Exhibit B

REVISED FINAL REPORT

of the

Tennessee Bar Association
Committee for the Study of
Standards of Professional Conduct

Revised Committee Draft of
Proposed Tennessee Rules of Professional Conduct

December 3, 2001

NOTE: This draft of the Proposed Tennessee Rules of Professional Conduct includes, after each Proposed Rule, Comment, and Definitional Cross-References, a section entitled Committee Notes. This section, prepared on behalf of the Committee, includes a brief comparison of the Proposed Rule to existing Tennessee ethics rules, a brief comparison of the Proposed Rule to the pertinent provisions of the ABA Model Rules of Professional Conduct; a brief description of any changes made to the Proposed Rule and Comment after the Committee's Preliminary Draft, was issued by the Committee for discussion purposes in November 1997, yet before the Petition was filed in October 2000; and a brief description of comments received by the Tennessee Supreme Court or the Committee after the filing of the TBA Petition in October 2000, as well as any response or changes to the Proposed Rule made by the Committee in response to such comments.

TABLE OF CONTENTS

PREAMBLE

[1] A lawyer is an expert in law pursuing a learned art in service to clients and in the spirit of public service and engaging in these pursuits as part of a common calling to promote justice and public good. Essential characteristics of the lawyer are knowledge of the law, skill in applying the applicable law to the factual context, thoroughness of preparation, practical and prudential wisdom, ethical conduct and integrity, and dedication to justice and the public good.

[2] A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

[3] As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesperson for each client. A lawyer acts as evaluator by examining a client's legal affairs and reporting about them to the client or to others.

[4] In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

[5] A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

[6] As a public citizen, a lawyer should seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance, and should therefore devote professional time and civic influence in their behalf. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

[7] Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.

[8] A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the

public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

[9] In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an upright person while earning a satisfactory living. The Rules of Professional Conduct prescribe terms for resolving such conflicts. Within the framework of these Rules many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.

[10] The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

[11] To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

[12] The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

[13] Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

SCOPE

[1] The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has professional discretion. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term "should." Comments do not add obligations to the Rules but provide either additional guidance for practicing in compliance with the Rules or make suggestions about good practice which lawyers would be well-advised to heed even though the Rules do not require them to do so.

[2] The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.

[3] Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that may attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

[4] Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may differ from those of lawyers in private client-lawyer relationships. For example, in certain circumstances, the Attorney General of Tennessee has authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. The same may be true of lawyers employed by the federal government. Also, certain government lawyers under the supervision of these officers may be authorized to represent several government agencies, officers or employees in legal controversies in circumstances where a private lawyer could not represent multiple private clients. Government lawyers in Tennessee are also subject to the Open Meetings Act as interpreted by the Tennessee courts. They also may have authority to represent the "public interest" in circumstances where a private lawyer would not be authorized to do so. These Rules are not intended to abrogate the powers and responsibilities of government lawyers under federal law or under the constitution, statutes, or common law of Tennessee.

[5] Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

[6] Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.

[7] Moreover, these Rules are not intended to govern or affect judicial application of either the attorney-client or work product privilege. Those privileges were developed to promote compliance with law and fairness in litigation. In reliance on the attorney-client privilege, clients are entitled to expect that communications within the scope of the privilege will be protected against compelled disclosure. The attorney-client privilege is that of the client and not of the lawyer. The fact that in exceptional situations the lawyer under the Rules has a limited discretion to disclose a client confidence does not vitiate the proposition that, as a general matter, the client has a reasonable expectation that information relating to the client will not be voluntarily disclosed and that disclosure of such information may be judicially compelled only in accordance with recognized exceptions to the attorney-client and work product privileges.

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

[9] The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are intended either as guides to interpretation or as suggestions of good practice, but the text of each Rule is authoritative.

Comments Received After September 2000 Draft, Committee Response, and Changes Made

1. Each paragraph in the Preamble and Scope has been numbered. This parallels the enumeration in the Comments and will facilitate citation.

2. Scope, Paragraph [4], has been modified in response to the Comment filed with the Court by the Attorney General of Tennessee. The Committee believes that this change is responsive to the Attorney General's concern, while also acknowledging that lawyers for other governmental entities may also have special powers and responsibilities. Rather than create unique and non-uniform Tennessee exceptions in each of the various rules about which the Attorney General voiced concern, the Committee believes that this revision affords Tennessee courts the flexibility to recognize the distinctive legal responsibilities and prerogatives of the Attorney General and other government lawyers.

CHAPTER 1
CLIENT-LAWYER RELATIONSHIP

PROPOSED RULE 1.0
DEFINITIONS

(a) "Belief" or "Believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

(b) “Consents in Writing” or “Written Consent” denotes either (i) a written consent executed by a client, or (ii) oral consent given by a client which the lawyer confirms in writing in a manner which can be easily understood by the client and which is promptly transmitted to the client by means reasonably calculated to reach the client.

(c) "Consult" or "Consultation" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

(d) "Firm" or "Law Firm" denotes a lawyer or lawyers in a private firm, lawyers employed in the legal department of a corporation, government agency, or other organization and lawyers employed in a legal services organization. See Comment, Rule 1.10.

(e) "Fraud” or “Fraudulent" denotes an intentionally false or misleading statement of material fact, an intentional omission from a statement of fact of such additional information as would be necessary to make the statements made not materially misleading, and such other conduct by a person intended to deceive a person or tribunal with respect to a material issue in a proceeding or other matter.

(f) "Knowingly," "Known," or "Knows" denotes actual awareness of the fact in question. A person's knowledge may be inferred from circumstances.

(g) "Material" denotes something which a reasonable person would consider important in assessing or determining how to act in a matter.

(h) “Partner” denotes a partner in a law firm organized as a partnership or professional limited liability partnership, a shareholder in law firm organized as a professional corporation, a member in a law firm organized as a professional limited liability company, or a sole practitioner who employs other lawyers or nonlawyers in connection with his or her practice.

(i) "Reasonable" or "Reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(j) "Reasonable belief”’ or "Reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(k) "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(l) "Substantial" denotes something that is not only material but also of clear and weighty importance.

(m) "Tribunal" denotes a court or other adjudicative body.

COMMENT

In circumstances in which these rules require either consent in writing or written consent, the requirement may be satisfied by an electronic transmission that is reasonably calculated to reach the client, provided that the transmission can be reduced to writing or permanently retained in electronic format.

COMMITTEE NOTES

Comparison To Current Tennessee Ethics Rules

There are no counterparts to these definitions in the Disciplinary Rules except as follows: (d) Firm or Law Firm: A law firm is defined in the Disciplinary Rules as including "a professional legal corporation and a professional legal limited liability legal company." Paragraph (d) broadens this definition by referring more generally to a private firm and broadening one definition to include legal departments and legal services organizations as well as the traditional private law firm.

(m) Tribunal: This definition is the same as Disciplinary Rule Definition (8).

Comparison To ABA Model Rules

The definitions are identical to the Model Rule definitions except as follows:

(b) Consents in Writing: There is no counterpart in the Model Rules.

(e) Fraud or Fraudulent: The Model Rule defines these terms as denoting "conduct that has a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information." The proposed definition includes specific reference to intentionally false and misleading statements and an intentional omission from a statement of fact of such additional information as would be necessary to make the statements made not materially misleading.

(g) Material: There is no definition of "material" in the Model Rules.

(h) Partner: The Model Rule definition of a "partner" is limited to "a member of a partnership" and a "shareholder in a law firm organized as a professional corporation." The Committee has broadened this definition -- which is used in Rules 5.1 through 5.4 -- to include members in PLLCs and a sole practitioner who employs other lawyers or nonlawyers in connection with his or her practice.

(l) Substantial: The definition has been slightly modified to highlight the relationship between materiality (something a reasonable lawyer would consider important) and substantiality (something that is of clear and weighty importance).

Changes Made to 1997 Committee Preliminary Draft In Response to Comments

The definitions were transferred from a "Terminology" section at the end of the Preamble to a new Rule 1.0.

The following definitions were deleted as unnecessary:

“Agency” denotes a governmental organization or entity other than a tribunal.

“Employee” denotes a person who is acting on behalf of a lawyer or law firm and who has agreed to be subject to a lawyer’s right to control with respect to actions taken on behalf of the lawyer or law firm.

"Organization or other legal entity" denotes trusts, estates, partnerships, limited partnerships, corporations, limited liability companies, limited liability partnerships, and other relationships regarded in law as having a legal existence separate and distinct from that of the persons who are parties to the relationship.

"Person" denotes an individual, an organization or other legal entity, or an agency.

Paragraph (b) defining “Consents in Writing” was added.

Comments Received After September 2000 Draft, Committee Response, and Changes Made

1. A redundant reference to limited liability partnerships in Paragraph (h)’s definition of “partner” was deleted.

2. In response to a suggestion from members of the TBA’s Tax, Probate, and Trust Law Section, Paragraph (b) and Comment [1] were modified to clarify that a written confirmation of an oral consent must be transmitted to the client by “means reasonably calculated to reach the client.” This increases the likelihood that the client will receive the confirmation and protects the lawyer where the lawyer has transmitted the confirmation by reasonable means, but the client does not receive it.

PROPOSED RULE 1.1
COMPETENCE

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

COMMENT

Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis

of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] In a situation in which a client is threatened with imminent and irreparable harm, a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in such a situation, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.

Maintaining Competence

[6] To maintain the requisite knowledge and skill, a lawyer should engage in regular continuing study and education which is pertinent to the lawyer’s practice and should conscientiously satisfy all requirements for continuing legal education in all jurisdictions in which the lawyer is licensed to practice law. If a system of peer review has been established, the lawyer should consider making use of it in appropriate circumstances.

DEFINITIONAL CROSS-REFERENCES

“Reasonably” See Rule 1.0(i)

COMMITTEE NOTES

Comparison To Current Tennessee Ethics Rules

DR 6-101(A)(1) provides that a lawyer shall not handle a matter "which he knows or should know that he is not competent to handle, without associating himself with a lawyer who is competent to handle it." DR 6-101(A)(2) requires "preparation adequate in the circumstances." Rule 1.1 more fully particularizes the elements of competence. Whereas DR 6-101(A)(3) prohibits the "[n]eglect of a legal matter," Rule 1.1 does not contain such a prohibition. Instead, Rule 1.1 affirmatively requires the lawyer to be competent.

Comparison To ABA Model Rules

Proposed Rule 1.1 is identical to ABA Model Rule 1.1.

Changes Made to 1997 Committee Preliminary Draft In Response to Comments

The Committee modified Comment [1] by deleting the two examples of when a lawyer might be held to the standard of a specialist -- "when a lawyer is practicing in a field of law regarded by lawyers as requiring special expertise, or in which lawyers may be certified as specialists by the Commission on Specialization and Continuing Legal Education" and "when a lawyer claims to have special expertise."

The Committee modified Comment [2] by deleting the statement that "a lawyer should not undertake the representation of a client in a matter the lawyer is not personally competent to handle unless the client is first advised that the lawyer will need to associate another lawyer in the matter."

The Committee deleted Comments [7] through [10], which read as follows:

> [7] In order to be certified as a specialist by the Commission on Specialization and Continuing Legal Education, a lawyer must carry at least $500,000 malpractice insurance. Although there is no rule requiring lawyers to carry malpractice insurance, a lawyer should carry such malpractice insurance, or have in reserve sufficient assets, as will enable the lawyer to compensate the lawyer's clients for reasonably foreseeable losses that may be caused by the failure of the lawyer to represent the client in accordance with the standards of reasonable lawyers in this Tennessee.
>
> [8] Although the duty set forth in this rule is only a duty to provide competent representation to a person a lawyer is representing as a client, a lawyer should also act reasonably to prevent a prospective client who the lawyer declines to represent in a matter from erroneously assuming that the lawyer's decision not to undertake the representation constitutes advice with respect to the merits of the matter the client has discussed with the lawyer. It is particularly important that the lawyer do so if the prospective client has consulted with the lawyer about the matter at the lawyer's office, at a mutually prearranged meeting, or at a meeting initiated by the lawyer. Upon deciding not to represent the prospective client in the matter, the lawyer should, prior to or within a reasonable time after the conclusion of the consultation, communicate with the prospective client in a way reasonably calculated to inform the prospective client that the lawyer is not undertaking the representation and that the prospective client should promptly consult another lawyer if he or she is still interested in pursuing the matter. In many instances a lawyer who declines to represent a prospective client in a matter will be well-advised to communicate this information to the prospective client in writing.
>
> [9] See Rule 1.8(H) with respect to the validity of agreements between a lawyer and a client which prospectively limit the lawyer's liability for malpractice or settle client claims that the lawyer did not provide them with competent representation. Although Rule 1.2(D) permits a lawyer and client to agree to limit the objectives or scope of the lawyer's representation, the lawyer is prohibited from entering into any such agreement as would prevent the lawyer from providing the client with the competent representation required by this Rule.
>
> [10] If a lawyer comes to know that he or she has not provided competent representation to a client and that the failure to do so is likely to have or has had a material adverse effect on the representation of the client, the lawyer should try to prevent or rectify the adverse effect. If unable to do so, the lawyer should consult with the client about the

problem and act reasonably to compensate client for losses caused by the failure of the lawyer to provide the competent representation required by this rule.

All deletions were made to bring Proposed Tennessee Rule 1.1 into conformity with ABA Model Rule 1.1. Although the Committee approved the substance of the deleted material, it was the conclusion that it was not sufficiently important to warrant sacrificing the uniformity that comes with adoption of the ABA Model Rule.

Comments Received After September 2000 Draft, Committee Response, and Changes Made

1. In light of the Committee's approval of a suggestion from members of the TBA's Tax, Probate and Trust Law Section that Comments [6] and [7] to Rule 1.14 be modified to replace the concept of an "emergency" with a more specific reference to situations in which a client will suffer "imminent and irreparable harm," the Committee concluded that Comment [3] to this Rule should be similarly modified. In both situations, the Committee was concerned that the concept of an emergency might be too narrowly construed so that it would only embrace unexpected and suddenly-occurring situations, rather than all situations in which a client needs a lawyer's help to prevent imminent and irreparable harm. This change is also consistent with the suggestion of the Professionalism Committee of the Knoxville Bar Association that Comment [3]'s reference to an "emergency" be defined.

2. The TBA Committee considered, but did not approve, the recommendation of the Board of Professional Responsibility that Proposed Rule 1.1 be replaced with the substance of DR 6-101(A). The Board contends that DR 6-101(A)(1) affords clients more protection, will be easier to enforce, and gives more guidance to lawyers. For the following reasons, the TBA Committee disagrees with the Board's conclusions for a number of reasons:

a. Replacing Proposed Rule 1.1 with DR 6-101 would be inconsistent with the Committee's goal of promoting uniformity among state ethics rules.

b. Proposed Rule 1.1 affords clients protection identical to the protection afforded by DR 6-101(A)(2) and (3). There is no question that a lawyer who violates DR 6- 101(A)(2) ("a lawyer shall not handle a legal matter without preparation adequate in the circumstances") will have failed to provide "competent representation to a client" as defined in Proposed Rules 1.1 to include "preparation reasonably necessary for the representation." Comment [5] reinforces this point by repeating that reasonably competent representation "also includes adequate preparation." The Comment provides further guidance by stating that "required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence." Similarly, a lawyer who violates DR 6-101(A)(3) ("a lawyer shall not neglect a legal matter entrusted to the lawyer" will violate Proposed Rule 1.1's duty to provide competent representation as defined to include "thoroughness and preparation reasonably necessary for the representation.") Neglecting a matter would also violate Rule 1.3's requirement that the lawyer act with "reasonable diligence."

c. The TBA Committee acknowledges that Proposed Rule 1.1 differs from DR 6-101(A)(1) in that it does specifically preclude a lawyer from "handling a matter that the

lawyer knows or should know the lawyer is not competent to handle." A lawyer cannot violate Rule 1.1 by undertaking a case that lawyer is not competent to handle. Rather, Rule 1.1 will only be violated if the lawyer, having undertaken a case the lawyer was not competent to handle, thereafter fails to provide competent representation. Concurring in the reasoning set forth in Comment [2], the Committee believes that, for purposes of discipline, the lawyer should be judged not by what competence he or she is thought to have when a case is undertaken, but rather by the quality of the representation actually provided to the client by virtue of the lawyer's preparation or association of another lawyer. Also, the TBA Committee does not believe it makes sense for a lawyer who competently represented a client to be exposed to a risk of discipline because the lawyer was not competent to handle the matter when the representation was undertaken.

d. The Proposed Rule affords the public greater protection than DR 6-101(A) because it permits discipline of a lawyer who does not neglect a matter, but who nonetheless fails to provide competent representation because of a defect in either the lawyer's knowledge or skill as would be reasonably necessary for the representation.

PROPOSED RULE 1.2
SCOPE OF THE REPRESENTATION AND THE ALLOCATION OF AUTHORITY BETWEEN THE LAWYER AND CLIENT

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

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of a client's representation if the limitation is reasonable under the circumstances and the client gives consent, preferably in writing, after consultation.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows or reasonably should know is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

COMMENT

Allocation of Authority Between Client and Lawyer

[1] Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. Also, the decisions specified in paragraph (a), such as whether to settle a civil matter, must be made by the client. Other decisions may be made by the lawyer pursuant to the lawyer's implied authority to take action necessary to carry out the representation, subject to the lawyer's duty to keep the client reasonably informed about the status of the representation. See Rule 1.4. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, for example, the lawyer normally will assume responsibility for technical and legal tactical issues, but usually will defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Law defining the lawyer's scope of authority in litigation varies among jurisdictions.

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

[3] Communication between the lawyer and the client is necessary for the client to effectively participate in decisions relating to client's representation. The lawyer must, therefore,

keep the client reasonably informed about the lawyer's actions on behalf of the client. See Rule 1.4.

[4] At the outset of a representation, the client may authorize the lawyer to take action on the client's behalf without further consultation. Ordinarily, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time, and a lawyer may not rely on an advance authorization if there has been such a material change in the circumstances known to the lawyer that the client's prior authorization can no longer be regarded as an adequately informed decision.

[5] In a case in which the client appears to be suffering mental disability, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

Independence From Client's Views or Activities

[6] Legal representation should not be being denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

Agreements Limiting the Scope of the Representation

[7] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[8] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

[9] Other agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1,1.8, and 5.6.

Criminal, Fraudulent and Prohibited Transactions

[10] Paragraph (d) prohibits a lawyer from counseling or assisting a client to engage in conduct that the lawyer knows or reasonably should know is criminal or fraudulent. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the

course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[11] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer may be permitted but is not required by Rule 1.6 to reveal the client's wrongdoing. In any case, however, the lawyer is required to avoid furthering the purpose, for example, by suggesting how it might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a).

[12] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[13] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a sham transaction; for example, a transaction to effectuate criminal or fraudulent escape of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

[14] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law, or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4.

DEFINITIONAL CROSS-REFERENCES

"Reasonable" See Rule 1.0(i)
"Consultation" See Rule 1.0(c)
"Knows" See Rule 1.0(f)
"Reasonably Should Know" See Rule 1.0(k)
"Fraudulent" See Rule 1.0(e)

COMMITTEE NOTES

Comparison To Current Tennessee Ethics Rules

There is no direct counterpart to this Rule in the Tennessee Rules.

Paragraph (a): There is no direct counterpart to Paragraph (a) in the Tennessee Rules, but DR 7-101(A)(4) provides that a lawyer "shall not intentionally . . . fail to seek the lawful objectives of his client through reasonably available means permitted by law" and DR 7-101(B)(4) provides that a lawyer may, "where permissible, exercise his professional judgment to waive or fail to assert a right or position of his client." EC 7-7 reads: "In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client . . . ." EC 7-8 also states that, "[i]n the final analysis, however, the . . . decision whether to forego legally available objectives or methods because of nonlegal factors is ultimately for the client . . . ."

Paragraph (b): There is no counterpart to Paragraph (b) in the Tennessee Rules.

Paragraph (c): There is no counterpart to Paragraph (c) in the Tennessee Rules. DR 7-101(A)(4), however, provides that a lawyer "shall not intentionally . . . fail to seek the lawful objectives of his client through reasonably available means permitted by law . . . ," leaving unaddressed the extent to which lawyers and clients may agree that the lawyer will provide a limited representation.

Paragraph (d): DR 7-102(A)(7) more broadly provides that a lawyer shall not "[c]ounsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent."

Comparison To ABA Model Rules

Paragraph (a): Except for the second half of the first sentence, Proposed Rule 1.2(a) tracks ABA Model Rule 1.2(a). The second half of the first sentence in the Model Rule requires the lawyer to consult with client about the means to be used to pursue the client's objectives. The Committee has changed this so that the duty to consult about means will be addressed in Rule 1.4 as an aspect of the lawyer's duty to keep the client reasonably informed about the status of the representations. Also, the Proposed Rule expressly recognizes the lawyer's implied authority to take action to carry out the representation, but, in recognition that implied authority can be revoked, Comment [1] discusses the resolution of disagreements between lawyer and client about the means to be used to carry out the representation.

Paragraph (b) is identical to ABA Model Rule 1.2(b).

Paragraph (c): Paragraph (c) is related to but significantly modifies Model Rule 1.2(c) which provides that "a lawyer may limit the objectives of the representation if the client consents after consultation." The Proposed Rule makes clear that lawyers and clients are free to limit the scope of the lawyer's representation of the client so long as the limited representation is reasonable under the circumstances.

Paragraph (d): Paragraph (d) is identical to Model Rule 1.2(d) except that we also require the lawyer to refuse to counsel or assist the client if the lawyer "reasonably should know" that the client's conduct is criminal or fraudulent.

The Committee has moved ABA Model Rule 1.2(e) to Comment [14].

Changes Made to 1997 Committee Preliminary Draft In Response to Comments

The Committee substantially revised Proposed Rule 1.2 so that it would more closely track the ABA Model Rule.

The Committee deleted Paragraph (B) of the Preliminary Draft, which read:

> (B) Before or within a reasonable time after agreeing to represent a client in a matter, a lawyer who has not regularly represented the client in similar matters shall consult with the client about the scope and objectives of the representation and the allocation of decision-making authority between the lawyer and client.

The Committee concluded that such consultation, while desirable, should not be mandated under pain of professional discipline because of the difficulty of ascertaining the proper extent of the consultation in a particular case.

Paragraph (a) replaces Paragraph (C) in the Preliminary Draft that read as follows:

> (C) Unless required or permitted to do otherwise by paragraph (E) or by an agreement with the client permitted by paragraph (D), a lawyer
>
> (1) shall provide such services as would reasonably be expected by the client under the circumstances; and
>
> (2) shall abide by the instructions of the client with respect to the objectives of the representation and the means by which they are to be pursued; and
> (3) shall consult with the client and abide by the client's specific instructions, if any, with respect to the objectives of the representation and any of the following actions:
>
> (a) in a civil proceeding the filing of a complaint, the offer, acceptance, or rejection of a proposal for settlement of the matter, or the filing of an appeal from an adverse decision, or
>
> (b) in a criminal proceeding the entry of a plea, the offer, acceptance or rejection of a proposal with respect to the plea to be entered or sentence to be imposed, the waiver of a constitutional right or testimonial privilege of the client, or the filing of an appeal of a conviction or sentence, or
>
> (c) any other action that the lawyer reasonably believes will subject the client to a material risk of civil or criminal liability or will cause substantial harm to another person; and
>
> (4) in the absence of instructions from the client to the contrary, the lawyer may, without prior consultation with the client, take any other action the lawyer reasonably believes will contribute to the achievement of the client's objectives.

The Committee concluded that the specification of the scope of a representation in Paragraph (C)(1) was unnecessary and that the requirement in Paragraph (C)(2) that the lawyer abide by client instructions was ill advised in light of the variety of situations in which such a duty might be implicated and the importance of lawyers retaining independence of professional judgment. The Committee also concluded that the list of decisions in Paragraph (C)(3) that must be made by the client should be conformed with ABA Model Rule 1.2(a).

With respect to disagreements between the lawyer and the client as to the means to be used to accomplish the client's objectives, the final draft reflects the Committee's judgment that such disagreements should be resolved by the lawyer and the client with the client having the right to discharge the lawyer if they cannot reach agreement and the lawyer having a similar right to withdraw from the representation (subject, of course, to the power of the court to deny a request for permission to withdraw where withdrawal would interfere with the due administration of justice).

Paragraph (b) is identical to Paragraph (A) of the Preliminary Draft. It was moved so that the paragraphing in the Tennessee rule would be the same as in the ABA Model Rule.

Paragraph (c) replaces Paragraph (D) of the Preliminary Draft, which read:

(D) After consultation by the lawyer with the client, a lawyer and client may by written agreement limit the scope and objectives of the representation, limit the means the lawyer will employ in representing the client, or allocate to either the lawyer or client authority to make decisions with respect to the representation, provided, however, that no such agreement shall be effective to

> (1) confer upon the lawyer unrestricted authority to offer or to accept or reject an offer of a settlement in a civil proceeding or a plea agreement in a criminal prosecution, or
>
> (2) confer upon the lawyer an irrevocable authority to take action on behalf of the client, or
>
> (3) confer upon the lawyer authority to take action if there has been a material change in circumstances relating to the action that the lawyer has reason to believe was not anticipated by the client at the time the lawyer was authorized to take the action, or
>
> (4) to confer upon the lawyer the authority to take an action if law or the rules of a tribunal require that the action be taken personally or be specifically approved by the client.

The Committee concluded that the effectiveness of a delegation of authority by the client to the lawyer was more appropriately addressed in the Comments. The Committee also concluded, however, that agreements limiting the scope of a representation should only be permitted if reasonable under the circumstances.

Paragraph (d) replaces Paragraph (E) of the Preliminary Draft that read:

(E) Notwithstanding any agreement or instructions to the contrary, a lawyer

> (1) shall not counsel the client to engage in or assist the client in conduct, or otherwise take action on behalf of the client which the lawyer knows or reasonably should know is illegal, fraudulent, or prohibited by the Rules of Professional Conduct, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law; and
>
> (2) may refuse to take any action the lawyer believes is illegal, fraudulent, or prohibited by the Rules of Professional Conduct; and
>
> (3) may refuse to take any action the lawyer reasonably believes is unprofessional; and
>
> (4) may take any action that law, the Rules of Professional Conduct, or the order of a tribunal requires the lawyer to take; and

(5) may take any action without the consent of the client when law or an order of a tribunal requires such immediate action that the lawyer reasonably believes that the consent of the client cannot be obtained prior to taking action.

Because Proposed Rule 1.2 no longer requires the lawyer to abide by client instructions about the means to be used to accomplish the client's objectives, the Committee concluded that paragraphs (2) through (5) -- which were exceptions to the duty to abide by client instructions -- were no longer necessary and that the point made by these paragraphs could be incorporated into the Comment.

Comments Received After September 2000 Draft, Committee Response, and Changes Made

The Attorney General has voiced concern about the inconsistency between Rule 1.2(a) and the statutory authority of the Attorney General pursuant to Tenn. Code Ann. §§ 8-6-109(b)(1) and 20-13-103. The Committee believes that it has adequately addressed this problem in Scope, Paragraph [4].

PROPOSED RULE 1.3
DILIGENCE

A lawyer shall act with reasonable diligence and promptness in representing a client.

COMMENT

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client. Unless instructed by a client to the contrary, a lawyer has professional discretion in determining the means by which a matter should be pursued, and the lawyer is not required to abide by unreasonable client instructions. See Rule 1.2. A lawyer's work load should be controlled so that each matter can be handled adequately.

[2] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.

[3] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client but has not been specifically instructed concerning pursuit of an appeal, the lawyer should advise the client of the possibility of appeal before relinquishing responsibility for the matter.

DEFINITIONAL CROSS-REFERENCES

“Reasonable” See Rule 1.0(i)

COMMITTEE NOTES

Comparison To Current Tennessee Ethics Rules

The Proposed Rule is identical to DR 7-101(A)(1). DR 6-101(A)(3) also requires that a lawyer not "neglect a matter entrusted to him."

Comparison To ABA Model Rules

The Proposed Rule is identical to ABA Model Rule 1.3.

Changes Made to 1997 Committee Preliminary Draft In Response to Comments

No changes.

Comments Received After September 2000 Draft, Committee Response, and Changes Made

1. The Board of Professional Responsibility has asked the Court to add a second sentence to the Rule that would state: "A lawyer shall not neglect a legal matter entrusted to the lawyer." This wording comes from DR 6-103(A)(3). The Committee believes that this addition is unnecessary because a lawyer who neglects a matter has violated Rule 1.3 by failing to provide diligent and prompt representation. If, however, the Court believes there should be a specific reference to neglect, the Committee recommends that this point be made in a new first sentence to Comment [1], rather than in the Rule text, so as to maintain the consistency of this Rule with the ABA Model Rule, which has been widely adopted.

2. The Attorney General has voiced a concern about that portion of Comment [1] that refers to the right of the client to determine the means by which a matter should be pursued. Such a right is said to be inconsistent with the Attorney General's responsibility to make decisions about litigated matters in the interests of the State of Tennessee, notwithstanding the dictates or wishes of agency officials. As explained in the Committee's response to the Attorney General's concerns about Rule 1.2, which specifically addresses the allocation of authority between lawyer and client, the Committee believes that these concerns are adequately addressed in Scope, Paragraph [4].

PROPOSED RULE 1.4
COMMUNICATION

(a) A lawyer shall keep a client reasonably informed about the status of a matter and comply with reasonable requests for information within a reasonable time.

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

COMMENT

Keeping the Client Reasonably Informed

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

Explaining Matters

[2] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. For example, a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party and take other reasonable steps that permit the client to make a decision regarding a serious offer from another party.

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

Withholding Information

[4] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

DEFINITIONAL CROSS-REFERENCES

"Reasonable" and "Reasonably" See Rule 1.0(i)

COMMITTEE NOTES

Comparison To Current Tennessee Ethics Rules

The proposal is identical to DR 7-101(A)(2) and (3), except that "within a reasonable time" is added.

Comparison To ABA Model Rules

The proposal is identical to Model Rule 1.4, except that "within a reasonable time" is added.

Changes Made to 1997 Committee Preliminary Draft In Response to Comments

To conform the proposal to the current Tennessee Rules and ABA Model Rule 1.4, the following paragraphs contained in the Preliminary Draft were deleted:

> (A) Before or within a reasonable time after agreeing to represent a client in a matter, a lawyer shall consult with the client about the representation as may be required by the Rules of Professional Conduct.
>
> (B) During the course of the representation, a lawyer shall
>
> (2) initiate a consultation with the client within a reasonable time
>
> (a) prior to taking any action requiring the specific consent of the client; or
>
> (b) after the lawyer comes to know that the client expects assistance not permitted by the Rules of Professional Conduct or other law or that the lawyer is otherwise unwilling to provide.

The Committee concluded that paragraph (A) was unnecessary and that the matters covered in Paragraph (B)(2) are adequately addressed in Rule 1.2.

Comments Received After September 2000 Draft, Committee Response, and Changes Made

No comment or changes.

PROPOSED RULE 1.5
FEES

(a) A lawyer's fee and charges for expenses shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services;

(8) whether the fee is fixed or contingent;

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

(10) whether the fee agreement is in writing.

(b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing and signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and whether there was a recovery, and showing the remittance, if any, to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or the award of custodial rights, or upon the amount of alimony or support, or the value of a property division or settlement, unless the matter relates solely to the collection of arrearages in alimony or child support or the enforcement of an order dividing the marital estate and the fee arrangement is disclosed to the court; or

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

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

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

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

(3) the total fee is reasonable.

COMMENT

Basis or Rate of Fee

[1] When the lawyer has regularly represented a client, there ordinarily will have evolved an understanding concerning the basis or rate of the fee. In a new client-lawyer relationship, however, an understanding as to the fee should be promptly established. It is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, or to identify the factors that may be taken into account in finally fixing the fee. When developments occur during the representation that render an earlier estimate substantially inaccurate, a revised estimate should be provided to the client. A written statement concerning the fee reduces the possibility of misunderstanding. Furnishing the client with a simple memorandum or a copy of the lawyer's customary fee schedule is sufficient if the basis or rate of the fee is set forth.

Terms of Payment

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

[3] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures. When there is doubt whether a contingent fee is consistent with the client's best interest, the lawyer should offer the client

alternative bases for the fee and explain their implications. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage.

[4] In some circumstances, other law may regulate the fees and expenses charged by lawyers. For example, Tennessee law regulates contingent fees in medical malpractice cases. See, e.g., Tenn. Code Ann. § 29-26-120 (1980). In these circumstances, charging unlawful fees or expenses may be considered unreasonable under section (a) of this Rules and may violate Rule 8.4 or other rules. See, e.g., Rule 8.4(d) (prohibiting conduct prejudicial to the administration of justice).

Division of Fee

[5] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee on either the basis of the proportion of services they render or by agreement between the participating lawyers if all assume responsibility for the representation as a whole and the client is advised and does not object. It does not require disclosure to the client of the share that each lawyer is to receive. Joint responsibility for the representation entails the obligations stated in Rule 5.1 for purposes of the matter involved.

Disputes Over Fees

[6] If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

DEFINITIONAL CROSS-REFERENCES

“Firm” See Rule 1.0(d)
“Reasonable” and “Reasonableness” See Rule 1.0(i)

COMMITTEE NOTES

Comparison To Current Tennessee Ethics Rules

Paragraph (a): DR 2-106(A) provides that a lawyer "shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee." DR 2-106(B) provides that a fee is "clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee." EC 2-17 states that a lawyer "should not charge more than a reasonable fee . . . ." The requirement that charges for expenses, as well as fees, be reasonable is new. With the exception of Subparagraphs (9) and (10), the factors to be considered in determining the reasonableness of the fees and charges for costs are substantially identical to those listed in DR 2-106(B).”

Paragraph (b): There is no counterpart to Paragraph (b) in the Tennessee Rules. EC 2-19 states that it is "usually beneficial to reduce to writing the understanding of the parties regarding the fee, particularly when it is contingent."

Paragraph (c): There is no counterpart to Paragraph (c) in the Tennessee Rules. EC 2-20 provides that "[c]ontingent fee arrangements in civil cases have long been commonly accepted in the United States," but that "a lawyer generally should decline to accept employment on a contingent fee basis by one who is able to pay a reasonable fixed fee . . . ."

Paragraph (d)(1): There is no comparable provision in the Disciplinary Rules, but EC 2-20 provides that "contingent fee arrangements in domestic relations cases are rarely justified." The Committee's proposal with respect to contingent fees in domestic relations matters tracks but is not identical to the approach taken in Hall v. Davis, slip op., No. 01-A-01-9404-CV-00146, 1994 Tenn. App. LEXIS 534 (Tenn. Ct. App., Middle Section, Sept. 21, 1994), and Alexander v. Inman, slip op., No. 01A01-9605-CH-00215, 1996 Tenn. App. LEXIS 801 (Tenn. Ct. App., Middle Section, Dec. 11, 1996), reversed on other grounds, 974 S.W.2d 689 (Tenn. 1998). A noticeable difference is that we have dispensed with a requirement of prior judicial approval. The Committee believes that notification is a sufficient safeguard.

Paragraph (d)(2): DR 2-106(C) more broadly prohibits "a contingent fee in a criminal case."

Paragraph (e): DR 2-107(A) permits division of fees only if: "(1) The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made. (2) The division is in proportion to the services performed and responsibility assumed by each. (3) The total fee does not exceed clearly reasonable compensation . . . ." Paragraph (e) permits division without regard to the services rendered by each lawyer if they assume joint responsibility for the representation.

Comparison To ABA Model Rules

Paragraph (a): The proposal is identical to ABA Model Rule 1.5(a) except for the addition to the reference to "charges for expenses" and subparagraphs (9) and (10).

Paragraph (b): The proposal is identical to ABA Model Rule 1.5(b).

Paragraph (c): Except for a minor editorial change in the last sentence, the proposal is substantively identical to ABA Model Rule 1.5(c).

Paragraph (d)(1): The proposal differs from ABA Model Rule 1.5(d)(1) which flatly prohibits charging "any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof."

Paragraph (d)(2): The proposal is identical to ABA Model Rule 1.5(d)(2).

Paragraph (e): The proposal is identical to ABA Model Rule 1.5(e).

Changes Made to 1997 Committee Preliminary Draft In Response to Comments

Paragraph (A): The Committee deleted a Paragraph (A)(2) that created a rebuttable presumption of reasonableness when a knowledgeable client executed a written fee agreement:

> A fee determined in accordance with a written agreement signed by a knowledgeable client after consultation with the lawyer about the fee and reasonable alternative fee arrangements shall be presumed reasonable unless the lawyer had reason to believe that the client did not understand the terms of the agreement when it was signed. A knowledgeable client is
>
> > (a) a client who by virtue of his or her knowledge about and prior experience with lawyers and legal matters can be regarded as capable, after consultation with the lawyer, of making reasonable judgments about the relative advantages and disadvantages of the fee agreement, or
> >
> > (b) a client represented by an agent who by virtue of his or her knowledge about and prior experience with lawyers and legal matters can be regarded as capable, after consultation with the lawyer, of making reasonable judgments about the relative advantages and disadvantages of the agreement.

The Committee concluded that this novel provision was unnecessary because the factors to be considered in determining the reasonableness of a fee are sufficiently flexible to permit consideration of the fact that a knowledgeable client agreed to the fee in writing.

Paragraph (D)(1)(6): The Committee deleted from Paragraph (D)(1)(b) the requirement that a lawyer must secure prior judicial approval of a contingent fee to charged in a domestic relations matter. The Committee thought that notification of the tribunal, coupled with the general prohibition against charging unreasonable fees, affords clients sufficient protection against the misuse of contingent fees in this context.

Comment [4] was added to alert lawyers to statutory restrictions on contingent fees.

Comments Received After September 2000 Draft, Committee Response, and Changes Made

1. In paragraph (a), the Committee has replaced "costs" with "expenses," because costs might be too narrowly understood or construed to mean court costs, and lawyers frequently incur expenses other than court costs. The reference to expenses is broad enough to include all expenditures by a lawyer incurred on behalf of a specific client.

2. The Board of Professional Responsibility has asked the Court to add an eleventh factor to be considered in determining whether a lawyer's fee is reasonable: "whether a lawyer of ordinary prudence would be left with a firm and definite conviction that the fee is not in excess of a reasonable fee." This is a negative formulation of the current standard in DR 2-106(B), which serves as a definition of a clearly excessive fee prohibited by DR 2-106(A). The Committee is opposed to this change because this reference does not describe a factor to be considered in determining whether a fee is reasonable, but rather is a specification of how certain the lawyer must be that the fee is reasonable, after consideration of those factors. As such it introduces new and undefined terminology that does not mesh with the terminology consistently employed throughout the Rules. The Committee's proposal requires that a lawyer's fee fall within the range of fees that would be charged by reasonably prudent and competent lawyers under the circumstances. See Rule

1.0(i). An added reference to "a firm and definite conviction that the fee is not in excess of a reasonableness fee" will only confuse the inquiry.

3. The Tennessee Trial Lawyers Association asked the Committee to replace the requirement that a lawyer's fee be "reasonable" with a less restrictive prohibition against charging "a clearly excessive fee." As noted by the TTLA, DR 2-106 (A) currently provides that a lawyer shall not charge a clearly excessive fee, which is then defined in DR 2-106(B) in terms of whether a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee exceeds a reasonable fee. For there to be such a definite and firm conviction, then, the fee would have to be considerably well in excess of a reasonable fee. Particularly concerned about the difficulty of determining the reasonableness of contingent fees, the TTLA argued that lawyers should be afforded more leeway in charging for their services than is afforded by the proposed requirement that fees be reasonable. In the end, however, the Committee was persuaded that the public, many of whom are not well-informed about lawyer fee practices, need the greater protection afforded by a more straightforward requirement that a lawyer's fee be reasonable.

PROPOSED RULE 1.6
CONFIDENTIALITY

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except that the lawyer may make such disclosures as are impliedly authorized by the client in order for the lawyer to carry out the representation.

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

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

(2) to prevent the client or another person from committing a crime, unless disclosure is prohibited or restricted by Rule 3.3;

(3) to rectify or mitigate substantial injury to the financial interests or property of another resulting from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services, unless disclosure is prohibited or restricted by Rule 3.3;

(4) to secure legal advice about the lawyer's compliance with these Rules; or

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

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

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

(2) to comply with Rules 3.3, 4.1, or other law.

COMMENT

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.8(b) with respect to the use of such information to the disadvantage of the client. See Rule 1.9(c) with respect to disclosure and adverse use of information relating to the representation of a former client.

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

[3] Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct. The common

law recognizes that the client's confidences must be protected from disclosure. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

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

[5] The principle of lawyer-client confidentiality is given effect by related bodies of law, including the attorney-client privilege, the work-product doctrine, and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

[6] The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

[7] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of hypotheticals to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

[8] A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

[9] Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client

[10] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Substantial bodily harm includes life threatening and debilitating illnesses and the consequences of child sexual abuse. Such injuries are reasonably certain to occur if they will be suffered imminently or if there is a present and substantial threat that a person will suffer such injuries at a later date if the lawyer fails to take action necessary to

eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[11] Paragraph (b)(2) enables the lawyer to reveal information to the extent necessary to prevent the client from committing a crime. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although Paragraph (b)(2) does not require that the lawyer reveal the client's misconduct, the lawyer may not in any way counsel the client to engage, or assist the client, in conduct that the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances. Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization's constituents. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b). Rule 3.3, rather than Paragraph (b)(2) governs disclosure of a client's intention to commit perjury or other crimes in connection with an adjudicative proceeding.

[12] Paragraph (b)(3) addresses the situation in which a lawyer services have been used by the client in furtherance of the client's commission of a crime or fraud, but the lawyer does not discover this misuse of the lawyer's services until after the crime or fraud has been consummated and loss has been suffered by the victim. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which a substantial loss suffered by the affected person can be rectified or mitigated. In such situations, the lawyer may disclose information relating to representation to the extent necessary to assist the affected persons recoup their losses.

[13] A lawyer's confidentiality obligations do not preclude a lawyer from securing legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct. For the protection of the client, such disclosures may be made only if they will be protected by the attorney-client privilege.

[14] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal or professional disciplinary proceeding, and can be based on a wrong allegedly committed by the lawyer against the client, or on a wrong alleged by a third person; for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend, of course, applies where a proceeding has been commenced. Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner which limits

access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[15] A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.

[16] Paragraph (b) permits but does not require the disclosure or use of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (5). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. Where practical, the lawyer should seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose. A lawyer's decision not to take preventive action permitted by paragraph (b) does not violate this Rule.

Disclosure Otherwise Required or Authorized

[17] The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. See Rules 2.2, 2.3, 3.3 and 4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules.

[18] A lawyer must also comply with lawful orders of a tribunal, an administrative or executive agency, or a legislative body. If a lawyer is called as a witness to give testimony concerning a client, or is otherwise ordered to reveal information relating to the client's representation, the lawyer must, absent authorization from the client to do otherwise, assert on behalf of the client all non-frivolous claims that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer should consult with the client about the possibility of appealing the adverse ruling. See Rule 1.4 and 1.2. Unless an appeal is taken, the lawyer must comply with the order.

Acting Competently to Preserve Confidentiality

[19] A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or by other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1, and 5.3.

[20] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer utilize special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality

include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

Former Clients

[21] The duty of confidentiality continues after the client-lawyer relationship has been terminated. See Rule 1.9(c).

DEFINITIONAL CROSS-REFERENCES

"Consultation" See Rule 1.0(c)
"Fraud" See Rule 1.0(e)
"Reasonably" See Rule 1.0(i)
"Reasonably Believes" See Rule 1.0(j)
"Substantial" See Rule 1.0(l)
"Tribunal" See Rule 1.0(m)

COMMITTEE NOTES

Comparison To Current Tennessee Ethics Rules

Paragraph (a): The reference to "information relating to the representation of the client" encompasses more information than embraced by DR 4-101(A)'s reference to "confidences" and "secrets." This is because DR 4-101(A) defined a "secret" in terms of information "gained in" the professional relationship that "the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client."

