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SEP 11 2015
Clerk of the Courts
Rec'd By _____

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE: PETITION TO AMEND TENNESSEE SUPREME COURT RULE 9, SECTION 5.4(c)

No. ADM 2015-01135

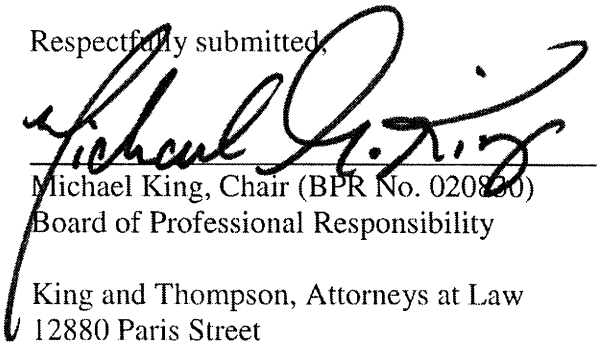
BOARD OF PROFESSIONAL RESPONSIBILITY'S REPLY TO COMMENT OF THE TENNESSEE BAR ASSOCIATION

The Board of Professional Responsibility of the Supreme Court of Tennessee (Board) makes the following reply to the Comment of the Tennessee Bar Association (TBA) regarding the Board's Petition to Amend Tenn. Sup. Ct. R. 9 § 5.4(c):

First, the explicit language of Tenn. Sup. Ct. R.9 § 5.4 states, "An advisory ethics opinion may be issued by Disciplinary Counsel when there is readily available precedent." While Ethics Counsel responds to the majority of attorneys' requests for ethics opinions, all Disciplinary Counsel regularly if not daily respond to requests. Restricting disclosure of requests and responses from Disciplinary Counsel would impede the Board's service of providing ethics opinions. Second, to address the TBA's concerns about privilege, the Board proposes amending the proposed language of Tenn. Sup. Ct. R. 9 § 5.4(c) as follows:

5.4(c) An advisory ethics opinion may be issued by Disciplinary Counsel ~~orally~~ when there is readily available precedent. The advisory opinion shall not be binding on the Board and shall offer no security to the person requesting it. All requests for advisory opinions, oral and written, and the Board's Responses shall be confidential ~~and privileged~~ and shall not be public records or open for public inspection, except as otherwise provided in Section 32 and subject to waiver by the requesting attorney.

Respectfully submitted,



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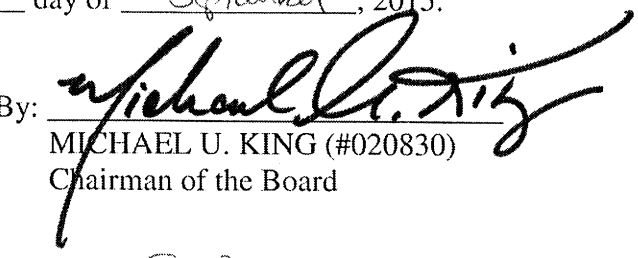
I certify that the foregoing has been mailed to Allan F. Ramsaur, Esq., Executive Director, Tennessee Bar Association, 221 4th Avenue North, Suite 400, Nashville, Tennessee by U.S. mail, on this the 11 day of September, 2015.

By: 
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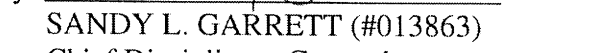
By: 
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IN THE SUPREME COURT OF TENNESSEE,
AT NASHVILLE

FILED
2015 AUG 25 AM 9:56
KNOXVILLE

IN RE: PETITION TO AMEND)
TENNESSEE SUPREME COURT) NO. ADM2015-01135
RULE 9, SECTION 5.4(c))

COMMENT OF THE KNOXVILLE BAR ASSOCIATION

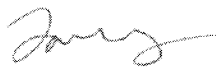
The Knoxville Bar Association (the "KBA"), through its Professionalism Committee and Board of Governors, has carefully considered the Petition to Amend Tennessee Supreme Court Rule 9, Section 5.4(c).

In its review, the KBA sought the opinions of its members regarding the confidentiality of all written and oral advisory opinions from disciplinary counsel at the Board of Professional Responsibility. The Professionalism Committee of the KBA (the "Committee"), has a longstanding practice of evaluating proposed rule changes. Consistent with that practice, the Committee carefully considered these proposals.

After discussion, the Committee voted to recommend to the KBA Board of Governors, (the "Board"), that the Board adopt the recommendations of the Board of Professional Responsibility. The matter was thoroughly considered at the meeting of the Board on August 19, 2015, and the proposed amendment to Supreme Court Rule 9, Section 5.4(c) was approved as recommended.

Respectfully submitted this 24th day of August, 2015.

KNOXVILLE BAR ASSOCATION



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IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE PROPOSED AMENDMENT TO TENNESSEE SUPREME COURT RULE 9, SECTION 5.4(c)

No ADM2015-01135

COMMENT OF THE TENNESSEE BAR ASSOCIATION

The Tennessee Bar Association ("TBA"), acting through its President, Bill Harbison; Chair, TBA Standing Committee on Ethics and Professional Responsibility, Brian S. Faughnan; General Counsel, Paul Ney; and Executive Director, Allan F. Ramsaur, in response to the June 23, 2015 Order of this Court soliciting public comment submits the following comment on the petition filed in this matter by the Board of Professional Responsibility ("BPR") on June 18, 2015.

