

IN THE SUPREME COURT OF TENNESSEE

IN RE PROPOSED TENNESSEE RULES
OF PROFESSIONAL CONDUCT

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No. M2000-02416-SC-RL-RL

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF
PETITION OF TENNESSEE BAR ASSOCIATION
THE ~~ADOPTION~~ ADOPTION OF
PROPOSED RULES OF PROFESSIONAL CONDUCT

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The Tennessee Bar Association (“TBA”) submits the following supplemental memorandum in support of its Petition filed in this matter seeking the adoption of the Proposed Tennessee Rules of Professional Conduct (“Proposed Rules”):

I. Introduction

Since the filing of the Petition in this matter and the Proposed Rules on October 9, 2000, the TBA, through its Standing Committee on Ethics and Professional Responsibility (“Committee”), has engaged in a process, sanctioned by this Court, of soliciting and encouraging comments on the Proposed Rules from as many sources as possible, engaging in constructive dialogue with the numerous commentators, and proposing revisions to its Proposed Rules to respond to these comments and to otherwise improve the proposal. The proposal now filed with this memorandum represents the fruits of this labor by the Committee and many others and, in the opinion of the Committee and the TBA, represents a significant improvement over the Proposed Rules originally filed with the Court.

II. The Committee’s Process Since the Filing of the Petition

For the last year, consistent with the November 28, 2000, Order of this Court, the TBA and its Committee have widely distributed information concerning its Petition and the Proposed Rules, distributing copies of the Petition and the Proposed Rules to every element of the organized bench and bar, posting these materials on its website, making formal and informal presentations to the bench, bar, and public, and answering formal and informal inquiries from many people and organizations.

The comments received by the Court and the Committee were of a remarkably high quality and raised a number of important policy questions, some of which had been previously considered by the Committee, and some of which had not previously been considered by the Committee. The Committee received comments in various formats and venues, including written comments,

comments at seminars and other meetings, informal meetings, and one day-long Nashville meeting in January 2001, attended by representatives of a number of groups, including several representatives of each Tennessee U.S. Attorney, the Tennessee District Attorney Generals Conference, and the Tennessee Association of Criminal Defense Counsel.

The written comments received comprised more than 290 pages. The commentators included the following:

Lacy Adams
Attorney General of Tennessee
T. Maxfield Bahner
Board of Professional Responsibility of the Supreme Court of Tennessee
Professor Neil P. Cohen, University of Tennessee College of Law
Keith Downen
East Tennessee Victims' Rights Task Force
Federal Bar Association – Nashville Chapter
Vickie E. Fox
Joe M. Goodman
Julie N. Jones
R. L. King
Knoxville Bar Association
Judge Robert A. Lanier, Shelby County Circuit Court
Joe E. Manuel
Memphis Bar Association
Nashville Bar Association
William A. Newcomb
Obion County Bar Association
Tennessee Association of Chiefs of Police
Tennessee Association of Criminal Defense Lawyers
Tennessee Commission on Continuing Legal Education and Specialization
Tennessee District Attorneys General Conference
Tennessee Trial Lawyers' Association
Tennessee Victims' Coalition Tennessee Trial Lawyers' Association
United States Attorneys for Tennessee (Carl K. Kirkpatrick, Veronica F. Coleman, and Quentin L. White)

(All of these comments have, for the convenience of the Court, been submitted as Exhibit D, including a three-ring binder that organizes these comments according to the Proposed Rule to which the comment was addressed.)

Regardless of whether the comment raised an issue that had been previously considered by the Committee or one that had not previously been considered by the Committee, each issue was considered afresh by the Committee. Over a period of several months, the Committee met as a

group with, or had its representatives meet with, commentators, and frequently these meetings resulted in additional or substitute language in the Proposed Rule or Comment at issue. The Committee also met a number of times, in person and by conference call, to consider the comments and possible revisions to the Proposed Rules and Comments.

Through this process, the Committee made changes to a number of Proposed Rules and Comments, see infra at 5-6, and these resulting changes have been filed contemporaneously with this memorandum.

III. The Documents Likely Needed By the Court to Review the Petition

The Committee has prepared this filing with a view toward making its proposal and its process as easily comprehensible as possible, and with a view toward reducing the number of documents likely to be needed by the Court to reach its decisions in this matter. The TBA believes that the documents filed with this Supplemental Memorandum are the primary documents that will be necessary to decision on this petition by this Court.

The attachments to this supplemental memorandum are as follows:¹

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 actual adoption by this Court. Should the Court choose to grant the TBA's Petition, the TBA recommends that this document be enacted to replace current Rule 8 of the Rules of the Supreme Court of Tennessee.

Exhibit B Revised 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 to Tennessee's current ethics rules; (2) comparing the proposal to the relevant ABA Model Rule; (3)

¹ Also accompanying this petition will be electronic versions of this supplemental memo and Exhibits A and B for use by the Court.

comparing the Proposed Rule filed with the Petition in October 2000 to the Preliminary Draft issued by the Committee for discussion purposes in November 1997; and (4) describing the comments received by the Court and the TBA after the filing of the Petition, offering the Committee's response to these comments, and describing any changes made by the Committee to the Proposed Rule and Comment since the filing of the Petition.

