective positions concerning this issue.

The BPR incorporates herein its comments previously submitted.

The proposed rules delete (1)(2)(3) from the current RPC 7.3(c) as follows:

(1) The words "Advertising Material" appear on the outside of the envelope, if any, and at the beginning and ending of any recorded or electronic communication.~~Each communication, including envelopes and self-mailing brochures or pamphlets, shall include the words "THIS IS AN ADVERTISEMENT" as follows:~~

~~(ja) In written communications sent by mail, telegraph, facsimile, or computer transmission, the required wording shall appear in conspicuous print size on the outside envelope, if any, and at the beginning and end of the written material. If the written communication is a self-mailing brochure or pamphlet, the required wording shall appear on the address panel of the brochure or pamphlet.~~

~~(jib) In video communications, the required wording shall appear conspicuously in the communication for at least five seconds at the beginning and five seconds at the end of the communication and the required wording of the audio portion of the video communication shall be presented as required in subsection (c)(1)(c) below.~~

~~(iiic) In audio communications, the required wording shall be presented at both the beginning and end of the communication in a tone, volume, clarity and speed of delivery at least equivalent to the clearest quality tone, volume, clarity and speed used elsewhere in the communication.~~

These proposed deletions are not part of ABA Model Rule 7.3(c). The deleted provisions of the rule address specifics or mechanics of the rule governing direct solicitation communication. These specifics are not otherwise stated in the rules or comments. The provisions proposed to be deleted serve the purpose of enforcement. Deleting these provisions serves no apparent purpose, other than consistency with ABA Model Rules. That purpose alone is not sufficient if their retention is otherwise beneficial.

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IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE: PETITION FOR ADOPTION OF AMENDED TENNESSEE RULES OF PROFESSIONAL CONDUCT	) Case No.: M2009-00979-SC-RL1-RL	

BRIEF OF CHRISTIAL LEGAL SOCIETY—CHATTANOOGA CHAPTER IN SUPPORT OF ITS PROPOSED CHANGE TO THE TENNESSEE RULES OF PROFESSIONAL CONDUCT

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Comes now Christian Legal Society—Chattanooga Chapter (hereinafter "CLS"), by and through its undersigned members and representatives, and submits this Brief in support of the proposed rule change previously submitted to this Honorable Court, and pursuant to this Court's invitation to brief proposed rule change in its Order filed April 21, 2010.

I. CLS' RATIONALE FOR INCLUSION OF ITS PROPOSED RULE CHANGE

Pursuant to its previous submission, CLS respectfully requests the following be added to the RPC as part of the Preamble, section 7; or part of the Scope, section 16; or as a new rule 1.20; to read substantially as follows:

> Nothing in these Rules of Professional Conduct shall infringe upon, limit, or otherwise deny an attorney's freedom to decline or withdraw from representation in any case in which representation would violate the attorney's sincerely held religious beliefs or in any case where the attorney's beliefs could conflict with the zealous and effectual representation of the client.

Under the First Amendment to the Constitution of the United States, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Const. Am. 1. Furthermore, under the Constitution of the State of Tennessee, "all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience" and "no human authority can, in any case whatever, control or interfere with the rights of conscience." Tenn. Const. Art. I, Sec. 3, 4.

The rationale of CLS is to state within the four corners of the RPC that the constitutional protections reserved by all of the citizens of the United States and of the State of Tennessee fully apply to licensed attorneys in their practice of law, so that attorneys will not find it necessary to consult or refer to these constitutions, or other

external sources, while defending themselves against a grievance. Inclusion of the proposed rule will make clear that the RPC are not intended in any way to limit or supplant the constitutional rights of attorneys in their lawful legal practice, regardless of whether a particular party or tribunal agree or disagree with the attorney's sincerely held religious beliefs and regardless of whether those in disagreement constitute a political majority.

It is the intent of the CLS to not only protect the rights of attorneys to the free exercise of their religious conscience, but also to provide for the highest level of advocacy for their clients. An attorney who finds himself in a situation where the zealous and legal advocacy on behalf of his client causes him to be at odds with his conscience, as informed by his sincerely held religious beliefs, will find himself in a situation that is utterly untenable. Either the conscience of the attorney will be violated or the cause of the client will suffer.

Further, attorneys should have the express right to decline representation which could potentially entail a violation of conscience or belief. Forcing an attorney to accept such representation is clearly not in the best interest of the client. As both of these described outcomes would be detrimental to the legal system as a whole, all efforts should be undertaken to prevent this type of conflict from arising in the first place. While this is always the responsibility of the attorney to determine, the RPC should fully support and endorse the free exercise of attorneys conscience and religious belief.

