



LEGAL AID OF EAST TENNESSEE

744 Mc Callie Ave, Suite 410, Chattanooga, TN 37403

Telephone (423) 756-4013 Facsimile (423) 265-4164

Toll-free Telephone (800) 572-7457

Executive Director

David R. Yoder

February 16, 2010

Michael W. Catalano, Clerk
100 Supreme Court Bldg.
401 Seventh Avenue, North
Nashville, TN 37219-1407

Re: No. M2010-00330-SC-RL2-RL

Dear Mr. Catalano:

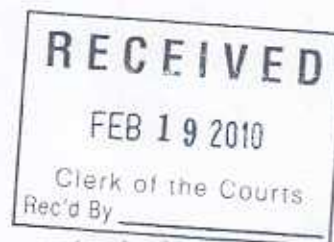
I have received a copy of the Supreme Court order proposing Rule 50A, Rules of the Supreme Court and a copy of the Appendix. I am a candidate for admittance as an Emeritus Attorney.

I believe that the Supreme Court's adoption of the proposal will be one of the most progressive things that has occurred in Tennessee since I came here in 1962. It will be a win-win situation for the Access to Justice Initiative advanced by the Supreme Court as well as all of the citizens of the State of Tennessee.

Sincerely,



Richard R. Ruth Jr.
BPR # 1027



Associate Director
Russell Fowler



LEGAL AID OF EAST TENNESSEE

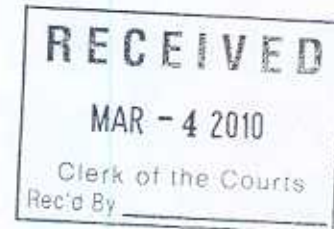
744 Mc Callie Ave, Suite 410, Chattanooga, TN 37403
Telephone (423) 756-4013 Facsimile (423) 265-4164
Toll-free Telephone (800) 572-7457

Executive Director
David R. Yoder

Associate Director
Russell Fowler

February 25, 2010

Michael W. Catalano, Clerk
100 Supreme Court Bldg.
401 Seventh Avenue, North
Nashville, TN 37219-1407



Re: M2010-00330-SC-RL2-RL

Dear Mr. Catalano:

Supplementing my letter dated February 16, 2010, concerning the proposed new Rule 50A, Rules of the Supreme Court of Tennessee, upon my re-review of the proposed Rule and in particular, 1.02 (b) (1), I think the Supreme Court should reconsider the time restrictions for admittance as an Emeritus Attorney special licensure or provide for a waiver of the limitation for engagement in the practice of law for five of the last ten years.

I will seek admittance under the proposed new Rule, however I have only practiced three years in the last ten years. I actively practiced until 2002 when I retired to care for my late wife who had a terminal illness. At my request, the Board of Professional Responsibility placed my license inactive in good standing. My license was reinstated in March 2009 so I could practice as a volunteer for Legal Aid of East Tennessee where I presently practice.

I am 72 years of age and attesting to my current mental and legal competence for the practice, I enclose a copy of an article to be published in a Legal Aid publication in the near future with a photograph. As you can well see I am well regarded and serve an important and appreciated part of the Initiative for Equal Access to Justice. Unless the Rule is amended or waived by the Court, I will not qualify for admittance as an Emeritus Attorney under the proposed new Rule. I wish to qualify.

Please pass this comment to the Court for consideration.

Yours very truly,


Richard R. Ruth Jr.
BPR # 1027



DICK RUTH, EMERITUS LAWYER EXTRAORDINAIRE

By LAET Chattanooga Lawyers Tracy Cox and Charlie McDaniel

Richard "Dick" Ruth came to the Bar in 1965 following graduation at UT College of Law in Knoxville. He went on to a stellar career as one of Tennessee's preeminent litigators, often handling trials in federal court. He practiced in Chattanooga until 2002 when he began his retirement. This allowed Mr. Ruth more time for restoring antique British sports cars. In early 2009, his eldest son, a partner with Miller & Martin PLLC, insisted that he reactivate his license and, because of the economic times, in some way volunteer using his knowledge and experience to help others who cannot afford legal services. He has been volunteering with Legal Aid of East Tennessee's Chattanooga office for what will be a year this spring.

"On moral, religious and ethical principals, I have a calling to do this work," said Mr. Ruth. "Without organizations like LAET, there are people who would not otherwise have access to justice. Pro bono work is very rewarding and very worthwhile."

His pro bono work at LAET has included not only a full caseload, but also providing invaluable mentoring LAET's younger lawyers with legal analysis, critique and advice. "I have had an opportunity to get to know these lawyers and their staff. They are hard workers and very good lawyers," said Mr. Ruth.

Russell Fowler, Associate Director for the LAET Southern Region, said that "Mr. Ruth has been a treasure-trove of litigation experience and wisdom for our lawyers. He brings energy, enthusiasm, and creativity to every task he undertakes and many a low-income Tennessean has benefited by having Dick Ruth in their corner. His clients have a real champion fighting for them. He treats every case as the most important case in the world. His clients are so appreciative and so is the Southern Region staff."

Mr. Ruth said, "I am not a liberal. I do not feel that it is the government's function to take care of people in all circumstances; yet there are people who, without Legal Aid, simply would not have access to justice. Nothing undermines our society more than the inability to access our legal system."

Mr. Ruth has also been instrumental in the successful efforts in having the Tennessee's Access to Justice Commission propose Rule 50A concerning the Emeritus Attorneys Pro Bono Participation Program. This important reform will help to bring other Tennessee lawyers out of retirement to do pro bono work.

This new emeritus rule will have a real and immediate impact on access to justice, and the quality of justice, in Tennessee. Our courts, the bar, and low-income Tennesseans will all benefit by having access to the vast wealth of knowledge and experience these senior lawyers have. In addition to direct case work, these lawyers will be invaluable mentors to young legal aid and pro bono attorneys and gives the poor the very best legal counsel possible. And, the entire system of justice in Tennessee will benefit by getting our finest retired lawyers back at the Bar. Dick Ruth is proof of that.



BOARD OF PROFESSIONAL RESPONSIBILITY

of the

SUPREME COURT OF TENNESSEE

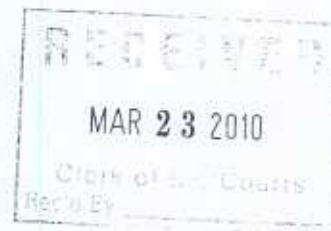
NANCY S. JONES
CHIEF DISCIPLINARY COUNSEL
SANDY L. GARRETT
DEPUTY CHIEF DISCIPLINARY COUNSEL - LITIGATION
RACHEL L. WATERHOUSE
DEPUTY CHIEF DISCIPLINARY COUNSEL - INVESTIGATIONS
BEVERLY P. SHARPE
CONSUMER COUNSEL DIRECTOR
JAMES A. VICK
ETHICS COUNSEL

1101 KERMIT DRIVE, SUITE 730
NASHVILLE, TENNESSEE 37217
TELEPHONE: (615) 361-7500
(800) 486-5714
FAX: (615) 367-2480
E-MAIL: ethics@tbpr.org
Website: www.tbpr.org

KEVIN D. BALKWILL
M. KRISANN HODGES
CAROLYN V. MOORE
KIMBRA SPANN
PRESTON SHIPP
RANDALL J. SPIVEY
DISCIPLINARY COUNSEL

March 22, 2010

Michael Catalano, Esq.
Appellate Court Clerk
Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219



RE: Comments to Proposed New Rule 50A

Dear Mr. Catalano:

The Board of Professional Responsibility respectfully submits its Comment to the Draft New Rule 50A Regarding the Establishment of an Emeritus Pro Bono Participation Program.

Respectfully,

A handwritten signature in cursive script that reads "Nancy S. Jones".

Nancy S. Jones
Chief Disciplinary Counsel

NSJ:db

encl.

MAR 23 2010

**COMMENT OF THE BOARD OF PROFESSIONAL
RESPONSIBILITY TO THE DRAFT NEW RULE SUBMITTED BY
THE ACCESS TO JUSTICE COMMITTEE REGARDING THE ESTABLISHMENT
OF AN EMERITUS PRO BONO PARTICIPATION PROGRAM**

The Board of Professional Responsibility (the "Board") applauds the diligent work of the Access to Justice Commission in its efforts to identify barriers to the delivery of competent legal services to the disadvantaged citizens of the State. During this period of economic downturn, every day the Board sees the unfortunate impact of attorney misconduct from the neglect of client matters in situations where the client has no money to find other counsel. The expansion of pro bono services will go a long way toward filling the unmet need of the disadvantaged for basic legal services. The Board respectfully submits the following comments to the draft new rule regarding the establishment of an emeritus pro bono participation program:

1. Use of the term "emeritus" to describe lawyers who have practiced only five of the previous ten years.

The proposal uses the term "emeritus" to describe the length of practice required for certification under the rule. The Board is concerned that the use of this term may be misleading. Lawyers who have practiced for only five years are not eligible for partner status at most Tennessee law firms. These lawyers may have a very limited amount of experience.

