



IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

**IN RE: PROPOSED AMENDMENTS
TENNESSEE SUPREME COURT RULE 9, SECTION 16**

No. ADM2023-001437

**COMMENT OF THE BOARD OF PROFESSIONAL
RESPONSIBILITY TO PROPOSED AMENDMENTS TO
TENNESSEE SUPREME COURT RULE 9, SECTION 16**

Pursuant to this Court's Order filed October 12, 2023, the Board of Professional Responsibility (the Board) respectfully submits the following comments to proposed amendments to Tennessee Supreme Court Rule 9 Section 16.

Current Section 16.1(c) of Tennessee Supreme Court Rule 9 outlines the procedure whereby complaints against Disciplinary Counsel are submitted directly to the Board. Current Section 16.1(c) provides that complaints against Disciplinary Counsel are investigated by an attorney member of the Board or a Special Disciplinary Counsel if requested by the Board.

Proposed Section 16.1(1) abolishes the Board's ability to investigate complaints against Disciplinary Counsel and instead requires the appointment of a Special Disciplinary Counsel to investigate complaints against Disciplinary Counsel. Attorney and lay members of the Board receive training on Tennessee Supreme Court Rule 9 to ensure Board members possess the requisite knowledge to consider discipline of attorneys. Current Section 16.1(c)'s procedure authorizing the Board to investigate complaints against Disciplinary Counsel, unless the Board requests a Special Disciplinary Counsel, is sound and should not be amended.

This Court has appointed 182 attorneys to currently serve as district committee members in Tennessee's nine disciplinary districts. District committee members receive

no compensation for their service but they perform a vital service to the profession by reviewing recommendations regarding disciplinary investigations and serving as three-member Hearing Panels in formal disciplinary proceedings. Each district committee member receives three hours of continuing legal education on disciplinary enforcement as set forth in Tennessee Supreme Court Rule 9. Current Section 16.1(d) outlines the procedure whereby complaints against district committee members are submitted directly to the Board. Additionally, current section 16.1(d) provides that Disciplinary Counsel investigate complaints against district committee members while findings of Disciplinary Counsel's investigation are reviewed by a committee of no fewer than three members of the Board. Board of Professional Responsibility Policy 3.6(A)(1)(c) establishes a Quarterly Ethics and Appeal Review Committee of the Board which reviews Disciplinary Counsel's investigation of complaints against district committee members.

Proposed Section 16.1(2) states complaints against district committee members shall be conducted by a special hearing committee. It is unclear whether the special hearing committee language referenced in proposed Section 16.1(2) is one current or former district committee member or panel of several district committee members. The current system for Disciplinary Counsel's investigation and the Board's review of complaints against district committee members is clear and effective. Disciplinary Counsel are experienced in investigating and prosecuting violations of the Rules of Professional Conduct and the Rules of Disciplinary Enforcement and applying the ABA Standards for Imposing Lawyer Sanctions. The current process for Disciplinary Counsel's investigation of complaints against district committee members in Section 16.1(d) is effective and should not be changed.

This Court has appointed nine attorneys and three lay members to serve on the Board. Like district committee members, members of the Board receive no compensation for their service in considering and recommending private and public discipline and the filing of formal disciplinary charges. Current Section 16.2(a) provides that complaints against attorney members of the Board alleging violations of the Rules of Professional Conduct shall be submitted directly to the Chief Justice of the Court. Current Section

16.3(a) provides for the Chief Justice's appointment of a Special Disciplinary Counsel to investigate complaints against attorney members of the Board. After Special Disciplinary Counsel investigates an attorney Board member, Special Disciplinary Counsel's recommendations for dismissal, private or public discipline or the filing of formal disciplinary charges, are reviewed by a designated Reviewing Justice.

Proposed Rule 16.1(3) creates a new process whereby the Chief Justice shall appoint a special standing Board of three members to review complaints against a member of the Board. It is unclear from the language of proposed Section 16.1(3) whether the special standing Board would consist of current or former Board members and what the term of the special standing Board would be. As an alternative to the current and proposed rules regarding investigating complaints against attorney members of the Board, current section 16.3 could be amended to provide that a Special Disciplinary Counsel, who may be a current or former district committee member trained in Tennessee Supreme Court Rule 9, investigate complaints against attorney members of the Board then report findings to a special Board of three members appointed by the Chief Justice.

This special Board, appointed by the Chief Justice, would review Special Disciplinary Counsel's recommendations for dismissal, private informal admonition, private reprimand, public censure, and the filing of formal charges. Consistent with existing Section 16.3(c), if the special Board approves filing formal charges or the Respondent attorney Board member requests a hearing, the Chief Justice will designate a special hearing panel to proceed pursuant to existing Sections 6 and 15. Any appeal by the special Board or Respondent attorney Board member would proceed in accordance with Section 33.

A red lined version of the Board's proposed amendments to Rule 9 Section 16 is attached as Exhibit A.

RESPECTFULLY SUBMITTED,

Jennifer Hagerman By SG wife permission
Jennifer Hagerman (BPR No. 020281)
Chair,
Board of Professional Responsibility
of the Supreme Court of Tennessee
1302 Main Street
PO Box 160
Humboldt, TN 38343

Sandy Garrett
SANDY GARRETT (BPR No. 013863)
Chief Disciplinary Counsel,
Board of Professional Responsibility
of the Supreme Court of Tennessee
10 Cadillac Drive, Suite 220
Brentwood, TN 37027

Certificate of Service

I certify that the foregoing has been emailed to Sheree Wright, Esq., Executive Director, Tennessee Bar Association, at swright@tnbar.org, on this the 11th day of December 2023.