Thus, CLS believes the addition of our proposed rule into the RPC will expressly acknowledge the constitutional rights of attorneys, safeguard the consciences of members of the bar, and be in the best interest of the public.

II. WHY THE RPC MAY NOT ALREADY SUFFICIENTLY ADDRESS THE ISSUES RAISED BY CLS

In its Order of April 21, 2010, this Court asked CLS to specifically address whether RPC's 1.7, 1.16(b), 1.16(b)(4), and 6.2(c) are not already sufficient to protect an attorney's exercise of his or her religious beliefs in declining or withdrawing from representation. CLS would respectfully show unto the Court that those rules may not be sufficiently clear on this topic.

First, Rule 1.7(a)(2) concerning a "personal interest" of the attorney clearly refers to an individual "interest" of an attorney that is otherwise quantifiable as a business, professional, or pecuniary interest, quite different from the kinds of interests that would be described as "religious." Proposed comment 10 to Rule 1.7 specifically refers to the kinds of interests covered by RPC 1.8. None of the matters described in RPC 1.8, nor anything else in RPC 1.7 or any of its current or proposed comments give any indication that a lawyer could classify a religious objection as a "personal interest." Further, to do so would automatically turn the attorney's religious conviction into a conflict of interest. This unwarranted and unwanted arrangement could easily lead to the serious consequence of an attorney's supposed religious convictions being used against him to conflict him out of certain representation which he would otherwise be free to take. CLS's proposed rule amendment does not purport to create a legal conflict of interest as that concept has been historically understood to apply to attorneys. Therefore, RPC 1.7 as either currently existing or as proposed amended may not suit the concerns of CLS, and indeed its use in such manner could easily lead to unconstitutional discrimination.

Second, RPC 1.16, and specifically 1.16(b)(4)(as proposed) may not adequately address the concerns of CLS. We are particularly concerned with the proposed changes to proposed RPC 1.16(b)(4) and comment 7 to RPC 1.16. Both the rule and comment have removed the ability for a lawyer to withdraw from representation if the "objective" of the representation should be "repugnant or imprudent" to the lawyer. Instead, the proposed changes only allow withdrawal on the basis of some "action" to be taken. An "action" taken in the course of representation differs substantially from the overall objective of the representation. Just as it is possible to pursue even the most virtuous objective in a sharp and unprofessional manner, so it is conceivable that an attorney might be asked to pursue a repugnant objective with ordinary and well worn methods and means that individually could only be described as orthodox and benign. Thus, the removal of the "objective" phrase raises the most concern for CLS. However, even if RPC 1.16(b)(4) were left unaltered (other than being renumbered) CLS still finds that it may not be sufficient for future generations of lawyers who may find that the social mores of society have shifted so far out of alignment with their religious views, that even the broadly subjective standard of what a lawyer considers "repugnant" may not provide a sufficient justification for withdrawal from representation. Therefore we ask this Court to provide a specific safe haven for all attorneys of any faith to freely exercise their religious views, regardless of whether anyone else might find them repugnant, or otherwise.

Finally, CLS believes that RPC 6.2(c), as similarly stated above, may not adequately protects an attorney in a rapidly changing society from future definitions of "repugnant," and respectfully asks this Court to provide a specific safe haven for all

attorneys of any faith to freely exercise their religious views, regardless of whether anyone else might find them repugnant, or otherwise.

III. CLS' RESPONSE TO THE TBA'S OBJECTION TO CLS' PROPOSED RULE CHANGE

While the Court did not specifically request a response from CLS on comments and response of the Tennessee Bar Association as expressed by the Standing Committee on Ethics and Professional Responsibility (hereinafter "TBA"), CLS believes some limited attention should be given to those comments.

Whether any other U. S. jurisdiction does or does not have a similar rule provision to that proposed by CLS would seem to be neither relevant nor persuasive. If the rule proposed by CLS is in fact right and just, recognizes that lawyers serving in the course and scope of their profession have constitutional rights and a right of conscience, is beneficial to the profession and the public, and resolves confusion and speculation about whether such and such a rule or combination of rules afford these rights and accomplish these goals, CLS believes that it should be included in the RPC--whether all other states do this or no other state yet does it.