The term "emeritus" is defined in Webster's as one holding an honorary title after retirement corresponding to that last held during active service. Under Section 20 of Rule 9, retired status is a different status than inactive status. The Board is of the view that the term "emeritus" connotes a longer career and a higher level of practice than that obtained after only five years of experience, and as a result, the public may be misled concerning the attorney's qualifications.

2. Section 1.02(a), defining the term "active practice of law."

Section 20.2(e) of Supreme Court Rule 9 has long defined the term "practice of law." The Board suggests that for consistency within the Court's rules and to avoid any confusion regarding the proper definition of the term, Section 1.02(a) should be revised with a reference to Sections 20.2 and 20.8 of Rule 9, which define the requirements for retired or inactive status of a Tennessee law license.

3. Section 1.02(b), the portion of the definition of the term "emeritus attorney" as one admitted to practice before the "highest court of any other state or territory of the United States of the District of Columbia."

The Board is not certain of the need for or desirability of permitting attorneys licensed in other states, but not currently practicing law, to participate in this program. Lawyers from other states currently are permitted to provide pro bono services if they hold the status of in-house counsel who have registered with the Board of Law Examiners and the Board of Professional

Responsibility pursuant to newly enacted Supreme Court Rules 7, Section 10.01 and 9, Section 33, respectively. Rule 7, Section 10.01(c) expressly allows such lawyers to perform pro bono legal services. As discussed more thoroughly below, the administrative and disciplinary issues associated with lawyers licensed in another state, but not actively engaged in the practice of law, make the participation of such lawyers whose licenses are on inactive status unworkable.

4. Section 1.02(b)(4), the agreement to abide by the Tennessee Rules of Professional Conduct and to submit to the Tennessee Supreme Court for disciplinary purposes.

The Board respectfully suggests that, as applied to attorneys licensed in another state and not registered with the Board and the Board of Law Examiners as in-house counsel, there is no viable disciplinary enforcement mechanism available should such attorney violate a Tennessee Rule of Professional Conduct. The types of discipline available under Rule 9, as set out in Section 4, are disbarment, suspension, temporary suspension, public censure, private reprimand or private informal admonition. It is not clear to the Board that the Tennessee Supreme Court has the power to disbar a lawyer licensed in another state. Similarly, since lawyers covered by the proposed rule have licenses on inactive status, there is no reasonable mechanism for suspending such a license temporarily or otherwise, even assuming the Supreme Court had the power to do so. It also is not clear that should a public censure, private reprimand or private informal admonition be issued following a disciplinary investigation under Rule 9, that the state in which the lawyer is licensed would have any obligation to attach such discipline to that lawyer's record. As a result, any efforts to impose discipline under Rule 9 for breaches of Rule 8 likely may be futile.

The Board is further of the view that its staff is already seriously overworked with the recent promulgation of the conditional admission rule, the mandatory IOLTA rule, the multi-jurisdictional practice rule, and the rule providing for license suspension for Professional Privilege Tax noncompliance, with no corresponding increase in personnel. The Board is of the view that it is not prudent to expand the Board's disciplinary jurisdiction to lawyers licensed in other states who have taken inactive status when no funding mechanism to cover the costs of such disciplinary proceedings is provided.

5. The provisions of Section 1.03 and 1.04(a) that would permit a lawyer licensed in another state whose license is on inactive status to appear in court on behalf of a client without a supervising attorney present.

The provision of proposed Section 1.03(a) that would permit a lawyer licensed in another state whose license is on inactive status to appear in a Tennessee court on behalf of a client without a licensed Tennessee attorney present is in direct conflict with this Court's pro hoc vice rule which has been in effect for more than twenty-five (25) years. Supreme Court Rule 19 requires that, in order for a lawyer not licensed in Tennessee to appear in a Tennessee court, the lawyer must have an active license in good standing in the state in which the lawyer resides and in any other state in which he is admitted. Rule 19 (a)(1) and (2). Pro hoc admission cannot be granted unless the lawyer is associated in the proceeding with a lawyer licensed to practice law in Tennessee, who is in good standing and admitted to practice before the Supreme Court, and

who resides in and maintains an office in Tennessee. Rule 19(g). The Tennessee attorney associated in the proceeding must sign all pleadings, motions and other papers served in the proceeding, and “shall personally appear for all court proceedings...unless excused by the court.” Rule 19 (g).

The Board is of the view that there are sound policy reasons behind the requirements of Rule 19, including assurances that attorneys not licensed in Tennessee will not disrupt the efficient administration of justice due to a lack of knowledge of and experience with Tennessee court rules and procedures. The required appearance of a licensed Tennessee attorney assures that such knowledge and experience will be brought to bear in proceedings in which out-of-state attorneys appear. The Board further suggests that the segment of the population whose interests are to be represented pursuant to the proposed rule, includes some of the most disadvantaged of the State’s citizens and who are in need of the safeguard of having a licensed Tennessee attorney present at all court proceedings.

The Board has additional concerns regarding whether the attorney assigned by the legal assistance organization will be able to provide the level of supervision required by RPC 5.1 if the supervising attorney is not required to appear in court with the emeritus attorney.

6. Section 1.04(b) prohibits the emeritus attorney from representing himself or herself to be active members of the Tennessee bar licensed to practice in the state.

The Board suggests that the provisions of Section 1.04(b) do not go far enough to protect the interests of the segment of the population the proposed rule is designed to assist. The Board suggests that every “legal assistance organization” approved by the Court should have an affirmative obligation to disclose in its written materials and in any document memorializing the individual client representation, that the organization associates Tennessee attorneys who do not have active law licenses, the length of the period the license has been on inactive status, and the most recent year of active practice.

In the event the Court adopts the proposed provision regarding out-of-state attorneys, who are not licensed in Tennessee, the Board suggests that in addition to these express disclosures, the client should be advised in writing that the lawyer is not licensed in Tennessee. Clients of legal assistance organizations should have the same ability as other consumers of legal services in the state to determine whether to accept representation from a particular lawyer. Since the proposed rule does not contemplate that out-of-state lawyers will be required to register with the Board, the Board will have no ability to provide licensure or license status information about these lawyers to consumers.

7. Section 1.07, Discipline and Fees.

The second sentence of Section 1.07 contains a confusing term. The Board believes that the proponents of the rule meant to exempt emeritus attorneys from the annual registration fee imposed on active Tennessee lawyers pursuant to Section 20 of Rule 9. This fee is not a “disciplinary” fee as stated in the proposal. The use of the term “disciplinary” in this context

suggests that lawyers who may be subject to discipline by the Board for violations of Rule 8 would, under the terms of the proposed rule, be exempt from the levy of costs and expenses of a disciplinary proceeding as otherwise imposed by Section 24.3 of Rule 9. To the extent the proponents of the proposed rule did, in fact, intend to exempt emeritus lawyers from payment of costs imposed under Section 24.3, the Board objects.

As discussed above in connection with proposed Section 1.02(b)(4), the Board has serious concerns regarding its ability to discipline lawyers not licensed in Tennessee. It has similar concerns regarding disciplinary proceedings against Tennessee lawyers whose licenses are on inactive status. First, the proposed rule does not specifically grant to the Board the authority to conduct proceedings to determine whether it is appropriate to “revoke” the certification of an emeritus attorney as contemplated by Section 1.06(a)(2). The Board is the agency of the Court that investigates allegations of attorney misconduct, brings formal charges of misconduct, and its hearing panels issue judgments containing findings that form the bases upon which the Court issues orders of enforcement imposing discipline on attorneys. It is unclear from the rule as currently proposed how the Board’s disciplinary jurisdiction applies in the contemplated certification revocation context.

While it would be possible to impose the sanction of disbarment or suspension on a Tennessee lawyer whose license was on retired or inactive status, it is not clear what the impact of the imposition of private discipline would have under the proposed rule. Currently, the imposition of a private reprimand or a private informal admonition under Section 4 of Rule 9 does not impact the status of a lawyer’s license and the issuance of such sanction by the Board is entirely confidential pursuant to Section 25 of Rule 9. It is not clear from the proposed rule whether the issuance of private discipline would constitute a disqualifying condition under Section 1.02(b)(2), which provides that the emeritus lawyer not have been “disciplined for professional misconduct” in any jurisdiction within the last ten years. Further, it is not clear how the confidentiality provisions of Section 25 of Rule 9 would apply should the imposition of private discipline be considered grounds for revocation of an emeritus attorney certification. The Board recommends that the imposition of any form of discipline on an emeritus attorney would automatically disqualify that attorney from further participation in the emeritus pro bono program.

8. Section 1.08, Mandatory Continuing Legal Education.

Due to concerns regarding the competency requirement of RPC 1.1, the Board agrees that emeritus attorneys should participate in continuing legal education. However, since many of the matters legal assistance organizations address for their clients involve unique issues of Tennessee law, it is unclear to the Board how the Court can ensure that a certified emeritus attorney has the necessary legal knowledge, training and experience to provide competent advice to its clients without a requirement for certain types of CLE courses, or mandated in-house training by the organization. For example, if the client’s issue is eligibility for TennCare health benefits, it is unclear to the Board how the emeritus attorney will receive adequate training to understand the complexities of this regulatory scheme by obtaining just any twelve (12) unspecified CLE course offerings required by Section 3 of Rule 21.