Exhibit C “Redlined” Version of Revised Committee Draft of Proposed Tennessee Rules of Professional Conduct

This document is identical to Exhibit B, except that changes to the black-letter Proposed Rules and Comments made since the filing of the Petition are shown in “redlined” version, so that the Court can easily identify any changes made to the version of the Proposed Rules and Comments filed with the Petition. Changes made in the Committee Notes to the Proposed Rules are not redlined.

Exhibit D Comments Received by the Court and the Committee

These documents include all the written comments received by the Court or by the Committee concerning its proposal since the filing of the Petition in October 2000. These comments are included in the form they were submitted and are also organized topically by the particular Proposed Rule to which they pertain.²

Exhibit E Petition and Memorandum in Support of Petition of Tennessee Bar Association for the Adoption of Proposed Rules of Professional Conduct

This is the original Petition and supporting memorandum filed in this matter (but without any attachments), which contains much narrative background materials concerning this matter.

IV. Significant Revisions to the Proposed Rules

In the Revised Committee Draft of Proposed Tennessee Rules of Professional Conduct, filed as Exhibit B accompanying this memorandum, the Committee has indicated, by redlining the language of each Proposed Rule and Comment, all changes made in the proposal since the filing of the Petition. In a new, final section of the Committee Notes section that follows each Proposed

² Filed with the original Petition were copies of the Preliminary Draft Report of the Committee (issued by the Standards Committee for public comment in November 1997 and published in the February 17, 1998, edition of *West's Tennessee Decisions*) and all comments received by the Committee concerning its Proposed Rules prior to the filing of the Petition.

Rule and Comment, the Committee generally describes the comments received concerning the Proposed Rule, the Committee's response to these comments, and any changes made to the Proposed Rule and Comment.³

As Exhibit B reflects, the following Proposed Rules contain substantive changes:

- Scope, Paragraph 4
- Rule 1.0(b), (h)
- Rule 1.1, Comment [3]
- Rule 1.5(a)
- Rule 1.6(b)(3) and Comment [17]
- Rule 1.7, Comments [15], [18], [20], and [22]
- Rule 1.8(i)
- Rule 1.10(a) and Comments [6] and [7]
- Rule 1.14, Comments [6] and [7]
- Rule 1.15(a)(1), (c)
- Rule 2.2(b) and Comments [1], [2], [4], [5], [7]
- Rule 2.4(e)(2) and Comments [9], [12], and [13]
- Rule 3.3
- Rule 3.4(f), (g)
- Rule 3.8(d), (f)(4), (g) and Comments [1] and [5]
- Rule 3.9
- Rule 4.1(b), (c) and Comments [3], [4] and [5]
- Rule 4.2, Comment [6]
- Rule 4.3 and Comments [1] and [2]
- Rule 4.4, Comment
- Rule 5.1(a), (c)(2)(i) and Comments [1] and [3]
- Rule 5.3(a), (c)(2)
- Rule 5.5(b)(1)
- Rule 6.1, Comment [11]
- Rule 7.1(c), (d) and Comment [1]
- Rule 7.3(a), (b) and Comment [2]
- Rule 7.5, Comment [1]
- Rule 7.6(b)
- Rule 8.4, Comments [4] and [6]
- Transition Rule, Sections (b), (c)

V. Particular Issues for Decision by the Court

Over the course of the last six years, and particularly over the last year, the Committee has

³ Though these changes are not redlined, the Committee has also updated the first two portions of the Committee Notes following each Proposed Rule and Comment, which compare the Proposed Rule to existing Tennessee ethics rules and to the ABA Model Rules of Professional Conduct, to reflect changes made in the Proposed Rules.

engaged in an intense substantive conversation with virtually every organized segment of Tennessee's bench, bar, and public concerning the substantive rules that do, or should, govern lawyer ethics in Tennessee.

While this Court is, of course, the final arbiter concerning which of the many issues presented by the TBA's Petition merit its closest scrutiny, the Committee respectfully submits that there are a quite limited number of significant issues on which the bench, bar and public of Tennessee may not have reached complete consensus concerning these Proposed Rules and on which this Court should most closely focus its attention. The Committee believes that these issues are as follows:

- Rule 1.6(b) – permitted disclosure of confidential information
- Rule 1.10(c) – screening of laterally-moving lawyers
- Rule 2.4(e)(2) – role of ADR neutrals in drafting settlement agreements
- Rule 3.2 – duty to expedite litigation
- Rule 3.3 – candor to tribunal
- Rule 3.6(c) – extrajudicial speech in response to prior prejudicial publicity
- Rules 4.4 and 8.4 – surreptitious taping
- Rule 7.4 – disclaimers of lack of certification of specialization
- Rule 7.5 – trade names
- Rule 7.6 – intermediary or lawyer-referral organizations
- Rule 8.3 – scope of lawyer duty to report lawyer misconduct
- Rule 8.4 – authority of prosecutors to engage in investigatory conduct involving deceit; biased speech or conduct

