EXHIBIT A

TBA RESPONSE TO PUBLIC COMMENTS AND REVISIONS TO TBA'S PROPOSAL

Preamble and Scope

ETHICS COMMITTEE'S RECOMMENDATION:

We recommend no change to the TBA's proposal as to this section.

Public Comments and Committee's Response

BOARD OF PROFESSIONAL RESPONSIBILITY COMMENTS (pg 1 of BPR comment):

The Board recommends keeping the language in stricken Scope Comment 8 for clarification of the lawyer's exercise of discretion when electing not to disclose information otherwise permitted by RPC 1.6

COMMITTEE'S RESPONSE: We disagree with the Board's proposed change as the language in paragraph 14 of the Scope already covers the issue sufficiently. Paragraph 14 already states as follows: "Some of the Rules are imperatives, cast in 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 discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. . . ."

BOARD OF PROFESSIONAL RESPONSIBILITY COMMENTS (pg 1 of BPR comment):

The Board is of the opinion that certain terms contained within the proposed Preamble and Scope should be better defined and made simpler, e.g. "approbate", "vitiate", "obviate", and "abrogate". These Rules should be easily understood not only by the lawyers that are bound by the Rules, but by the public at large.

COMMITTEE'S RESPONSE: We disagree with the Board's proposal for removal of these terms. First, the meaning of the language in the preamble and scope is of less importance to the public at large given that these portions of the rules are ones for which lawyers cannot be charged with violations. Second, these terms have been used for quite some time not only in TN's rules but also in the ABA rules.

MEMPHIS BAR ASSOCIATION COMMENTS (pg 1 of MBA report)

The MBA proposes that the language in comment [20] of Scope regarding the fact that violations of the rules may be relevant evidence regarding whether a violation of the standard of care has also occurred should not be adopted and that instead the existing language (currently in [7] of the Scope) should be retained as the MBA "feels that "the language in the scope presently gives good guidance and should be retained."

COMMITTEE'S RESPONSE: We believe the TBA should continue to support its proposed revised language in comment [20] of the Scope. Not only is that language uniform to the ABA Model Rule, but also it is a more accurate statement of the law in Tennessee as it has been interpreted by the TN Supreme Court for almost twenty years now, see Lazy Seven Coal Sales, Inc. v. Stone & Hinds, P.C., 813 S.W.2d 400 (Tenn. 1991) ("Even though, as set forth above, the Code [of Professional Responsibility] does not define standards for civil liability, the standards stated in the Code are not irrelevant in determining the standard of care in certain actions for malpractice. The Code may provide guidance in ascertaining lawyers' obligations to their clients under various circumstances and conduct which violates the Code may also constitute a breach of the standard of care due a client.").

CHRISTIAN LEGAL SOCIETY AND TWO OTHER ATTY COMMENTS:

Request "that an additional provision be added to the proposed amended rules, perhaps as part of the Preamble, section 7, or part of the Scope, section 16; or as a new rule 1.20 to read substantially as follows:

> Nothing in these Rules of Professional Conduct shall infringe upon, limit or otherwise deny an attorney's freedom to decline or withdraw from representation in any case in which representation would violate the attorney's sincerely held religious beliefs or in any case where the attorney's beliefs could conflict with the zealous and effectual representation of the client.
>
> Our rationale is to state within the four corners of these rules themselves that the constitutional protections afforded all citizens of the United States and of the State of Tennessee apply to attorneys in their practice of the law, so that lawyers don't have to consult those external sources and try to determine where the rules contradict them. This would make clear that these rules are not intended in any way to limit or supplant those constitutional rights as they protect lawyers in their lawful legal practice, regardless of whether parties or tribunals agree or disagree with the attorneys' "sincerely held religious beliefs" and regardless of whether those in disagreement constitute a political majority.

COMMITTEE'S RESPONSE: We disagree with this proposal. First, we are not aware of any other U.S. jurisdiction with such a provision in their rules. Second, we believe that this concept is unworkable on a number of fronts, including but not limited to the fact that it would appear to be very bad public policy to perhaps have disciplinary proceedings turning on an examination of whether any lawyer's religious beliefs are "sincerely held" or not, especially when the rules already provide a number of different avenues for lawyers with such beliefs to reach a conclusion that the ethics rules permit them to either not take a case or to withdraw from a case if such an issue is presented. See, e.g., RPC 1.7 (material limitation based on personal interest of the lawyer) and RPC 1.16(b) (allowing withdrawal for any reason if can be accomplished without material adverse effect on interests of client) and RPC 1.16(b)(3) (allowing withdrawal even if material adverse effect on interests of client when "client insists upon taking an action that the lawyer considers repugnant or

imprudent"). Third, because of the coverage of the other rules, this is most likely to only affected appointments of counsel by courts and RPC 6.2(c) already addresses the ability of a lawyer to seek to avoid a particular court appointment because the client or cause is repugnant to the lawyer. Finally, adoption of this proposal would mean that the rules would be taking a position that allowing a lawyer's religious beliefs to trump a court's ability under RPC 1.16(c) to order a lawyer to continue representing a client notwithstanding good cause for terminating the representation. Not only is the judicial power to render such an order as to an attorney is a matter of law beyond the scope of the ethics rules, but also such a provision would amount to picking sides in advance as to a hypothetical dispute between a well-established constitutional right (the right of counsel for a criminal defendant) and a much less established constitutional right (the right of a lawyer not to represent someone in particular).

RPC 1.0

ETHICS COMMITTEE'S RECOMMENDATION:

We recommend no change to the TBA's proposal to this rule.

Public Comments and Committee's Response

MEMPHIS BAR ASSOCIATION COMMENTS (pg 2 of MBA report):

Recommends that the definition of fiduciary be reinserted since the word does appear in the proposed revised comment [12] and [27] of RPC 1.7. "In addition, the duty of layer as a fiduciary is commented on in many case decisions and a definition in the rules would appear to be helpful to lawyers."

COMMITTEE'S RESPONSE: We believe the TBA should continue to advocate that fiduciary be deleted as a defined term from the rules. Although the word does appear in two proposed revised comments, it does not appear anywhere in the black-letter text of the rules. We have no other defined term that appears only in comments and, if you look at the architecture of the definitional cross-references – it only refers to defined terms appearing in the black-letter of rules not in comments. Further, as far as providing a definition that is helpful to lawyers, the current definition of "fiduciary" in the RPC 1.0 does not, in our opinion, do even that as it is fairly circular as far as definitions go.

RPC 1.2

ETHICS COMMITTEE'S RECOMMENDATION:

We recommend no change to the TBA's proposal as to this rule.

Public Comments and Committee's Response

BOARD OF PROFESSIONAL RESPONSIBILITY COMMENTS (pg 3 of BPR comment):

The Board has concerns that the proposed additional language in subpart (a) requiring consultation with the client regarding the means toward the client's objectives in addition to the language in proposed Comment 2 regarding withdrawal or termination when fundamental disagreements arise between the lawyer and client leaves a question as to who controls the means toward a client's objectives. This has traditionally been the role of the attorney, but the proposed Rule appears to blur that line. The Board requests a clarification of the Rule in that regard.

COMMITTEE'S RESPONSE: The language proposed in Comment [2] was a compromise in light of a variety of conflicting views about who should control decisions as to the means to carry out the client's objectives. The line has *always* been blurred and that our proposal is a good step toward doing what can be done to try to provide the principles that allow lawyers to be knowledgeable about the difficulties that are always below the surface in this blurry area.

