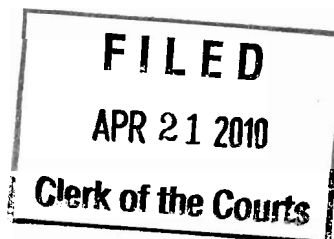


IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE



IN RE PETITION FOR THE ADOPTION OF AMENDED
TENNESSEE RULES OF PROFESSIONAL CONDUCT

No. M2009-00979-SC-RL1-RL

Filed: April 21, 2010

ORDER

In May 2009, the Tennessee Bar Association (“TBA”) filed the pending Petition for the Adoption of Amended Tennessee Rules of Professional Conduct, asking the Supreme Court to substantially revise the ethics rules governing Tennessee lawyers. On June 22, 2009, the Court filed an order publishing the TBA’s proposed amended Rules of Professional Conduct and soliciting written comments from judges, lawyers, bar associations, members of the public, and any other interested parties. The deadline for submitting written comments was Wednesday, December 16, 2009. On January 8, 2010, the Court filed an order allowing the TBA to respond to the numerous written comments submitted during the comment period; the TBA filed its response to the public comments on February 18, 2010.

After having considered the petition, the written comments submitted to the Court, and the TBA’s response to those comments, the Court has identified a number of issues concerning which it would be helpful to have oral arguments. The Court therefore directed the Appellate Court Clerk to schedule oral argument at 10:00 a.m. on June 1, 2010, in Nashville, and to notify all the interested parties accordingly.

The Court, at oral argument, is particularly interested in the issues listed below. Additionally, only the TBA and the individuals and organizations specified below will be permitted to present oral arguments. Oral argument of each issue shall be limited to ten (10) minutes per side—with allowance for additional time being subject to the discretion of the Chief Justice—and shall proceed in the order set out below. The TBA shall argue first in support of the proposed rule at issue, reserving any time for desired rebuttal, and the designated party or parties shall respond with any objections, concerns or suggestions regarding the issue. In those instances in which multiple parties are to be heard in response to the TBA’s submissions, those parties are to decide among themselves, prior to argument, the appropriate allocation of the ten (10) minutes allotted for argument by those parties.

Finally, any individual or organization that previously filed written comments, whether or not that individual or organization is designated below to present oral arguments, may submit additional written comments or briefing regarding any of the issues listed below; all such submissions shall be filed with the Clerk of the Appellate Courts in Nashville on or before Friday, May 14, 2010.

The Court requests oral arguments of the following issues, presented by the party or parties indicated below:

ISSUE 1: Preamble & Scope – Should Comment [1] under the *current* Preamble be deleted (as proposed by the TBA) or retained?

Parties requested to address this issue: The TBA.

ISSUE 2: RPC 1.2: Scope of Representation and Allocation of Authority Between Client and Lawyer – The Board of Professional Responsibility (“BPR”), in its written comments, raised concerns about the proposed changes in RPC 1.2(a) and recommended clarifying that paragraph, as well as Comment 2. The Court asks the TBA to present its position regarding this issue and asks the BPR to present its concerns with more specificity and to make any suggestions to clarify the paragraph.

Parties requested to address this issue: The TBA and the BPR.

ISSUE 3: RPC 1.6: Confidentiality of Information – Why is paragraph (a)(3)—which is not contained in the ABA Model Rule 1.6—needed? Can the TBA provide specific factual examples? Is paragraph (a)(3) too vague for purposes of disciplinary enforcement? Does Comment 8a to RPC 1.9 relate to RPC 1.6(a)(3) and, if so, how do those two items affect each other?

Parties requested to address this issue: The TBA and the BPR.

ISSUE 4: RPC 1.7: Conflict of Interest: Current Clients – The BPR, in its written comments, stated its opposition to the deletion of current Comment [19]. The Court asks the TBA to present its position regarding this issue and asks the BPR to present with more specificity its reason(s) for recommending retention of the Comment.

Parties requested to address this issue: The TBA and the BPR.

ISSUE 5: RPC 1.10. Imputation of Conflicts of Interest: General Rule – The Court asks the TBA to present argument regarding its proposed deletion of existing RPC 1.10(d) and asks the BPR to present its position regarding this issue.

Parties requested to address this issue: The TBA and the BPR.

ISSUE 6: RPC 1.12. Former Judge or Arbitrator – The TBA’s proposed RPC 1.12, like Tennessee’s current RPC 1.12, omits mediators and third-party neutrals from the rule; ABA Model Rule 1.12, however, includes mediators and third-party neutrals. The Court asks the TBA to present argument as to whether Tennessee’s RPC 1.12 should include mediators and third-party neutrals and, if so, the effect of such inclusion on the other RPCs.

Parties requested to address this issue: The TBA. In its discretion, the BPR may respond to the TBA’s argument.

ISSUE 7: RPC 1.16: Declining or Terminating Representation – The Tennessee District Public Defenders Conference (“PDs Conference”) and one District Public Defender (individually) expressed concern in their separate written comments about the TBA’s proposed changes to RPC 1.16(d). The Court asks the TBA to present its position regarding this amendment and asks the PDs Conference to respond; additionally, the Tennessee District Attorneys General Conference (“DAs Conference”) and the BPR may, in their discretion, present their respective positions on this issue.

Parties requested to address this issue: The TBA, the PDs Conference, the DAs Conference, and the BPR.

