

IN THE SUPREME COURT OF TENNESSEE

)  
IN RE PROPOSED TENNESSEE RULES)  
OF PROFESSIONAL CONDUCT) No. \_\_\_\_\_  
)  
)

PETITION OF TENNESSEE BAR ASSOCIATION  
FOR THE ADOPTION OF  
PROPOSED RULES OF PROFESSIONAL CONDUCT

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Petitioner Tennessee Bar Association (“TBA”) petitions the Court to adopt as the rules governing the conduct of lawyers practicing in Tennessee, and in place of the Code of Professional Responsibility codified as Rule 8 of the Rules of this Court, the proposed Tennessee Rules of Professional Conduct, the text of which is Exhibit A to this petition, and to make such other conforming changes in the Rules of the Supreme Court as may be appropriate in light of this amendment. In support of the adoption of these proposed rules, the TBA states as follows:

For more than 30 years, the conduct of Tennessee lawyers has been guided and governed by the Disciplinary Rules and Ethical Considerations of Tennessee’s Code of Professional Responsibility, patterned after the American Bar Association’s 1969 Model Code of Professional Responsibility. Now, after five years of study, drafting, comment, and consultation among interested members of the bench, bar, and public, the TBA seeks to have this Court bring Tennessee once again into the mainstream of lawyer ethics by adopting a set of ethics rules patterned after the ABA’s Model Rules of Professional Conduct, which were first promulgated by the ABA in 1983 and are now adopted in substantial part by 44 American jurisdictions, but modified to fit particular Tennessee circumstances.

As demonstrated more fully in the memorandum filed in support of this petition, there are compelling reasons supporting the TBA’s proposal. Though this Court has made needed, minor changes to Tennessee’s lawyer ethics rules, no thoroughgoing review and revision of these rules has occurred in Tennessee since 1970. The practice of law, in all its forms, has changed dramatically since that time, with the introduction of many new areas of practice and the adoption of many new procedural and substantive rules of law (including, for example, the Tennessee Rules of Civil Procedure, the Tennessee Rules of Evidence, court-annexed mediation, and comparative fault).

Indeed, the law governing lawyers itself has changed and developed dramatically since 1970, including many decisions of the appellate courts of Tennessee concerning such matters as conflicts of interest and attorney fees, while the underlying rules have not been thoroughly

examined for their adequacy to the task of regulating relations between lawyers and clients in a new century.

At the same time, the overwhelming majority of American jurisdictions have followed the lead of the ABA in patterning their rules after the ABA Model Rules in the 17 years since their adoption in 1983. As of the date of the filing of this petition, some 44 jurisdictions have now adopted a version of the ABA Model Rules. Tennessee's failure to follow this path has left Tennessee with a set of ethics rules that are, quite simply, outdated and much in need of improvement. More significantly, the experience of these many other jurisdictions has allowed Tennessee the luxury of assessing the propriety and utility of particular Model Rules, as well as other states' amended versions of them, in deciding what rules to propose to this Court for adoption in Tennessee.

For this reason, and after five years of committee study and consultation, the TBA believes the time has come for the adoption of new lawyer ethics rules by this Court. The TBA's Proposed Rules were developed for the TBA by its Standing Committee on Ethics and Professional Responsibility (formerly known as its Committee for the Study of Standards of Professional Conduct, or sometimes merely referred to as the "Standards Committee"<sup>1</sup>).

The TBA believes that the labor of its Committee for more than five years has produced Proposed Rules that, both in their form and their substance, do honor to Tennessee traditions of law and professionalism and move Tennessee squarely into the mainstream of American legal ethics. Indeed, several aspects of these Proposed Rules would place Tennessee at the vanguard of American legal ethics.

As discussed in more detail in its supporting memorandum, the choice of the TBA's Committee, and ultimately the TBA, to recommend that Tennessee move to ethics rules

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<sup>1</sup> From its inception in 1995 through June 2000, the Committee charged with the work that has produced this petition was known as the Committee for the Study of Standards of Professional Conduct, or sometimes as the "Standards Committee." As the Standards Committee was completing its work on the Proposed Rules and as a part of renewing its commitment to the work of legal ethics in Tennessee, the TBA reorganized the Standards Committee into a standing committee of the TBA with a broader mandate in this area.

patterned after the ABA Model Rules, and thus to abandon its reliance on rules patterned after the old ABA Model Code of Professional Responsibility, was unanimous and quickly arrived at. If there has been any clear trend in American legal ethics over the last generation, it has been the steady march of jurisdictions toward the ABA Model Rules, with 44 jurisdictions now in that camp. The Committee further found compelling reasons for preferring, on the merits, the Rule-and-Comment format of the ABA Model Rules, all of which are detailed in the supporting memorandum.

Substantively, in the long process of drafting and re-drafting its proposed rules, the TBA Committee has neither slavishly followed the ABA Model Rules nor lightly departed from them. Through this long process, three primary values emerged as its guides: uniformity, which most often led the Committee to follow the language of an ABA Model Rule; adherence to Tennessee statutory or decisional law, and even to certain settled Tennessee ethical rules and interpretations, which often led the Committee to depart from the language of an ABA Model Rule; and, certainly not least, writing the best possible rule, even to the point of abandoning an ABA Model Rule or overruling Tennessee rule or precedent. As in any drafting process, these values were often in real tension, but from that creative tension emerged a work product that the TBA and the Committee as a whole believes does justice to each of these values.

Understanding that the process by which this Court considers this petition must be tailored to the significance of the task, the TBA respectfully makes several suggestions to the Court. First, although, as described in the memorandum supporting this petition, the TBA has gone to extraordinary lengths to solicit and consider comments from all quarters on these proposed rules, this Court should continue this effort by, as is its usual custom in similar matters, broadly distributing this proposal<sup>2</sup> and allowing a comment period for members of the bench, bar, and public. In soliciting comments, the TBA would also suggest that this Court strongly encourage all those who wish to ask this Court to change particular proposed rules to submit

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<sup>2</sup> The TBA likewise plans to publish this final proposal widely, including on its web site, and to continue its solicitation of comments.

alternative language to aid the Court in assessing the appropriateness of the substantive suggestions. As a part of this process, the TBA would further respectfully suggest that this Court consider itself holding oral argument or hearings in each of the three grand divisions of the State, either before the end of the comment period or shortly afterwards, with a view toward allowing the widest possible discussion of these Proposed Rules. Finally, after the conclusion of the comment period, but before the final argument or hearing that would be held by this Court, the TBA respectfully requests the opportunity to fully consider and respond to the comments submitted, with a view toward reconsidering particular proposed provisions that have been subject to comment and offering integrated alternative drafting suggestions arising from comments received.

WHEREFORE, the TBA respectfully urges this Court to grant its petition, to begin the process of consideration of this petition for the adoption of new lawyer ethics rules for Tennessee and, ultimately, to grant this petition.

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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 F to the petition by regular U.S. Mail, postage prepaid.