RPC 1.4

ETHICS COMMITTEE'S RECOMMENDATION:

We recommend no change to the TBA's proposal as to this rule.

Public Comments and Committee's Response

BOARD OF PROFESSIONAL RESPONSIBILITY COMMENTS (pg 5 of BPR comment):

(a)(2) & Comment 3: See concerns as set forth above in RPC 1.2

COMMITTEE'S RESPONSE: We believe that the TBA should stand by the proposed language as we believe it is both an indication of what lawyers should do, and what we believe most lawyers already do, with respect to making sure to properly communicate with their clients about means used in pursuing their matters.

TENNESSEE ASSOCIATION OF PROFESSIONAL MEDIATORS COMMENT

It has proposed revisions to comments [3] and [5] to add further language regarding communicating with clients about alternatives to litigation. Specifically they seek to have the following language added to comment [3]: "The duty imposed by paragraph (a)(2) typically requires attorneys to inform their clients of all reasonable means by which the client's goals may be achieved, including methods of Alternative Dispute Resolution such as Arbitration, Mediation and other forms of alternative dispute resolution." And they seek to have the following language added to comment [5]: "Adequate communication should apprise clients of the advantages and disadvantages associated with the reasonable means by which the client's goals may be achieved including litigation, mediation, arbitration and other forms of alternative dispute resolution. For example, an attorney, where appropriate, might compare each process in terms of what party or person possesses decision-making authority, the amount of time and expense involved, and other risks and benefits to each process."

COMMITTEE'S RESPONSE: We believe the TBA should not support these additions proposed by TAPM. These proposed additions go too far in terms of both detail and policy. We believe that the language the TBA has proposed to be added to comment [5] of RPC 2.1 is sufficient.

COMMENTS SUBMITTED BY THE TENNESSEE DISTRICT PUBLIC DEFENDERS CONFERENCE:

The PDs propose revisions to comment [7] of the proposed revisions to explicitly give attorneys discretion to not divulge certain information in their possession to clients.

COMMITTEE'S RESPONSE: We do not agree that the PDs proposed language is needed in connection with this rule. Further, we believe that the PDs language goes too far in

terms of being able to read as providing unbridled discretion to an attorney to not disclose information to clients that clients should otherwise have the right to receive. We also believe that the language in the comment that the PDs would like stricken is an important part of the comments and that the last two sentences of comment [7] already appropriately balance and address the kinds of concerns expressed by the PDs.

RPC 1.5

ETHICS COMMITTEE'S RECOMMENDATION:

We recommend that the TBA not oppose adding (a)(9) back into the Rule and communicate that lack of opposition to the Court. We also recommend that the TBA revise its proposal to add the following last sentence to comment [2]:

> **"With respect to whether a writing is required when a lawyer seeks to change the terms of a fee agreement with a client, see RPC 1.8 cmt. [1]."**

We also recommend the TBA revise its proposal to add a requirement that any nonrefundable fee be agreed to in a writing signed by the client (new RPC 1.5(f) and a revised comment [4] and new comment [4a]. Specifically, we propose the following revisions to the TBA's proposal:

> (f) A fee that is nonrefundable in whole or in part shall be agreed to in a writing, signed by the client, that explains the intent of the parties as to the nature and amount of the nonrefundable fee.
>
> [4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. *See* RPC 1.16(d). The obligation to return any portion of a fee does not apply, however, if the lawyer charges a reasonable nonrefundable fee.
>
> [4a] A nonrefundable fee is one that is paid in advance and earned by the lawyer when paid. Nonrefundable fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule. In determining whether a particular nonrefundable fee is reasonable, or whether it is reasonable to charge a nonrefundable fee at all, a lawyer must consider the factors that are relevant to the circumstances. Recognized examples of appropriate nonrefundable fees include a nonrefundable retainer paid to~~retainer by which the lawyer is~~ compensate~~d~~ the lawyer for being available to represent the client in one or more matters or where~~.~~ ~~Nor does the obligation to return any portion of a fee apply if~~ the client agrees to pay to the lawyer at the outset of the representation a reasonable fixed fee for the representation. Such fees are earned fees so long as the lawyer remains available to provide the services called for by the retainer or for which the fixed fee was charged. RPC 1.5(f) requires a writing signed by the client to make certain that l~~L~~awyers ~~should~~ take special care to assure that clients understand the implications of agreeing to pay a non-refundable fee.~~ retainer or a fixed fee payable in advance, and such agreements should be memorialized in a writing, preferably signed by the client.~~

Public Comments and Committee's Response

BOARD OF PROFESSIONAL RESPONSIBILITY COMMENTS (pg 7 of BPR comment):

The Board recommends keeping the stricken language in the current subpart (a)(9) to prevent unjustified client expectations as to a lawyer's advertised fee. The Board encounters this most often relating to "free consultations" that are later charged for in some fashion.

COMMITTEE'S RESPONSE: Although we believe that the BPR's specific concern would already be covered by RPC 7.1 (i.e., it would be a violation of that rule for a lawyer to offer a free consultation and then charge the client for the consultation afterwards), we see no need for opposition to the Board's request to add (a)(9) back into the Rule.

BOARD OF PROFESSIONAL RESPONSIBILITY COMMENTS (pg 7 of BPR comment):

The Board recommends that the last sentence in proposed subpart (b) require a writing if the lawyer's fee changes after the representation of the client has begun.

COMMITTEE'S RESPONSE: We disagree. We believe that the TBA's proposed revisions to comment [1] to RPC 1.8 already make clear that a writing (and more) is required when a lawyer seeks to change their fee in a way that benefits the lawyer. In light of this comment, however, we do believe that a pointer to RPC 1.8 is in order and have drafted language to do just that as set forth in our recommendation above.

BOARD OF PROFESSIONAL RESPONSIBILITY COMMENTS (pg 7 of BPR comment):

The Board recommends that the word "must" or "shall" be used instead of the word "should" used twice in the last sentence in proposed Comment 4 regarding non-refundable retainers. Issues surrounding the comprehension by clients of a lawyer's non-refundable fee are common subjects for complaints in this office.

COMMITTEE'S RESPONSE: We do not oppose the idea that these agreements need to be memorialized in writing but have real concerns about putting such a "shall" requirement only in the comments and not in the black-letter of the rule. In light of the Board's comment, we reconsidered our original approach to this issue and, ultimately, voted to propose to add a black-letter requirement of a signed writing for nonrefundable fees and have also drafted proposed comment revisions regarding such a requirement.

RPC 1.6

ETHICS COMMITTEE'S RECOMMENDATION:

We recommend that the TBA revise its proposed comment [2] to replace the word "relation" with the word "relating."

Public Comments and Committee's Response

BOARD OF PROFESSIONAL RESPONSIBILITY COMMENTS (pg 9 of BPR comment):

The Board is of the opinion that proposed subpart (a)(3) is problematic since the word "public" is not defined. The Board had concerns about whether, for example, non-recorded information during a court proceeding would be considered "public" if the hearing were open to the public. Although recognizing it might be difficult, he Board requests clarification in the definition of the word "public".

COMMITTEE'S RESPONSE: Recognizing that this was a much discussed issue for the committee and that ultimately the language adopted for the proposed (a)(3) was the result of much compromise and effort, we are of the opinion that "public" is a pretty clear word as far as words go and provides a sound foundation for disciplined thinking as specific questions arise. Accordingly, we have not recommended any change to the TBA's proposal in this respect.

