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IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE: PETITION TO AMEND SELECTED PROVISIONS OF TENNESSEE SUPREME COURT RULE 8

No. ADM 2016-01382

COMMENT OF THE BOARD OF PROFESSIONAL RESPONSIBILITY TO PETITION TO AMEND SELECTED PROVISIONS OF TENNESSEE SUPREME COURT RULE 8

The Board of Professional Responsibility (the Board) pursuant to this Court's Order filed August 18, 2016, respectfully submits the following comments to proposed revisions to Tenn. Sup. Ct. R. 8. The Board approves of proposed changes to Tenn. Sup. Ct. R. 8 not specifically addressed herein.

Rule 8 – Tennessee Rules of Professional Conduct

1. Rule 1.4, Comment 4

> [4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. ~~Client communications, including telephone calls,~~A lawyer should ~~be~~ promptly respond to ~~returned~~ or acknowledge~~d~~ client communications.

Comment: The last sentence of Comment 4 suggests the creation of an additional burden for attorneys not required by RPC 1.4 for attorneys individually to respond to or acknowledge all client communications without any reasonableness standard. The Board proposes striking the last sentence or modifying the sentence as follows:

> ~~"Client communications, including telephone calls,~~A lawyer or member of the lawyer's staff should ~~be~~ promptly and reasonably respond to ~~returned~~ or acknowledge~~d~~ client communications." [1]

2. Rule 1.6, Comment 13

> [13] Paragraph (b)(6) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. See RPC 1.17, Comment [7]. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. Any such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. Moreover, the disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, paragraph (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a

[1] The Board's proposed language is indicated in red.

lawyer's conduct when exploring an association with another firm and is beyond the scope of these Rules.

Comment: Since Rule 1.6 addresses confidentiality and is not restricted to attorney-client privileged communications, the Board respectfully suggests modifying the sentence included in Comment 13 as follows:

> "Moreover, the disclosure of any information is prohibited if it would compromise the ~~attorney-client privilege~~client's confidentiality or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge)."

3. Rule 1.6, Comment 18

> [18~~5~~] ~~A~~Paragraph (d) requires a lawyer ~~must~~to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. *See* RPCs 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (d) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed

consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see RPC 5.3, Comments [3]-[4].

Comment: The Board is concerned that the proposed language in Comment 18 creates a disciplinary enforcement problem. Alternatively, the Board proposes the following language:

[18~~5~~] ~~A~~Paragraph (d) requires a lawyer ~~must~~to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. *See* RPCs 1.1, 5.1 and 5.3. In determining the reasonableness of the lawyer's efforts to prevent ~~T~~the unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client, factors to be considered include, but are not limited to ~~does not constitute a violation of paragraph (d) if the lawyer has made reasonable efforts to prevent the access or disclosure~~the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon

the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see RPC 5.3, Comments [3]-[4].

4. Rule 1.18(a)

A person who ~~discusses~~consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

Comment: "Consults" is defined in proposed Comment 2 to RPC 1.18. The Board respectfully suggests "consult/consults" be included in the definitional section in Rule 1.0 since "consult" is also referenced in RPCs 1.2(a) and 1.4(2) and (5).

5. Rule 1.18, Comment 2

[2] ~~Not all persons who communicate~~A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information ~~to a lawyer are entitled to protection under this Rule.~~ about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. *See also* Comment [4]. In contrast, a consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. Such ~~A~~ a person ~~who~~ communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the

possibility of forming a client-lawyer relationship, and is thus not a "prospective client." ~~within the meaning of paragraph (a).~~ Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a "prospective client."

Comment: The Board respectfully suggest amending the last sentence in Comment 2 as follows:

Moreover, a person who communicates with a lawyer for the sole purpose of disqualifying the lawyer is not a "prospective client."

6. Rule 4.4(b)

(b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client that the lawyer knows or reasonably should know is protected by RPC 1.6 (including a document or electronically stored information protected by the attorney-client privilege or the work-product rule) and has been disclosed to the lawyer inadvertently or by a person not authorized to disclose such a document or electronically stored information to the lawyer, shall:

Comment: The Board suggests the proposed language narrows the protection of the rule. Accordingly, the Board suggest the following language:

(b) A lawyer who receives ~~a document or electronically stored~~ information relating to the representation of the lawyer's client that the lawyer knows or reasonably should know is protected by RPC 1.6 (including a document or electronically stored information protected by the attorney-client privilege or the work-product rule) and has been disclosed to the lawyer inadvertently or by a person not authorized to disclose such ~~a document or electronically stored~~ information to the lawyer, shall:

7. Rule 4.4, Comment 2

> [2] The duties imposed by paragraph (b) on lawyers who know or who reasonably should know that they have received information protected by RPC 1.6 that was disclosed to them inadvertently or by a person not authorized to disclose the information to them reflect the importance of client-lawyer confidentiality in the jurisprudence of this state and the judgment that lawyers in their dealings with other lawyers and their clients should take the steps that are required by this Rule in the interest of protecting client-lawyer confidentiality even if it would be to the advantage of their clients to do otherwise. For purposes of this Rule, "document or electronically stored information" includes, in addition to paper documents, email, and other forms of electronically stored information, including embedded data (commonly referred to as "metadata"), that is subject to being read or put into readable form. Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer.

