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November 17, 2016

The Honorable James Hivner
Clerk, Tennessee Supreme Court
Supreme Court Building, Room 100
401 7th Avenue North
Nashville, TN 37219

IN RE: PETITION TO AMEND SELECTED PROVISIONS
OF TENNESSEE SUPREME COURT RULE 8
NO. ADM2016-01382

Dear Jim:

Attached please find an original and one copy of the Response to Comment of the Board of Professional Responsibility in reference to the above matter.

As always, thank you for your cooperation. I remain,

Very truly yours,

Allan F. Ramsaur
Executive Director

cc: Jason Long, President, Tennessee Bar Association
Brian Faughnan, Chair, Tennessee Bar Association Committee on
Ethics and Professional Responsibility
Ed Lanquist, General Counsel
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APPELLATE COURT CLERK
NASHVILLE

**IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE**

FILED
2016 NOV 17 PM 3:42

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

APPELLATE COURT CLERK

No ADM2016-01382

**RESPONSE TO THE COMMENT OF THE BOARD OF PROFESSIONAL
RESPONSIBILITY**

The Tennessee Bar Association (“TBA”), by and through its President, Jason H. Long; Chair of its Committee on Ethics and Professional Responsibility, Brian Faughnan; General Counsel, Edward D. Lanquist; and Executive Director, Allan F. Ramsaur, files this response to the comment filed by the Board of Professional Responsibility in this matter. The TBA appreciates the careful and thoughtful consideration given by the Board of Professional Responsibility to the proposals made by the TBA in its petition dated July 11, 2016. For ease of reference, the TBA responds to the comments numbered by the Board of Professional Responsibility as numbers 1 to 10 using the same numbering:

1. The TBA supports the revision to RPC 1.4 [Comment 4] proposed by the Board of Professional Responsibility providing that a response by a lawyer’s staff is acceptable communication.

2. The Board of Professional Responsibility suggests substituting confidentiality for privilege in RPC 1.6 [Comment 3]. The TBA respectfully disagrees with this suggestion. Privilege was picked as the reference point specifically because it is a subset of confidentiality and is considered to be of more importance. If the language were changed to reference compromising confidentiality, instead of compromising only privilege, then the comment would essentially permit next to nothing in terms of disclosure, since all information is confidential under RPC 1.6. Any disclosure would “compromise” confidentiality. The language “otherwise prejudice the client,” already protects against anything that is confidential but not privileged and that the TBA submits should not be able to be disclosed in the context discussed, a merger of law firms or the exploration of a move by a lawyer from one firm to another.
3. The Board of Professional Responsibility suggests that there may be some disciplinary enforcement problem created by the change to RPC 1.6 [Comment 18]. Given the potential concerns that Tennessee lawyers may have that any revisions of this nature might impose too high of a burden of technological acumen on them, the TBA believes this safe-harbor for avoiding any violation of RPC 1.6 (d), if the lawyer acted reasonably but a breach of security still happened, needs to remain explicit in the comment.

4. The Board of Professional Responsibility proposes to adopt a definition of “consult” to be used throughout the entire Rules of Professional Conduct. “Consult” is not necessarily used the same way in each of those places in the rules that the Board of Professional Responsibility references. Thus, trying to implement the explanation of what this concept means for this rule as laid out in the proposed comment as a defined term throughout the rules would be problematic.
5. The Board of Professional Responsibility proposes that the word “sole” be inserted in the last sentence of the comment to RPC 1.18 [Comment 2]. The TBA does not think “sole” is the right standard. We are opposed to deviating from the ABA language, especially since it has been largely adopted elsewhere without the addition of the “sole” language.
6. The Board of Professional Responsibility appears to be taking the position that existing RPC 4.4 would apply to purely verbal information. The TBA disagrees with that interpretation of the existing rule as it seems to be unworkable as a concept. The existing rule contemplates that the inadvertently or unauthorizedly disclosed information be in a format where the lawyer can “immediately terminate review or use of the information.” The intent of the TBA proposed revision is to make clear that the rule applies to all kind of electronically-stored information – emails, text

messages, voice mail messages, tweets. Unless the Court agrees that RPC 4.4 can be triggered by a lawyer overhearing a conversation then there would be no reason to adopt the Board of Professional Responsibility's suggested amendment to the TBA revision.

7. The Board of Professional Responsibility proposes that there be no explicit mention of metadata in the inadvertent disclosure comment. This is a substantial and unwarranted change. The TBA respectfully submits that the language from the ABA Ethics 20/20 comment proposal, that the TBA proposed, captures the correct balance from all of the various opinions over the years on the metadata issue and what the starting position should be, given the concomitant duty of technological competence for sending lawyers.
8. The TBA supports the Board of Professional Responsibility's proposed revision to continue the use of the terminology "internal policies and procedures" rather than "measures" in RPC 5.3 [Comment 1].
9. The TBA supports the Board of Professional Responsibility's proposed inclusion of a reference to Tennessee's RPC 7.6 regarding intermediary organizations in RPC 7.2(a).
10. The Board of Professional Responsibility's suggests that everywhere the term "lead generator" is used it should be changed to "intermediary

organization” in RPC 7.2 [Comment 7]. This would be a giant step backward and would put into jeopardy many arrangements in Tennessee that are already commonplace. The TBA does not believe these arrangements should be rendered unethical. Google ad-word and pay-per-click services, for example, are lead generators used by lawyers in Tennessee presently with no harm caused to consumers of legal services. The entities behind such lead generation services should not be treated as intermediary organizations which would be required to register under Tenn. Sup. Ct. R. 44.

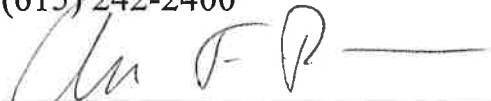
For the foregoing reasons the TBA agrees with several of the Board of Professional Responsibility’s suggestions but opposes several others.

Respectfully Submitted,

By: /s/ by permission
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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing has been served upon the individuals and organizations identified in Exhibit "A" by regular U.S. Mail, postage prepaid within seven (7) days of filing with the Court.


Allan F. Ramsaur