Paragraph (b)(1): No counterpart in Tennessee Rules.

Paragraph (b)(2): Substantially similar to DR 4-101(c)(3).

Paragraph (b)(3): No counterpart in Tennessee Rules.

Paragraph (b)(4): No counterpart in Tennessee Rules.

Paragraph (b)(5): DR 4-101(C)(4) permits disclosures "necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct."

Paragraph (c): DR 4-101(C)(2) permits disclosure "when . . . required by law or court order."

Comparison to ABA Model Rules

Paragraph (a): Proposed Rule 1.6 (a) is identical to ABA Model Rule 1.6(a).

Paragraph (b)(1): Proposed Rule 1.6(b)(1) tracks ABA Model Rule 1.6(b)(1), only permits disclosure to prevent the client as well as the client, from committing a crime likely to result in imminent death or substantial bodily harm.

Paragraphs (b)(2) and (3): The Model Rules does not permit disclosure to prevent the client from committing a crime or to rectify substantial resulting from a crime or fraud in the commission of which the client's had used the lawyer's services.

Paragraph (b)(4): There is no counterpart in the ABA Model Rules.

Paragraph (b)(5): Paragraph (b)(5) is identical to the ABA Model Rule 1.6(b)(2).

Paragraph (c): There is no counterpart in the ABA Model Rules.

Changes Made to 1997 Committee Preliminary Draft In Response to Comments

Paragraphs (a), (b)(5), and (c) are the same as paragraphs (A), (B)(4), and (C)(2) in the Preliminary Draft.

Paragraph (b)(1): The Committee has broadened the grant of permission to lawyers to reveal information relating to the representation of a client for the purpose of preventing death or substantial bodily. Disclosure is now permitted without any requirement that it be the result client's crime. Also the death or injury no longer must be imminent. It is sufficient if the harm is reasonably certain to occur. This change is consistent with the American Law Institute Restatement of the Law Governing Lawyers.

Paragraph (b)(2): Paragraph (b)(2) is new and permits disclosure to prevent the commission of any crime (with an exception for those crimes against the administration of justice that are addressed by Rule 3.3). This carries forward into the proposed rule the permission to reveal client confidences and secrets granted by DR 4-101(c)(3).

Deletion of Paragraph (B)(3) of the Preliminary Draft: The Committee deleted paragraph (B)(3) that permitted disclosure "to inform a law firm with whom the lawyer proposes to associate, or with whom the lawyer has associated, of the identity of the lawyer's clients, and general subject matter of the representation of those clients, but only if the lawyer reasonably believes that such disclosure will not materially disadvantage the client." Given the limited nature of the information involved and the generally accepted practice among lawyers, the Committee concluded that this exception was not necessary.

Paragraph (b)(3): Paragraph (b)(3) is new and permits disclosure to rectify or mitigate substantial financial loss resulting from a client's crime or fraud in which the client used the lawyer's services. The rationale for this exception is that the client has abused the attorney-client relationship by using the lawyer's services to commit the crime or fraud and has thereby forfeited the protections of Rule 1.6.

Paragraph (b)(4): Paragraph (b)(4) represents a tighter formulation of the exception in paragraph (B)(2) of the Preliminary Draft. The change has no effect on the scope of the exception.

Paragraph (c)(1): The Committee has deleted the references to "an agency" so the lawyer is only required to comply with orders of a "tribunal." The Committee thinks that confidentiality is so important that lawyers should only be required to abide by the order of a court or a comparable adjudicative body.

Comments Received After September 2000 Draft, Committee Response, and Changes Made

1. For different reasons, the Knoxville Bar Association and the East Tennessee Victim's Rights Task Force have voiced concern about the Committee's recommendation that Rule 1.6 protect all "information relating to the representation of a client." The KBA's concern is that the breadth of the protection will unnecessarily prohibit lawyers from sharing information acquired during a representation that would help educate the bar or facilitate settlement and mediation. The Victim's Rights Task Force, on the other hand, objects because Rule 1.6 protects more than the client's communications with the lawyer and affords lawyers a shield behind which they can hide to avoid what most citizens would consider our obligations to our communities.

The Committee concedes that Rule 1.6 protects more information than protected by the DR 4-101, which only protects "confidences" and "secrets." The essential difference is that Rule 1.6 precludes disclosure of information relating to the representation without regard to whether disclosure would be embarrassing or would likely to detrimental to the client. The Committee, however, does not share the KBA's concern about this rule as an impediment to education of the bar because, as noted in Comment [7], lawyers can use hypotheticals to share their experience with other lawyers. Nor does the Rule preclude a disclosure that will facilitate settlement or mediation because such disclosures would be impliedly authorized to carry out the representation. The client can also expressly authorize such disclosures. Nor does the Committee agree with the Victim's Rights Task Force criticism because the information about which they are concerned -- information relating to the commission of crime -- would be harmful to the client and would therefore constitute a "secret" under DR 4-101(A). In this regard, the Committee's proposal does not change the law. More importantly, the Committee would note that its proposal broadens the circumstances in which a lawyer is permitted to disclose information relating to a client's representation to prevent loss of life or substantial bodily harm, to prevent the client from committing a crime, and to rectify or mitigate the consequences of a crime or fraud in which the client used the lawyer's services.

2. T. Maxfield Bahner of Chattanooga Bar has asked the Committee to follow the lead of the ABA House of Delegates and the American College of Trial Lawyers and delete Paragraphs (b)(2) and (b)(3). The effect of this proposal would be to prohibit lawyers, absent client consent, from revealing information relating to the client's representation, even when necessary to prevent the client from committing a crime or to mitigate or rectify the consequences of a crime or fraud in the commission of which the client had used the lawyer's services. With due respect to the American College of Trial Lawyers and the ABA House of Delegates, the Committee believes their position on confidentiality is out of line with the prevailing sentiment in Tennessee and most other jurisdictions about the circumstances in which lawyers should be permitted to take action to protect others from the wrongful conduct of their clients. Paragraph (b)(2) is consistent with current law in Tennessee, and Paragraph (b)(3) only permits disclosures when the client has grossly abused the attorney-client relationship by using the lawyer's services in furtherance of the client's crime or fraud.

3. Paragraph (b)(2) permits a lawyer to disclose information relating to the representation to prevent commission of a crime, unless disclosure is prohibited or restricted by Rule 3.3. The Board of Professional Responsibility and representatives of several victim's rights groups have asked the Court to drop the exception to the lawyer's right to reveal a client's intention to commit a crime. The Committee urges the Court not to do so. The sole purpose for the cross-reference to Rule 3.3 in Paragraph (b)(3) is to clarify that Rule 3.3, rather than Rule 1.6(2), governs when the crime in question relates to an adjudicative proceeding. Paragraphs (c) and (d) of Rule 3.3 do not allow disclosure in cases in which the client intends or has committed a fraud against the court or an

offense against the administration of justice (other than jury tampering). See the Committee's discussion of proposals to modify Rule 3.3. Permitting disclosure pursuant to Rule 1.6(b)(2) would be inconsistent with the restrictions on disclosure in Rule 3.3. If the Court approves the Committee's proposal with respect to Rule 3.3, it should not change Rule 1.6(b)(2).

4. Paragraph (b)(3): On its own motion, the Committee proposes that an exception comparable to that in Paragraph (b)(2) be added to Paragraph (b)(3) that permits disclosure to rectify the consequences of a client's crime or fraud. Upon review of the relationship between the exceptions in Rule 1.6(b) and Rule 3.3, the Committee concluded that there might be situations in which Paragraph (b)(3) might be read to permit disclosure in situations in which it would be prohibited by Rule 3.3. Once again, the sole purpose of this change is to clarify that lawyers must be guided by Rule 3.3 rather than Rule 1.6(b)(3) when the crime in fraud in question relates to an adjudicative proceeding.

5. Paragraphs (b)(1) and (b)(2): Both the United States Attorneys and the Tennessee District Attorneys General Conference have asked the Court to modify the Committee's proposal in Paragraphs (b)(1) and (b)(2) so as to require (rather than merely permit) lawyers to reveal information relating to client's representation to the extent necessary to prevent reasonably certain death or substantial bodily harm and to prevent the client or another person from committing a crime. The Committee opposes this proposal because it would impose an obligation on lawyers that is not imposed on other citizens and would do so in situations in which the lawyer has no greater ability, either by virtue of training or experience, to predict where death or substantial bodily injury will result or that the client will actually carry out the crime in question. The Committee is also concerned that mandatory disclosure would have a much greater adverse affect on clients' willingness to confide with their lawyers than would be the case when the lawyer is permitted to disclose, but retains the discretion to remain silent.

6. The Attorney General has voiced concerns about the relationship between Rule 1.6 and the Open Meeting Law, as interpreted by the Court in Smith County Educ. Assn v. Anderson, 676 S.W.2d 328 (Tenn. 1984), and Van Hooser v. Warren Co. Bd. of Educ., 807 S.W.2d 230 (Tenn. 1991). The Attorney General is concerned that these decisions might not be deemed "other law" requiring disclosure and his concern is heightened by the assertion in Comment [17] that there should be a presumption against other law superceding Rule 1.6. The Committee believes that it is beyond question that a statute such as the Open Meetings Act, as interpreted by the Supreme Court, constitutes "other law" within the meaning of Rule 1.6(c). Also, the Committee believes that it has adequately addressed the Attorney General's concerns by adding a specific reference to the Open Meetings Act in Scope, Paragraph [4], and by deleting the assertion in Rule 1.6, Comment [17] that there should be a presumption against other law superceding Rule 1.6. The deleted assertion in Comment [17] was contained in the ABA Model Rule Comment, but the Committee concurs in the recommendation of the ABA Ethics 2000 Commission that it be deleted as an unnecessary and inappropriate attempt control the resolution of a question of law that the Comment acknowledges is beyond the scope of the Rules.

PROPOSED RULE 1.7
CONFLICT OF INTEREST: GENERAL RULE

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents in writing after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents in writing after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

COMMENT

Loyalty to a Client

[1] Loyalty is an essential element in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. The lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the parties and issues involved and to determine whether there are actual or potential conflicts of interest.

[2] If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. See Rule 1.16. Where more than one client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by Rule 1.9. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see the Comment to Rule 1.3 and the statement in the Preamble about the scope of these Rules.

[3] As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. Paragraph (a) expresses that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients. Paragraph (a) applies only when the representation of one client would be directly adverse to the other.

[4] Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. Paragraph (b) addresses such situations. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does,

whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Consideration should be given to whether the client wishes to accommodate the other interest involved.

Consultation and Consent

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

[6] In the absence of other law to the contrary, a government official or entity, like any other client, may waive a conflict of interest under this Rule.

[7] This Rule requires the lawyer either to secure a written consent executed by the client or to memorialize an oral consent given by the client. See Rule 1.0(b) Terminology (defining "Consents in Writing"). If it is not feasible to secure or memorialize the writing either at the time the conflict arises or at the time the client gives consent, then the lawyer must secure or memorialize it within a reasonable time thereafter. The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened by a conflict of interest, as well as the reasonably available alternatives, and to afford the client an opportunity to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision they are being asked to make and to resolve disputes or ambiguities that might later occur by virtue of there being no writing. The writing need not take any particular form; it should, however, include disclosure of the relevant circumstances and reasonably foreseeable risks of the conflict of interest, as well as memorialization of the client's agreement to the representation despite such risks.

Lawyer's Interests

[8] The lawyer's own interests should not be permitted to have an adverse effect on the representation of a client. For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee. See Rules 1.1 and 1.5. If the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. A lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest.

Conflicts in Litigation

[9] Paragraph (a) prohibits representation of opposing parties in litigation. Simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or co-defendants, is governed by paragraph (b). An impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an

opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests is proper if the risk of adverse effect is minimal and the requirements of paragraph (b) are met. Compare Rule 2.2 involving intermediation between clients.

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

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

Interest of Person Paying for a Lawyer's Service

[12] A lawyer may be paid from a source other than the client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client. See Rule 1.8(f). For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement, and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence. So also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees, if the clients consent after consultation and the arrangement ensures the lawyer's professional independence.

Other Conflict Situations

[13] Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for adverse effect include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions

being performed by the lawyer, the likelihood that actual conflict will arise and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree.

[14] For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them. See Rule 2.2 with respect to a lawyer serving two or more clients as an intermediary.

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

[16] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director.

Conflict Charged by an Opposing Party

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

Special Considerations in Joint Representation

[18] In considering whether to represent clients jointly in the same matter, such as representing co-plaintiffs or co-defendant, a lawyer should be mindful that if the joint representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment, and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the joint representation fails, unless each client consents after consultation.

[19] A particularly important factor in determining the appropriateness of joint representation is the effect on lawyer-client confidentiality and the attorney-client privilege. With regard to the evidentiary attorney-client privilege, the prevailing rule is that as between commonly

represented clients, the privilege does not attach. Hence, it must be assumed that, if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[20] As to the duty of confidentiality, joint representation will almost certainly be inadequate if one client attempts to keep something in confidence between the lawyer and that client, which is not to be disclosed to the other client. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the joint representation and as part of the process of obtaining each client's consent, advise each client that the lawyer will share all information material to the representation with each of the jointly represented clients, unless specifically instructed by one of the clients not to do so. The lawyer should also advise each client that, if any client later insists that some matter material to the representation should be kept from the other, the lawyer will abide by the client's instructions to maintain the confidentiality of the specified information, but that it is likely that the lawyer will be required to withdraw from the representation. In limited circumstances, however, it may be appropriate for the lawyer to proceed with the representation when the clients have agree, after being properly informed, that the lawyer will keep certain information confidential.

[21] Subject to the above limitations, each client in the joint representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. Each client also has the right to discharge the lawyer as stated in Rule 1.16.

Relation to Other Rules

[22] When a lawyer represents a client in a partisan role, whether as an advocate, an advisor, or the author of a legal opinion to be rendered on behalf of the client for use by a third person, this rule provides special protections for the client to assure that the lawyer's loyalty will not be diluted by interests of other clients or interests of the lawyer or third persons. This rule, however, is not applicable to conflicts of interest affecting clients the lawyer undertakes to serve as an intermediary. If, for example, business persons or members of a family are seeking the lawyer's advice or assistance in a non-adversarial effort to accomplish a common objective with respect to the formation, conduct, modification or termination of a consensual relation between them, such as the formation of a business or a purchase or sale of property, Rule 2.2 applies. Similarly, if the effectuation of an estate plan or other gratuitous transfer entails the formation, modification or termination of a consensual legal relationship between clients, and the lawyer acts as an intermediary in connection with the transaction, Rule 2.2 applies. Otherwise, this Rule applies. Nor is this rule applicable to conflicts of interest affecting parties to a dispute who a lawyer undertakes to serve as a dispute resolution neutral. See Rule 2.4.

DEFINITIONAL CROSS-REFERENCES

"Reasonably Believes" See Rule 1.0(j)
"Consents in Writing" See Rule 1.0(b)
"Consultation" See Rule 1.0(c)
"Materially" See Rule 1.0(g)

COMMITTEE NOTES

Comparison To Current Tennessee Ethics Rules

DR 5-101(A) provides that, "[e]xcept with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of the client will be or reasonably may be affected by his own financial, business, property, or personal interests." DR 5-105(A) provides that a lawyer "shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C)." DR 5-105(C) provides that "a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf on each."

Comparison To ABA Model Rules

The Proposed Rule is identical to ABA Model Rule 1.7, except for its requirement of written consents to waive conflicts of interest.

Changes Made to 1997 Committee Preliminary Draft In Response to Comments

Paragraph (a): The cross-reference to Rule 2.2 was dropped. The relationship between Rule 1.7 and Rule 2.2 is discussed in the Comment.

Comment [6] has been added to clarify that the Rule does not preclude government clients from giving consent to a representation involving a conflict of interest.

Comment [7] has been added to explain the requirement that the client's consent to a conflict of interest be in writing.

Comments [18] through [21] were added to explain the relationship between the confidentiality duties in Rule 1.6 and the conflict of interest rules.

Comments Received After September 2000 Draft, Committee Response, and Changes Made

1. In response to suggestions from the TBA Tax, Probate, and Trust Law Section, the Committee proposes changes to Comments [15], [18], and [22] for the purpose of clarifying the applicability of this Rule to the joint representation of family members and explaining the relationship between Rule 1.7, which is applicable to a joint representation in connection with a gratuitous transfer, and Rule 2.2, which is applicable to quid pro quo exchanges between clients who are jointly represented by a single lawyer acting as an intermediary between the clients.

2. The Committee proposes a modification to Comment [20] for the purpose of clarifying that the waiver of confidentiality that is normally a prerequisite for a joint representation can be revoked at any time prior to a lawyer's disclosure, that the lawyer will be required to respect the demand for confidentiality, and that, in such a situation, the lawyer will normally have to withdraw from the joint representation. This change confirms the rejection by the Committee of a request from the TBA Tax, Probate, and Trust Law Section for a modification of Comment [20] to indicate that a client's waiver of confidentiality in connection with a joint representation is irrevocable. Although recognizing that clients can waive the protections of Rule 1.6, the Committee believes that confidentiality is too important to allow, much less require, irrevocable waivers. Also, such

irrevocable waivers should not be permitted because it is unlikely that the client will be able at the time of the waiver to foresee all future circumstances in which the waiver might adversely affect his/her interests. The Committee's view is consistent with its position that clients must retain the power to revoke authority they have previously given a lawyer to take action on their behalf. See Rule 1.2, Comment [4].

3. The Board of Professional Responsibility has asked the Court to amend paragraphs (a) and (b) so that a lawyer may not ask a client to consent to a conflict of interest unless "it is obvious" that the relationship with the client or the representation will not be affected by the conflict of interest. This is the standard currently used in DR 5-105(C). The Committee's proposal permits the lawyer to seek client consent if the lawyer "reasonably believes" that the relationship with the client or the representation will not be adversely affected. "Reasonably believes" is a defined term and denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable. See Rule 1.0(j). Reasonableness is determined from the perspective of a reasonably prudent and competent lawyer. See Rule 1.0(i). The Board argues that its version is "clearer," "more enforceable," and "more protective of the public interest." The Committee respectfully disagrees.

The Board's proposal would create confusion, rather than add clarity, because it would introduce a new, undefined term into a document that employs an interrelated set of defined terms to specify the "scienter" element in the each of the rules. Also, as Proposed Rule 1.7 has been very widely adopted by other jurisdictions, the change proposed by the Board would be inconsistent with the Committee's goal of promoting uniformity among state ethics rules. This need for uniformity is particularly acute with respect to this central conflict of interest rule. With respect to ease of enforcement, the Committee does not see how it will be easier to prove what is obvious to a reasonable lawyer that it will be to prove what a reasonable lawyer would conclude under the circumstances. In either case, the Court must determine what the reasonable lawyer would ascertain under the circumstances. That one standard may be stricter than the other does not mean that it will be easier to prove that the standard has been violated. Finally, with respect to the Board's argument that its proposal will be "more protective of the public," the Committee acknowledges that Proposed Rule 1.7 will permit clients to give their consent to a joint representation in some circumstances in which they would not be allowed to do so if the Board's proposal were adopted. Such added protection, however, comes at a high price. The price is the restriction on the client's freedom to retain counsel of their choice. The Committee believes that that Proposed Rule 1.7, with its focus on the lawyer's reasonable belief that neither the relationship with the client nor the representation will be adversely affected, affords clients the protection they need without unduly restricting their freedom to consent, after consultation, to a representation affected by a conflict of interest.

4. The Attorney General has voiced concern that Rule 1.7 may be inconsistent with his statutory responsibilities with respect to the representation of the State, its agencies, and officers. The Committee believes that it has adequately addressed this issue by its revision of Scope, Paragraph [4], and that the issue of whether the Attorney General is authorized by law to represent state agencies and employees when the conflict of interest rules would prohibit other lawyers from doing so should be resolved as a matter of law, rather than by creating exceptions in the ethics rules.

5. The Tennessee District Attorneys General Conference and the United States Attorneys have requested that a new paragraph (c) to added to Rule 1.7 that would prohibit the representation of more than one client in a criminal case unless the lawyer affirmatively shows to the tribunal that no conflict exists or will exist. Although the Committee has recognized in Comment [9] that "the potential for conflict of interest in a criminal case is so grave that ordinarily a lawyer should decline

to represent more than one defendant," the Committee is strongly opposed to conditioning such joint representation on an affirmative demonstration to the court that there is no conflict of interest or no likelihood that a conflict of interest will materialize. In the first place, the imposition of such a special duty implies that criminal defense attorneys are less likely than other lawyers to conscientiously comply with the conflict of interest rules. The Committee does not believe that to be the case. Second, it very difficult to affirmatively prove a negative proposition, and to do so the lawyer would have to prematurely reveal her defense strategy or other information relating to the representation. The Committee does not believes that it is appropriate to force a criminal defendant to make a choice between a joint representation and the premature disclosure of information relating the defense. Third, if there is a need for judicial approval of joint representation in criminal cases, the Committee believes that such a requirement should be imposed by the Rules of Criminal Procedure rather than the Rules of Professional Conduct. Finally, for many years, the Tennessee Supreme Court has wisely avoided adopting such per se rules concerning lawyer conflicts of interest, see, e.g., State v. Jones (In re Banks), 726 S.W.2d 515 (Tenn. 1987); In re Petition of Youngblood, 895 S.W.2d 322 (Tenn. 1995, and declining to enshrine such a rule of law in the black letter of Tennessee's ethics rules would be consistent with this tradition.

PROPOSED RULE 1.8
CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client; and

(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents thereto, in a writing signed by the client.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client, unless the client consents after consultation, except as otherwise permitted or required by Rule 1.6 or Rule 3.3.

(c) A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation or direction from one other than the client unless:

(1) the client consents after consultation;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless:

(1) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(2) each client consents in writing after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) enter into an agreement with a prospective, current, or former client to prospectively limit the lawyer's liability to the client for malpractice; and

(2) shall not settle a claim for such liability, unless:

(a) the client is represented in the matter by independent counsel; or

(b) the lawyer fully discloses all the terms of the agreement to the client in a manner which can reasonably be understood by the client, advises the client to seek the advice of independent counsel, and affords the client a reasonable opportunity to do so.

(i) A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent a client in a representation directly adverse to a person whom the lawyer knows is represented by the other lawyer, unless the client consents in writing after consultation regarding the relationship.

(j) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien granted by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

COMMENT

Transactions Between Client and Lawyer

[1] As a general principle, all transactions between client and lawyer should be fair and reasonable to the client. In such transactions a review by independent counsel on behalf of the client is often advisable. Furthermore, a lawyer may not exploit information relating to the representation to the client's disadvantage. For example, a lawyer who has learned that the client is investing in specific real estate may not, without the client's consent, seek to acquire nearby property where doing so would adversely affect the client's plan for investment. Paragraph (a) does not, however, apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

[2] A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, however, the client should have the detached advice that another lawyer

can provide. Paragraph (c) recognizes an exception where the client is a relative of the donee or the gift is not substantial.

Literary Rights

[3] An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraph (j).

Person Paying for Lawyer's Services

[4] Rule 1.8(f) requires disclosure of the fact that the lawyer's services are being paid for by a third party. Such an arrangement must also conform to the requirements of Rule 1.6 concerning confidentiality and Rule 1.7 concerning conflict of interest. Where the client is a class, consent may be obtained on behalf of the class by court-supervised procedure.

Limiting Liability

[5] Paragraph (h) is not intended to apply to customary qualifications and limitations in legal opinions and memoranda.

Relationships Between Lawyers

[6] Rule 1.8(i) applies to “related” lawyers who are in different firms. Related lawyers in the same firm are governed by Rules 1.7, 1.9, and 1.10. The disqualification stated in Rule 1.8(i) is personal and is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10.

Acquisition of Interest in Litigation

[7] Paragraph (j) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. This general rule, which has its basis in common law champerty and maintenance, is subject to specific exceptions developed in decisional law and continued in these Rules, such as the exception for reasonable contingent fees set forth in Rule 1.5 and the exception for certain advances of the costs of litigation set forth in paragraph (E).

DEFINITIONAL CROSS-REFERENCES

“Consents in Writing” See Rule 1.0(b)
“Consultation” See Rule 1.0(c)
“Knowingly” and “Knows” See Rule 1.0(f)
“Reasonable” and “Reasonably” See Rule 1.0(i)
“Substantial” See Rule 1.0(l)

COMMITTEE NOTES

Comparison To Current Tennessee Ethics Rules

Paragraph (a): DR 5-104(A) provides that a lawyer "shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure." EC 5-3 states that a lawyer "should not seek to persuade his client to permit him to invest in an undertaking of his client nor make improper use of his professional relationship to influence his client to invest in an enterprise in which the lawyer is interested."

Paragraph (b): DR 4-101(B)(2) similarly provides that a lawyer “shall not knowingly use a confidence or secret of a client to the disadvantage of the client.”

The Committee rejected a proposal that would prohibit the lawyer from using information relating to the representation to the advantage of the lawyer or a third person. DR 4-101(B)(3), on the other hand, currently provides that a lawyer should not use "a confidence or secret of a client for the advantage of the lawyer, or of a third person, unless the client consents after full disclosure."

Paragraph (c): There is no counterpart to paragraph (c) in the Disciplinary Rules. EC 5-5, however, states that a lawyer "should not suggest to his client that a gift be made to himself or for his benefit. If a lawyer accepts a gift from his client, he is peculiarly susceptible to the charge that he unduly influenced or overreached the client. If a client voluntarily offers to make a gift to his lawyer, the lawyer may accept the gift, but before doing so, he should urge that the client secure disinterested advice from an independent, competent person who is cognizant of all the circumstances. Other than in exceptional circumstances, a lawyer should insist that an instrument in which his client desires to name him beneficially be prepared by another lawyer selected by the client."

Paragraph (d): Paragraph (d) is substantially similar to DR 5-104(B), but refers to "literary or media" rights, a more generally inclusive term than "publication" rights.

Paragraph (e): Paragraph (e)(1) is similar to DR 5-103(B), but eliminates the requirement that "the client remains ultimately liable for such expenses." Paragraph (e)(2) has no counterpart in the Disciplinary Rules.

Paragraph (f): Paragraph (f)(1) is substantially identical to DR 5-107(A)(1).

Paragraph (g): Paragraph (g) differs from DR 5-106 in that it requires that the lawyer afford the client an opportunity to consult independent counsel and that the client consent in writing.

Paragraph (h): Paragraph (h)(1) is similar to DR 6-102(A). There is no counterpart in the Disciplinary Rules to Paragraph (h)(2).

Paragraph (i): There is no counterpart to Paragraph (i) in the Disciplinary Rules. In Tennessee Formal Ethics Opinion 82-F-31, the Ethics Committee addressed the issue of spousal disqualification within the rubric of DR 5-105 and held that there was no per se disqualification of married lawyers who were not practicing together from representing clients with opposing interests. Special circumstances, however, might warrant disqualification, and such a disqualification would be imputed to other lawyers in the disqualified lawyer’s firm.

Paragraph (j): Paragraph (j) is substantially the same as DR 5-103(A).

Comparison To ABA Model Rules

Proposed Rule 1.8 is identical to ABA Model Rule 1.8, except as follows:

Paragraph (g): Paragraph (g) differs from ABA Model Rule 1.8(g) to the extent that it requires that the lawyer afford the client an opportunity to consult independent counsel. The Committee believes there is such potential for conflict in aggregate settlements that this special procedural safeguard is needed. Also the client's consent must be given in writing.

Paragraph (h): Paragraph (h)(1) differs from ABA Model Rule 1.8(h) in that the latter permits exculpation from liability if "permitted by law and the client is independently represented in making the agreement." Paragraph (h)(2) differs from the Model Rule in that the latter only prohibits settlement of a malpractice claim with an unrepresented current or former client "without first advising that person in writing that independent representation is appropriate in connection therewith."

Changes Made to 1997 Committee Preliminary Draft In Response to Comments

The Committee added a reference to "direction" in Paragraph (f), precluding a lawyer from accepting either compensation or direction unless the lawyer complies with the requirements of the Rule.

The Committee deleted language in Paragraph (i) so that it would conform to ABA Model Rules 1.8(i).

Comments Received After September 2000 Draft, Committee Response, and Changes Made

1. The Committee recommends modification of Rule 1.8(i) to require that the client give written consent as defined in Rule 1.0(b). This Committee believes that this type of conflict of interest should be treated the same as Rule 1.7 conflicts of interest.

2. The Attorney General has voiced a concern that Paragraph (b) would permit a government agency to consent to the adverse use of confidential information, and that allowing the government to do so is inconsistent with the holding in Formal Ethics Opinion 81-F- 4 that governmental clients cannot effectively consent to a representation involving a conflict of interest. The Committee does not believe that such a restriction on the rights of governmental clients should be imposed by the Rules of Professional Conduct. Indeed, in this regard, the Committee would call the Court's attention to Rule 1.7, Comment [6], which states: "In the absence of other law to the contrary, a government official or entity, like any other client, may waive a conflict interest under this Rule." The Court should similarly note that Rule 1.11 (Successive Government and Private Employment) specifically permits the appropriate government agency to consent to a conflict of interest involving a former government lawyer. By expressly recognizing the right of government clients to give consent on the same terms as other clients, the Committee intended to overrule any Formal Ethics Opinions that have held to the contrary. As a matter of professional ethics, the Committee sees no justification for treating governmental clients differently than other clients. The Committee, of course, recognizes the power of the government to regulate the conduct of its employees and to prohibit its agencies or officials from giving consent in situations in which other clients are allowed to do so. The point is simply that such restrictions should be imposed by the governmental client or by other law enacted by the General Assembly, rather than by the Rules of Professional Conduct. Thus, the Committee recommends no change to Paragraph (b) that would

preclude a governmental client from giving consent to a disclosure that otherwise would be prohibited by the rule.

3. The Attorney General has also voiced a concern about Rule 1.8(c), his point being that it permits lawyers to accept gifts in situations in which it would be a crime for a government lawyer to accept the gift. That the ethics rules permit a lawyer to accept a gift does not strip the General Assembly of its power to prohibit a government lawyer from accepting such a gift. The government lawyer would not be allowed to plead the ethics rule is defense of an indictment for violating Tenn. Code Ann. §§ 39-16-102 and 104. Indeed, by committing such an offense, the government lawyer may have violated Rule 8.4(b) that prohibits a lawyer from committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer. Thus, the Committee sees no need to modify its proposal.

4. The Attorney General has voiced concern about the prohibition in Rule 1.8(f) on a lawyer accepting direction from one other than the client unless certain requirements are met. This is said to conflict with the power of the Attorney General to direct assistant attorneys general to take action over the objection of an agency being represented by the assistant. The Committee believes that this concern is adequately addressed in Scope, Paragraph [4], and other law. In addition, the Committee would not characterize the Attorney General as a "person other than the client" within the meaning of Rule 1.8(f). The Attorney General can be seen as a statutorily authorized representative who speaks for the ultimate client, the State. Alternatively, the Attorney General is the lawyer with ultimate responsibility for the representation of the State. In neither case would it be appropriate to think of the Attorney General as a person other than the client. He is either the alter ego of the client or the lawyer for the client. In neither case would Rule 1.8(f) be applicable. Consequently, the Committee sees no need to modify its proposal.

PROPOSED RULE 1.9
CONFLICT OF INTEREST: FORMER CLIENT

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client, unless the former client consents in writing after consultation.

(b) Unless the former client consents in writing after consultation, a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; .

(c) Unless the former client consents after consultation, a lawyer who has formerly represented a client in a matter, or whose present or former firm has formerly represented a client in a matter, shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules otherwise permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation of the former client except as these Rules otherwise permit or require with respect to a client.

COMMENT

[1] After termination of a client-lawyer relationship, a lawyer may not represent another client except in conformity with this Rule, except that in the case of a government or former government lawyer, Rule 1.11 applies, rather than paragraphs (a) and (b) of this Rule.

[2] The scope of a "matter" for purposes of this Rule will depend on the facts of a particular situation or transaction. The appropriateness of the subsequent representation will depend on the scope of the representation in the former matter, the scope of the proposed representation in the current matter, and its relationship to the former matter.

[3] The current matter is substantially related to the former matter if the current matter involves the work the lawyer performed for the former client or there is a substantial risk that representation of the present client will involve the use of information acquired in the course of representing the former client, unless that information has become generally known.

Changing Sides

[4] Representing one side and then switching to represent the other in the same matter clearly implicates loyalty to the first client and protection of that client's confidences. Similar considerations apply in non-litigation matters. For example, a lawyer negotiating a complex agreement on behalf of a seller could not withdraw and represent the buyer against the interests of the seller in the same transaction. Further, just as a lawyer may nor represent both sides concurrently in the same case, see Rule 1.7(a), the lawyer also may not represent them consecutively.

[5] Beyond switching sides in the same matter, the concept of substantial relationship applies to later developments arising out of the original matter. A matter is substantially related if it involves the work the lawyer performed for the former client. For example, a lawyer may not on behalf of a later client attack the validity of a document that the lawyer drafted if doing so would materially and adversely affect the former client. Similarly, a lawyer may not represent a debtor in bankruptcy in seeking to set aside a security interest of a creditor that is embodied in a document that the lawyer previously drafted for the creditor.

Protecting Confidentiality

[6] The substantial relationship standard is employed most frequently to protect the confidential information of the former client. A subsequent matter is substantially related to an earlier matter if there is a substantial risk that the subsequent representation will involve the use of confidential information of the former client in violation of the restrictions these Rules and other law place on disclosure. Substantial risk exists where it is reasonable to conclude that it would materially advance the client's position in the subsequent matter to use confidential information obtained in the prior representation.

[7] Inquiries concerning the existence, exchange, and potential for use of such confidential information may themselves raise concerns and difficulties. A concern to protect a former client's confidential information would be self-defeating if, in order to obtain its protection, the former client were required to reveal in a public proceeding the particular communication or other confidential information that could be used in the subsequent representation. On the other hand, closed or in camera proceedings may implicate issues of fairness to other parties. Further, the interests of subsequent clients also militate against extensive inquiry into the precise nature of the lawyer's representation of the subsequent client and the nature of exchanges between them

[8] The substantial relationship test attempts to avoid requiring actual disclosure of confidential information by focusing upon the general features of the matters involved and inferences as to the likelihood that confidences were imparted by the former client that could be used to adverse effect in the subsequent representation. The inquiry into the issues involved in the prior representation should be as specific as possible without thereby revealing the confidential client information itself or confidential information concerning the second client. Nevertheless, the subsequent client's interest in selection of counsel of his or her choice requires that the lawyer be permitted, within appropriate limits, to defeat any presumption or inference concerning the lawyer's receipt or exchange of confidential information.

[9] For example, a lawyer who has represented a business person and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors who sought to oppose rezoning of the property, but would not be precluded, on the grounds of a substantial relationship between the two matters, from defending a tenant of the completed shopping center in resisting eviction for non-payment of rent.

[10] Information that might be confidential for some purposes under these Rules (so that, for example, a lawyer would not be free to discuss it publicly) might nonetheless be so general, readily observable, or of little value in the subsequent litigation that it should not by itself result in a substantial relationship being found. Thus, a lawyer may master a particular substantive area of the law while representing a client, but that does not preclude the lawyer from later representing another client adversely to the first in a matter involving the same legal issues, if the

facts are not substantially related. A lawyer might also have learned a former client's preferred approach to bargaining in settlement discussions or negotiating business points in a transaction, willingness or unwillingness to be deposed by an adversary, and financial ability to withstand extended litigation or contract negotiations. Only when such information will be directly in issue or of unusual value in the subsequent matter will it be independently relevant in assessing a substantial relationship.

Lawyers Moving Between Firms

[11] When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

[12] Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(c). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm.

[13] Application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firms's clients. In contrast, another lawyer may have access to the files of only a limited number of client and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients.

[14] Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6 and 1.9(c).

Relation to Other Rules

[15] Except in situations governed by Rule 1.11, Rule 1.9 applies in all circumstances in which a lawyer has previously represented a client as an advocate, advisor, intermediary, or author of a legal opinion to be rendered on behalf of a client for use by a third person. Except as provided in Rule 2.4, Rule 1.9 does not apply to parties being served by a lawyer as a dispute resolution neutral. If, however, the lawyer's service as a neutral will be materially adverse to a former client and

the dispute is substantially related to the former representation, the lawyer must afford the former client the protections of Rule 1.9.

DEFINITIONAL CROSS-REFERENCES

"Consents in Writing" See Rule 1.0(b)
"Consultation" See Rule 1.0(c)
"Firm" See Rule 1.0(d)
"Knowingly" and Known" See Rule 1.0(f)
"Material" and "Materially" See Rule 1.0(g)
"Substantially" See Rule 1.0(l)

COMMITTEE NOTES

Comparison To Current Tennessee Ethics Rules

Paragraph (a): There is no counterpart to paragraph (a) in the Disciplinary Rules, but it is consistent with the holdings in Tennessee Formal Ethics Opinions 81-F-5, 81-F-9, 84-F-65, and 86-F-104.

Paragraph (b): There is no counterpart to paragraph (b) in the Disciplinary Rules, but it is consistent with Tennessee Formal Ethics Opinion 89-F-118 which permits a lawyer to rebut a presumption that the lawyer had acquired confidential information about a client of a law firm with which the lawyer had formerly been associated.

Paragraph (c): The Disciplinary Rules do not specify the duration of the lawyers' duties to preserve client confidentiality and to refrain from using confidential information to the disadvantage of a client.

Comparison To ABA Model Rules

Rule 1.9 is substantively identical to ABA Model Rule 1.9, except for the requirement in Paragraphs (a) and (b) that the client give written consent to waive a conflict of interest. The Comment, however, has been significantly modified to provide more guidance to lawyers when they are determining whether two matters are substantively related within the meaning of Paragraphs (a) and (b).

Changes Made to 1997 Committee Preliminary Draft In Response to Comments

The Preliminary Draft was revised so that the Rule would more closely conform to the Model Rule. The Comments were revised to provide additional guidance for lawyers when they are determining whether two matters are substantially related within the meaning of Paragraphs (a) and (b).

Comments Received After September 2000 Draft, Committee Response, and Changes Made

Proposed Rule 1.9 is identical to ABA Model Rule 1.9, except for the Proposed Rule's requirements of written consent to waive a conflict of interest. The Board of Professional Responsibility, however, has recommended the addition of a new Paragraph (a) that would incorporate into the Rule the duty to former clients as stated in Formal Ethics Opinions 84-F-65

and 86-F-104. The Committee believes that this addition is unnecessary because the restrictions set forth in the Formal Ethics Opinions are already included in the Proposed Rule. Proposed Rule 1.9(c) addresses the confidentiality issue addressed by Paragraph (a)(1) of the Board's proposal. Rule 1.9(a), which precludes adverse representation in "the same or a substantially related matter," clearly prohibits representation in the circumstances addressed by Paragraphs (a)(2) and (3) of the Board's proposal. The Comments provide further guidance as to when two matters will be deemed to be substantially related. Also, because Model Rule 1.9 has been widely adopted, adding the peculiar wording of the Formal Ethics Opinions would be inconsistent with the Committee's goal of promoting uniformity among state ethics rules, particularly the conflict of interest rules. The Committee also believes that Proposed Rule 1.9(a) provides former clients more protection that does the narrower formulation in the Ethics Opinions.

PROPOSED RULE 1.10
IMPUTED DISQUALIFICATION: GENERAL RULE

(a) Except as permitted by paragraph (c), while lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9(a), 1.9(b), or 2.2.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) If a lawyer is personally disqualified from representing a person with interests adverse to a client of a law firm with which the lawyer was formerly associated, other lawyers currently associated in a firm with the personally disqualified lawyer may nonetheless represent the person if both the personally disqualified lawyer and the lawyers who will represent the person on behalf of the firm act reasonably to:

(1) identify that the personally disqualified lawyer is prohibited from participating in the representation of the current client; and

(2) determine that no lawyer representing the current client has acquired any information from the personally disqualified lawyer that is material to the current matter and is protected by Rule 1.9(c); and

(3) promptly implement screening procedures to effectively prevent the flow of information about the matter between the personally disqualified lawyer and the other lawyers in the firm; and

(4) advise the former client in writing of the circumstances which warranted the implementation of the screening procedures required by this rule and the actions which have been taken to comply with this Rule.

(d) A disqualification prescribed by this rule may be waived by the affected client or former client under the conditions stated in Rule 1.7.

COMMENT

Definition of "Firm"

[1] For purposes of the Rules of Professional Conduct, the term "firm" includes lawyers in a private firm, and lawyers in the legal department of a corporation or other organization, or in a legal services organization. See Rule 1.0(d) (defining “Firm” or “Law Firm”). Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a

way suggesting that they are a firm or conduct themselves as a firm, they should be regarded as a firm for the purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the rule that information acquired by one lawyer is attributed to the other.

[2] With respect to the law department of an organization, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. However, there can be uncertainty as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

[3] Similar questions can also arise with respect to lawyers in legal aid. Lawyers employed in the same unit of a legal service organization constitute a firm, but not necessarily those employed in separate units. As in the case of independent practitioners, whether the lawyers should be treated as associated with each other can depend on the particular rule that is involved, and on the specific facts of the situation.

Principles of Imputed Disqualification

[4] The rule of imputed disqualification stated in paragraph (a) recognizes the community of interest and shared loyalty presumed to exist among lawyers who are associated in law firm. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by paragraphs (b) and (c).

Lawyers Moving Between Firms

[5] When a lawyer who is associated in a firm leaves the firm, the question of whether a lawyer should undertake representation adverse to clients of the former firm is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised and that confidential information related to the representation will not be used to the client's disadvantage. Second, the rule should not be cast so broadly as to preclude other persons from having reasonable choice of legal counsel. Third, the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

[6] Paragraphs (a) and (b) govern the vicarious disqualification of a law firm in the situation in which a lawyer leaves the firm and continues or undertakes the representation of a client previously represented by the firm, the firm is no longer representing the client and lawyers who have remained in the firm are asked to undertake a representation materially adverse to the firm's former client. If the new matter is substantially related to a matter in which the firm previously

represented the client, the firm, absent the former client's consent, will be precluded by paragraph (a) from undertaking the representation if any lawyer remaining in the firm would be precluded by Rule 1.9(a) from doing so because the lawyer had participated in the client's prior representation. Alternatively, paragraph (b) precludes the firm from undertaking the representation if any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter. If, on the other hand, no remaining lawyer participated in the client's representation or possessed confidential information, the firm is permitted to undertake the representation even though it is materially adverse to the former client in a substantially related matter.

[7] Paragraph (c) addresses the situation in which a lawyer leaves one law firm and joins another firm which is representing a client with interests materially adverse to a client of the new lawyer's former firm. The new lawyer may be personally disqualified from participating in the representation of some of the new firm's clients because of his prior representation of or acquisition of confidential information about clients of his or her former law firm. This personal disqualification will not be imputed to other lawyers in the personally disqualified lawyer's new firm if they act reasonably to protect the confidentiality interests of the person being represented by the personally disqualified lawyer's former firm.

[8] Paragraph (c) sets forth the measures that must be taken in order protect the confidentiality interests of the client being represented by the personally disqualified lawyer's former firm. Whether a firm's screening procedures are effective to prevent the flow of information about the matter between the personally disqualified lawyer and the other lawyers in the firm is a question of fact. Factors to be considered include: a written affirmation by the personally disqualified lawyer and the lawyers and firm personnel handling the matter in question that they are aware of and will abide by the screening procedures implemented by the firm, the structural organization of the law firm or office, the likelihood of contact between the personally disqualified lawyer and the lawyers handling the matter in question, and the existence of firm rules and a filing system which prevents unauthorized access to files with respect to the matter in question. Although this Rule does not require that the personally disqualified lawyer be prohibited from sharing in any fee generated by the representation in question, such a prohibition can be considered in determining the effectiveness of the screening procedures employed by the firm. The question to be asked in each case is whether the screening mechanism effectively reduces to an acceptable level the potential for misuse of information related to the representation of the personally disqualified lawyer's former client.