PROPOSED RULE 50A, RULES OF THE SUPREME COURT OF TENNESSEE,
NO. M2010-00330-SC-RL2-RL

To: Michael W. Catalano
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407



Response to Proposed Rule

Please consider these comments regarding the emeritus attorneys pro bono participation program as being submitted by the undersigned as an individual attorney; they do not represent the views of her governmental employer nor that of any other organization.

The goal of proposed Rule 50A is commendable. I write to support its consideration and to identify areas where I believe clarification would be appropriate and expansion desirable.

These comments are written under the assumption that the goal of Proposed Rule 50A is to increase the number of attorneys who are providing pro bono legal services by removing barriers to such participation that might have a particular impact on one or more segments of the attorney population. One such segment appears to be persons who have not practiced recently for personal reasons. I assume another primary goal of the drafters was to encourage a different segment of the population, attorneys who are winding down their practice or who have retired from compensated legal employment, to use their skills and training to assist those unable to pay for representation. Considering the large number of "baby boomers" who have and who will reach that stage of their life and their careers in this and successive decades, this seems an admirable and achievable goal. As an aspirant to membership in this segment of the profession, I analyzed the Rule, and make these comments, based on how I envisioned the Rule applying to me at a future date and to other persons similarly situated.

1. I suggest use of a term other than "emeritus attorney". I believe the word "emeritus", although an honorific, could, because of its connotations of age and infirmity, lead some attorneys who would be eligible for the program (e.g. women who have been raising children rather than engaging in compensated legal activities) not to consider it. I also believe that to the extent younger attorneys with as little as 5 years of practice did participate, it would be a misnomer. Even where it might be appropriate, it might not be attractive; baby boomers have not embraced the idea that they are middle-aged, let alone old or "geezer-like". I suggest the use of an ageless title, such as "Special Pro Bono Attorney," or something similar; the program name would change accordingly. This would be more inclusive in its connotations and more descriptive of the realities of its standards.

2. I believe a modification of both the proposed Rule and another Rule might result in greater participation by attorneys by removing a real and a perceived risk of participation. Section 1.02(c)(6) states that, in order to be approved as a legal assistance organization eligible to have emeritus attorneys participate with it in the rendering of legal services, the organization must specify "the existence and extent of malpractice insurance to cover claims made by clients against an emeritus attorney." This provision, while laudable, does not offer sufficient protection for the attorney's clients because no minimum or threshold amount of the insurance is specified - on either a per claim, per attorney or aggregate basis. It also does not require disclosure of whether the cost of defense is within or without the policy limits (which can significantly impact the amount of the policy limits available to pay claims) or whether the carrier must be admitted in Tennessee.

It does not offer protection for the participating emeritus attorneys because nothing in the proposed Rule limits a client's recovery to the legal assistance organization's insurance policy or its other organizational assets.

Rule 8, R.P.C. 1.8(h)(1) states that "A lawyer shall not: Enter into an agreement with a prospective, current, or former client to prospectively limit the lawyer's liability to the

client for malpractice." I respectfully suggest that a modification of this Rule should be considered to allow for such a waiver with regard to services provided by an emeritus attorney through an approved legal assistance organization which limits the attorney's liability exposure to the insurance provided by the organization. Attorneys who have retired because they have the financial resources to do so may be unlikely to put their retirement plans and all of their retirement resources at risk in order to provide pro bono services.

If deemed necessary by the Court, although I do not recommend it, such a modification could provide that the client would be informed of the limitation and given a choice of accepting an emeritus attorney with a limit on the client's recovery in the event of malpractice to insurance proceeds or waiting until an attorney without a limit on their personal liability exposure could assist them. I imagine, especially if the required organizational insurance policy was adequate, many prospective clients would choose to accept representation with a limitation.

I suggest that this change (allowing emeritus attorneys to prospectively limit their liability to a client for malpractice) would be appropriate because the emeritus program and its attorneys will differ from what may reasonably be expected from attorneys who are performing voluntary pro bono service while actively engaged in the compensated practice of law (as well as from those who are engaged in legal practice for compensation). Those attorneys, especially those not engaged in corporate or governmental practice, are likely to have a personal malpractice policy that would supplement or substitute for any legal assistance organization policy. Secondly, they would have the ability and the years to make up for any financial loss due to a claim not covered by, or in excess of, a policy. An emeritus attorney is far less likely to be able to return to gainful employment (as an attorney or otherwise) to recoup the cost of any award in excess of insurance coverage. In reality, the supervision of emeritus attorneys required under the proposed Rule and the existence of an organization policy should make the likelihood of a malpractice claim being sufficiently large to affect the personal assets of a participating attorney minimal. However, concern about such a risk may

lead attorneys not to participate in the program. Why not remove the concern? As stated at the beginning of these remarks, I am speaking only for myself and, for me, this would be a significant deterrent to participation.

If client protection in addition to that created by the legal assistance organization's insurance policy were deemed necessary, perhaps the Lawyers Fund for Client Protection, or IOLTA proceeds, or another profession-wide organization could be tasked with providing financial back-up to emeritus program participants so that participating attorneys would not be at financial risk while they perform a much needed public and professional service without any personal financial gain.

3. If one of the purposes of the proposed Rule is to encourage attorneys who have recently retired from a full-time practice to engage in pro bono activities with an approved legal assistance organization, Section 1.04(b) may be counterproductive as currently written: "Emeritus attorneys permitted to perform services under this section are not, and shall not represent themselves to be, active members of the Tennessee bar licensed to practice in the state". As a baby-boomer who has contemplated life's possibilities following retirement from my compensated employment, I have not envisioned immediately requesting that my law license be placed on inactive status so that I would no longer be eligible to practice law. Unless and until I made such a request, I believe I would be an active, licensed member of the bar even though I was not engaged in the active practice of law. Indeed, while Section 1.02(b)(2) indicates that membership "may include retired or inactive status", retired or inactive status did not appear to be required. Why then does §1.04(b) prohibit an accurate self representation?

If some statement is necessary (and I question that assumption), I suggest that it would be more accurate to revise Section 1.04(b) to read: "Emeritus attorneys permitted to perform legal services only by virtue of this section are not, and shall not represent themselves to be, holders of an active Tennessee bar license."

Section 1.02(b)(4) and Section 1.03 also assume that an emeritus program attorney is not a licensed attorney. At the risk of being repetitive, I urge that the Rule be rewritten to make it clear that Tennessee attorneys with an active license may seek to become certified as an emeritus attorney. For such an attorney, this would mean limiting practice during the period of certification and participation in the emeritus program to pro bono work and supervision by another attorney and relief from disciplinary fees and privilege taxes without having to surrender the attorney's license. Such an attorney would retain the right to withdraw from the program, seek compensated employment, and resume the payment of fees and taxes. While such a Rule could be subject to abuse, it would appear far more likely of achieving its goal of increasing the participation of lawyers and the access of citizens to the justice system. (There does appear to be an omission or lettering error in Section 1.02(b)(2) with the second clause, beginning with the word "Membership," having no clear connection to the first clause.)

I suggest that this distinction is an important one. If it is the intent of the drafters that only persons who do not have an active license should be able to participate in this program, the Rule should so state. I also think that this would be a serious mistake. I believe that the Rule should be structured to allow and encourage persons who have not yet retired their license to participate in the emeritus program. They may be loath to give up that which they worked so hard to acquire and maintain until they are certain that they will never again practice as a matter of choice, or need to practice as a matter of financial hardship. I respectfully suggest that it is in those first few years of retirement that an attorney may be best equipped to provide pro bono services under this program. Such an attorney's physical and mental health, and their familiarity with practical practice issues, will likely be better while they still have their license and are on the cusp of complete retirement rather than later, after they have made a permanent decision to surrender their license. This transition time is the time period when it may be most feasible to get a lawyer involved in rendering such service. Lawyers who have not retired their law license will, in my opinion, be more likely to be enticed to participate in the emeritus attorneys program because of the provisions in Section 1.07 that an attorney performing legal services solely under the emeritus program will not be subject

to the privilege tax. The privilege tax is currently \$400; it may well increase in coming years. Allowing lawyers to render pro bono services, and only pro bono services, without paying for the privilege of doing so is an excellent idea.

4. I suggest the definition of "active practice of law" found in Section 1.02 would benefit from further clarification. Is someone who is working on a part-time basis or an uncompensated basis, but who has not done so under the emeritus program, a person who has been engaged in the "active practice of law" so that their years of such practice would count, under Section 1.02(b)(1), towards eligibility for participation in the emeritus program? I do not believe the answer to this question is apparent from the text.

Additionally, any definition or reference in this Section should not conflict with Rule 9, §20.2(e) which defines the term "practice of law".

