Model Rules

Latest Updates to Tennessee Ethics Rules
Add Some Unique Standards to ABA Models

The Tennessee Supreme Court Sept. 29 issued its latest revisions to the state’s lawyer conduct standards, embracing many of the most recent changes to the ABA models while retaining numerous distinctive Tennessee rules and adding some unique new provisions.

The amendments take effect Jan. 1, 2011, and “have prospective application only, applying to all relationships existing on, and conduct taken from, that date forward,” according to the court’s order.

Significant new departures from the Model Rules include:

- a new rule and comments on nonrefundable fees (see box);
- a more detailed provision about what a lawyer must do upon receiving an inadvertent or unauthorized disclosure; and
- the absence of a black-letter, per se prohibition against sexual relations with clients.

When Tennessee first adopted its version of the ABA Model Rules of Professional Conduct in 2003, it primarily drew on the pre-2002 version of the Model Rules, according to Brian S. Faughnan, who chairs the TBA’s Standing Committee on Ethics and Professional Responsibility. “The end product does represent significant strides toward further uniformity,” said Faughnan, who practices with Adams and Reese in Memphis, Tenn.

Overall, Faughnan said, “while Tennessee may have been slow to move to Model Rules-style ethics rules originally, it has acted very quickly to modernize and improve our ethics rules in ways that will benefit clients and lawyers alike.”

Nonrefundable Fees. Faughnan characterized Tennessee’s new rule and comments on nonrefundable fees and retainers as “state of the art.”

Rule 1.5(f) requires a written agreement, signed by the client, explaining the nature and amount of the nonrefundable fee. A comment gives two examples of appropriate nonrefundable fees: a retainer paid to compensate the lawyer for being available to represent the client in one or more matters; and a fixed fee paid at the outset of a representation. Like any other fee, a nonrefundable fee must be reasonable, the comment emphasizes.

Dealing With Accidental Disclosures.
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Revised Rule 1.5 also features new requirements for lawyers who are not in the same firm to divide a fee. The client must agree to the arrangement, and the agreement must be confirmed in writing. As under the current Tennessee rule, the total fee must be reasonable, and either the division must be proportionate to each lawyer’s services or the lawyers must assume joint responsibility for the representation.

The order adopting the rule amendments states that the new rule on nonrefundable fees and the amended rule on division of fees between lawyers not in the same firm “shall apply only to those agreements that are entered into or amended on or after January 1, 2011.”

Dealing With Accidental Disclosures. According to Faughnan, another key rule change will provide needed certainty for Tennessee lawyers in dealing with inadvertent disclosures.

Rule 4.4(b) is much more detailed than Model Rule 4.4(b), which simply states that a lawyer who receives...
The Tennessee rule requires a lawyer who receives confidential or privileged information through an inadvertent or unauthorized disclosure to (1) stop reading or using it; (2) notify the sender; and (3) either comply with the sender's instructions or refrain from using the material until a definitive court ruling is issued.

Faughnan also noted that under revised Rule 1.9, lawyers are permitted to both use and reveal information relating to representation of a former client when the information has become generally known. This change will help Tennessee lawyers avoid technical or accidental violations of their confidentiality duty to former clients, he explained.

In contrast, Model Rule 1.9 has no exception that allows a lawyer to reveal generally known information about a former client's representation.

**Personal Relations.** Tennessee did not adopt Model Rule 1.8(j), which forbids a lawyer to have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

Instead, three new comments to Rule 1.7 point out that combining representation with an intimate personal relationship can exploit the client, impair the lawyer's judgment, and imperil the attorney-client privilege. "Such a relationship may create a conflict of interest under paragraph (a) (2) or violate other disciplinary rules, and it generally is imprudent even in the absence of an actual violation of these Rules," Comment [12] declares.

Comment [12b] notes that sexual relationships with the representative of an organizational client may not present the same questions of inherent inequality as an intimate relationship with an individual client. But impairment of the lawyer's independent professional judgment and protection of the attorney-client privilege are still concerns, particularly if outside counsel has a sexual relationship with a representative who supervises, directs, or regularly consults with an outside lawyer concerning the organization's legal matters, the comment states.

Tennessee Adopts Rule, Comments Addressing Subject of Nonrefundable Fees

*Effective Jan. 1, 2011, Tennessee Rule of Professional Conduct 1.5 and its Comment state, in part:*

"(f) A fee that is nonrefundable in whole or in part shall be agreed to in a writing, signed by the client, that explains the intent of the parties as to the nature and amount of the nonrefundable fee."

**Comment**

"[4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See RPC 1.16(d). The obligation to return any portion of a fee does not apply, however, if the lawyer charges a reasonable nonrefundable fee."