BOARD OF PROFESSIONAL RESPONSIBILITY COMMENTS (pg 9 of BPR comment):

COMMENT OF ALAN LEISERSON

The word "relation" should be "relating" in proposed Comment 2.

COMMITTEE'S RESPONSE: We agree.

COMMENT OF SHELDON GILMAN

Mr. Gilman takes issue with the TBA's proposed revisions to RPC 1.6(b) as to additional permissive disclosures of confidential information. Mr. Gilman's concern appears to be a belief that such provisions are unnecessary in light of the mandatory disclosure requirements in RPC 1.6(c) and that these proposed revisions could make life difficult for lawyers in future malpractice actions because they could be viewed as having a responsibility to act. Mr. Gilman also argues that the disclosure is really actually mandatory because of the pressure a lawyer will face. Mr. Gilman cites to Illinois' version of Rule 1.6 as being better and notes that Kentucky did not adopt the language that the TBA is proposing. Mr. Gilman also states a belief that the disclosure requirements triggered by 3.3 and 1.13 should be enough.

COMMITTEE'S RESPONSE: We do not believe that the TBA should make any changes in response to Mr. Gilman's comment. We do not believe that the Tennessee courts would transform permissive disclosure provision into mandatory disclosure obligations. Further, RPC 1.13 and 3.3 deal with different matters. TN's RPC 1.13 only provides for a "reporting up the ladder" obligation and no "reporting out" obligation, and RPC 3.3, since it only applies to courts, would not address at all issues associated with client use of lawyer's services to perpetrate a fraud outside of the context of litigation. We believe that lawyers can benefit from guidance about what is permitted as well as what is required.

RPC 1.7

ETHICS COMMITTEE'S RECOMMENDATION:

We recommend that the TBA reach out to the Chair of the TBA Estate Planning Section, who filed one of the individual comments, to see if replacing the language proposed to be deleted with language patterned after the ACTEC commentary would be acceptable in terms of any need for specific guidance. Such language would be patterned after pertinenetlanguage in the ACTEC commentary. We would propose the following as a replacement comment:

> **It is often appropriate for a lawyer to represent more than one member of the same family in connection with their estate plans, more than one beneficiary with common interests in an estate or trust administration matter, or co-fiduciaries of an estate or trust. Multiple representation in such contexts often can result in more economical and better coordinated plans prepared by counsel who has a better overall understanding of all of the relevant family and property considerations. Multiple representations of these kinds are appropriate where the interests of the clients in cooperation and achieving common objectives predominate over any inconsistent interests and where the lawyer complies with Rule 1.7's requirements as to informed consent. A lawyer may not represent clients whose interests actually conflict to such a degree that the lawyer cannot adequately represent their individual interests. Such conflicts of interest are so serious that Rule 1.7 prohibits a lawyer from undertaking or continuing representation of multiple clients even with the informed consent of each of the clients. See RPC 1.7(b)(1). Unless the plan involves the formation, modification, or termination of a consensual relationship between clients and the lawyer acts as an intermediary in compliance with RPC 2.2, undertaking such a multiple representation will be governed by this rule. See RPC 2.2 cmt [4].**

Otherwise, we recommend no changes to the TBA's proposal as to this rule.

<u>Public Comments and Committee's Response</u>

BOARD OF PROFESSIONAL RESPONSIBILITY COMMENTS (pg 12 of BPR comment):

The Board recommends keeping the stricken language in (c)(2) as it provides a clear explanation of the required information.

COMMITTEE'S RESPONSE: We disagree. "Informed consent" is a new proposed defined term, and we believe the definition of informed consent provides as clear, and likely actually a clearer, explanation of the required information as did the stricken language of (c)(2).

BOARD OF PROFESSIONAL RESPONSIBILITY COMMENTS (pg 12-13 of BPR comment):

The Board has concerns about the capacity of a juvenile to give his or her informed consent to a lawyer representing a co-defendant under proposed subpart (c)(2). The Board is of the opinion that a juvenile does not have the capacity to make such a decision and recommends that informed consent be given by an adult without an interest who has decision-making authority over the juvenile.

COMMITTEE'S RESPONSE: We disagree. With due respect to the Board's opinion, whether any particular juvenile has the capacity to make a decision they are bound by is traditionally a question governed by other law, and we believe that the presence of the requirement in (c)(1) that a tribunal has to reach certain conclusions is a sufficient safeguard.

BOARD OF PROFESSIONAL RESPONSIBILITY COMMENTS (pg 13 of BPR comment):

The Board has concerns about stricken Comment 12 and a lawyer's duty of loyalty. The Board recommends keeping the stricken language to clarify a lawyer's role in conflicts within an enterprise or governmental relationship.

The Board has concerns about stricken Comment 19 and the responsibilities involved in raising conflicts issues. The Board recommends keeping the stricken language to clarify the responsibilities of those facing a potential conflicts issue.

COMMITTEE'S RESPONSE: We disagree as to both of these comments. As to Comment 12, we believe that new comments [33] and [34] addressing issues arising from representation of organizational clients provide better guidance and are less likely to mislead lawyers than comment [12] as to the ability to take on an adverse representation. As to Comment [19], we believe that the TBA was correct to recommend removal for at least two reasons: (a) that first sentence can be misread to mean that it is nobody's else's business when that is not the case; and (b) the comment unnecessarily seems to be written as if seeking to tell courts what they should and shouldn't do. Finally, we continue to be of the opinion that RPC 1.7 and its comments are one of those rules in which the general desirability of rules being as uniform as they can with the ABA Model Rule is heightened given modern practice.

MEMPHIS BAR ASSOCIATION COMMENTS (pg 2 of MBA report):

MBA believes that the Court should adopt a rule similar to ABA Rule 1.8(j) to address the prohibition on sex with clients instead of through comments to Rule 1.7.

COMMITTEE'S RESPONSE: We do not believe the TBA should move away from its proposal. This issue was discussed extensively by our committee prior to submitting our original proposal to the Court and, ultimately, it was the committee's considered view that the proper place to address this issue was in the comments to Rule 1.7 because the problem

that is created by a sexual relationship with a client is a 1.7 material limitation conflict arising from the lawyer's personal interest.

BOARD OF PROFESSIONAL RESPONSIBILITY COMMENTS (pg 13 of BPR comment):

The Board believes that "consentable", "consentability", and "nonconsentable" are not proper words and should be changed to "subject to consent", "the ability to consent", and "not subject to consent" respectively. These terms are interspersed within proposed Comments 13-17. The Board recognizes that the proposed words are used by the ABA Model Rules and makes its recommendation regardless.

COMMITTEE'S RESPONSE: We disagree as to the propriety of these terms. These are not only the terms used by the ABA Model Rules, but are the terms used in many other states rules and, perhaps most importantly, are the terms used by those throughout the country who practice in these areas to discuss these concepts.

COLLECTION OF COMMENTS FROM INDIVIDUAL TRUST/ESTATE LAWYERS:

A number of lawyers have submitted comments that object to the removal of the following sentence from existing comment [17]/proposed comment [27]: "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 interests of other family members."

These lawyers claim that this language provides good guidance to trust and estate lawyers as to how to resolve conflicts of interest among family members and that removal of this comment may expose trust and estate lawyers to a greater risk of violating the ethical rules, even when they are facilitating healthy and harmonious family estate planning.

