IN THE SUPREME COURT OF TENNESSEE

IN RE PROPOSED TENNESSEE RULES OF PROFESSIONAL CONDUCT	)))))	No. M2000-02416-SC-RL-RL

PETITION FOR CLARIFICATION OR RECONSIDERATION
BY TENNESSEE BAR ASSOCIATION
CONCERNING CERTAIN ISSUES RELATED TO
TENNESSEE RULES OF PROFESSIONAL CONDUCT

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I. INTRODUCTION

As a result of orders entered on August 27 and September 17, 2003, this Court granted the petition of the Tennessee Bar Association ("TBA") for the adoption of new lawyer ethics for Tennessee, and the resulting Tennessee Rules of Professional Conduct ("Rules") go into effect on March 1, 2003.

Over the several months since this Court's enactment of the Rules, a number of issues have arisen concerning aspects of these new Rules, most of which merely involve language adopted by the Court (much of which was enacted as proposed by the TBA) that is in need of clarification or correction. Two of these issues involve policy issues raised by the Court's action. This petition for reconsideration is intended to bring these issues to the Court's attention in advance of the March 1, 2003, effective date of these new Rules.

II. PROPOSED AMENDMENTS

In this petition for reconsideration, the TBA seeks to have this Court address the following issues:

- The TBA seeks clarification of the language of Comments [4] and [5] to Rule 8.4 by which the Court has banned secret taping by lawyers as deceitful, including specifically:
  - Clarifying whether the Court intended to ban prosecutors and/or other counsel in criminal matters from secret taping, thus invalidating the guidance of Tennessee Formal Ethics Opinions 81-F-14 and 81-F-14(a); and
  - Clarifying certain other aspects of the language of the language of the second sentence of Comment [5] to Rule 8.4.
- The TBA seeks reconsideration of the Court's apparent decision to ban most otherwise lawful, traditionally permitted surveillance by, or under the supervision of, lawyers.
- The TBA seeks reconsideration of the Court's decision to retain in Tennessee's ethics rules the existing broad practice area disclaimers in new Rule 7.4 or, in the alternative, should the Court decide to retain this requirement, the TBA seeks to have the Court clarify the language of Rule 7.4 on this issue.
- The TBA seeks to have the Court make a number of non-substantive amendments to various of the new Rules and Comments, all intended to clarify their meaning or correct errors, as follows:

•Clarification of the discussion in Comment [7] to Rule 1.2 of permitted agreements limiting the scope of a representation pursuant to Rule 1.2(c).

•Amendment to Rule 1.6(a) to add an inadvertently-omitted "the" to the phrase, "information relating to representation of a client," so that the phrase will read "information relating to the representation of a client."

•Amendment to Comment [6] to Rule 1.14 deleting "Emergency" from heading to conform to earlier changes in TBA's Proposed Rule, which were adopted by this Court.

•Amendment to add a Comment to Rule 4.1, to replace one deleted by this Court apparently due to the Court's decision not to adopt the TBA's Proposed Rule 1.6(b)(3).

•Amendment to Comment [7] to Rule 4.2 to confirm the point in time at which Rule 4.2 applies to prosecutor contacts with represented criminal accused.

•Amendment to Transitional Rule to add an inadvertently-omitted reference to the new writing requirement of Rule 1.11.

•Amendment to Rule 7.6(a) to delete the hyphen from "lawyer-advertising."

•Amendment of Comment [4] to Rule 1.5 to amend "Rules" to "Rule."

A. Proposed Amendment to Comment to Rule 4.4 and Comments [4] and [5] to Rule 8.4.

In the several months since the adoption by this Court of the new Tennessee Rules of Professional Conduct, no single topic has been discussed more by Tennessee lawyers and judges than the Court's amendments to Comment [5] to Rule 8.4 concerning secret taping and surveillance activities by lawyers. Considering the other important changes contained in these new Rules, the prominence of this discussion is certainly a strong and healthy indicator of the broad acceptance of these Rules by the bench and bar.

The Court will doubtless recall that the TBA proposed that the Court codify in the Comments to Rules 4.4 and 8.4 the view that secret taping by lawyers does not, in and of itself, amount to "conduct involving dishonesty, fraud, deceit, or misrepresentation," as banned in current DR 1-102(A)(4) and the substantively identical new Rule 8.4(c).[1] Accepting such a proposal would have clearly and unequivocally abandoned the longstanding guidance of Tennessee Formal Ethics Opinions 81-F-14 and 81-F-14(a). The Court rejected the TBA's proposal on this point, instead enacting language in Comment [5] to Rule 8.4.

The language adopted by the Court in Comment [5] to Rule 8.4, however, has generated significant confusion in the Tennessee legal community as to the Court's intent in two different areas – first, the scope of the ban on secret taping by lawyers, especially its application to prosecutors and other lawyers involved in criminal matters; and, second, whether the Court truly intended to ban otherwise lawful, traditionally permitted surveillance by lawyers or those they supervise.

