

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

**IN RE: PROPOSED TENNESSEE RULES OF
PROFESSIONAL CONDUCT**

No. M2000-02416-SC-RL-RL

Filed April 18, 2002 (jsr)

ORDER SCHEDULING ORAL ARGUMENT

On December 3, 2001, the Tennessee Bar Association (“TBA”) filed its Revised Final Report concerning adoption of its Proposed Tennessee Rules of Professional Conduct (“Proposed Rules”). On February 6, 2002, the Clerk of the Appellate Courts sent letters to all individuals and organizations who responded with earlier comments, asking each whether the TBA’s Revised Final Report satisfied their initial concerns regarding the Proposed Rules. The Clerk also asked whether the particular individuals or organizations would be interested in being heard at oral argument on specific issues that they felt remained unresolved by the Revised Final Report.

The Clerk received additional responses from many of these individuals and organizations and forwarded these responses to the Court. After having considered these additional comments and suggestions, this Court is of the opinion that significant issues remain as to whether the TBA’s proposal should be adopted in place of the current Tennessee Code of Professional Responsibility. Consequently, the Court finds that oral argument on these issues would be particularly helpful in considering whether to adopt the TBA’s proposal. Therefore, the Court directs the Clerk of the Appellate Courts to schedule oral argument on June 6, 2002, at 9:00 a.m. in Nashville and to notify all the interested parties accordingly.

With regard to the procedures to be followed at argument, discussion of each issue shall be limited to ten (10) minutes per side—with allowance for addition time being subject to the discretion of the Chief Justice—and shall proceed in the order presented below. The TBA shall argue first in support of the Proposed Rules at issue, reserving any time for desired rebuttal, and the designated party or parties shall respond with any concerns or suggestions. In those instances when multiple parties are to be heard in response to the TBA’s submissions, those parties are to decide among themselves, prior to argument, the proper allocation of the ten (10) minute argument period. Finally, should the parties wish to submit further comments or briefing on

their designated issue or issues, such submissions shall be filed with the Clerk of the Appellate Court on or before Friday, May 17, 2002.

In particular, the Court desires to hear argument on the following issues, presented by the party or parties indicated below:

ISSUE 1: Whether this Court should (1) adopt Proposed Rule 1.6(a) (Confidentiality), which requires a lawyer to keep confidential “all information related to the representation of a client,” or (2) retain the current confidentiality standard contained in Tennessee Supreme Court Rule 8, DR 4-101(B), which prohibits a lawyer from revealing “a confidence or secret of a client.”

Parties requested to address this issue: The TBA to argue in favor of adopting Proposed Rule 1.6(a) as submitted in the Revised Final Report; the Tennessee Board of Professional Responsibility to argue in favor of retaining the current confidentiality standard contained in Tennessee Supreme Court Rule 8, DR 4-101(B).

ISSUE 2: Whether this Court should (1) adopt Proposed Rule 1.6(b)(1)-(2) (Confidentiality), which permits a lawyer to reveal “information related to the representation of a client” when the lawyer reasonably believes that such a revelation is necessary “to prevent reasonably certain death or substantial bodily harm” or “to prevent the client or another person from committing a crime”; or (2) *affirmatively require* a lawyer to reveal “information related to the representation of a client” when the lawyer reasonably believes that such a revelation is necessary “to prevent reasonably certain death or substantial bodily harm” or “to prevent the client or another person from committing a crime.”

Parties requested to address this issue: The TBA to argue in favor of adopting Proposed Rule 1.6(b)(1)-(2) as submitted in the Revised Final Report; the Tennessee District Attorneys General Conference and the Tennessee Board of Professional Responsibility to argue in favor of requiring a lawyer to have an affirmative ethical obligation to reveal such information.

ISSUE 3: Whether this Court should adopt Proposed Rule 1.6(b)(3) (Confidentiality), which permits a lawyer to reveal “information related to the representation of a client” when the lawyer reasonably believes that such a revelation is necessary “to rectify or mitigate substantial injury to the financial interests or property of another resulting from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services.”

Parties requested to address this issue: The TBA to argue in favor of adopting Proposed Rule 1.6(b)(3) as submitted in the Revised Final Report; Mr. T. Maxfield Bahner, Chattanooga Bar, to argue in favor of omitting this section.

ISSUE 4: Whether this Court should (1) adopt Proposed Rule 1.7(b) (Conflicts of Interest - General Rule), which prohibits a lawyer from representing “a client if the representation of that client may be materially limited by the lawyer’s responsibilities to another

client or to a third person, or by the lawyer's own interests," unless the lawyer "reasonably believes" that the representation will adversely affect and the client consents in writing after consultation, or (2) retain the current standard of Tennessee Supreme Court Rule 8, DR 5-105(C), which conditions multiple representations upon whether "it is obvious that the lawyer can adequately represent the interest of each and if each consents to the representation."

Parties requested to address this issue: The TBA to argue in favor of Proposed Rule 1.7(b) as submitted in the Revised Final Report; the Tennessee Board of Professional Responsibility to argue in favor of retaining the current standard.

ISSUE 5: If this Court adopts Proposed Rule 1.7, whether this Court should also adopt a rule that prohibits a lawyer from representing more than one client in the same criminal case unless the lawyer affirmatively shows to the tribunal that no conflict of interest exists or will exist.