Several, but not all of the lawyers submitting this type of comment go on to say: "Requiring otherwise cooperative family members to execute conflict waivers in order to avoid an ethics violation is a disruptive intrusion into what is traditionally a nonadversarial representation."

COMMITTEE'S RESPONSE: We strongly disagree with the sentiments expressed by these comments. Some discussion of history is likely in order to fully discuss the issues presented. Because of a request by the estate planning section in about 2000, Comment [5] to our Rule 2.2 pretty much excludes applying that rule to estate planning. Framing these representations as nonadversarial in nature would actually support the idea that they should be governed by Rule 2.2, but they are only within Rule 2.2 under our rules under certain limited circumstances. See RPC 2.2 cmt. [4].

Our committee knew of this history and decided that the compromise language in the current comment was no longer needed because the general language of the ABA Model Rules comments that we are proposing be adopted that we believe covers the issues of common representation sufficiently, proposed comments [29]-[32]. For example, proposed

comment [32] already covers the first part of the language about which these commenters now complain. The compromise language from the past that the TBA's proposed revision would now delete was explicitly agreed not to have been intended to change the substance of the rule. Yet, some of these comments appear to reflect that the language in current comment [17] is not actually providing good guidance to lawyers but appears to be misleading lawyers into thinking that the comment changes the requirements of the rule and allows trust and estate lawyers engaged in multiple representation from avoiding having to obtain waivers of conflicts.

As to the rest of the language proposed to be stricken, stating what a lawyer may "take into account" -- we are of the opinion that the better course is that in such situations instead of just giving guidance to lawyers that they can take such things into account, the comments should give guidance to a lawyer working through this issue that the client(s) desire to accommodate the interests of the other family members makes it easy for all to agree to waive that conflict/potential conflict and that it makes sense for the overall guidance in the comments to lead lawyers to actually get that consent to the conflict as opposed to ending up concluding that there was no conflict in the first place – it also is guidance that is in the best interest of those lawyers in terms of protecting them in the event of later disagreements and avoiding getting caught up in he said/she said disputes about what people did or didn't agree was important in the past.

As is indicated in our recommendation, there is more appropriate language that condenses the following language in the ACTEC commentaries if any specific additional comment language was needed:

"It is often appropriate for a lawyer to represent more than one member of the same family in connection with their estate plans, more than one beneficiary with common interests in an estate or trust administration matter, co-fiduciaries of an estate or trust, or more than one of the investors in a closely held business. Such representation can result in more economical and better coordinated plans prepared by counsel who has a better overall understanding of all of the relevant family and property considerations. Multiple representation is appropriate where the interests of the clients in cooperation, including obtaining cost effective representation and achieving common objectives, predominate over their limited inconsistent interests."

"Some conflicts of interest are so serious that the informed consent of the parties is insufficient to allow the lawyer to undertake or continue the representation (a "non-waivable" conflict). Thus, a lawyer may not represent clients whose interests actually conflict to such a degree that the lawyer cannot adequately represent their individual interests. . . . On the other hand, if the actual or potential conflicts between competent, independent parties are not substantial, their common interests predominate, and it otherwise appears appropriate to do so, the lawyer and the parties may agree that the lawyer will represent them jointly subject to MRPC 1.7 . . . or act as an intermediary pursuant to former MRPC 2.2."

If special language giving guidance to trust and estate lawyers in TN should be injected back into the comments to RPC 1.7, all would be better served if it were to track more closely the language quoted from ACTEC than the language the TBA has proposed to delete. We do not believe that is necessary, however, in light of the good language giving guidance to all lawyers about how to address common representations in proposed comments [29]-[32], but would recommend that we extend an olive branch to the estate planning folks to see if they would be supportive of replacing existing comment [17] with language patterned after the above ACTEC commentary and that also provides a clear pointer to RPC 2.2 cmt. [4].

RPC 1.9

ETHICS COMMITTEE'S RECOMMENDATION:

We recommend no change to the TBA's proposal as to this rule.

Public Comments and Committee's Response

BOARD OF PROFESSIONAL RESPONSIBILITY COMMENTS (pg 14 of BPR comment):

The Board has concerns about proposed Comment 8a and permissible instances where a lawyer may reveal confidential information of a client that is "generally known". The proposed Comment appears to diminish a lawyer's obligation of confidentiality by giving specific examples of "generally known" information that is permissible for disclosure purposes.

COMMITTEE'S RESPONSE: We disagree with the BPR. The TBA's proposal used language patterned after the Restatement of the Law Governing Lawyers to give guidance as to what "generally known" means. We continue to believe the TBA was correct in going with that approach, and we fail to see how giving such guidance as to what "generally known" means can itself diminish confidentiality obligations.

RPC 1.14

ETHICS COMMITTEE'S RECOMMENDATION:

In light of the concerns raised by the Board of the negative connotation of using "suffers" in this context, we believe the TBA should agree to this change and revise its proposal so that the language in comments [1] and [2] reads as follows: "has a diminished mental capacity" and "has a disability."

Public Comments and Committee's Response

BOARD OF PROFESSIONAL RESPONSIBILITY COMMENTS (pg 15 of BPR comment):

The Board is of the opinion that using "suffers" or "suffers from" in proposed Comments 1 and 2 to describe one's diminished capacity or disability is inappropriate and recommends refraining from the use of such language, regardless of the ABA's use. The stricken word "has" should remain.

COMMITTEE'S RESPONSE: We agree.

RPC 1.15

ETHICS COMMITTEE'S RECOMMENDATION:

We recommend that, in light of the Court's 2009 order adopting a new RPC 1.15 but that only addressed the IOLTA issues, that the TBA bring to the Court's attention the need to be mindful of the additional changes set out in our proposal and to make certain to "true up" that rule revision with what gets done in this petition with respect to definitional cross-references and any internal citations set out in comments. In connection with this, we also suggest that the TBA provide as an attachment to its further filing a new redline showing the additional changes, if any, that would have to be made to what the Court did last year.

RPC 1.16

ETHICS COMMITTEE'S RECOMMENDATION:

We recommend that the TBA revise its proposed language for the beginning of RPC 1.16(d) so that it would read as follows:

> **"A lawyer who is discharged by a client, or withdraws from representation of a client, shall, to the extent reasonably practicable, take steps to protect the client's interests. Depending on the circumstances, protecting the client's interest may include: (1) giving reasonable notice to the client, (2) allowing time for the employment of other counsel, (3) cooperating with any successor counsel engaged by the client, (4) promptly surrendering all client file materials, as defined in RPC 1.19(b), and (5) promptly refunding any advance payment of fees or expenses that has not been earned or incurred."**

Public Comments and Committee's Response

BOARD OF PROFESSIONAL RESPONSIBILITY COMMENTS (pg 17 of BPR comment):

The Board is of the opinion that the stricken word "including" should remain in proposed subpart (d) instead of the phrase "such as" to make the steps that a lawyer shall take upon withdrawal or discharge more of a requirement and less of an option. In conjunction with such change, the Board also recommends that each step be numbered similar to the current Rule, i.e. (1) giving reasonable notice to the client, allowing time for the employment of other counsel, (2) cooperating with any successor counsel engaged by the client, (3) promptly surrendering all client file materials, as defined in RPC 1.19(b), and (4) promptly refunding any advance payment of fees for expenses that have not been earned or incurred. The TBA committee chair agrees with the numbering proposal.

