THE HYPOTHETICALS IN THIS PRESENTATION ARE TAKEN, IN PART, FROM AN ARTICLE BY ATTORNEY PAMELA ESTERMAN SIVE, PAGET & RIESEL, P.C. NEW YORK, NY 10022, FOR THE AMERICAN BAR ASSOCIATION
ETHICAL ISSUES FOR ENVIRONMENTAL LAWYERS

• CONFLICTS OF INTEREST
• CONFIDENTIALITY
• OBLIGATIONS TO PROSPECTIVE CLIENTS
• SOCIAL NETWORKING AND BLOGGING
CONFLICTS OF INTEREST
CONFLICTS OF INTEREST

BPR Ethics Inquiries From 1/1/2018 to 12/31/2018

- 703 Conflict of Interest (30%)
- 126 Advertising (5%)
- 2 Criminal Convictions (0%)
- 86 Fees (4%)
- 69 File遗漏 (5%)
- 129 Improper Communications (5%)
- 47 Misrepresentation or Fraud (5%)
- 8 Unknown (0%)
- 110 Unauthorized Practice of Law (5%)
- 108 Trust Violations (5%)
- 149 Reporting Misconduct (6%)
- 549 Relationship with Client (23%)
- 249 Other (10%)
- 25 Personal Behavior (1%)
- 4 Neglect (0%)
CONFLICTS ARISING IN REPRESENTATION OF MULTIPLE PARTIES IN THE SAME MATTER
CONFLICTS ARISING IN REPRESENTATION OF MULTIPLE PARTIES IN THE SAME MATTER

HYPOTHETICAL: YOU HAVE BEEN ASKED TO REPRESENT COMPANY A, IN A MULTI-PARTY SUPERFUND MATTER WHERE COMPANY A’S INTEREST MAY BE ADVERSE TO COMPANY B. A CONFLICTS CHECK REVEALS THAT YOUR FIRM HAS NEVER REPRESENTED COMPANY B, BUT REPRESENTED COMPANY C, WHICH IS THE PARENT COMPANY OF COMPANY B IN A MERGER TRANSACTION. THE LANGUAGE OF COMPANY C’S RETAINER AGREEMENT IN THE MERGER STATES THAT YOUR FIRM WAS HIRED TO REPRESENT COMPANY C AND ALL ASSOCIATED COMPANIES.
ETHICAL ISSUES:

• 1. IS THERE AN EXISTING CONFLICT?
• 2. DO YOU NEED TO OBTAIN CONSENT?
• 3. IF BOTH PARTIES, COMPANY A AND COMPANY B, REQUEST YOUR REPRESENTATION IN THE SUPERFUND MATTER, MAY YOU TAKE CONCURRENT REPRESENTATION?
RPC 1.7

(A) EXCEPT AS PROVIDED IN PARAGRAPH (B), A LAWYER SHALL NOT REPRESENT A CLIENT IF THE REPRESENTATION INVOLVES A CONCURRENT CONFLICT OF INTEREST. A CONCURRENT CONFLICT OF INTEREST EXISTS IF:

1. THE REPRESENTATION OF ONE CLIENT WILL BE DIRECTLY ADVERSE TO ANOTHER CLIENT; OR

2. THERE IS A SIGNIFICANT RISK THAT THE REPRESENTATION OF ONE OR MORE CLIENTS WILL BE MATERIALLY LIMITED BY THE LAWYER’S RESPONSIBILITIES TO ANOTHER CLIENT, A FORMER CLIENT OR THIRD PERSON OR BY A PERSONAL INTEREST OF THE LAWYER.
RPC 1.7

(B) NOTWITHSTANDING THE EXISTENCE OF A CONCURRENT CONFLICT OF INTEREST UNDER PARAGRAPH (A), A LAWYER MAY REPRESENT A CLIENT IF:

1. THE LAWYER REASONABLY BELIEVES THAT THE LAWYER WILL BE ABLE TO PROVIDE COMPETENT, AND DILIGENT REPRESENTATION TO EACH AFFECTED CLIENT;

2. THE REPRESENTATION IS NOT PROHIBITED BY LAW;

3. THE REPRESENTATION DOES NOT INVOLVE THE ASSERTION A CLAIM BY ONE CLIENT AGAINST ANOTHER CLIENT REPRESENTED BY THE LAWYER IN THE SAME LITIGATION OR OTHER PROCEEDING BEFORE A TRIBUNAL; AND

4. EACH AFFECTED CLIENT GIVES INFORMED CONSENT, CONFIRMED IN WRITING.
HOW DO YOU RESOLVE THIS CONFLICT OF INTEREST QUERY?

• 1. CLEARLY IDENTIFY THE CLIENT OR CLIENTS;
• 2. DETERMINE WHETHER A CONFLICT OF INTEREST EXISTS;
• 3. DECIDE WHETHER THE REPRESENTATION MAY BE UNDERTAKEN DESPITE THE EXISTENCE OF A CONFLICT, I.E. WHETHER THE CONFLICT IS CONSENTABLE; AND
• 4. IF SO, CONSULT WITH THE CLIENTS AFFECTED UNDER PARAGRAPH (A) AND OBTAIN THEIR INFORMED CONSENT, CONFIRMED IN WRITING.
ANALYSIS

• ALTHOUGH YOUR FIRM DOES NOT DIRECTLY REPRESENT COMPANY B, THE LANGUAGE OF THE RETAINER AGREEMENT GIVES COMPANY C THE REASONABLE EXPECTATION THAT YOUR FIRM REPRESENTS ANY OF ITS SUBSIDIARIES. THEREFORE, YOU SHOULD OBTAIN CONSENT FROM COMPANY C, BEFORE UNDERTAKING THE REPRESENTATION OF COMPANY A.
WHAT IS “INFORMED CONSENT”
RPC 1.0 (E)INFORMED CONSENT

• “INFORMED CONSENT” DENOTES THE AGREEMENT BY A PERSON TO A PROPOSED COURSE OF CONDUCT AFTER THE LAWYER HAS COMMUNICATED ADEQUATE INFORMATION AND EXPLANATION ABOUT THE MATERIAL RISKS OF AND REASONABLY AVAILABLE ALTERNATIVES TO THE PROPOSED COURSE OF CONDUCT.
WHAT SHOULD LAW FIRM CONSIDER IN OBTAINING “INFORMED CONSENT”? 