5. Section 1.08 states that emeritus attorneys "must comply with Tennessee's continuing legal education requirements. Tenn. Sup. Ct. R. 21." Does such mandatory compliance permit an emeritus attorney to take advantage of the exemption from continuing education requirements for an attorney after the calendar year in which the attorney turns 65 years of age found in Rule 21, Section 2.04(a)? If this exemption is still available, this could be stated more clearly.

I thank the Court for the opportunity to comment on Proposed Rule 50A and for any consideration of these comments.

Sincerely,



Susan Emery McGannon
BPR 005051
P. O. 1044
Murfreesboro, TN 37133-1044



TENNESSEE BAR
ASSOCIATION

PRESIDENT

Gail Vaughn Ashworth
200 Fourth Avenue North
1100 Noel Place
Nashville, Tennessee 37219
(615) 254-0400
FAX (615) 254-0459
Email: gail@gideonwiseman.com

PRESIDENT-ELECT

Sam Elliott
320 McCallie Avenue
Chattanooga, Tennessee 37402
(423) 756-5171
FAX (423) 266-1605
Email: seliot@glpcc.com

VICE PRESIDENT

Danny Van Horn
6075 Poplar Avenue
Suite 500
Memphis, Tennessee 38119
(901) 680-7331
FAX (901) 680-7201
Email: danny.vanhorn@butlersnow.com

TREASURER

Richard Johnson
511 Union Street
Suite 2700
Nashville, Tennessee 37219
(615) 850-8151
FAX (615) 244-6804
Email: rjohnson@wallerlaw.com

SECRETARY

Jason Pannu
201 Fourth Ave North
Suite 1500
Nashville, TN 37219-8615
(615)259-1366
Fax: (615)259-1389
Email: jpannu@lewisking.com

IMMEDIATE PAST PRESIDENT

George T. Lewis

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Cynthia Wyrick, Sevierville

GENERAL COUNSEL

William L. Harbison, Nashville

EXECUTIVE DIRECTOR

Allan F. Ramsaur, Nashville
Email: aramsaur@tnbar.org

April 12, 2010

The Honorable Michael Catalano
Clerk, Tennessee Supreme Court
Supreme Court Building, Room 100
401 Seventh Avenue North
Nashville, TN 37219



IN RE: PROPOSED RULE 50A -
RULES OF THE SUPREME COURT OF TENNESSEE
No. M2010-0030-SC-RL2-RL

Dear Mike:

Attached please find an original and six copies of the Request for Extension of Time To File Comments of the Tennessee Bar Association in reference to the above matter.

As always, thank you for your cooperation. I remain,

Very truly yours,

Allan F. Ramsaur
Executive Director

cc: Gail Vaughn Ashworth, TBA President
William L. Harbison, TBA General Counsel
Nancy S. Jones, Chief Disciplinary Counsel,
Tennessee Board of Professional Responsibility
Margaret Behm, Chair, Access To Justice Commission
Becky Rhodes, Administrative Office of the Courts

Tennessee Bar Center
221 Fourth Avenue North, Suite 400
Nashville, Tennessee 37219-2198
(615) 383-7421 • (800) 899-6993
FAX (615) 297-8058
www.tba.org

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

FILED

2010 APR 12 PM 2:21

IN RE: PROPOSED RULE 50A
RULES OF THE
SUPREME COURT OF
TENNESSEE

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No. M2010-0030-SC-RL2-RL

APPELLATE COURT CLERK
NASHVILLE

REQUEST FOR EXTENSION OF TIME
TO FILE COMMENTS UNTIL APRIL 30, 2010

The Tennessee Bar Association ("TBA"), by and through its President, Gail Vaughn Ashworth; General Counsel, William L. Harbison; and Executive Director, Allan F. Ramsaur; and, the Board of Professional Responsibility, by and through its Chief Disciplinary Counsel, Nancy S. Jones, request a brief extension of time, until April 30, 2010, to file comments in this matter. The purpose of the brief extension of time would be to permit representatives of those involved to explore the possibility of attempting to reconcile viewpoints towards the end of being able to present to the Court an agreement as to certain items in the proposal and to attempt to frame for the Court any items about which there remain any different points of view.

RESPECTFULLY SUBMITTED,

By: /s/ by permission

GAIL VAUGHN ASHWORTH (010656)
President, Tennessee Bar Association
Gideon & Wiseman PLC
200 4th Avenue North, 1100 Noel Place
Nashville, Tennessee 37219
(615) 254-0400

By: /s/ by permission

WILLIAM L. HARBISON (007012)
General Counsel,
Tennessee Bar Association
Sherrard & Roe, PLC
424 Church Street, Suite 2000
Nashville, Tennessee 37219
(615) 742-4200

By: /s/ by permission

NANCY S. JONES (016369)
Chief Disciplinary Counsel,
Tennessee Board of Professional
Responsibility
1101 Kermit Drive, Suite 730
Nashville, Tennessee 37217
(615) 695-0927

By: A-F-R

ALLAN F. RAMSAUR (005764)
Executive Director,
Tennessee Bar Association
Tennessee Bar Center
221 Fourth Avenue North, Suite 400
Nashville, Tennessee 37219-2198
(615) 383-7421

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 on April 12, 2010.

 A-F-R
Allan F. Ramsaur

Exhibit A

Doug Blaze
UT College of Law
1505 West Cumberland Ave.
Knoxville, TN 37996

Katie Edge
Miller & Martin PLLC
1200 One Nashville Place
150 Fourth Avenue, North
Nashville, TN 37219

Francis S. Guess
The Danner Company
696 Nashville Pike
Gallatin, TN 37066

Buck Lewis
Baker, Donelson, Bearman, Caldwell
& Berkowitz PC
165 Madison Ave., Suite 2000
Memphis, TN 38103

A. Gregory Ramos
North, Pursell, Ramos & Jameson
Bank of America Plaza, Suite 1850
414 Union St.
Nashville, TN 37219

D. Billye Sanders
Attorney-at-Law
3514 Geneva Circle
Nashville, TN 37209

Maura Smith
International Paper
6400 Poplar Avenue
Memphis, TN 38197-0198

Dr. Frank Anthony Thomas
Mississippi Blvd. Christian Church
70 N. Bellevue
Memphis, TN 38104

Bill Young
Blue Cross Blue Shield of Tennessee
1 Cameron Hill
Chattanooga, TN 37402

Allan Ramsaur
Executive Director
Tennessee Bar Association
221 Fourth Avenue North, Suite 400
Nashville, TN 37219-2198

Nancy Jones
Director
Tennessee Board of Professional
Responsibility
1101 Kermit Drive, Suite 730
Nashville, TN 37217

Hardin County Bar Assn

William Cockett
Johnson County Bar Assn
PO Box 108
Mountain City TN 37683-0108

Michael Davis
Morgan County Bar Assn
PO Box 925
Wartburg TN 37887

Keith Alley
Loudon County Bar Assn
902 East Broadway Street
902 East Broadway Street
Lenoir City TN 37771

Daryl Colson
Overton County Bar Assn
211 N Church St
Livingston TN 38570

William Douglas
Lauderdale County Bar Assn
P O Box 489
109 N Main St
Ripley TN 38063

Beth Belew
Paris-Henry County Bar Assn
200 N Poplar St
Paris TN 38242

Keith Colston
Rutherford-Cannon County Bar Assn
P. O. Box 1336
106 East College St
Murfreesboro TN 37130

Joseph Ford
Franklin County Bar Assn
17 S College St
Winchester TN 37398

Mark Blakley
Scott County Bar Assn
P O Box 240
Huntsville TN 37756

Bratten Cook
DeKalb County Bar Assn
104 N 3rd St
Smithville TN 37166

Andrew Frazier
Benton County Bar Assn
P O Box 208
116 E Main
Camden TN 38320

Matt Bolton
Washington County Bar Assn
104 East Main St
Johnson City TN 37604

Dan Coughlin
Bristol Bar Assn
P.O. Box 1745
Bristol TN 37621

James Hayes
Putnam County Bar Assn
PO BOX 3294
2105 Old
COOKEVILLE TN 38502

Ben Boston
Lawrence County Bar Assn
P O Box 357
235 Waterloo St
Lawrenceburg TN 38464

Jerred Creasy
Dickson County Bar Assn
230 N Main St
Dickson TN 37055

Diane Hicks
Blount County Bar Assn
101 W Broadway Ave Ste 208
Maryville TN 37801

Lee Bowles
Marshall County Bar Assn
520 N Ellington Pkwy
Lewisburg TN 37091

Terri Crider
Gibson County Bar Assn
P.O. Box 160
1302 Main Street
Humboldt TN 38343

Jason Holly
Carter County Bar Assn
420 Railroad Street
Elizabethton TN 37643

Daniel Boyd
Hawkins County Bar Assn
P. O. Box 298
155 East Main St
Rogersville TN 37857

Robert Curtis
Giles County Bar Assn
P.O. Box 517
Pulaski TN 38478

John Holt
Robertson County Bar Assn
121 5th Ave W
Springfield TN 37172

Damon Campbell
Oblon County Bar Assn
PO Box 427
317 S. Third St.
Union City TN 38281