Quite obviously, the issues of secret taping and surveillance are important ones that touch directly on core values of the legal profession and that, on a daily basis, directly affect the ability of courts and judges to find the truth and make the judicial system work effectively for parties,

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[1] Should the Court choose to reconsider its decision on this policy issue, language that would accomplish this result is attached as Exhibit A.

witnesses, and the public. Because of the importance of these issues to Tennessee lawyers, Tennessee judges, and the Tennessee judicial system, the TBA respectfully requests that this Court adopt language to clarify its intent.

1. The Court should amend the Comments to Rule 8.4 to clarify that the ban on secret taping by lawyers is co-extensive with Tennessee Formal Ethics Opinions 81-F-14 and 81-F-14(a), particularly in its application to prosecutors and other lawyers involved in criminal matters.

It is of signal importance to Tennessee lawyers and judges that the Court clarify the language that it has adopted to ban secret taping by lawyers. Because the Court's new language has been read by Tennessee lawyers as ambiguous, and because the result intended by the Court is not clear from the language appearing in Comments [4] and [5], the TBA proposes alternative language that would clearly accomplish different possible results the Court may have intended.

Having rejected the TBA's proposal that the rules of ethics not ban secret or surreptitious taping as inherently deceptive, the TBA believes that codification of the longstanding guidance of Tennessee Formal Ethics Opinions 81-F-14 and 81-F-14(a) would be far preferable to any other available alternative. The following language would accomplish this result, address several ambiguities in Comments [4] and [5] to Rule 8.4, and also enact the TBA's position (to be discussed below) on surveillance:

[Deletions to this Court's September 17, 2002, language are shown as ~~struck through~~; additions are shown as <u>double-underlined</u>.]

[Comments [4] and [5] to Rule 8.4]

> [4] Paragraph (c) prohibits lawyers from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. Such conduct reflects adversely on the lawyer's fitness to practice law. In some circumstances, however, prosecutors are authorized by law to use, or to direct investigative agents to use, investigative techniques that might be regarded as deceitful. <u>For example, prosecutors are ordinarily authorized by law to direct or advise law enforcement agents concerning covert contacts with persons suspected of criminal activity.</u> This Rule does not prohibit such conduct.
>
> [5] The conduct prohibited by paragraph (c) includes the secret or surreptitious recording of a conversation ~~or the actions of another~~. <u>Prosecutors are authorized by law, however, to use investigative techniques that might be regarded as deceitful, *see* Comment [4] *supra*, and the secret or surreptitious recording of a conversation is one such technique.</u>

> For this reason, and based on considerations of fundamental fairness, the prohibition on the secret or surreptitious recording of conversations does not apply to criminal matters, whether by prosecutors or other lawyers. ~~Before any party~~ In a matter other than a criminal matter, before any conversation may be recorded, that fact must be disclosed in advance of the recording, though the lawyer need not divulge all of the reasons or purposes for making the recording. However, if the person to be recorded ~~party~~ inquires into the purposes of the recording, then paragraph (c) of this Rule would further require the lawyer to be candid and to refrain from deceiving that ~~party~~ person, either affirmatively or through omission.

Assuming that the Court adheres to its view that most secret taping by lawyers should be banned, the TBA believes that attempting to codify the traditional Tennessee approach on this issue would be the best available alternative for the Tennessee judicial system. Apart from the positive value of stability and continuity in ethics rules, the traditional Tennessee view permitting lawyers involved in criminal matters to secretly tape (or supervise others who do so) is supported by significant other law.

Prosecutors are, of course, authorized by law to assist or supervise law enforcement agencies in certain investigations, and one legitimate investigative technique is the secret taping of individuals. Banning prosecutors from using, or assisting in the use of, such a technique has the potential for significantly hampering law enforcement efforts or, worse, providing an a disincentive for law enforcement agencies to seek or accept the assistance of lawyers in investigations. Clearly, Tennesseans are better served by law enforcement investigations being appropriately counseled or supervised by lawyers.

Further, Tennessee Formal Ethics Opinions 81-F-14 and 81-F-14(a) have permitted other lawyers involved in representations concerning criminal matters to secretly tape or supervise others in doing so. In part, basic considerations of fairness suggest that defense counsel must be allowed this investigative tool if prosecutors are permitted it, but the TBA is also concerned that such an ethical restriction on investigative techniques available to defense counsel may unconstitutionally limit a criminal defendant's ability to defend himself.

Adopting the TBA's language would thus codify the traditional Tennessee view on secret taping in a manner that should be clear to lawyers and judges.

2. Should the Court decide not to codify the guidance in Tennessee Formal Ethics Opinions 81-F-14 and 81-F-14(a), the Court should nevertheless clarify its intent concerning the scope of the ban on secret taping, particularly in its application to prosecutors and others involved in criminal matters.

Should the Court decide not to codify the guidance in Tennessee Formal Ethics Opinions 81-F-14 and 81-F-14(a), the Court should nevertheless clarify its intent concerning the scope of the ban on secret taping, particularly in its application to prosecutors and others involved in criminal matters.