[9] Where a lawyer has joined a private firm after having represented the government, the situation is governed by Rule 1.11(a) and (b). Where a lawyer represents the government after having served private clients, the situation is governed by Rule 1.11(c)(1). The individual lawyer involved is bound by the Rules generally, including Rules 1.6, 1.7 and 1.9(c).

DEFINITIONAL CROSS-REFERENCES

"Firm" and "Law Firm" See Rule 1.0(d)
"Material" and "Materially" See Rule 1.0(g)
"Reasonably" See Rule 1.0(i)
"Substantially" See Rule 1.0(l)

COMMITTEE NOTES

Comparison To Current Tennessee Ethics Rules

Paragraph (a): The vicarious disqualification called for by paragraph (a) when a lawyer in the firm is personally disqualified by Rules 1.7, 1.8(c), and 2.2 is consistent with DR 5-105(D). The vicarious disqualification called for by paragraph (a) when a lawyer in the firm is personally disqualified by Rule 1.9 is consistent with the Tennessee ethics opinions cited in the Committee Notes to Proposed Rule 1.9.

Paragraph (b): There is no counterpart to paragraph (b) in the Disciplinary Rules.

Paragraph (c): Paragraph (c), read in conjunction with Rule 1.9(b), is intended to codify Tennessee Formal Ethics Opinion 89-F-118 (which permits the use of screening procedures in a law firm that has hired a lawyer who had previously been associated with a law firm and is personally disqualified from representing interests adverse to a client of his or her former firm)

Paragraph (d): DR 5-105(D) does not specifically permit a client to consent to a representation by a lawyer who otherwise would be vicariously disqualified from representing a client.

Comparison To ABA Model Rules

Paragraph (a): Except for the cross-reference to Paragraph (c), Paragraph (a) is identical to ABA Model Rule 1.10(a).

Paragraph (b): Paragraph (b) is identical to ABA Model Rule 1.10(b).

Paragraph (c): There is no counterpart to Paragraph (c) in the ABA Model Rules.

Paragraph (d): Paragraph (d) is similar to ABA Model Rule 1.10(c), with the clarifying addition of "or former client."

Changes Made to 1997 Committee Preliminary Draft In Response to Comments

Paragraph (C) was deleted and Paragraph (B) has been revised so that this portion of the Proposed Rule will conform to Model Rule 1.10. The effect of the change is to reverse the Committee's position with respect to the appropriateness of a law firm using screening procedures when a lawyer leaves the firm, some of the firm's clients go along, and the firm now wants to represent a new client with interests materially adverse to its former client in a substantially related matter. Model Rule 1.10(b) permits such representation only if no lawyer still associated with the firm possesses confidential information that is material to the matter. If any lawyer still with the firm possessed such confidential information, the firm could not prevent the disqualification by screening the lawyer. Paragraph (C) would have permitted the law firm to undertake the representation adverse to its former client if the firm adequately screened the lawyer who possessed the confidential information from participation in the matter. Upon reconsideration, the Committee has concluded that a law firm's duty of loyalty to its former clients should preclude the representation of a new client when any lawyer still associated with the firm possesses confidential information that is material to the matter.

Comments Received After September 2000 Draft, Committee Response, and Changes Made

1. The Committee has revised Paragraph A so it will conform to the ABA Model Rule. No change in substance is intended.

2. The Board of Professional Responsibility suggests that Proposed Rule 1.10 be replaced with the substance of DR 5-105(D). The Committee opposes this recommendation as relates to paragraph (a) because it is inconsistent with the policy judgment reflected in Paragraph (a) that there should be no vicarious disqualification when a lawyer is disqualified from representing a client by Rules 1.8(i) or 3.7(a). As Paragraph (a) tracks the Model Rule, which has been widely adopted, it also promotes uniformity among state ethics rules. The Committee also opposes the deletion of Paragraph (b) because it addresses an issue not addressed by our current Rule -- i.e., the responsibilities of a law firm to its client when a lawyer in the firm leaves and the client discharges the firm and retains the service of the departing lawyer. This issue will not go away because the Rules do not address it. Finally, with respect to Paragraph (c), which codifies the holding in Formal Ethics Opinion 89-F-118, the Committee believes that screening is of such importance that it should be addressed in the Rules rather than in a non-binding ethics opinion.

3. On its own motion, the Committee recommends the deletion of Comments [6] and [7] because they are not relevant to an interpretation of the rule. As will be explained below, however, the Committee concurs with the criticism levied in Comment [7] at the use of "appearance of impropriety" as a standard of conduct for the violation of which a lawyer can be subject to professional discipline.

4. In light of the Court's decision in Clinard v. Blackwood, 46 S.W. 3d 177 (Tenn. 2001), the Committee carefully reconsidered its proposal to permit non-consensual screening to prevent the vicarious disqualification of a firm in cases in which a lawyer moves from one firm to another and the lawyer joining the firm would be personally disqualified because of his or her involvement in the former firm's representation of a client. In light of this review, the Committee respectfully, but forcefully, urges the Court to approve screening where the personally disqualified lawyer and the other lawyers with whom the personally disqualified lawyer practices comply with the requirements of Paragraph (c). This reflects the judgment of the Committee that screening should be permitted even on facts such as those of the Clinard case, so long as the lawyers have complied with Paragraph (c). Given the safeguards afforded the former client by Paragraph (c), -- in particular the requirement that the former client be notified of the screening -- the Committee does not believe that there is either an appearance of impropriety or a material risk of impropriety. To the contrary, the implementation of a screen in compliance with Paragraph (c) evidences a strong respect for the legitimate interests of the former client. Unlike the vicarious disqualification that would otherwise be required, it also accommodates the very important interest of the clients of the lawyer's new firm in being able to be represented by their counsel of choice. The Committee would also specifically call the Court's attention to the requirement that the screen be "effective," an objective standard to which the Court may refer as it assesses the propriety of screening in individual cases. The Committee believes it would be preferable for the Court to focus on the effectiveness of the screen rather than the appearance of impropriety.

Thus, the Committee has specifically and consciously chosen not to modify its proposal to preclude screening in certain cases because of an "appearance of impropriety." Apart from the question of whether such a standard should be used in connection with disqualification motions, the Committee is particularly concerned about subjecting lawyers to professional discipline for appearances of impropriety. The ABA Model Rules explicitly rejected the use of "appearance of impropriety" as a basis for imposing discipline on the grounds that it is question-begging and affords lawyers insufficient guidance as to the conduct for which they can be disciplined. Even if the Court were to reaffirm its decision in Clinard to use "appearance of impropriety" as a standard for ruling on disqualification motions, the Committee does not believe that it should be incorporated into the Rules of Professional Conduct that are used as the basis for imposing lawyer discipline.

If, however, the Court concludes that the Rules of Professional Conduct should preclude the use of screening on facts similar to those of Clinard, the Committee recommends that this be done by crafting a narrow exception that would preclude the use of a screen when the lawyer who had switched firms had been substantially involved in an adjudicative proceeding and the lawyer's new firm was representing the adverse party in that proceeding. This could be done by adding a new Paragraph (d) as follows and re-lettering existing Paragraph (d) as (e).

> (d) The procedures in paragraph (c) may not be employed without the consent of the client of the personally disqualified lawyer's former firm if the personally disqualified lawyer was substantially involved in the former firm's representation of the client in connection with a pending adjudicative proceeding in which the lawyer's current firm represents a client directly adverse to the former firm's client in the proceeding.

PROPOSED RULE 1.11
SUCCESSIVE GOVERNMENT AND PRIVATE EMPLOYMENT

(a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents in writing after consultation. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless both the personally disqualified lawyer and the lawyers who are representing the client in the matter act reasonably to:

(1) ascertain that the personally disqualified lawyer is prohibited from participating in the representation of the current client; and

(2) determine that no lawyer representing the client has acquired any material confidential government information relating to the matter; and

(3) promptly implement screening procedures to effectively prevent the flow of information about the matter between the personally disqualified lawyer and other lawyers in the firm; and

(4) advise the government agency in writing of the circumstances which warranted the have utilization of the screening procedures required by this rule and the actions which been taken to comply with this rule.

(b) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person the lawyer acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. A firm with which that lawyer is associated may undertake or continue representation in the matter only if both the personally disqualified lawyer and the lawyers who are representing the client in the matter comply with the requirements set forth in paragraph (a).

(c) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:

(1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or

(2) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(d) As used in this Rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

(e) As used in this Rule, the term "confidential government information" means information which has been obtained under governmental authority and which, at the time this rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and which is not otherwise available to the public.

COMMENT

[1] This Rule prevents a lawyer from exploiting public office for the advantage of a private client.

[2] A lawyer representing a government agency, whether employed or specially retained by the government, is subject to the Rules of Professional Conduct, including the prohibition against representing adverse interests stated in Rule 1.7 and the protections afforded former clients in Rule 1.9. In addition, such a lawyer is subject to Rule 1.11 and to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule.

[3] Where the successive clients are a public agency and a private client, the risk exists that power or discretion vested in public authority might be used for the special benefit of a private client. A lawyer should not be in a position where benefit to a private client might affect performance of the lawyer's professional functions on behalf of public authority. Also, unfair advantage could accrue to the private client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. However, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. The provisions for screening and waiver are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service.

[4] When the client is an agency of one government, that agency should be treated as a private client for purposes of this Rule if the lawyer thereafter represents an agency of another government, as when a lawyer represents a city and subsequently is employed by a federal agency.

[5] Paragraph (a)(2) does not require that a lawyer give notice to the government agency at a time when premature disclosure would injure the client; a requirement for premature disclosure might preclude engagement of the lawyer. Such notice is, however, required to be given as soon as practicable in order that the government agency will have a reasonable opportunity to ascertain that the lawyer is complying with Rule 1.11 and to take appropriate action if it believes the lawyer is not complying.

[6] Paragraph (b) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.

[7] Paragraphs (a) and (c) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.

[8] Paragraph (c) does not disqualify other lawyers in the agency with which the lawyer in question has become associated.

[9] In the absence of other law to the contrary, a government official or entity, like any other client, may waive a conflict of interest under this Rule.

DEFINITIONAL CROSS-REFERENCES

"Consents in Writing" See Rule 1.0(b)
"Consultation" See Rule 1.0(c)
"Firm" See Rule 1.0(d)
"Knowingly" and "Knows" See Rule 1.0(f)
"Material" See Rule 1.0(g)
"Reasonably" See Rule 1.0(i)
"Substantially" See Rule 1.0(l)

COMMITTEE NOTES

Comparison To Current Tennessee Ethics Rules

The first sentence in Paragraph (a) is similar to DR 9-101(B), except that the latter used the phrase "in which he had substantial responsibility while he was a public employee."

The second sentence in Paragraph (a) and Paragraphs (b), (c), (d) and (e) have no counterparts in the Disciplinary Rules.

Comparison To ABA Model Rules

The Proposed Rule is identical to ABA Model Rule 1.11, except that the standard for screening conform to the standard in Proposed Rule 1.10, rather than those in Model Rule 1.11(a) or (b).

Changes Made to 1997 Committee Preliminary Draft In Response to Comments

Comment [9] was added as a clarification.

Comments Received After September 2000 Draft, Committee Response, and Changes Made

Consistent with its recommendation with respect to Proposed Rule 1.10, the Board of Professional Responsibility has asked the Court to delete that portion of Proposed Rule 1.11 that specifies the circumstances in which screening can be used to avoid the vicarious disqualification of the former government lawyer's new law firm. Again, the Committee believes that screening should be addressed in the Rule, rather than in an ethics opinion, and that the Rule should specify the circumstances in which screening will be permitted. Also, such departure from that ABA Model Rule, which as been widely adopted, is inconsistent with the Committee's goal of promoting uniformity among state ethics rules.

PROPOSED RULE 1.12
FORMER JUDGE OR ARBITRATOR

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, arbitrator or law clerk to such a person, unless all parties to the proceeding consent after consultation, in a writing or writings signed by all parties.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer, or arbitrator. A lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge, other adjudicative officer or arbitrator.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless both the disqualified lawyer and the lawyers representing the client in the matter have complied with the requirements set forth in Rule 1.11(a)(1), (2) and (3) and advise the appropriate tribunal in writing of the circumstances which warranted the utilization of the screening procedures required by this rule and the actions which have been taken to comply with this rule.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

COMMENT

[1] This Rule generally parallels Rule 1.11. The term "personally and substantially" signifies that a judge who was a member of a multi-member court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits. Compare the Comment to Rule 1.11. The term "adjudicative officer" includes such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges.

[2] The provisions of Rule 10 of the Rules of the Supreme Court of Tennessee, concerning the Application of the Code of Judicial Conduct, provides that a part-time judge, judge pro tempore or retired judge recalled to active service may not "act as a lawyer in any proceeding in which the judge has served as a judge or in any other proceeding related thereto." Although phrased differently from this Rule, those rules correspond in meaning.

DEFINITIONAL CROSS-REFERENCES

“Consultation” See Rule 1.0(c)
“Firm” See Rule 1.0(d)
“Knowingly” See Rule 1.0(f)
“Substantially” See Rule 1.0(l)
“Tribunal” See Rule 1.0(m)

COMMITTEE NOTES

Comparison To Current Tennessee Ethics Rules

Paragraph (a) is substantially similar to DR 9-101(A), which provides that a lawyer "shall not accept private employment in a matter upon the merits of which he has acted in a judicial capacity." Paragraph (a) differs, however, in that it is broader in scope and states more specifically the persons to whom it applies. There is no counterpart in the Disciplinary Rules to Paragraphs (b), (c) or (d). With regard to arbitrators, EC 5-20 states that "a lawyer [who] has undertaken to act as an impartial arbitrator or mediator, . . . should not thereafter represent in the dispute any of the parties involved." DR 9-101(A) does not provide a waiver of the disqualification applied to former judges by consent of the parties. However, DR 5-105(C) is similar in effect and could be construed to permit waiver.

Comparison To ABA Model Rules

The Proposed Rule is identical to ABA Model Rule 1.12, except that it has been modified so that the screening required by this rule conforms to the requirements set forth in Proposed Rules 1.10 and 1.11. Unlike Model Rule 1.12, the Proposed Rule does not prohibit the personally disqualified lawyer from sharing financially in fees earned by the firm for handling the matter in which the lawyer could not participate.

Changes Made to 1997 Committee Preliminary Draft In Response to Comments

Comment (2) was added for clarification.

Comments Received After September 2000 Draft, Committee Response, and Changes Made

No comments or changes.

PROPOSED RULE 1.13
ORGANIZATIONAL CLIENTS

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization has engaged or is engaged in action, has refused or refuses to act, or intends to act or refrain from acting in a matter related to the representation that is or will be a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

(1) asking reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act on behalf of the organization as determined by applicable law.

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

(d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is or becomes apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7 and 2.2. If the organization's consent to the dual representation is required by Rule 1.7 or 2.2, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented or by the shareholders.

COMMENT

The Entity as the Client

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this

Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. However, different considerations arise when the lawyer knows that the organization may be substantially injured by action of a constituent that is in violation of law. In such a circumstance, it may be reasonably necessary for the lawyer to ask the constituent to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. Clear justification should exist for seeking review over the head of the constituent normally responsible for it. The stated policy of the organization may define circumstances and prescribe channels for such review, and a lawyer should encourage the formulation of such a policy. Even in the absence of organization policy, however, the lawyer may have an obligation to refer a matter to higher authority, depending on the seriousness of the matter and whether the constituent in question has apparent motives to act at variance with the organization's interest. Review by the chief executive officer or by the board of directors may be required when the matter is of importance commensurate with their authority. At some point it may be useful or essential to obtain an independent legal opinion.

[4] In an extreme case, it may be reasonably necessary for the lawyer to refer the matter to the organization's highest authority. Ordinarily, that is the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions highest authority reposes elsewhere; for example, in the independent directors of a corporation.

Relation to Other Rules

[5] The authority and responsibility provided in paragraph (b) are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rules 1.6, 1.8, 1.16, 3.3 or 4.1. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 1.2(d) can be applicable. The lawyer’s right to withdraw from the representation of an organizational client in the circumstances specified in paragraph (c) is in addition to the right to withdraw in the various circumstances specified in Rule 1.16(b).

Government Agency

[6] The duty defined in this Rule applies to governmental organizations. However, when the client is a governmental organization, a different balance may be appropriate between maintaining

confidentiality and assuring that the wrongful official act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulations. Therefore, defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. Although in some circumstances the client may be a specific agency, it is generally the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the government as a whole may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. This Rule does not limit that authority. See note on Scope.

Clarifying the Lawyer's Role

[7] There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

[8] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

Dual Representation

[9] Paragraph (e) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

Derivative Actions

[10] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

[11] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

DEFINITIONAL CROSS-REFERENCES

“Knows” See Rule 1.0(f)
“Reasonably” See Rule 1.0(k)

"Substantial" See Rule 1.0(l)

COMMITTEE NOTES

Comparison To Current Tennessee Ethics Rules

There is no counterpart to the Proposed Rule in the Disciplinary Rules. EC 5-18 states that "[a] lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interests and his professional judgment should not be influenced by the personal desires of any person or organization. Occasionally, a lawyer for an entity is requested by a stockholder, director, officer, employee, representative, or other person connected with the entity to represent him in an individual capacity; in such case the lawyer may serve the individual only if the lawyer is convinced that differing interests are not present."

Comparison To ABA Model Rules

The Proposed Rule is identical to ABA Model Rule 1.13 except that we have extended the application of Paragraph (b) to past as well as future misconduct of a constituent and modified Paragraph (c) adding a cross-reference to the disclosures of information relating to the representation that are permitted by Proposed Rules 1.6 and 4.1.

Changes Made to 1997 Committee Preliminary Draft In Response to Comments

Paragraph (c): A cross-reference to Proposed Rules 1.6 and 4.1 has been added to Paragraph (c). The cross-reference is needed because of changes made to Rule 1.6 to permit disclosure of information necessary to prevent a client from committing a crime and to rectify substantial financial loss resulting from a client's commission of a crime or fraud in furtherance of which the client used the lawyer's services.

Comment [5]: A sentence has been added to Comment [5] clarifying that the right to withdraw under the circumstances specified in Paragraph (c) supplements the right to withdraw in the various circumstances specified in Rule 1.16(b).

Comments Received After September 2000 Draft, Committee Response, and Changes Made

1. The Board of Professional Responsibility has recommended the deletion of Paragraph (b), which specifies a lawyer's duties to an organizational client in circumstances in which an organizational constituent intends to engage, is engaging, or has engaged in conduct that is detrimental to the client. The only specific objection is that the Rule specifies that one of the remedial measures the lawyer might be required to take would be to advise the constituent to obtain a separate legal opinion for presentation to a proper authority within the organization. The Board voices a concern about the constituent obtaining a self-serving opinion. The simple answer to this is that the reference to a second opinion is only an example of a remedial measure that may be reasonable in some circumstances. Dropping the matter after a constituent had compounded the misconduct by seeking a bogus second opinion would not satisfy Paragraph (b)'s core requirement that the lawyer take reasonable remedial action to the protect the organization. Apart from this particular response, however, the Committee does not agree with the Board's more sweeping recommendation to delete Paragraph (b). It is extremely important that lawyers for organizational

clients be alerted to their obligation to take reasonable remedial action to protect the client from misconduct of its officers or employees. Finally, because Rule 1.13 has been widely adopted, leaving it unchanged is consistent with the Committee's desire for uniformity among state ethics rules, and this Rule provides crucial, needed guidance to lawyers.

2. The Board of Professional Responsibility has also recommended the deletion of paragraph (e). Paragraph (e) provides that an organization's lawyer may jointly represent the organization and a director, officer or employee to the extent permitted by Rules 1.7 or 2.2. The Board believes that public protection is sacrificed by the waiver incorporated in Paragraph (e). This reflects a misunderstanding of Paragraph (e). Paragraph (e) does not waive anything, but it simply serves to recognize (1) that it is quite common for a single lawyer to jointly represent an organization and one of its constituents, (2) that such a representation may involve a conflict of interest, (3) that such conflicts are be resolved in compliance with Rule 1.7 or 2.2, as the case may be, and (4) that if client consent is required, the organization's consent must be secured from an official other than the person who will be jointly represented by the organization's lawyer. By dropping Paragraph (e), the Court would not change the conflict of interest rules applicable to the joint representation of organizational clients and their constituents. On the other hand, Paragraph (e) helpfully alerts lawyers to this type of conflict of interest, directs them to the pertinent rules, and appropriately requires that the organization's consent be given by a person other than the constituent who will be jointly represented by the organization's lawyer. This latter point will be unaddressed if Paragraph (e) is deleted. Thus, the Committee supports its retention.

PROPOSED RULE 1.14
CLIENT UNDER A DISABILITY

(a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.

COMMENT

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

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

[3] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. If a legal representative has not been appointed, the lawyer should see to such an appointment where it would serve the client's best interests. Thus, if a disabled client has substantial property that should be sold for the client's benefit, effective completion of the transaction ordinarily requires appointment of a legal representative. In many circumstances, however, appointment of a legal representative may be expensive or traumatic for the client. Evaluation of these considerations is a matter of professional judgment on the lawyer's part.

[4] If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

Disclosure of the Client's Condition

[5] Rules of procedure in litigation generally provide that minors or persons suffering mental disability shall be represented by a guardian or next friend if they do not have a general guardian. However, disclosure of the client's disability can adversely affect the client's interests. For

example, raising the question of disability could, in some circumstances, lead to proceedings for involuntary commitment. The lawyer's position in such cases is an unavoidably difficult one. The lawyer may seek guidance from an appropriate diagnostician.

Emergency Legal Assistance

[6] If the health, safety or financial interest of a person under a disability is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the disabled person or another acting in good faith on the person's behalf has consulted the lawyer. Even in such a situation, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the disabled person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

[7] A lawyer who acts on behalf of a disabled person threatened with imminent and irreparable harm should keep the confidences of the disabled person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the disabled person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such actions taken on behalf of a disabled person.

DEFINITIONAL CROSS-REFERENCES

"Reasonably" See Rule 1.0(i)
"Reasonably Believes" See Rule 1.0(j)

COMMITTEE NOTES

Comparison To Current Tennessee Ethics Rules

There is no counterpart to the Proposed Rule in the Disciplinary Rules. EC 7-11 states that the "responsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of a client. Examples include the representation of an illiterate or an incompetent." EC 7-12 states that "any mental or physical condition of a client that renders him incapable of making a considered judgment on his own behalf casts additional responsibilities upon his lawyer. Where an incompetent is acting through a guardian or other legal representative, a lawyer must look to such representative for those decisions which are normally the prerogative of the client to make. If a client under disability has no legal representative, his lawyer may be compelled in court proceedings to make decisions on behalf of the client. If the client is capable of understanding the matter in question or of contributing to the advancement of his interests, regardless of whether he is legally disqualified from performing certain acts, the lawyer should obtain from him all possible aid. If the disability of a client and the lack of a legal representative compel the lawyer to make decisions for his client, the lawyer should consider all circumstances then prevailing and act with care to safeguard and advance the interests of his client. But obviously a lawyer cannot perform any act or make any decision which the law requires his client to perform or make, either acting for himself if competent, or by a duly constituted representative if legally incompetent."

Comparison To ABA Model Rules

The Proposed Rule is identical to ABA Model Rule 1.14.

Changes Made to 1997 Committee Preliminary Draft In Response to Comments

No changes.

Comments Received After September 2000 Draft, Committee Response, and Changes Made

1. In response to a Comment from the TBA Tax, Probate and Trust Law Section, the Committee recommends the replacement of the references in Comments [6] and [7] to an "emergency" with a more direct reference to situations in which the impaired client is threatened with imminent and irreparable harm to his or her health, safety or financial interests. The Section was concerned that the reference to an "emergency" might be read to impose restrictions other than that there be a threat of imminent and irreparable harm. Others thought the reference to an emergency was redundant. The Committee agrees with the Section that a lawyer should be allowed to take protective action when necessary to prevent imminent and irreparable harm to a client, without any other limitations that might be inferred from the reference to an emergency.

2. The Board of Professional Responsibility has recommended that Rule 1.14(b) be modified to clarify that lawyers may seek court approval for protective actions on behalf of disabled clients when questions arise whether seeking protective action are appropriate. As proposed by the Board, Paragraph (b) would read:

> (b) A lawyer may seek the appointment of a guardian or <u>seek court approval to</u> take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.

The Committee opposes this proposal. In the first place, the Board's proposal is flawed because, as drafted, it requires the lawyer to seek judicial approval prior to taking protective action. Even if redrafted, the Committee sees no need for such detail. Simply stated, seeking judicial approval to take a protective action is a protective action permitted by Rule 1.14(b) so long as the lawyer reasonably believes that the client cannot adequately act in the client's own interest. Seeking judicial confirmation of the lawyer's judgment is like consulting with an appropriate diagnostician, as mentioned in Comment [5]. Given the widespread adoption of ABA Model Rule 1.14, adding such unnecessary detail is inconsistent with the Committee's goal of promoting uniformity among ethics rules.

PROPOSED RULE 1.15
SAFEKEEPING PROPERTY

(a) A lawyer shall hold property and funds of clients or third persons that are in a lawyer's possession in connection with a representation separate from the lawyer's own property and funds.

(1) Funds belonging to clients or third persons shall be kept in a separate account maintained in an insured depository institution which is located in the state where the lawyer's office is situated (or elsewhere with the consent of the client or third person) and which participates in the overdraft notification program as required by Supreme Court Rule 9. A lawyer may deposit the lawyer's own funds in such an account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.

(i) Except as provided by subparagraph (a)(1)(ii), interest earned on accounts in which the funds of clients are deposited less any deduction for service charges, fees of the depository institution, and intangible taxes collected with respect to the deposited funds shall belong to the clients whose funds are deposited and the lawyer shall have no right or claim to such interest.

(ii) A lawyer shall deposit funds of clients and third persons that are nominal in amount or expected to be held for a short period of time in a pooled account that participates in the Interest On Lawyers' Trust Accounts ("IOLTA") program, which provides that all interest earned be paid to the Tennessee Bar Foundation in accordance with the requirements of Supreme Court Rule. The determination of whether funds are nominal in amount or are to be held for a short period of time rests in the sound discretion of the lawyer and no charge of ethical impropriety or other breach of professional conduct shall attend an attorney's exercise of good faith judgment in that regard.

(iii) A lawyer may decline to participate in the IOLTA program by notifying the Chief Justice of the Supreme Court and the Board of Professional Responsibility as permitted by Supreme Court Rule _____.

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property. If a dispute arises between the client and a third person with respect to their respective interests in the funds or property held by the lawyer, the portion in dispute shall be kept separate and safeguarded by the lawyer until the dispute is resolved.

(c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interest.

COMMENT

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of

safekeeping is warranted by special circumstances. All property of clients or third persons should be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities.

[2] Lawyers often receive funds from third parties from which the lawyer's fee will be paid. If there is risk that the client may divert the funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention in a dispute with the client. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

[3] Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party. If not inconsistent with the interests of the client, the lawyer may file an interpleader action concerning funds in dispute between the client and a third party.

[4] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction.

[5] In certain circumstances, Tennessee law governing abandoned property may apply to monies in lawyer trust accounts or other property left in the hands of lawyers and may govern its disposition. See Tenn. Code Ann. §§ 66-29-101 through 204 (1993 and Supp. 1999) (Uniform Disposition of Unclaimed Property Act).

DEFINITIONAL CROSS-REFERENCES

None.

COMMITTEE NOTES

Comparison To Current Tennessee Ethics Rules

Paragraph (a): DR 9-102(A) provides that "funds of clients" are to be kept in an identifiable bank account in the state in which the lawyer's office is situated. DR 9-102(B)(2) provides that a lawyer shall "[i]dentify and label securities and properties of a client .. . and place them in . . . safekeeping . . . ." DR 9-102(B)(3) requires that a lawyer "[m]aintain complete records of all funds, securities, and other properties of a client." Proposed Rule 1.15(a) extends these requirements to property of a third person that is in the lawyer's possession in connection with the representation. The second sentence in Paragraph (a)(1)(2) tracks DR 9-102 (C)(2)(d).

Paragraph (a)(1)(ii) does not contain the detailed administrative provisions contained in DR 9-102(C)(2) governing the IOLTA. The Committee determined that these details were more properly included in a separate Supreme Court Rule devoted to this purpose. The Committee submits that a Supreme Court Rule that would be substantively identical to the administrative requirements of DR 9-102 would provide as follows:

PROPOSED SUPREME COURT RULE ___
INTEREST ON LAWYER TRUST ACCOUNTS

Tennessee Supreme Court Rule 8 (Tennessee Rules of Professional Conduct) requires Tennessee lawyers to participate in the Interest on Lawyers' Trust Account (IOLTA) program, absent notice to the Chief Justice of the Supreme Court of Tennessee and the Board of Professional Responsibility of the Supreme Court of Tennessee.

The following rule shall govern the maintenance and operation of accounts (hereinafter "IOLTA accounts") under this program:

(1) Lawyers or law firms depositing client funds in an IOLTA account shall direct the depository institution:

(i) To remit interest, net any service charges or fees, as computed in accordance with the institution's standard accounting practice, at least quarterly, to the Tennessee Bar Foundation for deposit in its Interest on Lawyers' Trust Accounts program (IOLTA); and

(ii) To transmit with each remittance to the Tennessee Bar Foundation a statement showing the name of the lawyer or law firm on whose account the remittance is sent, the account number and the rate of interest applied, with a copy of such statement to be transmitted to the lawyer or the law firm.

(2) All interest transmitted to the Tennessee Bar Foundation shall be distributed by that entity for the following purposes:

(i) To provide legal assistance to the poor;

(ii) To provide student loans, grants, and scholarships to deserving law students;

(iii) To improve the administration of justice; and

(iv) For such other programs for the benefit of the public as are specifically approved by the Supreme Court of the State of Tennessee from time to time.

(3) The registration required by Rule 9, Section 20.5, of the Rules of the Supreme Court shall also include an IOLTA compliance statement, which shall set forth the bank or banks where the lawyer or the law firm maintains such depository account. Such compliance statement shall further designate the account number assigned by any such bank to such account. The IOLTA compliance statement shall direct such bank or banks to remit interest thereon as required in Rule 1.15 of the Rules of Professional Conduct, Tennessee Supreme Court Rule 8.

(4) A lawyer who does not maintain such depository account for deposit of clients' funds as referenced above shall advise the Board of Professional Responsibility of the State of Tennessee when filing the registration statement and IOLTA compliance statement as referenced above herein, that such lawyer does not maintain, and the reasons why such lawyer does not maintain such a pooled depository account. A

copy of such declination to participate in the IOLTA program, or statement that no such pooled depository account is maintained shall be transmitted to the Tennessee Bar Foundation by the Board of Professional Responsibility.

(5) The Board of Professional Responsibility, acting in concert with the Tennessee Bar Foundation, may promulgate such forms and procedures as will implement paragraphs this Rule and Rule 1.15 of the Rules of Professional Conduct, Tennessee Supreme Court Rule 8.

Paragraph (b): Paragraph (b) is substantially similar to DR 9-102(B)(1), (3) and (4), but the Committee has added a clause making it clear that if there is a dispute between the client and third person, the lawyer must keep the disputed funds separate pending resolution of the dispute.

Paragraph (c): Paragraph (c) is similar to DR 9-102(A)(2).

Comparison To ABA Model Rules

Paragraph (a) contains all the substance of ABA Model Rule 1.15(a), but has been reorganized and supplemented to account for current Tennessee law with respect to overdraft notification and the Interest On Lawyers Trust Accounts (IOLTA) program. Paragraphs (b) and (c) track ABA Model Rule l.15(b) and (c).

Changes Made to 1997 Committee Preliminary Draft In Response to Comments

Language from current DR 9-102(C)(2)(d) has been added to Paragraph (a)(1)(ii).

The Committee has deleted Comment [5] that read: A "client's security fund" provides a means through the collective efforts of the bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer. Where such a fund has been established, a lawyer should participate." This Comment is not needed because Tennessee's Client Security Fund is financed by a mandatory assessment imposed on all lawyers.

A sentence has been added to Comment [3] alerting lawyers to the possibility of filing an interpleader action to resolve a dispute between the lawyer's client and a third party about their respective entitlement to funds held by the lawyer.

The Committee has added Comment [5] as a helpful reference for lawyers.

Comments Received After September 2000 Draft, Committee Response, and Changes Made

The Committee has deleted the second sentence in Paragraph (c) as surplusage and has made minor editorial changes to Comments [1] and [2]. Helpful language paralleling DR 9-102(A)(1) has been added to Paragraph (a)(1).

PROPOSED RULE 1.16
DECLINING AND TERMINATING REPRESENTATION

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

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

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

(3) the lawyer is discharged.

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

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

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

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

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

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

(6) other good cause for withdrawal exists; or

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

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

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

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

(2) promptly surrendering papers and property of the client and any work product prepared by the lawyer for the client and for which the lawyer has been compensated;
(3) promptly surrendering any other work product prepared by the lawyer for the client, provided, however, that the lawyer may retain such work product to the extent permitted by

other law but only if the retention of the work product will not have a materially adverse affect on the client with respect to the subject matter of the representation;

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

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

COMMENT

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion.

Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may wish an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient.

Discharge

[4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring the client to proceed without assistance of counsel.

[6] If the client is mentally incompetent, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and, in an extreme case, may initiate proceedings for a conservatorship or similar protection of the client. See Rule 1.14.

Optional Withdrawal

[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably

believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer also may withdraw where the client insists on a repugnant or imprudent objective or action.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation. The lawyer must, however, give the client reasonable notice of the lawyer's intention to withdraw.

Assisting the Client Upon Withdrawal

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law.

[10] Whether or not a lawyer for an organization may under certain unusual circumstances have a legal obligation to the organization after withdrawing or being discharged by the organization's highest authority is beyond the scope of these Rules.

DEFINITIONAL CROSS-REFERENCES

"Consents in Writing" See Rule 1.0(b)
"Consultation" See Rule 1.0(c)
"Fraud"and "Fraudulent" See Rule 1.0(e)
"Material" and Materially" See Rule 1.0(g)
"Reasonable" See Rule 1.0(i)
"Reasonably Believes" See Rule 1.0(j)
"Substantial" See Rule 1.0(l)
"Substantially" See Rule 1.0(l)
"Tribunal" See Rule 1.0(m)

COMMITTEE NOTES

Comparison To Current Tennessee Ethics Rules

Paragraph (a): With respect to the mandatory obligation to decline a representation, DR 2-109(A) provides that a lawyer "shall not accept employment . . . if the lawyer knows or it is obvious that [the prospective client] wishes to . . . [b]ring a legal action . . . or otherwise have steps taken, merely for the purpose of harassing or maliciously injuring any person . . . . or [p]resent a claim or defense . . . that is not warranted under existing law, unless it can be supported by good faith argument for an extension, modification, or reversal of existing law." With respect to mandatory withdrawal from a representation, DR 2-110(B) provides that "[a] lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw from employment if: (1) the lawyer knows or it is obvious that the client is bringing the legal action, conducting the defense, or is asserting a position in the litigation or is otherwise having steps taken, merely for the purpose of harassing or maliciously injuring any person; (2) the lawyer knows or it is obvious that continued employment will result in violation of a Disciplinary Rule; (3) the lawyer's mental or physical condition renders it unreasonably difficult for him to carry out the employment effectively; or (4) the lawyer is discharged by his client."

Paragraph (b): There is no comparable right to withdraw or seek permission of a tribunal to withdraw "without cause" in the Disciplinary Rules.

The enumerated causes for permissive withdrawal compare to the Disciplinary Rules as follows:

Paragraph (b)(1): Subparagraph (b)(1) permits withdrawal if "the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent." DR 2-110(C)(1), on the other hand, permits withdrawal if the client insists on presenting a claim or a defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification ,or reversal of existing law." DR 2-110(c)(1)(b) permits withdrawal "if the client personally seeks to pursue an illegal course of conduct." DR 2-110(C)(1)(c) permits withdrawal if the client insists that the lawyer pursue a course of conduct that is illegal or that is prohibited under the Disciplinary Rules.

Paragraph (b)(2): There is no counterpart to subparagraph (b)(2) in the Disciplinary Rules.

Paragraph (b)(3): DR 2-110(C)(1)(e) permits withdrawal the client "[i]nsists, in a matter not pending before a tribunal, that the lawyer engage in conduct that is contrary to the judgment and advice of the lawyer but not prohibited under the Disciplinary Rules." This is consistent with the reference in Subparagraph (b)(3) to imprudent conduct, to which has been added the reference to repugnant conduct.

Paragraph (b)(4): DR 2-110(C)(1)(f) permits withdrawal if the client "deliberately disregards an agreement or obligation to the lawyer as to expenses and fees."

Paragraph (b)(5): DR 2-110(C)(1)(d) permits withdrawal if the client engages in "conduct that renders it unreasonably difficult for the lawyer to carry out the employment effectively." There is no counterpart in the Disciplinary Rules to the Subparagraph (b)(5)'s grant of permission to withdraw if the representation with result in an unanticipated and substantial financial burden.

Paragraph (b)(6): DR 2-110(C)(6) permits withdrawal exists if "[t]he lawyer believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal."

Paragraph (b)(7): DR 2-110(C)(5) permits withdrawal if the lawyer's "client knowingly and freely assents to termination of the employment."

Paragraph (c): DR 2-110(A)(1) provides: "If permission for withdrawal from employment is required by the rules of a tribunal, the lawyer shall not withdraw without its permission."

Paragraph (d): Paragraph (d) differs from DR 2-110(A)(2) and (3) as follows:

1. The Proposed Rule deals more specifically with the lawyer's responsibilities and rights with respect to client papers, property, and work product the lawyer has prepared in the course of the representation.

2. The Proposed Rule also provides that the lawyer may not exercise his or her right to retain papers if so doing would have a materially adverse effect on the client with respect to the subject matter in which the lawyer was representing the client.

3. Paragraph (d)(4) explicitly requires the return of unspent advance payments for costs.

Comparison To ABA Model Rules

Proposed Rule 1.16 is identical to Model Rule 1.16 except as follows:

Paragraph (b)(3) broadens the Model Rule by permitting withdrawal if a client insists upon pursuing an objective or taking action that the lawyer considers repugnant or imprudent.

Paragraph (b)(5) is more restrictive than Model Rule 1.16(b)(5) in that it only permits withdrawal if the representation will result in an "unanticipated and substantial" financial burden..

There is no counterpart in the Model Rule to paragraph (b)(7).

Changes Made to 1997 Committee Preliminary Draft In Response to Comments

Paragraph (a): References to Proposed Rule 6.2 and seeking the permission of a tribunal were deleted as an unnecessary departure from ABA Model Rule 1.16(a).

Paragraph (b): To eliminate another unnecessary departure from ABA Model Rule 1.16, Paragraphs (B) and (C) in the preliminary draft have been combined into Paragraph (b) from which the references to Proposed Rule 6.2 and seeking permission of a tribunal have been deleted. Subparagraphs (b)(1) and (b) have also been modified to conform to the Model Rule.

Deletions: The following paragraphs were deleted:

Paragraph (D): This paragraph, which addressed confidentiality issues as might arise when a lawyer seeks a tribunal's permission, has been deleted as redundant. These issues are adequately addressed by Proposed Rules 1.6 and 3.3.

Paragraph (F): Paragraph (F), which required lawyers associated in a form to take action to protect firm clients when a lawyer who is handling the matter for the firm leaves the firm, has been deleted. The Committee has concluded that this issue can be adequately handled in terms of the lawyer's duty under Proposed Rule 1.4 to keep the client reasonably advised about the status of the representation.

Also, Comment [11] was deleted.

Comments Received After September 2000 Draft, Committee Response, and Changes Made

The Attorney General has voiced concern that Rule 1.16 may impose restrictions on the freedom of the Attorney General to terminate the representation by his office of a state agency or official in circumstances in which a potential conflict of interest exists or an employee is deemed to have acted outside the scope of his or her employment. The Committee sees no need to change this Rule in response to the Attorney General's concern because Paragraph (b)(6) permits withdrawal for "other good cause." Compliance by the Attorney General with the responsibilities of his office should be deemed good cause for withdrawal in those situations in which withdrawal would have an adverse effect on the client. More generally, however, the Committee believes that the extent to

which the Attorney General is obligated to comply with the Rules of Professional Conduct is a question of law that is beyond the scope of these Rules.

PROPOSED RULE 1.17
SALE OF A LAW PRACTICE

A lawyer or a law firm may sell or purchase a law practice, including good will, if the following conditions are satisfied:

(a) The seller ceases to engage in the private practice of law in the geographic area in which the practice has been conducted; and

(b) The practice is sold as an entirety to another lawyer or law firm and the seller provides the buyer with written notice of the fee agreement with each of the seller's clients and any other agreements relating to each client's representation; and

(c) Written notice is given to each of the seller's clients regarding the proposed sale, the client's right to retain other counsel or to take possession of the file, and the fact that the client's consent to representation by the purchaser will be presumed if the client does not take any action or does not otherwise object within thirty (30) days of receipt of the notice.

(d) If a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction or by the presiding judge in the judicial district in which the seller resides. The seller may disclose to the court *in camera* information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file.

(e) Unless the client consents in writing after consultation, the fees and expenses charged a client shall not be increased by reason of the sale, and the purchasing lawyer shall abide by any agreements between the selling lawyer and the client with respect to the representation as are permitted by these rules and of which the purchasing lawyer was given notice prior to the transfer of the representation.

COMMENT

[1] The practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will. Pursuant to this Rule, when a lawyer or an entire firm ceases to practice and another lawyer or firm takes over the representation, the selling lawyer or firm may obtain compensation for the reasonable value of the practice as may withdrawing partners of law firms. See Rules 5.4 and 5.6.

Termination of Practice by the Seller

[2] The requirement that all of the private practice be sold is satisfied if the seller in good faith makes the entire practice available for sale to the purchaser. The fact that a number of the seller's clients decide not to be represented by the purchaser but take their matters elsewhere, therefore, does not result in a violation. Neither does a return to private practice as a result of an unanticipated change in circumstances result in a violation. For example, a lawyer who has sold the practice to accept an appointment to judicial office does not violate the requirement that the sale be attendant to cessation of practice if the lawyer later resumes private practice upon being defeated in a contested or a retention election for the office.

[3] The requirement that the seller cease to engage in the private practice of law does not prohibit employment as a lawyer on the staff of a public agency or a legal services entity which provides legal services to the poor, or as in-house counsel to a business.

[4] The Rule permits a sale attendant upon retirement from the private practice of law within the jurisdiction. Its provisions, therefore, accommodate the lawyer who sells the practice upon the occasion of moving to another state. Tennessee is sufficiently large that a move from one locale therein to another is tantamount to leaving the jurisdiction in which the lawyer has engaged in the practice of law. To also accommodate lawyers so situated, the Rule permits the sale of the practice when the lawyer leaves the geographic area in which he or she is practicing as well as when the lawyer leaves the state.

Single Purchaser

[5] The Rule requires a single purchaser. The prohibition against piecemeal sale of a practice protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee-generating matters. The purchaser is required to undertake all client matters in the practice, subject to client consent. If, however, the purchaser is unable to undertake all client matters because of a conflict of interest in a specific matter respecting which the purchaser is not permitted by Rule 1.7 or another rule to represent the client, the requirement that there be a single purchaser is nevertheless satisfied.

Client Confidences, Consent and Notice

[6] Negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client no more violate the confidentiality provisions of Model Rule 1.6 than do preliminary discussions concerning the possible association of another lawyer or mergers between firms, with respect to which client consent is not required. Providing the purchaser access to client-specific information relating to the representation and to the file, however, requires client consent. The Rule provides that before such information can be disclosed by the seller to the purchaser the client must be given actual written notice of the contemplated sale, including the identity of the purchaser and any proposed change in the terms of future representation, and must be told that the decision to consent or make other arrangements must be made within 30 days. If nothing is heard from the client within that time, consent to the sale is presumed.