Parties requested to address this issue: The TBA to argue in favor of adopting Proposed Rule 1.7 as submitted in the Revised Final Report; the Tennessee District Attorneys General Conference to argue in favor of adding this additional prohibition to Proposed Rule 1.7.

ISSUE 6: Whether this Court should adopt Proposed Rule 3.2 (Expediting Litigation), which requires that "[a] lawyer shall make reasonable efforts to expedite litigation *consistent with the interests of the client.*"

Parties requested to address this issue: The TBA to argue in favor of adopting Proposed Rule 3.2 as submitted in the Revised Final Report; the Tennessee District Attorneys General Conference to argue in favor of omitting the emphasized language.

ISSUE 7: Whether this Court should (1) adopt Proposed Rule 3.3(b) (Candor Toward the Tribunal), which prohibits a lawyer from offering evidence "the lawyer knows to be false," or (2) adopt a rule that prohibits a lawyer from offering evidence that the lawyer *reasonably believes* is false.

Parties requested to address this issue: The TBA to argue in favor of adopting Proposed Rule 3.3(b) as submitted in the Revised Final Report; the Tennessee District Attorneys General Conference to argue in favor of prohibiting a lawyer from offering evidence that the lawyer *reasonably believes* is false.

ISSUE 8: Whether this Court should (1) adopt Proposed Rule 3.3(e)-(f) (Candor Toward the Tribunal), which requires a lawyer to request withdrawal from the representation of a client if the lawyer learns of a client fraud upon the tribunal and the client "refuses or is unable to disclose or otherwise rectify the crime or fraud," or (2) adopt a rule that also requires the lawyer to reveal the substance and nature of the fraud to the tribunal.

Parties requested to address this issue: The TBA to argue in favor of adopting Proposed Rule 3.3(e)-(f) as submitted in the Revised Final Report; the Tennessee District Attorneys General Conference to argue in favor of requiring a lawyer to also reveal the client's fraud.

ISSUE 9: Whether this Court should (1) adopt Proposed Rule 3.3(h) (Candor Toward the Tribunal), which requires a lawyer to report a third party's perpetration of a fraud upon the tribunal or commission of an offense against the administration of justice in connection with the proceeding, but only if the lawyer comes to know of the facts "prior to the conclusion of the proceeding," or (2) adopt a rule requiring the lawyer to reveal such frauds and offenses even after the conclusion of the proceedings.

Parties requested to address this issue: The TBA to argue in favor of adopting Proposed Rule 3.3(h) as submitted in the Revised Final Report; the Tennessee District Attorneys General Conference to argue in favor of requiring a lawyer to reveal a third party's fraud after the conclusion of the proceedings.

ISSUE 10: Whether this Court should (1) adopt Proposed Rule 3.6(c) (Trial Publicity), which permits a lawyer to make a public statement about a case when "a reasonable lawyer would believe [that such a statement] is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client," or (2) adopt a rule that prohibits all extrajudicial statements "that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding."

Parties requested to address this issue: The TBA to argue in favor of adopting Proposed Rule 3.6(c) as submitted in the Revised Final Report; the Tennessee District Attorneys General Conference to argue in favor of omitting Proposed Rule 3.6(c).

ISSUE 11: Whether this Court should (1) adopt the language of the comment to Proposed Rule 4.4 (Respect for the Rights of a Third Person), which states that "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," or (2) continue to prohibit surreptitious tape recordings in civil proceedings as now required by Formal Ethics Opinions 81-F-14 and 81-F-14(a).

Parties requested to address this issue: The TBA to argue in favor of adopting Proposed Rule 4.4 as submitted in the Revised Final Report; the Tennessee Board of Professional Responsibility to argue in favor of prohibiting surreptitious tape recordings in civil proceedings.

ISSUE 12: Whether this Court should (1) adopt Proposed Rule 7.5 (Firm Names and Letterhead), which permits law firms to use trade names under certain circumstances, or (2) retain the substance of Tennessee Supreme Court Rule 8, DR 2-102(B), which prohibits the use of trade names.

Parties requested to address this issue: The TBA to argue in favor of adopting Proposed Rule 7.5 as submitted in the Revised Final Report; the Tennessee Board of Professional Responsibility to argue in favor of retaining the prohibition on the use of trade names.

In addition to the issues listed above for oral argument, the Tennessee Attorney General has expressed his desire to supply additional briefing, but not argument, on the following issue:

Whether this Court should (1) adopt Paragraph [4] in the Scope of the Proposed Rules, which states that “[t]hese Rules *are not intended* to abrogate the powers and responsibilities of government lawyers under federal law or under the constitution, statutes, or common law of Tennessee,” or (2) revise this language to read “[t]hese Rules *do not* abrogate the powers and responsibilities of government lawyers under federal law or under the constitution, statutes, or common law of Tennessee.”

Therefore, the Attorney General shall file any additional briefing with the Clerk of the Appellate Court on or before Friday, May 17, 2002. The TBA shall then file a response brief with the Clerk of the Appellate Court, if any response is desired, on or before Monday, May 27, 2002.

Finally, the Court wishes to acknowledge that the comments, suggestions, and responses submitted by all the parties have been invaluable to its consideration of these important proposals. To that end, the Court wishes to express its sincere gratitude to all the parties for their participation thus far in this process.

PER CURIAM