Because the TBA is uncertain of the intended result of the Court's adopted language in Comments [4] and [5] to Rule 8.4, the TBA offers the Court two drafting solutions to other possible intended results, even though the TBA opposes the policy results that they would accomplish.

Some have construed the Court's adopted language as announcing an intent to allow *only prosecutors* to secretly tape. The TBA believes that this would be bad policy for the Tennessee judicial system and quite possibly an unconstitutional restriction on the right of a criminal accused's lawyer to gather evidence; nevertheless, the TBA offers the Court language that would accomplish this result (while also clarifying other language in these Comments and enacting the TBA's position on surveillance, which is discussed below). This draft language is attached as Exhibit B.

Similarly, some Tennessee lawyers reading the Court's adopted language have concluded that the Court intended to ban *all* secret taping by *all* lawyers, including prosecutors and other lawyers handling criminal matters. Again, the TBA believes that this would be bad policy for Tennessee lawyers, their clients, and the Tennessee judicial system, but, should the Court choose to adopt such a rule, the TBA offers the Court language that would accomplish this result (while also clarifying other language in these Comments and enacting the TBA's position on surveillance, which is discussed below). This draft language is attached as Exhibit C.

3. Regardless of the policy result chosen by the Court, the Court should adopt certain clarifying amendments to Comment [5] to Rule 8.4.

In each alternative proposal discussed above, the TBA has proposed minor amendments to the last two sentences of Comment [5] that are needed to clarify that any prohibition on recording applies to certain conversations, not to certain persons, and to remove any references to "party," a term that has sometimes been construed to refer only to persons formally involved in litigation. See, e.g., Monceret v. Board of Professional Responsibility, 29 S.W.3d 455, 458-60 (Tenn. 2000) (rejecting a disciplinary respondent's argument that the term "party" in DR 7-104(A)(1) did not include a witness who was not a party to litigation). Also, at the beginning of this portion of the Comment, the language should be amended to reflect that what may or may not be "recorded" is a "conversation," rather than a "party." These amendments are reflected in each of the alternative proposal submitted by the TBA with this petition.

4. Regardless of its decision concerning the scope of the ban on secret taping by lawyers, the Court should clarify that its new language in Comment [5] to Rule 8.4 is not intended to ban otherwise lawful, traditionally permitted surveillance by lawyers.

No other single provision of the new Rules has generated more debate and concern by Tennessee lawyers than the inclusion of the phrase "or the actions of another" in the first sentence of the Court's Comment [5] to Rule 8.4. The sentence at issue reads:

> The conduct prohibited by paragraph (c) includes the secret or surreptitious recording of a conversation *or the actions of another*.

(Emphasis added.) Many Tennessee lawyers have reasonably read the inclusion of this phrase to mean that the most routine of surveillance activities directed at opposing parties or witnesses in litigation – surveillance of the type that is lawful today and that traditionally has been a legitimate and effective tool of lawyers of all kinds to seek the truth and advocate for their clients – will be unethical on and after March 1, 2003.

While the TBA, of course, is not aware of the Court's intent in adopting this language, one familiar with the history of the adoption of the Rules could reasonably surmise that the inclusion of the phrase that has generated such consternation may well have been inadvertent on the Court's

part.[2] Regardless of its origin, however, the TBA strongly urges this Court to simply delete this phrase from Comment [5] to Rule 8.4, believing the reasons for doing so are numerous and compelling.

Should this language be left in place, it is clear that Tennessee lawyers and judges would be forced to give some meaning to it and almost certainly would read it to ban a substantial amount of ordinary surveillance engaged in, supervised by, or assisted by Tennessee lawyers that is otherwise lawful, traditionally permitted, and often critically important to the effective functioning of the judicial system in Tennessee.

One might ask whether banning as improperly dishonest, fraudulent, or deceitful "the secret or surreptitious recording of . . . the actions of another" would encompass ordinary surveillance. First, it is certainly relevant that practicing lawyers across the state who have reviewed this language afresh have concluded that it would do so. Second, it is clear that the formulation of this language covers much lawful conduct that has very significant positive value for the judicial system. For example, it is hard to imagine that any surveillance undertaken for the purpose of testing whether a party's or a witness's actions conform to her testimony or statements could be effective if the ethics rules required that a lawyer disclose in advance that it was taking place. Assuming that the filming

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[2] In the TBA's final, December 2001 proposal to the Court, the proposed rules addressed and generally authorized secret taping in two places, the Comment to Proposed Rule 4.4 and a Comment to Proposed Rule 8.4. Comment [4] to Proposed Rule 8.4, as proposed by the TBA in December 2001, included a sentence ultimately deleted by the Court that read as follows:

> Also, secret recording of a conversation ***or the actions of another*** for the purpose of obtaining or preserving evidence does not, by itself, constitute conduct involving deceit or dishonesty. See Rule 4.4.