[7] A lawyer or law firm ceasing to practice cannot be required to remain in practice because some clients cannot be given actual notice of the proposed purchase. Since these clients cannot themselves consent to the purchase or direct any other disposition of their files, the Rule requires an order from a court having jurisdiction authorizing their transfer or other disposition. The Court can be expected to determine whether reasonable efforts to locate the client have been exhausted, and whether the absent client's legitimate interests will be served by authorizing the transfer of the file so that the purchaser may continue the representation. Preservation of client confidences requires that the petition for a court order be considered *in camera*.

[8] All the elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive the sale of the practice.

Fee Arrangements Between Client and Purchaser

[9] The sale may not be financed by increases in fees charged the clients of the practice. Existing agreements between the seller and the client as to fees and the scope of the work must be honored by the purchaser, unless the client consents after consultation.

Other Applicable Ethical Standards

[10] Lawyers participating in the sale of a law practice are subject to the ethical standards applicable to involving another lawyer in the representation of a client. These include, for example, the seller's obligation to exercise competence in identifying a purchaser qualified to assume the practice and the purchaser's obligation to undertake the representation competently (see Rule 1.1); the obligation to avoid disqualifying conflicts, and to secure client consent after consultation for those conflicts which can be agreed to (see Rule 1.7); and the obligation to protect information relating to the representation (see Rules 1.6 and 1.9).

[11] If approval of the substitution of the purchasing attorney for the selling attorney is required by the rules of any tribunal in which a matter is pending, such approval must be obtained before the matter can be included in the sale (see Rule 1.16).

Applicability of the Rule

[12] This Rule applies to the sale of a law practice by representatives of a deceased, disabled or disappeared lawyer. Thus, the seller may be represented by a non-lawyer representative not subject to these Rules. Since, however, no lawyer may participate in a sale of a law practice which does not conform to the requirements of this Rule, the representatives of the seller as well as the purchasing lawyer can be expected to see to it that the requirements are met.

[13] Admission to or retirement from a law partnership or professional association, retirement plans and similar arrangements, and a sale of tangible assets of a law practice, do not constitute a sale or purchase governed by this Rule.

[14] This Rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice.

DEFINITIONAL CROSS-REFERENCES

“Consents in Writing” See Rule 1.0(b)
“Consultation” See Rule 1.0(c)
“Law Firm” See Rule 1.0(d)

COMMITTEE NOTES

Comparison To Current Tennessee Ethics Rules

There is no counterpart to the Proposed Rule in the Disciplinary Rules.

Comparison To ABA Model Rules

Proposed Rule 1.17 is identical to ABA Model Rule 1.17 except for the following modifications:

Paragraph (b): Paragraph (b) includes an additional requirement that the seller provide the buyer with written notice of the seller's fee agreements and any other agreements with respect to the representation of each of the seller's clients. The Committee believes that the purchasing lawyer must have this information in order to comply with paragraph (e).

Paragraph (c): The Model Rule presumes consent of the client to the sale of the practice if the client does not take action or otherwise object within 90 days after notice of the proposed sale.

Paragraph (d): Unlike Paragraph (d) of the Model Rule, the Proposed Rule does not permit the purchasing lawyer to condition his or her representation of the selling lawyer's clients upon a change in the fee or expense arrangements as were agreed to by the client and the selling lawyer. The Proposed Rule, however, does permit the purchasing lawyer to request such a change and to implement the change if the client consents after consultation. We have also required the purchasing lawyer to honor any other agreements with respect to the representation if the lawyer had notice of them prior to the transfer of the representation.

Changes Made to 1997 Committee Preliminary Draft In Response to Comments

No changes.

Comments Received After September 2000 Draft, Committee Response, and Changes Made

No comments or changes.

CHAPTER 2
THE LAWYER AS COUNSELOR, INTERMEDIARY, AND DISPUTE RESOLUTION NEUTRAL

PROPOSED RULE 2.1
ADVISOR

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

COMMENT

Scope of Advice

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

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

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

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

Offering Advice

[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, duty to the client under Rule 1.4 may require that the lawyer act if the client's course of action is related to the representation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

DEFINITIONAL CROSS-REFERENCES

None.

COMMITTEE NOTES

Comparison To Current Tennessee Ethics Rules

There is no direct counterpart to the Proposed Rule in the Disciplinary Rules. EC 7-8 states that "[a]dvice of a lawyer to his client need not be confined to purely legal considerations. . . . In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible. . . . In the final analysis, however, . . . the decision whether to forego legally available objectives or methods because of nonlegal factors is ultimately for the client. . . ."

Comparison To ABA Model Rules

The Proposed Rule is identical to ABA Model Rule 2.1.

Changes Made to 1997 Committee Preliminary Draft In Response to Comments

No changes.

Comments Received After September 2000 Draft, Committee Response, and Changes Made

No comments or changes.

PROPOSED RULE 2.2
LAWYER SERVING AS INTERMEDIARY BETWEEN CLIENTS

(a) A lawyer represents clients as an intermediary when the lawyer provides impartial legal advice and assistance to two or more clients who are engaged in a candid and non-adversarial effort to accomplish a common objective with respect to the formation, conduct, modification, or termination of a consensual legal relation between them.

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

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

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

(3) the lawyer consults with each client about:

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

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

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

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

(4) each client consents in writing to the lawyer's representation and each client authorizes the lawyer to disclose to each of the other clients being represented in the matter any information relating to the representation the disclosure of which the lawyer reasonably believes is required by Rule 1.4.

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

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

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

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

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

(1) any of the clients so requests;

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

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

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

COMMENT

[1] A lawyer acts as an intermediary under this Rule when the lawyer represents two or more clients who are cooperatively trying to accomplish a common objective with respect to the formation, conduct, modification, or termination of a consensual legal relation between them. The hallmarks of an intermediation include the impartiality of the lawyer who serves as intermediary, the open, candid, and non-adversarial nature of the clients' pursuit of a common objective, and the limited subject matters in which a lawyer may serve multiple clients as an intermediary (*i.e*., the adjustment of a consensual legal relationship among or between the clients). Because intermediation differs significantly from the partisan role normally played by lawyers, and requires that the lawyer be impartial as between the clients rather than an advocate on behalf of each, a lawyer should only undertake this role with client consent after consultation about the distinctive features of this role. Also, given the risks associated with joint representation of parties whose interests may potentially be in conflict, the Rule provides a number of safeguards designed to limit its applicability and to protect the interests of the several clients.

[2] Paragraph (b) specifies the circumstances in which a lawyer may serve multiple clients as an intermediary. With respect to the clients being served as an intermediary, this Rule, and not Rule 1.7, applies. Rule 1.7 remains applicable, however, to protect other clients the lawyer may be representing or may wish to represent in other matters. For example, if the lawyer's representation of two clients as an intermediary in a matter will materially limit the lawyer's representation of another client the lawyer is representing as an advocate, the lawyer must afford that client the protections of Rule 1.7. Similarly, if the lawyer's representation of two clients as an intermediary would be materially adverse to one of the lawyer's former clients, and the matters are substantially related, the lawyer must afford the former client the protection of Rule 1.9.

[3] Rule 2.2 does not apply to a lawyer acting as a dispute resolution neutral, such as an arbitrator or a mediator, as the parties to a dispute resolution proceeding are not clients of the lawyer, even where the lawyer has been appointed with the concurrence of the parties. Other rules of conduct govern a lawyer's service as a dispute resolution neutral. See Rule 2.4 and Tennessee Supreme Court Rule 31.

[4] Because this Rule only applies to the formation, conduct, modification or termination of consensual legal relationships between clients, it does not apply to the representation of multiple

clients in connection with gratuitous transfers or other matters in which there is not a quid pro quo exchange. Thus, for example, conflicts of interest arising from the representation of multiple clients in estate planning or the administration of an estate are governed by Rule 1.7 rather than by this Rule. If, however, the effectuation of an estate plan or other gratuitous transfer entails the formation, modification or termination of a consensual legal relationship between clients, and the lawyer acts as an intermediary in connection with the transaction, this Rule, and not Rule 1.7, will apply.

[5] A lawyer may act as an intermediary in seeking to establish or adjust a consensual legal relationship among or between clients on an amicable and mutually advantageous basis: for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest. As part of the work of an intermediary, the lawyer may seek to achieve the clients' common objective or to resolve potentially conflicting interests by developing the parties' mutual interests. The alternative may be that each party may have to obtain separate representation, with the possibility in some situations of incurring additional cost, complications, or even litigation. Given these and other relevant factors, each client may prefer to have one lawyer act as an intermediary for all rather than hiring a separate lawyer to serve as his or her partisan.

[6] In considering whether to act as intermediary between clients, a lawyer should be mindful that, if the intermediation fails, the result can be additional cost, embarrassment, and recrimination. In some situations, the risk of failure is so great that intermediation is plainly impossible or imprudent for the lawyer or the clients. For example, a lawyer cannot undertake common representation of clients between whom contentious litigation is imminent or who contemplate contentious negotiations, as is often the case when dissolution of a marriage is involved. More generally, if the relationship between the parties has already assumed definite antagonism, the possibility that the clients' interests can be adjusted by intermediation ordinarily is not very good.

[7] The appropriateness of intermediation can depend on its form. Forms of intermediation range from an informal "facilitation" in which the lawyer's responsibilities are limited to presenting alternatives from which the clients will choose to a full-blown representation in which the lawyer provides all legal services needed in connection with the proposed transaction. One form may be appropriate in circumstances where another would not. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis, whether the situation involves creating a relationship between the parties or terminating one, and the relative experience, sophistication, and economic bargaining power of the clients, or the existence of prior familial, business, or legal relationships.

Confidentiality and Privilege

[8] A particularly important factor in determining the appropriateness of intermediation is the effect on client-lawyer confidentiality and the attorney-client privilege. In a common representation, the lawyer is still required both to keep each client adequately informed and to maintain confidentiality of information relating to the representation. See Rules 1.4 and 1.6. Complying with both requirements while acting as intermediary requires a delicate balance. If the balance cannot be maintained, the common representation is improper.

[9] Paragraph (b)(4) and (c)(2) makes clear that the obligations of attorney-client confidentiality apply to clients being served by a lawyer as an intermediary, but that, as between the clients being so served, confidentiality is inappropriate and must be waived by each of the clients.

Thus, while the lawyer must maintain confidentiality as against strangers to the relationship, the lawyer has no such duty to keep information provided to the lawyer by one client confidential from the other clients. Moreover, the lawyer may well, depending on the circumstances, have an affirmative obligation to disclose such information obtained from one client to other clients. Obviously, this important implication of the lawyer's responsibilities as an intermediary must be disclosed and explained to the clients.

[10] Since the lawyer is required to be impartial between commonly represented clients, intermediation is improper when that impartiality cannot be maintained. For example, a lawyer who has represented one of the clients for a long period and in a variety of matters might have difficulty being impartial between that client and one to whom the lawyer has only recently been introduced.

Consultation

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

[12] Paragraph (c)(3) is an application of the principle expressed in Rule 1.4. Where the lawyer is intermediary, the clients ordinarily must assume greater responsibility for decisions than when each client is independently represented.

Withdrawal

[13] Common representation does not diminish the rights of each client in the client-lawyer relationship. Each client has the right to loyal and diligent representation, the right to discharge the lawyer as stated in Rule 1.16, and the protection of Rule 1.9 concerning obligations to a former client.

[14] Because of the obligations of a lawyer serving as an intermediary to the intermediation clients, the lawyer must withdraw from the representation if any of the intermediation clients so requests; if one or more of the clients denies the lawyer the authority to disclose certain information to any of the remaining clients, thereby preventing the lawyer from being able to discharge the lawyer's duties to the remaining clients to communicate with them and disclose information to them; or if any of the various predicate requirements for intermediation can no longer be satisfied.

[15] Upon withdrawal from the role of intermediary or completion of an intermediation, the lawyer must afford all of the clients formerly served as an intermediary the protections of Rules 1.9 and 1.10.

DEFINITIONAL CROSS-REFERENCES

"Consents in Writing" See Rule 1.0(b)
"Consults" See Rule 1.0(c)
"Material" and "Materially" See Rule 1.0(g)
"Reasonably Believes" See Rule 1.0(j)

COMMITTEE NOTES

Comparison To Current Tennessee Ethics Rules

There is no direct counterpart to the Proposed Rule in the Disciplinary Rules. EC 5-20 states that a "lawyer is often asked to serve as an impartial arbitrator or mediator in matters which involve present or former clients. He may serve in either capacity if he first discloses such present or former relationships." DR 5-105(B) provides that a lawyer "shall not continue multiple employment if the exercise of his independent judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, or if it would be likely to involve him in representation of differing interests, except to the extent permitted under DR 5-105(C)." DR 5-105(C) provides that "a lawyer may represent multiple clients if it is obvious that he can adequately represent the interests of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each."

Comparison To ABA Model Rules

The Proposed Rule embraces the concepts underlying ABA Model Rule 2.2, but attempts to more comprehensively and specifically to set forth the lawyer's responsibilities when undertaking to serve as an impartial intermediary between two clients. Model Rule 2.2 provides:

RULE 2.2 Intermediary

(a) A lawyer may act as intermediary between clients if:

(1) the lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtains each client's consent to the common representation;

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

(3) the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.

(b) While acting as intermediary, the lawyer shall consult with each client concerning the decisions to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.

(c) A lawyer shall withdraw as intermediary if any of the clients so requests, or if any of the conditions stated in Paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.

Changes Made to 1997 Committee Preliminary Draft In Response to Comments

Paragraph (a): No changes.

Paragraph (b): No change in substance. Compression of conflict of interest standards into two paragraphs. Elimination of awkward references to "intermediation clients."

Paragraph (c): No change in substance. As each party to the intermediation is the lawyer's client, the Committee deleted Subparagraphs (c)(2) and (3) as unnecessarily repetitive of Rules 1.6 and 1.2.

Paragraph (f): As each party to an intermediation is a client, the Committee deleted Paragraph (f) as unnecessarily repetitive of Rule 1.9, which lays out a lawyer's duties to former clients.

Comments Received After September 2000 Draft, Committee Response, and Changes Made

In response to suggestions from the TBA Tax, Probate, and Trust Law Section, the Committee proposes a change to Paragraph (b), the addition of new comment [4], and some minor changes to Comments [1], [5], and [7]. The change in Paragraph (b) and the new Comment, together with the addition of a new Comment [22] to Rule 1.7, are intended to confirm and clarify that Rule 1.7 and Rule 2.2 are mutually exclusive. Rule 2.2 governs when a lawyer provides clients impartial legal advice and assistance in connection with a consensual transaction between them. Rule 1.7 applies to all other representations in which the lawyer is presumed to be representing each client as a partisan advocate. This distinction is highlighted by the specification in the Comments that the representation of multiple clients in connection with gratuitous transfers is governed by Rule 1.7 rather than Rule 2.2. In this regard, the Committee rejected a proposal to allow lawyers who would represent multiple parties in a business transaction to choose between providing them with impartial advice and assistance or serving each client as a partisan advocate. This would have given the lawyer a choice of complying with either Rule 1.7 or Rule 2.2. The Committee opposes such an approach because it believes that advocacy and intermediation are mutually exclusive roles, and that partisan advocacy is not an appropriate role when a lawyer is representing two clients in a consensual transaction between them.

PROPOSED RULE 2.3
EVALUATION FOR USE BY THIRD PERSONS

(a) A lawyer may undertake an evaluation of a matter affecting a client for the use of someone other than the client if:

(1) the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client; and

(2) the client consents after consultation.

(b) Except as disclosure is required in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

COMMENT

Definition

[1] An evaluation may be performed at the client's direction but for the primary purpose of establishing information for the benefit of third parties; for example, an opinion concerning the title of property rendered at the behest of a vendor for the information of a prospective purchaser, or at the behest of a borrower for the information of a prospective lender. In some situations, the evaluation may be required by a government agency; for example, an opinion concerning the legality of the securities registered for sale under the securities laws. In other instances, the evaluation may be required by a third person, such as a purchaser of a business.

[2] Lawyers for the government may be called upon to give a formal opinion on the legality of contemplated government agency action. In making such an evaluation, the government lawyer acts at the behest of the government as the client but for the purpose of establishing the limits of the agency's authorized activity. Such an opinion is to be distinguished from confidential legal advice given agency officials. The critical question is whether the opinion is to be made public.

[3] A legal evaluation should be distinguished from an investigation of a person with whom the lawyer does not have a client-lawyer relationship. For example, a lawyer retained by a purchaser to analyze a vendor's title to property does not have a client-lawyer relationship with the vendor. So also, an investigation into a person's affairs by a government lawyer, or by special counsel employed by the government, is not an evaluation as that term is used in this Rule. The question is whether the lawyer is retained by the person whose affairs are being examined. When the lawyer is retained by that person, the general rules concerning loyalty to client and preservation of confidences apply, which is not the case if the lawyer is retained by someone else. For this reason, it is essential to identify the person by whom the lawyer is retained. This should be made clear not only to the person under examination, but also to others to whom the results are to be made available.

Duty to Third Person

[4] When the evaluation is intended for the information or use of a third person, a legal duty to that person may or may not arise. That legal question is beyond the scope of these Rules. However, since such an evaluation involves a departure from the normal client-lawyer relationship, careful analysis of the situation is required. The lawyer must be satisfied as a matter of professional judgment that making the evaluation is compatible with other functions undertaken in behalf of the

client. For example, if the lawyer is acting as advocate in defending the client against charges of fraud, it would normally be incompatible with that responsibility for the lawyer to perform an evaluation for others concerning the same or a related transaction. Assuming no such impediment is apparent, however, the lawyer should advise the client of the implications of the evaluation, particularly the lawyer's responsibilities to third persons and the duty to disseminate the findings.

Access to and Disclosure of Information

[5] The quality of an evaluation depends on the freedom and extent of the investigation upon which it is based. Ordinarily a lawyer should have whatever latitude of investigation seems necessary as a matter of professional judgment. Under some circumstances, however, the terms of the evaluation may be limited. For example, certain issues or sources may be categorically excluded, or the scope of search may be limited by time constraints or the noncooperation of persons having relevant information. Any such limitations which are material to the evaluation should be described in the report. If after a lawyer has commenced an evaluation, the client refuses to comply with the terms upon which it was understood the evaluation was to have been made, the lawyer's obligations are determined by law, having reference to the terms of the client's agreement and the surrounding circumstances.

Financial Auditors' Requests for Information

[6] When a question concerning the legal situation of a client arises at the instance of the client's financial auditor and the question is referred to the lawyer, the lawyer's response may be made in accordance with procedures recognized in the legal profession. Such a procedure is set forth in the American Bar Association Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information, adopted in 1975.

DEFINITIONAL CROSS-REFERENCES

“Consultation” See Rule 1.0(c)
“Reasonably Believes” See Rule 1.0(j)

COMMITTEE NOTES

Comparison To Current Tennessee Ethics Rules

There is no counterpart to the Proposed Rule in the Disciplinary Rules.

Comparison To ABA Model Rules

The Proposed Rule is identical to ABA Model Rule 2.3.

Changes Made to 1997 Committee Preliminary Draft In Response to Comments

No changes.

Comments Received After September 2000 Draft, Committee Response, and Changes Made

The Attorney General has voiced concern that the Proposed Rule conflicts with the Attorney General’s obligation under state law to render legal opinions in response to requests from various

state officials. The Committee sees no need to specifically address this conflict in Rule 2.3 because Scope, Paragraph [4], indicates that the Rules of Professional Conduct are not intended to abrogate the statutory authority or alter the statutory responsibilities of the Attorney General. Also with respect to the Attorney General's specific concern about the need to obtain the consent of an agency head prior to rendering an opinion about the duties of that agency, the Committee would note that the State may well have given "consent" to have the Attorney General render such opinions by virtue of legislative enactments concerning the Attorney General's authority and duties.

PROPOSED RULE 2.4
LAWYER AS DISPUTE RESOLUTION NEUTRAL

(a) A lawyer serves as a dispute resolution neutral when the lawyer impartially assists two or more persons who are not clients of the lawyer to reach a resolution of disputes that have arisen between them. Service as a dispute resolution neutral may include service as a mediator, an arbitrator whose decision does not bind the parties, a case evaluator, or a judge or juror in a mini-trial or summary jury trial as described in Supreme Court Rule 31, or in such other capacity as will enable the lawyer to impartially assist the parties resolve their dispute.

(b) A lawyer may serve as a dispute resolution neutral in a matter if:

(1) the lawyer is competent to handle the matter;

(2) the lawyer can handle the matter without undue delay;

(3) the lawyer reasonably believes he or she can be impartial as between the parties;

(4) none of the parties to the dispute is being represented by the lawyer in other matters;

(5) the lawyer's service as a dispute resolution neutral in the matter will not be adversely affected by the representation of clients with interests directly adverse to any of the parties to the dispute, or by the lawyer's responsibilities to a client or a third person, or by the lawyer's own interests;

(6) the lawyer consults with each of the parties to the dispute, or their attorneys, about the lawyer's qualifications and experience as a dispute resolution neutral, the rules and procedures which will be followed in the proceeding, and the lawyer's responsibilities as a dispute resolution neutral, provided, however, that any party to the dispute who is represented by a lawyer may waive his or her right to all or part of the consultation required by this paragraph;

(7) the lawyer consults with each of the parties, or their lawyers, about any interests of the lawyer, the lawyer's clients, the clients of other lawyers with whom the lawyer is associated in a firm, or third persons which may materially affect the lawyer's impartiality in the matter;

(8) unless the service is pursuant to Supreme Court Rule 31, each of the parties, or their attorneys, consents in writing to the lawyer's service as a dispute resolution neutral in the matter; and

(9) if the service is pursuant to Supreme Court Rule 31, the lawyer is qualified to serve in accordance with the requirements of that Rule.

(c) While serving as a dispute resolution neutral, a lawyer shall:

(1) act reasonably to assure that the parties understand the rules and procedures which will be followed in the proceeding and the lawyer's responsibilities as a dispute resolution neutral;

(2) act impartially, competently and expeditiously to assist the parties resolve the matters in dispute;

(3) promote mutual respect among the parties for the dispute resolution process;

(4) as between the parties to the dispute and third persons, treat all information related to the dispute as if it were information protected by Rules 1.6 and 1.8 (b),

(5) as between the parties to the dispute, treat all information obtained in an individual caucus with a party or a party's lawyer as if it were information related to the representation of a client protected by Rules 1.6, and 1.8(b);

(6) render no legal advice to any party to the dispute, but, if the lawyer believes that an unrepresented party does not understand how a proposed agreement might affect his or her legal rights or obligations, the lawyer shall advise that party to seek the advice of independent counsel;

(7) accept nothing of value, other than fully disclosed reasonable compensation for services rendered as the dispute resolution neutral, from a party, a party's lawyer, or any other person involved or interested in the dispute resolution process;

(8) not seek to coerce or unfairly influence a party to accept a proposal for resolution of a matter in dispute and shall not make any substantive decisions on behalf of a party; and

(9) if the service is pursuant to Supreme Court Rule 31, comply with all other duties of a dispute resolution neutral as set forth in the Rule.

(d) A lawyer shall withdraw from service as a dispute resolution neutral or, if appointed by a court, shall seek the court's permission to withdraw from service as a dispute resolution neutral if:

(1) any of the parties so requests;

(2) the lawyer reasonably believes that further dispute resolution services will not lead to an agreement resolving the matter in dispute or that any of the parties is unwilling or unable to cooperate with the lawyer's dispute resolution initiatives; or

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

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

(1) may, with the consent of all the parties to the dispute, in compliance with the requirements of Rules 1.2(c) and 2.2, draft a settlement agreement that results from the dispute resolution process, but shall not otherwise represent any or all of parties in connection with the matter, and

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

COMMENT

[1] Mediation, arbitration, and other forms of alternative dispute resolution have been in use for many years, but increasing demands in recent years for more prompt and efficient means of resolving disputes of all kinds have led to an increase in the demand for the services of dispute resolution neutrals skilled in the analysis of disputes and in conflict resolution. Lawyers are often particularly well-suited to perform this role and should be encouraged to do so.

[2] Although service as a dispute resolution neutral is considered a law-related service governed generally by these Rules (see Rule 5.7), the unique nature of a lawyer's role when serving as a dispute resolution neutral demands separate, more specific, treatment in this Rule for the guidance of the profession and the public.

[3] This Rule provides that a lawyer may serve as a dispute resolution neutral, whether as a mediator, non-binding arbitrator, a case evaluator, or judge or juror in a mini-trial or summary jury trial. The scope of a lawyer's possible service as a neutral is intended to be generally the same as that adopted in Tennessee Supreme Court Rule 31 governing court-annexed alternative dispute resolution. While Rule 31 covers only court-annexed alternative dispute resolution, however, this Rule covers services as a dispute resolution neutral whether rendered in connection with court-annexed dispute resolution proceedings or in another, perhaps wholly private context not covered by Rule 31.

[4] This Rule does not cover the rendering by a lawyer of services related to alternative dispute resolution that are not neutral in nature, but are more judicial in nature, such as service as an arbitrator in a binding arbitration. Although Rule 5.7 may address a lawyer's obligations in such a context, this Rule does not purport to address them.

[5] Although a lawyer who serves as a dispute resolution neutral is subject to the Rules of Professional Conduct (see Rule 5.7), many of the Rules do not directly apply to such service because the participants in a dispute resolution proceeding are not the lawyer's clients. Other Rules do apply, however, and this Rule further provides specific applications of certain rules that must apply differently in this context (including, for example, the application of rules governing conflicts of interest).

[6] Although the requirements of this Rule are generally intended to be consistent with those imposed on dispute resolution neutrals under Rule 31, there are duties additional to those set out in Rule 31 that are imposed on lawyers who serve in this role. See also Standards of Professional Conduct for Rule 31 Mediators. Even though nonlawyers certified by the Supreme Court under Rule 31 as dispute resolution neutrals may not be subject to these Rules and the parties to the dispute are not deemed to be the clients of the lawyer serving as their dispute resolution neutral, the parties are properly entitled to assume that lawyers serving in this capacity are largely subject to the same broad standards of conduct as are applicable to lawyers when they are providing legal services to clients.

[7] The Court has set forth in Rule 31 rules and standards of professional conduct applicable to all Rule 31 neutrals, including both lawyers and nonlawyers. Thus, paragraph (b) contemplates that a lawyer may serve as a Rule 31 neutral if the lawyer complies with these requirements. Paragraph (b)(9) requires that a lawyer serving as a dispute resolution neutral pursuant to Supreme Court Rule 31 must comply fully with the requirements of that Rule.

[8] Paragraph (b) specifies the circumstances in which a lawyer may serve parties to a dispute as a dispute resolution neutral. With respect to the parties to the dispute, Rule 1.7 is inapplicable because there is no attorney-client relationship between the neutral and the parties to

the dispute. Rule 1.7 remains applicable, however, to protect a client, as distinct from parties the lawyer is serving as a neutral, if the lawyer's service as a neutral will materially limit the lawyer's representation of the client. Similarly, if the lawyer's service as a neutral would be materially adverse to one of the lawyer's former clients, and the matters are substantially related, the lawyer must afford the former client the protection of Rule 1.9.

[9] Conflicts of interest for lawyers serving as dispute resolution neutrals are specifically addressed, given the fact that, although parties to a dispute resolution proceeding are not the clients of the dispute resolution neutral, the lawyer serving as neutral must be impartial, must fully disclose any pertinent relationships to the parties to the proceeding, and must obtain their consent to the lawyer's service based on these disclosures. Note that, although paragraph (b)(4) does not provide for mandatory vicarious disqualification based on a lawyer's current or prospective service as a dispute resolution neutral, the fact that, for example, a lawyer asked to serve as a neutral has a partner who currently represents one of the parties to the dispute in other matters would obviously have to disclose this fact to the parties under (b)(7) and obtain consent to service as a neutral. Of course, this lawyer would also have to have a reasonable belief that impartiality was possible despite this and other such pertinent relationships. If a lawyer may not make the disclosures required by paragraph (b)(7) because of his confidentiality obligations to a client, then the lawyer may not serve as a dispute neutral.

[10] Paragraph (c) further provides various standards of conduct particular to service by a lawyer as a dispute resolution neutral. Again, these rules of conduct are intended to be consistent with Rule 31 and to address the particular situation of a neutral, who occupies a significantly different relationship to participants in a dispute resolution proceeding than a lawyer does with clients. Paragraphs (c)(4) and (c)(5) treat the confidentiality of all information related to the dispute (including that obtained in individual caucuses with the parties) by analogy to the Rules concerning the confidentiality of client information. Thus, for example, any question concerning the potential disclosure of fraud by a participant in a dispute resolution proceeding would be addressed under Rules 1.6, 3.3 or 4.1 as though the participant were, in fact, a client of the lawyer. Other portions of paragraph (c), such as the ban on undisclosed compensation by one of the participants in paragraph (c)(7), the prohibition on coercion or decision making on behalf of parties in paragraph (c)(8), and the ban on giving legal advice to the participants in paragraph (c)(6), impose restrictions needed to insure and reinforce the necessary impartiality of the lawyer serving as a dispute resolution neutral.

[11] Paragraph (d) requires that a lawyer serving as a dispute resolution neutral withdraw or seek an appointing court's permission to withdraw in certain specified circumstances, such as a request by a party to do so or the lawyer's reasonable belief that the lawyer's service will not be fruitful.

[12] Paragraph (e) establishes a lawyer's duties toward participants in a dispute resolution proceeding upon the termination of the lawyer's service as a neutral for any reason, whether because a settlement is achieved or because a party requests the lawyer's withdrawal. Given the impartial role of a dispute resolution neutral, it is inappropriate for a lawyer who had served as a dispute resolution neutral to later represent any of the parties to the dispute in connection with the subject matter of that dispute resolution proceeding. This disqualification, however, does not extend to other lawyers associated in a law firm with the dispute resolution neutral. If, however, the parties have successfully resolved their dispute, paragraph (e)(1) permits the lawyer-neutral to draft the agreement settling their dispute, but this must be done in conformity with Rules 1.2(c) and 2.2.

[13] Further, paragraph (e)(2) provides that, even though the participants to a concluded dispute resolution proceeding were not the clients of the lawyer who served as a dispute resolution

neutral in that proceeding, these participants are nevertheless entitled to the protections relating to confidentiality and conflicts of interest afforded by Rules 1.6, 1.8(b), and 1.9 as if they were former clients.

DEFINITIONAL CROSS-REFERENCES

"Consents in Writing" See Rule 1.0(b)
"Consultation" and "Consults" See Rule 1.0(c)
"Firm" See Rule 1.0(d)
"Materially" See Rule 1.0(g)
"Reasonable" and "Reasonably" See Rule 1.0(i)
"Reasonably Believes" See Rule 1.0(j)

COMMITTEE NOTES

Comparison To Current Tennessee Ethics Rules

There is no counterpart to this Rule in the Disciplinary Rules.

With the following exceptions, the Committee intended to conform Rule 2.4 to Supreme Court Rule 31:

1. The conflict of interest disclosure requirements in paragraph (d)(5) differ from those in Rule 31. Our purpose was to conform the disclosure requirements to Rule 1.7(b) in those cases in which the lawyer's service as a dispute resolution neutral is not pursuant to Rule 31. We would recommend that Rule 31 be conformed to the Rules of Professional Conduct.

2. Paragraph (b)(6) differs from Rule 31 in that it has been conformed to Model Rule terminology and permits parties represented by counsel to waive this consultation.

Comparison To ABA Model Rules

There is no counterpart to this Rule in the ABA Model Rules.

Changes Made to 1997 Committee Preliminary Draft In Response to Comments

In response to recommendations from the Alternative Dispute Resolution Commission, the Committee made the following two changes to the Preliminary Draft:

Paragraph (b): Paragraph (b) was restructured so that its provisions are applicable to all ADR proceedings, whether or not ordered pursuant to Rule 31. Compliance with additional requirements imposed by Rule 31 is now mandated by Subparagraph (b)(9).

Paragraph (e): Paragraph (e)(1) has been amended to narrow the circumstances in which a lawyer who has served as a dispute resolution may subsequently represent one or more of the parties the lawyer served as a neutral. The preliminary draft permitted such subsequent representation if all the parties consented. The final draft permits the lawyer, with consent of all the parties, to draft a settlement agreement that has resulted from the dispute resolution process, but otherwise prohibits representation in connection with the matter.

The Committee also added Comment [8] and re-ordered the Comments.

Comments Received After September 2000 Draft, Committee Response, and Changes Made

1. The Committee has corrected an inaccurate cross-reference in Paragraphs (c)(4) and (c)(5).

2. The Board of Professional Responsibility has recommended that Paragraphs (c)(4) and (5) be amended to empower the parties to waive the confidentiality to which they would other be entitled by Rules 1.6, 1.8(b), and 1.9(c). The change recommended by the Board is unnecessary and would be redundant because all three of the cross-referenced confidentiality rules provide that clients can consent to disclosure or adverse use of otherwise protected information. If, however, the Court believes that this point needs to be made more specifically in Rule 2.4, the Committee would recommend adding a new fifth sentence to Comment [10] that would read: "Also, like a client, a party being served by a lawyer as a dispute resolution neutral may consent to disclosure or use of information that otherwise would be prohibited by Rules 1.6 or 1.8(b)."

3. Mike Hester, on behalf of the Knoxville Bar Association, has voiced concern that paragraph (b)(7) requires a lawyer/neutral to consult with the parties about any interests of the lawyer's clients that may materially affect the lawyer's impartiality. The concern is that this may require a disclosure that would be prohibited by Rule 1.6. The Committee's response is to make no change to the consultation requirement, because parties to a dispute resolution process must be advised if the neutral's representation of a client will materially limit the neutral's impartiality. Rather, the Committee has added a sentence to Comment [9] that clarifies that, if a lawyer cannot make a disclosure required by Paragraph (b)(7) because it would require disclosure of information relating to a client's representation and the client has not consented to the disclosure, the lawyer simply cannot serve as a neutral because the lawyer cannot provide the consultation needed for the parties' consent to be effective. This is no different than the outcome that would result if a lawyer needed consent of a client to a representation affected by a conflict of interest and could not provide the client with information the client needed to make an adequately informed decision about whether to consent to the conflict.

4. Mr. Hester has also voiced concern about the requirement in Paragraph (c)(6) that "if the lawyer believes that an unrepresented party does not understand how a proposed agreement might adversely affect his or her legal rights or obligations, the lawyer shall advise the party to seek the advice of independent counsel." The concern is that this will serve as a "red flag" that the agreement is a bad one and that such conduct is inconsistent with the role of a neutral. The Committee's response is not to delete the obligation to advise the unrepresented party to seek independent counsel. Rather, the Committee proposes that Paragraph (c)(6) be modified to neutralize the obligation so it applies not only when there would be an adverse legal effect but rather at any time the lawyer believes that an unrepresented party does not understand the legal effect of a proposed agreement. The Committee would also note that this obligation can be satisfied by giving this advice to all unrepresented parties at the outset of the dispute resolution process.

5. Mr. Joe Manuel, of Chattanooga, has objected to Paragraph (e)(1) to the extent that it permits a lawyer who has served parties in a dispute resolution process to subsequently draft their settlement agreement. Apart from this general objection, he is especially troubled because the Rule appears to permit a lawyer who had withdrawn as the mediator prior to the completion of the process to thereafter draft the agreement the resulted from the process. Although the Committee does not agree with Mr. Manuel that there should be an absolute bar against the neutral drafting the agreement between the parties, it is recommending that Paragraph (e)(1) be modified to require the lawyer to comply with Rule 1.2(c) (limited representation must be reasonable under the

circumstances) and Rule 2.2 (special rules applicable when lawyers serves as an intermediary between clients in a transaction between them). This is because the lawyer who is drafting the agreement has changed roles. He or she is no longer serving the parties as a dispute resolution neutral, but is now undertaking their representation as an intermediary between clients. This is partially responsive to Mr. Manuel's concern because there will be instances in which circumstances arising in connection with the dispute resolution process would preclude the lawyer from thereafter drafting the agreement as a Rule 2.2 intermediary.

CHAPTER 3
ADVOCATE

PROPOSED RULE 3.1
MERITORIOUS CLAIMS AND CONTENTIONS

A lawyer shall not bring or defend, or continue with the prosecution or defense of a proceeding, or assert or controvert, or continue to assert or controvert, an issue therein unless, after reasonable inquiry, the lawyer has a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

COMMENT

[1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they act reasonably to inform themselves about the facts of their client's case and the law applicable to the case and then act reasonably in determining that they can make non-frivolous arguments in support of their client's position. Such an action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person or if the lawyer is unable either to make a non-frivolous argument on the merits of the action taken or to support the action taken by a non-frivolous argument for an extension, modification or reversal of existing law.

[3] Although this Rule does not preclude a lawyer for a defendant in a criminal matter from defending the proceeding so as to require that every element of the case be established, the defense attorney must not file frivolous motions and must give notice to the prosecution if the lawyer decides to abandon an affirmative defense that the lawyer had previously indicated would be presented in the case.

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

DEFINITIONAL CROSS-REFERENCES

"Reasonable" See Rule 1.0(i)

COMMITTEE NOTES

Comparison To Current Tennessee Ethics Rules

DR 7-102(A)(1) provides that a lawyer may not "[f]ile a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another." Proposed Rule 3.1 is to the same general effect as DR 7-102(A)(1), with three qualifications. First, the test of improper conduct is changed from "merely to harass or maliciously injure another" to the requirement that there be a basis for the litigation measure involved that is "not frivolous." This includes the concept stated in DR 7-102(A)(2) that a lawyer may advance a claim or defense unwarranted by existing law if "it can be supported by good faith argument for an extension, modification, or reversal of existing law." Second, the test in Rule 3.1 is an objective test, whereas DR 7-102(A)(1) applied only if the lawyer "knows or when it is obvious" that the litigation is frivolous. Third, Rule 3.1 has an exception that in a criminal case, or a case in which incarceration of the client may result (for example, certain juvenile proceedings), the lawyer may put the prosecution to its proof even if there is no non-frivolous basis for defense.

Comparison To ABA Model Rules

The Proposed Rule is the same as ABA Model Rule 3.1 except that the Proposed Rule makes it clear that a lawyer may not continue to assert or controvert an issue unless the lawyer continues to have a non-frivolous basis for the claim. The Proposed Rule also makes clear that the lawyer must make reasonable inquiry into the basis for the claims the lawyer will make on behalf of a client.

Changes Made to 1997 Committee Preliminary Draft In Response to Comments

At the request of the Tennessee District Attorneys General Conference, Comment [3] was added to clarify the application of Rule 3.1 to in connection with representation of a defendant in a criminal matter.

At the request of the Alternative Dispute Resolution Commission, Comment [4] was added to remind lawyers to give careful consideration to alternative dispute resolution prior to filing a complaint in a civil matter.

Comments Received After September 2000 Draft, Committee Response, and Changes Made

No comments or changes.

PROPOSED RULE 3.2
EXPEDITING LITIGATION

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

COMMENT

[1] Dilatory practices bring the administration of justice into disrepute. Although there will be occasions when a lawyer may properly seek a postponement for personal reasons, such as illness or a conflict with an important family engagement, it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates. Nor will a failure to expedite be reasonable if done for the primary purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a reasonable lawyer would regard the course of action as having

some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

[2] Even if a lawyer is justified in seeking to delay a proceeding, the lawyer may not do so by means otherwise prohibited by these rules. See, e.g., Rules 3.1 and 3.4.

DEFINITIONAL CROSS-REFERENCES

"Reasonable" See Rule 1.0(i)

COMMITTEE NOTES

Comparison To Current Tennessee Ethics Rules

DR 7-101(A)(4) provides in pertinent part that a lawyer does not violate the lawyer's duty to represent a client zealously "by being punctual in fulfilling all professional commitments." DR 7-102(A)(1) provides that a lawyer "shall not . . . [F]ile a suit, assert a position, conduct a defense [or] delay a trial . . . when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another."

Comparison To ABA Model Rules

Proposed Rule 3.2 is identical to the ABA Model Rule 3.2.

Changes Made to 1997 Committee Preliminary Draft In Response to Comments

Comment [1] was modified to clarify that there will be occasions when a lawyer may properly seek a postponement for personal reasons, such as illness or a conflict with an important family engagement.

Comments Received After September 2000 Draft, Committee Response, and Changes Made

The United States Attorneys, the Tennessee District Attorneys General Conference ("TDAGC"), Professor Neil Cohen, the East Tennessee Victims Rights Task Force, and the Tennessee Victim's Coalition have asked the Court to modify Rule 3.2 so that the lawyer's duty to make reasonable efforts to expedite litigation will not be subject to the caveat that those efforts must be consistent with the client's interests. So modified, the Rule would simply require the lawyer to "make reasonable efforts to expedite litigation." The TDAGC is concerned that, despite the Comment that indicates to the contrary, the Rule could be interpreted, particularly by a layperson, to allow lawyers to delay litigation whenever doing so furthers a client's interests, even if the client's purpose is merely to inconvenience other parties, victims, or witnesses. On the other hand, the Memphis Bar Association has voiced concern that a duty to expedite litigation could be construed to require a lawyer in every instance to take extraordinary steps to force the litigation process to move faster, and that this would place an impractical burden on lawyers. The Memphis Bar Association recommends conforming Rule 3.2, which is a duty owed to the Court, to the duty owed to the client "to act with reasonable diligence and promptness in representing a client [in an adjudicative proceeding]."

The Committee believes that its proposal, which is identical to the ABA Model Rule, strikes a sensible balance between these competing recommendations and concerns. The Committee

believes that the administration of justice will be best served if lawyers are required to expedite litigation when it is reasonable to accelerate its normal pace. Thus, contrary to the recommendation of the Memphis Bar Association, the Committee would retain the duty to act reasonably to expedite litigation. Implicit in this duty is an obligation not to unreasonably delay litigation and to act diligently and promptly, but when it reasonable to do so, the administration of justice will be best served if the lawyers are required to expedite the process. On the other hand, the Committee strongly believes that a lawyer should not be required to expedite litigation when doing so would impair a legitimate interest of the client, such as a need for more time to effectively prepare a case. Thus, the Committee is opposed to deleting the reference to the client's interests. It is important to note that Comment [1] makes clear that the reference to "the interests of the client" does not legitimate dilatory practices whenever they would benefit a client. The failure to expedite has to be "reasonable," and the client interest served by the failure to expedite must be legitimate. Thus, as clearly indicated in the Comment, a failure to expedite will violate the Rule if done for the primary purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. The last sentence of the Comment also indicates that realizing financial or other benefit from an improper delay is not a legitimate client interest. Ultimately, the Committee thinks that Rule 3.2 as proposed both protects the administration of justice against undue delay and protects litigants against the unfairness that can result from an undue rush to justice.

PROPOSED RULE 3.3
CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal; or

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) in an ex parte proceeding, fail to inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

(b) A lawyer shall not offer evidence the lawyer knows to be false, except that a lawyer who represents a defendant in a criminal proceeding, and who has been denied permission to withdraw from the defendant's representation after compliance with paragraph (f), may allow the client to testify by way of an undirected narrative or take such other action as is necessary to honor the defendant's constitutional rights in connection with the proceeding.

(c) A lawyer shall not affirm the validity of, or otherwise use, any evidence the lawyer knows to be false.

(d) A lawyer may refuse to offer or use evidence, other than the testimony of a client who is a defendant in a criminal matter, that the lawyer reasonably believes is false, misleading, fraudulent or illegally obtained.

(e) If a lawyer knows that the lawyer's client intends to perpetrate a fraud upon the tribunal or otherwise commit an offense against the administration of justice in connection with the proceeding, including improper conduct toward a juror or a member of the jury pool, or comes to know, prior to the conclusion of the proceeding, that the client has, during the course of the lawyer's representation, perpetrated such a crime or fraud, the lawyer shall advise the client to refrain from, or to disclose or otherwise rectify, the crime or fraud and shall consult with the client about the consequences of the client's failure to do so.

