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January 21, 2005

The Honorable Michael Catalano
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Nashville, TN 37219

IN RE: BOARD OF PROFESSIONAL
RESPONSIBILITY ADVISORY COMMITTEE
NO. M2004-01600-SC-RL2-BP

Dear Mike:

Attached please find an original and six copies of the Comment of the Tennessee Bar Association in reference to the above matter.

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

Very truly yours,

Allan F. Ramsaur
Executive Director

Cc:
Charles W. Swanson, President, Tennessee Bar Association
Gail Vaughn Ashworth, General Counsel
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IN THE SUPREME COURT OF TENNESSEE

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IN RE:

**BOARD OF PROFESSIONAL
RESPONSIBILITY ADVISORY COMMITTEE.**APPELLATE COURT CLERK
NASHVILLE
No. M2004-01600-SC-RL2-BP**COMMENT OF THE TENNESSEE BAR ASSOCIATION**

In response to the invitation of this Court to the public, the bar, and the judiciary to submit comments concerning the reports of the Board of Professional Responsibility Advisory Committee ("BPR Advisory Committee") and the American Bar Association Standing Committee on Professional Discipline ("ABA Standing Committee") on the lawyer regulatory system in Tennessee, the Tennessee Bar Association ("TBA") submits the following Comment:

INTRODUCTION

In August 2003, the ABA Standing Committee issued a report on the Tennessee lawyer regulation system. In October 2003, the Chief Disciplinary Counsel to the Board of Professional Responsibility ("Chief Disciplinary Counsel" or "CDC") prepared a response to that report with selected comments of disciplinary counsel. On June 15, 2004, this Court's BPR Advisory Committee filed its report on the lawyer regulatory system with the Court and responded to the ABA Standing Committee report.

In an effort to respond on behalf of the organized bar, the leadership of the TBA asked the TBA Standing Committee on Ethics and Professional Responsibility (the "TBA Standing Committee") to review these various reports and develop comments to be submitted on behalf of the TBA to this Court. The Committee appointed a three-member sub-committee consisting of attorneys Matthew J. Sweeney of Nashville, Albert C. Harvey of Memphis, and David Wade of

Memphis, who reviewed these reports and responses and led the Committee's deliberations. The TBA Standing Committee then debated and approved a draft Comment, which was subsequently presented to, and debated and approved by, the TBA House of Delegates and Board of Governors, leading to this Comment. This Comment thus reflects the considered judgment of a significant number of TBA volunteers and leaders, many with long experience in the field of ethics and lawyer regulation.

In an effort to be most helpful and constructive, the format of this Comment reflects not only the positions taken by the TBA after its deliberation, but places them in the context of the positions taken on pending recommendations by the BPR Advisory Committee, the Chief Disciplinary Counsel, and the ABA Standing Committee.

As the submissions of the BPR Advisory Committee, the Chief Disciplinary Counsel, and the ABA Standing Committee each provide in-depth analysis of the various issues, the TBA felt it unnecessary to comment in detail on every issue. In most respects, the TBA adopts those responses where both the Chief Disciplinary Counsel and the BPR Advisory Committee agreed. In a few instances, the TBA recommends minor deviations from the views represented.

In a few instances where the Chief Disciplinary Counsel and the BPR Advisory Committee agreed, the TBA disagrees and explains its position and reasoning. There were also several circumstances where the Chief Disciplinary Counsel and the BPR Advisory Committee disagreed. As to those points, the TBA Standing Committee has stated its recommendation with a brief supporting explanation.

The ABA Standing Committee made seventeen numbered recommendations, some with lettered sub-parts. The format of this Comment employs the same numbering system, stating the ABA Standing Committee recommendation, followed by very brief summaries of the responses

of the Chief Disciplinary Counsel and the BPR Advisory Committee, all to provide context. The TBA's comment and recommendation then follow.

Broadly speaking, the TBA observes that the ABA Standing Committee's recommendations seem aimed, in several instances, at decreasing the authority and involvement of the Board of Professional Responsibility in lawyer discipline. One primary example of this apparent goal is Recommendation 2, calling for the appointment of an "oversight committee." Based on the experience of the TBA, and upon reports from attorneys around the state, the TBA believes that the Board of Professional Responsibility functions quite well in its central role in Tennessee's lawyer disciplinary system. In states where a unified or integrated bar¹ elects the membership of their respective disciplinary boards, oversight could be a key issue; however, adequate protections are built into the Tennessee system, if for no other reason than that Board of Professional Responsibility members are appointed by this Court. The TBA believes that this key difference offers a substantial check and balance on lawyer self-regulation.