• 1. HAVE A SEPARATE VERBAL COMMUNICATION WITH EACH CLIENT AND CLEARLY IDENTIFY EACH CLIENT TO THE OTHER AND ADVISE EACH CLIENT OF YOUR RELATIONSHIPS WITH THE OTHER.

• 2. INCLUDE IN YOUR COMMUNICATION A DISCUSSION THAT IS IN SIMPLE TERMS TO ASSURE THAT THE CLIENT UNDERSTANDS ALL OF THE ISSUES.
• 3. ASK CLIENTS IF THEY HAVE ANY QUESTIONS ABOUT THESE MATTERS.

• 4. ANSWER ALL OF THEIR QUESTIONS.

• 5. ADVISE THE CLIENTS THAT YOU WILL BE SENDING THEM A LETTER CONTAINING ALL THE INFORMATION CONTAINED IN YOUR VERBAL EXPLANATION AND THAT YOU WILL NOT BE ABLE TO PROCEED WITHOUT RECEIVING THEIR VERBAL CONSENT, TO BE FOLLOWED UP BY THEIR INFORMED WRITTEN CONSENT.

• 6. DESCRIBE THE CIRCUMSTANCES THAT CREATE A CONFLICT.

• 7. OBTAIN CLIENTS’ INFORMED CONSENT IN WRITING.
• 8. ADVISE THE CLIENT OF THE SERIOUSNESS OF THE DECISION SO AS TO AVOID DISPUTES OR AMBIGUITIES THAT MIGHT LATER OCCUR.

• 9. ADVISE EACH CLIENT THAT ONCE THEY GIVE THEIR CONSENT, THEY MAY LATER REVOKE IT, AND LIKE ANY OTHER CLIENT, TERMINATE YOUR REPRESENTATION AT ANYTIME.

• 10. SUGGEST THAT EACH CLIENT SEEK INDEPENDENT LEGAL ADVICE AND GIVE THE CLIENTS OPPORTUNITY TO SEEK SUCH ADVICE.
MULTIPLE REPRESENTATIONS IN SUPERFUND MATTERS ARE GENERALLY PERMISSIBLE.

• RPC 1.7 PROHIBITS A LAWYER FROM UNDERTAKING LEGAL REPRESENTATION WHERE DIRECT ADVERSITY EXISTS BETWEEN TWO CLIENTS UNLESS THE LAWYER REASONABLY BELIEVES THERE WILL BE NO ADVERSE EFFECT ON THE REPRESENTATION AND EACH CLIENT PROVIDES INFORMED CONSENT.
COMPANY A AND COMPANY B MAY HAVE SUFFICIENT COMMON INTEREST IN COOPERATING WITH REGULATORY AGENCIES TO PERMIT MULTIPLE REPRESENTATION.

• HOWEVER, IF THEY CANNOT AGREE ON HOW LIABILITY SHOULD BE APPORTIONED BETWEEN THEM, IT WOULD NOT BE PERMISSIBLE TO HAVE MULTIPLE REPRESENTATION BECAUSE THEIR POSITIONS ARE FUNDAMENTALLY ANTAGONISTIC.
LAWYERS MUST ALSO TAKE MEASURES TO REASSESS THE REPRESENTATION AND THE POTENTIAL FOR CONFLICTS THROUGHOUT MULTIPLE REPRESENTATION.

• SUPERFUND MATTERS CAN LAST MANY YEARS, AND POSITIONS MAY CHANGE WITH THE INTRODUCTION OF NEW INFORMATION, MAKING REASSESSMENT OF CONFLICTS ESPECIALLY IMPORTANT IN THESE MATTERS.
CONFLICTS BETWEEN CURRENT CLIENTS IN DIFFERENT MATTERS
CONFLICTS BETWEEN CURRENT CLIENTS IN DIFFERENT MATTERS

• HYPOTHETICAL: THE POSITION ON SUBSTANTIVE LEGAL ISSUES YOU WILL BE ARGUING IN COMPANY X’S DEFENSE IS DIRECTLY CONTRARY TO THE POSITION YOU ARE ADVOCATING ON BEHALF OF ANOTHER CLIENT IN A DIFFERENT UNRELATED MATTER.
IS ARGUING TWO SIDES OF THE SAME LEGAL ISSUE A CONFLICT OF INTEREST?