(f) If a lawyer, after consultation with the client as required by paragraph (e), knows that the client still intends to perpetrate the crime or fraud, or refuses or is unable to disclose or otherwise rectify the crime or fraud, the lawyer shall seek permission of the tribunal to withdraw from the representation of the client and shall inform the tribunal, without further disclosure of information protected by Rule 1.6, that the lawyer's request to withdraw is required by the Rules of Professional Conduct.

(g) A lawyer who, prior to conclusion of the proceeding, comes to know that the lawyer has

offered false tangible or documentary evidence shall withdraw or disaffirm such evidence without further disclosure of information protected by Rule 1.6.

(h) A lawyer who, prior to the conclusion of the proceeding, comes to know that a person other than the client has perpetrated a fraud upon the tribunal or otherwise committed an offense against the administration of justice in connection with the proceeding, and in which the lawyer's client was not

implicated, shall promptly report the improper conduct to the tribunal, even if so doing requires the disclosure of information otherwise protected by Rule 1.6. :

(i) A lawyer who, prior to conclusion of the proceeding, comes to know of improper conduct by or toward a juror or a member of the jury pool shall report the improper conduct to the tribunal, even if so doing requires the disclosure of information otherwise protected by Rule 1.6.

(j) If, in response to a lawyer's request to withdraw from the representation of the client or the lawyer's report of a perjury, fraud, or offense against the administration of justice by a person other than the lawyer's client, a tribunal requests additional information which the lawyer can only provide by disclosing information protected by Rule 1.6 or 1.9(c), the lawyer shall comply with the request, but only if finally ordered to do so by the tribunal after the lawyer has asserted on behalf of the client all non-frivolous claims that the information sought by the tribunal is protected by the attorney-client privilege.

COMMENT

[1] This Rule governs the conduct of a lawyer who is representing a client in connection with the proceedings of a tribunal, such as a court or an administrative agency acting in an adjudicative capacity. It applies not only when the lawyer appears before the tribunal, but also when the lawyer participates in activities conducted pursuant to the tribunal's authority, such as pre-trial discovery in a civil matter.

[2] The advocate's task is to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client is qualified by the advocate's duty to refrain from assisting a client to perpetrate a fraud upon the tribunal. However, an advocate does not vouch for the evidence submitted in a cause; the tribunal is responsible for assessing its probative value.

Representations by a Lawyer

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit, or assist the client in committing a fraud, applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).

Misleading Legal Argument

[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction which has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

Ex Parte Proceedings

[5] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in an ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. As provided in paragraph (a)(3), the lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

Refusing to Offer or Use False Evidence

[6] When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes. The lawyer must similarly refuse to offer a client's testimony that the lawyer knows to be false, except that paragraph (b) permits the lawyer to allow a criminal defendant to testify by way of narrative if the lawyer's request to withdraw, as required by paragraph (f), is denied. Paragraph (c) precludes a lawyer from affirming the validity of, or otherwise using, any evidence the lawyer knows to be false, including the narrative testimony of a criminal defendant.

[7] As provided in paragraph (d), a lawyer has authority to refuse to offer or use testimony or other proof that the lawyer believes is untrustworthy. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this rule does not permit a lawyer to refuse to offer or use the testimony of such a client because the lawyer reasonably believes the testimony to be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify.

Wrongdoing in Adjudicative Proceedings by Clients and Others

[8] A lawyer who is representing a client in an adjudicative proceeding and comes to know prior to the completion of the proceeding that the client has perpetrated a fraud or committed perjury or another offense against the administration of justice, or intends to do so before the end of the proceeding, is in a difficult position in which the lawyer must strike a professionally responsible balance between the lawyer's duties of loyalty and confidentiality owed to the client and the equally important duty of the lawyer to avoid assisting the client with the consummation of the fraud or perjury. In all such cases, paragraph (e) requires the lawyer to advise the client to desist from or to rectify the crime or fraud and inform the client of the consequences of a failure to do so. The hard questions come in those rare cases in which the client refuses to reveal the misconduct and prohibits the lawyer from doing so.

[9] Paragraph (f) sets forth the lawyer's responsibilities in situations in which the lawyer's client is implicated in the misconduct. In these situations, the Rules do not permit the lawyer to report the client's offense. Confidentiality under Rule 1.6 prevails over the lawyer's duty of candor to the tribunal. Only if the client is implicated in misconduct by or toward a juror or a member of the jury pool does the lawyer's duty of candor to the tribunal prevail over confidentiality. See paragraph (i).

[10] Although the lawyer may not reveal the client's misconduct, the lawyer must not voluntarily continue to represent the client, for to do so without disclosure of the misconduct that would assist the client to consummate the offense. The Rule, therefore, requires the lawyer to seek

permission of the tribunal to withdraw from the representation of the client. To increase the likelihood that the tribunal will permit the lawyer to withdraw, the lawyer is also required to inform the court that the request for permission to withdraw is required by the Rules of Professional Conduct. This statement also serves to advise the tribunal that something is amiss without providing the tribunal with any of the information related to the representation that is protected by Rule 1.6. These Rules, therefore, are intended to preserve confidentiality while requiring the lawyer to act so as not to assist the client with the consummation of the fraud. This reflects a judgment that the legal system will be best served by rules that encourage clients to confide in their lawyers who in turn will advise them to rectify the fraud. Many, if not most, clients will abide by their lawyer's advice, particularly if the lawyer spells out the consequences of failing to do so. At the same time, our legal system and profession cannot permit lawyers to assist clients who refuse to follow their advice and insist on consummating an ongoing fraud.

[11] Once the lawyer has made a request for permission to withdraw, the tribunal may grant or deny the request to withdraw without further inquiry or may seek more information from the lawyers about the reasons for the lawyer's request. If the judge seeks more information, the lawyer must resist disclosure of information protected by Rule 1.6, but only to the extent that the lawyer may do so in compliance with Rule 3.1. If the lawyer cannot make a non-frivolous argument that the information sought by the tribunal is protected by the attorney-client privilege, the lawyer must respond truthfully to the inquiry. If, however, there is a non-frivolous argument that the information sought is privileged, paragraph (h) requires the lawyer to invoke the privilege. Whether to seek an interlocutory appeal from an adverse decision with respect to the claim of privilege is governed by Rule 1.2 and 3.1.

[12] If a lawyer is required to seek permission from a tribunal to withdraw from the representation of a client in either a civil or criminal proceeding because the client has refused to rectify a perjury or fraud, it is ultimately the responsibility of the tribunal to determine whether the lawyer will be permitted to withdraw from the representation. In a criminal proceeding, however, a decision to permit the lawyer's withdrawal may implicate the constitutional rights of the accused and may even have the effect of precluding further prosecution of the client. Notwithstanding this possibility, the lawyer must seek permission to withdraw, leaving it to the prosecutor to object to the request and to the tribunal to ultimately determine whether withdrawal is permitted. If permission to withdraw is not granted, the lawyer must continue to represent the client but cannot assist the client in consummating the fraud or perjury by directly or indirectly using the perjured testimony or false evidence during the current or any subsequent stage of the proceeding. A defense attorney who complies with these rules is acting professionally without regard to the effect of the lawyer's compliance on the outcome of the proceeding.

False Documentary or Tangible Evidence

[13] If a lawyer comes to know that tangible items or documents that the lawyer has previously offered into evidence have been altered or falsified, paragraph (g) requires that the lawyer withdraw or disaffirm the evidence but does not otherwise permit disclosure of information protected by Rule 1.6. Because disaffirmance, like withdrawal, can be accomplished without disclosure of information protected by Rule 1.6, it is required when necessary for the lawyer to avoid assisting a fraud on the tribunal.

Crimes or Frauds by Persons Other than the Client

[14] Paragraph (h) applies if the lawyer comes to know that a person other than the client has engaged in misconduct in connection with the proceeding. Upon learning prior to the

completion of the proceeding that such misconduct has occurred, the lawyer is required by paragraph (e) to promptly reveal the offense to the tribunal. The client's interest in protecting the wrongdoer is not sufficiently important as to override the lawyer's duty of candor to the court and to take affirmative steps to prevent the administration of justice from being tainted by perjury, fraud or other improper conduct.

Misconduct By of Toward Jurors or Members of Jury Pool

[15] Because jury tampering undermines the institutional mechanism our adversary system of justice uses to determine the truth or falsity of testimony or evidence, paragraph (i) requires a lawyer who learns prior to the completion of the proceeding that there has been misconduct by or directed toward a juror or prospective juror must reveal the misconduct and the identity of the perpetrator to the tribunal, even if so doing requires disclosure of information protected by Rule 1.6. Paragraph (i) does not require that the lawyer seek permission to withdraw from the further representation of the client in the proceeding, but in cases in which the client is implicated in the jury tampering, the lawyer's continued representation of the client may violate Rule 1.7. Rule 1.16(a)(1) would then require the lawyer to seek permission to withdraw from the case.

Crime or Fraud Discovered After Conclusion of Proceeding

[16] In cases in which the lawyer learns of the client's misconduct after the termination of the proceeding in which the misconduct occurred, the lawyer is prohibited from reporting the client's misconduct to the tribunal. Even though the lawyer may have innocently assisted the client to perpetrate the offense, the lawyer should treat this information as the lawyer would treat information with respect to any past crime a client might have committed. The client's offense will be deemed completed as of the conclusion of the proceeding. An offense which occurs at an earlier stage in the proceeding will be deemed an ongoing offense until the final stage of the proceeding is completed. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for an appeal has passed.

Constitutional Requirements

[17] These Rules apply to defense counsel in criminal cases, as well as in other instances. However, the definition of the lawyer's ethical duty in such a situation may be qualified by constitutional provisions for due process and the right to counsel in criminal cases. The obligation of the advocate under these Rules is subordinate to any such constitutional requirement.

DEFINITIONAL CROSS-REFERENCES

"Consult" and "Consultation" See Rule 1.0(c)
"Fraud" and "Fraudulent" See Rule 1.0(e)
"Knowingly," "Known" and "Knows" See Rule 1.0(f)
"Material" See Rule 1.0(g)
"Reasonably Believes" See Rule 1.0(j)
"Tribunal" See Rule 1.0(m)

COMMITTEE NOTES

Comparison To Current Tennessee Ethics Rules

Paragraph (a)(1): Paragraph (a)(1) is similar to DR 7-102(a)(5).

Paragraph (a)(2): Paragraph (a)(2) is substantially the same as DR 7-106(B)(1).

Paragraph (a)(3):There is no counterpart to this rule in the Disciplinary Rules.

Paragraph (b): DR 7-102(A)(4) provides that a lawyer shall not "[k]nowingly use perjured testimony or false evidence. There is no counterpart in the Disciplinary Rules to the second half of the sentence.

Paragraph (c): DR 7-102(A)(4) provides that a lawyer shall not "[k]nowingly use perjured testimony or false evidence.

Paragraph (d): There is no counterpart to Paragraph (d) in the Disciplinary Rules.

Paragraphs (e) and (f): The comparable Disciplinary Rule is DR 7-102(B)(1) which provides:

> A lawyer who receives information clearly establishing that . . . his client has, in the course of the representation, perpetrated a fraud upon a person or tribunal, shall promptly call upon his client to rectify the same, and if the client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication

Paragraph (g): There is no counterpart to Paragraph (g) in the Disciplinary Rules.

Paragraph (h): DR 7-102(B)(2) provides that "[a] lawyer who receives information clearly establishing that . . . a person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal."

Paragraph (i): DR 7-108(G) provides that "a lawyer shall reveal promptly to the court improper conduct by a venireperson or a juror, or by another toward a venireperson's or a juror's family, of which the lawyer has knowledge."

Paragraph (j): There is no counterpart to paragraph (g) in the Disciplinary Rules.

Note that there is no counterpart in the Proposed Rule to DR 7-106(B)(2), which provides that, unless the information is privileged or irrelevant, a lawyer shall disclose to the tribunal the identities of the clients he or she represents and of the persons who employed the lawyer.

Comparison To ABA Model Rules

Paragraph (a)(1): ABA Model Rule 3.3 (a)(1) only prohibits false statements of "material" fact or law.

Paragraph (a)(2): Paragraph (a)(2) is identical to ABA Model Rule 3.3(a)(3).

Paragraph (a)(3): Paragraph (a)(3) is identical to ABA Model Rule 3.3(d).

Paragraph (b): The prohibition against offering evidence known to be false is substantially the same as the first sentence of ABA Model Rule 3.3(a)(4). There is no stated exception in the Model Rule for the for the narrative testimony of a client who is a defendant in a criminal matter.

Paragraph (c): There is no counterpart to paragraph (c) in the ABA Model Rules.

Paragraph (d): Paragraph tracks ABA Model Rule 3.3(c), except that the Proposed Rule broadens the lawyer's discretion to refuse to offer evidence to include not only false evidence, but also misleading, fraudulent or illegally obtained evidence. On the other hand, the Rule does not permit the lawyer to refuse to offer the testimony of a client who is a defendant in a criminal matter when the lawyer only has reason to believe, as distinct from knowledge, that the testimony will be false, misleading, fraudulent or illegally obtained. Paragraph (d) also grants the lawyer discretion to refuse to use evidence the lawyer reasonably believes to be false.

Paragraphs (e) and (f): The ABA Model Rule counterparts to Paragraphs (e) and (f) are found in Rules 3.3(a)(2) and (4) and 3.3(b). These rules provide that a lawyer must disclose to the court information the non-disclosure of which would assist the client to perpetrate a fraud on the court and that the lawyer must do so even if the information is protected by Rule 1.6. Rule 3.3(a)(4) deals particularly with the correction of evidence the lawyer has offered and which the lawyer now knows to be false. The Proposed Rule requires a "noisy" attempt to withdraw from the representation rather than disclosure of confidential information to the tribunal.

Paragraph (g): Model Rule 3.3(a)(4) and (b) more broadly requires the lawyer to take reasonable remedial measures, including, if necessary, disclosure to the tribunal, of information relating to the representation.

Paragraph (h): There is no counterpart to paragraph (h) in the ABA Model Rules.

Paragraph (i): There is no counterpart to paragraph (i) in the ABA Model Rules.

Paragraph (j): There is no counterpart to paragraph (j) in the ABA Model Rules.

Changes Made to 1997 Committee Preliminary Draft In Response to Comments

The following changes have been made to the Preliminary Draft:

Paragraphs (a), (b) and (j): Without change in substance, Paragraph (a)(3) has been added to paragraph (b) and paragraph (J) has been relocated to paragraph (a)(3).

Paragraph (a)(1): The prohibition against a lawyer making false statements of law or fact is no longer limited to statements of "material" fact or law. The Committee can see no reason for a lawyer to ever knowingly lie to a court.

Paragraph (b): The original proposal, which that allowed a lawyer to refuse to offer any evidence that the lawyer reasonably believes to be false or misleading, has been modified to eliminate this discretion when the evidence in question is the testimony of a client who is a defendant in a criminal matter. The Committee thinks that the right of a criminal defendant to testify is so fundamental that a lawyer should not be allowed to overrule a client's decision to testify unless the lawyer knows the testimony is false or misleading.

Paragraph (c): The Committee has deleted paragraph (C) which read as follows, and renumbered subsequent paragraphs:

A lawyer shall not knowingly fail to disclose a material fact to a tribunal if disclosure is necessary to avoid assisting a criminal or fraudulent act by the client, except that if such disclosure is not permitted by Rule 1.6 or 1.8(B), the lawyer shall

(1) request that the client authorize the lawyer to make the required disclosure; and

(2) consult with the client about the consequences of the client's refusal to authorize the disclosure; and

(3) if the client refuses or is unable to authorize the required disclosure, seek permission of the tribunal to withdraw from the representation of the client and inform the tribunal, without further disclosure of information protected by Rule 1.6, that the lawyer's request to withdraw is required by the Rules of Professional Conduct.

Proposed paragraphs (c) and (d) (as relettered in the Final Draft) effectively prevent a lawyer from assisting a client to commit a crime or fraud related to an adjudicative proceeding, making it unnecessary to have another rule requiring withdrawal if the lawyer's silence will assist the client commit a crime or fraud.

Delete paragraph (E)(3): The Committee has deleted paragraph (E)(3) from the Preliminary Draft. It required a lawyer who is no longer representing a client but learns that the client had perpetrated a fraud against the tribunal while the lawyer was representing the client to inform the court, without further disclosure of information protected by Rule 1.6, that the lawyer had learned information that would have required the lawyer to withdraw if the lawyer were still representing the client. The Commission concluded that the duty to make "noise' is only appropriate when necessary to facilitate the lawyer's withdrawal from the representation of a client under circumstances in which the lawyer's continued representation will assist the client consummate the crime or fraud. That, of course, is not the case when the lawyer is no longer representing the client.

Paragraph (g): The Committee deleted the requirement that a lawyer make reasonable efforts to secure interlocutory appellate relief from an adverse ruling of the tribunal with respect to a claim of privilege and added language to Comment [14] indicating that decision making governing interlocutory appeals is governed by Rules 1.2 and 3.1.

Comment [7]: The Committee has added language to indicate that "proceeding has concluded within the meaning of Rule 3.3 when a final judgment in the proceeding has been affirmed on appeal or the time for an appeal has passed."

Comments Received After September 2000 Draft, Committee Response, and Changes Made

1. In its Comment to Rule 1.6, the Board of Professional Responsibility has, without further explanation, called Rule 3.3 "a very complicated, untenable analysis that is impossible to follow." With due respect, the Committee would describe it as a comprehensive, detailed, step-by-step guide for lawyers who need to know how to comply with current Tennessee law when faced with one of the most difficult, and potentially dangerous, questions of professional ethics. The criminal defense bar, in particular, has welcomed the step-by-step directions provided by the Rule. With that said, however, the Committee on its own motion is recommending several changes to Rule 3.3 that make the Rule more user-friendly. Only two of these changes have any substantive effect:

to know that he or she has offered false evidence. Paragraph (e) and Comment [13] require that a lawyer who disaffirms the evidence, but without further disclosure of information protected by Rule 1.6. Because disaffirmance, like withdrawal, can be accomplished without disclosure of information protected by Rule 1.6, it is required when necessary for the lawyer to avoid assisting a fraud on the tribunal.

client consent before the lawyer has taken the required remedial steps. In Paragraph (f), the Committee has deleted the requirement that the client consent before the lawyer reveals such requirement in DR 7-102(b)(2) and, given that Paragraph (e) only applies if the client is not implicated in the misconduct and requires that the lawyer report the misconduct, the Committee sees no need for prior consultation with the client.

2. Substantively, the Committee's proposal has been endorsed by the Tennessee Association of Criminal Defense Lawyers, but is opposed by representatives of Tennessee's United States Attorneys, the Tennessee District Attorneys General Conference, the Tennessee Association of Chiefs of Police, Professor Neil P. Cohen, the East Tennessee Victim's Rights Task Force, and several other commentators interested in victim's rights. Because of the similarity of the concerns raised by these commentators, the Committee will direct its response to the changes proposed by the Tennessee District Attorneys General Conference (TDAGC).

adding a sentence to Paragraph (a)(3) and to Comment [3] to make it clear that Rule 3.6 applies to grand jury proceedings. The TDAGC recommends proceeding. The Committee agree that the duty of candor in paragraph (a)(3) should not extend to grand jury -- not because it is not an ex parte proceeding, but because it is not a tribunal (which is defined in Rule 1.0(m) as "a court or other adjudicative body." The Committee has dropped from the Comment to Rule 3.8 a sentence that indicated that paragraph (a)(3) was applicable to grand juries. With that deletion, the Committee thinks it is sufficiently clear that grand jury proceedings are investigatory, rather than adjudicatory, and that it is not necessary to lengthen the Rule to make this point.

paragraph (b) to prohibit a lawyer from offering or using false evidence that the lawyer reasonably to Paragraph (b) prohibiting offering or using false evidence that the lawyer knows to be false. believes to be false, misleading, fraudulent, or illegally obtained. Currently, the Committee's draft, like the ABA Model Rule, prohibits a lawyer from offering evidence the lawyer knows to be false. A lawyer who does not know the evidence is false may offer it or use it, leaving the determination of its truth or falsity to the finder of fact. To prohibit a lawyer from offering or using evidence when the lawyer does not know of its falsity is to place the lawyer in the role of fact-finder. This would be the effect of the change proposed by TDAGC, because it would preclude offering or using false evidence when the lawyer did not "know" of its falsity, but only had "reason to believe" that it was false. The Committee's proposal, however, explicitly provides that a lawyer has the discretion, notwithstanding client instructions to the contrary, however, to refuse to offer or use evidence the lawyer reasonably believes, but does not know, to be false, or reasonably believes to be misleading or illegally obtained. This is explained in Comments [5] and [6]. To better flag the distinction between the prohibition against offering or using evidence known to be false and the grant of discretion to refuse to offer or use evidence the lawyer reasonably believes to be false or misleading, the Committee recommends that Paragraph (b) be broken into three separate paragraphs - Paragraph (b) prohibiting offering evidence the lawyer knows to be false, Paragraph (c) prohibiting use of evidence known to be false, and Paragraph (d) permitting, but not requiring the lawyer to refuse to offer or use evidence the lawyer reasonably believes, but does not know, to be false.

3. Paragraphs (e) and (f) - client's intent to perpetrate a fraud on the court or to commit an offense against the administration of justice: Except for allowing a defendant in a criminal proceeding to offer undirected false testimony, the TDAGC recommends that this paragraph be revised to prohibit the lawyer from seeking to withdraw from the representation, as is required by the Committee's proposal and current Tennessee law, and would require the lawyer to advise the

Court of the client's misconduct if there was no other way to prevent the fraud. The Committee's proposal only requires the lawyer to advise the Court that the motion to withdraw is required by the Rules of Professional Conduct. Incidental to this proposal, the TDAGC would delete paragraph (j) that provides guidance to the lawyer about how to respond to a judge's request for further information after the lawyer has requested permission to withdraw.

There is a stark difference between the Committee's proposal, which is supported by TACDL, and the TDAGC proposal. The TDAGC imposes a duty to report client's intended crime or fraud to the court if necessary to prevent its commission. The Committee's proposal requires that the lawyer seek permission to withdraw so that the lawyer will not assist the client commit the crime, but does not further elevate the lawyer's duty to the tribunal over the lawyer's duty of confidentiality owed to the client. While acknowledging that the TDAGC proposal is consistent with the ABA Model Rule 3.3 and the Ethics 2000 Commission's proposal, the Committee's proposal represents our attempt to codify current Tennessee law as understood in light of this Court's decision not to amend DR 7-102(B)(1) in confirmation of the holding in Formal Ethics Opinion 93-F-133, which no longer reflects Tennessee law. The Committee's believes that the Court struck the right chord when it held that a lawyer should not be allowed to assist client misconduct by continuing to represent the client, but otherwise should be required to preserve the confidentiality of information relating to the representation. Incidental to the obligation to withdraw is the limited obligation to advise the court the lawyer's request for permission to withdraw is required by the Rules. The TDAGC, on the other hand, rejects withdrawal as an effective means to avoid assisting the client's fraud or crime because the client will have learned to conceal the misconduct from the new lawyer who undertakes the client's representation in the proceeding.

4. Paragraphs (e) and (f) - client's commission of crime or fraud during the course of the lawyer's representation: The thrust of the TDAGC proposal is the same as its proposal with respect to a client's intention to commit a crime or fraud. Except for false testimony by a client in a criminal matter, a lawyer who comes to know that a client has perpetrated a fraud upon the tribunal or committed an offense against the administration of justice must report the misconduct to the tribunal. The Committee's proposal requires an attempt to withdraw, but precludes reporting the offense to the tribunal. This is the situation specifically addressed by DR 7-102(B)(1), and the Committee's proposal is consistent with the Court's resolution of this issue by rulemaking in 1996. The TDAGC proposal is consistent with ABA Model Rule 3.3 and the Ethics 2000 Commission proposal.

5. Paragraphs (e) through (i) duties only attach if lawyers comes to know of misconduct "prior to the conclusion of the proceeding:" The TDAGC wants to require that a lawyer report frauds on the court and other offenses against the administration of justice even if the lawyer first learns about the fraud or crime after the proceeding has been concluded. Because the offense is completed once the proceeding is concluded , the Committee's proposal does not require withdrawal under Paragraph (d) because continued representation can no longer assist the client commit the offense and does not require disclosure under Paragraphs (e) and (f) because the crime ordinarily can no longer be prevented or rectified once the proceeding has concluded. Surely, disclosure would not be permitted if, after the conclusion of the proceeding, the perpetrator went to another lawyer and confessed. The Committee does not think the outcome should be different because the perpetrator confesses to the lawyer who was representing him in the proceeding to which the offense related.

6. The key points of disagreement with respect to Rule 3.3 relate to whether lawyers should have an affirmative duty to breach client confidentiality whenever necessary to protect the administration of justice against fraud or criminal misconduct or whether it is sufficient that the

lawyer take such action, and only such action, as is necessary to avoid assisting the crime or fraud. While conceding that most jurisdictions have adopted the ABA Model Rule that requires disclosure if the lawyer learns of the misconduct prior to the conclusion of the proceeding, the Committee believes that confidentiality should prevail. If, however, the Court decides to impose a duty on lawyers to reveal frauds on the court or other crimes against the administration of justice, the Committee would recommend that the Court consider adopting ABA Model Rule 3.3, as revised by the ABA Ethics 2000 Commission, rather than the TDAGC's amendments to the Committee's proposal as modified TDAGC proposal. The Rule text would read as follows:

RULE 3.3: CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

There are three primary substantive differences between the TDAGC and this Ethics 2000 proposal. First, the Ethics 2000 proposal would not permit a lawyer for a defendant in a criminal case to allow the client to testify falsely by way of an undirected narrative, unless the courts have previously held that the client has a constitutional right to so testify. Second, the disclosure obligations in the Ethics 2000 proposal terminate at the conclusion of the proceeding. Finally, the Ethics 2000 proposal does not prohibit a lawyer from seeking permission to withdraw from the representation, but leaves that issue to be resolved by reference to Rule 1.16 that addresses mandatory and permissive withdrawal. Also, if the Court chooses to recognize a duty of candor to the tribunal the overrides confidentiality, adopting the Model Rule would bring Tennessee even more closely into line with the ethics rules in other jurisdictions. Conforming changes would need to made to the Comments.

PROPOSED RULE 3.4
FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act; or

(b) falsify evidence, counsel or assist a witness to offer false or misleading testimony; or

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists; or

(d) in pretrial procedure, make a frivolous discovery request or fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party; or

(e) in trial,

(1) allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence;

(2) assert personal knowledge of facts in issue except when testifying as a witness; or

(3) state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

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

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

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

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

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

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

COMMENT

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for the purpose of impairing its availability in a pending proceeding or a proceeding the commencement of which can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information.

[3] Although paragraph (f) broadly prohibits lawyers from taking extrajudicial action to impede informal fact-gathering, it does permit the lawyer to request that the lawyer's client, and relatives or employees or agents of the client, refrain from voluntarily giving information to another party. This is because such relatives and employees will normally identify their interests with those of the client. See also Rule 4.2.

[4] With regard to paragraph (h), it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.

DEFINITIONAL CROSS-REFERENCES

"Knowingly" See Rule 1.0(f)
"Material" See Rule 1.0(g)
"Reasonable" and "Reasonably" See Rule 1.0(i)
"Reasonably Believes" See Rule 1.0(j)
"Tribunal" See Rule 1.0(m)

COMMITTEE NOTES

Comparison To Current Tennessee Ethics Rules

Paragraph (a): DR 7-109(A) provides that a lawyer "shall not suppress any evidence that the lawyer or the lawyer's client has a legal obligation to reveal." DR 7-109(B) provides that a lawyer "shall not advise or cause a person to hide or to leave the jurisdiction of a tribunal for the purpose of becoming unavailable as a witness. . . ."

Paragraph (b): DR 7-102(A)(6) provides that a lawyer shall not participate "in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false."

Paragraph (c): Paragraph (c) is substantially similar to DR 7-106(A), which provides that a lawyer "shall not disregard . . . a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but may take appropriate steps in good faith to test the validity of such rule or ruling."

Paragraph (d): There is no counterpart to Paragraph (d) in the Disciplinary Rules.

Paragraph (e): Paragraph (e) substantially tracks the substance of DR 7-106(C)(1), (2), (3) and (4).

Paragraph (f): DR 7-109(B) provides that "a lawyer shall not advise or cause a person to hide or to leave the jurisdiction of a tribunal for the purpose of becoming unavailable as a witness therein." There is no counterpart in the Disciplinary Rules to Rule 3.4(f)'s prohibition against requesting persons (other than relative or employees of a client) not to cooperate with opposing counsel.

Paragraph (g): Paragraph (g) is substantively identical to DR 7-109(C).

Omitted from the Proposed Rule is any counterpart to DR 7-106(C)(5), which requires lawyers to comply with known local customs of courtesy or practice of the bar or a particular tribunal or to give opposing counsel timely notice of his or her intent not to comply.

Comparison To ABA Model Rules

Paragraph (a): Paragraph (a) is identical to ABA Model Rule 3.4(a).

Paragraph (b): Paragraph (b) is identical to ABA Model Rule 3.4(b), except that the prohibition against offering an inducement to a witness prohibited by law has been moved to Paragraph (g).

Paragraph (c): Paragraph (c) is identical to ABA Model Rule 3.4(c).

Paragraph (d): Paragraph (d) is identical to ABA Model Rule 3.4(d).

Paragraph (e): Paragraph (e) is identical to ABA Model Rule 3.4(e).

Paragraph (f): Paragraph (f) is identical to ABA Model Rule 3.4(f).

Paragraph (g): There is no counterpart to Paragraph (g) in the ABA Model Rule.

Paragraph (h): Paragraph (h) contains that portion of ABA Model Rule 3.4(b) that prohibits "offering or inducement to a witness prohibited by law," but also contains the substance of Tennessee DR 7-109(C).

Changes Made to 1997 Committee Preliminary Draft In Response to Comments

Paragraph (f) was modified so it now includes both the substance of DR 7-109(B) and Model Rule 3.4(f) which prohibits a lawyer requesting a person other than the client, or a relative or an agent of the client, to refrain from voluntarily giving information to another party.

Paragraph (g) has been added to incorporate the substance of DR 7-109(C) into Rule 3.4. Paragraph (B) in the Preliminary Draft more generally prohibited a lawyer from "offer[ing] an inducement to a witness prohibited by law." The Committee believes that the additional guidance provided by adding the substance of DR7-109(C) to the Rule is useful.

Comments Received After September 2000 Draft, Committee Response, and Changes Made

The Committee has separated Paragraph (f) into two paragraphs -- a Paragraph (f) that is identical to ABA Model Rule 3.4(f) and a new Paragraph (g) that incorporates with slight revision the substance of DR 7-109(B). The exceptions in Paragraph (f) for relatives of a client and employees of a corporate client are not appropriate with respect to requesting or assisting a person to take action that will render the person unavailable to appear as a witness by way of deposition or at trial. Paragraph (g) has been re-lettered as Paragraph (h).

PROPOSED RULE 3.5
IMPARTIALITY AND DECORUM OF THE TRIBUNAL

A lawyer shall not:

(a) seek to influence a judge, juror, a member of the jury pool, or other official by means prohibited by law;

(b) communicate *ex parte* with a judge, juror, or a member of the jury pool, prior to or during a proceeding, except as permitted by law;

(c) communicate with a juror after completion of the juror's term of service if the communication is prohibited by law or is reasonably likely to harass or embarrass the juror or influence the juror's actions in future jury service;

(d) conduct a vexatious or harassing investigation of a juror or a member of the jury pool; or

(e) engage in conduct intended to disrupt a proceeding before or conducted pursuant to the authority of a tribunal.

COMMENT

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law or state or local rules of procedure. Others are specified in the Tennessee Code of Judicial Conduct, with which an advocate should be familiar. For example, a lawyer shall not give or lend anything of value to a judge, judicial officer or employee of a tribunal, except as permitted by Section (C)(4) of Canon 5 of the Code of Judicial Conduct. A lawyer, however, may make a contribution to the campaign fund of a candidate for judicial office in conformity with Section (B)(2) of Canon 7 of the Code of Judicial Conduct.

[2] Paragraph (b) does not prohibit communicating with a judge on the merits of the cause in writing if the lawyer promptly delivers a copy of the writing to opposing counsel and to parties who are not represented by counsel. Oral communication is permitted upon adequate notice to opposing counsel and parties who are not represented by counsel.

[3] A communication with or an investigation of the spouse, child, parent or sibling of a juror or a member of the jury pool will be deemed a communication with or an investigation of the juror.

[4] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

[5] Paragraph (e) prohibits a lawyer from engaging in conduct intended to disrupt a deposition as well as a trial.

DEFINITIONAL CROSS-REFERENCES

"Reasonably" See Rule 1.0(i)
"Tribunal" See Rule 1.0(m)

COMMITTEE NOTES

Comparison To Current Tennessee Ethics Rules

Paragraph (a): DR 7-110 (A) provides that "[a] lawyer shall give or lend anything of value to a judge, official or employee of a tribunal, except as permitted by Section (C)(4) of Canon 5 of the Code of Judicial Conduct, but a lawyer may make a contribution to the campaign fund of a candidate for judicial office in conformity with Section (B)(2) under Canon 7 of the Code of Judicial Conduct."

Paragraph (b): With regard to Paragraph (b) as applicable to judges and officials, DR 7-110 currently reads as follows:

DR 7-110. Contact With Officials

(B) In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending, except:

(1) In the course of official proceedings in the cause.

(2) In writing if the lawyer promptly delivers a copy of the writing to opposing counsel or to the adverse party if that party is not represented by a lawyer.

(3) Orally upon adequate notice to opposing counsel or to the adverse party if that party is not represented by a lawyer.

(4) As otherwise authorized by law, or by Section A(4) under Canon 3 of the Code of Judicial Conduct.

With regard to paragraph (b) as applicable to jurors, DR 7-108 currently reads as follows:

DR 7-108. Communication With or Investigation of Jurors

(A) Before the trial of a case a lawyer connected therewith shall not communicate with or cause another to communicate with anyone the lawyers knows to be a member of the venire from which the jury will be selected for the trial of the case.

(B) During the trial of a case:

(1) A lawyer connected therewith shall not communicate with or cause another to communicate with any member of the jury.

(2) A lawyer who is not connected therewith shall not communicate with or cause another to communicate with a juror concerning the case.

(C) DR 7-108(A) and (B) do not prohibit a lawyer from communicating with venire persons or jurors in the course of official proceedings.

. . . .

(F) All restrictions imposed by DR 7-108 upon a lawyer also apply to communications with or investigations of members of a family of a venireperson or a juror.

Paragraph (c): DR 7-108 (D) and (F) currently reads as follows:

(D) After discharge of the jury from further consideration of a case with which the lawyer was connected, the lawyer shall not ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence his actions in future jury service.

. . . .

(F) All restrictions imposed by DR 7-108 upon a lawyer also apply to communications with or investigations of members of a family of a venireperson or a juror.

Paragraph (d): Paragraph (d) is very similar to DR 7-108(E).

Paragraph (e): DR 7-106(C)(6) provides that a lawyer shall not engage in "undignified or discourteous conduct which is degrading to a tribunal."

Comparison to ABA Model Rules

Paragraph (a): Paragraph (a) is identical to ABA Model Rule 3.5(a).

Paragraph (b): Paragraph (b) is identical to ABA Model Rule 3.5(b) except that its applicability has been limited to communications prior to and during the proceeding. Communicating with jurors after discharge of the jury is separately addressed in Proposed Rule 3.5(c).

Paragraph (c): There is no counterpart to Paragraph (c) in the ABA Model Rules. Model Rule 3.5(b) prohibits communications with jurors “unless permitted by law.”

Paragraph (d): There is no counterpart to Paragraph (d) in the ABA Model Rules.

Paragraph (e): Paragraph (e) is identical to ABA Model Rule 3.5(c), except for the reference to proceedings conducted pursuant to the authority of a tribunal that was added to make clear that lawyers may not engage in disruptive or disorderly conduct in depositions.

Changes Made to 1997 Committee Preliminary Draft In Response to Comments

All references to “prospective jurors” have been replaced with “members of the jury pool”to clarify that the prohibition on communication only applies to persons who have been summoned to jury duty.

Paragraph (c) has been modified to prohibit a lawyer from communicating with a juror after the trial is over if the communication is reasonably likely to harass or embarrass the juror or influence the juror’s actions in future jury service. This prohibition is similar to DR 7-108(D), but judges the lawyer’s communication by its effect on the juror rather than the lawyer’s motive for the communication.

Paragraph (e) has been modified so it will only prohibit intentionally disruptive conduct. The modification conforms Paragraph (e) to ABA Model Rule 3.5(c). While the Committee deplores any conduct -- much of which is prompted in the heat of the moment -- that interferes with the orderly conduct of a proceeding, the Committee believes that professional discipline should be reserved for intentionally disruptive behavior.

Comment [2] was added to explain that the prohibition in Paragraph (b) against *ex parte* communication was not meant to prohibit communications currently permitted by DR 7-110(2) and (3).

Comments Received After September 2000 Draft, Committee Response, and Changes Made

The Board of Professional Responsibility has recommended the addition of a new paragraph providing that "a lawyer shall not loan money or other things of value to or on behalf of a judge, or members of the judge's immediate family." The Committee believes this issue is appropriately addressed by Comment [1] and has also recommended that the issue be further addressed in a new Comment to Rule 8.4 that explains the prohibition in Rule 8.4(f) against assisting a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

PROPOSED RULE 3.6
TRIAL PUBLICITY

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense or defense involved, and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

COMMENT

[1] It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical

nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

[2] Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such Rules.

[3] The Rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.

[4] Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters will be governed by paragraph (a).

[5] There are, on the other hand, certain subjects which are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration; or

(5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial.

[6] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Nonjury hearings and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

[7] Finally, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, but only if a reasonable lawyer would believe a public response is required in order to avoid substantial prejudice to the lawyer's client. In some situations, prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

[8] See Rules 3.8(e) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

DEFINITIONAL CROSS-REFERENCES

“Firm” See Rule 1.0(d)
“Knows” See Rule 1.0(f)
“Materially” See Rule 1.0(g)
“Reasonably Should Know” See Rule 1.0(k)
“Reasonable” See Rule 1.0(i)
“Substantial” See Rule 1.0(l)

COMMITTEE NOTES

Comparison To Current Tennessee Ethics Rules

Proposed Rule 3.6 is similar to the very cumbersome DR 7-107, except as follows: First, Rule 3.6 adopts the general criterion of "substantial likelihood of materially prejudicing an adjudicative proceeding" to describe impermissible conduct. Second, Rule 3.6 makes clear that only attorneys who are, or have been involved in a proceeding, or their associates, are subject to the Rule. Third, Rule 3.6 omits the particulars in DR 7-107(B), transforming them instead into an illustrative compilation as part of the Rule's commentary that is intended to give fair notice of the kinds of statements that are generally thought to be more likely than other kinds of statements to pose unacceptable dangers to the fair administration of justice. Whether any statement will have a substantial likelihood of materially prejudicing an adjudicatory proceeding will depend upon the facts of each case. The particulars of DR 7-107(C) are retained in Rule 3.6(b), except for DR 7--107(C)(7), which provided that a lawyer may reveal "[a]t the time of seizure, a description of the physical evidence seized, other than a confession, admission or statement." Finally, Rule 3.6 authorizes a lawyer to protect a client by making a limited reply to adverse publicity substantially prejudicial to the client.

Comparison To ABA Model Rules

Proposed Rule 3.6 is identical to ABA Model Rule 3.6, except that the expectation of whether a statement will be disseminated by means of public communication will be judged from the perspective of a reasonable lawyer, rather than that of a reasonable person. Also, because of its

inconsistency with Paragraph (b)(1), Paragraph (6) was deleted from Comment [5] of the Model Rule.

Changes Made to 1997 Committee Preliminary Draft In Response to Comments

No changes.

Comments Received After September 2000 Draft, Committee Response, and Changes Made

1. The cross-reference to Rule 3.8(g) in Comment [8] was dropped because the Committee is recommending the deletion of Rule 3.8(g).

2. After considering comments *pro* (Tennessee Association of Criminal Defense Lawyers) and *con* (Circuit Court Judge Robert A. Lanier, the United States Attorneys, and the Tennessee District Attorney Generals Conference), the Committee persists in its recommendation that the Court approve both paragraph (c) and Comment [7]. As an express exception to Paragraph (a)'s prohibition against public statements that will have a substantial likelihood of materially prejudicing an adjudicative proceeding, Paragraph (c) permits a lawyer to make a statement the lawyer reasonably believes is necessary to protect a client the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. To be within the protection of Paragraph (c), the statement must be limited to information necessary to mitigate the recent adverse publicity.

The Committee disagrees with the characterization of paragraph (c) as permitting one wrong to justify another. Such is not the rationale for the Rule. Rather, the Committee believes that Paragraph (c) is a narrowly crafted exception that protects a lawyer's mitigating statement because such a mitigating statement does not present a substantial likelihood of materially prejudicing an adjudicative proceeding and, therefore, constitutionally cannot be prohibited in light of the U.S. Supreme Court's ruling in Gentile v. Nevada State Bar, 501 U.S. 1030 (1991).

Should the Court decide that Paragraph (c) should not be included in Rule 3.6, the Committee recommends that Comment [7] be revised as follows:

> [7] Finally, extrajudicial statements that might, standing by themselves, present a substantial likelihood of materially prejudicing an adjudicative proceeding. ~~otherwise raise a question under this Rule~~ may not have such an effect ~~be permissible~~ when they are made in response to materially prejudicial statements made publicly by another party, another party's lawyer, or third persons, ~~but only if a reasonable lawyer would believe a public response is required in order to avoid substantial prejudice to the lawyer's client~~ and the response serves only to mitigate or rectify the prejudicial affect of the prior statements. Such a response could have ~~In some situations, prejudicial statements have been publicly made by others, responsive statements may have~~ the salutary effect of lessening, rather than aggravating, ~~any resulting~~ the adverse impact of the prior statements on the adjudicative proceeding. Such responsive statements ~~should~~ must ~~be limited to~~ contain only such information as is necessary to mitigate or rectify the undue prejudice created by the statements made by others or that does not otherwise violate paragraph (a).

This Comment makes the point that one of the circumstances to be considered in determining whether a statement presents a substantial likelihood of materially prejudicing an adjudicative proceeding is whether the statement's effect is to mitigate or rectify the material prejudicial effect of prior statements by others. Unlike Paragraph (c), which is presented as an

exception to Paragraph (a), such a revised Comment [7] would serve as an interpretation of Paragraph (a), as do Comments [5] and [6].

PROPOSED RULE 3.7
LAWYER AS WITNESS

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

COMMENT

[1] Combining the roles of advocate and witness can prejudice the opposing party and can involve a conflict of interest between the lawyer and client.

[2] The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

[3] Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

[4] Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the opposing party. Whether the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The principle of imputed disqualification stated in Rule 1.10 has no application to this aspect of the problem.

[5] Whether the combination of roles involves an improper conflict of interest with respect to the client is determined by Rule 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer or a member of the lawyer's firm, the representation is improper. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. See Comment to Rule 1.7. If a lawyer who is a member of a firm may not act as both advocate and witness by reason of conflict of interest, Rule 1.10 disqualifies the firm also.

DEFINITIONAL CROSS-REFERENCES

"Firm" See Rule 1.0(d)
"Substantial" See Rule 1.0(l)

COMMITTEE NOTES

Comparison To Current Tennessee Ethics Rules

DR 5-102(B) prohibits a lawyer, or the lawyer's firm, from serving as advocate if the lawyer "learns or it is obvious that the lawyer or a lawyer in the lawyer's firm ought to be called as a witness on behalf of his client." DR 5-102(B) provides that a lawyer, and the lawyer's firm, may continue representation if the "lawyer learns or it is obvious that the lawyer or a lawyer in the lawyer's firm may be called as a witness other than on behalf of the client . . . until it is apparent that his testimony is or may be prejudicial to the client." DR 5-101(B) permits a lawyer to testify while representing a client: "(1) If the testimony will relate solely to an uncontested matter; (2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; (3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client; (4) As to any matter if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or the lawyer's firm as counsel in the particular case."