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LUCIAN T. PERA

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**EXHIBIT A**

Proposed Tennessee Rules of Professional Conduct

[filed separately]

**EXHIBIT B**

Committee Draft of Proposed Tennessee Rules of Professional Conduct

[filed separately]

**EXHIBIT C**

Preliminary Draft Report of the TBA Committee

[filed separately]

**EXHIBIT D**

Comments Received by TBA Committee

[filed separately]

## **EXHIBIT E**

Comments Received by TBA Committee Organized by Topic or Rule  
(provided in separate 3-ring binder)

[filed separately]

**EXHIBIT F**

List of Individuals and Organizations Served

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IN RE PROPOSED TENNESSEE RULES)  
OF PROFESSIONAL CONDUCT) No. \_\_\_\_\_  
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MEMORANDUM IN SUPPORT OF  
PETITION OF TENNESSEE BAR ASSOCIATION  
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## INTRODUCTION

*I am certainly not an advocate for frequent and untried changes in laws and constitutions. I think moderate imperfections had better be borne with; because, when once known, we accommodate ourselves to them, and find practical means of correcting their ill effects. But I know also, that laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy, as civilized society to remain ever under the regimen of their barbarous ancestors.*

*Thomas Jefferson, Letter to Samuel Kercheval,*

For more than 30 years, the conduct of Tennessee lawyers has been guided and governed by the Disciplinary Rules and Ethical Considerations of Tennessee's Code of Professional Responsibility, patterned after the American Bar Association's 1969 Model Code of Professional Responsibility. After five years of study, drafting, comment, and consultation among interested members of the bench, bar, and public, the TBA now seeks to have this Court bring Tennessee once again into the mainstream of lawyer ethics by adopting a set of ethics rules patterned after the ABA's Model Rules of Professional Conduct, which were first promulgated by the ABA in 1983 and now adopted in substantial part by 44 American jurisdictions. While there doubtless were good reasons for Tennessee not to adopt a version of the Model Rules shortly after their initial 1983 promulgation by the ABA, the TBA believes that the time has now come.

The TBA's Proposed Rules, developed for the TBA by its Standing Committee on Ethics and Professional Responsibility (formerly known as its Committee for the Study of Standards of Professional Conduct, or sometimes merely referred to as the "Standards Committee"<sup>3</sup>), are

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<sup>3</sup> From its inception in 1995 through June 2000, the Committee charged with the work that has produced this petition was known as the Committee for the Study of Standards of Professional Conduct, or sometimes as the "Standards Committee." As the Standards Committee was completing its work on the Proposed Rules and as a part of renewing its commitment to the work of legal ethics in Tennessee, the TBA reorganized the Standards Committee into a standing committee of the TBA with a broader mandate in this area. See infra at 29-30.

closely patterned after the ABA Model Rules. These Proposed Rules offer, however, a fully integrated set of ethics rules for Tennessee, conforming these Rules to other Tennessee law where appropriate, on occasion codifying Tennessee practice not reflected in the ABA Model Rules, and on occasion carrying forward existing Tennessee rules thought by the TBA to be so well settled as to merit continued adherence by this Court. Nevertheless, the overwhelming majority of the Rules and Comments proposed by the TBA find their origin in and closely track the ABA Model Rules.

In this petition, the history of the TBA's efforts to develop these Proposed Rules will be summarized, followed by a brief overview of the substantive approach of the TBA's Standards Committee to its work. In addition, this petition will recount for the Court the extraordinary efforts of the Standards Committee to obtain comment from all quarters on its work, and to work toward consensus on them where possible, through the publication of extensive drafts, solicitation of and consideration of comments, discussions with individual practitioners and judges, seminars, and, most importantly, extensive reconsideration and revision of its work product once published.

Filed with this petition are several sets of attachments (some filed separately due to their size), which together are quite voluminous, but which nevertheless are thought to be necessary to provide the Court with the tools to address this proposal. These attachments are as follows:<sup>4</sup>

Exhibit A      Proposed Tennessee Rules of Professional Conduct

*This document contains the proposed black-letter Rules and Comments in the form the TBA proposes for adoption by this Court.*

Exhibit B      Committee Draft of Proposed Tennessee Rules of Professional Conduct

*In addition to the proposed black-letter Rules and Comments, this document includes the Standards Committee's notes concerning each Proposed Rule. Thus, after each individual Proposed Rule and Comment, the Committee has provided short sections (1) comparing the Proposed Rule and Comment to Tennessee's*

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<sup>4</sup> Also accompanying this petition will be electronic versions of the petition and Exhibits A and B for use by the Court.

*current ethics rules, (2) comparing the proposal to the relevant ABA Model Rule, and (3) comparing the proposal to the Preliminary Draft issued by the Committee for discussion purposes in November 1997.*

Exhibit C Preliminary Draft Report of the TBA Committee

*This is the discussion draft, including proposed rules, comments, and extensive committee notes, issued by the Standards Committee for public comment in November 1997 and published in the February 17, 1998, edition of West's Tennessee Decisions.*

Exhibit D Comments Received by TBA Committee

*These documents include virtually all the written comments received by the Standards Committee concerning its proposed rules, most of them focusing on proposal made by the Committee in November 1997 Preliminary Draft.*

Exhibit E Comments Received by TBA Committee Organized by Topic or Rule

*These documents are the same documents included in Exhibit D, except that they are organized by reference to the particular rule or topic to which they refer.*

## **THE RECENT HISTORY OF TENNESSEE ETHICS RULES**

Since 1970, Tennessee's lawyers have been governed by the Disciplinary Rules and Ethical Considerations contained in the Code of Professional Responsibility, patterned after the American Bar Association's 1969 Model Code of Professional Responsibility (the "Model Code"). Today, 30 years later, 44 states have adopted some version of the ABA's 1983 Model Rules. Thus, today Tennessee stands in a dwindling minority of states employing the format and substance of the ABA Model Code, and more than a generation has passed since any thoroughgoing revision of Tennessee's ethics rules.

From at least 1938 to 1970, Tennessee lawyers were required to conduct themselves in accordance with the Canons of Ethics promulgated by the American Bar Association in 1908.

In 1970, the Tennessee Supreme Court replaced the Canons with the Code of Professional Responsibility, closely based upon the ABA Model Code of Professional Responsibility (the “ABA Model Code”), which the ABA had adopted just a year earlier. Every other American jurisdiction likewise adopted versions of the Model Code as the foundation for its own regulation of the practice of law.

By the end of the 1970s, however, leaders of the legal profession had begun to question the adequacy of the ABA Model Code as a blueprint for lawyer regulation, raising concerns both about its structure and its substance. This dialogue led to the appointment by the ABA of a Commission on Evaluation of Professional Standards (later known as the “Kutak Commission”) and to the eventual approval by the ABA House of Delegates in 1983 of the Model Rules of Professional Conduct (the “ABA Model Rules”). The ABA Model Rules differ sharply from the ABA Model Code in organization, utilizing a black-letter Rule and Comment format rather than the structure of the ABA Model Code with its Canons, Ethical Considerations, and Disciplinary Rules. The ABA Model Rules also contained a significant number of new and different rules, many covering topics not covered in the ABA Model Code.

In response to this ABA initiative, many state bar associations, including the TBA, convened study groups to review and evaluate the ABA Model Rules and make recommendations as to whether their states should replace their versions of the ABA Model Code with a version of the ABA Model Rules. Indeed, a special TBA committee, the Committee on the Code of Professional Conduct worked from 1981 through 1985, carefully reviewed the ABA Model Rules, issued two reports in which the Committee twice approved the Rule and Comment format of the Model Rules, approved most of the specific Rules, but also noted concerns about or disapproval of and suggestions for modification of some of the Rules.