• COMMENT [24] TO RPC 1.7 SAYS THAT ORDINARILY A LAWYER MAY TAKE INCONSISTENT LEGAL POSITIONS IN DIFFERENT TRIBUNALS AT DIFFERENT TIMES ON BEHALF OF DIFFERENT CLIENTS. A CONFLICT OF INTEREST EXISTS IF THERE IS A SIGNIFICANT RISK THAT THE LAWYER’S ACTION ON BEHALF OF ONE CLIENT WILL MATERIALLY LIMIT THE LAWYER’S EFFECTIVENESS IN REPRESENTING ANOTHER CLIENT IN A DIFFERENT CASE, FOR EXAMPLE, WHEN A DECISION FAVORING ONE CLIENT WILL CREATE A PRECEDENT LIKELY TO SERIOUSLY WEAKEN THE POSITION TAKEN ON BEHALF OF ANOTHER CLIENT.
CONFIDENTIALITY
HYPOTHETICAL: UNDER COMPANY A’S MANAGEMENT DIRECTION, COMPANY A EMPLOYEES HAVE BEEN DUMPING WASTE IN A SURFACE IMPOUNDMENT LOCATED ON COMPANY A’S PROPERTY. AFTER CONTINUOUS DUMPING FOR TWO YEARS, MANAGEMENT DECIDES TO SELL THIS PARCEL OF PROPERTY. TO DISGUISE THE DUMPING, IT COVERS THE IMPOUNDMENT WITH CLEAN SOIL AND SOD BEFORE OFFERING IT FOR SALE. DURING SALE NEGOTIATIONS, A PROSPECTIVE BUYER SPECIALLY ASKS COMPANY A REPRESENTATIVES IF ANY HAZARDOUS WASTES HAVE EVER BEEN DISPOSED OF ON THE PARCEL. COMPANY A’S REPRESENTATIVES STATE THAT NO SUCH DISPOSAL HAS OCCURRED.
ADDITIONAL FACTS

• As seller’s lawyer in the transaction, buyer’s lenders want an opinion letter based on an environmental audit of the property that was supervised and signed by you. The environmental audit demonstrates that the waste was disposed of on the parcel and analysis shows waste was extremely hazardous and direct exposure will cause death within hours.
ETHICAL ISSUES

• WHAT ARE YOUR OBLIGATIONS IN REGARD TO RENDERING YOUR OPINION TO THE LENDERS?
• WHAT IF YOUR CLIENT INSISTS THAT YOU CONTINUE WITH THE TRANSACTION WITHOUT DISCLOSURE?
• WHAT ARE YOUR OBLIGATIONS WITH REGARD TO THE HAZARDOUS WASTE IN THIS CASE?
RPC 2.3 EVALUATION FOR USE BY THIRD PERSONS

• (A) A LAWYER MAY PROVIDE AN EVALUATION OF A MATTER AFFECTING A CLIENT FOR THE USE OF SOMEONE OTHER THAN THE CLIENT IF THE LAWYER BELIEVES THAT MAKING THE EVALUATION IS COMPATIBLE WITH OTHER ASPECTS OF THE LAWYER’S RELATIONSHIP WITH THE CLIENT.
• (B) WHEN THE LAWYER KNOWS OR REASONABLY SHOULD KNOW THAT THE EVALUATION IS LIKELY TO AFFECT THE CLIENT’S INTERESTS MATERIALLY AND ADVERSELY, THE LAWYER SHALL NOT PROVIDE THE EVALUATION UNLESS THE CLIENT GIVES INFORMED CONSENT.

• (C) EXCEPT AS DISCLOSURE IS AUTHORIZED IN CONNECTION WITH A REPORT OF AN EVALUATION, INFORMATION RELATING TO THE EVALUATION IS OTHERWISE PROTECTED BY RPC 1.6.
YOU CANNOT GIVE YOUR OPINION LETTER TO BUYER’S LENDERS WITHOUT INFORMED CLIENT CONSENT.
WHAT IF YOUR CLIENT INSISTS THAT YOU CONTINUE WITH THE TRANSACTION WITHOUT DISCLOSURE?
RPC 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS

• (A) IN THE COURSE OF REPRESENTING A CLIENT A LAWYER SHALL NOT KNOWINGLY MAKE A FALSE STATEMENT OF MATERIAL FACT OR LAW TO A THIRD PERSON.

• (B) IF, IN THE COURSE OF REPRESENTING A CLIENT IN A NONADJUDICATIVE MATTER, A LAWYER KNOWS THAT THE CLIENT INTENDS TO PERPETRATE A CRIME OR FRAUD, THE LAWYER SHALL PROMPTLY ADVISE THE CLIENT TO REFRAIN FROM DOING SO AND SHALL DISCUSS WITH THE CLIENT THE CONSEQUENCES OF THE CLIENT’S CONDUCT. IF AFTER SUCH DISCUSSION THE LAWYER KNOWS THAT THE CLIENT STILL INTENDS TO ENGAGE IN THE WRONGFUL CONDUCT, THE LAWYER SHALL:
• (1) WITHDRAW FROM THE REPRESENTATION OF THE CLIENT IN THE
MATTER; AND
• (2) GIVE NOTICE OF THE WITHDRAWAL TO ANY PERSON WHO THE
LAWYER KNOWS IS AWARE OF THE LAWYER’S REPRESENTATION OF
THE CLIENT IN THE MATTER AND WHOSE FINANCIAL OR PROPERTY
INTERESTS ARE LIKELY TO BE INJURED BY THE CLIENT’S CRIMINAL OR
FRAUDULENT CONDUCT. THE LAWYER SHALL ALSO GIVE NOTICE TO
ANY SUCH PERSON OF THE LAWYER’S DISAFFIRMANCE OF ANY
WRITTEN STATEMENTS, OPINIONS, OR OTHER MATERIAL PREPARED BY
THE LAWYER ON BEHALF OF THE CLIENT AND WHICH THE LAWYER
REASONABLY BELIEVES MAY BE USED BY THE CLIENT IN FURTHERANCE
OF THE CRIME OR FRAUD.
YOU MUST WITHDRAW IF THE CLIENT INTENDS TO CONTINUE TO PERPETRATE THE FRAUD

• YOU MUST ALSO GIVE NOTICE TO THE BUYER OF YOUR WITHDRAWAL.
RPC 1.6

• THE TENNESSEE RULES OF PROFESSIONAL CONDUCT DESCRIBE THE DUTY TO CONFIDENTIALITY IN REGARDS TO PROTECTING CLIENT INFORMATION LEARNED DURING THE COURSE OF THE REPRESENTATION AND PROTECTING THIRD PARTIES AND THE PUBLIC INTEREST.