Creed Daniel
Grainger County Bar Assn
P O Box 6
Courthouse Sq 115 Marshall Ave
Rutledge TN 37861

Carmon Hooper
Haywood County Bar Assn
P O Box 55
10 S Court Square
Brownsville TN 38012

Mart Cizek
Anderson County Bar Assn
125 N Main St
Clinton TN 37716

Brad Davidson
Cocke County Bar Assn
317 East Main Street
Newport TN 37821

Steve Huret
Kingsport Bar Assn
PO Box 88
Kingsport TN 37662

Mike Jenne
Bradley County Bar Assn
P.O. Box 161
260 N Ocoee St.
Cleveland TN 37364

Caroline Knight
Cumberland County Bar Assn
28 W Fifth Street
Crossville TN 38555

Gregory Letfew
Roane County Bar Assn
PO Box 63
109 North Front Avenue
Rockwood TN 37854

Matt Maddox
Carroll County Bar Assn
P O Box 827
19695 E Main St
Huntingdon TN 38344

James McKenzie
Twelfth Judicial District Bar Assn
1475 Market St Rm 202
Dayton TN 37321

William Mitchell
White County Bar Assn
112 South Main Street
Sparta TN 38583

Dalton Mounger
Maury County Bar Assn
PO Box 1468
808 South High St
Columbia TN 38402

David Myers
Union County Bar Assn
P O Box 13
105 Monroe St
Maynardville TN 37807

Timothy Naifeh
Lake County Bar Assn
227 Church St
Tiptonville TN 38079

Craig Northcott
Coffee County Bar Assn
1301 E. Carroll St.
Tullahoma TN 37388

Adam Parrish
Fifteenth Judicial District Bar Assn
112 E. High St.
Lebanon TN 37087

Sheri Phillips
Montgomery County Bar Assn
PO Box 273
105 S Third St
Clarksville TN 37040

David Pollard
Campbell County Bar Assn
PO Box 436
Liberty And Church
Jacksboro TN 37757

Jason Randolph
Jefferson County Bar Assn
P O Box 828
Dandridge TN 37725

Stevie Roller
Warren County Bar Assn
111 W Court Sq Ste 1
McMinnville TN 37110

Dora Salinas
Cheatham County Bar Assn
104 Frey St
104 Frey St
Ashland City TN 37015

Randall Self
Lincoln County Bar Assn
P O Box 501
131A E Market St
Fayetteville TN 37734

Charles Sexton
Sevier County Bar Assn
111 Commerce St
Sevierville TN 37862

Todd Shelton
Greene County Bar Assn
100 S Main St
Greeneville TN 37743

Lois Shults-Davis
Unicoi County Bar Assn
PO Box 129
111 Gay Street
Erwin TN 37650

Todd Siroky
Jackson-Madison County Bar Assn
P.O. Box 1147
209 E Main St
Jackson TN 38302

David Stanifer
Claiborne County Bar Assn
PO Box 217
1735 Main St
Tazewell TN 37879

Richard Swanson
Hamblen County Bar Assn
717 W Main St Ste 100
Morristown TN 37814

James Taylor
Rhea County Bar Assn
1374 Railroad St Ste 400
Dayton TN 37321

Dwaine Thomas
Monroe County Bar Assn
PO Box 99
102 College St
Madisonville TN 37354

Harriet Thompson
Hardeman County Bar Assn
P O Box 600
205 East Market St.
Bolivar TN 38008

Billy Townsend
Decatur, Lewis,
Perry, Wayne Counties Bar Assn
26 West Linden Ave
Hohenwald TN 38462

Jeffery Washburn
Weakley County Bar Assn
P.O. Box 199
117 N. Poplar St.
Dresden TN 38225

Jack Welch
Williamson County Bar Assn
121 1st Ave S Ste 200
Franklin TN 37064

John White
Bedford County Bar Assn
P O Box 169
111 North Spring St Ste 202
Shelbyville TN 37162

John Lee Williams
Humphreys County Bar Assn
102 S Court Square
102 South Court Square
Waverly TN 37185

Matthew Willis
Dyer County Bar Assn
PO Box H
322 Church Ave. N.
Dyersburg TN 38025

Tish Wilsdorf
Hickman County Bar Assn
820 Hwy 100
121 Cabin Dr.
Centerville TN 37033

Donald Winder
McMinn-Meigs County Bar Assn
PO Box 628
10 W Madison Ave
Athens TN 37371

James Witherington
Tipton County Bar Assn
P O Box 922
205 S Main Street
Covington TN 38019

Lance Wray
Sumner County Bar Assn
131 Maple Row Blvd Ste A-101
Hendersonville TN 37075

Adele Anderson
Tennessee Board of Law Examiners
"401 Church Street, Suite 2200"
Nashville TN 37243

Barri Bernstein
Tennessee Bar Foundation
618 Church St Suite 120
Nashville TN 37219

Jerry Black
TN Assn of Criminal Defense Lawyers
1505 W Cumberland Ave
4965 Roberson Springs Rd.
Knoxville TN 37996

Doug Blaze
University of Tennessee College of Law
1505 W. Cumberland Ave
Knoxville TN 37923

Leilani Boulware
Lawyers Fund for Client Protection
3425A Richards St.
Nashville TN 37215

Beth Brooks
East Shelby County Bar Assn
2299 Union Ave
Memphis TN 38104

Hewitt Chatman
Ballard-Taylor Bar Association
511 Algje Neely Rd
Denmark TN 38391

Erik Cole
Tennessee Alliance for Legal Services
50 Vantage Way Suite 250
Nashville TN 37228

Jonathan Cole
Nashville Bar Association
211 Commerce St. Ste 800
Nashville TN 37201

Isaac Conner
Tennessee Alliance for Black Lawyers
1223 5th Ave. N.
Nashville TN 37208

Leslie Cory
Federal Bar Assn Chattanooga Chapter
1010 Market St Ste 306
Chattanooga TN 37402

Walter Crouch
Federal Bar Assn-Nashville Chapter
P O Box 198966
511 Union St Suite 2700
Nashville TN 37219

Barbara Deans
Ben Jones Chapter - National Bar Association
40 S. Main Ste. 2250
Memphis TN 38103

Sam Doak
Knoxville Bar Association
PO Box 300
2300 First Tennessee Plaza
Knoxville TN 37901

Melanie Grand
Lawyers Association for Women
P O Box 190583
Nashville TN 37219

Chris Guthrie
Vanderbilt University School of Law
131 21st Ave. South Room 108
Nashville TN 37203

Amy Hollars
Tennessee Lawyers Assn for Women
P.O. Box 68
1010 E Main St
Livingston TN 38570

Lynda Hood
Chattanooga Bar Association
801 Broad St Suite 420 Pioneer Bldg
Chattanooga TN 37402

Deb House
ETLAW
502 S. Gay Street, Suite 404
Knoxville TN 37902

Michele Howard-Flynn
Association for Women Attorneys
119 S. Main St. Ste. 500
Memphis TN 38103

Nancy Jones
Board of Professional Responsibility
1101 Kermit Drive Suite 730
Nashville TN 37217

Suzanne Keith
Tennessee Association for Justice
1903 Division St
Nashville TN 37203

Kaz Kikkawa
Tennessee Asian Pacific American Bar Assn
c/o Branstetter, Stranch & Jennings, PLLC
One Park Plaza 1-4-E
Nashville TN 37203

Joe Loser
Nashville School of Law
4013 Armory Oaks Drive
600 Linden Square
Nashville TN 37204

Steve Miller
Tennessee Defense Lawyers Assn
119 South Main Street Suite 400
Memphis TN 38173

Mario Ramos
TN Assn of Spanish Speaking Attnys
611 Commerce St Suite 3119
Nashville TN 37203

Allan Ramsaur
Tennessee Bar Association
221 4th Ave N Suite 400
Nashville TN 37219

Candice Reed
Lawyers Assn for Women
Marion Griffin Rep
112 Westwood Place, Suite 350
Brentwood TN 37027

John Rice
Chattanooga Bar Association
PO Box 4326
300 Forrest Avenue
Chattanooga TN 37405

Wayne Ritchie
Tennessee Association for Justice
PO Box 1126
606 W Main Ave Ste 300
Knoxville TN 37901

Chantelle Roberson
S.L. Hutchins Chapter - National Bar Assn.
832 Georgia Avenue Ste 1000
Chattanooga TN 37402

Katy Russell
SETLAW
P. O. Box 151
Chattanooga TN 37401

Billy Ryan
Federal Bar Assn - Memphis Chapter
1545 Union Ave
Memphis TN 38104

Tom Scott
Board of Professional Responsibility
550 W Main St Ste 601
Knoxville TN 37902

Dave Shearon
Tennessee Commission CLE
221 Fourth Avenue North, Suite 300
Nashville TN 37219

Barbara Short
TN Assn of Criminal Defense Lawyers
121 21st Ave. N. Ste 311
Nashville TN 37203