In December 1985, however, that committee finally concluded that

absent the call of Tennessee legal trumpets, which we had not heard, the current Code of Professional Responsibility, as adopted in Tennessee, should not be significantly changed at this time. There are aspects of the Model Rules of Professional Conduct which can be incorporated into the Code of Professional Responsibility. Such incorporation into the existing Code format would be preferable.

Recommending further study of the Model Rules, that committee concluded its work with a prediction that the “time for the Model Rules of Professional Conduct may come in Tennessee, but that time is not now or very near.”

The majority of Tennessee’s sister jurisdictions, however, came to a different conclusion. As of 1987, 23 jurisdictions had completed a comprehensive revision of their ethics rules, with 21 modeling new ethics rules after the ABA Model Rules and several others amending their versions of the ABA Model Code to incorporate some of the substantive provisions of the ABA Model Rules. Since 1987, another 21 jurisdictions have become “Model Rule jurisdictions,” leaving Tennessee as one of a diminishing handful of jurisdictions that have not thoroughly revised their ethics rules in response to the 1983 promulgation of the ABA Model Rules.

Though the structure, format, and basic content of Tennessee’s lawyer ethics rules have thus remained unchanged for more than a generation as the mainstream has changed around them, on a number of occasions since 1970, this Court has amended the Code, and some of those amendments are indeed identical to provisions in the ABA Model Rules.<sup>5</sup> The Board of Professional Responsibility has also issued a number of Formal Ethics Opinions that have drawn on ABA ethics opinions primarily based on the ABA Model Rules.<sup>6</sup>

## **THE TBA STANDARDS COMMITTEE**

### **Origin of the TBA Committee**

In Spring 1995, TBA President Howard H. Vogel of Knoxville (1995-96) appointed the Committee for the Study of Standards of Professional Conduct (the “Standards Committee”).

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<sup>5</sup> For example, see Disciplinary Rule 2-101(A) with respect to misleading advertisements, which is derived from ABA Model Rule 7.1; Disciplinary Rule 7-101(A)(1) with respect to diligent representation, which is derived from ABA Model Rule 1.3; and Disciplinary Rule 7-101(A)(2) and (3) with respect to communicating with the client, which are derived from ABA Model Rule 1.4.

<sup>6</sup> See, e.g., Tennessee Formal Ethics Opinion 98-F-141 (1998) (citing ABA Formal Opinion 93-371); Tennessee Formal Ethics Opinion 93-F-133 (1993) (citing ABA Formal Opinions 287 (1953), 341 (1975), 87-353 (1987), 93-376 (1993)), withdrawn by Tennessee Formal Ethics Opinions 87-F-112 (1987) (citing ABA Informal Opinion 1373 (1976)).

For more than five years, this Committee has worked to develop the draft the ethics rules now offered to this Court by the TBA.

The Committee included lawyers from across the state and from all walks of the profession. This was a working Committee, and each member listed below actively contributed to the work of the Committee. Thanks are also due to Chancellor Ellen Hobbs Lyle of Nashville, who contributed to the early work of the Committee, but whose other commitments unfortunately did not permit her to participate in the Committee's later efforts.

*Committee Roster*

Paul Campbell, III, Chair  
Lucian T. Pera, Vice-Chair  
Carl A. Pierce, Reporter

Thomas C. Binkley  
George W. Bishop, III  
John T. Blankenship  
Lance B. Bracy  
Robert E. Cooper, Jr.  
W. Thomas Dillard  
Jef Feibelman  
John W. Gill, Jr.  
Albert C. Harvey  
F. Evans Harvill  
Charles A. High, Jr.

William Lewis Jenkins, Jr.

Kathy L. Laizure  
Ernest F. Lidge, III  
Mary Frances Lyle  
Nancy C. Miller-Herron  
Barbara J. Moss  
George H. Nolan  
Frank J. Runyon, II  
William Stewart Rutchow  
Matthew J. Sweeney, III  
Dalton L. Townsend  
Charles L. Trotter, Jr.

Frankie E. Wade

**The Committee's First Questions**

At its initial meeting, the Standards Committee directly addressed two overarching questions, both of which this petition squarely presents for this Court as preliminary questions: First, has the time come for a thoroughgoing revision of the substance of Tennessee's ethics rules; and, second, should Tennessee's ethics rules move to the format of the ABA Model Rules? A powerful consensus quickly emerged that the answer to both questions was, "yes." While not all Committee members necessarily agreed on each and every reason supporting this consensus, very substantial reasons support these two fundamental premises of the Committee's work.

**The Need for Comprehensive Revision**

With respect to the need for a comprehensive revision of Tennessee's ethics rules, the calendar and the behavior of other jurisdictions offer much support: Fifteen years have now passed since the 1980s TBA committee submitted its final report, and 30 years have now passed since this Court adopted the Code. Also, since the 1983 promulgation of the ABA Model Rules, 44 jurisdictions have adopted them in substantial part.

While popularity cannot be the touchstone of a decision as to what ethics rules to adopt, there can be no doubt that the widespread adoption of the ABA Model Rules, even with variations, indeed reflects a broad and deep consensus within the legal profession, and among the supreme courts that regulate it, as to the appropriate norms of behavior and rules governing misconduct and the general effectiveness of the ABA Model Rules in capturing this consensus.

More practically, Tennessee's membership in a diminishing minority of ABA Model Code jurisdictions means that the everyday working Tennessee lawyer or judge who wants and needs a prompt, accurate, and reliable answer to an ethical question that is not easily answered by the plain language of Tennessee's Code today has less and less analogous authority from other jurisdictions on which to draw for help.

Of greater significance to the Standards Committee, however, was the fact that, since the ABA's 1969 adoption of its Model Code, there have been vast changes in the practice of law that have raised new questions for which the ABA Model Code — and, hence, Tennessee's ethics rules — simply provides no answers. Some of these new questions have been answered in the ABA Model Rules, although admittedly others are not yet answered even by them. Some of the Tennessee "answers" to these questions can be found by the diligent lawyer in the Board of Professional Responsibility's Formal Ethics Opinions or in case law, but values of education and guidance of practicing lawyers and judges suggest that, where possible, these "answers" should properly be incorporated in the ethics rules themselves.

Moreover, many Tennessee lawyers have come to question some of the answers that are actually provided by our current Code. Further, some members of the Standards Committee were also concerned that some of the current Disciplinary Rules arguably prohibit

constitutionally-protected conduct of lawyers and clients, while statutory enactments and judicial decisions also suggest the need for a rethinking of some of the Code's rules.

None of these developments might separately mandate that the rules be changed (except perhaps the existence of unconstitutional rules), but all of these developments taken together led the Committee to firmly and unanimously conclude that the time had indeed come for a comprehensive reevaluation of the standards of professional conduct for lawyers in Tennessee.

### **The Committee's Choice of Format**

Why should Tennessee move toward the format of the Model Rules for its ethics rules?

The Standards Committee felt the answers were quite clear and compelling.

Patterned after the ABA Model Code, Tennessee's Code consists of Canons, Ethical Considerations, and Disciplinary Rules. The Canons are "statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relationship with the public, with the legal system, and with the legal profession." The Canons are:

Canon 1: A Lawyer Should Assist in Maintaining the Integrity and Competence of the Legal Profession.

Canon 2: A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available.

Canon 3: A Lawyer Should Assist in Preventing the Unauthorized Practice of Law.

Canon 4: A Lawyer Should Preserve the Confidences and Secrets of a Client.

Canon 5: A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client.

Canon 6: A Lawyer Should Represent a Client Competently.