• RPC 1.6 (A) A LAWYER SHALL NOT REVEAL INFORMATION RELATING TO THE REPRESENTATION OF A CLIENT UNLESS:
  • 1. THE CLIENT GIVES INFORMED CONSENT;
  • 2. THE DISCLOSURE IS IMPLIED AUTHORIZED TO CARRY OUT THE REPRESENTATION;
  • 3. THE DISCLOSURE IS PERMITTED BY PARAGRAPH (B) OR REQUIRED BY PARAGRAPH (C)
(C) A LAWYER SHALL REVEAL INFORMATION RELATING TO THE REPRESENTATION OF A CLIENT TO THE EXTENT THE LAWYER REASONABLY BELIEVES IS NECESSARY:

- 1. TO PREVENT REASONABLY CERTAIN DEATH OR SUBSTANTIAL BODILY HARM;
ANALYSIS

RPC 1.6 (C)(1) REQUIRES A LAWYER TO REVEAL ENOUGH INFORMATION TO PREVENT THE WASTE FROM CAUSING REASONABLY CERTAIN DEATH OR SUBSTANTIAL BODILY HARM. SO IN THIS HYPOTHETICAL THE LAWYER IS OBLIGATED TO INFORM THE APPROPRIATE REGULATORY AGENCIES REGARDING DISPOSAL OF WASTE ON THE PROPERTY.
HYPOTHETICAL: DURING DISCOVERY, YOU DEPOSE W AN ADVERSE WITNESS, AND DURING THE COURSE OF THE DEPOSITION, W REVEALS THAT SHE HAS ACCOUNTS ON FACEBOOK AND LINKEDIN, TWO SOCIAL NETWORKING SITES THAT PERMIT “FRIEND” OF USERS TO ACCESS PERSONAL INFORMATION POSTED BY THAT USER. YOU ALSO LEARN THAT W WOULD “FRIEND” ANYONE WHO REQUESTS TO BE HER FRIEND. YOU BELIEVE THAT W HAS POSTED INFORMATION ON HER PAGES THAT MAY BE USED TO IMPEACH HER AT TRIAL. YOU ASK YOUR PARALEGAL, P, WHO IS NOT FRIENDS WITH W TO TRY TO “FRIEND” W. P WILL USE HER REAL NAME, BUT WILL NOT REVEAL WHERE SHE WORKS OR THE REASON SHE WANTS TO BE W’S “FRIEND.”
ETHICAL ISSUES

• 1. IS THE LAWYER RESPONSIBLE FOR THE PARALEGAL’S CONDUCT?
• 2. IS THE PARALEGAL’S CONDUCT A VIOLATION?
• 3. HAS THE LAWYER ENGAGED IN PROFESSIONAL MISCONDUCT?
RPC 5.3 RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS

• “WITH RESPECT TO A NONLAWYER EMPLOYED OR RETAINED BY OR ASSOCIATED WITH A LAWYER…A LAWYER SHALL BE RESPONSIBLE FOR CONDUCT OF SUCH PERSON THAT WOULD BE A VIOLATION OF THE RULES OF PROFESSIONAL CONDUCT IF ENGAGED IN BY A LAWYER IF: (1) THE LAWYER ORDERS OR, WITH THE KNOWLEDGE OF THE SPECIFIC CONDUCT, RATIFIES THE CONDUCT INVOLVED…”
RPC 8.4 MISCONDUCT

• “IT IS PROFESSIONAL MISCONDUCT FOR A LAWYER TO:

• (A) VIOLATE OR ATTEMPT TO VIOLATE THE RULES OF PROFESSIONAL CONDUCT, KNOWINGLY ASSIST OR INDUCE ANOTHER TO DO SO, OR DO THROUGH THE ACTS OF ANOTHER;…

• (C) ENGAGE IN CONDUCT INVOLVING DISHONESTY, FRAUD, DECEIT OR MISREPRESENTATION…”
YOU KNOW THAT W MOST LIKELY WILL NOT ALLOW YOU TO ACCESS TO HER SITES, BUT WOULD MOST LIKELY ALLOW SOMEONE ELSE WHO IS NOT ASSOCIATED WITH YOU. BECAUSE OF THIS YOU ASKED YOUR PARALEGAL TO TRY TO “FRIEND” W TO OBTAIN INFORMATION FROM A WITNESS’S NETWORKING SITES THAT MAY BE USED DURING LITIGATION TO IMPEACH HER. P WOULD NOT HAVE BECOME “FRIENDS” WITH W OTHERWISE. BY OMITTING THE HIGHLY MATERIAL FACT THAT P ONLY WANTS TO BECOME W’S “FRIEND” TO OBTAIN THIS INFORMATION TO SHARE WITH YOU, P IS PURPOSEFULLY CONCEALING INFORMATION IN ORDER TO INDUCE W TO BECOME HER “FRIEND”.
ANALYSIS