The BPR petition cites a concern that there may not be sufficient confidentiality protections under the existing rules for attorneys who request oral or written advisory ethics opinions. The BPR notes that Disciplinary Counsel responded to almost 2,300 such requests during fiscal 2013-2014. The BPR suggests that certain revisions are necessary to assure confidentiality of such interactions, which will aid lawyers in complying with Tenn. Sup. Ct. R. 8, RPC 1.6(b)(4) that permits attorneys to disclose confidential information about their representation of their clients to seek advice about their own compliance with their ethical duties.

The TBA considers the informal ethics advice that Disciplinary Counsel provides to Tennessee attorneys through its designated Ethics Officer to be a very valuable service. The TBA agrees that an interpretation of the Court's rules that has a chilling effect on the willingness

of Tennessee attorneys to seek out such guidance would be bad for the profession and the public. Given that the Tenn. Sup. Ct. R. 9, § 5.4(c) already explicitly provides that any such "advisory opinion shall not be binding on the Board and shall offer no security to the person requesting it," it seems hard to believe that so many inquiries would be received annually if Tennessee lawyers did not believe that their inquiries would at least be maintained as confidential.

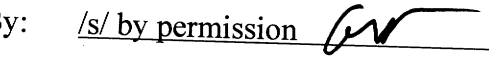
The TBA respectfully suggests that better, clearer language could be used to revise the language in Tenn. Sup. Ct. R. 9, § 5.4(c) to address this concern effectively so that the rule would still permit the lawyer receiving the ethics advice to authorize its disclosure or dissemination. The TBA submits that the reference to Section 32 of Rule 9 alone does not address the issue in a manner that would permit, for example, the lawyer and Disciplinary Counsel to agree to make an informal ethics opinion publicly available as guidance to the rest of the bar, as has occurred in the past. Nor does reference to Tenn. Sup Ct. R. 9, § 32 sufficiently protect the inquiring attorney from having Disciplinary Counsel use details learned during the consultation against the lawyer in a future disciplinary proceeding. The TBA also believes that to avoid any confusion about the meaning of the term "privileged" in this context that the section should make clear that, while the communications are treated as privileged and confidential, no attorney-client relationship between Disciplinary Counsel and the requesting lawyer is actually created.

The TBA submits that revising existing Tenn. Sup Ct. R. 9, § 5.4(c) in the following manner would accomplish the goals articulated in the BPR's petition by providing sufficient confidential treatment of inquiries and properly address the issue raised in this Comment as well:

> 5.4(c) An advisory ethics opinion may be issued by Disciplinary Counsel ~~orally~~ when there is readily available precedent. The advisory opinion shall not be binding on the Board and shall offer no security to the person requesting it. <u>A lawyer shall have a privilege as to any request for advisory opinion, oral or</u>

written, and the lawyer's request and the Board's response shall be confidential and shall not be public records or open for public inspection. Based on this privilege, no such requests or responses shall be shared with disciplinary counsel for the Board or publicly-disclosed absent the lawyer's permission. No attorney-client relationship shall be created by a lawyer making or receiving a response under this subsection.

Respectfully Submitted,

By: /s/ by permission 

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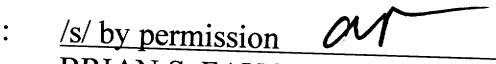
By: /s/ by permission 

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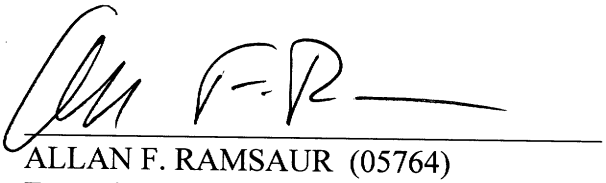
By: 

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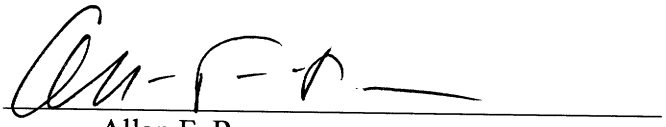
CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing has been served upon the individuals and organizations identified in Exhibit "A" by regular U.S. Mail, postage prepaid within seven (7) days of filing with the Court.



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APPELLATE COURT CLERK
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June 26, 2015

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Tennessee Appellate Courts
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ADM 2015-01135

RE: Tenn. Sup. Ct. R. 9

Dear Mr. Hivner,

I have reviewed the proposed amendment to Rule 9 adding the provision of confidentiality to advisory opinions obtained by attorneys. In my personal and professional opinion the amendment is a good one to be made. As the Board of Professional Responsibility has suggested, the failure to add confidentiality to those communications chills the right of the attorney to utilize that assistance. The proposal is good and should be approved.

Thank you.

Yours truly,

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RLH/fdt