COMMITTEE'S RESPONSE: We agree that the use of numbering of the steps similar to the current version of the Rule is a helpful suggested revision. We believe, however, that there is an even clearer way than what was suggested by the Board to revise the language to make the appropriate point as to the lawyer's obligation. Accordingly, we have recommended that the TBA revise its proposal using slightly different language than what the Board suggests.

COMMENTS SUBMITTED BY THE TENNESSEE DISTRICT PUBLIC DEFENDERS CONFERENCE:

Routinely district public defender offices withdraw as counsel after an adverse final decision in the Court of Criminal Appeals as provided in Rule 14, Rules of Tennessee Supreme Court. This is an example where the case is not being transferred to another attorney, but is simply closed. The rule should allow the client to get the file (subject to work product exception and the information referred to in section 1 of these comments) upon request rather than automatically.

Otherwise, this could cause an additional expense of time and money to deliver voluminous files (and the lawyer would always have to make backup copies) to a client who did not even want the file.

COMMITTEE'S RESPONSE: The PDs comment appears to be directed at dissatisfaction with what the current rules already require upon termination or withdrawal of representation. We do not believe that the rule requirements should be changed. We also believe it is not reasonable to view the current rule as requiring lawyers to turn over materials to a client at the end of a representation if the client doesn't want the file.

RPC 1.18

ETHICS COMMITTEE'S RECOMMENDATION:

We recommend that the TBA revise its proposal to replace the word "person" in 1.18(c) with the words "prospective client."

Public Comments and Committee's Response

BOARD OF PROFESSIONAL RESPONSIBILITY COMMENTS (pg 20 of BPR comment):

The Board is not in favor of the word "significantly" as used in proposed subpart (c) and Comment 6, and recommends its deletion from the proposed Rule. The word leaves too much room for interpretation.

The Board is not in favor of the language contained in proposed Comment 5 and recommends deletion of the Comment. The Board is of the opinion that there are occasions where conflicts should not be subject to waiver even with the consent of a potential client.

COMMITTEE'S RESPONSE: We disagree with the BPR in both respects. We believe that "significantly" is the appropriate limitation and, further, given that "significantly" is where the ABA draws the line, its omission in our rule would indicate that the possibility of insignificant harm would be enough in TN to trigger the need for screening if the representation is to be undertaken. As to Comment 5, we see no reason why a prospective client should not be permitted to agree as long as the informed consent standard is met.

MEMPHIS BAR ASSOCIATION COMMENTS (pg 2 of MBA report):

"This rule on the duties to prospective clients is valuable, however, the use of the terms 'client' and 'prospective client' are difficult to understand in paragraph [c] and it is recommended that this paragraph be re-worded to clarify the duties sought to be imposed on the lawyer."

COMMITTEE'S RESPONSE: We do not agree that any confusion should be created with respect to the use of "client" and "prospective client" in paragraph (c), especially in light of (a). We do, however, believe that it would be better for clarity to replace the word "person" in paragraph (c) with "prospective client" in order to make the intended reference crystal clear.

RPC 1.19

ETHICS COMMITTEE'S RECOMMENDATION:

We recommend that the TBA revise its proposal as to this rule to delete "attorney notes" from (5) of the rule and from comment [2]. We believe that the remaining language "Research materials and other work product" will be sufficient to reach any attorney notes that should be turned over to clients as file materials.

Public Comments and Committee's Response

MEMPHIS BAR ASSOCIATION COMMENTS (pg 2 of MBA report):

"This Rule was specially written by the TBA Ethics Committee and is not a party of the ABA Model Rules. While it gives good guidance to lawyers on materials to which a client is entitled, the MBA Committee believes that 'attorney notes' should be removed from the list of items to be returned to the client on request. It is the Committee's view that notes taken by the lawyer are personal to the lawyer, and it should remain in the lawyer's discretion whether or not those notes are revealed to anyone, including the client."

COMMITTEE'S RESPONSE: We do not agree with the MBA's position that "notes taken by the lawyer are personal to the lawyer" as a general statement. Whether a client should be entitled to get copies of an attorney's notes should turn on the reason the notes were created. The TBA's proposal already specifically provides that it is only those attorney notes [and other work product] that are "prepared by the lawyer for the client related to the client's matter" that are client file materials under the rule if payment for that work has been received. Attorney notes that are not prepared "for the client" would not become client file materials under the TBA's original proposal. However, in the interest of alleviating concern on this issue, we believe the TBA should drop "attorney notes" from (5) of the rule and comment [2] of its proposal because, with that deletion, attorney notes that constitute work product prepared by the lawyer for the client would still qualify as client file materials, but there will be no possible way to misread the rule to require production of purely personal notes of an attorney.

COMMENTS OF THE TENNESSEE DISTRICT ATTORNEYS GENERAL CONFERENCE:

The TDAGC asks the Court to delay adopting Rule 1.19 and provide as one of their bases for such a proposal the notion of how this rule would impact public defenders and criminal defense lawyers with respect to their current practices of shielding their clients from certain sensitive information and whether client files are even an appropriate subject for an ethics rule.

COMMENTS SUBMITTED BY THE TENNESSEE DISTRICT PUBLIC DEFENDERS CONFERENCE:

In some criminal cases in Tennessee, defense counsel obtains information that is in addition to the discovery provided under Rule 16 of the Tennessee Rules of Criminal Procedure. Practices such as "open file" policies furnish defense counsel with access to exculpatory evidence, and help the defense provide more effective representation for either settlement or trial. In addition, independent investigation, criminal records checks, and computer investigation can be invaluable tools.

Against this background, the proposed rules require defense counsel to turn over all investigative records, personal notes, etc., to clients, which could result in access by others in state or local confinement facilities. This poses a danger to citizens whose personal information should not be "disseminated to the world" (e.g. Social Security numbers, date of birth, addresses, contact information including cell phone numbers, etc.) The proposed rules will impair defense counsel's abilities to gather important and potentially exculpatory information. The new proposal is overly burdensome and requires defense counsel to divulge information contrary to various privacy laws.

The PDs also opposed Rule 1.19 on the basis that they claim it does not preserve the current exception in Rule 1.16(d).

COMMITTEE'S RESPONSE: We do not agree with either the TDAGC or the PDs that proposed Rule 1.19 would change whatever existing ability a lawyer has to withhold certain information from a client because the lawyer is concerned that disclosure to the client would cause harm to others. We also believe that Rule 1.19 does, in fact, specifically work with Rule 1.16(d) with respect to that exception. Finally, we believe that the language included in comment [3] to this rule sufficiently makes clear that the rule does not require a lawyer to provide materials to a client if doing so would be contrary to a court order or other law.

RPC 2.1

ETHICS COMMITTEE'S RECOMMENDATION:

We recommend no change to the TBA's proposal as to this rule.

Public Comments and Committee's Response

NASHVILLE BAR ASSOCIATION COMMENT

The NBA supports our proposed revision to comment [5] of this rule.

COMMITTEE'S RESPONSE: No response required.

RPC 2.2

ETHICS COMMITTEE'S RECOMMENDATION:

We recommend that the TBA revise its proposal as to this rule to delete the word "shall" before the word "discuss" in (c)(3).