• ALTHOUGH, YOU DID NOT ORDER P TO “FRIEND” W, BECAUSE YOUR ARE P’S EMPLOYER AND IN A POSITION OF AUTHORITY, P MAY BELIEVE THAT SHE IS OBLIGATED TO “FRIEND” W. FURTHER, YOU ARE PROCURING THE CONDUCT, AND IF P BECOMES W’S “FRIEND”, YOU WOULD BE RATIFYING IT WITH FULL KNOWLEDGE OF THE PROPRIETY OR LACK THEREOF. THEREFORE, EVEN THOUGH YOU DID NOT ENGAGE IN THE ACTUAL CONDUCT, YOU ARE RESPONSIBLE FOR P’S ACTIONS, AND ARE THUS RESPONSIBLE FOR VIOLATING THIS RULE.
OBLIGATIONS TO PROSPECTIVE CLIENTS
HYPOTHETICAL: COMPANY A CALLS YOU FOR AN INTERVIEW TO DETERMINE IF THEY WANT TO HIRE YOU AS COUNSEL. YOU ARE TOLD THAT SEVERAL FIRMS WILL BE INTERVIEWED. YOU WANT TO LEARN AS MUCH AS POSSIBLE ABOUT THE CLIENT.
ETHICAL ISSUE

• DO YOU HAVE A DUTY OF CONFIDENTIALITY TO THE PROSPECTIVE CLIENT?
RPC 1.18 DUTIES TO PROSPECTIVE CLIENTS

• (A) A PERSON WHO CONSULTS WITH A LAWYER ABOUT THE POSSIBILITY OF FORMING A CLIENT-LAWYER RELATIONSHIP IS A PROSPECTIVE CLIENT.

• (B) EVEN WHEN NO CLIENT-LAWYER RELATIONSHIP ENSUES, A LAWYER WHO HAS LEARNED INFORMATION FROM A PROSPECTIVE CLIENT SHALL NOT USE OR REVEAL THAT INFORMATION, EXCEPT AS RPC 1.9 WOULD PERMIT WITH RESPECT OF INFORMATION OF A FORMER CLIENT.
ARE YOU DISQUALIFIED FROM REPRESENTING ANY OTHER PARTIES IN THE MATTER?

- DISQUALIFICATION IS ONLY APPROPRIATE IF THE LAWYER LEARNED INFORMATION THAT IS "SIGNIFICANTLY HARMFUL" TO THE PROSPECTIVE CLIENT’S MATTER.
SOCIAL NETWORKING AND BLOGGING
RPC 8.4  MISCONDUCT

• “IT IS PROFESSIONAL MISCONDUCT FOR A LAWYER TO:
  
• (A) VIOLATE OR ATTEMPT TO VIOLATE THE RULES OF PROFESSIONAL CONDUCT, KNOWINGLY ASSIST OR INDUCE ANOTHER TO DO SO THROUGH THE ACTS OF ANOTHER;

• (C) ENGAGE IN CONDUCT INVOLVING DISHONESTY, FRAUD, DECEIT OR MISREPRESENTATION;”
WHAT ABOUT BLOGGING?

- BLOGGING RAISES SEVERAL ETHICAL ISSUES INCLUDING:
RPC 7.1

• “A LAWYER SHALL NOT MAKE A FALSE OR MISLEADING COMMUNICATION ABOUT THE LAWYER OR THE LAWYER’S SERVICES. A COMMUNICATION IS FALSE OR MISLEADING IF IT CONTAINS A MATERIAL MISREPRESENTATION OF FACT OR LAW, OR OMITS A FACT NECESSARY TO THE MAKE THE STATEMENT CONSIDERED AS A WHOLE NOT MATERIALLY MISLEADING.”

• Because potential clients have access to lawyer’s blogs unless such access is restricted, lawyers must be very careful about what they post and ensure that it is truthful.
RPC 7.3 SOLICITATION OF CLIENTS

• “A LAWYER SHALL NOT BY IN-PERSON, LIVE TELEPHONE OR REAL-TIME ELECTRONIC CONTACT SOLICIT PROFESSIONAL EMPLOYMENT WHEN A SIGNIFICANT MOTIVE FOR THE LAWYER’S DOING SO IS THE LAWYER’S PECUNIARY GAIN, UNLESS THE PERSON CONTACTED:

• (1) IS A LAWYER; OR

• (2) HAS A FAMILY, CLOSE PERSONAL, OR PRIOR RELATIONSHIP WITH THE LAWYER.”
• EMAILS, LIKE WRITTEN COMMUNICATIONS, ARE NOT PROHIBITED OUTRIGHT. BLOG POSTS ARE SIMILAR TO EMAIL; THEY ARE NOT POSTED IN REAL-TIME. HOWEVER, IF THE BLOG ENCOURAGES INTERACTION BETWEEN POTENTIAL CLIENTS AND THE LAWYER-AUTHOR, OR THE AUTHOR IMMEDIATELY RESPONDS TO COMMENTS MADE IN RESPONSE TO THE POSTS, THE BLOGS COULD BE CONSTRUED AS REAL-TIME ELECTRONIC CONTACT.
A FIRM’S OR LAWYER’S WEBSITE IS CONSIDERED AS A FORM OF ADVERTISING

• A BLOG GENERALLY A PART OF THE FIRM’S WEBSITE, WOULD LIKELY CONSTITUTE ADVERTISING AND BE COVERED BY THE ADVERTISING RULES.
RPC 5.5 UNAUTHORIZED PRACTICE OF LAW

• A LAWYER WHO IS NOT ADMITTED TO PRACTICE IN THIS JURISDICTION SHALL NOT:

• (1) EXCEPT AS AUTHORIZED BY THESE RULES OR OTHER LAW, ESTABLISH AN OFFICE OR OTHER SYSTEMATIC AND CONTINUOUS PRESENCE IN THIS JURISDICTION FOR THE PRACTICE OF LAW; OR

• (2) HOLD OUT TO THE PUBLIC OR OTHERWISE REPRESENT THAT THE LAWYER IS ADMITTED TO PRACTICE IN THIS JURISDICTION.
The internet has created a multijurisdictional environment for legal services.