Canon 7: A Lawyer Should Represent a Client Zealously Within the Bounds of the Law.

Canon 8: A Lawyer Should Assist in Improving the Legal System.

Canon 9: A Lawyer Should Avoid Even the Appearance of Impropriety.

Immediately following each individual Canon is a group of related Ethical Considerations, which are "aspirational in character and represent the objectives toward which every member of the profession should strive." Following each group of Ethical Considerations comes a group of Disciplinary Rules that are "mandatory in character" and "state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action."

Having so differentiated between the three types of prescriptive norms contained in the Model

Code, the Preliminary Statement to the Code concludes that “an enforcing agency, in applying the Disciplinary Rules, may find interpretive guidance in the basic principles embodied in the Canons and in the objectives reflected in the Ethical Considerations.”

By contrast, the TBA’s Proposed Rules, like the ABA Model Rules, consists of approximately 56 discrete Rules, each of which is followed by a Comment. The Comments, like those comments to various uniform acts such as the Uniform Commercial Code, explain and illustrate the meaning and purpose of the Rule and are intended as guides to interpretation, but the text of each Rule is authoritative. Like the ABA Model Rules, the Proposed Rules are organized into 8 separately titled sections:

- Rules 1.1 - 1.17 Client-Lawyer Relationship
- Rules 2.1 - 2.4 Counselor
- Rules 3.1 - 3.9 Advocate
- Rules 4.1 - 4.4 Transactions with Persons Other Than Clients
- Rules 5.1 - 5.7 Law Firms and Associations
- Rules 6.1 - 6.4 Public Service
- Rules 7.1 - 7.6 Information About Legal Services
- Rules 8.1 - 8.5 Maintaining the Integrity of the Profession

The Standards Committee consciously and deliberately chose to follow the organization and format of the ABA Model Rules for a variety of compelling reasons. First, the ABA Model Rules are organized more practically by reference to things lawyers do rather than by reference to abstract professional ideals. It seems sensible to organize rules of conduct by reference to what lawyers do — *e.g.*, representing clients both generally and more particularly in one of the various roles lawyers may play on behalf of their clients, interacting with third parties, working with other lawyers and non-lawyers in law firms, rendering public service, marketing their practices, or more generally engaging in conduct that might either undermine or enhance the integrity of the profession. It seems more logical, for example, to include the rules with respect to fees and safeguarding client property in an article setting forth the lawyer’s general duties with respect to her representation of a client, rather than having the fee and client property rules in separate Canons and the fee rules in a Canon that also contains the rules governing advertising and solicitation.

The Rule-Comment format also properly focuses the reader's primary attention on the Rules themselves. Unlike the Code, in which the Disciplinary Rules are presented after the Canons and the Ethical Considerations, the ABA Model Rule format places the Rule first. The Rule-Comment format also makes it clear that there is only one set of Rules and that the Comments are subordinate to the text of the rule it follows. With the Canons and Ethical Considerations of the Code formulated in prescriptive terms, it is too easy (and has been too easy for the courts and lawyers) to accord both Canons and Ethical Considerations more independent, authoritative legal weight than would be the case if they were formulated as Comments to a particular Rules.

The Standards Committee was also concerned that the juxtaposition in the Code of Ethical Considerations and Disciplinary Rules leaves a lawyer who fully complies with every Disciplinary Rule open to the charge that he has somehow fallen short of the expectations of his profession. Rules governing the ethical conduct of lawyers should clearly specify the conduct expected of a professionally responsible lawyer and should not suggest that lawyer's need to do more or less to be regarded as a "true" professional. Ethical exhortation is important, but, to the extent it is needed or undertaken, it should not be confused with rules the violation of which may result in disbarment or other lawyer discipline.

The Standards Committee also had a very practical reason for preferring the organization and format of the Model Rules: Adopting the organization and format of the ABA Model Rules will make it dramatically easier for Tennessee lawyers to clearly understand and comply with their professional responsibility. The vast majority of other jurisdictions, including most of those contiguous to Tennessee, have adopted the organization, format, and orientation of the ABA Model Rules. As a direct result, most of the secondary literature, ethics opinions, and case law about the professional responsibilities of lawyers now focus on the ABA Model Rules, and the ABA Model Rules have become the unquestioned centerpiece of the ongoing dialogue within America (inside and outside the profession) about the professional responsibilities of lawyers. By embracing the organization and format of the ABA Model Rules, it will be easier for

Tennessee lawyers to participate in and benefit from this dialogue to ascertain their professional responsibilities. This will be increasingly important as more and more of the practice of law occurs across state boundaries and more and more lawyers become licensed to practice in more than one state.

### **The Committee's Work Method**

In order to accomplish its work, the Committee divided itself into ten smaller, overlapping working groups, each of which was assigned the responsibility of working with the Reporter to generate proposals for the adoption or modification of a topically related set of rules. The Standards Committee as a whole generally met monthly in person.

At these meetings, the Committee would consider the proposals submitted by the working groups. A particular Proposed Rule might exactly parallel the ABA Model Rule, or it might be the third draft of a rule intended to carefully engraft a particular Tennessee decision on an ABA Model Rule, or it might address an issue about which both the ABA Model Rules and the ABA Model Code were both silent. The Committee then closely examined, discussed, and debated the working group's proposal and sometimes referred the draft rule back to the working group or the Reporter for revision. This process repeated itself until the Committee thought it was ready for a vote on a Proposed Rule or alternative formulations of a Proposed Rule. This laborious process of drafting, revision, discussion, and debate continued for almost two years.<sup>7</sup>

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<sup>7</sup> In the first months of the Standards Committee's existence, the TBA President and Board of Governors asked the Committee to set aside its work plan to address two time-sensitive proposals for significant revisions to existing Disciplinary Rules then pending before this Court.

The first of these tasks concerned the proposed revisions to DR 7-102 concerning disclosure of client perjury. The Committee prepared an elaborate proposal on this issue, which was submitted to the Court on behalf of the TBA. This proposal was largely incorporated into the analogous provisions of the rules proposed in the Committee's Preliminary Draft.

The second of these tasks concerned a proposal to amend the lawyer advertising rules to restrict in several ways targeted direct-mail solicitation of clients. Again, the proposal prepared by the Committee was adopted virtually completely by the Board of Governors and submitted to this Court as the TBA's proposal. A substantial portion of this work was also incorporated in the rules proposed in the Preliminary Draft.

At the conclusion of its work on all of the individual rules, the Committee met in retreat for two days in June 1997 in Clarksville to review the entire set of Proposed Rules for consistency and to reconsider particular rules of concern to individual Committee members.

At its July 1997 meeting, the TBA Board of Governors approved the distribution of this Preliminary Draft for comment.

### **The Committee's Three Primary Values**

In the long process of drafting the substance of the Proposed Rules, three primary values of the Committee emerged as its guides: uniformity, which most often led the Committee to follow the language of an ABA Model Rule; adherence to Tennessee substantive law, whether statutory or decisional, and even to certain settled Tennessee ethical rules and interpretations, which often led the Committee to depart from the language of an ABA Model Rule; and, certainly not least, writing the best possible rule, even to the point of abandoning an ABA Model Rule or overruling Tennessee rule or precedent. As in any drafting process, these values were often in real tension, but from that creative tension emerged a work product that the Committee as a whole believes does justice to each of these values.