Public Comments and Committee's Response

BOARD OF PROFESSIONAL RESPONSIBILITY COMMENTS (pg 23 of BPR comment):

The Board is not in favor of the use of the word "discuss" in place of the word "consult" in proposed subpart (b)(3), (c)(3), and Comment 11, and recommends using the word "consult". The word "consult" connotes the use of legal opinion and advice and comports to the proposed Rule so long as the information given is impartial pursuant to proposed subpart (c)(1). In addition, the Board recommends retaining the definition of "consult" in RPC 1.0, Definitions.

Also, the word "shall" should be omitted from the beginning of (c)(3) before the proposed word "discuss" because it is redundant.

COMMITTEE'S RESPONSE: We agree as to the deletion of "shall" before the word "discuss" in (c)(3) as being redundant. We disagree, however, with the idea that "consult" should replace "discuss." The committee engaged in extensive discussion about what term to use given the dropping of "consult" as a defined term because of the move to the "informed consent" definition approach. We also believe the TBA should oppose any effort to put "consent" back into the rules as a defined term as that would create significant difficulties in a number of respects. And, of course, we believe it is telling that the definition of "consult" in the current rule does not, in fact, say any of the things that the BPR states that word "connotes."

RPC 2.4

ETHICS COMMITTEE'S RECOMMENDATION:

We recommend no change to the TBA's proposal as to this rule.

Public Comments and Committee's Response

MEMPHIS BAR ASSOCIATION COMMENTS (pg 3 of MBA report):

A sentence is proposed to be added to Comment 10 of Rule 2.4 concerning the ethical duty of a lawyer serving as a dispute resolution neutral to report unethical conduct and there is a reference to Rule 8.3. Rule 8.3, however, does not concern alternate dispute resolution and is therefore confusing as a reference. Either change is required in comment 10 of Rule 2.4 – or – Rule 8.3(c) or one of its comments should be expanded.

COMMITTEE'S RESPONSE: We believe this comment misapprehends how Rule 2.4 works and specifically the fact that 2.4(c)(4) and (5) require a neutral to treat information as if it were information protected by RPC 1.6. Thus, because of that requirement, we believe it does make sense to have the pointer to RPC 8.3(c) because it is that provision that says a lawyer does not have a duty to report misconduct if information protected by RPC 1.6 would be disclosed.

RPC 3.1

ETHICS COMMITTEE'S RECOMMENDATION:

The committee recommends that the TBA revise its proposal with respect to comment [3] and retain the existing comment [3] in the Tennessee rules.

Public Comments and Committee's Response

BOARD OF PROFESSIONAL RESPONSIBILITY COMMENTS (pg 24 of BPR comment):

The Board recommends keeping the stricken language in Comment 3 to clarify what a lawyer may and may not do in the representation of a defendant in a criminal matter.

COMMITTEE'S RESPONSE: In light of the Board's comment, we have reconsidered and now recommend that the TBA should revise its proposal as to Comment [3] to just leave that comment in its existing form.

BOARD OF PROFESSIONAL RESPONSIBILITY COMMENTS (pg 24 of BPR comment):

The Board recommends keeping the stricken language in Comment 4 to promote settlement between parties to a dispute, but moving the language to the RPC Preamble to reflect a general comment on the practice of law at large.

COMMITTEE'S RESPONSE: We disagree with the Board. The TBA's proposal in comment [5] to RPC 2.1 already addresses all that we believe is needed to be said in this area and does so with language that we believe is more fitting in terms of a "may be necessary" structure as opposed to being capable of being read to say that a lawyer necessarily acts unreasonably if they do not actively look to promote settlement.

RPC 3.2

ETHICS COMMITTEE'S RECOMMENDATION:

We recommend no change to the TBA's proposal as to this rule.

Public Comments and Committee's Response

COMMENTS OF THE TENNESSEE DISTRICT ATTORNEYS GENERAL CONFERENCE:

The TDAGC opposes the proposed change to Rule 3.2 to add the phrase "consistent with the interest of the client" and states their belief that such a proposal was rightly rejected by the Court years ago and should be rejected again.

COMMITTEE'S RESPONSE: We believe the TBA should continue to stand by its proposal in this respect. This was an issue that was the subject of much debate in our committee and the concerns regarding this proposal were fully heard and considered, but the majority of the committee did not agree with the position articulated by the TDAGC. Further, we submit that the added language in the comment rather than being contradictory to the added language of the rule is properly explanatory and undercuts the TDAGC's position that the rule will permit "delay, for the sake of delay".

RPC 3.4

ETHICS COMMITTEE'S RECOMMENDATION:

We recommend no change to the TBA's proposal as to this rule.

Public Comments and Committee's Response

BOARD OF PROFESSIONAL RESPONSIBILITY COMMENTS (pg 25 of BPR comment):

The Board recommends the addition to proposed subpart (c) the language contained in prior Rule DR 7-106(A) that states: "A lawyer shall not disregard or advise the client to disregard a standing rule of a tribunal or a ruling made in the course of a proceeding, but may take appropriate steps in good faith to test the validity of such rule or ruling." This is an area that confronts the Board regularly, and the recommendation will promote a better understanding by the practitioner in this situation, regardless of the fact that it is language from a past rule.

COMMITTEE'S RESPONSE: We disagree with the Board's proposed revision. Our committee's review process was driven by comparing our current rules to the ABA Model Rules to see if there were further changes we believed desirable, but we intentionally did not explore tinkering with rules generally during this revision process; thus, we did not discuss in this round the merits of the language of 3.4(c) generally. We do not believe, however, that the TBA should support bringing back rule language that has been gone for almost 6 years. We believe that the combination of RPC 3.4(c), RPC 3.1, and RPC 8.4(g) should provide enough guidance to lawyers as to this issue.

RPC 3.7

ETHICS COMMITTEE'S RECOMMENDATION:

We recommend that the TBA revise its proposal to insert the words "at trial" after "advocate" in the first sentence of Comment [3].

Public Comments and Committee's Response

MEMPHIS BAR ASSOCIATION COMMENTS (pg 2-3 of MBA report):

"The first sentence in Comment 3 appears to be too restrictive, and it is recommended that 'the tribunal' in the first sentence be deleted and in its place be substituted 'integrity of the proceedings."

COMMITTEE'S RESPONSE: We agree that the first sentence can be improved to make clear that it does not extend beyond the restriction in the black letter of the rule. We believe the best way to do that is to insert the words "at trial" after "advocate." We do not agree with the proposal to replace "tribunal" with "integrity of the proceedings." We believe that what is intended by saying to protect the tribunal is clear, but the language before the comma is to some extent superfluous. The TBA could certainly opt to revise the proposal to simply have comment [3] begin "Paragraph (a) . . ."

RPC 3.8

ETHICS COMMITTEE'S RECOMMENDATION:

We have received an informal comment regarding an incongruity in our version of (g) and what proposed comment [6] says is required by (g). In order to remedy this incongruity, we recommend that the TBA revise its proposal as to comment [6] to read as follows:

"When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person was convicted of a crime that the person did not commit, paragraph (g) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable efforts to cause another appropriate authority to undertake the necessary investigation."

Otherwise, we recommend no changes to the TBA's proposal as to this rule in response to the public comments.

Public Comments and Committee's Response

COMMENTS OF TENNESSEE'S THREE U.S. ATTORNEYS:

The 3 US Attorneys in Tennessee object to adoption of proposed 3.8(g) and (h) on a wide variety of bases, including: (1) an assertion that the rules are unnecessary, (2) that few states have followed the ABA's lead; (3) that prosecutors who are strangers to a case should not be treated any differently than other lawyers; (4) the obligations in proposed (g) and (h) are unclear with respect to "knows" and "material" and undertaking further investigation; (5) that the good faith exception is undefined as to being subjective or objective; (6) that these provisions would be inconsistent with other law; and (7) that this would lead to a flood of jailhouse lawyers filing ethics complaints against prosecutors.