(Emphasis added.) Phrased as an exclusion from the ban on deceptive conduct by a lawyer, this phrase, "or the actions of another," merely confirmed the long-held view of Tennessee lawyers and courts that ordinary, otherwise lawful surveillance of a witness or a party to litigation is not deceptive.

Unfortunately, when the Court decided to ban secret or surreptitious taping the Court appears to have merely continued to use this language, but inserted it as part of a ***ban*** on certain conduct described as ***actually*** being deceptive. This possibly inadvertent continuation of this phrase has caused mischief and led to an unintended (the TBA hopes) interpretation of Comment [5].

in a public place of a supposedly totally disabled worker's compensation claimant might otherwise reveal him to be moving without any restriction, can any reasonable person believe that such fraud would be revealed with this tool if the fraudulent claimant were given advance notice of the filming? Whether the formulation reaches all otherwise lawful surveillance, it clearly reaches and prohibits lawyer involvement in a substantial amount of laudatory conduct.

On public policy grounds, the TBA knows of no substantial grounds that exist for banning lawyer involvement in conduct that has been recognized as lawful for many years and that contributes substantially to the truth-finding function of the Tennessee judicial system. No abuse of surveillance has been reported to the TBA or been discussed in any comments to the Court concerning these Rules, nor is the TBA aware of any groundswell of public opinion, or of any widely-shared opinion among the bench and bar, that lawyers involved in surveillance for clients have somehow run amok. Nor is the conduct of surveillance unregulated today, as the law of trespass, invasion of privacy, and other law certainly limit what any Tennessee citizen may do in this regard. Finally, the list of Tennessee decisions that demonstrate the value of lawful surveillance is a long and valuable one.[3] Against this backdrop of Tennessee practice, custom, and established law, to suddenly ban lawyer involvement in this otherwise lawful activity would be a radical departure.

One might also suggest that, even if lawyers are banned from involvement in ordinary surveillance activities, clients and law enforcement agents are not themselves subject to this prohibition and, thus, that the ban is inconsequential. This may or may not be true, but it is clearly true that a ban on lawyer involvement means that it is much more likely that such surveillance

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[3] See, e.g., Stout v. Exide Corp., No. E2001-00572-WC-R3-CV, 2002 Tenn. LEXIS 159 (Tenn. Mar. 18, 2002); Parker v. Wausau Ins. Cos., No. W2000-01517-WC-R3-CV, 2001 Tenn. LEXIS 399 (Tenn. May 3, 2001); Atwell v. Colonial Freight Sys., No. 03S01-9609-CV-00090, 1997 Tenn. LEXIS 378 (Tenn. July 14, 1997); Rainey v. Oak Ridge School, No. 03S01-9607-CV-00077, 1997 Tenn. LEXIS 312 (Tenn. June 3, 1997); Premier Mfg. Support Servs. v. Cothran, No. 01S01-9605-CV-00102, 1997 Tenn. LEXIS 41 (Tenn. Jan. 17, 1997); Ervin v. Memphis Publ'g Co., No. 02S01-9512-CV-00126, 1996 Tenn. LEXIS 396 (Tenn. June 18, 1996); Lannom v. Board of Educ., No. M1999-00137-COA-R3-CV, 2000 Tenn. App. LEXIS 133 (Tenn. Ct. App. Mar. 6, 2000); D v. K, 917 S.W.2d 682 (Tenn. Ct. App. 1995); Pettus v. Hurst, 882 S.W.2d 783 (Tenn. Ct. App. 1993).

activities will violate existing legal restrictions on such conduct and will violate the legitimate property or privacy rights of those under surveillance. Taking lawyers out of the process just means that clients will undertake these activities without counsel, not that these activities will not occur.

Finally, the Court should recall that neither the TBA nor any other commentator requested that the Court enact any restriction of any kind on surveillance. To the extent that the Court does, in fact, believe that its rules should somehow expressly preclude, limit, or regulate lawyer involvement in otherwise lawful surveillance, members of the profession and others affected by such a decision should be permitted to present to the Court comments and briefing on all aspects of this important policy question. Apart from the substantive policy issues raised, an additional question never addressed in this rulemaking proceeding is the simple question of whether such regulation should be accomplished in lawyer ethics rules and, if so, whether such a prohibition should be prominently placed in the black letter of an ethics rule, rather than in more general language in a Comment. To date, there has been no opportunity for the debate of any of these issues before the Court, and the TBA strongly believes there should be before any such rule is considered by this Court. much less adopted.

B. Proposed Amendment to Rule 7.4 Concerning Practice Area Disclaimers.

In adopting the new Tennessee Rules of Professional Conduct, the Court rejected the proposal of the TBA that the Court abandon the existing broad disclaimer requirement for all published or broadcast communications by lawyers that mention substantive areas of practice or fields of law. While the TBA would urge the Court to reconsider this decision,[4] should the Court choose not to do so, the TBA would urge the Court to clarify Rule 7.4 as adopted.

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[4] Should the Court choose to reconsider its decision and abandon the "not certified" disclaimer, the TBA has supplied language that would accomplish this purpose that substantially tracks its December 2001 proposal to this Court. This language is attached as Exhibit D.