Comparison To ABA Model Rules

Proposed Rule 3.7 is identical to ABA Model Rule 3.7.

Changes Made to 1997 Committee Preliminary Draft In Response to Comments

No changes.

Comments Received After September 2000 Draft, Committee Response, and Changes Made

No comments or changes.

PROPOSED RULE 3.8
SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor in a criminal matter:

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

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

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

(d) shall make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in

connection with sentencing, disclose to the defense and, if the defendant is proceeding *pro se*, to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and

(e) shall:

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

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

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

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

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

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

COMMENT

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

[2] Paragraph (c) does not apply to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of a suspect who has knowingly waived the rights to counsel and silence.

[3] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

[4] Paragraph (f) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

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

DEFINITIONAL CROSS-REFERENCES

"Known" and "Knows" See Rule 1.0(f)
"Reasonable" See Rule 1.0(i)
"Reasonably Believes" See Rule 1.0(j)
"Substantial" See Rule 1.0(l)
"Tribunal" See Rule 1.0(m)

COMMITTEE NOTES

Comparison To Current Tennessee Ethics Rules

Paragraph (a): DR 7-103(A) provides that a "public prosecutor . . . shall not institute . . . criminal charges when the prosecutor or government lawyer knows or it is obvious that the charges are not supported by probable cause."

Paragraph (b): There is no comparable provision in the Disciplinary Rules.

Paragraph (c): There is no comparable provision in the Disciplinary Rules.

Paragraph (d): Paragraph (d) is substantially similar to DR 7-103(B): "A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if the defendant has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.

Paragraph (e): There is no comparable duty in the Disciplinary Rules.

Paragraph (f): DR 7-103(C) currently provides that "[i]t is unprofessional conduct for a prosecutor to subpoena an attorney to the grand jury or to any state or federal administrative body with a similar function without prior judicial approval in circumstances where the prosecutor or such other government attorney seeks to compel the attorney-witness to provide evidence concerning a person who at the time is represented by the attorney-witness."

Comparison to ABA Model Rules

Paragraph (a): Paragraph (a) is identical to ABA Model Rule 3.8(a).

Paragraph (b): Paragraph (b) is identical to ABA Model Rule 3.8(b).

Paragraph (c): Paragraph (c) differs from ABA Model Rule 3.8(c) in that the prosecutor is only prohibited from "advising" an unrepresented accused to waive important pre-trial rights. The ABA Model Rule provides more broadly that the prosecutor shall not "seek to obtain" such waivers.

Paragraph (d): Paragraph (d) is identical to ABA Model Rule 3.8(d), except that disclosure to the tribunal is only required if the defendant is proceeding *pro se*.

Paragraph (e): Paragraph (e) differs from ABA Model Rule 3.8(e) in that the Proposed Rule only requires that the prosecutor act with reasonable care to prevent employees of the prosecutor's office from making extrajudicial statements which the prosecutor was prohibited from

making. The ABA Model Rule requires more generally that the prosecutor act reasonably to prevent "investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case" from making statements the prosecutor could not make.

Paragraph (f): Paragraph (f) is identical to ABA Model Rule 3.8(F).

Paragraph (g): There is no counterpart in the Proposed Rule to ABA Model Rule 3.8(g) that prohibits prosecutors from making extrajudicial statements that have a substantial likelihood of heightening public condemnation of the accused.

Changes Made to 1997 Committee Preliminary Draft In Response to Comments

The Final Draft is identical to the Preliminary Draft except for the deletion from paragraph (g) of the requirement that judicial approval of a subpoena of a lawyer must be "after an opportunity for an adversarial proceeding." The Committee concluded that this requirement, for which there is no counterpart in DR 7-103(C) was both unnecessary and too burdensome on the courts.

Comments Received After September 2000 Draft, Committee Response, and Changes Made

1. In response to a comment from the Tennessee District Attorneys General Conference, and with its concurrence, the Committee has amended Paragraph (d) so that the disclosure of exculpatory evidence need only be made to the defense except when a defendant is proceeding *pro se*. In such a case, for the protection of the pro se defendant, the disclosure must be made to both the defendant and the tribunal.

2. Both the United States Attorneys and the Tennessee District Attorneys General Conference have asked the Court to delete Paragraph (f), which governs the issuance by prosecutors of subpoenas to lawyers seeking evidence about a client or former client. Although opposed to the deletion of Paragraph (f), the Committee, with the concurrence of the prosecutors, recommends the deletion of the requirement in Paragraph (f)(4) that the prosecutor obtain prior judicial approval. The Committee believes that the requirements in paragraphs (f)(1) through (3) afford lawyers and their clients adequate protection against unwarranted efforts to intrude upon the attorney-client relationship, and having no reason to believe that prosecutors will not conscientiously comply with their professional responsibilities, the Committee sees no need for the special, advance judicial supervision called for by paragraph (f)(4). With this change, the Proposed Rule conforms to the ABA Model Rule. Given the special power wielded by prosecutors, particularly with respect to the issuance of grand jury subpoenas, and the special importance of effective assistance of counsel in criminal proceedings, the Committee persists in its belief that paragraphs (f)(1) through (3) are appropriate standards of professional conduct that strike the right balance between the need to protect the attorney-client relationship and the need for effective law enforcement.

3. In response to concerns voiced by the United States Attorneys and the Tennessee District Attorneys General Conference, the Committee recommends the deletion of Paragraph (g) and Comment [5]. Although Paragraph (g) is in the ABA Model Rule, the Committee concluded that the special prohibition against prosecutorial statements that have "a substantial likelihood of heightening public condemnation of the accused" is too vague and might have an unconstitutionally chilling effect on statements made by prosecutors, especially when they are

standing for election. The Committee notes, of course, that statements by a prosecutor heightening public condemnation of an accused that are made prior to or during judicial proceedings would normally be prohibited by Rule 3.6 (Trial Publicity).

4. In response to concerns voiced by the United States Attorneys and the Tennessee District Attorneys General Conference, the Committee recommends the deletion of the sentence in Comment [1] that states that Rule 3.3(a)(3) (mandatory disclosure of all relevant facts in an *ex parte* hearing applies to grand jury proceedings. The Committee agrees with the prosecutors that Rule 3.3(a)(3) should not be applicable to grand jury proceedings.

5. The Board of Professional Responsibility recommends deletion of Paragraphs (b), (c), and (e)(2). The Committee opposes this recommendation, in part because these provisions have met with the approval of both the United States Attorneys and the Tennessee District Attorneys General Conference.

6. The United States Attorneys have asked the Court to add a paragraph to Rule 3.8 that would broadly state that, "notwithstanding any other provision in these rules, it is not professional misconduct for a government lawyer to supervise, encourage, conduct or advise civil or criminal investigators or other law enforcement officials about lawful law enforcement activities involving the investigation of civil, criminal or constitutional rights violations." It is the Committee's view that the Court should not craft exceptions to the Rules of Professional Conduct that are only applicable to prosecutors. If there are to be such law enforcement exceptions, they should be authorized by other law, with this Court being the final arbiter of whether such law should be given precedence over the Rules of Professional Conduct. The Committee would note that the special concern of the prosecutors about the prohibition against *ex parte* communications with represented persons, as applied to criminal and civil law enforcement investigations, has been directly addressed in Rule 4.2, Comment [7], in a way acceptable to the Tennessee District Attorneys General Conference.

PROPOSED RULE 3.9
ADVOCATE IN NON-ADJUDICATIVE PROCEEDINGS

A lawyer representing a client before a legislative body or administrative agency in a non-adjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a)(1) and (2), (b), (c), and (d), 3.4(a) through (c), 3.5(a), (b) and (e), and 4.1.

COMMENT

[1] In representation before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in a rule-making or policy-making capacity, lawyers present facts, formulate issues and advance argument in the matters under consideration. The decision-making body, like a court, should be able to rely on the integrity of the submissions made to it. A lawyer appearing before such a body should deal with the tribunal honestly and in conformity with applicable rules of procedure.

[2] Lawyers have no exclusive right to appear before non-adjudicative bodies, as they do before a court. The requirements of this Rule therefore may subject lawyers to regulations inapplicable to advocates who are not lawyers. However, except for the fact that lawyers need not secure the permission of a legislative body or administrative agency to withdraw from the representation of a client in a non-adjudicative matter and that certain of the rules governing the conduct of lawyers in adjudicative matters are not pertinent to non-adjudicative matters, legislatures and administrative agencies have a right to expect lawyers to deal with them as they deal with courts.

[3] This Rule does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency; representation in such a transaction is governed by Rules 4.1 through 4.4.

[4] See Rule 4.1 for the duties of a lawyer who comes to know that the lawyer's client or a witness whose testimony is presented by the lawyer has testified falsely or otherwise presented false evidence in a non-adjudicative proceeding conducted by a legislative body or administrative agency.

DEFINITIONAL CROSS-REFERENCES

None.

COMMITTEE NOTES

Comparison To Current Tennessee Ethics Rules

There is no counterpart to this rule in the Disciplinary Rules.

Comparison to ABA Model Rules

The Proposed Rule is identical to ABA Model Rule 3.9 except for a modification of the cross- references to account for changes we made in the cross-referenced rules. ABA Model Rule 3.9 incorporates by reference the Model Rule 3.3(a) to (c) duty to disclose client perjury or falsification of evidence. The Committee has proposed different rules with respect to client perjury and fraud. The lack of a cross reference in Proposed Rule 3.9 to Proposed Rule 3.3(e) through (j)

has the effect of requiring the lawyer to comply with Proposed Rule 4.1(b) and (c) rather than Proposed Rule 3.3(e) through (j). In case of client fraud or perjury by a client in a non-adjudicative proceeding, then, the lawyer's duty would entail non-disclosure and either a silent withdrawal or, in some circumstances, a "noisy" withdrawal.

Changes Made to 1997 Committee Preliminary Draft In Response to Comments

The Final Draft is identical to the Preliminary Draft except for the replacement of the reference to a legislative and administrative "tribunal" with a reference to legislative "body" and administrative "agency" and the addition of Comment [4] that highlights the cross-reference to Rule 4.1.

Comments Received After September 2000 Draft, Committee Response, and Changes Made

The Committee conformed Paragraph (a) to changes made to Rule 3.3.

CHAPTER 4
TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

PROPOSED RULE 4.1
TRUTHFULNESS AND CANDOR IN STATEMENTS TO OTHERS

(a) In the course of representing a client, a lawyer shall not knowingly make a false statement of material fact or law to a third person.

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

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

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

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

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

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

COMMENT

Misrepresentation

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

[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an

acceptable settlement of a claim are in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.

Crime or Fraud by Client

[3] Paragraphs (b) and (c) provide guidance for lawyers who discover that a client intends to or is engaging in criminal or fraudulent conduct, and in some cases may even have used the lawyer's services to assist them commit the crime or fraud. To avoid assisting the client with the crime or fraud, the lawyer must advise the client to refrain from or to rectify the consequences of the criminal or fraudulent act. If the client refuses or is unable to do so, the lawyer must withdraw from the representation of the client in the matter. Additionally, this Rule mandates limited disclosures -- notice of withdrawal or disaffirmance of written work product -- in circumstances in which such disclosure is necessary for the lawyer to prevent the client from using the lawyer's services in furtherance of the crime or fraud. To this limited extent, then, this Rule overrides the lawyer's duties in Rules 1.6, 1.8(b) and 1.9(c) prohibiting disclosure or use to the disadvantage of the client of information relating to the representation. Other than the disclosure mandated by this rule, however, the lawyer must not reveal information relating to the representation unless permitted to do so by Rule 1.6.

[4] If a lawyer learns that a client intends to commit a crime or fraud under circumstances in which the lawyer will not assist the offense by remaining silent, paragraph (b) requires remonstration with the client against the crime or fraud, and requires withdrawal if the client does not desist from the course of conduct in question. Although the lawyer is not required to reveal the client's intended or ongoing fraud, the lawyer is required to communicate the fact that he or she has withdrawn from the representation of the client to any person who the lawyer reasonably believes knows of the lawyer's involvement in the matter and whose financial or property interests are likely to be damaged by the client's intended or ongoing misconduct. This communication is necessary to fully distance the lawyer from the client's misconduct. If the client's intended conduct is a crime, full disclosure of the crime is permitted by Rule 1.6(b), but is not required by paragraph (b) of this Rule.

[5] In some cases, a lawyer will learn about a client's crime or fraud after he or she has innocently prepared and submitted statements, opinions or other materials to third parties who will be adversely affected if the client persists with his or her misconduct. If the lawyer was misled by the client, some of these statements, opinions or materials may be false or misleading. Even though accurate, they may be necessary for the accomplishment of the client's crime or fraud. This presents the lawyer with a dilemma. Without the consent of the client, the lawyer may not correct the statements, opinions or materials. That would violate the prohibition against revealing information related to the representation of the client. Yet to do nothing would allow the client to use the lawyer's work in the client's ongoing effort to consummate the fraud. To resolve this dilemma, paragraphs (b) and (c) do not require disclosure of the crime or fraud but only requires that the lawyer effectively disengage from the crime or fraud by giving notice to affected persons of the lawyer's disaffirmance of the lawyer's work product that the lawyer reasonably believes may be used by the client in furtherance of the crime or fraud. See Rule 1.6(b) for the circumstances in which the lawyer may be permitted to more fully reveal information for the purposes or preventing or rectifying the client's crime or fraud.

[6] If, after the conclusion of a matter in which a lawyer has represented a client, the lawyer learns that the client has perpetrated a crime or fraud during the course of the lawyer’s representation, the lawyer may not reveal the crime or fraud unless permitted to do so by Rule 1.6(b)(3).

DEFINITIONAL CROSS-REFERENCES

"Knowingly" and "Knows" See Rule 1.0(f)
"Material" See Rule 1.0(g)
"Fraud" and Fraudulent" See Rule 1.0(e)
"Consult" and "Consultation" See Rule 1.0(c)
"Reasonably Believes" See Rule 1.0(j)

COMMITTEE NOTES

Comparison To Current Tennessee Ethics Rules

Paragraph (a): Paragraph (a) is substantially similar to DR 7-102(A)(5), which states that "[i]n the representation of a client, a lawyer shall not . . . [k]nowingly make a false statement of law or fact."

Paragraph (b): There is no comparable provision in the Disciplinary Rules.

Paragraph (c): There is no comparable provision in the Disciplinary Rules.

Comparison To ABA Model Rules

Paragraph (a): Paragraph (a) is identical to the ABA Model Rule 4.1(a).

Paragraph (b): There is no directly comparable provision in the ABA Model Rules. Model Rule 4.1 itself says nothing about withdrawal, but Model Rules 1.2(d) and 1.16 would probably require withdrawal. Although a Comment to Model Rule 1.6 indicates that it does not prohibit a lawyer from informing persons of his or her withdrawal, there is no rule that requires lawyers to inform affected persons of the withdrawal.

Paragraph (c): There is no directly comparable provision in the ABA Model Rules. Model Rule 4.1 itself says nothing about withdrawal, but Model Rules 1.2(d) and 1.16 would probably require withdrawal. Although a Comment to Model Rule 1.6 discusses what has come to be known as "noisy withdrawals," there is no rule that requires a lawyer to inform affected persons of his or her withdrawal or to disaffirm work product tainted by the client's fraud.

Changes Made to 1997 Committee Preliminary Draft In Response to Comments

Paragraph (a): The Committee deleted proposed Paragraph (a)(2) as unnecessary because of the Rules' requirement that the lawyer withdraw, notify affected persons of the withdrawal and disaffirm written statements will preclude the lawyer from assisting a client's crime or fraud.

Paragraph (b): Modified text requires that lawyer "know" rather than have "substantial reason to believe" that client will commit crime or fraud.

Paragraph (c): No change in substance. Restructured text recognizes difference between situation in which lawyer is currently representing the client from the situation in which the lawyer had previously but no longer is representing the client.

Comments Received After September 2000 Draft, Committee Response, and Changes Made

1. On is own initiative, the Committee recommends some minor stylistic changes to Paragraphs (b) and (c) intended to make the rule more user-friendly. The addition of the reference to disaffirmance of opinions and other work product in Paragraph (b) was needed to cover the situation in which the lawyer has prepared such work product prior to learning that the client intends to commit a crime or fraud.

2. The Board of Professional Responsibility has requested the addition of a new Paragraph (d) intended to clarify the relationship between Rule 4.1 and 1.6. With the addition of a new last sentence to Comment [3], the Commission believes the Comments [3], [4], [5] and [6] adequately explain the difference between the limited disclosure that is mandated by Rule 4.1 (so that the lawyer will not assist the client commit the crime or fraud) and the disclosures that are permitted, but not required, by Rules 1.6(b)(2) and (3) (to prevent a crime or to rectify a crime or fraud in which the client has used the lawyer's services).

PROPOSED RULE 4.2
COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

COMMENT

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship, and the uncounseled disclosure of information relating to the representation.

[2] This rule applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract or negotiation, who is represented by counsel concerning the matter to which the communication relates. The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the communication is not permitted by this Rule.

[3] In the case of a represented organization, this Rule prohibits communications by a lawyer for another person or entity concerning the matter in representation with a member of the governing board, an officer or managerial agent or employee, or an agent or employee who supervises or directs the organization's lawyer concerning the matter, has authority to contractually obligate the organization with respect to the matter, or otherwise participates substantially in the determination of the organization's position in the matter.

[4] If an agent or employee of an organization is represented in the matter by his or her own counsel, consent by that counsel will be sufficient for purposes of this Rule. Nor is consent of the organization's lawyer required for communication with a former agent or employee.
See Rule 4.4 regarding the lawyer's duty not to violate the organization's legal rights by inquiring about information protected by the organization's attorney-client privilege or as work-product of the organization's lawyer. In communicating with a current or former agent or employee of an organization, a lawyer shall not solicit or assist in the breach of any duty of confidentiality owed by the agent to the organization. See Rule 4.4.

[5] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the subject matter of the representation. For example, the existence of a controversy between a government agency and a private party, or between two private parties, does not prohibit a lawyer for either from communicating with nonlawyers representatives of the other regarding a separate matter, such as additional or different unlawful conduct. Nor does this Rule preclude a lawyer from communicating with a person who seeks a second opinion about a matter in which the person is represented by another lawyer. Also, parties to a matter may communicate directly with each other.

[6] Communications with represented persons may be authorized by specific constitutional or statutory provisions, by rules governing the conduct of proceedings, or by applicable judicial precedent or by court order. Communications authorized by law, for example, may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal

right to communicate with a governmental official having the power to redress the client's grievances.

[7] By virtue of its exemption of communications authorized by law, this Rule permits a prosecutor or a government lawyer engaged in a criminal or civil law enforcement investigation to communicate with or direct investigative agents to communicate with a represented person prior to the commencement of a criminal or civil law enforcement proceeding against the represented person. A civil law enforcement investigation is one conducted under the government's police or regulatory power to enforce the law. Once a represented person has been arrested, indicted, charged, or named as a defendant in a criminal or civil law enforcement proceeding, however, prosecutors and government lawyers must comply with this Rule. A represented person's waiver of the constitutional right to counsel does not exempt the prosecutor from the duty to comply with this Rule.

[8] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

DEFINITIONAL CROSS-REFERENCES

"Knows" See Rule 1.0(f)

COMMITTEE NOTES

Comparison To Current Tennessee Ethics Rules

The Proposed Rule differs from DR 7-104(A)(1) to the extent that DR 7-104(A)(1) only applies to communications with represented "parties." This makes clear that the Rule applies prior to institution of formal civil or criminal proceedings to which persons become parties. There are no counterparts to the Comments in the Ethical Considerations, but Comment [3] is intended to be consistent with Formal Ethics Opinions 83-F-46, 46(a), and 46(b). This Proposed Rule is also consistent with the decision in Monceret v. Board of Professional Responsibility, 29 S.W.3d 455 (Tenn. 2000).

Comparison to ABA Model Rules

The text of the Rule is identical to ABA Model Rule 4.2. There is no counterpart to Comment [1]. Comments [3] and [4] differ significantly from the Model Rule Comment that specifies how the Rule applies to organizational clients. There are no counterparts in the Model Rule to Comments [6] and [7].

Changes Made to 1997 Committee Preliminary Draft In Response to Comments

In the Preliminary Draft, Proposed Rule 4.2 applied to represented "persons" in civil matters and represented "parties" in criminal matters. The purpose of the differentiation between civil and criminal matters was to permit prosecutors, in connection with law enforcement investigations, to communicate directly with a represented person prior to arrest or indictment. The Proposed Rule is now identical to the ABA Model Rule, and the issue of the application of the rule to prosecutors is treated in new Comments [6] and [7], with the same substantive result.

In responding to concerns expressed by Tennessee prosecutors about this Proposed Rule, the Committee amended the language of the first sentence of Comment [7] to clarify that the Rule

"permits" the contacts described there, in order to reinforce the proposition that such conduct by prosecutors is "authorized by law" under existing Tennessee ethics rules and decisional law. See, e.g., State v. Mosher, 755 S.W.2d 464 (Tenn. Crim. App.), appeal denied (Tenn. 1988).

The Committee believes and intends that the adoption of the Proposed Rule would not change the substance of the current Tennessee ethics rule or decisional law on this point.

Comment [3] in the Preliminary Draft prohibited communication with a corporate employees whose "act or omission in the matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on behalf of the organization. These references have been deleted, so that the Comment will be consistent with the "control group" test set forth in Formal Ethics Opinions 83-F-46, 46(a), and 46(b).

Comments Received After September 2000 Draft, Committee Response, and Changes Made

1. In response to a Comment from the United States Attorneys, the Committee has added a reference to "a court order" as a source of authorization by law for a communication with a represented person.

2. The Board of Professional Responsibility has asked the Court to add a new Paragraph (b) that restricts communications with government officials who are represented in their official capacity by a government lawyer. The Committee does not support this proposal. The Committee believes that there should be a uniform ethics rule applicable to all lawyers, and that the only exception should be for communications authorized by law. As noted in Comment [6], the Committee believes that the issue the Board would address by amending the ethics rule should be resolved as a matter of other law, in particular by reference to the constitutional right to petition for redress of grievances. Indeed, the Committee is concerned that the restrictions that the Board would impose on direct communication with government officials might be inconsistent with the constitutional right to petition.

3. The Board of Professional Responsibility has also asked the Court to modify Comment [3] to specifically incorporate into the Comment the control group test articulated in Formal Ethics Opinions 83-F-46(a) and 83-F-46(b). Apart from the inappropriateness of specifically citing Formal Ethics Opinions in the Comment, the Committee believes that its formulation of the control group test is consistent with the Formal Ethics Opinions, but also more precisely delineates the agents or employees who are included. In addition to specifying members of the governing board, officers, and managerial agents as management or administrative level employees, the Committee's draft also clarifies that the control group includes an agent or employee who supervises or directs the organization's lawyer concerning the matter, has authority to contractually obligate the organization with respect to the matter, or otherwise participates substantially in the determination of the organization's position in the matter. This latter clarification is consistent with the formulation of the control group test in the American Law Institute's Restatement of the Law Governing Lawyers.

4. The United States Attorneys have asked that the first sentence of Comment [7] be incorporated into the Rule text. The Committee believes that it is both inappropriate and unnecessary to include in the Rule text this particular example of a communication authorized by law. The Rule makes it clear that a communication that otherwise would be prohibited without consent of a represented person's lawyer is permitted if the communication is authorized by other law, and Comment [6] clearly explains that the communications about which the United States

Attorneys are concerned are authorized by law. This, of course, would be true even if Comment [6] were deleted. The Committee believes that Comment [6] makes the point with sufficient force that modification of the rule text is not needed. The Tennessee District Attorneys General Conference supports the formulation presented by the Committee.

5. The United States Attorneys have also asked to Court to delete the last sentence of Comment [7] that states: "A represented person's waiver of the constitutional right to counsel does not exempt the prosecutor from the duty to comply with this Rule." The Committee opposes this proposal because, as indicated by Comment [1], Rule 4.2 is designed to protect not only the rights of the represented person, but also to protect the proper functioning of the legal system. This is why the protections of Rule 4.2, unlike the constitutional right to counsel, cannot be waived by the client without the consent of the client's lawyer. Unless the client discharges the lawyer, Rule 4.2 remains applicable and bars communication without the consent of the lawyer. The client's consent, as evidenced by the waiver of the right to counsel, is of no effect.

PROPOSED RULE 4.3
DEALING WITH UNREPRESENTED PERSON

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

COMMENT

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(d).

[2] The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

DEFINITIONAL CROSS-REFERENCES

"Knows" See Rule 1.0(f)
"Reasonable" See Rule 1.0(i)
"Reasonably Should Know" See Rule 1.0(k)

COMMITTEE NOTES

Comparison To Current Tennessee Ethics Rules

There is no counterpart in the Disciplinary Rules to the first two sentences. The prohibition against rendering legal advice is identical to that currently contained in DR 7-104(A)(2).

Comparison To ABA Model Rules

The initial portion of proposed rule is identical to ABA Model Rule 4.3, but adds a prohibition against rendering legal advice to the unrepresented person.

Changes Made to 1997 Committee Preliminary Draft In Response to Comments

Eliminated sub-paragraphing, but no substantive changes.

Comments Received After September 2000 Draft, Committee Response, and Changes Made

The Committee concurs with the recommendation of the Board of Professional Responsibility that the limitation against rendering advice to an unrepresented person be limited to situations in which there is a conflict of interest between the lawyer's client and the unrepresented person. As revised, this Rule will be identical to Rule 4.3 as proposed to the ABA House of Delegates by the Ethics 2000 Commission. In place of the Comment proposed by the Board, however, the Committee recommends adoption of the new Comment to Rule 4.3 proposed by the Ethics 2000 Commission. The Committee believes that the Ethics 2000 Comment provides more useful guidance about the circumstances that affect the propriety of a lawyer providing legal advice to an unrepresented person.

PROPOSED RULE 4.4
RESPECT FOR RIGHTS OF THIRD PERSONS

In representing a client, a lawyer shall not:

(a) use means that have no substantial purpose other than to embarrass, delay, or burden a third person or knowingly use methods of obtaining evidence that violate the legal rights of such a person; or

(b) threaten to present a criminal charge, or to offer or to agree to refrain from filing such a charge, for the purpose of obtaining an advantage in a civil matter.

COMMENT

Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons. For example, a lawyer may not secretly record a conversation or the activities of another person if doing so would violate state or federal law specifically prohibiting such recording. Otherwise, this Rule does not prohibit secret recording so long as the lawyer has a substantial purpose other than to embarrass or burden the persons being recorded. It would be a violation of Rule 4.1 or Rule 8.4(c), however, if the lawyer stated falsely or affirmatively misled another to believe that a conversation or an activity was not being recorded. By itself, however, secret taping does not violate either Rule 8.4(c) (prohibition against dishonest or deceitful conduct) or Rule 8.4(d) (prohibition against conduct prejudicial to the administration of justice.)

DEFINITIONAL CROSS-REFERENCES

“Knowingly” See Rule 1.0(f)
“Substantial” See Rule 1.0(l)

COMMITTEE NOTES

Comparison To Current Tennessee Ethics Rules

Paragraph (a): There are several Disciplinary Rules which can be seen as specific applications of the more general rule set forth in the Proposed Rule. DR 7-106(C)(2) provides that a lawyer shall not "[a]sk any question that the lawyer has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person." DR 7-102(A)(1) provides that a lawyer shall not "take . . . action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another." DR 7-108(D) provides that "[a]fter discharge of the jury . . . the lawyer shall not ask questions or make comments to a member of that jury that are calculated merely to harass or embarrass the juror. . . ." DR 7-108(E) provides that a lawyer "shall not conduct . . . a vexatious or harassing investigation of either a venireperson or a juror."

Paragraph (b): DR 7-105 provides that a lawyer “shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil proceeding.”

Comparison To ABA Model Rules

Paragraph (a): Paragraph (a) is identical to ABA Model Rule 4.4 except that it only prohibits lawyers from "knowingly" using methods of obtaining evidence that violate the legal rights of a person.

Paragraph (b): There is no counterpart to Paragraph (b) in the Model Rules. Under the Model Rules engaging in the conduct prohibited by the Proposed Rule would only be prohibited if it amounted to extortion or the compounding of a crime. See ABA Formal Ethics Opinion 92-363.

Changes Made to 1997 Committee Preliminary Draft In Response to Comments

Paragraph (a): Although the opposite was suggested in the Committee Notes to the Preliminary Draft, the Committee now takes the position that nothing in this Proposed Rule or Proposed Rule 8.4 should be construed to invalidate the interpretation of provisions of the Tennessee Code of Professional Responsibility stated in Tennessee Formal Ethics Opinions 81-F-14 and 81-F-14(a) that surreptitious taping in civil matters violates DR 1-102(A)(4). The Committee considered the substantive policy question of surreptitious taping seriously and at great length and the Committee ultimately voted in support of the propriety of the current ban in civil matters on surreptitious taping reflected in Tennessee Formal Ethics Opinions 81-F-14 and 81-F-14(a).

Paragraph (b): The Committee dropped the prohibition against threatening to "file a complaint or report with a tribunal or agency with power to impose penalties or sanctions." The committee decided it would be preferable to limit the specific prohibition in Paragraph (b) to threats of criminal prosecution and to leave the propriety of other threats to be determined by reference to Paragraph (a) (violate legal rights of another) or Rule 8.4 (shall not commit a crime, for example, extortion or compounding an offense).

Comments Received After September 2000 Draft, Committee Response, and Changes Made

The Board of Professional Responsibility requested that language be added to Rule 4.4 prohibiting surreptitious recording in civil cases. This would codify the opinions of the Board in Formal Ethics Opinions 81-F-14 and 81-F-14(a). In these Opinions, the Board adopted the substance of ABA Formal Ethics Opinion 337 (1974).

In considering the Board's request, the Committee noted that recording is a useful means of preserving evidence and countering false testimony. The recent trend of opinions has been to hold that lawful secret recording, by itself, is not deceitful. Also, Rule 4.4 only prohibits the use of methods of obtaining evidence that violate the legal rights of another. Moreover, very recently, the ABA Standing Committee on Ethics and Professional Responsibility has withdrawn Formal Ethics Opinion 337 and replaced it with a new opinion holding that lawful secret recording, by itself, does not violate either Rules 4.4 or 8.4 (b)(prohibiting dishonest or deceitful conduct.) See ABA Formal Opinion 01-422 (2001). The Committee concurs with the reasoning of the ABA Standing Committee and, therefore, has added language to the Comment indicating that Rule 4.4 does not by itself preclude lawful secret recording. Language has also been included in a new Comment to Rule 8.4 indicating that by itself secret taping is neither deceitful nor dishonest.

CHAPTER 5
LAW FIRMS, LEGAL DEPARTMENTS, AND LEGAL SERVICE ORGANIZATIONS

PROPOSED RULE 5.1
RESPONSIBILITIES OF A PARTNER, MANAGING LAWYER OR SUPERVISORY LAWYER

(a) A partner in a law firm and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

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

(2) the lawyer:

(i) is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, has direct supervisory authority over the other lawyer, is serving as co-counsel with the other lawyer in the matter, or is sharing fees from the matter with the other lawyer; and

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

COMMENT

[1] Paragraph (a) applies to lawyers who have managerial authority over the professional work of a law firm. See Rule 1.0(d) (defining law firm to include not only a private law firm, but also a legal department of a corporation, government agency, or other organization and a legal services organization). Each partner in a law partnership, or their counterparts in firms organized as professional corporations, professional limited liability companies, or professional limited liability partnerships will be deemed to possess managerial authority for all aspects of the firm's practice. A law firm or other organization of lawyers described in this Rule may, however, agree that the managerial authority for the conduct of the firm or organization will be centralized in some but not all of the partners or managing lawyers. In such a case, only the partners or managing lawyers possessing such managerial authority will be subject to the duty imposed by paragraph (a). On the other hand, however, paragraph (a) may be applicable when a lawyer in a firm or other organization of lawyers described in this Rule, whether or not a partner or a managing lawyer, is assigned intermediate-level managerial responsibilities for a department or an office within the firm. Because many lawyers do not practice in traditional law firms, but rather practice law in legal departments of business firms, legal services organizations, or in legal departments of governmental agencies, this rule also applies to lawyers possessing managerial authority in such organizations.

[2] The measures required to fulfill the responsibility prescribed in paragraph (a) can depend on the organization's structure and the nature of its practice. In a small law firm or legal department, for example, informal supervision and occasional admonition ordinarily might be sufficient. In large firms or legal departments, however, or in practice situations in which intensely difficult ethical problems frequently arise, more elaborate procedures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. Firms and legal departments, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm or organization can influence the conduct of all its members and a lawyer having authority over the work of another may not assume that the subordinate lawyer will inevitably conform to the Rules.

[3] Paragraph (b) applies to lawyers, without regard to their status in a firm or other organization of lawyers described in this Rule, who assume direct supervisory responsibility for the oversight of the work of another lawyer.

[4] Paragraph (c)(1) expresses a general principle of responsibility for acts of another. See also Rule 8.4(a).

[5] Paragraph (c)(2) specifies the circumstances in which one lawyer will be held accountable for the professional misconduct of another lawyer because he or she knows the other lawyer has engaged in professional misconduct and fails to take reasonable action to prevent or mitigate the harm caused by the professional misconduct. Whether a lawyer has such supervisory authority in particular circumstances is a question of fact. Partners of a private firm have at least indirect responsibility for all work being done by the firm, while a partner in charge of a particular matter ordinarily has direct authority over other firm lawyers engaged in the matter. Appropriate remedial action by a partner would depend on the immediacy of the partner's involvement and the seriousness of the misconduct. The supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. If, for example, a partner in a law firm knows that another lawyer in the firm misrepresented a matter to an opposing party in a negotiation, the partner as well as the subordinate has a duty to correct the resulting misapprehension. Such would also be the case if a lawyer who was associated with another lawyer as a direct supervisor, co-counsel, or as a party to a fee-sharing agreement learned that the other lawyer had engaged in misconduct in connection with the representation. This duty is in addition to the lawyer's Rule 8.3(a) duty to report professional misconduct to the Office of Disciplinary Counsel. The obligation to take reasonable remedial action, however, does not require the lawyer to take any action which would violate these rules, e.g., disclosing information related to the representation of a client in violation of Rule 1.6. Nor does the duty to mitigate harm require the lawyer to compensate a person for losses suffered by virtue of the misconduct the lawyer knows has occurred.

[6] Professional misconduct by a lawyer in a firm or other organization of lawyers described in this Rule, or a lawyer who is working under the direct supervision of another lawyer could reveal a violation of paragraph (a) or (b) on the part of the partner or the supervisory lawyer even though it does not entail a violation of paragraph (c) by the partner, the managing lawyer, or supervisory lawyer because there was no direction, ratification, or knowledge of the violation.

[7] Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or another lawyer with whom the lawyer is associated in connection with the representation of a client. Whether a lawyer may be held civilly or criminally liable for another lawyer's conduct is a question of law beyond the scope of these Rules. This Rule is only

intended to provide a basis for professional discipline and is not intended to alter the legal rights and responsibilities of partners, supervisory lawyers, co-counsel, or parties to fee-sharing agreements with respect to the conduct of other lawyers with whom they are associated.

DEFINITIONAL CROSS-REFERENCES

"Firm" and "Law Firm" See Rule 1.0(d)
"Knows" See Rule 1.0(f)
"Partner" See Rule 1.0(h)
"Reasonable" See Rule 1.0(i)

COMMITTEE NOTES

Comparison To Current Tennessee Ethics Rules

There is no counterpart to the Proposed Rule in the Disciplinary Rules.

Comparison To ABA Model Rules

The Proposed Rule embraces the basic substance of ABA Model Rule 5.1, but has been modified as follows:

a. Paragraph (a) has been modified to distinguish between partners in law firms (and their counterparts in PCS, PLLCs, and PLLPs) and lawyers who possess managerial authority in other law firms, such as legal departments and legal service offices. Both are subject to the same duty, but it was felt that we were stretching the definition of a partner too far when we tried to include all lawyers with managerial authority within the definition. We have also made it clear that lawyers who possess managerial authority with respect to a portion of the legal activity in a firm must comply with the requirements of paragraph (a).

b. Paragraph (c)(2) has been revised to extend the duty of one lawyer to act reasonably to prevent or mitigate the consequences of professional misconduct of another lawyer to lawyers jointly representing a client or who have assumed joint responsibility for a representation pursuant to a Rule 1.5(e) fee-sharing agreement. The Model Rule only applies to partners and to lawyers with direct supervisory responsibility for the work of another lawyer.

Changes Made to 1997 Committee Preliminary Draft In Response to Comments

No changes.

Comments Received After September 2000 Draft, Committee Response, and Changes Made

1. The Committee has modified Paragraph (a) and Comment [1] to eliminate the specific references to legal departments and legal service organizations, because the definition of a law firm in Rule 1.0(d) already includes such organizations. A conforming change was made to Paragraph (c)(1)(i). While eliminating the redundancy, the Committee also conformed the wording of Paragraph (a) and (c)(1)(i) to the Ethics 2000 Commission proposal. No change in substance is intended.

2. In response to a recommendation from the Memphis Bar Association, the Committee has modified Comment [3] so that it more closely tracks the wording of Paragraph (b).

PROPOSED RULE 5.2
RESPONSIBILITIES OF A SUBORDINATE LAWYER

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

COMMENT

[1] Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the Rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.

[2] When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the subordinate lawyer's supervisor, another lawyer who has primary responsibility for the representation, or a lawyer who has authority to resolve such matters on behalf of the firm, and a subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

DEFINITIONAL CROSS-REFERENCES

"Reasonable" See Rule 1.0(i)

COMMITTEE NOTES

Comparison To Current Tennessee Ethics Rules

There is no counterpart to this Rule in the Disciplinary Rules.

Comparison To ABA Model Rules

The Proposed Rule is identical to the Model Rule, with the exception of the addition of language in the fifth sentence of Comment [2] noting that the subordinate lawyer may be guided by the decision of a lawyer other than the subordinate lawyer's direct supervisor in appropriate circumstances.

Changes Made to 1997 Committee Preliminary Draft In Response to Comments

The version of the Rule contained in the Preliminary Draft eliminated the reference to "subordinate" lawyers based on concern for the tone of the term in referring to supervised lawyers.

In the interest of greater conformity with the version of this Rule in force in other jurisdictions, however, the Committee conformed its proposal to the language of the Model Rule.

Comments Received After September 2000 Draft, Committee Response, and Changes Made

No comments or changes.

PROPOSED RULE 5.3
RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS

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

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

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

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

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

(2) the lawyer:

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

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

COMMENT

[1] Lawyers generally employ nonlawyers in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such employees act for the lawyer in rendition of the lawyer's professional services. A lawyer should give such employees appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

DEFINITIONAL CROSS-REFERENCES

"Firm" and "Law Firm" See Rule 1.0(d)
"Knows" See Rule 1.0(f)
"Partner" See Rule 1.0(h)
"Reasonable" See Rule 1.0(i)

COMMITTEE NOTES

Comparison To Current Tennessee Ethics Rules

There is no direct counterpart to the Proposed Rule in the Disciplinary Rules. More specifically, however, DR 4-101(D) provides that a lawyer "shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidences or secrets of a client. . . ." DR 7-107(J) also provides that "[a] lawyer shall exercise reasonable care to prevent the lawyer's employees and associates from making an extrajudicial statement that the lawyer would be prohibited from making under DR 7-107."

Comparison To ABA Model Rules

The Proposed Rule tracks ABA Model Rule 5.3 with some modifications to clarify the Rule's applicability to lawyers in legal departments and legal seervice organizations who possess managerial authority comparable to that possessed by partners in private practice. In the two places where the Model Rule refers to nonlawyers acting in conformity with the "professional obligations of the lawyer," we have instead referred to the nonlawyer acting in conformity "with these Rules."

Changes Made to 1997 Committee Preliminary Draft In Response to Comments

The Preliminary Draft limited the lawyer's Rule 5.3 duties to the actions of nonlawyer employees. The Committee voted to return to the Model Rule formulation that makes the Rule applicable to "nonlawyers employed or retained or associated with a lawyer, law firm, legal department or other legal service organization."

Comments Received After September 2000 Draft, Committee Response, and Changes Made

The Committee has modified Paragraph (a) and Comment [1] to eliminate the specific references to legal departments and legal service organizations, because the definition of a law firm in Rule 1.0(d) already includes such organizations. A conforming change was made to Paragraph (c)(1)(i). While eliminating the redundancy, the Committee also conformed the wording of Paragraphs (a) and (c)(1)(i) to the Ethics 2000 Commission proposal. No change in substance is intended.

PROPOSED RULE 5.4
PROFESSIONAL INDEPENDENCE OF A LAWYER

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement;

which (4) a lawyer may share a court-awarded fee with a client represented in the matter for the fee was awarded or with a non-profit organization which employed or retained the lawyer in the matter for which the fee was awarded;

(5) a lawyer who is a full-time employee of a client may share a legal fee with the client to the extent necessary to reimburse the client for the actual cost to the client of permitting the lawyer to represent another client while continuing in the full-time employ of the client with whom the fee will be shared; and

(6) a lawyer may pay to a registered non-profit intermediary organization a referral fee calculated by reference to a reasonable percentage of the fee paid to the lawyer by the client referred to the lawyer by the intermediary organization.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or professional limited liability company authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or ownership interest of the lawyer for a reasonable time during administration;
(2) a nonlawyer is a member of the governing board or an officer thereof; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

COMMENT

[1] The provisions of this Rule largely express the traditional limitations on sharing fees and the co-ownership of law practices by nonlawyers. These limitations are to protect the lawyer's

professional independence of judgment. The rule recognizes several exceptions to the general prohibition against fee splitting with nonlawyers. These are situations in which there is little risk of harm resulting from lay attempts to interfere with the independent professional judgment of the lawyer.

[2] Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements must not interfere with the lawyer's professional judgment.

DEFINITIONAL CROSS-REFERENCES

"Firm" and "Law Firm" See Rue 1.0(d)
"Partner" See Rule 1.0(h)
"Reasonable" See Rule 1.0(i)

COMMITTEE NOTES

Comparison To Current Tennessee Ethics Rules

Paragraph (a): With the exception of subparagraphs (4), (5), and (6), paragraph (a) is substantially identical to DR 3-102(A). There are no counterparts in the Disciplinary Rules to subparagraphs (4), (5), and (6).

Paragraph (a)(4) is more permissive than the holding in Tennessee Formal Ethics Opinion 91-F-125 which permits governmental organizations to be awarded attorneys fees in excess of the pro rata salary of the lawyers who handled the case. The Proposed Rule effectively extends the holding in Formal Ethics Opinion 91-F-125 to all non-profit organizations which employ or retain counsel to act on behalf of the organization or its members or beneficiaries.

The issue addressed by subparagraph (a)(5) is addressed by Tennessee Formal Ethics Opinions 83-F-52 and 84-F-80 which appear to permit fee-sharing to the extent necessary to recoup the salary of a lawyer loaned by one for-profit organization to another. Although those opinions involved the loan of a lawyer to an affiliated company, there is nothing in the reasoning of the board suggesting such cost-recovery should be restricted to such cases.

Paragraph (a)(6) extends to all approved non-profit intermediary organizations the permission now granted to bar association-operated lawyer referral services to charge lawyers a referral fee based on a percentage of the fee they are paid by clients referred to them by the service. See Tennessee Formal Ethics Opinions 88-F-115 and 88-F-115(a).

Paragraph (b): Paragraph (b) is substantially identical to DR 3-103(A).

Paragraph (c): Paragraph (c) is substantially identical to DR 5-107(B).

Paragraph (d): Paragraph (d) is substantially identical to DR 5-107(C).