H. Smith
Cecil C. Humphreys School of Law
3715 Central Avenue
Memphis TN 38152

Lisa Smith
Tennessee Lawyers Assn for Women
P. O. Box 331214
Nashville Tennessee 37203

William Stover
Napier-Looby Bar Assn
800 Broadway 2nd Floor
Nashville TN 37203

Libby Sykes
Administrative Offices of the Courts
511 Union St Suite 600
Nashville TN 37219

Brack Terry
Federal Bar Association NE TN Chapter
PO Box 724
918 W First North St
Morristown TN 37815

Dalton Townsend
Tennessee Commission CLE
PO Box 869
617 Main Street
Knoxville TN 37901

George Underwood
William Henry Hastie Chapter - National Bar As
800 South Gay Street Suite 1100
Knoxville TN 37929

Ricky Wilkins
Memphis Bar Association
66 Monroe Ave Ste 103
Memphis TN 38103

Ricky Wilkins
Tennessee Board of Law Examiners
66 Monroe Ave Ste 103
Memphis TN 38103

Marsha Wilson
Knoxville Bar Association
P O Box 2027
505 Main St Suite 50
Knoxville TN 37901

Gigi Woodruff
Nashville Bar Association
315 Union Street Suite 800
Nashville TN 37201

APR 30 2010

**SUPPLEMENTAL COMMENT OF THE BOARD OF PROFESSIONAL
RESPONSIBILITY TO THE DRAFT NEW RULE SUBMITTED BY
THE ACCESS TO JUSTICE COMMITTEE REGARDING THE
ESTABLISHMENT OF AN EMERITUS PRO BONO PARTICIPATION PROGRAM**

The Board of Professional Responsibility (the "Board") has previously submitted its comment to the new rule proposed by the Access to Justice Committee regarding the establishment of an emeritus pro bono participation program. In response to the Board's comment, the Tennessee Bar Association suggested that the two organizations could work together to try to reach common ground in connection with their respective concerns regarding the proposed rule. The Board and the TBA jointly requested that the Court extend the comment period to April 30, 2010 to allow this collaborative process to take place. The Court, in a Per Curiam Order filed April 15, 2010, granted the requested extension.

After further study and discussions with the TBA concerning the provisions of the draft rule, the Board has the following further comment:

1. In Section 1 and 1.02(b), accept the TBA's proposal to change the term "emeritus" to "pro bono emeritus;" and
2. In Section 1.02 (b)(1) accept the TBA's addition of a second category of attorneys qualifying as a "pro bono emeritus attorney," and
3. In Section 1.07, agree with the TBA's acceptance of the Board's suggestion to delete the term "disciplinary fee" and substituting "registration fee;" and
4. In Section 1.06 (2), accept the TBA's proposal to add language to permit the Board to recommend to the Court the revocation of a pro bono emeritus attorney's certification.

In all other respects, the Board stands by its previously submitted comment.



TENNESSEE BAR
ASSOCIATION

PRESIDENT

Gail Vaughn Ashworth
200 Fourth Avenue North
1100 Noel Place
Nashville, Tennessee 37219
(615) 254-0400
FAX (615) 254-0459
Email: gail@gideonwiseman.com

PRESIDENT-ELECT

Sam Elliott
320 McCallie Avenue
Chattanooga, Tennessee 37402
(423) 756-5171
FAX (423) 266-1605
Email: selliot@gplca.com

VICE PRESIDENT

Danny Van Horn
6075 Poplar Avenue
Suite 500
Memphis, Tennessee 38119
(901) 680-7331
FAX (901) 680-7201
Email: danny.vanhorn@butlersnow.com

TREASURER

Richard Johnson
511 Union Street
Suite 2700
Nashville, Tennessee 37219
(615) 850-8151
FAX (615) 244-8804
Email: rjohnson@wallerlaw.com

SECRETARY

Jason Pannu
201 Fourth Ave North
Suite 1500
Nashville, TN 37219-8615
(615) 259-1366
Fax: (615) 259-1389
Email: jpannu@lewisking.com

IMMEDIATE PAST PRESIDENT

George T. Lewis

BOARD OF GOVERNORS

Tasha Blakney, Knoxville
Cari Carter, Memphis
Patrick Carter, Columbia
David Changas, Nashville
Jason Creasy, Dyersburg
Jackie Dixon, Nashville
David Doyle, Gallatin
D. Michael Dunavant, Ripley
Brian S. Faughnan, Memphis
Bobby Hibbett, Lebanon
Barbara Holmes, Nashville
Frank Johnstone, Kingsport
Jack H. "Nick" McCall Jr., Knoxville
Judge Carol McCoy, Nashville
Jane Powers, Crossville
Jonathan Steen, Jackson
Chris Varner, Chattanooga
Cynthia Wyrick, Sevierville

GENERAL COUNSEL

William L. Harbison, Nashville

EXECUTIVE DIRECTOR

Allan F. Ramsaur, Nashville
Email: aramsaur@tnbar.org

April 29, 2010

The Honorable Michael Catalano
Clerk, Tennessee Supreme Court
Supreme Court Building, Room 100
401 Seventh Avenue North
Nashville, TN 37219

IN RE: PROPOSED RULE 50A, RULES OF THE
SUPREME COURT OF TENNESSEE

Dear Mike:

Attached for filing please find an original and six copies of a Comment
in reference to the above new matter.

As always, thank you for your cooperation. I remain,

Very truly yours,

Allan F. Ramsaur
Executive Director

cc: Gail Vaughn Ashworth, President, Tennessee Bar Association
William L. Harbison, General Counsel, Tennessee Bar Association
Brian S. Faughnan, Chair, Standing Committee on Ethics &
Professional Responsibility

Service List



Tennessee Bar Center
221 Fourth Avenue North, Suite 400
Nashville, Tennessee 37219-2198
(615) 383-7421 • (800) 899-6993
FAX (615) 297-8058
www.tba.org

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

FILED
2010 APR 30 AM 10:37

IN RE: PROPOSED RULE 50A, RULES OF THE
SUPREME COURT OF TENNESSEE

APPELLATE COURT CLERK
NASHVILLE

No. M2010-00330-SC-RL2-RL

COMMENT OF THE TENNESSEE BAR ASSOCIATION

The Tennessee Bar Association ("TBA") submits this Comment in response to the Court's invitation extended to the bench, the bar, and the public to submit comments concerning a proposed Rule 50A, Rules of the Supreme Court of Tennessee submitted by the Access to Justice Commission to this Court for consideration. Pursuant to an Order entered by this court, the TBA was granted an extension of the deadline for providing comments so that the TBA could engage in discussions with the Board of Professional Responsibility ("BPR") regarding the public comments filed by the BPR.

Having engaged in those discussions, the TBA and the BPR were not able to reach agreement with respect to all of the contents of the TBA's comments set forth below but, where the TBA and the BPR are in agreement, we have specifically noted that agreement.

The TBA first commends the work of the Court's Access to Justice Commission in advancing the ideals behind the efforts of this Court and the bar to better provide access to justice within the State of Tennessee to citizens who cannot otherwise afford to retain counsel to assist them with a wide variety of legal issues greatly affecting their lives. The TBA is encouraged by the Court's continuing focus upon access to justice issues and believes that the adoption of a rule along the lines of the proposed Rule 50A is an effort to be embraced. It is

noteworthy that proposed Rule 50A's current language is drawn from a number of similar rules that have already been adopted in other U.S. jurisdictions.

The TBA also wants to acknowledge that the resources of the BPR have been taxed and strained as a result of its enforcement and regulatory role in our State and the increased burdens placed upon it, in part, flow from a number of the Court's initiatives enacted over the last year. It is quite understandable for the BPR to have some concern, as it has expressed in its comment filed with respect to proposed Rule 50A, about how its operations might be impacted by any added administrative burdens. Nevertheless, given the overriding importance of the cause of access to justice in Tennessee and the plight of Tennessee citizens who lack the resources to protect their rights and procure legal services, the TBA strongly believes that the Court should adopt a rule substantially similar to the proposed Rule 50A.

In an effort to try to address some of the issues raised by the BPR in its comment, the TBA has crafted a revised proposed Rule 50A that we submit represents an improvement upon the already good work performed by the Court's Access to Justice Commission and that should alleviate many of the concerns set forth by the BPR. Attached as Exhibit A is the TBA's revised proposed Rule 50A in a "redline" format that reflects proposed additions to the proposed Rule 50A attached to the Court's February 10, 2010 Order as being "double-underlined" and proposed deletions from the proposed Rule 50A as being "~~struck through~~."

What follows is a summary of the nature of the proposed revisions and the rationale behind them:

- A revision of the title for participating attorneys

The BPR has raised a concern that people may be misled by the term "emeritus" to describe the attorneys authorized under this rule and that concern has been echoed by one

individual attorney who filed a comment as well. Although the TBA believes that the majority of the attorneys that will be participating in this type of program at any given time are likely to be retired attorneys with long careers behind them and that those being served by such attorneys are not likely to be misled, the TBA also believes that a simple modification of proposed Rule 50A can readily remove any concern of this nature as to other attorneys who may qualify for, and participate, in this program. Accordingly, the attached redline replaces all references to “emeritus attorneys” with “pro bono emeritus attorneys.” The BPR, through its Disciplinary Counsel, has communicated to the TBA that it is in agreement with this proposed amendment.