Specifically, should this Court choose to adhere to its decision to continue the requirement of a "not certified" disclaimer, the TBA recommends that the Court make certain clarifying amendments to the language of Rule 7.4 and its Comments as adopted by the Court to correct several probably inadvertent omissions or inconsistencies in terminology. The TBA's proposed clarifying language is attached as Exhibit E.

For example, in Rule 7.4 as adopted by this Court, there is no language generally stating, as DR 2-101(C) currently does, when such disclaimers are needed. The lack of such language may leave lawyers in doubt about when such disclaimers are needed, or may suggest that they are needed even in otherwise appropriate private communications with clients or prospective clients. Similarly, an operative "may" in the Court's adopted language should be replaced by "shall" in order to require one of the disclaimers. Also, the language added by the Court does not consistently refer to "area of practice" or "field of law," and the TBA's proposed amendments conform this usage to avoid any possible confusion.

C. Miscellaneous Non-Substantive Amendments to Various Rules and Comments.

In the course of numerous seminars and other discussions with Tennessee lawyers about the new Rules, the TBA's Standing Committee on Ethics and Professional Responsibility has identified a number of minor clarifications, all non-substantive, the adoption of which before the effective date of the new Rules would improve their clarity.

1. Amendment to Comment [7] to Rule 1.2

Upon further review of Comment [7] to Rule 1.2, which is intended to explain the provision in Rule 1.2(c) permitting some limitations on the scope of a representation, the TBA has concluded that the last sentence was inartfully phrased and may create more confusion than understanding. Thus, the TBA proposed that Comment [7] to Rule 1.2 be amended as follows:

[Deletions to this Court's September 17, 2002, language are shown as ~~struck through~~; additions are shown as double-underlined.]

Agreements Limiting the Scope of the Representation

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

2. Amendment to Rule 1.6(a)

Remarkably, in one of the most important of the rules proposed by the TBA, and the rule most debated before this Court, the TBA simply inadvertently omitted the word "the" from the intended (and debated) formulation of what is confidential information – "information relating to the representation of a client." The TBA proposes that, before, the new Rules go into effect, its error be corrected as follows:

[Deletions to this Court's September 17, 2002, language are shown as ~~struck through~~; additions are shown as double-underlined.]

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

3. Amendment to Comment [6] to Rule 1.14

As a part of its last round of changes made to its proposal by the TBA, the TBA deleted from the Comments to its Proposed Rule 1.14 the word "emergency," believing that this term's meanings in other contexts made it less helpful in this context. Having made this change, however, the TBA inadvertently failed to carry through this change thoroughly by deleting the term from the heading in the Comments. The Court adopted the TBA proposal concerning Rule 1.14, omitting the word emergency from the text of the Comments. The TBA now proposes to delete the term

from the heading as well, for the sake of clarity, as follows:

[Deletions to this Court's September 17, 2002, language are shown as ~~struck through~~; additions are shown as <u>double-underlined</u>.]

~~Emergency~~ Legal Assistance

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

4. Addition of Comment to Rule 4.1 deleted by the Court in its September 17, 2002, order

In the course of adopting the new Rules, the Court rejected the TBA's proposal concerning the adoption of Proposed Rule 1.6(b)(3). The TBA believes that, in an effort to implement this decision throughout the Rules, the Court deleted Proposed Comment [6] to Rule 4.1, which expressly referred to Proposed Rule 1.6(b)(3).

While the reference to the deleted section certainly should have been abandoned, the TBA believes that the point otherwise made in the Comment is nonetheless accurate and helpful to lawyers in understanding the complex and difficult issues relating to client confidentiality. Thus, the TBA has revised this language in light of the Court's treatment of confidentiality in the Rules as adopted, and proposes that the following revised Comment (which is substantively identical to the one deleted) be included as Comment [6] to Rule 4.1:

[Deletions to this Court's September 17, 2002, language are shown as ~~struck through~~; additions are shown as <u>double-underlined</u>.]

> [6] If, after the conclusion of a matter in which a lawyer has represented a client, the lawyer learns that the client has perpetrated a crime or fraud during the course of the lawyer's representation, the lawyer may not reveal the crime or fraud, except as may be required by Rule 1.6(c). *See, e.g.*, RPC 1.6(c)(1) (requiring disclosure "to prevent reasonably certain death or substantial bodily harm").

5. Amendment to Comment [7] to Rule 4.2

During the course of a TBA seminar on the new Rules, a questioner asked whether a distinction in the formulation of language in two places in Comment [7] to Rule 4.2, which concerns when the protections of the Rule apply in criminal matters, carried any meaning. In fact, the language at issue in both places defines the point in time at which Rule 4.2's protections apply in criminal matters to preclude contact by prosecutors, and the more extensive language in one place reflected a carefully crafted resolution of the issue that had been worked out with the concurrence of prosecutors and defense counsel.[5] As a result, the TBA proposed that, for the sake of greater clarity, Comment [7] to Rule 4.2 be amended to conform the description of this point in time throughout Comment [7], as follows:

[Deletions to this Court's September 17, 2002, language are shown as ~~struck through~~; additions are shown as <u>double-underlined</u>.]