Comparison To ABA Model Rules

Paragraph (a): Except for the addition of subparagraphs (4), (5), and (6), paragraph (a) is identical to ABA Model Rule 5.4(a). Subparagraph (a)(4) codifies ABA Formal Opinion 93-374.

The rationale is that there is little risk of the harms normally associated with fee-sharing between lawyers and nonlawyers. Subparagraph (a)(5) codifies ABA Formal Opinion 95-392. The rationale is that the cost recovery poses little risk of the harms normally associated with fee-sharing between lawyers and nonlawyers.

Paragraph (b): Paragraph (b) is identical to ABA Model Rule 5.4(b).

Paragraph (c): Paragraph (c) is identical to ABA Model Rule 5.4(c).

Paragraph (d): Paragraph (d) is identical to ABA Model Rule 5.4(d) except for the issue of the specific reference to limited liability companies and the deletion of the catchall reference to "other incorporated association."

Changes Made to 1997 Committee Preliminary Draft In Response to Comments

No changes in the text of the Rule, except for the deletion in paragraph (D) of the catchall reference to "other incorporated association." Also deleted as surplusage were Comments [2], [3], and [4].

Due to changes made in Proposed Rule 7.6, conforming changes were made in paragraph (a)(6).

Comments Received After September 2000 Draft, Committee Response, and Changes Made

No comments or changes.

PROPOSED RULE 5.5
UNAUTHORIZED PRACTICE OF LAW

A lawyer shall not:

(a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or

(b) assist a person in the performance of activity that constitutes the unauthorized practice of law.

COMMENT

[1] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons.

[2] Paragraph (b) does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3. Likewise, it does not prohibit lawyers from providing professional advice and instruction to nonlawyers whose employment requires knowledge of law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

[3] A lawyer does not assist the unauthorized practice of law if he or she advises a client with respect to whether an activity constitutes the unauthorized practice of law, accepts an unsolicited referral of a client from a person whose prior involvement in the matter constituted the unauthorized practice of law, or defends a person against charges that he or she has engaged in the unauthorized practice of law.

DEFINITIONAL CROSS-REFERENCES

None.

COMMITTEE NOTES

Comparison To Current Tennessee Ethics Rules

Paragraph (a): Paragraph (a) is substantively the same as DR 3-101 (B).

Paragraph (b): Paragraph (b) is substantively the same as DR 3-101(A).

Comparison To ABA Model Rules

Paragraph (a): Paragraph (a) is identical to ABA Model Rule 5.5(a).

Paragraph (b): Paragraph (b) is substantively the same as ABA Model Rule 5.5(b).

Changes Made to 1997 Committee Preliminary Draft In Response to Comments

Minor editorial changes only.

Comments Received After September 2000 Draft, Committee Response, and Changes Made

Based on its revision of Proposed Rule 7.6 concerning intermediary organizations, the Committee has deleted Paragraph (b)(1), as such issues would now be treated outside these Rules. Upon making this revision, the Committee concluded that the retention of Paragraph (b)(2) was not necessary, particularly as it would be a non-uniform provision. No change in the substance of the Proposed Rules is intended.

PROPOSED RULE 5.6
RESTRICTIONS ON RIGHT TO PRACTICE

A lawyer shall not participate in offering or making:

(a) a partnership or employment agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties.

COMMENT

[1] An agreement restricting the right of a lawyer to practice after leaving a firm not only limits the lawyer's professional autonomy, but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.

[2] Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.

[3] This Rule does not apply to prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.

DEFINITIONAL CROSS-REFERENCES

None.

COMMITTEE NOTES

Comparison To Current Tennessee Ethics Rules

The Proposed Rule is substantively similar to DR 2-108.

Comparison To ABA Model Rules

The Proposed Rule is identical to the ABA Model Rule 5.6.

Changes Made to 1997 Committee Preliminary Draft In Response to Comments

No changes.

Comments Received After September 2000 Draft, Committee Response, and Changes Made

No comments or changes.

PROPOSED RULE 5.7
RESPONSIBILITIES REGARDING LAW-RELATED SERVICES

(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

(2) by a separate entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services of the separate entity are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

COMMENT

[1] When a lawyer performs law-related services or controls an organization that does so, there exists the potential for ethical problems. Principal among these is the possibility that the person for whom the law-related services are performed fails to understand that the services may not carry with them the protections normally afforded as part of the client-lawyer relationship. The recipient of the law-related services may expect, for example, that the protection of client confidences, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provision of law-related services when that may not be the case.

[2] Rule 5.7 applies to the provision of law-related services by a lawyer even when the lawyer does not provide any legal services to the person for whom the law-related services are performed. The Rule identifies the circumstances in which all of the Rules of Professional Conduct apply to the provision of law-related services. Even when those circumstances do not exist, however, the conduct of a lawyer involved in the provision of law-related services is subject to those Rules that apply generally to lawyer conduct, regardless of whether the conduct involves the provision of legal services. See, e.g., Rule 8.4.

[3] When law-related services are provided by a lawyer under circumstances that are not distinct from the lawyer's provision of legal services to clients, the lawyer in providing the law-related services must adhere to the requirements of the Rules of Professional Conduct as provided in Rule 5.7(a)(1).

[4] Law-related services also may be provided through an entity that is distinct from that through which the lawyer provides legal services. If the lawyer individually or with others has control of such an entity's operations, the Rule requires the lawyer to take reasonable measures to assure that each person using the services of the entity knows that the services provided by the entity are not legal services and that the Rules of Professional Conduct that relate to the client-lawyer relationship do not apply. A lawyer's control of an entity extends to the ability to direct its operation. Whether a lawyer has such control will depend upon the circumstances of the particular case.

[5] When a client-lawyer relationship exists with a person who is referred by a lawyer to a separate law-related service entity controlled by the lawyer, individually or with others, the lawyer must comply with Rule 1.8(a).

[6] In taking the reasonable measures referred to in paragraph (a)(2) to assure that a person using law-related services understands the practical effect or significance of the inapplicability of the Rules of Professional Conduct, the lawyer should communicate to the person receiving the law-related services, in a manner sufficient to assure that the person understands the significance of the fact, that the relationship of the person to the business entity will not be a client-lawyer relationship. The communication should be made before entering into an agreement for provision of or providing law-related services, and preferably should be in writing.

[7] The burden is upon the lawyer to show that the lawyer has taken reasonable measures under the circumstances to communicate the desired understanding. For instance, a sophisticated user of law-related services, such as a publicly held corporation, may require a lesser explanation than someone unaccustomed to making distinctions between legal services and law-related services, such as an individual seeking tax advice from a lawyer-accountant or investigative services in connection with a lawsuit.

[8] Regardless of the sophistication of potential recipients of law-related services, a lawyer should take special care to keep separate the provision of law-related and legal services in order to minimize the risk that the recipient will assume that the law-related services are legal services. The risk of such confusion is especially acute when the lawyer renders both types of services with respect to the same matter. Under some circumstances the legal and law-related services may be so closely entwined that they cannot be distinguished from each other, and the requirement of disclosure and consultation imposed by paragraph (a)(2) of the Rule cannot be met. In such a case a lawyer will be responsible for assuring that both the lawyer's conduct and, to the extent required by Rule 5.3, that of nonlawyer employees in the distinct entity which the lawyer controls complies in all respects with the Rules of Professional Conduct.

[9] A broad range of economic and other interests of clients may be served by lawyers' engaging in the delivery of law-related services. Examples of law-related services include providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting.

[10] When a lawyer is obliged to accord the recipients of such services the protections of those Rules that apply to the client-lawyer relationship, the lawyer must take special care to heed the proscriptions of the Rules addressing conflict of interest (Rules 1.7 through 1.11, especially Rules 1.7(b) and 1.8(a), (b), and (f)), and to scrupulously adhere to the requirements of Rule 1.6 relating to disclosure of confidential information. The promotion of the law-related services must also in all respects comply with Rules 7.1 through 7.3, dealing with advertising and solicitation. In that regard, lawyers should take special care to identify the obligations that may be imposed as a result of a jurisdiction's decisional law.

[11] When the full protections of all of the Rules of Professional Conduct do not apply to the provision of law-related services, principles of law external to the Rules, for example, the law of principal and agent, govern the legal duties owed to those receiving the services. Those other legal principles may establish a different degree of protection for the recipient with respect to confidentiality of information, conflicts of interest and permissible business relationships with clients. See also Rule 8.4 (Misconduct).

DEFINITIONAL CROSS-REFERENCES

"Knows" See Rule 1.0(f)
"Reasonably" and "Reasonable" See Rule 1.0(i)

COMMITTEE NOTES

Comparison To Current Tennessee Ethics Rules

There is no counterpart to this Rule in the Disciplinary Rules. Tennessee Formal Ethics Opinions 82-F-36 and 94-F-135 permit lawyers to engage in law-related businesses but require that all aspects of the law-related business be conducted in accordance with the Code of Professional Responsibility. The Proposed Rule carves out some exceptions to this requirement.

Comparison to ABA Model Rules

Proposed Rule 5.7 is identical to ABA Model Rule 5.7.

Changes Made to 1997 Committee Preliminary Draft In Response to Comments

In response to considerable comment, the Committee reconsidered its decision to codify the holdings in Tennessee Formal Ethics Opinions 82-F-36 and 94-F-135 and has now approved adoption of ABA Model Rule 5.7.

As proposed in the Preliminary Draft, Rule 5.7 read as follows:

(A) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services by

(1) the lawyer or by another lawyer or person with whom the lawyer is associated in a law firm; or

(2) by a separate entity controlled by the lawyer individually or with others.

(B) "Law-related services" are services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

Comments Received After September 2000 Draft, Committee Response, and Changes Made

No comments or changes.

CHAPTER 6
PUBLIC SERVICE
PROPOSED RULE 6.1
PRO BONO PUBLICO REPRESENTATION

A lawyer should render pro bono publico legal services. In fulfilling this responsibility, the lawyer should:

(a) provide a substantial portion of such services without fee or expectation of fee to:

(1) persons of limited means; or

(2) charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means; and

(b) provide any additional services through:

(1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;

(2) delivery of legal services at a substantially reduced fee to persons of limited means; or

(3) participation in activities for improving the law, the legal system or the legal profession.

(c) In addition to providing pro bono legal services, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

COMMENT

[1] Every lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. The actual amount of pro bono legal service a lawyer provides is left to the sound professional judgment of each lawyer, but every lawyer should render a reasonable amount of pro bono legal service each year. Services can be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation, such as post-conviction death penalty appeals.

[2] Paragraphs (a)(1) and (2) recognize the critical need for legal services that exists among persons of limited means by providing that a substantial majority of the legal services rendered annually to the disadvantaged be furnished without fee or expectation of fee. Legal services under these paragraphs consist of a full range of activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rule making and the provision of

free training or mentoring to those who represent persons of limited means. The variety of these activities should facilitate participation by government lawyers, even when restrictions exist on their engaging in the outside practice of law.

[3] Persons eligible for legal services under paragraphs (a)(1) and (2) are those who qualify for participation in programs funded by the Legal Services Corporation and those whose incomes and financial resources are slightly above the guidelines utilized by such programs but, nevertheless, cannot afford counsel. Legal services can be rendered to individuals or to organizations such as homeless shelters, battered women's centers and food pantries that serve those of limited means. The term "governmental organizations" includes, but is not limited to, public protection programs and sections of governmental or public sector agencies.

[4] Because service must be provided without fee or expectation of fee, the intent of the lawyer to render free legal services is essential for the work performed to fall within the meaning of paragraphs (a)(1) and (2). Accordingly, services rendered cannot be considered pro bono if an anticipated fee is uncollected, but the award of statutory attorney’s fees in a case originally accepted as pro bono would not disqualify such services from inclusion under this section. Lawyers who do receive fees in such cases are encouraged to contribute an appropriate portion of such fees to organizations or projects that benefit persons of limited means. In some cases, a fee paid by the government to an appointed lawyer will be so low relative to what would have been a reasonable fee -- as in post-conviction death penalty cases -- that the lawyer should be credited for the purpose of this rule as having rendered the services without fee.

[5] While it is possible for a lawyer to fulfill the annual responsibility to perform pro bono services exclusively through activities described in paragraphs (a)(1) and (2), to the extent that any hours of service remained unfulfilled, the remaining commitment can be met in a variety of ways as set forth in paragraph (b). Constitutional, statutory or regulatory restrictions may prohibit or impede government and public sector lawyers and judges from performing services the pro bono services outlined in paragraphs (a)(1) and (2). Accordingly, where those restrictions apply, government and public sector lawyers and judges may fulfill their pro bono responsibility by performing services outlined in paragraph (b).

[6] Paragraph (b)(1) includes the provision of certain types of legal services to those whose incomes and financial resources place them above limited means. It also permits the pro bono attorney to accept a substantially reduced fee for services. Examples of the types of issues that may be addressed under this paragraph include First Amendment claims, Title VII claims and environmental protection claims. Additionally, a wide range of organizations may be represented, including social service, medical research, cultural and religious groups.

[7] Paragraph (b)(2) covers instances in which attorneys agree to and receive a modest fee for furnishing legal services to persons of limited means. Participation in judicare programs and acceptance of court appointments in which the fee is substantially below a lawyer's usual rate are encouraged under this section.

[8] Paragraph (b)(3) recognizes the value of lawyers engaging in activities that improve the law, the legal system or the legal profession. Serving on bar association committees, serving on boards of pro bono or legal services programs, taking part in Law Day activities, acting as a continuing legal education instructor, a mediator or an arbitrator and engaging in legislative lobbying to improve the law, the legal system or the profession are a few examples of the many activities that fall within this paragraph.

[9] Because the provision of pro bono services is a professional responsibility, it is the individual ethical commitment of each lawyer. Nevertheless, there may be times when it is not feasible for a lawyer to engage in pro bono services. At such times a lawyer may discharge the pro bono responsibility by providing financial support to organizations providing free legal services to persons of limited means. Such financial support should be reasonably equivalent to the value of the hours of service that would have otherwise been provided. In addition, at times it may be more feasible to satisfy the pro bono responsibility collectively, as by a firm's aggregate pro bono activities.

[10] Because the efforts of individual lawyers are not enough to meet the need for free legal services that exists among persons of limited means, the government and the profession have instituted additional programs to provide those services. Every lawyer should financially support such programs, in addition to either providing direct pro bono services or making financial contributions when pro bono service is not feasible.

[11] Because this Rule states an aspiration rather than a duty, it is not intended to be enforced through disciplinary process.

DEFINITIONAL CROSS-REFERENCES

"Substantially" and "Substantial" See Rule 1.0(l)

COMMITTEE NOTES

Comparison To Current Tennessee Ethics Rules

There is no counterpart to the Proposed Rule in the Disciplinary Rules. EC 2-25 states that the "basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer. . . . Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged." EC 8-9 states that "[t]he advancement of our legal system is of vital importance in maintaining the rule of law . . . [and] lawyers should encourage, and should aid in making, needed changes and improvements." EC 8-3 states that "[t]hose persons unable to pay for legal services should be provided needed services."

Comparison To ABA Model Rules

The Proposed Rule is identical to ABA Model Rule 6.1 except that the Proposed Rule does not specify a target with respect to the amount of pro bono legal service each lawyer should render each year. The target in ABA Model Rule 6.1 is 50 hours each year.

Changes Made to 1997 Committee Preliminary Draft In Response to Comments

No changes.

Comments Received After September 2000 Draft, Committee Response, and Changes Made

The Memphis Bar Association has voiced a concern about what it perceives to be a contradiction between the precatory language of the Rule and the statement in Comment [11] that states that the responsibility set forth in the Rule is not intended to be enforced through the disciplinary process. Although the Committee believes that Comment [11] is consistent with the

aspirational nature of the Rule, it has modified Comment [11] to more clearly make both points -- that the Rule is aspirational and that, as a result, it is not intended to be enforced through the disciplinary process.

PROPOSED RULE 6.2
ACCEPTING COURT APPOINTMENTS

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

(a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law;

(b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or

(c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

COMMENT

[1] A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer's freedom to select clients is, however, qualified. All lawyers have a responsibility to assist in providing *pro bono publico* service. See Rule 6.1. An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients. A lawyer may also be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services.

Appointed Counsel

[2] For good cause a lawyer may seek to decline an appointment to represent a person who cannot afford to retain counsel or whose cause is unpopular. Good cause exists if the lawyer could not handle the matter competently, see Rule 1.1, or if undertaking the representation would result in an improper conflict of interest, for example, when the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client. A lawyer may also seek to decline an appointment if acceptance would be unreasonably burdensome, for example, when it would impose a financial sacrifice so great as to be unjust.

[3] An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty and confidentiality, and is subject to the same limitations on the client-lawyer relationship, such as the obligation to refrain from assisting the client in violation of the Rules.

DEFINITIONAL CROSS-REFERENCES

"Tribunal" See Rule 1.0(m)
"Unreasonable" See Rule 1.0(i)

COMMITTEE NOTES

Comparison To Current Tennessee Ethics Rules

There is no counterpart to the Proposed Rule in the Disciplinary Rules. EC 2-29 states that when a lawyer is "appointed by a court or requested by a bar association to undertake representation of a person unable to obtain counsel, whether for financial or other reasons, the

lawyer should not seek to be excused from undertaking the representation except for compelling reason. Compelling reasons do not include such factors as the repugnance of the subject matter of the proceeding, the identity or position of a person involved in the case, the belief of the lawyer that the defendant in a criminal proceeding is guilty, or the belief of the lawyer regarding the merits of the civil case." EC 2-30 states that "a lawyer should decline employment if the intensity of the lawyer's personal feelings, as distinguished from a community attitude, may impair his effective representation of a prospective client."

Comparison To ABA Model Rules

The Proposed Rule is identical to ABA Model Rule 6.2.

Changes Made to 1997 Committee Preliminary Draft In Response to Comments

Additional details that were included in the Preliminary Draft were deleted so that the Rule would conform with the ABA Model Rule. The additional detail was not sufficiently important to warrant departing from the Model Rule.

Comments Received After September 2000 Draft, Committee Response, and Changes Made

No comments or changes.

PROPOSED RULE 6.3
MEMBERSHIP IN LEGAL SERVICES ORGANIZATION

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:

(a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rule 1.7; or

(b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

COMMENT

[1] Lawyers should be encouraged to support and participate in legal service organizations. A lawyer who is an officer or a member of such an organization does not thereby have a client-lawyer relationship with persons served by the organization. However, there is potential conflict between the interests of such persons and the interests of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board of a legal services organization, the profession's involvement in such organizations would be severely curtailed.

[2] It may be necessary in appropriate cases to reassure a client of the organization that the representation will not be affected by conflicting loyalties of a member of the board. Established, written policies in this respect can enhance the credibility of such assurances.

DEFINITIONAL CROSS-REFERENCES

"Knowingly" See Rule 1.0(f)
"Law Firm" See Rule 1.0(d)
"Material" See Rule 1.0(g)

COMMITTEE NOTES

Comparison To Current Tennessee Ethics Rules

There is no counterpart to this Rule in the Disciplinary Rules.

Comparison To ABA Model Rules

The Proposed Rule is identical to ABA Model Rule 6.3.

Changes Made to 1997 Committee Preliminary Draft In Response to Comments

No changes.

Comments Received After September 2000 Draft, Committee Response, and Changes Made

No comments or changes.

PROPOSED RULE 6.4
LAW REFORM ACTIVITIES AFFECTING CLIENT INTERESTS

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefitted by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.

COMMENT

Lawyers involved in organizations seeking law reform generally do not have a client-lawyer relationship with the organization. Otherwise, it might follow that a lawyer could not be involved in a bar association law reform program that might indirectly affect a client. See also Rule 1.2(B). For example, a lawyer specializing in antitrust litigation might be regarded as disqualified from participating in drafting revisions of rules governing that subject. In determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other Rules, particularly Rule 1.7. A lawyer is professionally obligated to protect the integrity of the program by making an appropriate disclosure within the organization when the lawyer knows a private client might be materially benefitted.

DEFINITIONAL CROSS-REFERENCES

"Knows" See Rule 1.0(f)
"Materially" See Rule 1.0(g)

COMMITTEE NOTES

Comparison To Current Tennessee Ethics Rules

There is no counterpart to this Rule in the Disciplinary Rules.

Comparison To ABA Model Rules

The Proposed Rule is identical to ABA Model Rule 6.4.

Changes Made to 1997 Committee Preliminary Draft In Response to Comments

No changes.

Comments Received After September 2000 Draft, Committee Response, and Changes Made

No comments or changes.

CHAPTER 7
INFORMATION ABOUT LEGAL SERVICES

PROPOSED RULE 7.1
COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

A lawyer shall not make a false or misleading communication about the lawyer, the lawyer's services, the lawyer's charges for fees or costs, or the law as relates to the services the lawyer will provide. A communication is false or misleading if it:

(a) contains a material misrepresentation of fact or law, omits a fact necessary to make the statement considered as a whole not materially misleading; or

(b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; or

(c) compares the lawyer's services or fees with other lawyers' services or fees, unless the comparison can be factually substantiated.

COMMENT

[1] This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2 and solicitations directed to specific recipients permitted by Rule 7.3. Whatever means are used to make known a lawyer's services, statements about them should be truthful The prohibition in paragraph (b) of statements that may create an "unjustified expectation" would ordinarily preclude advertisements about results obtained on behalf of a client, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts, and advertisements containing client endorsements. Such information may create the unjustified expectation that similar results can be obtained for others without reference to the specific factual and legal circumstances.

DEFINITIONAL CROSS-REFERENCES

"Consult" and "Consultation" See Rule 1.0(c)
"Material" and "Materially" See Rule 1.0(g)
"Reasonable" See Rule 1.0(i)

COMMITTEE NOTES

Comparison To Current Tennessee Ethics Rules

The Proposed Rule is substantially similar to DR 2-101(A), except that the Proposed Rule embraces not only communications about the lawyer and the lawyer's services, but also communications about "the lawyer's charges for fees and costs" and communications about "the law as relates to the services the lawyer will provide."

The Proposed Rule does not include the long list of permitted information contained in DR 2-101(B). If true, none of the information listed in DR 2-101(B)(1) through (19) would be likely to mislead a prospective client. Communicating such information, therefore, would not be prohibited by the Proposed Rule.

Paragraph (c) (which prohibits a comparison of fees unless it can be factually substantiated) and Proposed Rule 1.5(a)(1)(i) (which adds "prior advertisements or statements by the lawyer with respect the lawyer's fees or charges for costs" as a factors to be considered in determining the reasonableness of a fee or a charge for costs differ markedly from the current Disciplinary Rules, DR 2-101(B)(20) through (25) and DR 2-101(I) and (J).

Comparison To ABA Model Rules

The Proposed Rule is identical to ABA Model Rule 7.1 except that the coverage of the Proposed Rule has been broadened to cover not only communications about the lawyer and the lawyer's services, but also communications about "the lawyer's charges for fees and costs" and communications about "the law as relates to the services the lawyer will provide."

Also Paragraph (c) addresses comparisons of a lawyer's fees with those charged by other lawyers as well as comparisons of the lawyer's services with other lawyer's services.

Changes Made to 1997 Committee Preliminary Draft In Response to Comments

The Committee deleted the reference in Paragraph (A) to the rendering of an opinion with respect to a material issue that could not be reasonably justified in light of facts known to the lawyer at the time the opinion was rendered. The Committee concluded that this extra detail was unnecessary.

Comments Received After September 2000 Draft, Committee Response, and Changes Made

In response to concerns voiced by the Memphis Bar Association and the Tennessee Trial Lawyers Association, the Committee recommends the deletion of Paragraphs (d)(2) and (3) and the incorporation of Paragraph (d)(1) into Paragraph (c). The Committee concluded that Paragraph (d)(2) is unnecessary because Paragraph (a) already prohibits false and misleading statements about the lawyer's services and fees, which, of course, would include false or misleading statements about initial consultations. The Committee deleted Paragraph (d)(3) because it questions the efficacy of such a general warning and believes that clients are adequately protected by enforcement of the requirements in Rule 1.5 that a lawyer's fee be reasonable and that the basis or rate of the fee be explained to the client.

PROPOSED RULE 7.2
ADVERTISING AND OTHER COMMUNICATIONS NOT DIRECTED TO SPECIFICALLY IDENTIFIED RECIPIENTS

(a) Subject to the requirements of paragraphs (b) through (e) below and Rules 7.1, 7.4, and 7.5, a lawyer may advertise professional services or seek referrals through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor advertising, radio or television, world wide web site, or other forms of communication not directed to specifically identified recipients.

(b) Within three days after the publication, distribution, or dispatch of an advertisement or a communication not directed to a specifically identified recipient, the lawyer shall file a copy of the advertisement or communication with the Board of Professional Responsibility, provided, however, that such filing is not required for any communication that only includes the name, address and profession of the lawyer or has been exempted from the filing requirement by the Board of Professional Responsibility.

(1) If communications which are similar in all material respects are published or displayed more than once or distributed to more than one person, the lawyer may comply with this requirement by filing a single copy of the communication.

(2) If a communication which has previously been filed with the Board is changed in any material respect, notice of the changes shall be filed with the Board within three days after its publication, distribution, or dispatch.

(c) A lawyer shall not give anything of value to a person for recommending or publicizing the lawyer's services except that a lawyer may:

(1) pay the reasonable costs of advertisements or other communications permitted by this Rule, Rule 7.3 or 7.5;

(2) pay the usual charges of a registered intermediary organization as permitted by Rule 7.6;

(3) pay a sponsorship fee or make a contribution to a charitable or other non-profit organization in return for which the lawyer will be given publicity as a lawyer;

(4) pay for a law practice in accordance with Rule 1.17.

(d) Except for communications by registered intermediary organizations, any communication subject to this Rule or Rule 7.3(b) shall include the name and office address of at least one lawyer or law firm assuming responsibility for the communication.

COMMENT

[1] This Rule governs general advertising through public media and other communications that are not directed to specifically identified individuals. The Rule encompasses all possible media through which such communications may be directed, including print, broadcasting, and computer-driven technology. Communications that are directed to specifically identified recipients are governed by Rule 7.3.

[2] To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.

[3] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

[4] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant.

[5] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

Record of Advertising

[6] Paragraph (b) requires that a lawyer file a copy of any advertisement or other communication governed by this Rule with the Board of Professional Responsibility within three days after publication, distribution, or dispatch. A lawyer may comply with the filing requirement of paragraph (b) by complying with guidelines that may be adopted by the Board of Professional Responsibility concerning appropriate methods by which a lawyer may provide the Board with notice of communications made by way of web sites, e-mail, or other electronic forms of communication or of changes to such communications. This Rule does not require that communications be subject to review prior to dissemination, although a lawyer is free to request such a review from the Board. This Rule provides the Board an opportunity to monitor lawyer communications to the public while not placing any sort of prior restraint on publication.

Paying Others to Recommend a Lawyer

[7] A lawyer is allowed to pay for advertising permitted by this Rule and for the purchase of a law practice in accordance with the provisions of Rule 1.17, but otherwise is not permitted to pay another person for channeling professional work. This restriction does not prevent an organization or person other than the lawyer from advertising or recommending the lawyer's services. Thus, a legal aid agency or prepaid legal services plan may pay to advertise legal services provided under its auspices. Likewise, a lawyer may participate in not-for-profit lawyer referral programs and pay the usual fees charged by such programs. Paragraph (c) does not prohibit paying

regular compensation to an assistant, such as a secretary, to prepare communications permitted by this Rule.

DEFINITIONAL CROSS-REFERENCES

"Law Firm" See Rule 1.0(d)
"Material" See Rule 1.0(g)
"Reasonable" See Rule 1.0(i)

COMMITTEE NOTES

Comparison To Current Tennessee Ethics Rules

The Proposed Rule differs from the current Disciplinary Rules in the following respects:

a. DR 2-101(B) only permits advertising "distributed in or covering the geographic area or areas in which the lawyer resides or maintains offices." No such limitation is imposed by the Proposed Rule.

b. There is no counterpart in the Proposed Rule to DR 2-101(D), which establishes a special procedure for amendment of DR 2-101(B).

c. There is no counterpart in the Proposed Rule to DR 2-101(E) which requires a lawyer to approve the advertisement in advance of its publication.

d. The Proposed Rule does not include all the detail set forth in DR 2-101(F) about the quality of the copy to be provided to the Board of Professional Responsibility.

e. There is no counterpart in the Proposed Rule to DR 2-101(G) and (H).

f. DR 2-101(C)(1) does not require that an office address be included in every communication.

g. Proposed Rule 7.2(c) is comparable but not identical to DR 2-103(B) which provides "that [a] lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his employment by a client, or as a reward for having made a recommendation resulting in his employment except that he may pay the usual and reasonable fees or dues charged by any of the organizations listed in DR 2-103(D)."

Comparison To ABA Model Rules

The proposed is structurally similar to ABA Model Rule 7.2, but differs substantively in the following respects:

a. In Paragraph (a), "world wide web site" is added to the list of approved media and the catchall phrase "other forms of communication not directed to specifically identified recipients" has been added.

b. In Paragraph (b) we have retained Tennessee's current requirement that the lawyer provide a copy of the communication to the Board of Professional Responsibility within three days after publication or broadcast. The Model Rule does not require filing,

but rather requires the lawyer to maintain a copy or recording for two years after its last publication.

c. Paragraph (c) tracks Model Rule 7.2(c) except that in paragraph (c)(2) we replace the Model rule reference to "not-for-profit lawyer referral service or legal service organization" with a more general reference to "a registered intermediary organization." There is no counterpart in the Model Rule to proposed Paragraph (c)(3) which permits sponsorships and contributions to charitable organizations in return for publicity as a lawyer.

d. Paragraph (d) requires that an advertisement include the name and office address of a lawyer or law firm responsible for its content. ABA Model Rule 7.2(d) only requires the inclusion of the name of a lawyer. This issue was addressed in Tennessee Formal Ethics Opinion 89-F-120.

Changes Made to 1997 Committee Preliminary Draft In Response to Comments

The Committee amended Paragraph (B)(2) to replace the phrase, "a copy of the revised communication shall be filed . . . ," with the phrase, "notice of the changes shall be filed . . . ," to address issues raised in connection with websites. To address the same issues, and to allow the Board of Professional Responsibility the latitude it now exercises to accept such notices electronically, the second sentence of Comment [6] was added.

In keeping with emerging usage, the phrase "Internet website" was replaced with "world wide web site."

Due to changes made in Proposed Rule 7.6, conforming changes were made in Paragraph (C)(2).

Comments Received After September 2000 Draft, Committee Response, and Changes Made

No comments or changes.

PROPOSED RULE 7.3
SOLICITATION AND OTHER COMMUNICATIONS DIRECTED TO SPECIFICALLY IDENTIFIED RECIPIENTS

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

(b) A lawyer shall not solicit professional employment by in person, live telephone, or real-time electronic contact, or by a writing, recording, telegram, facsimile, computer transmission or other mode of communication directed to a specifically identified recipient who has not initiated the contact with the lawyer if:

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

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

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

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

(1) Each communication, including envelopes and self-mailing brochures or pamphlets, shall include the words "THIS IS AN ADVERTISEMENT" as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

COMMENT

[1] There is a potential for abuse inherent in direct in-person or live telephone contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a specifically targeted recipient subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and overreaching.

[2] This potential for abuse inherent in direct in-person, live telephone, or real-time electronic solicitation of prospective clients justifies its prohibition, particularly since lawyer advertising and written and recorded communication permitted under this Rule offer alternative means of conveying necessary information to those who may be in need of legal services. Written and recorded communications which may be mailed or electronically transmitted make it possible for a prospective client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the prospective client to direct in-person live telephone, or real-time electronic persuasion that may overwhelm the client's judgment.

[3] The use of written and recorded communications to transmit information from lawyer to a specifically identified recipient, rather than direct in-person or live telephone contact, will help to assure that the information flows cleanly as well as freely. The contents of communications permitted under this Rule are permanently recorded and filed with the Board of Professional Responsibility. The contents of direct in-person or live telephone conversations between a lawyer to a prospective client can be disputed and are not subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

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

[5] But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 7.1, which involves coercion, duress or harassment within the meaning of Rule 7.3(b)(2), which involves contact with a prospective client who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(2), or which occurs within 30 days after an accident of disaster involving the individual of a member of the individual’s family, is prohibited. Moreover, if after sending a letter or other communication to a client as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the prospective client may violate the provisions of Rule 7.3(b)(1). Communications directed to specifically identified recipients must be identified as advertisements, may need to be marked with other disclaimers, and cannot be formatted or delivered in such a manner as to mislead the recipient about the nature of the communication.

[6] This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties if the lawyer’s purpose is to inform such entities of the lawyer’s willingness to cooperate with the plan in compliance with Rule 7.6. This form of communication is not directed to a prospective client. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which

the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

[7] The requirements in Rule 7.3(c) that certain communications be marked as advertisements and contain other disclaimers do not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.

[8] Rule 7.3 is not intended to apply to communications such as general interest newsletters or announcements of association or affiliation that comply with Rule 7.5. Other types of newsletters, brochures and similar communications sent to specifically identified recipients must comply with Rule 7.3.

DEFINITIONAL CROSS-REFERENCES

"Fraud" See Rule 1.0(e)
"Known" See Rule 1.0(f)
"Material" See Rule 1.0(g)

COMMITTEE NOTES

Comparison To Current Tennessee Ethics Rules

Paragraph (a) differs from DR 2-104 in that it only prohibits in-person, telephonic, and real-time electronic solicitation. All other targeted communications are governed by paragraph (b). DR 2-104(A)(2) extends the prohibition against "solicitation" to include not only in-person, live telephonic, and real-time electronic contact but also any "computer-on-line transmission directed to a specific recipient." The Committee believes that, with exception of real-time contact (e.g., chatroom or instant messaging), on-line communication initiated by a lawyer should be treated as a written communication.

Paragraph (b) includes the prohibition in DR 2-104(C)(1)(a) against written communication within 30 days of an accident.

Paragraph (c) incorporates the regulatory substance of DR 2-104(C)(2).

There is no counterpart to Paragraph (d) in the current Disciplinary Rules. The Committee thought this issue needed to be addressed because of the increased use by firms of newsletters as a vehicle for publicizing the firm's practice.

Comparison To ABA Model Rules

Paragraph (a) is identical to ABA Model Rule 7.3(a) except that the Proposed Rule makes it clear that a lawyer may speak with a prospective client who has initiated the conversation about the lawyer's prospective employment.

Paragraph (b) tracks ABA Model Rule 7.3(b) except that we have added as subparagraph (b)(3) the prohibition in DR 2-104(C)(1)(a) against written communication within 30 days of an accident.

Paragraph (c) imposes numerous restrictions not imposed by Model Rule in that ABA Model Rule 7.3(c), which more simply requires that written solicitations sent to persons known to be in need of legal service in a particular matter include the word "advertising material" on the outside of the envelope.

There is no counterpart to Paragraph (d) in ABA Model Rule 7.3. The Committee thought this issue needed to be addressed because of the increased use by firms of newsletters as a vehicle for publicizing the firm's practice.

There is no counterpart in the Proposed Rule to ABA Model Rule 7.3(D), which permits lawyers to participate with a prepaid legal service plan which uses in-person or telephonic solicitation to sell memberships or subscriptions in the plan so long as there is no solicitation of persons known to be in need of legal services in a particular matter. This issue is addressed in Proposed Rule 7.6 which deals comprehensively with intermediary organizations.

Changes Made to 1997 Committee Preliminary Draft In Response to Comments

No changes.

Comments Received After September 2000 Draft, Committee Response, and Changes Made

On its own motion, the Committee recommends that the prohibition on in-person and live telephone solicitation be extended to real-time electronic contact, such as occurs in a "chatroom" or with instant messaging. The Committee believes that there is a sufficient risk of overreaching in such situations to warrant this prohibition. The ABA Ethics 2000 Commission has similarly recommended that real-time electronic solicitation be banned.

PROPOSED RULE 7.4
COMMUNICATION OF FIELDS OF PRACTICE

Subject to the requirements of Rule 7.1, 7.2, and 7.3,

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.

(b) Except as permitted by paragraphs (c) and (d), a lawyer shall not state that the lawyer is a specialist, specializes or is certified or recognized as a specialist in a particular field of law.

(c) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.

(d) A lawyer who has been certified as a specialist in a field of law by the Tennessee Supreme Court or its Commission on Continuing Legal Education and Specialization may state that the lawyer "is certified as a specialist in [field of law] by the Tennessee Supreme Court." A lawyer so certified may also state that the lawyer is certified as a specialist in that field of law by an organization recognized or accredited by the Tennessee Supreme Court or its Commission on Continuing Legal Education and Specialization as complying with its requirements, provided the statement is made in the following format: "[Lawyer] is certified as a specialist in [field of law] by [organization]."

COMMENT

[1] This Rule permits a lawyer to indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields, or will not accept matters in a specified field or fields, the lawyer is permitted to so indicate.

[2] However, a lawyer may not communicate that the lawyer is a "specialist," practices a "speciality," "specializes in" a particular field, or that the lawyer has been recognized or certified as a specialist in a particular field of law, except as provided by this Rule. Recognition of specialization in patent matters is a matter of long-established policy of the Patent and Trademark Office, as reflected in paragraph (c).

[3] Paragraph (d) permits a lawyer to communicate that he or she is a specialist or has been certified or recognized as a specialist only when the lawyer has been so certified or recognized by the Supreme Court or its Commission on Continuing Legal Education and Specialization. The certification procedures are designed to require that the lawyer demonstrate higher degree of specialized ability and experience than is suggested by general licensure to practice law.

DEFINITIONAL CROSS-REFERENCES

"Substantially" See Rule 1.0(l)

COMMITTEE NOTES

Comparison To Current Tennessee Ethics Rules

Under paragraph (a), contrary to DR 2-101(C), no disclaimer of certification is required if the lawyer does no more than communicate that the lawyer is practicing or limiting his or her practice to particular fields of law.

Paragraph (d) permits lawyers who are certified as a specialist by the Commission on Continuing Legal Education and Specialization to "beef up" their claim and state that they certified by the Tennessee Supreme Court.

Comparison To ABA Model Rules

Paragraph (a) is identical to the first sentence in ABA Model Rule 7.4.

Paragraph (b) differs from ABA Model Rule 7.4 to the extent that it prohibits the lawyer from claiming that he or she is a specialist or specializes in an area of law unless the lawyer is certified as a specialist. The ABA Model Rule permits a claim that one is a specialist so long as the claim is not false or misleading.

Paragraph (c) incorporates the ABA Model Rule exception for patent lawyers, but does not include the exception for admiralty lawyers.

Changes Made to 1997 Committee Preliminary Draft In Response to Comments

The Committee added language to Paragraph (b) more clearly prohibiting statements that a lawyer is "certified or recognized as a specialist."

At the urging of the Tennessee Trial Lawyers Association and a committee of the Board or Professional Responsibility, the Committee amended paragraph (d) by adding the second sentence, permitting statements that a lawyer is certified or recognized as a specialist by national accrediting organizations approved by the Tennessee Supreme Court or its Commission on Continuing Legal Education and Specialization.

Comments Received After September 2000 Draft, Committee Response, and Changes Made

The Commission on Continuing Legal Education and Specialization has vigorously defended the current requirement that lawyers who are not certified as a specialist include a disclaimer to that effect whenever they advertise a practice area, and the Court has recently upheld the constitutionality of the disclaimer requirement. The Commission, however, has acknowledged that it has heard considerable opposition to the requirement, in particular the length of the required statement and the burden in some cases of having to disclaim certification in multiple practice areas. Thus, rather than recommend retention of the disclaimer requirement, the Commission has recommended that the rule be amended to require that every advertisement by a lawyer state: "Tennessee certifies attorneys in some areas. See www.cletn.com or call 615-741-3096."

While supportive of the work of the Commission and its promotion of specialty certification, the Committee persists in its belief that the current disclaimer requirement is ill-advised, and that the best approach to protect the public from confusion about lawyer specialization is to permit lawyers who are properly certified as specialists to say so in their advertising, while at the same time prohibiting those who are not certified from saying either that they are certified or that they are specialists. The Committee does not support the Commission's suggested alternative. In the Committee's judgment, the required statement does not provide potential clients with

information that will prevent them from being misled by a truthful advertisement. Rather, the required statement should properly be viewed as a part of an institutional advertising campaign to educate the public about speciality certification programs. In and of itself, there is nothing wrong with such an educational initiative. The Committee believes, however, that it would be unwise to use the Rules of Professional Conduct to require those lawyers who have chosen to exercise their constitutional right to advertise to carry out this campaign on behalf of the Commission. If such a campaign is needed, its cost should be borne by all lawyers, not just those who advertise. Also, if more public education about lawyer specialization is needed, the Committee would suggest that other forms of institutional advertising might be more effective than the statement proposed by the Commission.

PROPOSED RULE 7.5
FIRM NAMES AND LETTERHEADS

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.

(b) A law firm with offices in more than one jurisdiction may use the same name in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

COMMENT

[1] A firm may be designated by the names of all or some of its members, by the names of deceased or retired members where there has been a continuing succession in the firm's identity or by a trade name such as the "ABC Legal Clinic." A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. Although the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice, use of such names in law practice is acceptable so long as it is not misleading. If a private firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm.

[2] Paragraph (c) does not require a change in a law firm’s name or letterhead when a member of the firm interrupts his or her practice to serve, for example, as an elected member of the Tennessee General Assembly so long as the lawyer reasonably expects to resume active and regular practice with the firm at the end of the legislative session. Such a hiatus from practice is not for a substantial period of time. If, however, a lawyer were to curtail his or her practice and enter public service for a longer period of time, or for an indefinite period of time, the lawyer’s firm would have to alter its name and letterhead.

[3] With regard to paragraph (d), lawyers sharing office facilities, but who are not in fact partners, may not denominate themselves as, for example, "Smith and Jones," for that title suggests partnership in the practice of law.

DEFINITIONAL CROSS-REFERENCES

“Firm” and “Law Firm” See Rule 1.0(d)
“Substantial” See Rule 1.0(l)

COMMITTEE NOTES

Comparison To Current Tennessee Ethics Rules

Unlike the Proposed Rule, which permits the use of trade names so long as they are not misleading, DR 2-102(B) provides that "[a] lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm, except that . . . a firm may use as . . . its name[,] the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession."

The Proposed Rule does not include the requirement in DR 2-102(A) that professional cards, letterheads, or similar professional notices, or devices, be “dignified.”

Paragraph (b) is comparable in substance to DR 2-102(D), which provides that a partnership "shall not be formed or continued between or among lawyers licensed in different jurisdictions unless all enumerations of the members and associates of the firm on its letterhead and in other permissible listings make clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions; however, the same firm name may be used in each jurisdiction."

Paragraph (c) is comparable to DR 2-102(B) except that it does not contain the specific exemption for service in the General Assembly. The Committee’s proposal addresses that issue in the Comment.

Paragraph (d) is substantially identical to DR 2-102(C).

There is no counterpart in the Proposed to DR 2-102(E) that prohibits lawyers who are engaged both in the practice of law and another profession or business from so indicating on their letterheads, office signs or professionalism or from indicating that they are a lawyer in any publication in connection with their other profession.

Comparison To ABA Model Rules

The Proposed Rule is identical to ABA Model Rule 7.5.

Changes Made to 1997 Committee Preliminary Draft In Response to Comments

No changes.

Comments Received After September 2000 Draft, Committee Response, and Changes Made

1. To accommodate use by lawyers and law firms of the Internet, the Committee has added a new sentence to Comment [1] to clarify that a law firm or lawyer may use distinctive website addresses or other comparable professional designations.

