

# ADAMS AND REESE LLP

BRINKLEY PLAZA  
80 MONROE AVENUE, SUITE 700  
MEMPHIS, TENNESSEE 38103-2467

## M E M O R A N D U M

**TO:** TBA Board of Governors and House of Delegates

**FROM:** Lucian T. Pera, Chair  
TBA Standing Committee on Ethics and Professional Responsibility

**DATE:** June 3, 2008

**RE:** Discussion Draft of Revisions to the Tennessee Rules of Professional Conduct

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In 2002, after seven years of work by the TBA, and after many months of work by the Court, the Tennessee Supreme Court granted the TBA's petition to revise Tennessee's lawyer ethics rules and move to rules patterned after the ABA Model Rules of Professional Conduct. These new rules took effect in early 2003. In the years since, the new rules have been very well received by Tennessee's bench and bar.

Owing to the timing of Tennessee's adoption of a version of the ABA's Model Rules, however, and to revisions adopted by the ABA in 2002 and 2003, a number of significant improvements have been made to the ABA Model Rules beyond the version adopted in Tennessee. Since 2002, 35 American jurisdictions have considered these recent ABA amendments and adopted revised ethics rules. To a very great extent, the recent ABA amendments have been adopted by these 35 jurisdictions.

Of course, the TBA and the Tennessee Supreme Court knew about this timing issue in the run-up to the 2002 adoption of our new rules, and your Standing Committee on Ethics and Professional Responsibility has spent the last several years hard at work reviewing the latest ABA revisions and state adoptions and developing a revised set of lawyer ethics rules for Tennessee. Our nearly-final draft of these revisions is attached for your review.

**What your ethics committee asks of you is simple: We propose to circulate these draft rules to the bench, bar, and public for comment and criticism, and we want your permission to do so.** We know that doing so will lead to improvements in our draft.

The full redline draft of proposed changes is attached. The redline shows changes that we are considering proposing to the existing rules. My personal view is that, like the 2002 and 2003 revisions to the ABA Model Rules, which these revisions largely track, these proposals represent a tune-up, but not a complete overhaul, of Tennessee's ethics rules. By contrast, of course, the adoption of our new Tennessee rules in 2002 was clearly a complete overhaul.

The draft is lengthy and sometimes complicated, so here is our highlight of what we believe are the most significant proposed amendments, with the particular rules or comments discussed identified in parentheses:

- A move throughout the Rules from the concept of “consents after consultation” to “informed consent,” consistent with ABA’s recent amendment. (Rule 1.0(e)).
- An amendment of the division-of-fees rule, adding a writing requirement. (Rule 1.5(e)).
- Amendments to the confidentiality rule to add two additional exceptions to confidentiality regarding preventing fraud linked to the use of a lawyer’s services (patterned after recent ABA amendments) and an amendment to permit some additional harmless disclosures of client confidential information otherwise made public. (Rule 1.6(a) and (b)).
- Reformulation of the black letter of the basic conflict of interest rule closely tracking the ABA model and with no substantive change in meaning (Rule 1.7), along with additional or reformulated Comments to this Rule that address “thrust-upon” conflicts (Comment [5]), sexual relations between lawyers and clients (Comments [12] – [12b]), client revocation of consent to conflicts (Comment [21]), advance waiver of conflicts (Comment [22]), conflicts in class actions (Comment [25]), special considerations for conflicts in joint representation (Comments [29] – [32]), corporate family conflicts (Comment [33]), and lawyers serving as directors of clients (Comment [34]).
- An amendment to the basic conflict rule to explicitly deal with joint representation in juvenile delinquency proceedings in the same manner as criminal proceedings. (Rule 1.7(c)).
- A broadened provision barring solicitation of substantial gifts from clients. (Rule 1.8(c)).
- A new requirement for a signed writing regarding aggregate settlements. (Rule 1.8(g)(2)).
- An amendment to remove the absolute requirement of independent counsel regarding lawyers settling claims of clients and former clients. (Rule 1.8(h)(2)).
- An amendment to the rule concerning confidentiality of former clients’ matters permitting disclosure of information concerning representation of a former client now generally known and guidance regarding what “generally known” means. (Rule 1.9(c) and Comment [8a]).

- New treatment of the imputation of personal-interest conflicts within law firms and law departments. (Rule 1.10(a)).
- A revision of the rule concerning the required response of a lawyer to illegality within an organizational client. (Rule 1.13(b) and (c)).
- An amendment clarifying lawyers' handling of advance payment of fees and nonrefundable fees. (Rule 1.15(c) and Comment [8]).
- An amendment to the rule on the sale of a law practice, somewhat liberalizing the practice, and following the ABA model. (Rule 1.17).
- A new rule, following the ABA model, on the obligations of a lawyer to prospective clients who do not become clients, including a provision permitting other lawyers in the lawyer's firm to be adverse to a prospective client, under limited circumstances. (Rule 1.18).
- A proposed new rule addressing lawyer obligations concerning client file materials (Rule 1.19), as well as related revisions to existing rules concerning the obligation to return client file materials upon a lawyer's discharge or withdrawal (Rule 1.16(d)) and an new provision regarding returning materials to prospective clients (Rule 1.18(e)).
- Amendments to the rule providing special responsibilities of a prosecutor somewhat heightening the obligations of a prosecutor concerning public statements and imposing new obligations on prosecutors who learn of possible wrongful convictions, both provisions being patterned after ABA models. (Rule 3.8(f), (g) and (h)).
- An amendment to the rule prohibiting contact with represented persons that allows courts the ability to create exceptions to the rule in exigent circumstances. (Rule 4.2).
- Amendments to the rule prohibiting threatening criminal charges somewhat trimming back the overall prohibition, but adding language confirming the inclusion of lawyer disciplinary charges in the type of charges a lawyer may not threaten for the purpose of gaining advantage in a civil matter. (Rule 4.4(a)).
- A new provision in the rules addressing, in a systematic way, the obligations of a lawyer upon receiving inadvertently disclosed confidential or privileged information. (Rule 4.4(b)).

- Minor amendments to the lawyer advertising rules that, among other things, replace the requirement that lawyers file ads with the Board of Professional Responsibility with a requirement that lawyers merely retain these ads for a period (Rules 7.2(b), 7.3(c)(7)); a new rule (patterned after the ABA model) allowing lawyers to directly solicit business from lawyers (Rule 7.3(a)(1)); a slight amendment to the disclaimer required on certain ads (Rule 7.3(c)(1)).

As you may know by now, amendments to the Rules touching on pro bono are addressed in another report, to be presented by the President-Elect to the Board.

Speaking for the Committee, we appreciate your support.

LTP/kw