- If a lawyer’s or law firm’s website does not comply with the advertising rules or implies that lawyers in the firm are authorized to practice in the state where the advertisement appears, sanctions could be sought for unauthorized practice of law.
Another potential ethical issue that blogs raise is the potential that information received constitutes the formation of an attorney-client relationship.

• An attorney-client relationship is formed when a client reasonably relies on the advice of the lawyer. Law firm websites should include a disclaimer that all information contained on the website and blog is for informational purposes only, does not constitute legal advice and does not form an attorney-client relationship.
ETHICS UPDATE
BOARD NOTES

published by the

Board of Professional Responsibility

of the

Supreme Court of Tennessee

Fall 2018
TENNESSEE SUPREME COURT ADOPTS UNIFORM BAR EXAM AND TENNESSEE LAW COURSE

• MULTIJURISDICTIONAL OR CROSS BORDER PRACTICE IS MORE COMMON, ESPECIALLY IN TENNESSEE.
• TENNESSEE BORDERS MORE STATES THAN ANY OTHER STATE IN THE UNION.
NEW FORM OF ADMISSION

• APPLICANTS WITH A SCORE OF 270 OR HIGHER ON THE UBE IN ANOTHER JURISDICTION MAY BE ELIGIBLE FOR ADMISSION BASED ON THEIR UBE SCORE.

• THESE APPLICANTS WILL HAVE TO UNDERGO A CHARACTER AND FITNESS INVESTIGATION AND MEET ALL OTHER TN ELIGIBILITY REQUIREMENTS
TENNESSEE LAW COURSE

• ALL APPLICANTS FOR A TENNESSEE LAW LICENSE MUST TAKE THE TENNESSEE LAW COURSE ON DISTINCTIONS FOUND IN TN LAW.
TN SUPREME COURT PUTS LAWYER’S FUND FOR CLIENT PROTECTION WITH BPR.

• TENNESSEE ATTORNEYS SUPPORT THE LAWYER’S FUND BY PAYING $10 OF THEIR ANNUAL REGISTRATION TO THE FUND. NO TAXPAYER FUNDS ARE USED.

• LAST YEAR THE FUND PAID OUT $815,197.38 TO 39 CLAIMANTS WHO LOST MONEY DUE TO DISHONEST CONDUCT BY ATTORNEYS.
BPR ISSUES NEW FORMAL ETHICS OPINION 2018-F-166

• “IT IS IMPROPER FOR AN ATTORNEY TO PROPOSE OR ACCEPT A PROVISION IN A SETTLEMENT AGREEMENT THAT REQUIRE THE ATTORNEY TO BE BOUND BY A CONFIDENTIALITY CLAUSE THAT PROHIBITS A LAWYER FROM FUTURE USE OF INFORMATION LEARNED DURING THE REPRESENTATION OR DISCLOSURE OF INFORMATION THAT IS PUBLICLY AVAILABLE OR THAT WOULD BE AVAILABLE THROUGH DISCOVERY IN OTHER CASES AS PART OF THE SETTLEMENT, IF THAT ACTION WILL RESTRICT THE ATTORNEY’S REPRESENTATION OF OTHER CLIENTS.”
THE ELEPHANT IN THE ROOM

• CONTINUES TO BE THE CONTROVERSIAL FORMAL ETHICS OPINION 2017-F-163
THE CONTROVERSY HAS CAUSED THE BOARD TO IMPLEMENT A NOTICE AND COMMENT PERIOD FOR FORMAL ETHICS OPINIONS.

- DRAFT FORMAL OPINIONS ARE POSTED ON THE BPR WEBSITE AND THE PUBLIC IS ASKED FOR COMMENTS.
- THIS IS A 30 DAY PERIOD FOR COMMENT.
- THEREAFTER THE BOARD WILL VOTE ON WHETHER OR NOT TO ISSUE THE OPINION.
NEW NOTICE AND COMMENT PERIOD FOR FORMAL ETHICS OPINIONS

• NEW DRAFT FORMAL ETHICS OPINIONS WILL BE RELEASED ON TBA TODAY AND THE BOARD OF PROFESSIONAL RESPONSIBILITY WEBSITE, SOLICITING COMMENTS FOR 30 DAYS BEFORE THE BPR VOTES TO ISSUE OR NOT TO ISSUE THE FORMAL OPINION.
THE OPINION IS:

“IT IS IMPROPER FOR AN ATTORNEY TO PROPOSE OR ACCEPT A PROVISION IN A SETTLEMENT AGREEMENT, IN A PRODUCTS LIABILITY CASE, THAT REQUIRES DESTRUCTION OF THE SUBJECT VEHICLE ALLEGED TO BE DEFECTIVE IF THAT ACTION WILL RESTRICT THE ATTORNEY’S REPRESENTATION OF OTHER CLIENTS.”
For the Public

Questions or concerns about an attorney’s ethical conduct?

GET STARTED

For Legal Professionals

Assistance and information for the legal community.

GET STARTED
Latest News

Board Soliciting Comments on proposed Formal Opinion 2019-F-167

The Board of Professional Responsibility hereby solicits written comments from any interested parties regarding proposed Formal Ethics Opinion 2019-F-167. The deadline for submitting written comments is April 10, 2019. Written comments may be emailed to LChastain@lpbr.org or mailed to:

Board of Professional Responsibility of the Supreme Court of Tennessee
10 Cadillac Drive, Suite 220
Brentwood, TN 37027

and should reference the opinion number above.