> [7] By virtue of its exemption of communications authorized by law, this Rule permits a prosecutor or a government lawyer engaged in a criminal or civil law enforcement investigation to communicate with or direct investigative agents to communicate with a represented person prior to the <u>represented person being arrested, indicted, charged, or named as a defendant in a criminal or civil law enforcement proceeding</u> ~~commencement of a criminal or civil law enforcement proceeding~~ against the represented person. A civil law enforcement investigation is one conducted under the government's police or regulatory power to enforce the law. Once a represented person has been arrested, indicted, charged, or named as a defendant in a criminal or civil law enforcement proceeding, however, prosecutors and government lawyers must comply with this Rule. A represented person's waiver of the constitutional right to counsel does not exempt the prosecutor from the duty to comply with this Rule.

6. Amendment of Transitional Rule to include reference to Rule 1.11(a)

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[5] As the Court may be aware, throughout its lengthy process, the TBA has included, as active members of its drafting committee, highly respected prosecutors and defense counsel.

On the issue of the scope and application of Rule 4.2, perhaps above several other contentious issues concerning criminal practice, prosecutors and defense counsel, both on and off the Committee, have agreed on a compromise that carefully promotes the interests of the judicial system, without harming or affording an inappropriate advantage to prosecutors or defense counsel. As a result, Tennessee's Rule 4.2 probably provides Tennessee prosecutors more explicit protection for their legitimate activities, and probably more carefully delineates the protections for the criminal accused, than almost any other similar rule in the country.

Specifically, prosecutors and defense counsel on the TBA Committee are in agreement that this amendment to Comment [7] to Rule 4.2 is an appropriate and helpful one.

In the course of preparing its Proposed Transitional Rule, which was adopted by the Court, the TBA inadvertently omitted a reference to the new writing requirement in Rule 1.11(a). Because section (b) of the Transitional Rule was intended to refer to the new conflict-related writing requirements of the new Rules, the TBA proposes that the Rule be amended to include this omitted reference, as follows:

[Deletions to this Court's September 17, 2002, language are shown as ~~struck through~~; additions are shown as double-underlined.]

> The foregoing Rules shall become effective as of March 1, 2003, and shall have prospective application only, applying to all relationships existing on, and conduct taken from, that date forward. However, special provisions are made for the operation of the following Rules:
>
> > (a) The provisions governing contingent fee agreements contained in Rule 1.5(c) shall apply only to those agreements that are entered into or amended on or after March 1, 2003;
> >
> > (b) The provisions requiring a writing contained in Rules 1.7, 1.8(g), 1.9, 1.11(a), and 1.12 shall apply only to conflicts of interest that arise on or after March 1, 2003;
> >
> > (c) The provisions governing client consent contained in Rules 1.8(a) and 1.8(i) shall apply only to those transactions that are entered into or amended on or after March 1, 2003.

7. Amendment to Rule 7.6(a)

To conform to usage elsewhere in the new Rules, the TBA proposes to amend Rule 7.6(a) to delete the hyphen in the phrase "lawyer-advertising cooperative," which had been included in its Proposed Rule, as follows:

[Deletions to this Court's September 17, 2002, language are shown as ~~struck through~~; additions are shown as double-underlined.]

> (a) An intermediary organization is a ~~lawyer-advertising~~ lawyer advertising cooperative, lawyer referral service, prepaid legal insurance provider, or a similar organization the business or activities of which include the referral of its customers, members, or beneficiaries to lawyers or the payment for or provision of legal services to the organization's customers, members, or beneficiaries in matters for which the organization does not bear ultimate responsibility.

8. Amendment of Comment [4] to Rule 1.5

Finally, the TBA proposes to amend Comment [4] to Rule 1.5, which contains another

typographical error inadvertently carried forward from the TBA's Proposed Rule, as follows:

[Deletions to this Court's September 17, 2002, language are shown as ~~struck through~~; additions are shown as double-underlined.]

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

III. CONCLUSION

For the foregoing reasons, the TBA urges the Court to adopt the various amendments and corrections to the new Tennessee Rules of Professional Conduct, as set out above and in the attached Exhibits.

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing will be served, within 7 days of the filing of this document, upon the individuals and organizations identified in Exhibit F to this petition by regular U.S. Mail, postage prepaid.

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EXHIBIT A

Example of Language That Permit Secret Taping by All Lawyers

[Deletions to this Court's September 17, 2002, language are shown as ~~struck through~~; additions are shown as double-underlined.]