"[4a] A nonrefundable fee is one that is paid in advance and earned by the lawyer when paid. Nonrefundable fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule. In determining whether a particular nonrefundable fee is reasonable, or whether it is reasonable to charge a nonrefundable fee at all, a lawyer must consider the factors that are relevant to the circumstances. Recognized examples of appropriate nonrefundable fees include a nonrefundable retainer paid to compensate the lawyer for being available to represent the client in one or more matters or where the client agrees to pay to the lawyer at the outset of the representation a reasonable fixed fee for the representation. Such fees are earned fees so long as the lawyer remains available to provide the services called for by the retainer or for which the fixed fee was charged. RPC 1.5(f) requires a writing signed by the client to make certain that lawyers take special care to assure that clients understand the implications of agreeing to pay a nonrefundable fee."
In a paragraph not drawn from the ABA model, Rule 1.18 requires a lawyer to honor the prospective client’s request for return of all papers and property turned over to the lawyer.

Tennessee modified Rule 1.6 to add the two paragraphs in the ABA model that authorize disclosure of confidential information to prevent or rectify injury from a financial crime using the lawyer’s services.

Like the ABA model on representing organizations, Rule 1.13 requires corporate counsel to report inside wrongdoing up the ladder within the client. But when the lawyer cannot dissuade the entity’s highest authority from taking wrongful action, the rule continues to authorize outside disclosure of the wrongdoing “only to the extent permitted to do so by RPCs 1.6 and 4.1.”

Rule 4.1, which was not amended in substance, requires a noisy withdrawal when a lawyer learns that a client intends to perpetrate a crime or fraud in a nonjudicial matter or has already done so.

**Conflicts of Interest.** Tennessee carried forward its unique approach to screening in Rule 1.10. As Faughnan put it, the rule “permits full-bore screening as to transactional lawyers,” but “prohibits the use of screening to avoid conflicts when a lawyer who has been substantially involved in ongoing litigation seeks to move from her firm to the firm currently representing a directly adverse party in that ongoing litigation.”

The TBA proposed a broader screening provision, but the court did not accept it. In its press announcement, the court stated: “The amended RPCs retain the current rule protecting clients when attorneys move from one law firm to another in the midst of litigation proceedings.”

However, like the current ABA model, Rule 1.10 was amended to provide that a lawyer’s disqualification based on a personal interest will not be imputed to other lawyers in the firm unless the lawyer’s personal interest is likely to impair the representation by other lawyers.

Notably, amended Rule 1.7 follows the ABA model regarding the analysis of concurrent-client conflicts. Most of the extensive comments to the Model Rule are included in the revisions, offering Tennessee lawyers more guidance on troublesome conflicts issues such as when and how clients may consent to future conflicts.

**Advertising and Solicitation.** The elimination of the current filing requirement for advertisements is a key change, according to Faughnan.

As of Jan. 1, lawyers will no longer be required to file copies of advertisements with the Board of Professional Responsibility under Rule 7.2, but will merely have to ensure retention of a copy of their advertisements for a two-year period. Similarly, lawyers who send targeted mail to specific prospects under Rule 7.3 (solicitation of potential clients) will not have to submit a copy of the communication but simply keep a copy for two years along with a record of when and to whom it was sent.

Another change in the advertising rules is that communications under Rule 7.3 must state “Advertising Material” rather than “This is an advertisement.”

Rule 7.1 (communications concerning a lawyer’s services) was shortened to conform to the ABA model. The amended rule prohibits false and misleading communications and omits the specific prohibitions in the current Tennessee rule against creating unjustified expectations about results and making comparisons that cannot be substantiated.

On the other hand, numerous Tennessee provisions on marketing were carried forward, such as a 30-day ban on solicitation of accident victims (Rule 7.3(b)(3)) and a unique rule on accepting referrals from “intermediary organizations” (Rule 7.6).

**Rule on Client Files Rejected.** In its proposed amendment, the Tennessee Bar Association put forward a unique rule on client file materials. Proposed Rule 1.19 recognized a client’s right to “client file materials” and defined that term, and it allowed lawyers to copy client file materials for themselves at their own expense.

The court did not adopt the proposed rule. However, it did adopt a new comment to Rule 1.16 which states, as proposed by the bar, that a withdrawing lawyer “may, at the lawyer’s own expense, make a copy of client file materials for retention by the lawyer prior to surrender.”

The revised rules carry forward quite a few existing Tennessee rules, including extensive rules on the lawyer’s role as an intermediary (Rule 2.2) and lawyers serving as a “dispute resolution neutral” (Rule 2.4).

Also left nearly untouched was Tennessee’s unique rule on candor toward the tribunal (Rule 3.3), which differs from the ABA model in many respects.

With little or no change, the revised standards also retain existing rules on multijurisdictional practice (Rule 5.5), pro bono service (Rule 6.1), and short-term limited legal services (Rule 6.5).

Like many other states, Tennessee has not adopted Model Rule 7.6, which deals with political contributions to obtain government legal work or appointments by judges.

By Joan C. Rogers