COMMENTS OF THE TENNESSEE DISTRICT ATTORNEYS GENERALS CONFERENCE:

The TDAGC strongly supports the adoption of . . . "the innocence provisions", proposed Rule 3.8(g) and (h) and proposed Comments [6], [7], and [8], which provide guidance to the application of these sections. This support was made known to the TBA Board of Governors at the time they were considering this change. TDAG is dedicated to preventing mistaken convictions and rectifying the very few mistaken convictions that occur. The TDAGC believes the addition for proposed paragraphs (g) and (h) to Rule 3.8, Special Responsibilities of a Prosecutor, sets a clear standard for prosecutors and will increase confidence in our criminal justice system. In addition and just as importantly these amendments will lead to a greater understanding of the unique role of prosecutors to seek truth over and above winning a case.

COMMITTEE'S RESPONSE: We disagree with the comments of the US Attorneys and agree with the sentiments set forth by the TDAGC in supporting the TBA's proposal as to these portions of the rule. We believe that the TBA should continue to support the

proposal in these respects and, in so doing, we take special note of the fact that a working group in our committee that included individuals with relevant practice experience actually helped craft language that they believed was better in several respects in terms of what it asked of prosecutors than the ABA version. We also would note that we believe the use of defined terms in this rule is no more capable of being misconstrued than any other ethics rule and that the definitions of "know" and "material" provided in our rules are quite clear.

We believe that it is too early in the process since the ABA adoption of these provisions to say that courts are rejecting the ABA approach. Wisconsin adopted versions of (g) and (h), Delaware adopted a version of (g), and there are a number of states still considering the provisions. In Wisconsin, the predicted harms have not occurred nor have they in the handful of federal jurisdictions that adopt the ABA Model Rules as governing conduct in them, which would make federal prosecutors in those jurisdictions already subject to these rules. We also do not agree that there is significant disciplinary risk to prosecutors who fail to disclose while acting in good faith. The history of enforcement actions under Rule 3.8 is not one of overenforcement.

We acknowledge the truth of the statement that it is the defense's job as a matter of law to investigate newly discovered evidence, but that is precisely why a rule such as this is necessary. Usually, the defendant is in prison post-conviction and has no attorney – he cannot investigate. Unless the evidence is disclosed or investigated by the prosecutor, the defendant will never know if it nor of the need to investigate.

BOARD OF PROFESSIONAL RESPONSIBILITY COMMENTS (pg 27 of BPR comment):

The Board is of the opinion that the term "opprobrium" in proposed Comment 5 should be better defined and made simpler, regardless of the ABA's use. (See the Board's comments to the Preamble above).

The Board recommends that proposed Comment 8 be moved to the body of the Rule as subpart (i). The Board is of the opinion that said language should be part of the Rule due to the serious nature of consequences involved in the new prosecutorial requirements. In addition, the words "does not constitute a violation" indicates controlling authority, which is more suited to inclusion in a rule and not a comment.

COMMITTEE'S RECOMMENDATION: We disagree with the Board on both counts. First, we think that opprobrium [defined by The New Oxford American Dictionary, for example, as "harsh criticism or censure"] is likely exactly the right word to be used in this circumstance. As to the proposal to move Comment 8 to the text of the rule itself, given the delicate balance that was struck by the ABA in this area and in turn by our committee, we believe that the TBA should stick by its proposal and not advocate moving the good faith exception into the black-letter of the rule.

RPC 4.1

ETHICS COMMITTEE'S RECOMMENDATION:

We recommend that the TBA revise its proposal so as to retain the "or law" that we originally proposed be stricken from the first sentence of comment [1].

Public Comments and Committee's Response

BOARD OF PROFESSIONAL RESPONSIBILITY COMMENTS (pg 29 of BPR comment):

The Board recommends keeping the stricken word "CANDOR" in the caption of the Rule. The Board is of the opinion that the word "candor" connotes fairness and sincerity, which is different from the definition of "truthfulness".

The Board is not in favor of the use of the word "discuss" in place of the word "consult" in subparts (b) and (c), and recommends using the word "consult".

COMMITTEE'S RESPONSE: We disagree in both respects. Consistent with our response above to another aspect of the Board's comments, we do not believe the TBA should support dropping "discuss" in favor of "consult." As to adding the word "candor" back into the caption of the rule, we do not see any benefit to be gained in adding it and given that the rule governs what it governs, we do not think there is any detriment to dropping it in the interest of uniformity with the ABA Model Rule. (For what it is worth, we also do not agree about what the Board believes it connotes, but regardless do not believe it would make any sense to impose an ethical obligation of "sincerity" upon lawyers that would be over and above truthfulness. If lawyers' statements to others are truthful, it should not be a matter of professional discipline whether they are also sincere.)

BOARD OF PROFESSIONAL RESPONSIBILITY COMMENTS (pg 29 of BPR comment):

The Board recommends keeping the stricken language "or law" in the first sentence of proposed Comment 1. The Board is of the opinion that there is no affirmative duty for a lawyer to inform an opposing party of relevant law in a particular matter. This is congruent with the language in subpart (a).

COMMITTEE'S RESPONSE: We agree. This was a great catch by the Board.

BOARD OF PROFESSIONAL RESPONSIBILITY COMMENTS (pg 29 of BPR comment):

The Board recommends that the use of the word "omission" in proposed Comment 1 be clarified to only include omissions from statements made to a third party as opposed to the omission in providing information not communicated to said third party. In other words, omitting relevant information in communications to third parties that would be misleading would be an

unauthorized omission. However, an omission could not occur under the Rule in the absence of any communication made by a lawyer.

COMMITTEE'S RESPONSE: We disagree with the Board's suggestion. We believe the context of Comment [1] is sufficiently clear, especially given that RPC 4.1(a) only addresses statements actually made by the lawyer to a third person.

RPC 4.2

ETHICS COMMITTEE'S RECOMMENDATION:

We recommend no change to the TBA's proposal as to this rule.

Public Comments and Committee's Response

BOARD OF PROFESSIONAL RESPONSIBILITY COMMENTS (pg 31 of BPR comment):

The Board recommends keeping the stricken language in proposed Comment 4 concerning communication with a person who seeks a second opinion to clarify a lawyer's authority in speaking with a represented person when said person seeks a second opinion about their case.

COMMITTEE'S RESPONSE: We disagree. We believe the proposed replacement language is better because it encompasses second opinion consultations but also makes clear that there is a broader range of similar communications which are permissible. For example, a lawyer who is hired by the client to pursue a claim for malpractice.

RPC 4.4

ETHICS COMMITTEE'S RECOMMENDATION:

We recommend no change to the TBA's proposal as to this rule.

Public Comments and Committee's Response

BOARD OF PROFESSIONAL RESPONSIBILITY COMMENTS (pg 31 of BPR comment):

The Board recommends keeping the stricken language in subpart (a)(2) to clarify that the threat of refraining from presenting a criminal or disciplinary charge to gain an advantage in a civil matter should be equally prohibited since it can result in coercion and/or duress without the actual filing of a charge.

MEMPHIS BAR ASSOCIATION COMMENTS (pg 3 of MBA report):

The MBA Committee believes that the phrase "or refrain from filing" should be retained in the rule.