Ethics Workshop 2018

The Board of Professional Responsibility would like to thank everyone involved in helping to make the recent annual Ethics Workshop at the Nashville School of Law a huge success. Based on the positive feedback from this year’s 400 attendees, the speakers at the November 2nd workshop did a wonderful job and were extremely well-received. The following is a list of the speakers and the topics they covered:

- William T. Ramsey, Esq. and Jordan McQuown: “Attorney’s Competent Use of Technology”
- Lisa Smith, Esq.: “Girl Walks Out of a Bar” (Substance Abuse Issues)
- Krisann Hodges, Esq.: “Ethics from Hollywood”
- Judge Michael Binkley, Judge Phillip Robinson, and Judge Philip E. Smith: “Ethical Issues in Domestic Relations”

Annual Reports

Review our Annual Reports and get the latest trends and analysis for each of the nine Tennessee Disciplinary Districts.

- 37th Annual Report (July 1, 2017 - June 30, 2018)
- 36th Annual Report (July 1, 2016 - June 30, 2017)
- 35th Annual Report (July 1, 2015 - June 30, 2016)
- 34th Annual Report (July 1, 2014 - June 30, 2015)
- 33rd Annual Report (July 1, 2013 - June 30, 2014)
- 32nd Annual Report (July 1, 2012 - June 30, 2013)
- 31st Annual Report (July 1, 2011 - June 30th, 2012)
- 30th Annual Report (July 1, 2005 - June 30th, 2006)
- More ...

Quarterly Reports

Pursuant to Tennessee Supreme Court Rule 9, Section 4.5(b), the Board quarterly posts a report demonstrating the Board’s compliance with operating procedures.

- Q4/2018 Quarterly Report
- Q3/2018 Quarterly Report
BOARD OF PROFESSIONAL RESPONSIBILITY
OF THE
SUPREME COURT OF TENNESSEE

FORMAL ETHICS OPINION 2019-F-167

The Board of Professional Responsibility has been requested to issue a Formal Ethics Opinion regarding the ethical propriety of a settlement agreement, in a products liability case, which contains as a material condition of the settlement that the subject vehicle alleged to be defective be destroyed within 180 days with certification to defendant’s counsel of record of the destruction.

OPINION

It is improper for an attorney to propose or accept a provision in a settlement agreement, in a products liability case, that requires destruction of the subject vehicle alleged to be defective if that action will restrict the attorney’s representation of other clients.

DISCUSSION

The inquiring lawyer has encountered a condition to settlement, in product liability cases against a certain defendant, which requires plaintiff to destroy the vehicle that was the subject of the claim.

The parties agreed on a settlement amount, and the requirement of the destruction of the vehicle was only brought up after the Plaintiff agreed to settle. The client simply wanted to be
OFFICE OF DISCIPLINARY COUNSEL RECOGNIZES THE SERVICE OF RECEIVER ATTORNEYS

- WILLIAM BOYD  ELIZABETHTON
- JEFF CRANFORD  MORRISTOWN
- ART GRISHAM  CHATTANOOGA
- KYLE HECKMAN  LEBANON
- BRUCE HILL  SEVIERVILLE
- CALEB MCDANIEL  ELIZABETHTON
- DENNIS POWERS  GALLATIN
- GLENNA RAMER  CHATTANOOGA
- BRAXTON TERRY  MORRISTOWN
GUIDE FOR RETIRING ATTORNEYS

• TO REQUEST INACTIVE STATUS ATTORNEYS MUST FILE AN APPLICATION AND AFFIDAVIT UNDER PENALTY OF PERJURY THAT THE ATTORNEY IS NOT DELINQUENT IN ANY OF THE FOLLOWING OBLIGATIONS:
  • PAYMENT OF ALL FEES
  • COMPLETION OF ALL CLE REQUIREMENTS
  • SUBMISSION OF IOLTA FORM
  • PAYMENT OF PRIVILEGE TAX.
Attorney License Information
- Information for New Attorneys
- Active, Inactive & Exempt Status
- Reinstatement of Law License
- Letters of Good Standing

Rules
The Board is governed by the following rules.
- Board Policies and Rules
- Tennessee Supreme Court Rule 8 - Rules of Professional Conduct
- Tennessee Supreme Court Rule 9 - Disciplinary Enforcement
- Tennessee Supreme Court Rule 43 - Interest on Lawyers’ Trust Accounts
- Tennessee Supreme Court Rule 44 - Regulation of Lawyer Intermediary Organizations

Ethics Opinions
Search below by keyword, phrase or year for Formal Ethics Opinions issued from 1980 to the present.

Keyword(s) or Opinion Number

- Formal Ethics Opinions
- Informal Ethics Inquiries
- Ethics Frequently Asked Questions

State Agencies
- Tennessee Lawyers Assistance Program (TLAP)
- Tennessee Commission on Continuing Legal Education
- Tennessee Board of Law Examiners
- Tennessee Bar Foundation

Trust Accounting
- Approved Banks and Credit Unions
- IOLTA (Interest On Lawyers Trust Accounts)
- Attorney Trust Account Overdraft Notification Agreement

Pro Hac Vice Attorneys
- Pro Hac Vice Registration
- Pro Hac Vice Search
- Pro Hac Vice Frequently Asked Questions
- Supreme Court Rule 19 - Appearance Pro Hac Vice in Proceedings Before Tennessee Agencies and Courts by Lawyers Not Licensed to Practice Law in Tennessee

Resources
- TLAP (Tennessee Lawyers Assistance Program)
- Frequently Asked Questions regarding Suspended Attorneys
- Resources for When an Attorney is Unable to Practice Law
- File your Professional Privilege Tax
- The Tennessee Attorney’s Trust Account Handbook
- Links of Interest
IN 2018 THERE WERE 2,377 ETHICS INQUIRIES ANSWERED

BPR Ethics Inquiries From 1/1/2018 to 12/31/2018
A. Nature of Complaints

- Neglect or Failure to Communicate 52%
- Other 1%
- Personal Behavior 2%
- Fees 6%
- Improper Communications 8%
- Misrepresentation or Fraud 8%
- Criminal Convictions 2%
- Conflict of Interest 4%
- Trust Violations 8%
- Relationship with Client or Court 9%
ABA ISSUES FORMAL OPINION 483
LAWYERS’ OBLIGATIONS AFTER AN ELECTRONIC DATA BREACH OR CYBERATTACK.