[Comment to Rule 4.4]

Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship. For example, a lawyer may not secretly record a conversation or the activities of another person if doing so would violate state or federal law specifically prohibiting such recording. Otherwise, this Rule does not prohibit secret recording so long as the lawyer has a substantial purpose other than to embarrass or burden the persons being recorded. It would be a violation of Rule 4.1 or Rule 8.4(c), however, if the lawyer stated falsely or affirmatively misled another to believe that a conversation or an activity was not being recorded. By itself, however, secret taping does not violate either Rule 8.4(c) (prohibition against dishonest or deceitful conduct) or Rule 8.4(d) (prohibition against conduct prejudicial to the administration of justice.)

[Comment [5] to Rule 8.4]

[5] ~~The conduct prohibited by paragraph (c) includes the secret or surreptitious recording of a conversation or the actions of another. Before any party may be recorded, that fact must be disclosed in advance of the recording, though the lawyer need not divulge all of the reasons or purposes for making the recording. However, if the recorded party inquires into the purposes of the recording, then paragraph (c) of this Rule would further require the lawyer to be candid and to refrain from deceiving that party, either affirmatively or through omission.~~ The secret or surreptitious recording of a conversation or the actions of another for the purpose of obtaining or preserving evidence does not, by itself, constitute conduct involving deceit or dishonesty. See Rule 4.4.

EXHIBIT B

Example of Language That Would Permit *Only Prosecutors* to Secretly Tape
(Offered, But Not Endorsed as Policy, By the TBA)

[Deletions to this Court's September 17, 2002, language are shown as ~~struck through~~; additions are shown as double-underlined.]

[Comments [4] and [5] to Rule 8.4]

[4] Paragraph (c) prohibits lawyers from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. Such conduct reflects adversely on the lawyer's fitness to practice law. In some circumstances, however, prosecutors are authorized by law to use, or to direct investigative agents to use, investigative techniques that might be regarded as deceitful. For example, prosecutors are ordinarily authorized by law to direct or advise law enforcement agents concerning covert contacts with persons suspected of criminal activity. This Rule does not prohibit such conduct.

[5] The conduct prohibited by paragraph (c) includes the secret or surreptitious recording of a conversation ~~or the actions of another~~. As noted in the preceding Comment, prosecutors are authorized by law to use, or to direct investigative agents to use, investigative techniques that might be regarded as deceitful, and the secret or surreptitious recording of a conversation is one such technique. Other lawyers involved in representations involving criminal matters typically have no such authority under law and thus are barred from such secret or surreptitious recording. Before any ~~party~~ conversation may be recorded other than by a prosecutor in a criminal matter, that fact must be disclosed in advance of the recording, though the lawyer need not divulge all of the reasons or purposes for making the recording. However, if the person to be recorded ~~party~~ inquires into the purposes of the recording, then paragraph (c) of this Rule would further require the lawyer to be candid and to refrain from deceiving that ~~party~~ person, either affirmatively or through omission.

EXHIBIT C

Example of Language That Would Ban *All* Secret Taping by All Lawyers
(Offered, But Not Endorsed as Policy, By the TBA)

[Deletions to this Court's September 17, 2002, language are shown as ~~struck through~~; additions are shown as double-underlined.]

[Comments [4] and [5] to Rule 8.4]

[4] Paragraph (c) prohibits lawyers from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. Such conduct reflects adversely on the lawyer's fitness to practice law. In some circumstances, however, prosecutors are authorized by law to use, or to direct investigative agents to use, investigative techniques that might be regarded as deceitful. For example, prosecutors are ordinarily authorized by law to direct or advise law enforcement agents concerning covert contacts with persons suspected of criminal activity. This Rule does not prohibit such conduct.

[5] The conduct prohibited by paragraph (c) includes the secret or surreptitious recording of a conversation ~~or the actions of another~~. This prohibition applies with equal force to prosecutors, defense counsel, and other lawyers, notwithstanding that prosecutors may be authorized by other law, in some circumstances, to use other investigative techniques that might be regarded as deceitful, as noted in the preceding Comment. Before any ~~party~~ conversation may be recorded, that fact must be disclosed in advance of the recording, though the lawyer need not divulge all of the reasons or purposes for making the recording. However, if the person to be recorded ~~party~~ inquires into the purposes of the recording, then paragraph (c) of this Rule would further require the lawyer to be candid and to refrain from deceiving that ~~party~~ person, either affirmatively or through omission.

EXHIBIT D

Language That Would Abandon "Not Certified" Practice Area Disclaimer

[Deletions to this Court's September 17, 2002, language are shown as ~~struck through~~; additions are shown as double-underlined.]

Rule 7.4
COMMUNICATION OF FIELDS OF PRACTICE

Subject to the requirements of Rules 7.1, 7.2, and 7.3,

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.

(b) Except as permitted by paragraphs (c) and (d), a lawyer shall not state that the lawyer is a specialist, specializes, or is certified or recognized as a specialist in a particular field of law.

(c) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.