Also, while the TBA anticipates that amendments resulting from consideration of these reports will be formally adopted by the Court as part of Rule 9 or another of this Court's Rules,² we have noted certain specific matters that we believe should be stated clearly as part of the Rule. Singling out these specific matters, however, does not indicate that the TBA Committee believes that other recommendations are less significant or that they should not be part of Rule 9.

¹ It may well be that a number of the recommendations of the ABA Standing Committee originate from experience in, or reflect a bias in favor of, a unified or integrated bar structure that includes direct bar oversight and administration of the lawyer disciplinary function.

² The TBA also anticipates that the Court would publish for public comment any resulting amendments. As it has for many years, the TBA stands ready to assist in drafting any new or amended rules needed to implement any recommendations adopted.

TBA COMMENT

1. The Office of Disciplinary Counsel Should Have More Discretion and Increased Resources to Ensure Efficient and Effective Processing of Cases.

- (A) The CDC should have greater authority to act independently, such as to initiate investigations and to dismiss cases. Presently, the CDC must secure permission from the BPR to take either action.**

CDC:³ Agrees in part and disagrees in part (but not in response to this section of the report, but a later portion). Agrees that CDC should have authority to dismiss, subject to right of complainant to appeal decision. Believes that BPR should still decide whether there is probable cause for initiating a formal investigation.

BPR Advisory Committee:⁴ Does not address this issue, except in the context of appeal of any dismissal, as addressed below.

TBA Recommendation: Agrees in part and disagrees in part.

The TBA recommends that the CDC have the authority to dismiss a case, subject to the complainant's right to appeal, as addressed below. The TBA recommends that the BPR retain the jurisdiction to determine whether probable cause has been established for the purpose of bringing a formal petition for discipline as an important and effective check on the system.

- (B) Chief Disciplinary Counsel should be appointed by the Court and serve at the Court's pleasure, which would be consistent with the practice in a majority of jurisdictions. CDC also should be responsible for hiring and firing all office personnel.**

CDC: Agrees that appointment by the Court would be beneficial by fostering and enhancing the Court's confidence in the operation of the system, provided the current apolitical environment can be maintained. Some members of the staff have concerns that the apolitical environment can be maintained.

CDC does not address the hiring and firing of other personnel.

BPR Advisory Committee: Disagrees with the recommendation. It believes that the BPR should maintain the authority to appoint the CDC because it allows the

³ In this and similar portions of this Comment, the TBA refers to the response of the Chief Disciplinary Counsel and his staff dated October 2003 to the ABA Standing Committee's report.

⁴ In this and similar portions of this Comment, the TBA refers to the report and recommendation of the BPR Advisory Committee dated June 15, 2004.

CDC to maintain a level of independence and allows the CDC to remain apolitical.

The BPR Advisory Committee does not address the hiring and firing of other personnel.

TBA Recommendation: Disagrees with the recommendation.

The BPR should have and retain the authority to appoint and remove the CDC.

The TBA believes that the CDC should have the authority to hire and fire the staff and have overall administrative responsibility for the office and the staff.

- (C) **An Administrative Oversight Committee should be appointed by the Court.**

See discussion under Recommendation 2, below.

- (D) **The Office of the CDC should cease summarizing of complaints. It should just send out the complaint as received, because it will save time and permit a more complete and effective response to the grievance made.**

CDC: Disagrees because the summary process is not time-consuming or difficult and assists all participants in identifying the factual issues to be addressed as well as identifying the rules potentially implicated. Furthermore, the entire complaint is provided in all instances upon request.

BPR Advisory Committee: Disagrees with the recommendation as summarizing appears to be a useful function as presently employed.

TBA Recommendation: Disagrees.

Under the circumstances, the TBA sees no need for a change.

- (E) **The Office of the CDC should stop providing informal ethics opinions or, alternatively, if it does continue to provide the service, it should segregate it from the investigative and prosecutorial functions. The ABA Committee believes that the service is too time-consuming and present practices permit forum-shopping for favorable opinions.**

CDC: Disagrees and notes that there have been few instances of forum-shopping, and none with harmful effects. Additionally, it assists the staff to be aware of and sensitive to the day-to-day trials and tribulations of members of the bar.

BPR Advisory Committee: Disagrees as well, noting that in 2002 the Office of the CDC received about seven inquiries a week, accounting for approximately

two hours of the lawyers' time. Additionally, this area adds considerably to the work satisfaction of the lawyers and helps them to keep up with developments and concerns of all areas of practice.

TBA Recommendation: Disagrees, but suggests to the Chief Disciplinary Counsel an approach to handling informal opinions.

The informal opinion process is valuable and should be continued.