The TBA further objects that the determination of "sincerely held religious belief" is unworkable, and that it would be "very bad public policy" for a disciplinary proceeding to turn on whether or not a lawyer's religious beliefs are sincerely held or not. However, CLS would show to the court that a lawyer's beliefs, and the relative sincerity with which they are held are simply another issue of fact to be determined by the trier of fact, like any other fact provable by evidence, or not proved by lack of evidence. Simply because a matter may be hard to prove in a given case, that does not affect the validity or

reasonableness of the defense, nor affect whether or not the defense constitutes good or bad public policy. There are many issues with which the courts deal every day: state of mind, intent, insanity, just to name a few, which are difficult things to prove from time to time. Nevertheless, these issues are still elements of cases that judges or juries determine every day.

Further, there exist many precedents in American jurisprudence for the determination of a "sincerely held religious belief" or equivalent as an element in cases involving infringement on religious rights. *See, e. g., United States v. Seeger*, 380 U.S. 163, 85 S.Ct. 850, 13 L.Ed.2d 733 (1965) (adjudicating several cases regarding assertions of conscientious objector status to military service, and requiring petitioners to show "sincere religious beliefs." *Id.* at 176); *Equal Employment Opportunity Commission v. Unión Independiente De La Autoridad De Acueductos y Alcantarillados De Puerto Rico*, 279 F.3rd 49 (C.A.1 2002) (adjudicating a Title VII religious discrimination case requiring the plaintiff to show, *inter alia*, a bona fide religious practice that conflicts with the employment).

Finally if TBA's objection is to the "sincerely held" qualifier, CLS admits that such could be stricken without major injury to the proposal itself, but theoretically would expand it to include contrived or frivolously held beliefs.

The third objection raised by TBA specifically addresses RPC 6.2(c), and a lawyer's declining an appointment by a court due to its repugnance. It is possible that this rule is so broad and so subjective (the lawyer decides whether the case or client is sufficiently repugnant to prevent zealous advocacy, probably allowing the application of religious beliefs to this determination) that it is even more expansive than the CLS

proposal. Perhaps CLS should leave well enough alone, at least in the court appointed counsel context. It may be that the drafters of RPC 6.2(c) intended to allow an attorney to include religious beliefs in the determination of which representation would be too repugnant. However, as stated previously in this brief, this may not be the way the rule would be enforced. The CLS proposal would clear up any doubt in cases where the repugnance arises from a lawyer's religious beliefs as applied by the lawyer to the client or cause.

Finally, the TBA suggests that CLS's proposed rule would somehow trump a court's authority to appoint counsel to a case, or pre-determine a court's decision in a request to withdraw from representation in a case. TBA further suggests that the CLS proposed rule pits the well-established constitutional right of counsel against the much less established right of a lawyer not to represent any particular person. CLS first notes that the TBA overlooks the even clearer bedrock constitutional right to the free exercise of religion. Further than that, CLS can only respond that the TBA itself recognized in its comment that the judicial power to decide such matters exists as a matter of law beyond the scope of the RPC. While the RPC may be persuasive on a court as to what standard to apply in a given situation, CLS understands that the RPC do not bind the courts in such circumstances, but rather designed to guide lawyers in the conduct of their profession, and the Board of Professional Responsibility in the exercise of its role in assisting this Court in overseeing the profession. This, of course, remains true whether the Court decides to include the CLS proposal, or not.

IV CONCLUSION

The proposed addition to the RPC merely recognizes that the guarantees of religious freedom contained Article I, Sections 3 and 4 of the Constitution of Tennessee, and the First Amendment to the United States Constitution, apply to licensed attorneys in Tennessee acting in their professional capacities. This provision will fill any gaps that exist in the interplay of the various rules cited by the TBA and examined by the Court, as well as others, and will benefit both the public in providing zealous and willing advocates, and lawyers who can have their hearts fully in their work.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of foregoing document has been personally served upon the below listed counsel by deposit in the United States mail, postage prepaid, this 13th day of May, 2010.

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May 13, 2010

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Re: Amended Tennessee Rules of Professional Conduct, Brief of Christian Legal Society - Chattanooga

Dear Mr. Catalano:

Enclosed are the original and six copies of the brief to be filed on behalf of Christian Legal Society - Chattanooga respecting its proposed change to the rules. Please receive these for filing, and return a file stamped copy in the enclosed, self-addressed, stamped envelope.

We do expect to appear on June 1 to address the Court's questions as set out in its Order of April 21, 2010. Thank you.

Respectfully yours,

SPEARS, MOORE, REBMAN & WILLIAMS, P.C.

Scott N. Brown, Jr.

SNB,jr:sg
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