• MODEL RULE 1.4 REQUIRES LAWYERS TO KEEP CLIENTS “REASONABLY INFORMED ABOUT THE STATUS OF A MATTER AND TO EXPLAIN MATTERS “TO THE EXTENT REASONABLY NECESSARY TO PERMIT A CLIENT TO MAKE AND INFORMED DECISION REGARD THE REPRESENTATION.”
MODEL RULES 1.1, 1.6, 5.1, AND 5.3

• ADDRESS THE RISKS THAT ACCOMPANY THE BENEFITS OF THE USE OF TECHNOLOGY BY LAWYERS. WHEN A DATA BREACH OCCURS INVOLVING, OR HAVING A SUBSTANTIAL LIKELIHOOD OF INVOLVING MATERIAL CLIENT INFORMATION, LAWYERS HAVE THE DUTY TO NOTIFY CLIENTS OF THE BREACH AND TO TAKE OTHER REASONABLE STEPS CONSISTENT WITH THEIR OBLIGATIONS UNDER THESE MODEL RULES.
A. DUTY OF COMPETENCE

1. OBLIGATION TO MONITOR FOR A DATA BREACH.
2. STOPPING THE BREACH AND RESTORING SYSTEMS
3. DETERMINING WHAT OCCURRED.
B. DUTY OF CONFIDENTIALITY
C. LAWYER’S OBLIGATIONS TO PROVIDE NOTICE OF DATA BREACH

• 1. CURRENT CLIENT
• 2. FORMER CLIENT
• 3. BREACH NOTIFICATION REQUIREMENTS
Tennessee Supreme Court Approves Amendments to Tennessee Supreme Court Rule 7

By: Lisa Perlen, Executive Director
Tennessee Board of Law Examiners

The Tennessee Supreme Court approved amendments to Tennessee Supreme Court Rule 7 which governs licensing of attorneys in Tennessee, effective March 29, 2019. An Order soliciting comments on the proposed changes was entered on January 17, 2019. Links to the Order and rule revisions can be found at the end of this article.

After many changes to Rule 7 in recent years, including the adoption of the Uniform Bar Examination (UBE) and Tennessee Law Course, practice pending admission provisions, and temporary licensing for the spouse of a military servicemember, the Board and Supreme Court reviewed the balance of the licensing rule, some parts of which had not been revised in many years. The most recent changes reflect a universal review of the rule with key changes to practice pending admission, in-house counsel registration by non-Tennessee lawyers, and the rules governing law students working under supervision of faculty.

As part of the holistic review, the rule was reformatted to a consistent numbering convention for ease in citation. Further, emphasis was placed on ensuring that each section was properly placed in the corresponding Articles of the Rule based on the type of admission. Prior to the adoption of the UBE, to be licensed in Tennessee an applicant was required either to take the Tennessee bar examination or seek admission based on years of practice. With the adoption of the UBE and acceptance of transferred UBE scores, the focus shifts to licensing by exam score or licensing based on time engaged in the active practice of law.
CLE Commission Proposes Changes to Rule 21 with Goal of Clarity and Simplification

By: Judy Bond-McKissack, Executive Director, Tennessee CLE Commission

Supreme Court Rule 21 was last amended on December 16, 2014 with an effective date of January 1, 2015. That revision was the first comprehensive revision to the rule on mandatory continuing legal education since its inception. Since that time the staff of the Commission has engaged in conversations with many attorneys licensed in Tennessee who reside in Tennessee as well as other states. The questions asked in those conversations became the basis for the current proposal to revise Rule 21. The staff of the Commission, with tremendous support and help from the members of the Commission’s board, have attempted to create a rule that is as close to being self-explanatory as possible. The rule has been completely reorganized with cross references to other relevant provisions of the rule or regulations that also address the same topic being addressed.
The Board of Professional Responsibility has been requested to issue a Formal Ethics Opinion regarding the ethical propriety of a settlement agreement, in a products liability case, which contains as a material condition of the settlement that the subject vehicle alleged to be defective be destroyed within 180 days with certification to defendant’s counsel of record of the destruction.

**OPINION**

It is improper for an attorney to propose or accept a provision in a settlement agreement, in a products liability case, that requires destruction of the subject vehicle alleged to be defective if that action will restrict the attorney’s representation of other clients.
Questions
CONTACT INFORMATION

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- CONSUMER ASSISTANCE PROGRAM (615) 361-7500
- TENNESSEE LAWYERS ASSISTANCE PROGRAM (615) 741-3238
- TENNESSEE BOARD OF LAW EXAMINERS (615) 741-3234
- TENNESSEE COMMISSION ON CONTINUING LEGAL EDUCATION (615) 741-3096
- TENNESSEE BOARD OF JUDICIAL CONDUCT (615-649-8851)
- TENNESSEE ATTORNEY GENERAL’S OFFICE (615-741-3491)