The following is only a suggestion addressed to the CDC based on the experience of the members of the TBA Standing Committee, and is not proposed as an amendment to Rule 9. In the opinion of the Committee, it might be helpful to all concerned if there were a more marked separation between the disciplinary function and the valuable service of providing informal oral ethics opinions⁵ to inquiring lawyers. Such a separation would defeat forum-shopping for favorable opinions and also would help develop some consistency in the content of the opinions rendered. The CDC might appoint one specific staff lawyer to respond to informal opinion requests. That position within the office could be rotated on a yearly or more frequent basis, at the discretion of the CDC. The TBA Standing Committee also would suggest that a brief summary of each informal opinion be reduced to writing and circulated within the office to notify all staff of informal advice being given to inquiring lawyers for specific situations. This technique also would permit better identification of areas of problem or significance to the bar.

(F) The Office of the CDC should hire an Investigator and a Paralegal to lessen the workload and better facilitate the investigative process.

CDC: Disagrees, contending the present process has proven to be the most efficient.

BPR Advisory Committee: Disagrees as well, contending that the office should not be micro-managed.

TBA Recommendation: Disagrees.

The TBA does not believe that the CDC should be required to hire a paralegal or investigator. However, in this age of highly developed paraprofessional assistance for lawyers in all practice areas, it would seem that the support that such staffing could provide would be welcome and would likely promote efficiency. CDC should be permitted to hire a full-time or part-time paralegal or investigator, as needed.

⁵ This suggestion does not encompass the issuance of Formal Ethics Opinions or Informal Advisory Opinions.

2. **The Court Should Create An Oversight Committee To Assist With Strategic Planning For And Oversight Of The System.**

CDC: Disagrees that there is any need to change the structure of present system, although it suggests that it may promote the BPR's efficiency to reduce the number of its members to six lawyers and three lay members. The present structure works fine.

BPR Advisory Committee: Disagrees as well, noting that the ABA Standing Committee recommendation is based on its opinion of model practices rather than any existing deficiency in the Tennessee system.

TBA Recommendation: Disagrees.

The TBA sees no reason for change or to add an additional bureaucratic level to the present structure.

3. **Appeals to the Circuit/Chancery Courts Should Be Eliminated And The Structure And Duties Of The Board Should Be Revised.**

CDC: Agrees to eliminate role of courts. Disagrees on revision of structure of the Board, but would create new appeals panel within the Board and eliminate de novo review.

BPR Advisory Committee: Agrees to eliminate role of courts. Disagrees on revision of structure of the Board, but would create new appeals panel within the Board and eliminate de novo review.

TBA Recommendation: Strongly Disagrees, with comments.

Pure de novo review should be eliminated and replaced with a more limited form of de novo review in which: (1) the review by the Chancery or Circuit Court is limited to the record created before the hearing panel in a manner parallel to the limitations imposed upon the record on appeal from an original decision in Chancery or Circuit Court to the Court of Appeals, and (2) the review of the factual and legal conclusions of the hearing panel is undertaken pursuant to the standard of review afforded to decisions of a Chancery or Circuit Court by the Tennessee Rules of Appellate Procedure and related law, including affording factual determinations a presumption of correctness and permitting reversal of such factual determinations only if the preponderance of the evidence is otherwise. See, e.g., Tenn. R. App. Proc. 13(d); Cross v. City of Memphis, 20 S.W.3d 642 (Tenn. 2000).

4. **The Structure and Duties of the Hearing Committees Should be Revised.**

(A) **Increasing time for hearing panels to submit reports from 15 to 21 days.**

CDC: Disagrees.

BPR Advisory Committee: No response.

TBA Recommendation: Disagrees.

Should retain the 15-day time period.

(B) **Formal charges should be approved by the Chair of the hearing panel.**

CDC: Disagrees.

BPR Advisory Committee: No response.

TBA Recommendation: Disagrees.

The decision as to the filing of formal charges should be approved by the Board of Professional Responsibility.

(C) **The requirement that Hearing Committee members maintain a law office in the disciplinary district in which they reside should be eliminated.**

CDC: No response, but see (D) below.

BPR Advisory Committee: Agrees.

TBA Recommendation: Agrees, but with conditions.

Hearing Committee members should be practicing lawyers who maintain an office in the Grand Division in which the respondent lawyer practices.

Since charges of violation of the Rules of Professional Conduct are directed primarily to practicing lawyers, lawyers actively engaged in the practice of law should constitute the hearing panel. Having lawyers who practice within the same Grand Division, but may be outside the district, would make for ease of scheduling and would not offend concerns about the neutrality of the panel.