ISSUE 8: RPC 1.17: Sale of Law Practice – The Court asks the TBA to present oral argument concerning the following questions: In the context of the TBA’s proposal, “area of law practice” appears to refer to a *subject* area of law practice (not a geographic area) – is that correct? What are the policy reasons behind the American Bar Association’s inclusion of the sale of an “area of practice” in Model Rule 1.17, and is there a real need for such a rule in Tennessee? How often would the TBA expect the sale of an area of practice to occur in Tennessee, and what are actual examples of such sales? Are the terms “area of practice” and “geographical area” too vague for purposes of disciplinary enforcement? The Court also requests that the BPR present its views on this issue.

Parties requested to address this issue: The TBA and the BPR.

ISSUE 9: RPC 1.19: Client File Materials – The Court asks the TBA to present oral argument concerning its proposed RPC 1.19, especially in light of the fact that the ABA

Model Rules do not contain a comparable rule. The Memphis Bar Association, the DAs Conference, the PDs Conference, and one District Public Defender each filed written comments expressing various concerns with proposed RPC 1.19. The Court requests that the Memphis Bar Association, the DAs Conference and the PDs Conference present their respective positions regarding the proposed rule. Although the BPR did not file written comments concerning this proposed rule, the Court asks the BPR to present its position regarding the proposal.

In presenting their oral arguments, the parties should address, without limitation to raising other issues concerning this proposed rule, the following questions: Should the lawyer be given the discretion to remove certain information, for the protection of others, before giving the file to the client? How does RPC 1.4, Comment 7, affect the obligation under RPC 1.19 to turn over information to the client. RPC 1.19 states that the lawyer must turn over the client's file "upon request," but RPC 1.16(d)(4) could be read as requiring the lawyer to automatically turn over the client file—are those two provisions consistent? Could the definition of "client file materials" in RPC 1.19 be narrowed to address the PDs Conference's concerns?

Parties requested to address this issue: The TBA, the Memphis Bar Association, the DAs Conference, the PDs Conference, and the BPR.

ISSUE 10: The Christian Legal Society-Chattanooga Chapter ("CLS") proposes new "RPC 1.20: Religious Beliefs of Attorneys" (or, in the alternative, proposes adding similar language to the Preamble and Scope) – The Court asks a representative of the CLS to present oral argument regarding its proposal; in doing so, the CLS should address the question of whether RPCs 1.7, 1.16(b), 1.16(b)(3), and 6.2(c) are not already sufficient to cover the topic. The Court also asks the TBA to respond to the CLS's argument.

Parties requested to address this issue: Christian Legal Society-Chattanooga Chapter and the TBA.

ISSUE 11: RPC 3.2: Expediting Litigation – The TBA proposes adding "consistent with the interests of the client" to the current rule. The DAs Conference, in its written comments, stated that it opposes the addition of those words because, in summary, they can be interpreted as countenancing delay for the sake of delay. The Court asks the TBA, the DAs Conference and the PDs Conference to present their positions concerning this issue.

Parties requested to address this issue: The TBA, the DAs Conference and the PDs Conference.

ISSUE 12: RPC 3.8: Special Responsibilities of a Prosecutor – The TBA includes in its proposed RPC 3.8 new paragraphs (g) and (h), regarding wrongful convictions. The three United States Attorneys in Tennessee jointly filed a written comment opposing these provisions. The Court asks the TBA to present argument concerning 3.8(g) and (h) and asks a representative of the United States Attorneys to present argument concerning their opposition to those proposals. The Court also asks the DAs Conference, the PDs Conference and the BPR to present their respective positions on this topic. The parties should address the following questions, without limitation as to raising other issues on this topic: Should any form of 3.8(g) and (h) be adopted? If so, should the scope of 3.8(g) and (h) be narrowed to cover only wrongful convictions in the prosecutor's territorial jurisdiction?

Parties requested to address this issue: The TBA, a representative of the three United States Attorneys in Tennessee, the DAs Conference, the PDs Conference, and the BPR.

ISSUE 13: RPC 7.3: Solicitation of Potential Clients – In RPC 7.3(a)(2), the BPR suggests changing “prior professional relationship” to “prior legal professional relationship.” The Court asks the TBA and the BPR to argue their respective positions concerning this issue.

Parties requested to address this issue: The TBA and the BPR.

ISSUE 14: RPC 7.3: Solicitation of Potential Clients – RPC 7.3(a)(2) includes “close personal [relationships]” in those relationships excepted from the general prohibitions in paragraph (a), but “close personal [relationships]” are omitted from the similar exception stated in 7.3(b)(3). The Court asks the TBA to state the reason(s) for its different treatment of close personal relationships in the two paragraphs (or, in the alternative, was the omission in (b)(3) unintentional)?

Parties requested to address this issue: The TBA.

ISSUE 15: RPC 7.3: Solicitation of Potential Clients – The BPR, in its written comments, recommended retaining the three subparagraphs (detailing the “mechanics” of the required disclosures) in the *current* RPC 7.3(c)(1). The Court asks the TBA and the BPR to argue their respective positions concerning this issue.

Parties requested to address this issue: The TBA and the BPR.

In closing, the Court thanks the TBA for its conscientious and thorough work in developing and presenting to the Court the proposed amendments to the Rules of

Professional Conduct. The Court also thanks the organizations and individuals who submitted written comments concerning the proposed amendments; the comments submitted to the Court have been invaluable in our consideration of the proposed amendments. The Court expresses its sincere gratitude to all the participants in this important rulemaking process.

PER CURIAM