VI. Response to Memphis Bar Association Comment Concerning Adoption of Its *Guidelines for Professional Courtesy and Conduct* as Disciplinary Rules

In response to this Court's call for comments, the Memphis Bar Association submitted a number of thoughtful comments on particular Proposed Rules and Comments, each of which was considered by the Committee and the Committee's response to which is reflected in the attachments to this Memorandum. The Memphis Bar also proposed, as a part of its comments, that this Court enact as disciplinary rules (and presumably as part of the Proposed Rules) the Memphis Bar's *Guidelines for Professional Courtesy and Conduct*. Because the format of the Committee's submission does not easily allow a response not addressing a particular Proposed Rule, the Committee will offer its response here.

Specifically, the Committee considered this proposal carefully and respectfully opposes this suggestion. The Committee understands and heartily supports the Memphis Bar’s leadership efforts in creating and promoting its *Guidelines for Professional Courtesy and Conduct*, which doubtless have had a salutary effect on the attitudes of the bench and bar in the Memphis community. The Committee believes, however, that enacting this body of *Guidelines* as disciplinary rules, for which lawyers may be disciplined or even lose their law license, would be most inadvisable.

First and most important, these *Guidelines* were written largely as aspirational guidance for lawyers, in an effort to maintain a level of professionalism and civility properly cherished by the bench and bar. Indeed, a significant number of the *Guidelines* are specifically not written as mandatory rules, but with aspirational, “A lawyer should . . . ,” language.⁴ Thus, a significant portion of the individual *Guidelines* merely restate general principles that are much more specifically addressed (and properly so) in the existing Disciplinary Rules and in the Proposed Rules.⁵

Further, because of the aspirational nature of their origin, the *Guidelines* have not been drafted with the precision or clarity that would be required for rules that are to be used to decide whether a lawyer should be disciplined or lose her license to practice law. Moreover, they often simply do not provide the level of guidance necessary to allow conscientious lawyers to conform

⁴ For example, *Guideline* II.2. provides that “[a] lawyer should consult opposing counsel in an effort to resolve matters by agreement before filing motions or requesting hearings.” Thus, this particular *Guideline* could not practically be enforced as a disciplinary rule. To the extent that the point would be to change “should” to “shall,” this would effectively work a change in the rules of procedure, which should be done through another method.

⁵ Compare *Guidelines* I.4(a) (“A lawyer should do all that is necessary to ensure that clients, the public, and other lawyers respect the judicial system. To this end, a lawyer should: (a) never knowingly misstate the fact or law, regardless of any pressure to do so...”), I.9. (“A lawyer should never deceive the court or another lawyer.”), with DR 7-102(A)(5); Proposed Rules 3.3(a)(1), 4.1(a), 8.4(c).

their conduct to a disciplinary rule.⁶

Thus, the TBA respectfully opposes this suggestion by the Memphis Bar Association.

VII. Other Rule Changes Possibly Necessitated by Adoption of Proposed Rules

As the Court is doubtless aware, because the ethics rules are integrally related to other rules, the adoption of the TBA's Proposed Rules will likely necessitate amendments to several other rules of this Court.

While there may be other rules implicated by the changes the TBA proposes, the TBA is aware of two that will likely require attention by this Court and other appropriate adjunct bodies or organizations. First, in Proposed Rule 1.15, the TBA proposes the adoption of an ethics rule governing lawyer handling of the property of clients and others, including the requirement of the use of trust accounts. The TBA concluded, however, that the rules governing Tennessee's Interest on Lawyers' Trust Accounts ("IOLTA") program, which currently reside in the Disciplinary Rules, would more properly be located in another rule. Thus, should Proposed Rule 1.15 be adopted, these rules would have to be revised and relocated in another Supreme Court Rule. The Tennessee Bar Foundation is aware of the implications of the adoption of Proposed Rule 1.15, and the TBA understands that the Foundation will address the Court on this issue at the appropriate time.

Second, should this Court adopt Proposed Rule 2.4, which addresses lawyers serving as dispute resolution neutrals, both under Tennessee Supreme Court Rule 31 and otherwise, there would be slightly differing standards in Rule 2.4 and Rule 31, which the Committee believes should be harmonized. The TBA understands that this Court's Alternative Dispute Resolution Commission is aware of this implication of the adoption of Proposed 2.4.

In addition, if this Court adopts Proposed Rule 7.6 concerning intermediary organizations, it will be necessary for this Court to either itself adopt, or delegate to the Board of Professional

⁶ See, e.g., *Guideline* I.16. ("A lawyer should always be punctual.").

Responsibility the authority to adopt, implementing regulations regulating such organizations.

VIII. Conclusion

Based on this memorandum, its earlier memorandum, and the extensive supporting materials submitted in this matter, the TBA respectfully urges this Court to move with expedition to consider and adopt and enact the Proposed Tennessee Rules of Professional Conduct.

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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.

LUCIAN T. PERA

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