- Revisions of the requirements for qualifying as a pro bono emeritus attorney

The BPR has also raised a concern regarding the proposed rule requirement that a participating attorney only have actively practiced for five years of the last ten years. On the other hand, a comment was filed by another individual expressing an interest in participating in any such pro bono emeritus attorney program but concerned that because of his retired status he only has been in active practice 3 of the last 10 years and would not be eligible to participate because of the five out of ten year requirement.

The TBA’s attached redline seeks to address this issue by revising 1.02(b)(1) to establish alternate methods for qualifying as a pro bono emeritus attorney with one track for attorneys who have taken retired/inactive status after a career spanning at least twenty-five years and another track for attorneys engaged in the active practice of law for a minimum of five of the last ten years. The BPR, through its Disciplinary Counsel, has communicated to the TBA that it is in agreement with this proposed amendment to clarify that these are two tracks for obtaining approval to practice as a pro bono emeritus attorney. The BPR continues to express its concern regarding the underlying policy permitting persons licensed in another jurisdiction who have

practiced for five of the last ten years being permitted to practice in Tennessee as a pro bono emeritus attorney.

Further, in an effort to make certain that this rule could not be interpreted in a manner inconsistent with other aspects of this Court's rules, the TBA has proposed revisions to 1.02(b)(2) adding to the requirement that the attorney has not been subjected to discipline within the last ten years additional requirements that the attorney has never been disbarred and is not on disability inactive status in any jurisdiction.

- Revisions regarding "active practice of law"

The TBA believes that there is no inconsistency present in 1.02(a) of the proposed Rule 50A with respect to defining the "active practice of law" to mean engagement in "the practice of law" or that any express reference to Sections 20.2 and 20.8 of Rule 9 are required. In order to fully avoid even a slight risk of confusion, however, the TBA redline proposal adds language to 1.02(a) to make clear that "active practice of law" is a term being defined solely for purposes of this new proposed rule.

- Revisions regarding provisions relating to supervision and court appearances.

The BPR has raised some concern regarding the provisions of proposed Rule 50A and what they require of lawyers with respect to supervision and, particularly, has questioned whether it is appropriate for the supervisory lawyer to not have to be present in the courtroom when a pro bono emeritus attorney is making a court appearance. The TBA disagrees that the framework contemplated by proposed Rule 50A is somehow lacking. Under Tennessee's ethics rules, supervisory attorneys routinely have responsibility for subordinate lawyers who go to court to handle their matters. The ethics rules do not require that supervisory attorney to have to be present in court to fulfill their obligations as a supervising lawyer. *See* Tenn. Sup. Ct. R. 8, RPC

5.1. The TBA has proposed in its revisions some changes to the language of 1.04(a) of the proposed Rule 50A in order to more clearly establish that the framework is one requiring compliance with Rule 5.1. In light of those changes, the TBA also believes that any reference to Rule 5.4(c) is both unnecessary and potentially a source of confusion.

The TBA submits that the BPR's additional concerns expressed in their comment regarding permitting pro bono emeritus attorneys to make court appearances on matters can be handled in a straightforward matter by revising 1.03 of the proposed Rule 50A to make clear that the ability of a pro bono emeritus attorney to appear in court in a case is subject to court approval. With such a revision, a trial court could simply withhold such approval if it had some real concern about the ability of the pro bono emeritus attorney interested in appearing before it.

- Revisions regarding certification requirements

The TBA has some concerns regarding the mechanics of the certification requirements set forth in proposed Rule 50A, 1.05 as to certification and, specifically, whether it is realistic to presume that courts, both in Tennessee and outside of Tennessee, are set up to be in a position to readily certify how many years a lawyer practiced or to certify whether a particular lawyer was engaged in the active practice of law for 5 or 10 years, etc. The TBA submits that it should be sufficient for the purposes of this program to obtain both the certification from the pro bono organization set out in the proposed rule and the sworn statement from the lawyer seeking to be a pro bono emeritus attorney. Accordingly, the TBA's redline deletes 1.05(b) of the original proposal and amends 1.05(a) to also require the pro bono organization to provide a certification that the proposed pro bono emeritus attorney meets the requirements of 1.02(b).

- Revisions regarding withdrawal of certification

The TBA strongly believes that there is no reason to foreclose attorneys licensed only in other states from participating in this program should they so desire and should they be able to satisfy all other requirements for certification as a pro bono emeritus attorney in the rule and that the goal of providing better access to justice in Tennessee is fostered, as it was in adopting the “Katrina Rule,” by so doing. The TBA also questions the BPR’s comment with respect to the way it describes the scope of its disciplinary authority over lawyers licensed only in other states when they practice in Tennessee. *See* RPC 8.5. Nevertheless, given the limited nature of the ability to represent clients under this proposed rule—pro bono emeritus attorneys will be extremely limited in that they will only be able to provide services to pro bono clients and only able to do so through the auspices of an approved pro bono legal program—means that the likelihood of any of these attorneys being in a position to commit grievous disciplinary offenses (even if you assume for the sake of argument that they would be so inclined) is quite limited. For example, they will not be receiving any payments from clients, so there won’t be any opportunities for misappropriating those funds or for charging for services and then failing to deliver the services.¹

Moreover, given the very limited right of practice this proposed rule would offer, discipline in the form of withdrawal of the certification necessary to practice in this capacity would have the effect of being equivalent to disbarment in Tennessee for the lawyer involved. In order to address one aspect of the BPR’s concerns, the TBA’s redline has added a specific subsection to 1.06 to make clear how the BPR can effectuate such a withdrawal of certification upon an appropriate determination of a violation meriting the imposition of discipline. The BPR,

¹ Likewise, given the limited nature of this proposed rule, the fact that its scope is limited entirely to representing pro bono clients, the TBA submits that, given that the very point of IOLTA requirements is to benefit access to justice initiatives, that no amendment to the proposed rule to try to delineate special additional requirements for pro bono legal organizations with respect to the use of IOLTA accounts for holding any funds that might be received by way of judgments or settlements on behalf of pro bono clients is necessary.

through its Disciplinary Counsel, has communicated to the TBA that it is in agreement with this particular aspect of the proposed amendment—the addition of 1.06(2).

- Revisions regarding fees

The TBA agrees with the BPR's comment that the reference in 1.07 to a "disciplinary fee" is out of place, and the TBA has in its redline revised that language to refer to the "registration fee of all practicing attorneys." The BPR, through its Disciplinary Counsel, has communicated to the TBA that it is in agreement with this proposed amendment.

The TBA's redline also proposed a revision to the specific language set forth in the last sentence of 1.07 of proposed Rule 50A so that it would, as revised, read "A pro bono emeritus attorney performing services solely under the authority of this section shall not be deemed to be a person licensed as an attorney by this Court for purposes of Tenn. Code Ann. § 67-4-1702(a)(5).


Respectfully Submitted,

By: /s/ by permission

Gail Vaughn Ashworth (10656), President
Tennessee Bar Association
Gideon & Wiseman
1100 Noel Place
200 Fourth Avenue North
Nashville, TN 37219-2144
(615) 254-0400

By: /s/ by permission

William L. Harbison (7012), General Counsel
Tennessee Bar Association
Sherrard & Roe, PLC
424 Church Street, Suite 2000
Nashville, TN 37219
(615) 742-4200



Allan F. Ramsaur (5764), Executive Director
Tennessee Bar Association
Tennessee Bar Center
221 Fourth Avenue, North, Suite 400
Nashville, TN 37219
(615) 383-7421

By: /s/ by permission

Brian S. Faughnan (19379)
Adams and Reese, LLP
Brinkley Plaza
80 Monroe Avenue, Suite 700
Memphis, Tennessee 38103
(901) 524-5280

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 on April 30, 2010



Allan F. Ramsaur

EXHIBIT A

Section 1. Pro Bono Legal Services by Pro Bono Emeritus Attorneys.

1.01. Purpose. Attorneys have a responsibility to provide competent legal services for all persons, including those unable to pay for such services. As one means of meeting the unmet legal needs of those persons who are unable to afford counsel, this Court establishes the pro bono emeritus attorneys ~~pro bono~~ participation program.

1.02. Definitions.

(a) The "active practice of law" for purposes of this rule means engagement in the practice of law, including, but not limited to: private practice, in-house counsel, public employment, or employment by a not-for-profit organization.