(D) **The requirement that hearings be held in the disciplinary district where the respondent maintains his or her office should be eliminated.**

CDC: Agree, but restrict to Grand Division.

BPR Advisory Committee: Agrees.

TBA Recommendation: Agrees, but restricts to Grand Division.

- (E) **Hearing Committee members should not take part in any proceeding in which a judge, similarly situated, would have to recuse himself or herself.**

CDC: No response.

BPR Advisory Committee: Agrees.

TBA Recommendation: Agrees.

- (F) **The ABA Standing Committee recommends that non-attorneys serve as Hearing panel members.**

CDC: Agrees.

BPR Advisory Committee: Agrees.

TBA Recommendation: Disagrees.

The issue before a hearing panel solely pertains to whether a practicing attorney has adhered to professional standards applicable to the practice of law. While it may be politic to allow a non-lawyer to be one member of the panel, ultimately the reason for doing so has no bearing on formulating a sound judgment regarding the issues before the tribunal, any more than requiring that there be a lay member on each court of appeals panel when determining whether a trial judge has committed error. Persons trained in the practice of law and schooled in the Rules of Professional Conduct should be the panel members.

Further Specific TBA Recommendations:

Agrees with the ABA Standing Committee that the Tennessee Rules of Evidence should apply to hearings before hearing panels. This should be expressly stated in this Court's Rule 9.

Agrees with the ABA Standing Committee that each hearing panel should hold mandatory pre-hearing conferences to determine and schedule the items set out in Recommendation 10.

Agrees with the ABA Standing Committee that the Chief Disciplinary Counsel should have the authority to dismiss investigations without the approval of a reviewing member of a hearing panel.

Disagrees with the ABA Standing Committee that the recommendation of the Chief Disciplinary Counsel to proceed to formal charges should be approved by the chair of a hearing panel. The current practice of having such approval issue from the Board of Professional Responsibility should be maintained.

5. The Office of Disciplinary Counsel Should Be More Accessible to the Public.

CDC: Agrees.

BPR Advisory Committee: Agrees.

TBA Committee Recommendation: Agrees.

The office of Chief Disciplinary Counsel should set up its own website and should make available on that website all public disciplinary actions taken by the Board. In addition, the Consumer Assistance Program should also have a website and there should be links between the BPR and CAP websites.

6. All Volunteers In The Disciplinary System Should Receive More Formal Training.

CDC: Agrees.

BPR Advisory Committee: Agrees.

TBA Recommendation: Agrees.

Training should be mandatory both for new members of hearing panels, as well as continuing training for existing hearing panel members.

7. Disciplinary Proceedings Should Be Public After the Filing and Service of Formal Charges.

CDC: Agrees.

BPR Advisory Committee: Unnecessary due to new Supreme Court rule.

TBA Recommendation: The Court's recent amendments to Rule 9 should control.

Confidentiality should continue to attach to proceedings involving disability. See Rule 9 Sections 21, 22, 23, and 25.2 (amended) and 25.7 (amended).

8. **The Court Should Allow Complainants to Appeal Dismissal by the Office of Chief Disciplinary Counsel.**

CDC: Agrees.

BPR Advisory Committee: Agrees.

TBA Recommendation: Agrees.

Only one appeal should be allowed. That appeal would be on referral by the Office of Chief Disciplinary Counsel to a hearing panel chair for consideration. The standard of review by the hearing panel chair should be whether Chief Disciplinary Counsel's office abused its discretion in dismissing the complaint by acting arbitrarily, capriciously, or unreasonably.

9. **The Court Should Eliminate The Use of Private Discipline after the Filing Of A Petition For Discipline.**

CDC: Agrees.

BPR Advisory Committee: No response.

TBA Recommendation: Agrees.

Consistent with the Court's recent amendments to Rule 9, a private reprimand, admonition, or other form of private discipline could still be imposed prior to the filing of formal charges or in those situations where there is no finding of probable cause for formal charges.

10. **The Court Should Amend Section 13.6 of Rule 9 To Require Pre-Hearing Conferences In Matters Pending Before the Hearing Panels.**

CDC: Agrees.

BPR Advisory Committee: Agrees.

TBA Recommendation: Agrees.

The pre-hearing conference should be conducted by the chair of the hearing panel in order to frame the issues to be resolved and procedures in preparation for the hearing (including discovery) and for the hearing itself.

11. The Court Should Amend Section 23 of Rule 9 To Provide That The Rules of Evidence Apply to Disciplinary Proceedings And To Define The Standard Of Proof.

CDC: Agrees.

BPR Advisory Committee: Agrees.

TBA Recommendation: Agrees.