#### *Uniformity*

Uniformity was most often the Committee's primary value, and this predisposition most often led it to show great deference to the approval of individual Model Rules without modification. Operationally, this generally led the Committee to look at the language of the Model Rule first and then to require good cause to be shown for departures from this language.

Admittedly, there is today less uniformity among the various jurisdictions with respect to the rules governing professional conduct than there was prior to the promulgation of the Model Rules. A few states, like Tennessee, are still using the ABA Model Code, and there are significant substantive and language differences between the ABA Model Rules and the ABA Model Code. Also, because the ABA no longer "maintains" or updates its Model Code, Model

Code states like Tennessee have been left largely to their own devices when they have attempted to update particular portions of the Disciplinary Rules to accommodate critical needs, leading to even more non-uniformity. In addition, those states that have adopted versions of the ABA Model Rules have generally enacted more variations than were previously seen in the adoption of the Model Code.

Of course, complete uniformity among the jurisdictions is impossible, but the Committee was clearly motivated in moving toward the ABA Model Rules by the desire to reduce the obvious non-uniformity of Tennessee's legal ethics rules. Despite the number of instances in which the Committee's Proposed Rules do, in fact, differ from the ABA Model Rules, the Committee worked from a strong presumption in favor of adopting the ABA Model Rules where possible, particularly those Rules that have been adopted without significant modification by most other jurisdictions. Rather than seeing this as blindly following the herd, the Committee viewed this as leading Tennessee down well-traveled paths to a sensible destination.

Several reasons supported this predisposition. In part, the Committee came to think of the ABA Model Code as a good first draft and the ABA Model Rules as an improved second draft. Not only were the ABA Model Rules the product of painstaking and thoughtful analysis by the Kutak Commission which drafted them, but they were also distilled through a lengthy process of nationwide debate and revision leading up to the final vote in the ABA House of Delegates. The Kutak Commission and the House of Delegates that approved the Model Rules possessed more current, complete, and accurate information about the social circumstances in which law is practiced and were able to draw upon more than a decade of experience under the ABA Model Code. They had access to a substantial literature about the Code, much of it raising questions about the comprehensiveness and clarity of the ABA Model Code.

The Standards Committee was also cognizant of the fact that the ABA Model Rules have now been reviewed and many of its rules and comments have been widely adopted without modification. Although few, if any, jurisdictions have adopted the ABA Model Rules in toto, without modification, they do now undoubtedly serve as the backbone for the self-regulation of

the bar throughout the country because the profession and the courts have consciously chosen them repeatedly. Although the Standards Committee never felt bound to blindly follow the herd, it seemed sensible to at least track the herd for a while, and to assume at the outset that the herd might be headed in the right direction.

Further, any lack of uniformity in the rules governing a lawyer's conduct presents obvious problems for lawyers who are licensed and practicing in more than one jurisdiction, lawyers licensed in one jurisdiction who have been admitted to practice in another jurisdiction *pro hac vice*, and lawyers who are representing parties in multi-state transactions or litigation with implications in a number of states. Tennessee's geography<sup>8</sup> and the great uncertainty about choice of law issues governing the practice of law argue particularly strongly in favor of moving in the direction of uniformity and in the direction of the ABA Model Rules.

Still another reason for generally preferring the ABA Model Rules to the current Code is the fact that the Model Rules address at least 30 issues that are not specifically addressed in the ABA Model Code. Although, as stated in the Preamble to the ABA Model Code, "a lawyer . . . assumes many roles that require the performance of many difficult tasks" and "not every situation a lawyer may encounter can be foreseen," the Committee strongly felt that our rules of professional conduct should address most if not all of those situations which can be foreseen as likely to arise in the practice of law as it is being practiced today and is likely to be practiced in the days to come.

The Standards Committee also noted that the ABA Model Rules take a more realistic approach to the fact that lawyers play many different roles in their representation of clients. The ABA Model Code is a unitary set of rules to be "uniformly applied to all lawyers, regardless of the nature of their professional activities." The Disciplinary Rules are not tailored to account for

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<sup>8</sup> Interestingly, of the eight states contiguous with Tennessee, all have now adopted ethics rules patterned after the ABA Model Rules. When the Standards Committee started its work more than five years ago, at least two of these states were Model Code states. Thus, today, more than ever, ethics issues related to cross-border or multi-jurisdictional practice by Tennessee lawyers can often implicate the language of quite different ethics rules.

the different roles lawyers play on behalf of clients. The ABA Model Rules, on the other hand, takes a different approach to professional self-regulation.

At the outset, the Preamble alternatively pictures a lawyer in three distinct roles — as “a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.” The ABA Model Rules also identify five distinct roles lawyers may play when acting as representatives of their clients — advisor, advocate, negotiator, intermediary, and evaluator — and the Rules themselves address the differing demands of these roles. It is now easier to imagine how the rights and duties of the lawyers might vary with the role they are playing. A duty to “zealously” represent a client, for example may make some sense for a lawyer serving as an advocate or even as a negotiator, but makes little sense when applied to the lawyer who is serving as an advisor, intermediary, or evaluator. One can also imagine some conflicts arising when a lawyer attempts to play more than one of these roles at the same time. The Standards Committee concluded that the ABA Model Rules better account for the fact that lawyers play many different roles and different roles may call for different rules.

Finally, absolutely critical to the predisposition of many Committee members to defer generally to the language of the ABA Model Rules was the view that greater uniformity would allow conscientious Tennessee lawyers and judges to more quickly and easily find real answers to real questions about what is expected of a lawyer. Compliance with important ethics rules, just as with other laws and rules, depends in large part on clarity and accessibility. The ABA Model Rules now occupy center stage in the growing literature about lawyers’ professional responsibilities. At best, the ABA Model Code is currently on the side of the stage and headed offstage, almost certainly never to return. Moving toward the ABA Model Rules will enable Tennessee lawyers faced with difficult questions to easily draw upon very useful authorities that focus their analysis on the Model Rules.

#### *Adherence to Existing Tennessee Law*

Although strongly predisposed to approve the Model Rules, the Standards Committee was also predisposed to incorporate into the Proposed Rules norms of professional conduct

possibly unique to Tennessee, but well-settled or recently settled by Tennessee courts, or apparently meeting with the general approval of the bench, bar, and informed public opinion. Indeed, the Committee sometimes chose to value such adherence to Tennessee law over uniformity.

Operationally, this meant that the Committee always sought to determine whether and how current Tennessee law differed from an ABA Model Rule under consideration and to carefully consider whether the Tennessee status quo should be retained. Where the General Assembly or this Court had firmly or recently decided a question of law or written another rule directly relevant to an ethics rule, the Committee, like many similar committees in other states adopting the ABA Model Rules, often felt that certainty of result was more important than uniformity. Indeed, in some instances, some Committee members even felt this value more important even than correcting what they might have thought was an incorrect, though settled, rule.

#### *Drafting the Best Possible Rule*

But simply writing the best possible rule was also a value that the Standards Committee sometimes honored most, even to the point of abandoning a Model Rule or overruling decisional precedent. The Committee recognized that its work represents a rare opportunity, the first such opportunity in a generation, to write on a cleaner slate, understanding that strenuous comments to the contrary or, ultimately, the views of this Court might overrule this judgment. Thus, the Committee concluded that it could not always responsibly limit itself to a choice between the ABA Model Rule and the current Tennessee rule.