2. The Board of Professional Responsibility has recommended the deletion of Rule 7.5 and has more particularly voiced its opposition to permitting law firms to use trade names. The Committee does not believe that trade names are any more inherently misleading than law firm names that include the names of deceased or retired lawyers. Indeed, such firm names are trade

names. If, however, the Court decides that trade names should be prohibited, the solution is not the repeal of Rule 7.5. Rather, Rule 7.5(a) would need to be revised to prohibit, rather than permit, the use of trade names. Apart from the trade name issue, the Committee believes that Paragraphs (b) through (d) provide useful guidance to lawyers about specific problems involving law firm names. Indeed the issues addressed by these paragraphs are currently addressed in DR 2-102(B), (C), and (D).

PROPOSED RULE 7.6
INTERMEDIARY ORGANIZATIONS

(a) An intermediary organization is an lawyer-advertising cooperative, lawyer referral service, prepaid legal insurance provider or a similar organization the business or activities of which includes the referral of its customers, members, or beneficiaries to lawyers or the payment for or provision of legal services to the organization's customers, members or beneficiaries in matters for which the organization does not bear ultimate responsibility.

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

(1) the organization:

(i) is owned or controlled by the lawyer, a law firm with which the lawyer is associated, or a lawyer with whom the lawyer is associated in a firm;

(ii) is engaged in the unauthorized practice of law;

(iii) engages in marketing activities that are false or misleading or are otherwise prohibited by the Board of Professional Responsibility; or

(iv) has not registered with the Board of Professional Responsibility and complied with all requirements imposed by the Board; or

(2) the lawyer will be unable to represent the client in compliance with these Rules.

COMMENT

[1] For there to be equal access to justice, there must be equal access to lawyers. For there to be equal access to lawyers, potential clients must be able to find lawyers and have the economic resources needed to pay the lawyers a reasonable fee for their services. In an effort to assist prospective clients to find and be able to retain competent lawyers, lawyers and nonlawyers alike have formed a variety of organizations designed to bring clients and lawyers together and to provide a vehicle through which the lawyers can be fairly compensated and the clients can afford the services they need. Some of these intermediary organizations operate as charities. Others operate as businesses. Because they ultimately bear the liability of their insureds, liability insurance companies which pay for or otherwise provide lawyers to defend their insureds are not intermediary organizations within the meaning of this Rule.

[2] The requirements set forth in paragraph (b) are intended to protect the clients who are represented by lawyers to whom they have been referred or assigned by an intermediary organization. It is the responsibility of each lawyer who would participate in the activities of an intermediary organization to act reasonably to ascertain that the organization meets the standards set forth in paragraph (b). Normally it will be sufficient for the lawyer to ascertain that the organization has registered with the Board of Professional Responsibility and to review the materials the organization has filed with the Board in compliance with the Board's reporting requirements. If, however, by virtue of his or her participation in the activities of an intermediary organization, a lawyer comes to know that the organization does not meet the standards set forth in paragraph (b), the lawyer shall terminate his or her participation in the activities of the organization and should so advise the Board of Professional Responsibility.

DEFINITIONAL CROSS-REFERENCES

"Firm" and "Law Firm" See Rule 1.0(d)
"Knows" See Rule 1.0(f)
"Reasonably Should Know" See Rule 1.0(k)

COMMITTEE NOTES

Comparison To Current Tennessee Ethics Rules

DR 2-103 currently provides in pertinent part:

(B) A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure the lawyer's employment by a client, or as a reward for having made a recommendation resulting in employment by a client, except that he may pay the usual and reasonable fees or dues charged by any of the organizations listed in DR 2-103(D).

(C) Lawyers shall not request a person or organization to recommend or promote the use of their services or those of their partner or associate, or any other lawyer affiliated with them or their firm, as a private practitioner, except as authorized by DR 2-101, and except that:

(1) Referrals may be requested from a lawyer referral service operated, sponsored, or approved by a bar association and may pay its fees incident thereto.

(2) The lawyer may cooperate with the legal service activities of any of the offices or organizations enumerated in DR 2-103(D)(1) through (4) and may perform legal services for those to whom the lawyer was recommended by it to do such work if:

(a) The person to whom the recommendation is made is a member or beneficiary of such office or organization; and

(b) The lawyer remains free to exercise his or her independent professional judgment on behalf of his client.

(D) Lawyers or their partners or associates or any other affiliated lawyers may be recommended, employed or paid by, or may cooperate with, one of the following offices or organizations that promote the use of their services or those of the partners or associates or other affiliated lawyers if there is no interference with the exercise of independent professional judgment in behalf of the client:

(1) A legal aid office or public defender office:

(a) Operated or sponsored by a duly accredited law school.

(b) Operated or sponsored by a bona fide non-profit community organization.

(c) Operated or sponsored by a governmental agency.

(d) Operated, sponsored, or approved by a bar association.

(2) A military legal assistance office.

(3) A lawyer referral service operated, sponsored, or approved by a bar association.

(4) Any bona fide organization that recommends, furnishes or pays for legal services to it members or beneficiaries provided the following conditions are satisfied:

(a) Such organization, including any affiliate, is so organized and operated that no profit is derived by it from the rendition of legal services by lawyers, and that, if the organization is organized for profit, the legal services are not rendered by lawyers employed, directed, supervised or selected by it except in connection with matters where such organization bears ultimate liability of its member or beneficiary.

(b) Neither lawyers, nor partners, nor associates, nor any other affiliated lawyers, nor any non-lawyer, shall have initiated or promoted such organization for the primary purpose of providing financial or other benefit to such lawyer, partner, associate or affiliated lawyer.

(c) Such organization is not operated for the purpose of procuring legal work or financial benefit for any lawyer as a private practitioner outside of the legal services program of the organization.

(d) The member or beneficiary to whom the legal services are furnished, and not such organization, is recognized as a client of the lawyer in the matter.

(e) Any member or beneficiary who is entitled to have legal services furnished or paid for by the organization may, if such member or beneficiary so desires, select counsel other than that furnished, selected or approved by the organization for the particular matter involved; and the legal service plan of such organization provides appropriate relief for any member or beneficiary who asserts a claim that representation by counsel furnished, selected or approved would be unethical, improper or inadequate under the circumstances of the matter involved and the plan provides an appropriate procedure for seeking such relief.

(f) The lawyer does not know or have cause to know that such organization is in violation of applicable laws, rules of court and other legal requirements that govern its legal service operations.

(g) Such organization has filed with the appropriate disciplinary authority at least annually a report with respect to its legal service plan, if any, showing its terms, its schedule of benefits, its subscription charges, agreements with counsel, and financial results of its legal service activities or, if it has failed to do so, the lawyer does not know or have cause to know of such failure.

If the Proposed Rule is adopted, The Committee recommends that the Court authorize the Board of Professional Responsibility to promulgate regulations governing the registration of and

reporting by intermediary organizations. These requirements might include requirements such as those set out in the more detailed version of this Proposed Rule issued in the Committee's Preliminary Draft, including the following:

(1) That none of the activities of the organization in this state constitutes the unauthorized practice of law; and

(2) That, with respect to referrals of its members, beneficiaries or customers to lawyers who are not employees of the organization, the organization permits the participation of not less than four lawyers licensed to practice in Tennessee, each of whom maintains an office in the geographical area served by the intermediary organization; provided, however, that the organization may require such participating lawyers to

(i) meet reasonable and objectively determinable standards of competence and experience; and

(ii) pay a reasonable participation fee not otherwise prohibited by these Rules; and

(3) That the organization does not engage in false or misleading communication about the nature of its activities as a intermediary organization; and

(4) That the organization's marketing activities are conducted in accordance with these Rules if:

(i) the organization provides any information to current or prospective members, beneficiaries or customers about specific lawyers who are cooperating with the intermediary organization; or

(ii) the organization's marketing activity is directed to a person known to be in need of legal services with respect to a particular matter; and

(5) That the organization does not condition its referral of its members, beneficiaries or customers to lawyers upon a preliminary determination by the organization that the client's claims or defenses have merit or economic value; and

(6) That the organization utilizes reasonable procedures to assure that the lawyers to whom the organization refers its members, beneficiaries or customers are properly licensed and competent to handle the matters referred to them; and

(7) That the organization does not limit the objectives of the representation to be provided by participating lawyers to its members, beneficiaries or customers, or the means to be used to accomplish those objectives, if such limitation would materially impair the lawyer's ability to provide the client with the quality of representation that would be provided to a client who had not been referred to the lawyer by the organization; and

(8) That the organization utilizes reasonable procedures to provide substitute counsel in the event that a lawyer to whom a matter is referred cannot undertake or continue the representation in compliance with these rules; and

(9) That the organization acknowledges that a lawyer who undertakes to represent a member, beneficiary, or customer of the intermediary organization will establish an

attorney-client relationship with the member, beneficiary or customer and agrees that it will not interfere with the lawyer's representation of the client, request or require that the lawyer reveal information protected by Rule 1.6, or request or require that the lawyer take any other action prohibited by these rules; and

(10) That the organization has established reasonable procedures to receive complaints from its members, beneficiaries, or customers about the lawyer to whom they were referred and promptly forwards a report of any such complaint to the Office of Disciplinary Counsel; and

(11) That the organization does not refer fee-generating matters to lawyers prohibited by paragraph (b)(1) from accepting such referrals and, if it is organized for profit, does not permit its lawyer-employees to represent clients in violation of paragraph (b)(2); and

(12) That the organization has registered with the Board of Professional Responsibility and complied with all reporting requirements imposed by the Board for the purpose of enabling lawyers to ascertain from materials on file with the Board whether the organization is a qualified intermediary organization.

Comparison To ABA Model Rules

There is no Model Rule specifically dealing with this topic. Because of this silence the ABA Ethics Committee has held in Formal Ethics Opinion 87-355 (1987) that lawyers may cooperate with for-profit prepaid legal insurance plans provided that the lawyer's representation of the referred can be conducted in accordance with generally applicable of rules of professional conduct. Model Rule 7.3(D), however, expressly recognizes the general legitimacy of lawyers cooperating with intermediary organizations by providing that "a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer which uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan."

Changes Made to 1997 Committee Preliminary Draft In Response to Comments

Rule 5.8 in the Preliminary Draft conditioned a lawyer's right to cooperate with an intermediary organization upon the lawyer acting reasonably to ascertain that the intermediary met twelve distinct characteristics of a "qualified" intermediary organization. Upon further reflection, the Committee concluded that its proposal would impose an unreasonable burden on lawyers, would not provide meaningful protection for the public, and in the end would be inconsistent with the profession's commitment to expanding access to justice by facilitating efforts of intermediary organizations to help prospective clients secure competent and affordable legal representation.

Thus, in Proposed Rule 7.6, the Committee has dropped much of the regulatory detail that was included in Rule 5.8 and recommends that intermediary organizations be required by the Supreme Court to register with the Office of Disciplinary Counsel of the Board of Professional Responsibility and to demonstrate that their operations conform to such standards as the Court approves as necessary for protection of the public. Under Proposed Rule 7.6, the lawyer must only determine that his or her participation will not lead to a violation of any of the generally applicable Rules of Professional Conduct and that the organization is registered with the Office of Disciplinary Counsel. This is a much more manageable inquiry for the lawyer, and the Committee

believes that Tennessee will be better served if intermediary organizations are monitored by the Office of Disciplinary Counsel.

Proposed Rule 5.8 as included in the Preliminary Draft read as follows:

Proposed Rule 5.8
Intermediary Organizations

(A) An intermediary organization is an organization which in the ordinary course of its business or activities refers its customers, members, or beneficiaries to lawyers or pays for or otherwise provides legal services to the organization's customers, members or beneficiaries in matters for which the organization does not bear ultimate responsibility.

(B) A lawyer shall not

(1) seek or accept a fee-generating referral from an intermediary organization by which the lawyer is employed or which is owned or controlled by the lawyer, a law firm with which the lawyer is associated, or a lawyer with whom the lawyer is associated in a firm; or

(2) represent any member, beneficiary, or customer of a for-profit intermediary organization by which the lawyer is employed; or

(3) engage in any of the activities permitted by paragraph (D) in connection with the activities of an intermediary organization which the lawyer knows or should know is not a qualified intermediary organization.

(C) Prior to engaging in any of the activities permitted by paragraph (D), a lawyer shall act reasonably to ascertain that the intermediary organization with which he or she will participate is a qualified intermediary organization. An intermediary organization is a qualified intermediary organization if

(1) none of the activities of the organization in this state constitutes the unauthorized practice of law; and

(2) with respect to referrals of its members, beneficiaries or customers to lawyers who are not employees of the organization, the organization permits the participation of not less than four lawyers licensed to practice in Tennessee, each of whom maintains an office in the geographical area served by the intermediary organization; provided, however, that the organization may require such participating lawyers to

(a) meet reasonable and objectively determinable standards of competence and experience; and

(b) pay a reasonable participation fee not otherwise prohibited by these Rules; and

(3) the organization does not engage in false or misleading communication about the nature of its activities as a intermediary organization; and

(4) the organization's marketing activities are conducted in accordance with these Rules if

(a) the organization provides any information to current or prospective members, beneficiaries or customers about specific lawyers who are cooperating with the intermediary organization; or

(b) the organization's marketing activity is directed to a person known to be in need of legal services with respect to a particular matter; and

(5) the organization does not condition its referral of its members, beneficiaries or customers to lawyers upon a preliminary determination by the organization that the client's claims or defenses have merit or economic value; and

(6) the organization utilizes reasonable procedures to assure that the lawyers to whom the organization refers its members, beneficiaries or customers are properly licensed and competent to handle the matters referred to them; and

(7) the organization does not limit the objectives of the representation to be provided by participating lawyers to its members, beneficiaries or customers, or the means to be used to accomplish those objectives, if such limitation would materially impair the lawyer's ability to provide the client with the quality of representation that would be provided to a client who had not been referred to the lawyer by the organization; and

(8) the organization utilizes reasonable procedures to provide substitute counsel in the event that a lawyer to whom a matter is referred cannot undertake or continue the representation in compliance with these rules; and

(9) the organization acknowledges that a lawyer who undertakes to represent a member, beneficiary, or customer of the intermediary organization will establish an attorney-client relationship with the member, beneficiary or customer and agrees that it will not interfere with the lawyer's representation of the client, request or require that the lawyer reveal information protected by Rule 1.6, or request or require that the lawyer take any other action prohibited by these rules; and

(10) the organization has established reasonable procedures to receive complaints

from its members, beneficiaries, or customers about the lawyer to whom they were referred and promptly forwards a report of any such complaint to the Office of Disciplinary Counsel; and

(11) does not refer fee-generating matters to lawyers prohibited by paragraph (B)(1) from accepting such referrals and, if it is organized for profit, does not permit its lawyer-employees to represent clients in violation of paragraph (B)(2); and

(12) the organization has registered with the Board of Professional Responsibility and complied with all reporting requirements imposed by the Board for the purpose of enabling lawyers to ascertain from materials on file with the Board whether the organization is a qualified intermediary organization.

(D) Except as otherwise prohibited by these rules, a lawyer may participate in the activities of a qualified intermediary organization that is not owned or controlled by the lawyer, a law firm with which the lawyer is associated, or a lawyer with whom the lawyer is associated in a firm as follows:

(1) seek referrals from the organization in compliance with the requirements of Rules 7.1 through 7.5; and

(2) pay reasonable participation fees charged by the organization if such payments conform to the requirements of Rule 5.4(A) and the lawyer does not charge a client who is referred to the lawyer a fee in excess of the fee that the client would have been charged had there not been a referral; and

(3) undertake the representation of a client referred to the lawyer by the organization; and

(4) accept payment of the lawyer's fee by the organization if the client consents after consultation with the lawyer; and

(5) unless otherwise prohibited from doing so by these rules, agree in advance not to charge a client referred to the lawyer by the organization a fee in excess of an amount specified by the organization or to be determined in accordance with a method prescribed by the organization; and

(6) to the extent permitted by Rule 5.5(B) be paid a salary by the organization to provide legal services to its members, beneficiaries or customers.

COMMENT

For 1. For there to be equal access to justice, there must be equal access to lawyers. there to be equal access to lawyers, potential clients must be able to find lawyers and have the economic resources needed to pay the lawyers a reasonable fee for their services. In effort to assist prospective clients to find and be able to retain competent lawyers, lawyers and nonlawyers alike have formed a variety of organizations designed to bring clients and lawyers together and to provide a vehicle through which the lawyers can be fairly compensated and the clients can afford the services they need. Some of these intermediary organizations operate as charities. Others operate as businesses. Because they ultimately bear the liability of their insureds, liability insurance companies which pay for or otherwise provide lawyers to defend their insureds are not intermediary organizations within the meaning of this Rule.

the 2. This rule reflects a judgment that a lawyer should be permitted to participate in activities of an intermediary organization to the extent specified in paragraph (D) so long as the intermediary organization is not controlled by the lawyer (or the lawyer's firm or a lawyer with whom the lawyer is associated in a firm), is not engaged in the unauthorized practice of law, or fails to meet the standards set forth in paragraph (C) for qualified intermediary organizations.

3. The qualifications set forth in paragraph (C) are intended to protect the clients who are represented by lawyers to whom they have been referred or assigned by an intermediary organization. It is the responsibility of each lawyer who would participate in the activities of an intermediary organization to act reasonably to ascertain that the organization meets the standards set forth in paragraph (C). Normally it will be sufficient

for the lawyer to ascertain that the organization has registered with the Board of Professional Responsibility and to review the materials the organization has filed with the Board in compliance with the Board's reporting requirements. If, however, by virtue of his or her participation in the activities of an intermediary organization, a lawyer comes to know that the organization does not meet the standards set forth in paragraph (C), the lawyer shall terminate his or her participation in the activities of the organization and should so advise the Board of Professional Responsibility.

Comments Received After September 2000 Draft, Committee Response, and Changes Made

1. The Committee has modified Paragraph (b)(1)(iii) to replace the reference to "marketing activities prohibited by Rules 7.1, 7.3(b) and 7.3(c)" with a reference to "marketing activities that are false or misleading or otherwise prohibited by the Board of Professional Responsibility." The Committee concluded that some restrictions that are appropriate with respect to direct marketing by a lawyer or law firm may not be appropriate when applied to the marketing activities of an intermediary organization that not owned or controlled by the lawyer. Thus, the only specific restriction mentioned in the Rule is the obvious prohibition against false or misleading marketing. Beyond that, however, the Committee believes that the Court should delegate to the Board of Professional Responsibility the authority to regulate the marketing activities intermediary organizations. In anticipation that the Board would promulgate regulations governing the marketing activities of registered intermediary organization, the Committee has revised the Rule to prohibit a lawyer from accepting referrals or payment of fees from an intermediary organization if the lawyer knows or reasonably should know the organization is engaging in prohibited marketing activities.

2. The Committee has modified Paragraph (b)(1)(iv) to refer more broadly to "requirements," rather than "reporting requirements." Because the Committee anticipates that registered intermediary organizations may be subject to requirements other than a reporting requirement, the reference to reporting requirements was too narrow.

3. The Board of Professional Responsibility has recommended that the criteria for intermediary organizations be included in Rule 7.6. The Committee disagrees because it believes that the Rules of Professional Conduct should only include Rules governing the conduct of lawyers. Indeed, the Committee's primary objection to the current rule is that it attempts to use the ethics rules to indirectly regulate the conduct of intermediary organizations.

4. The Committee believes that the registration requirements for intermediary organizations should be in a separate rule that will be separately enforced by the Board of Professional Responsibility or such other agency as the Court deems appropriate. While the Committee would be honored to work with the Court, the Board of Professional Responsibility, or the Office of Disciplinary Counsel to develop appropriate standards for intermediary organizations and establish an effective registration and reporting system, our primary recommendation is that the Court should separate the regulation of lawyer conduct from the regulation of intermediary organizations. Thus, we cannot support the Board's recommendation that the standards for intermediary organizations be added to Rule 7.6.

CHAPTER 8
MAINTAINING THE INTEGRITY OF THE PROFESSION

PROPOSED RULE 8.1
BAR ADMISSION AND DISCIPLINARY MATTERS

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

(a) knowingly make a false statement of material fact; or

(b) fail to disclose a fact necessary to correct a misapprehension of material fact known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by Rule 1.6.

COMMENT

[1] The duty imposed by this Rule extends to persons seeking admission to the bar as well as to lawyers. Hence, if a person makes a material false statement in connection with an application for admission, it may be the basis for subsequent disciplinary action if the person is admitted, and in any event may be relevant in a subsequent admission application. The duty imposed by this Rule applies to a lawyer's own admission or discipline as well as that of others. Thus, it is a separate professional offense for a lawyer to knowingly make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct. This Rule also requires affirmative clarification of any misunderstanding on the part of the admissions or disciplinary authority of which the person involved becomes aware.

[2] This Rule is subject to the provisions of the Fifth Amendment to the United States Constitution and Article I, Section 9, of the Constitution of Tennessee. A person relying on such a provision in response to a question, however, should do so openly and not use the right of non-disclosure as a justification for failure to comply with this Rule.

[3] A lawyer representing an applicant for admission to the bar, or representing a lawyer who is the subject of a disciplinary inquiry or proceeding, is governed by the rules applicable to the client-lawyer relationship.

DEFINITIONAL CROSS-REFERENCES

“Knowingly” or “Known” See Rule 1.0(f)
“Material” See Rule 1.0(g)

COMMITTEE NOTES

Comparison To Current Tennessee Ethics Rules

DR 1-101(A) provides that a lawyer "is subject to discipline for making a materially false statement in, or deliberately failing to disclose a material fact requested in connection with, an application for admission to the bar." DR 1-101(B) provides that a lawyer "shall not further the

application for admission to the bar of another person known by the lawyer to be unqualified in respect to character, education, or other relevant attribute."

Comparison to ABA Model Rules

The Proposed Rule is identical to ABA Model Rule 8.1.

Changes Made to 1997 Committee Preliminary Draft In Response to Comments

The Committee deleted language in the Preliminary Draft that provided that the Rule 1.6 confidentiality obligation would only trump the Rule 8.1 disclosure obligation in circumstances in which the information was related to the lawyer's representation of a bar applicant or a lawyer subject to the disciplinary proceeding. Now, Rule 1.6 trumps Rule 8.1 in all cases. The change conforms the Proposed Rule to ABA Model Rule 8.1 and Proposed Rule 8.3.

Comments Received After September 2000 Draft, Committee Response, and Changes Made

The Board of Professional has recommended that the Court add to Rule 8.1 the prohibition in DR 1-101(B) against furthering the application for admission of the bar of another person known by the lawyer to be unqualified in respect to character, education, or other relevant attributes. The Committee opposes this recommendation because it forces each lawyer to make a decision that should be made collectively by the Board of Law Examiners. The Committee believes that there are simply too many situations in which one reasonable lawyer will conclude with certainty that an applicant is unfit for admission and another equally reasonable lawyer will conclude with equal certainty to the contrary. The Committee believes that the Board of Law Examiners can adequately protect the public if the Rules require that a lawyer who recommends an applicant for admission be truthful, respond completely and truthfully to inquiries from the Board, and take the initiative to correct any misapprehension that the lawyer knows to have arisen about the applicant's credentials.

PROPOSED RULE 8.2
JUDICIAL AND LEGAL OFFICIALS

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

COMMENT

[1] Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney general, prosecuting attorney and public defender. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

[2] When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.

[3] To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized and to responsibly speak out when necessary to prevent or rectify injustice or to promote needed improvements in the judicial system.

DEFINITIONAL CROSS-REFERENCES

"Knows" See Rule 1.0(f)

COMMITTEE NOTES

Comparison To Current Tennessee Ethics Rules

Paragraph (a): DR 8-102(A) provides that a lawyer "shall not knowingly make false statements of fact concerning the qualifications of a candidate for election or appointment to a judicial office." DR 8-102(B) provided that a lawyer "shall not knowingly make false accusations against a judge or other adjudicatory officer." The Proposed Rule also prohibits making a statement with reckless disregard for its truth or falsity.

Paragraph (b): Paragraph (b) is substantively the same as DR 8-103.

Comparison to ABA Model Rules

The Proposed Rule is identical to ABA Model Rule 8.2.

Changes Made to 1997 Committee Preliminary Draft In Response to Comments

No changes.

Comments Received After September 2000 Draft, Committee Response, and Changes Made

The Board of Professional Responsibility has asked the Court to prohibit lawyers from making "fraudulent" as well as false statements about judges. The Committee disagrees with this recommendation because it believes that political speech about public officials, including judges, cannot constitutionally be banned unless it is false or made with reckless disregard as to the truth. Given the uncertainties associated with the determination of when a statement is fraudulent, as opposed to false, the Committee believes that the broader prohibition would have an unconstitutional chilling effect on lawyer political speech. The Committee does not condone the behavior of a lawyer who makes misleading statements about a judge, but believes that more speech, rather than a broader ban on speech, is the proper remedy.

PROPOSED RULE 8.3
REPORTING PROFESSIONAL MISCONDUCT

(a) A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the Disciplinary Counsel of the Board of Professional Responsibility.

(b) A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the Disciplinary Counsel of the Court of the Judiciary.

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while serving as a member of a lawyer assistance program approved by the Supreme Court of Tennessee or by the Board of Professional Responsibility to the extent that such information would be confidential if it were communicated subject to the attorney-client privilege.

COMMENT

[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

[2] A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

[3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. Similar considerations apply to the reporting of judicial misconduct.

[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the rules applicable to the client-lawyer relationship.

[5] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers' or judges' assistance program. In that circumstance, providing for the confidentiality of such information encourages lawyers and judges to seek treatment through such program. Conversely, without such confidentiality, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. The Rule therefore exempts the lawyer from the reporting requirements of paragraphs (a) and (b) with respect to information that would be privileged if the relationship between the impaired lawyer or judge and the recipient of the information were that of a client and a

lawyer. On the other hand, a lawyer who receives such information would nevertheless be required to comply with the Rule 8.3 reporting provisions to report misconduct if the impaired lawyer or judge indicates an intent to engage in illegal activity, for example, the conversion of client funds to his or her use.

DEFINITIONAL CROSS-REFERENCES

"Substantial" See Rule 1.0(l)

COMMITTEE NOTES

Comparison To Current Tennessee Ethics Rules

DR 1-103(A) provides that "[a] lawyer possessing unprivileged knowledge of a violation of [a Disciplinary Rule] shall report such knowledge to . . .tribunal or other authority empowered to investigate or act upon such violation." The Proposed Rule only requires that a lawyer report misconduct that raises a substantial question about the lawyer's honesty, trustworthiness or fitness to practice law. While DR 1-103(A) only requires reporting if the lawyer possesses unprivileged information, Paragraph (b) of the Proposed Rule provides more generally that a lawyer is not required to report information relating to a client's representation that is protected by Rule 1.6. The principle and basic effect is the same. There is no counterpart in the current Tennessee rule to the exemption from the reporting requirement for lawyers who are members of a lawyer assistance program, but such an exemption has been recognized by Formal Ethics opinions of the Board of Professional Responsibility.

Comparison to ABA Model Rules

The Proposed Rule is identical to ABA Model Rule 8.3, except for the specific reference to the Disciplinary Counsels of the Board of Professional Responsibility and the Court of the Judiciary, and to lawyer assistance programs approved by the Supreme Court of Tennessee or the Board of Professional Responsibility.

Changes Made to 1997 Committee Preliminary Draft In Response to Comments

No changes.

Comments Received After September 2000 Draft, Committee Response, and Changes Made

The Board of Professional Responsibility has asked the Court to delete Paragraph (b) and to modify Paragraph (a) so that a lawyer would only have to report a violation of the Rules of Professional Conduct if the lawyer has "unprivileged" knowledge that another lawyer has committed a "clear" violation. The Committee believes this change is both unnecessary and undesirable. It is unnecessary because Paragraph (b) makes it clear that a lawyer has no duty to reveal information relating to a representation that is protected by Rule 1.6. This has basically the same effect as restricting the duty to report misconduct to situations in which a lawyer has unprivileged information, because the phrase "unprivileged information" has been understood to include both "confidences and secrets" under the Code and thus should be interpreted under the Rules to include all information relating to a representation. Similarly, if it is not "clear" that a rule has been violated, a lawyer cannot be said to "know" that the rule has been violated. The

additional verbiage is also undesirable because it adds terminology not otherwise used in the Proposed Rules and is inconsistent with the Committee's goal of promoting uniformity among state ethics rules. Also, the deletion of Paragraph (b) would eliminate the exemption from the reporting requirement for lawyers who are members of a lawyer assistance program. Although such an exemption has been recognized in Formal Ethics Opinions, such an important matter needs to be addressed in the Rules.

PROPOSED RULE 8.4
MISCONDUCT

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) attempt to, or state or imply an ability to influence a tribunal or a governmental agency or official on grounds unrelated to the merits of, or the procedures governing, the matter under consideration;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or

(g) knowingly fail to comply with a final court order entered in a proceeding in which the lawyer is a party, unless the lawyer is unable to comply with the order or is seeking in good faith to determine the validity, scope, meaning or application of the law upon which the order is based.

COMMENT

[1] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offense carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty or breach of trust, or serious interference with the administration of justice are in that category. Although under certain circumstances a single offense reflecting adversely on a lawyer’s fitness to practice -- such as a minor assault -- may not be sufficiently serious to warrant discipline, a pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[2] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation, or socio-economic status, may violate paragraph (d) if such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d).

[3] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith

challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[4] Paragraph [c] prohibits lawyers from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. Such conduct reflects adversely on the lawyer's fitness to practice law. In some circumstances, however, prosecutors are authorized by law to use, or to direct investigative agents to use, investigative techniques that might be regarded as deceitful. This Rule doe not prohibit such conduct. Also, secret recording of a conversation or the actions of another for the purpose of obtaining or preserving evidence does not, by itself, constitute conduct involving deceit or dishonesty. See Rule 4.4.

[5] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of attorney. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

[6] Paragraph (f) precludes a lawyer from assisting a judge or judicial officer in conduct that is a violation of the rules of judicial conduct. A lawyer cannot, for example, make a gift, bequest, favor, or loan to a judge, or a member's of the judge's family who resides in the judge's household, unless the judge would be permitted to accept, or acquiesce in the acceptance of such a gift, favor bequest or loan in accordance with Canon 4, Section D(5) of Tennessee Supreme Court Rule 10 (Code of Judicial Conduct).

[7] In both their professional and personal activities, lawyers have special obligations to demonstrate respect for the law and legal institutions. Normally, a lawyer who knowingly fails to obey a court order demonstrates a disrespect for the law that is prejudicial to the administration of justice. Failure to comply with a court order is not a disciplinary offense, however, when it does not evidence disrespect for the law either because the lawyer is unable to comply with the order or the lawyer is seeking in good faith to determine the validity, scope, meaning or application of the law upon which the order is based.

DEFINITIONAL CROSS-REFERENCES

"Fraud" See Rule 1.0(e)
"Knowingly" See Rule 1.0(f)
"Tribunal" See Rule 1.0(m)

COMMITTEE NOTES
Comparison To Current Tennessee Ethics Rules

Paragraph (a): DR 1-102(A) (1) and (2) provide that a lawyer shall not "[v]iolate a Disciplinary Rule" or "[c]ircumvent a Disciplinary Rule through actions of another."

Paragraph (b): DR 1-102(A)(3) provides that a lawyer shall not "[e]ngage in illegal conduct involving moral turpitude."

Paragraph (c): Paragraph (c) is identical to DR 1-102(A)(4).

Paragraph (d): Paragraph (d) is identical to DR 1-102(A)(5).

Paragraph (e): Paragraph (e) is similar to DR 9-101(C), but the proposed rule also prohibits attempts to exert improper influence.

Paragraph (f): There is no direct counterpart to paragraph (f) in Rule 8. EC 7-34 states in part that "[a] lawyer . . . is never justified in making a gift or a loan to a [judicial officer] except as permitted by . . . the Code of Judicial Conduct." EC 9-1 stated that a lawyer "should promote public confidence in our [legal] system and in the legal profession."

Paragraph (g): Paragraph (g) is a proposed modification of DR 1-102(7) that was added to Rule 8 by the Supreme Court on October 9, 1997. In the interest of consistency in terminology, the proposal prohibits lawyers from knowingly, rather than wilfully, refusing to comply with a court order. Paragraph (g) also differs from DR1-1025(7) in that it exempts from the prohibition two situations in which the lawyer's refusal does not evidence disrespect for the court's order.

Comparison To ABA Model Rules

Paragraph (a): Paragraph (a) is identical to ABA Model Rule 8.4(a).

Paragraph (b): Paragraph (b) is identical to ABA Model Rule 8.4(b).

Paragraph (c): Paragraph (c) is identical to ABA Model Rule 8.4(c).

Paragraph (d): Paragraph (d) is identical to ABA Model Rule 8.4(d).

Paragraph (e): Paragraph (e) is similar to BA Model Rule 8.4(e), but the Proposed Rule also specifically prohibits attempts to exert improper influence.

Paragraph (f): Paragraph (f) is identical to ABA Model Rule 8.4(f).

Paragraph (g): There is no counterpart to paragraph (g) in the ABA Model Rule.

Changes Made to 1997 Committee Preliminary Draft In Response to Comments

The Committee added a new paragraph (g) and corresponding Comment [5] to reflect the Supreme Court's amendment of DR 1-102 to prohibit lawyers from wilfully disobeying court orders in proceedings in which the lawyer is a party.

The Committee added Comment [2] alerting lawyers to the fact that biased or prejudiced speech and conduct in connection with the representation of a client may constitute conduct prejudicial to the administration of justice. A similar Comment was added to the ABA Model Rules in 1998.

Comments Received After September 2000 Draft, Committee Response, and Changes Made

1. The Committee added a new Comment [4] the first two sentences of which respond to a concern of the Tennessee District Attorneys General Conference about a decision in Oregon that interpreted Paragraph (c) as an absolute prohibition against deceitful or dishonest conduct to which is there was no exception for prosecutors engaged in law enforcement investigations that necessarily involved deceiving the suspects under investigation. See In re Gatti, 330 Ore. 517, 8 P.3d 966 (2000). Following the approach employed with respect to a prosecutorial

communications with represented suspects, see Rule 4.2, Comment [7], the Comment indicates that prosecutors may be authorized by other law to engage in such investigative deceit.

2. The Committee added a new Comment [4], the last sentence of which, in conjunction with a new Comment to Rule 4.4, implements the Committee's recommendation that secret, but otherwise lawful, recording of conversations or other conduct be permitted, reversing the holding in Formal Ethics Opinions 81-F-14 and 81-F-14(a). The new sentence indicates that the secret recording is not, by itself, deceitful or dishonest. As indicated in the Committee Notes to Rule 4.4, the ABA Standing Committee on Ethics and Professional Responsibility has overruled the ABA Formal Ethics Opinion that was approved by the Board of Professional Responsibility in 1981. See ABA Formal Ethics Opinion 01-422 (Electronic Recording by Lawyers Without the Knowledge of All Participants).

3. While in no way condoning discriminatory speech, the Memphis Bar Association has recommended the deletion of Comment [2] because of a concern that it is too difficult to identify what type of speech or conduct manifests bias or prejudice and, in addition whether such a manifestation is prejudicial to the administration of justice. On the other hand, the Committee to Implement the Recommendations of the Racial and Ethnic Fairness Commission and the Gender Fairness Commission has recommended that Paragraph (d) be modified to specify that conduct prejudicial to the administration of justice includes the knowing manifestation by a lawyer, by words or conduct in the course of representing a client, of a bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation, or socio-economic status. After consideration of these competing proposals, the Committee continues to believe that this important issue is best addressed by way of a Comment in which biased speech is specifically mentioned as conduct that may be, but is not by definition, prejudicial to the administration of justice. This affords the Board of Professional Responsibility and this Court the leeway to impose discipline when it can be constitutionally imposed because there is a substantial likelihood that the speech in question will have a material prejudicial effect on the administration of justice. Of equal importance, however, is that Comment [2] permits the Court to take into account all the circumstances in determining, on a case-by-case basis, whether the manifestation of bias had such a prejudicial effect. This is important because it affords the Court the flexibility to construe the rule so that its application will be consistent with the First Amendment of the United States Constitution and Article I, Section 19, of the Tennessee Constitution. Given such a flexible approach, the Committee believes that it is unnecessary to specify in the Comment that a trial judge's finding that peremptory challenges were exercised on a discriminatory basis is not, by itself, conduct prejudicial to the administration of justice.

4. The Board of Professional Responsibility has requested the addition of a new paragraph to Rule 3.5 that would prohibit lawyers from making loans to judges or members of their family. The Committee believes that the Board's proposal is both under-inclusive (in that it only prohibits loans, and not gifts, bequests and valuable favors) and over-inclusive (in that it prohibits loans in circumstances in which a judge would be permitted to accept the loan by the Code of Judicial Conduct). The Committee also believes that any rules restricting lawyers making loans to judges ought to conform to the rules governing acceptance of such loans by judges. The Committee, however, agrees with the Board of Professional Responsibility that lawyers should be specifically alerted to the likely impropriety of making a loans to a judge before whom the lawyer is appearing or likely to appear. Thus, the Committee recommends that a Comment be added to Rule 8.4 that specifically mentions making a loan to a judge as an example of conduct that might assist a judge in a violation of the Code of Judicial Conduct.

5. The Board of Professional Responsibility has recommended that Paragraph (b) be subdivided into two separate paragraphs. The first would make it misconduct for a lawyer to commit any felony. The second would make it misconduct for a lawyer to commit a misdemeanor that reflects adversely on the lawyer's fitness to practice law. The Committee persists in its view that lawyers should only be subject to discipline for the commission of criminal acts, whether characterized as felony or misdemeanor, that reflect adversely on their fitness to practice law. Just as there are felonies that would not involve "moral turpitude" under DR 1-102(A)(3), the Committee believes that the inadvertent commission of a strict liability felony or the commission of a felony premised on negligent conduct may not reflect adversely on the lawyer's fitness to practice law. The Committee believes that disciplinary authorities can and should be required to differentiate, on a case-by-case basis, between those felonies that reflect adversely on a lawyer's fitness to practice law and those that do not.

PROPOSED RULE 8.5
DISCIPLINARY AUTHORITY; CHOICE OF LAW

(a) Disciplinary Authority. A lawyer admitted to practice in Tennessee is subject to the disciplinary authority of the the Supreme Court of Tennessee regardless of where the lawyer's conduct occurs. A lawyer who engages in misconduct may be subject to the disciplinary authority of both the Supreme Court of Tennessee and the disciplinary authority of another jurisdiction where the lawyer is admitted to practice for the same conduct.

(b) Choice of Law. In any exercise of the disciplinary authority of the Supreme Court of Tennessee, the rules of professional conduct to be applied shall be as follows:

> (1) for conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise; and
>
> (2) for any other conduct,
>
> > (i) if the lawyer is licensed to practice only in Tennessee, the rules to be applied shall be the Tennessee Rules of Professional Conduct; and
> >
> > (ii) if the lawyer is licensed to practice in Tennessee and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

COMMENT
Disciplinary Authority

[1] Paragraph (a) restates longstanding law.

Choice of Law

[2] A lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to practice in more than

one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. In the past, decisions have not developed clear or consistent guidance as to which rules apply in such circumstances.

[3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of an attorney shall be subject to only one set of rules or professional conduct, and (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions.

[4] Paragraph (b) provides that as to a lawyer's conduct relating to a proceeding in a court before which the lawyer is admitted to practice (either generally or pro hac vice), the lawyer shall be subject only to the rules of professional conduct of that court. As to all other conduct, paragraph (b) provides that a lawyer licensed to practice only in Tennessee shall be subject to Tennessee Rules of Professional Conduct, and that a lawyer licensed in multiple jurisdictions shall be subject only to the rules of the jurisdiction where he or she (as an individual, not his or her firm) principally practices, but with one exception: if particular conduct clearly has its predominant effect in another admitting jurisdiction, then only the rules of that jurisdiction shall apply. The intention is for the latter exception to be a narrow one. It would be appropriately applied, for example, to a situation in which a lawyer admitted in, and principally practicing in, State A, but also admitted in State B, handled an acquisition by a company whose headquarters and operations were in State B of another, similar such company. The exception would not appropriately be applied, on the other hand, if the lawyer handled an acquisition by a company whose headquarters and operations were in State A of a company whose headquarters and main operations were in State A, but which also had some operations in State B.

[5] If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules.

[6] The choice of law provision is not intended to apply to transnational practice. Choice of law in this context should be the subject of agreements between jurisdictions or of appropriate international law.

DEFINITIONAL CROSS-REFERENCES

None.

COMMITTEE NOTES

Comparison To Current Tennessee Ethics Rules

There is no counterpart to Proposed Rule 8.5 in the Disciplinary Rules.

Comparison to ABA Model Rules

Proposed Rule 8.5 is identical to ABA Model Rule 8.5.

Changes Made to 1997 Committee Preliminary Draft In Response to Comments

The Committee deleted proposed Paragraph (B)(2)(iii) and Comment [6] that read as follows:

> Paragraph (B)(2)(c): if lawyers who are licensed in different jurisdictions are jointly representing a client in a matter, the rules to be applied to each lawyer with respect to his or her conduct in connection with the representation shall be the rules applicable to the lawyer who is licensed to practice law in the jurisdiction in which the conduct occurs, provided, however, that if the conduct clearly has its predominant effect in another jurisdiction in which one of the lawyers is licensed to practice, the rules of that jurisdiction shall be applied.
>
> Comment [6]: It is increasingly common for lawyers to be part of a "team" of lawyers who work together to represent a client. The team may consist of lawyers who are associated together in a firm, but a client may also be served by a team of lawyers who are not associated with each other in a firm. When all the lawyers on such a team are licensed in the same jurisdiction, or in an identically matched set of jurisdictions, an application of Paragraphs (B)(2)(i) and (ii) would enable the lawyers on the team to identify a single jurisdiction whose rules of professional conduct would be applicable to all lawyers on the team. Where, however, there is not complete identity of licensure, an application of Paragraphs (B)(2)(i) and (ii) could lead to a determination that different rules of professional conduct were applicable to different members of the team. The lawyers might then find themselves in the unenviable position in which one lawyer on the team was prohibited from doing something that another lawyer on the team was required to do. One state, for example, might prohibit its lawyers from revealing client fraud while another state might require such disclosure. Paragraph (B)(2)(c) represents a judgment that it is undesirable for lawyers who are jointly representing a client as part of a team to have conflicting or inconsistent professional responsibilities. It permits the team to act as an unit in accordance with a single set of professional rules -- the rules applicable to the lawyer licensed in the jurisdiction in which the conduct either occurs or has its predominant effect.

Because the choice of disciplinary law is a relatively new issue and one in which uniformity among the various jurisdictions is particularly important, the Committee concluded that it would unwise to depart from the ABA Model Rule and try to resolve at this time the choice of disciplinary rule to be applied when lawyers who are licensed in different jurisdictions are jointly representing a single client in a multi-state business transaction.

Comments Received After September 2000 Draft, Committee Response, and Changes Made

No comments or changes.

PROPOSED TRANSITION RULE
GOVERNING IMPLEMENTATION OF
TENNESSEE RULES OF PROFESSIONAL CONDUCT

The foregoing Rules shall become effective as of the date of the entry of this Order, except that:

(a) Rule 1.5(c) (governing contingent fee agreements) shall apply only to contingent fee agreements entered into or amended on or after the effective date of these Rules.

(b) The requirement of a writing contained in Rules 1.7, 1.8(g), 1.9, and 1.12 shall apply only to conflicts of interest that arise on or after the effective date of these Rules.

(c) Rules 1.8(a) and (i) shall apply only to transactions entered into or amended on or after the effective date of these Rules.

Comments Received After September 2000 Draft, Committee Response, and Changes Made

1. The Committee added a reference to Rules 1.8(g) and 1.11 in paragraph (b) of the Transition Rule. There is a new writing requirement in each of these Rules that should be treated the same as the requirements in Rules 1.7, 1.9, and 1.12.

2. The Committee also added a reference to Rule 1.8(i) in Paragraph (c) of the Transition Rule. To the extent that this Rule may require client consent in some circumstances in which such consent is not currently required, and additionally requires that such consent be in writing, the Rule should not be applied retroactively.

K:\LTP\Bar\CteReport\newfinalred(exb).wpd