~~(d) A lawyer who has been certified as a specialist in a field of law by the Tennessee Commission on Continuing Legal Education and Specialization may state, with respect to each area, "Certified as a (area of practice) Specialist by the Tennessee Commission on Continuing Legal Education and Specialization." Any lawyer so certified may also list any other certifications that he or she has obtained in that area of law, provided that the organizations issuing such certifications have been accredited by the Commission as complying with its requirements for certification, and provided further that such listing is in type not larger than that used to list certification from the Commission.~~

~~(e) If a lawyer has not been certified as a specialist by the Commission in an area in which the lawyer advertises and in which certification is available, then the lawyer must state with respect to each such area, "Not certified as a (area of practice) specialist by the Tennessee Commission on Continuing Legal Education and Specialization."~~

~~(f) If a lawyer has not been certified as a specialist by the Commission in an advertised area, but no certification is available from the Commission in that area of law, the lawyer may state, "Certification as a (area of law) specialist is not currently available in Tennessee."~~

~~(g) No lawyer shall communicate that certification is not available in an advertised area if the advertised area has been identified by the Commission as being included in an area of specialization or, in the absence of such identification, if the advertised area is reasonably included in a certified specialty.~~

(d) A lawyer who has been certified as a specialist in a field of law by the Tennessee Commission on Continuing Legal Education and Specialization may state that the lawyer "is certified as a specialist in [field of law] by the Tennessee Supreme Court." A lawyer so

certified may also state that the lawyer is certified as a specialist in that field of law by an organization recognized or accredited by the Tennessee Supreme Court or its Commission on Continuing Legal Education and Specialization as complying with its requirements, provided the statement is made in the following format: "[Lawyer] is certified as a specialist in [field of law] by [organization]."

COMMENTS

[1] This Rule permits a lawyer to indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields or will not accept matters in a specified field or fields, the lawyer is permitted to so indicate.

[2] However, a lawyer may not communicate that the lawyer is a "specialist," practices a "specialty," "specializes in" a particular field, or that the lawyer has been recognized or certified as a specialist in a particular field of law, except as provided by this Rule. Recognition of specialization in patent matters is a matter of long-established policy of the Patent and Trademark Office, as reflected in paragraph (c).

[3] Paragraph (d) permits a lawyer to communicate that he or she is a specialist or has been certified or recognized as a specialist when the lawyer has been so certified or recognized by the Tennessee Commission on Continuing Legal Education and Specialization. The certification procedures are designed to require that the lawyer demonstrate higher degree of specialized ability and experience than is suggested by general licensure to practice law. This paragraph also permits the lawyer to state that he or she is certified by other professional organizations, provided that such organizations have been accredited by the Commission as complying with its requirements to issue such certification.

~~[4] Paragraphs (e) through (g) restate previous law with respect to communications in fields of practice in which the lawyer is not certified as a specialist with the Tennessee Commission on Continuing Legal Education and Specialization.~~

EXHIBIT E

**Language That Would Clarify New Rule 7.4,
While Maintaining Disclaimer Requirement**

[Deletions to this Court's September 17, 2002, language are shown as ~~struck through~~; additions are shown as double-underlined.]

**Rule 7.4
COMMUNICATION OF FIELDS OF PRACTICE**

Subject to the requirements of Rules 7.1, 7.2, and 7.3,

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.

(b) Except as permitted by paragraphs (c) and (d), a lawyer shall not state that the lawyer is a specialist, specializes, or is certified or recognized as a specialist in a particular field of law.

(c) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.

(d) A lawyer who publishes or broadcasts an unsolicited communication with regard to any field of law in which the lawyer practices shall:

(1) If the lawyer ~~A lawyer who~~ has been certified as a specialist ~~in a field of law~~ by the Tennessee Commission on Continuing Legal Education and Specialization in the field of law so advertised, ~~may~~ state, with respect to each ~~area~~ field of law, "Certified as a (~~area of practice~~ field of law) Specialist by the Tennessee Commission on Continuing Legal Education and Specialization." Any lawyer so certified may also list any other certifications that he or she has obtained in that ~~area of law~~ field of law, provided that the organizations issuing such certifications have been accredited by the Commission as complying with its requirements for certification, and provided further that such listing is in type not larger than that used to list certification from the Commission.

(2) If the lawyer ~~(c) If a lawyer~~ has not been certified as a specialist by the Commission in ~~an area in which the lawyer advertises and~~ an advertised field of law in which certification is available, ~~then the lawyer must~~ state with respect to each such ~~area~~ field of law, "Not certified as a (~~area of practice~~ field of law) specialist by the Tennessee Commission on Continuing Legal Education and Specialization."

(3) If the lawyer ~~(f) If a lawyer~~ has not been certified as a specialist by the Commission in an advertised ~~area~~ field of law, but no certification is available from the Commission in that ~~area of law~~ field of law, ~~the lawyer may state,~~ state with respect to each such field of law, "Certification as a (~~area of law~~) specialist is not currently available in Tennessee."

(g) No lawyer shall communicate that certification is not available in an advertised ~~area~~ field of law if the advertised ~~area~~ field of law has been identified by the Commission as being included in an area of specialization or, in the absence of such identification, if the advertised ~~area~~ field of law is reasonably included in a certified specialty.

EXHIBIT F

[Attach Service List]