Although generally disinclined to depart from an ABA Model Rule or to overrule decisional precedent, the Committee has not hesitated to recommend a departure from both the Model Rule and the Tennessee status quo in cases where the Committee felt quite certain that it had a better idea. The Committee, therefore, was also predisposed to get it right.

Though these values were often in real tension, the Committee feels strongly that from that tension has emerged a work product that does justice to these values.

**THE TBA'S EFFORTS TO GENERATE COMMENT FROM,  
AND CONSENSUS WITHIN, THE PROFESSION ON ITS PROPOSED RULES**

Following the release of its Preliminary Draft in November 1991, and continuing even until the last few weeks, the TBA has worked to educate the bench and bar about its proposals, has solicited comments on the work of the Standards Committee, and has carefully considered them in framing this proposal.

As a part of its effort at outreach, the Standards Committee has:

- Distributed more than 2,500 hard copies of the Preliminary Draft of its proposed rules to Tennessee lawyers, judges, and others.
- Distributed more than 5,800 copies of the Preliminary Draft electronically through the TBA's website, TBALink, to Tennessee lawyers, judges, and others.<sup>9</sup>
- Solicited comments through forms distributed with every copy of the Preliminary Draft and through the TBA website.
- Published articles in the *Tennessee Bar Journal* and other publications about the substance of the proposed rules.
- Presented or participated in numerous CLE seminars across Tennessee concerning the proposed rules.
- Attended numerous ethics committee and board meetings of local and state bar groups across the state.

By these and other informal means, the Committee generated great discussion of the proposed rules and, as a result, received dozens of substantive, constructive comments about the proposed rules contained in its Preliminary Draft. (Copies of the voluminous comments received by the Committee are attached as Exhibits D and E to the petition.)

Then, beginning in 1998 and running for more than a year, the Standards Committee resumed its meetings and reviewed carefully each and every comment submitted, returning to

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<sup>9</sup> The TBA's website has proven a remarkable resource in making the TBA's drafts of proposed rules available quite broadly. More than 5,800 copies of the Preliminary Draft have been downloaded from the TBA website in various formats. In addition, this Preliminary Draft was posted directly on the website in full, and over 5,200 visitors to the site viewed portions of the draft in this way. The TBA also received more than 100 requests for a printed version of the Preliminary Draft through its website. Based on this success, the TBA plans to post its petition and the Proposed Rules submitted to this Court on the website as soon as possible.

each Proposed Rule and reconsidering its original judgment concerning each Proposed Rule and Comment. During this process, and as reflected in the Committee Notes section following each Proposed Rule and Comment in Exhibit B, the Committee revised and changed a number of its prior judgments, improving its work product tremendously as a result of the intense participation of lawyers, judges, and bar organizations from all across the state.

Perhaps most interestingly, the majority of the changes made by the Committee from its Preliminary Draft to the draft presently before the Court were changes to conform the proposal to the text of the ABA Model Rules.

Continuing its efforts to expose widely its drafts of these proposed rules and to garner support for them, in February 2000, after the TBA Board of Governors had approved these proposed rules in substantially their current form, the President of the TBA circulated this draft to all state-wide bar associations, all local bar associations, this Court's adjunct bodies, and other interested bodies, seeking final comments before filing.

Finally, continuing these efforts, in addition to serving copies of this petition and the relevant exhibits upon an extensive list of organizations and individuals with an interest in the regulation of the profession (including all state and local bar associations and adjunct bodies of this Court (see Exhibit F to Petition, List of Individuals and Organizations Served), the TBA will post this petition and all its exhibits (with the possible exception of the comments contained in Exhibits D and E) on its web site, <[www.tba.org](http://www.tba.org)>, within the next few weeks, so that members of the bench, bar, and public may continue to study and comment on this proposal.

## **IMPORTANT PROVISIONS OF**

### **THE PROPOSED TENNESSEE RULES OF PROFESSIONAL CONDUCT**

As an aid to the Court in reviewing and considering these extensive Proposed Rules, the TBA would particularly draw the Court's attention to the following portions of the proposal that are new, different from the current rules, or have generated significant comment within the Committee or by those who submitted comments to the Committee:

#### **CHAPTER 1**

**Rule 1.2. Scope of Representation and Decisionmaking Authority**

Rule 1.2 (a) — allocation of authority between lawyer and client; and decisions that must be made by client.

Rule 1.2(c) — agreements between lawyer and client providing for a limited representation of the client.

**Rule 1.5. Fees**

Rule 1.5(a) — attorney charges for fees and costs must be reasonable.

Rule 1.5(c) — contingent fee agreements must be in writing.

Rule 1.5(d) — contingent fees in domestic relations cases.

Rule 1.5(e) — fee-splitting between lawyers not in proportion to service rendered.

**Rule 1.6. Confidentiality**

Rule 1.6(a) — confidentiality duty applies to all “information relating to the representation of the client;” disclosure permitted if impliedly authorized to carry out the representation.

Rule 1.6(b)(1) and Comment [10] — disclosure permitted to prevent reasonably certain death or substantial bodily harm.

Rule 1.6(b)(2) — disclosure permitted to prevent client from committing a crime.

Rule 1.6(b)(3) — disclosure permitted to rectify substantial injury resulting from client’s crime or fraud in which client used lawyer’s services in furtherance of the crime or fraud.

Rule 1.6(b)(4) — disclosure permitted for the lawyer to secure legal advice about lawyer’s duties.

**Rule 1.7. Conflict of Interests: General Rule**

Rule 1.7 and Comment [7] — consent in writing by client required.

Comment [6] — government clients may give consent to conflicts of interest.

Comment [11] — positional conflicts.

**Rule 1.8. Conflict of Interest: Prohibited Transactions**

Rule 1.8(a) — heightened duties in all business transactions with clients.

Rule 1.8(e) — lawyer may advance of expenses of litigation with repayment contingent on outcome.

Rule 1.8(f) — lawyer may not accept compensation or direction from party fee payor.

Rule 1.8(g) — heightened duties and written consent in aggregate

third-  
settlements.

Rule 1.8(i) — conflicts involving opposing lawyers related to each other as spouse, sibling, or child; written client consent always required, but no vicarious disqualification.

**Rule 1.9. Conflict of Interest: Former Client**

Rule 1.9(a) — bars materially adverse representation in same or substantially related matter.

Comment [4] — description of a “substantially related matter.”

Rule 1.9(b) — lawyer who leaves firm and who did not participate in representation of a firm client may represent interests adverse to the former firm’s client so long as the lawyer did not acquire information relating to the client’s representation.

Rule 1.9(c) — specification of confidentiality obligation to former client.

**Rule 1.10. Imputed Disqualification: General Rule**

Rule 1.10(b) — no disqualification of firm if lawyer has left firm, takes firm client, and no lawyer still in firm participated in the representation or possesses information relating thereto.

Rule 1.10(c) — screening permitted when lawyer moves from one firm to another, subject to four safeguards.

**Rule 1.11. Successive Government and Private Employment** — special rules re conflicts for moving government lawyers.

**Rule 1.13. Organizational Clients**

**Rule 1.14. Client Under a Disability**

**Rule 1.17. Sale of a Law Practice** — permitted, subject to conditions and safeguards for clients.

**CHAPTER 2**

**Rule 2.2. Lawyer Serving as Intermediary Between Clients** — special rule specifying lawyer duties when serving as intermediary between client in transactional setting.