COMMITTEE'S RESPONSE: We disagree. The committee previously extensively discussed this proposed revision, and we do not believe the TBA should revisit because of the Board's comment or the MBA's comment. Of course, it also is worth noting that the language of the current rule does not actually prohibit "threats to offer" or "threats to refrain" but currently prohibits offering or agreeing to refrain from filing such a charge. The MBA's comment would appear to advocate having the rule actually prohibit a threat to refrain from filing. As the committee discussed, this prohibition would inappropriately hamper the ability of government prosecutors to negotiate a resolution of a matter in which the subject conduct creates both criminal and civil liability where the defendant agrees to imposition of civil penalties in exchange for an agreement that they will not be criminally prosecuted, for example.

RPC 5.3

ETHICS COMMITTEE'S RECOMMENDATION:

We recommend that the TBA revise its proposal to replace the word "person" in subpart (c)(2) with the word "nonlawyer."

Public Comments and Committee's Response

BOARD OF PROFESSIONAL RESPONSIBILITY COMMENTS (pg 32 of BPR comment):

The Board recommends the use of the word "nonlawyer" in place of the word "person" in proposed subpart (c)(2) to make the Rule congruent.

COMMITTEE'S RESPONSE: We agree. This was another great catch by the Board.

RPC 5.5

ETHICS COMMITTEE'S RECOMMENDATION:

We recommend that, in light of the Court's 2009 order adopting a new RPC 5.5, that the TBA bring to the Court's attention the need to make certain to "true up" that rule revision with what gets done in this petition with respect to definitional cross-references and any internal citations set out in comments. In connection with this, we also suggest that the TBA provide as an attachment to its further filing a new redline showing the additional changes, if any, that would have to be made to what the Court did last year.

RPC 6.1

ETHICS COMMITTEE'S RECOMMENDATION:

We recommend that, in light of the Court's 2009 order adopting a new RPC 6.1, that the TBA bring to the Court's attention the need to make certain to "true up" that rule revision with what gets done in this petition with respect to definitional cross-references and any internal citations set out in comments. In connection with this, we also suggest that the TBA provide as an attachment to its further filing a new redline showing the additional changes, if any, that would have to be made to what the Court did last year.

RPC 6.5

ETHICS COMMITTEE'S RECOMMENDATION:

We recommend that, in light of the Court's 2009 order adopting a new RPC 6.5, that the TBA bring to the Court's attention the need to make certain to "true up" that rule revision with what gets done in this petition with respect to definitional cross-references and any internal citations set out in comments. In connection with this, we also suggest that the TBA provide as an attachment to its further filing a new redline showing the additional changes, if any, that would have to be made to what the Court did last year.

RPC 7.1

ETHICS COMMITTEE'S RECOMMENDATION:

We recommend no change to the TBA's proposal as to this rule.

Public Comments and Committee's Response

MEMPHIS BAR ASSOCIATION COMMENTS (pg 3 of MBA report):

"This rule deals with communications from a lawyer and prohibits false or misleading comments by the lawyer. Based on the developing use of blogs by lawyers, it is felt that the rule should be expanded to cover the use and misuse of blogs by lawyers or agents of lawyers."

COMMITTEE'S RESPONSE: We believe the TBA should stand by its proposal for RPC 7.1. That rule applies to all communications by a lawyer about certain subjects regardless of the medium in which the communication occurs, whether on a blog, or on Twitter, or Facebook, or any other technology developed in the future through which human beings can communicate. We believe that is a much more viable overall approach than any effort to craft language targeted toward any one specific type of communication platform would be.

RPC 7.3

ETHICS COMMITTEE'S RECOMMENDATION:

We recommend that the TBA change its proposal and replace the word "prospective" in subparts (c)(5) and (c)(6) with "potential."

Public Comments and Committee's Response

BOARD OF PROFESSIONAL RESPONSIBILITY COMMENTS (pg 36 of BPR comment):

The Board recommends adding the word "legal" before the phrase "professional relationship" in proposed subpart (a)(2) and Comment 4.

COMMITTEE'S RESPONSE: We disagree. "Prior professional relationship" is the ABA Model language, and we believe we should continue to use it in our rules. We do not think prior professional relationships should be limited only to prior attorney-client relationships. If it were, the way to do it would not be to put the word "legal" in as that looks more like something attempting to distinguish between "legal" professional relationships and "illegal" professional relationships.

BOARD OF PROFESSIONAL RESPONSIBILITY COMMENTS (pg 36 of BPR comment):

The Board recommends that proposed subpart (c)(1) leave the stricken language in the Rule in addition to the new language. The Board is concerned that omitting the former language regarding "conspicuous" information leaves the advertising rules subject to abuse.

COMMITTEE'S RESPONSE: We disagree. The committee consciously decided to drop the overly detailed regulation in this respect believing that the new language regarding the need for it to say "Advertising Material" was sufficient. We recommend no change to the TBA proposal in this regard.

BOARD OF PROFESSIONAL RESPONSIBILITY COMMENTS (pg 36 of BPR comment):

The Board recommends the use of the word "potential" in place of the word "prospective" in proposed subparts (c)(5) and (c)(6) to make the Rule congruent.

COMMITTEE'S RESPONSE: We agree. This was another great catch by the Board.

RPC 7.6

ETHICS COMMITTEE'S RECOMMENDATION:

We do not recommend that the TBA make any changes to its proposal as to this rule.

Public Comments and Committee's Response

BOARD OF PROFESSIONAL RESPONSIBILITY COMMENTS (pg 37 of BPR comment):

The Board recommends a statutory fix here to provide a penalty provision for intermediary organizations that fail to comply with the proposed Rule. This would be enforced by the Tennessee Attorney General's office, similar to the unauthorized practice of law.

COMMITTEE'S RESPONSE: Given that the Board is talking about something that would go through the legislature, we see no need for the TBA to address this aspect of the Board's comment.

RPC 8.3

ETHICS COMMITTEE'S RECOMMENDATION:

We recommend no change to the TBA's proposal as to this rule.

Public Comments and Committee's Response

COMMENT OF SHELDON GILMAN

Mr. Gilman wants the Court to provide qualified immunity to lawyers who report other lawyers under RPC 8.3 and has proposed suggested language for such a rule. His proposal is as follows: (d) A lawyer acting in good faith in the discharge of the lawyer's professional responsibilities required by paragraphs (a) and (b) or when making a voluntary report of other misconduct shall be immune from any action, civil or criminal, and any disciplinary proceeding before the Bar as a result of said report, except for conduct prohibited by Rule 3.4(f).

COMMITTEE'S RESPONSE: We do not think that the TBA should change its position in response to Mr. Gilman's comment. We do not believe that a lawyer should be free from any possibility of discipline for making a frivolous disciplinary complaint against another lawyer. We believe that Supreme Court Rule 9, Section 27 provides immunity that is appropriate in scope and in the appropriate manner.

RPC 8.5

ETHICS COMMITTEE'S RECOMMENDATION:

We recommend that, in light of the Court's 2009 order adopting a new RPC 8.5, that the TBA bring to the Court's attention the need to make certain to "true up" that rule revision with what gets done in this petition with respect to definitional cross-references and any internal citations set out in comments. In connection with this, we also suggest that the TBA provide as an attachment to its further filing a new redline showing the additional changes, if any, that would have to be made to what the Court did last year.

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