Comment: The Board suggests the last sentence of Comment 2 narrows the protection of the rule and should be deleted as reflected below:

> [2] The duties imposed by paragraph (b) on lawyers who know or who reasonably should know that they have received information protected by RPC 1.6 that was disclosed to them inadvertently or by a person not authorized to disclose the information to them reflect the importance of client-lawyer confidentiality in the jurisprudence of this state and the judgment that lawyers in their dealings with other lawyers and their clients should take the steps that are required by this Rule in the interest of protecting client-lawyer confidentiality even if it would be to the advantage of their clients to do otherwise. For purposes of this Rule, "document or electronically stored information" includes, in addition to paper documents, email, and other forms of electronically stored information, including embedded data (commonly referred to as "metadata"), that is subject to being read or put into readable form. ~~Metadata in electronic~~

~~documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer.~~

8. Rule 5.3, Comment 1

[1] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to ensure that the firm has in effect measures~~establish internal policies and procedures designed to provide~~ giving reasonable assurance that nonlawyers in the firm and nonlawyers outside the firm who work on firm matters~~will~~ act in a way compatible with the professional obligations of the lawyer~~Rules of Professional Conduct~~. *See* Comment [6] to RPC 1.1 (retaining lawyers outside the firm) ~~RPC 5.1,~~ and Comment [1] to RPC 5.1 (responsibilities with respect to lawyers within a firm). Paragraph (b) applies to lawyers who have supervisory authority over such~~the work of a~~ nonlawyers within or outside the firm. Paragraph (c) specifies the circumstances in which a lawyer is responsible for the conduct of such~~a~~ nonlawyers within or outside the firm that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

Comment: The Board believes "measures" is vague and does not offer the protection prescribed by the current language of "internal policies and procedures." Accordingly, the Board would suggest the following revision to the first sentence of Comment 1:

[1] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to ~~ensure that the firm has in effect measures~~establish internal policies and procedures designed to provide ~~giving~~ reasonable assurance that nonlawyers in the firm and nonlawyers outside the firm who work on firm matters~~will~~ act in a way compatible with the professional obligations of the lawyer~~Rules of Professional Conduct~~. *See* Comment [6] to RPC 1.1 (retaining lawyers outside the firm) ~~RPC 5.1,~~ and Comment [1] to RPC 5.1 (responsibilities with respect to lawyers within a firm). Paragraph (b) applies to lawyers who have supervisory authority

over such~~the work of a~~ nonlawyers within or outside the firm. Paragraph (c) specifies the circumstances in which a lawyer is responsible for the conduct of such~~a~~ nonlawyers within or outside the firm that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

9. Rule 7.2(a)

(a) Subject to the requirements of paragraphs (b) through (d) below and RPCs 7.1, 7.3, 7.4 and 7.5, a lawyer may advertise services through written, recorded or electronic communication, including public media.

Comment: While the Petition does not seek any amendment to RPC 7.2(a), the Board respectfully asserts RPC 7.2(a) should include a reference to Tennessee's Rule 7.6 regarding intermediary organizations as suggested below:

(a) Subject to the requirements of paragraphs (b) through (d) below and RPCs 7.1, 7.3, 7.4,~~ and~~ 7.5~~,~~ and 7.6, a lawyer may advertise services through written, recorded or electronic communication, including public media.

10. Rule 7.2, Comment 7

[7] A lawyer may compensate employees, agents, and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff and website designers. Moreover, a lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with RPCs 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer), and the lead generator's communications are consistent with RPC 7.1

(communications concerning a lawyer's services). To comply with RPC 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. *See also* RPC 5.3 for the (duties of lawyers and law firms with respect to the conduct of nonlawyers); RPC 8.4(a) (duty to avoid violating the Rules through the acts of another) who prepare marketing materials for them.

Comment: All references in Comment 7 to "lead generator" should be substituted with the words "intermediary organization" as provided by Tennessee Rule 7.6, as follows:

[7] A lawyer may compensate employees, agents, and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff and website designers. Moreover, a lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the ~~lead generator~~intermediary organization does not recommend the lawyer, any payment to the ~~lead generator~~intermediary organization is consistent with RPCs 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer), and the ~~lead generator~~intermediary organization's communications are consistent with RPC 7.1 (communications concerning a lawyer's services). To comply with RPC 7.1, a lawyer must not pay an ~~lead generator~~intermediary organization that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. *See also* RPC 5.3 for the (duties of lawyers and law firms with respect to the conduct of nonlawyers); RPC 8.4(a) (duty to avoid violating the Rules through the acts of another) who prepare marketing materials for them.

RESPECTFULLY SUBMITTED,

Michael King By SG w/ permission

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Certificate of Service

I certify that the foregoing has been mailed to Allan F. Ramsaur, Esq., Executive Director, Tennessee Bar Association, 221 4th Avenue North, Suite 400, Nashville, Tennessee by U.S. mail, on this the 4th day of October, 2016.

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