**Rule 2.4. Lawyer as Dispute Resolution Neutral** — special rule specifying lawyer duties when serving as neutral.

**CHAPTER 3**

**Rule 3.1. Meritorious Claims and Contentions** — Frivolous contentions; disciplinary counterpart to Tenn. R. Civ. P. 11.

**Rule 3.2. Expediting Litigation** — affirmative duty to expedite litigation consistent with client interests.

**Rule 3.3. Candor toward the Tribunal**

Rule 3.3(c) through (h) — duties re perjury and other misconduct by clients and others.

**Rule 3.4. Fairness to Opposing Party and Counsel**

Rule 3.4(d) — lawyer duties re conduct of discovery.

Rule 3.4(f) — cannot request person other than client, family member of client or employee of client to refrain from voluntarily cooperating with opposing counsel.

**Rule 3.6. Trial Publicity**

Rule 3.6(c) — extrajudicial response permitted to undue prejudicial extrajudicial statements by others.

**Rule 3.7. Lawyer as Witness** — substantial liberalization of current advocate witness rules).

**Rule 3.8. Special Responsibilities of a Prosecutor**

Rule 3.8(b) — reasonable effort to assure accused is advised of rights.

Rule 3.8(f) — requirement of judicial approval before subpoenaing

lawyer.

Rule 3.8(g) — broader restraint on prosecutorial extrajudicial speech.

**CHAPTER 4**

**Rule 4.1. Truthfulness and Candor in Statements to Others**

Rule 4.1 (b) and (c) — mandatory noisy withdrawal or disaffirmance of work-product to disassociate lawyer from transactional fraud.

**Rule 4.2. Communication with Person Represented By Counsel**

Comments [3] and [4] — contacts with employees of represented

organization.

Comment [7] — prosecutorial pre-arrest, pre-indictment communication.

**Rule 4.4. Respect for Rights of Third Persons** — see Committee Notes re surreptitious taping.

**CHAPTER 5**

**Rule 5.1. Responsibilities of a Partner, Managing Lawyer or Supervisory Lawyer**

**Rule 5.2. Responsibilities of a Subordinate Lawyer**

**Rule 5.3. Responsibilities Regarding Nonlawyer Assistants** — lawyer's duty applicable with respect to persons "associated" with lawyer, not merely those employed by the lawyer.

**Rule 5.4. Professional Independence of a Lawyer**

Rules 5.4(a)(4)(5) and (6) — new circumstances in which fee splitting with non-lawyers is permitted.

**Rule 5.7. Responsibilities Regarding Law-Related Services** — substantial modification of current law concerning law-related services.

**CHAPTER 6**

**Rule 6.1. Pro Bono Publico Representation** — lawyer's responsibility to do pro bono service.

**CHAPTER 7**

**Rule 7.1. Communications Concerning a Lawyer's Services**

Rule 7.1(d) — disclaimer required when advertising fees.

**Rule 7.3. Solicitation and Other Communications Directed to Specifically Identified Recipients** — targeted e-mail and chat-rooms treated as written communication and, therefore, not prohibited as is in-person or telephonic solicitation.

**Rule 7.4. Communication of Fields of Practice** — elimination of disclaimers when listing practice areas.

**Rule 7.5. Firm Names and Letterheads** — use of law firm trade names permitted.

**Rule 7.6. Intermediary Organizations** — lawyer acceptance of referrals or payment from advertising cooperatives, lawyer referral services, prepaid legal insurance programs and other such intermediary organizations.

**CHAPTER 8**

**Rule 8.3. Reporting Professional Misconduct** — duty to report lawyer misconduct limited to misconduct that raises a substantial question about the lawyer's honesty, trustworthiness, or fitness to practice law in other respects.

**Rule 8.4. Misconduct**

Rule 8.4(g) — modification of the current rule with respect to lawyer compliance with court orders in proceedings in which they are a party.

Comment [2] — prohibition of discriminatory speech and conduct may be prejudicial to the administration of justice.

## **THE NEED FOR CONTINUED EVALUATION OF LEGAL ETHICS IN TENNESSEE**

Through its five years of deliberations and its thorough examination of the law and ethics rules governing lawyers in Tennessee, the Standards Committee came to the firm conviction that strong steps must be taken by the Tennessee bar and bench to more permanently establish this process of evaluation and reform for the rules governing the conduct of lawyers.

In 1970, along with every other American jurisdiction, Tennessee stepped into the modern era of legal ethics by adopting its version of the ABA Model Code. But then, for the next thirty years, no thoroughgoing review of legal ethics was successfully completed, although sporadic and isolated attempts were made along these lines. During these thirty years, the ABA completed a complete revision of the model ethics rules in this country, and more than 40 states and jurisdictions have now adopted versions of the ABA Model Rules. Though the TBA's proposal aims to bring Tennessee into this broad mainstream, for too long Tennessee has remained on a less and less traveled byroad of ethics in this nation, leaving Tennessee lawyers and judges with less guidance than they should have had and clients with less protection than they have deserved.

Lest this Court believe that the work of the Standards Committee, of which the Committee and the TBA are justly proud, brings Tennessee so far current in the developing law of ethics in America that prompt attention to this need for continuing re-evaluation is not needed, the TBA would offer to the Court the following list of issues arising from its work that it has felt it inappropriate for a variety of reasons to address in this proposal. A partial list of these issues that will need to be addressed by this Court in the years to come includes:

- Proposed Rule 1.10: Consider expressly addressing whether conflicts of interest arising from personal interest of lawyer should be imputed to others in law firm or office.
- Proposed Rule 2.4: Consider applicability of ethics rules to arbitrators and possible need for special rule; consider applicability of ethics rules to lawyers representing parties to dispute resolution proceedings and possible need for special rule.
- Proposed Rule 5.1: Consider possibility of discipline of law firms for misconduct of its lawyers.

- Proposed Rule 5.4: Within the context of multi-disciplinary practice issues, consider possibility of permitting fee-sharing with non-lawyer professionals and possibility of ownership of interests in law firm by non-lawyer professionals.
- Proposed Rule 5.5: Consider possible adoption of express definition in ethics rule of unauthorized practice of law or adoption of safe-harbor ethics rule for lawyers licensed in other states in certain situations; consider other changes to facilitate and regulate multi-jurisdictional practice.
- Proposed Rule 5.7: Consider changes in rule in light of changing models delivery of legal services, including emergence of multi-disciplinary professional service firms.
- Proposed Rule 7.1: Consider need for amendment of advertising and communication rules in light of technological developments, including the internet and the world wide web.
- Proposed Rule 8.5: Consider applicability of ethics rules to lawyers engaged in the multi-jurisdictional practice of law (for example, possible application to lawyer licensed only in Tennessee of ethics rules of another jurisdiction for lawyer conduct in another jurisdiction; possible pro hac vice procedure for transactional practitioners; choice of applicable ethics rules for lawyers licensed in multiple jurisdictions jointly representing client).

The ABA is, of course, deeply aware of this long list of issues pressing on the profession and, for that reason, appointed in 1997 its Special Commission on the Evaluation of the Model Rules of Professional Conduct (also known as the "Ethics 2000" Commission) to perform a thoroughgoing review of the ABA Model Rules of Professional Conduct and offer amendments to them. That report should be forthcoming in late 2000, but will not likely be adopted by ABA House of Delegates until 2001 at the earliest, and almost certainly later. The possible adoption of amendments to the ABA Model Rules, and the subsequent reaction of other states in determining whether to accept, reject, or modify any such amendments should be a matter of concern to Tennessee and the future of its regulation of lawyers. See also infra at 30-33.