The standard of proof required should continue to be preponderance of the evidence in order to prove allegations of misconduct. The standard of proof for reinstatement, however, should continue to be clear and convincing evidence. The TBA Committee recommends that the standard of proof in disciplinary cases should be expressly stated in this Court's Rule 9.

12. Disciplinary Matters Should Remain Exempt From Statutes of Limitations.

CDC: Agrees.

BPR Advisory Committee: Agrees.

TBA Recommendation: Agrees.

The time between the commission of the alleged misconduct and the filing of the complaint may be considered with regard to imposition of discipline and the nature of the sanction. The equitable doctrine of laches may be applied in appropriate cases. The CDC should continue to maintain all files where formal charges have been filed. However, in matters where no charges were filed, the CDC should have discretion to dispose of those records after a reasonable period of time, or to develop a procedure for expungement.

13. The Court Should Enhance Section 19 of Rule 9 to Reinstatement Proceedings.

CDC: Agrees.

BPR Advisory Committee: Agrees.

TBA Recommendation: Agrees.

The revised reinstatement proceedings should provide for notice to all concerned parties, reasonable time for investigation, and specific criteria to be met by the lawyer seeking reinstatement. The Court also should have the ability to impose conditions on reinstatement.

14. The Court Should Continue to Forbid Disbarred or Suspended Lawyers From Working in a Law Office or in an Office Where the Practice of Law is Conducted.

CDC: Agrees.

BPR Advisory Committee: Agrees.

TBA Recommendation: Agrees.

In addition, this provision should apply to disbarment or suspension of the lawyer by the Disciplinary Board of another state, unless the Court, pursuant to Rule 9, Section 17, has decided not to impose reciprocal discipline. There is a requirement for a Tennessee lawyer licensed in another state to immediately report any discipline rendered by the Disciplinary Board in that state. See Rule 9, Section 17. The TBA Committee recommends that this change be stated in Rule 9.

15. The Court Should Simplify Procedures Relating to Temporary Suspensions.

CDC: Agrees.

BPR Advisory Committee: Agrees.

TBA Recommendation: Agrees.

The Chief Disciplinary Counsel should have direct access to the Court to request immediate temporary suspension. To the extent possible, the lawyer should be given the opportunity to respond. The provision in Section 4.3 which permits a suspended lawyer to continue to represent clients for the first thirty days of the suspension should continue in effect unless the Court determines otherwise.

16. The Court Should Amend Section 4 of Rule 9 to Provide for Probation as an Available Sanction and Enact a Separate Rule Setting Forth Specific Requirements for the Imposition, Monitoring and Revocation of Probation.

CDC: Agrees.

BPR Advisory Committee: Agrees.

TBA Recommendation: Agrees.

Probation as a sanction is a good disciplinary tool. Both the Tennessee Bar Association and the Tennessee Lawyers Assistance Program could be used for monitors, training, and policies and procedures.

17. **The Court Should Study Whether to Institute the Mandatory Arbitration of Lawyer/Client Fee Disputes in the Future.**

CDC: Agrees.

BPR Advisory Committee: Agrees.

TBA Recommendation: Agrees.

Binding fee arbitration is advisable and is in the best interest of both the lawyer and the client. The process should not be mandatory for the client, but it should be mandatory for the lawyer if requested by the client. The TBA's recommendation on the arbitration of attorney-client fee disputes is contained in a separate petition, which is filed separately with this Court.

Gail Vaughn Ashworth *by apc*

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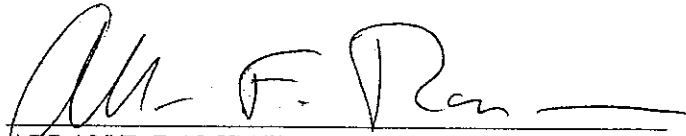
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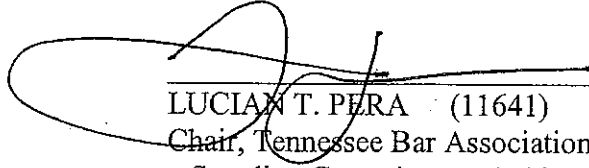
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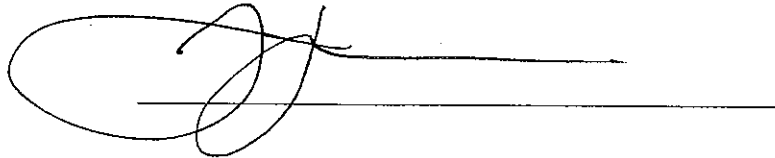


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CERTIFICATE OF SERVICE

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



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