(b) An "pro bono emeritus attorney" is any person, not currently actively engaged in the practice of law, who was or is admitted to practice before the Tennessee Supreme Court or the highest court of any other state or territory of the United States or the District of Columbia, and

(1) Has been engaged in the active practice of law for a minimum of five of the last ten years immediately preceding application to participate in the pro bono emeritus attorneys' ~~pro bono~~ program, or who has taken retired or inactive status but was engaged in the active practice of law for at least twenty-five years preceding application to participate in the pro bono emeritus attorneys' program and been admitted under this section for at least five of the previous ten years;

(2) Has never been disbarred and has not been disciplined for professional misconduct by the Bar or courts of any jurisdiction within the last ten years; Membership in good standing may include retired or and is not on disability inactive status in any jurisdiction;

(3) If not a member of the State Bar of Tennessee, has graduated from a law school accredited by the American Bar Association;

(4) Agrees to abide by the Tennessee Rules of Professional Conduct and to submit to the Tennessee Supreme Court for disciplinary purposes;

(5) Neither asks for nor receives compensation of any kind for the legal services to be rendered under this section; and

(6) Is certified under section 1.05.

(c) An "approved legal assistance organization" for the purposes of this section is a not-for-profit legal assistance organization which is approved by the Tennessee Supreme Court. An organization which receives funding from the Legal Services Corp. is presumptively approved

under this section. Any other organization seeking approval under this section must file a petition with the clerk of the Tennessee Supreme Court certifying that it is a not-for-profit organization and stating with specificity:

- (1) The structure of the organization and whether it accepts funds from clients;
- (2) The major sources of funds used by the organization;
- (3) The criteria used to determine potential clients' eligibility for legal services performed by the organization;
- (4) The types of legal and non-legal services performed by the organization;
- (5) The names of all members of the Tennessee bar who are employed by the organization and who regularly perform legal work for clients;
- (6) The existence and extent of malpractice insurance to cover claims made by clients against an pro bono emeritus attorney.

(d) A "supervising attorney" is an active member of the Tennessee bar who oversees the work of an pro bono attorney engaged in activities permitted by this section. The supervising attorney must:

(1) Be employed by or be a participating volunteer for an approved legal assistance organization; and

(2) Assume responsibility for overseeing the work of the pro bono emeritus attorney to the same extent as any supervising attorney in a legal assistance program supervises any other volunteer attorney.

1.03. An pro bono emeritus attorney, in association with an approved legal assistance organization, may perform any legal work on behalf of a client that could be performed by any licensed attorney in the state of Tennessee, except that the ability of a pro bono emeritus attorney to make court appearances is subject to court approval.

1.04. Supervision and Limitations:

(a) Subject to Tenn. R. Sup. Ct. 8, RPC 5.4(e), a pro bono emeritus attorney must perform all activities under the auspices of a supervising attorney. ~~The supervising attorney need not be personally present when the emeritus attorney engages in all activities, nor even be present when the emeritus attorney appears in court.~~ It is, however, the responsibility of the supervising attorney to ensure that the pro bono emeritus attorney receives the same supervision as any other volunteer attorney or subordinate attorney, including compliance with the requirements of Tenn. R. Sup. Ct. 8, RPC 5.1.

(b) Pro bono Emeritus attorneys permitted to perform services under this section are not, and shall not represent themselves to be, active members of the Tennessee bar licensed to practice in the state.

(c) The prohibition against compensation for the pro bono emeritus attorney contained in section 1.02(b)(5) shall not prevent the approved legal assistance organization from reimbursing the pro bono emeritus attorney for actual expenses incurred while rendering services under this section nor shall it prevent the approved legal assistance organization from making such charges for its services as it may otherwise properly charge. The approved legal assistance organization shall be entitled to receive all court-awarded attorneys' fees for any representation rendered by an pro bono emeritus attorney.

1.05. Certification. Permission for an pro bono emeritus attorney to perform services under this section shall become effective upon filing with an approval by the Tennessee Supreme Court of:

(a) A certificate by an approved legal assistance organization stating that the pro bono emeritus attorney is currently associated with that legal assistance organization, meets the requirements of section 1.02(b), and that an attorney employed by or participating as a volunteer with that organization will assume the duties of the supervising attorney as required under this section; and

~~(b) A certification from the highest court or agency in the state, territory or district in which the emeritus attorney previously has been licensed to practice law, certifying that the emeritus attorney has fulfilled the requirements of active bar membership and has a clear disciplinary record as required by section 1.02(b)(2); and~~

(be) A sworn statement by the pro bono emeritus attorney that he or she:

(1) Has read and is familiar with the Rules of Professional Conduct and the Rules of the Supreme Court of Tennessee relating to the conduct of lawyers, and will abide by the provisions of those Rules;

(2) Submits to the jurisdiction of the Tennessee Supreme Court for disciplinary purposes, as defined by the Rules of Professional Conduct;

(3) Will neither ask for nor receive compensation for any kind of legal services authorized by this Rule.

1.06. Withdrawal of Certification:

(a) Permission to perform services under this section shall cease immediately upon the filing with the clerk of the Tennessee Supreme Court a notice either:

(1) By the approved legal assistance organization stating that:

(A) The pro bono emeritus attorney has ceased to be associated with the organization, which notice must be filed within five days after such association has ceased; or

(B) That certification of such attorney has been withdrawn. An approved legal assistance organization may withdraw certification at any time and it is not necessary that the notice state cause for such withdrawal. A copy of the notice shall be filed with the clerk of the Tennessee Supreme Court and shall be mailed by the legal assistance organization to the pro bono emeritus attorney.

(2) By the Board of Professional Responsibility stating that the pro bono emeritus attorney has been determined, after investigation to have committed a violation of the Tennessee Rules of Professional Conduct meriting the imposition of discipline.

(3) By the Tennessee Supreme Court, in its discretion, at any time, stating that permission to perform services under this section has been revoked. A copy of such notice shall be mailed by the clerk of the Tennessee Supreme Court to the pro bono emeritus attorney and to the approved legal assistance organization to which he or she had been certified by the Tennessee Supreme Court.

(b) If a pro bono emeritus attorney's certification is withdrawn for any reason, the supervising attorney shall immediately file a notice of such action in any court or tribunal in which the pro bono emeritus attorney was participating as counsel.

1.07. Discipline and Fees. A pro bono emeritus attorney performing services under this section shall abide by the Tennessee Rules of Professional Conduct, and is subject to discipline, including withdrawal of certification under this rule, for any failure to comply with those Rules. A pro bono emeritus attorney is exempt from the disciplinary registration fee required of all practicing attorneys. A pro bono emeritus attorney performing services solely under the authority of this section shall not be deemed to be a person licensed as an attorney by this Court engaging in the practice of law for purposes of Tenn. Code Ann. § 67-4-1702(a)(5)1, et seq. (~~privilege tax applicable to specific vocations, professions, etc.~~).

1.08. Mandatory Continuing Legal Education: Pro bono Emeritus attorneys certified under section 1.05 must comply with Tennessee's continuing legal education requirements. Tenn. Sup. Ct. R. 21.



Chairperson
Margaret L. Behm, Esq.
Dodson, Parker, Behm &
Capparella, PC
1310 6th Avenue North
Nashville, TN 37208
Phone: (615) 254-2291

**Access to Justice
Coordinator**
Rebecca Rhodes, J.D.

Tennessee Supreme Court

ACCESS TO JUSTICE COMMISSION
Nashville City Center, Suite 600
511 Union Street
Nashville, TN 37219
615-741-2687 Fax 615-741-6285

Commission Members
Douglas A. Blaze, Esq.
Kathryn Reed Edge, Esq.
Francis S. Guess
George T. Lewis, III, Esq.
D. Billye Sanders, Esq.
A. Gregory Ramos, Esq.
Maura Abeln Smith, Esq.
Bill Young, Esq.

Supreme Court Liaison
Hon. Janice M. Holder

MEMORANDUM

TO: Members of the Court

**FROM: Margaret Behm
Access to Justice Commission Chairperson**

DATE: May 27, 2010

RE: Addition Comment on Pro Bono Emeritus/ Limited Practice Rule

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NASHVILLE



The Access to Justice Commission recommended to the Court in January the adoption of a pro bono emeritus or limited practice rule to encourage and to specially authorize the performance of pro bono legal work by attorneys who are retired and/or have, for other reasons, put their licenses on inactive status. That Rule was published for comment, and the Commission asked for an extension of the comment period to respond that was granted, giving the Commission until May 29, 2010 to offer further comment.

The Commission has read the comments of the Board of Professional Responsibility (BPR) and those of the Tennessee Bar Association (TBA) in response to the BPR Comments. The TBA offered a revised proposed version of the Rule to accommodate most of the BPR concerns with the original text of the proposed Rule; that has also been reviewed.

The Commission now offers this comment in support of the revised version proposed by the TBA with the revisions to accommodate most of the BPR concerns.

Several of the legal aid and pro bono programs currently have senior attorneys who are working with them to provide pro bono legal assistance and mentoring; these attorneys have had to reactivate their licenses and pay the professional tax in order to do that volunteer work. The Commission is asking the Court to adopt the Pro Bono Emeritus Rule, as revised by the TBA to meet BPR concerns, to prevent the necessity of those volunteers, and future volunteers, having to take those steps and incur that expense to volunteer through their local pro bono programs.

If there is anything further I can provide to you or the Court, please let me know.