The mechanism by which this Court accomplishes an institutionalization of this evaluation process is, of course, a matter peculiarly committed to the discretion of the Court, which is constitutionally endowed with the responsibility for regulating the legal profession. The

work of the Standards Committee, however, has demonstrated the ability and commitment of the TBA to contribute to this ongoing effort.

The TBA has firmly committed, as a part of its adoption of the Committee's proposal, to the creation and maintenance of a permanent Standing Committee on Ethics and Professional Responsibility, with an appropriate budget and staff to carry on the functions described above. This TBA Committee, now the successor to the Standards Committee, has a diverse membership appointed for three-year overlapping terms, and with a mandate to continuously review and propose revisions to the rules governing the practice of law in Tennessee. The TBA stands ready to work with this Court, formally or informally, to carry out such a mandate from this Court through such a committee.

The Court also has other tools at its disposal that may assist in this necessary effort. One of the great successes of the Court over the last generation has been the work of the Advisory Commission of Civil and Criminal Rules in continuously and conscientiously updating the rules of procedure governing practice in Tennessee courts of record, in much the same way that Tennessee's lawyer ethics rules should be updated and maintained. A possible solution to the problem identified by the Standards Committee, potentially complementary to additional efforts by the TBA, would be the creation of an adjunct body of the Court mandated to be the guardian of lawyer ethics rules in Tennessee.

Regardless of the precise solution crafted by the Court, perhaps in consultation with the TBA, this is an effort that should not be neglected.

### **ABA ETHICS 2000**

One legitimate question that has recurred in the last several years and months of the Standards Committee's work is whether the TBA should have, or whether this Court should, delay consideration of this petition until the ABA Special Commission on the Evaluation of the Model Rules of Professional Conduct (also known as the "Ethics 2000" Commission) completes its work. The Standards Committee and the TBA have thoroughly considered this question and

feel strongly that this petition should be presented to this Court despite the somewhat parallel efforts of the ABA and, more importantly, the TBA and its Standards Committee urge this Court to move ahead forthwith to start the process of its consideration of the important issues presented by this petition.

ABA Ethics 2000, appointed in 1997 (as the Standards Committee was releasing its Preliminary Draft), is a thirteen-person ABA special commission that has been charged with reviewing the current ABA Model Rules and proposing possible amendments to them to the ABA House of Delegates.<sup>10</sup> Tennessee is fortunate in that two members of Ethics 2000 are also members of the Standards Committee,<sup>11</sup> and the Reporter for the Standards Committee has also served as one of the two Reporters for Ethics 2000,<sup>12</sup> thus allowing Tennessee the closest possible look at the work product and process of Ethics 2000. Having worked at possible revisions to the ABA Model Rules for more than three years, Ethics 2000 expects to release its first full report on its proposed changes to the Model Rules in the fall of 2000.

The reasons favoring this Court's prompt commencement of its process for consideration of the TBA's proposed rules, notwithstanding the work of Ethics 2000, are compelling. First, the Proposed Rules and Comments now offered to this Court by the TBA include a number of the most helpful efforts by the ABA to codify existing law under the ABA Model Rules. See, e.g., Proposed Rule 1.6(b)(1), (b)(3), and (b)(4) (confidentiality); Proposed Rule 1.7, Comments [18]-[20] (conflicts in joint representation); Proposed Rule 3.6 (trial publicity). While the Standards Committee has consciously avoided adopting any portions of the work of Ethics 2000 that would take Tennessee outside the mainstream of ethics rules.

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<sup>10</sup> The ABA House of Delegates is the 532-member legislative body that sets the policy of the ABA. The House includes representatives of ABA sections and divisions, state and local bar associations (the TBA has four delegates to the House), and other legal organizations. Any amendments to the ABA Model Rules must be approved by the House at one of its twice-annual meetings before they become effective.

<sup>11</sup> Albert C. Harvey and Lucian T. Pera, both of Memphis.

<sup>12</sup> Professor Carl A. Pierce of the College of Law of the University of Tennessee at Knoxville.

In reviewing, but only selectively adopting, portions of ABA Ethics 2000's interim work product, The Committee felt that it was critically important to allow the process of the ABA to work to produce final amendments to the Model Rules: The ABA's many practice-area-specific sections and entities are always invaluable sources of opinion in this process, and it is clear beyond doubt that whatever proposed amendments Ethics 2000 issues will be improved by debate at the ABA, which has not even seriously begun.

Moreover, even if the ABA amends the ABA Model Rules in a particular way, it would serve Tennessee well to allow the collective wisdom of other states to consider the wisdom and utility of the amendments before committing to them. In this sense, the 17 years of practical experience by the adopting jurisdictions with the ABA Model Rules since their 1983 adoption has proven invaluable to the Committee in making intelligent recommendations to this Court.

Second, the timing of the possible adoption of any amendments to the Model Rules proposed by Ethics 2000 is uncertain at best. The earliest possible meeting of the ABA House of Delegates at which these proposed amendments might be debated is August 2001, and the current expectation is that consideration of these amendments by the House will require at least two meetings to accomplish. Seasoned observers of the ABA's political process believe that it is unlikely for the House to begin its consideration of Ethics 2000's work until February 2002. Thus, there is reason to believe that the promptest possible consideration of Ethics 2000's work would not be concluded until August 2002. Without intruding into the province of this Court's decisionmaking process, the TBA respectfully suggests that proceedings on this petition could easily proceed in such a way that the matter could be briefed, fully commented on by members of the bench, bar, and public, and ripe for decision many months before that time.

Third, Ethics 2000 has made abundantly clear that it will propose retaining the structure and format of the ABA Model Rules, and that it will attempt in its proposed amendments to be "minimalist," proposing changes only where needed and avoiding unnecessary changes that might lead to more non-uniformity among the adopting jurisdictions.

Finally, and most persuasive to the Standards Committee, while the TBA in now way minimizes the importance of the work of Ethics 2000, the TBA and its Standards Committee believe that Tennessee's move to the format, structure, and substance of the ABA Model Rules as they currently are adopted in 44 American jurisdictions is vastly more important and will likely be more difficult for Tennessee lawyers, judges, and clients than any possible future adoption of any Ethics 2000 amendments after the ABA has approved them and the states have begun to consider them.

### **OFFER OF ASSISTANCE**

The TBA understands fully the complexity of the task it has requested that this Court undertake in considering this proposal, and the TBA and its Standing Committee on Ethics and Professional Responsibility stand ready to assist the Court in this task in whatever ways the Court may deem appropriate. For example, having drafted a set of rules and comments that are deeply interrelated and complex, the Committee is willing and able to provide the Court with appropriately drafted alternative formulations of particular rules should the Court wish to consider them. Also, should this Court feel that further explanatory materials or comparative information would be helpful, the Committee would be happy to develop and provide them to the Court.

### **CONCLUSION**

With humility in the face of the scope and importance of the task of reforming Tennessee's lawyer ethics rules, the TBA asks that this Court consider and ultimately grant this petition in the Jeffersonian spirit that understands that, while "frequent changes in laws and Constitutions" are not to be favored, "laws and institutions must go hand in hand with the progress of the human mind."

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LUCIAN T. PERA  
Chair, Tennessee Bar Association  
Standing Committee on Ethics  
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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 F to the petition by regular U.S. Mail, postage prepaid.

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LUCIAN T. PERA

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