By: Jennifer Hagerman By SG wife permission
Jennifer Hagerman (BPR No. 020281)
Chairman of the Board

By: Sandy Garrett
Sandy Garrett (BPR No. 013863)
Chief Disciplinary Counsel

Exhibit A

Rule 9: Disciplinary Enforcement

Section 16. Complaints Against Board Members, District Committee Members, or Disciplinary Counsel

16.1. (a) Complaints against Disciplinary Counsel or a district committee member alleging violations of the Rules of Professional Conduct shall be submitted directly to the Board.

(b) Disagreement with the official decision of Disciplinary Counsel, a hearing panel, or a district committee member, taken in the course and scope of his or her responsibilities, shall not be grounds for the filing of a disciplinary complaint.

(c) The investigation of complaints against Disciplinary Counsel submitted under Section 16.1 shall proceed in accordance with the procedures contained in Section 15, except that an attorney member of the Board appointed by the Chair shall conduct the investigation and the findings of such investigation shall be reviewed by a committee of no fewer than three members of the Board appointed by the Chair or Vice Chair. Provided, however, that the Board may request the Court to appoint a Special Disciplinary Counsel to conduct the investigation. Upon application to the Court, the Court may authorize the payment of reasonable fees and expenses to Special Disciplinary Counsel.

(d) The investigation of complaints against district committee members shall be conducted by Disciplinary Counsel in accordance with the procedures contained in Section 15. The findings of such investigation shall be reviewed by a committee of no fewer than three members of the Board appointed by the Chair or Vice Chair. Provided, however, that the Board may request the Court to appoint a Special Disciplinary Counsel to conduct the investigation. Upon application to the Court, the Court may authorize the payment of reasonable fees and expenses to Special Disciplinary Counsel.

16.2. (a) Complaints against attorney members of the Board alleging violations of the Rules of Professional Conduct shall be submitted directly to the Chief Justice of the Court.

(b) Disagreement with the official decision of the Board or a member, taken in the course and scope of his or her responsibilities, shall not be grounds for the filing of a disciplinary complaint.

16.3. The investigation of complaints submitted under Section 16.2 shall be conducted

by Special Disciplinary Counsel against attorney members of the Board shall proceed in accordance with the procedures contained in Section 15, with the following modifications:

(a) A Special Disciplinary Counsel, whom the Chief Justice shall appoint ~~by order entered under seal~~, shall take the place and perform all of the functions of Disciplinary Counsel set forth in Section 15.1, including all investigations, whether upon complaint or otherwise. Upon conclusion of an investigation, Special Disciplinary Counsel may recommend dismissal, private informal admonition of the attorney concerned, or a private reprimand, public censure, or prosecution of formal charges ~~before to~~ a special hearing panel Board of three members appointed by the Chief Justice.

~~(b) One member of the Court, whom the Chief Justice shall designate, shall take the place and perform all of the functions of the Board in all investigations and proceedings governed by this Section, including the review of recommendations of dismissal or private informal admonition, or a private reprimand, public censure or prosecution of formal charges, pursuant to Section 15.1. The member so designated shall not participate with the Court in any subsequent proceedings in the same case.~~

(1) If Special Disciplinary Counsel's recommendation is dismissal, it shall be reviewed by the ~~designated member of the Court ("Reviewing Justice")~~ special Board, who may approve or modify it. If the recommendation is approved by ~~the Reviewing Justice~~, notice of the disposition by dismissal shall be provided by Special Disciplinary Counsel to the complainant. A complainant who is not satisfied with the disposition by dismissal of the matter may appeal in writing to the ~~Chief Justice~~ special Board within thirty days of receipt of notice of the ~~Reviewing Justice's approval of the~~ recommended disposition. The ~~Court~~ special Board may approve, modify, or disapprove the disposition, or direct that the matter be investigated further. If the ~~Court~~ special Board approves the recommended disposition of dismissal, ~~the Court shall enter an appropriate order under seal~~ the complainant has no other or further right of appeal or review under this Rule or otherwise.

(2) If Special Disciplinary Counsel's recommendation is diversion or private informal admonition, it shall be reviewed by the ~~Reviewing Justice~~ special Board, who may approve or modify it. If the recommendation is approved by ~~the Reviewing Justice~~, notice shall be provided by Special Disciplinary Counsel to the complainant that the complaint has been resolved by diversion or private informal admonition and that the matter is confidential under Section 32. The complainant has no right to appeal a disposition by diversion or private informal admonition under this Section.

(3) If the recommended disposition is private reprimand, public censure, or prosecution of formal charges before a special hearing panel, ~~the Reviewing~~

~~Justice~~ special Board shall review the recommendation and shall approve, disapprove, or modify it. ~~The Reviewing Justice may determine whether a matter should be concluded by dismissal or private informal admonition; may approve or impose a private reprimand or public censure; or may direct that a formal proceeding be instituted before a special hearing panel.~~

(4) If Special Disciplinary Counsel's recommendation is private reprimand, and if the recommendation is approved by the ~~Reviewing Justice~~ special Board, notice shall be provided by Special Disciplinary Counsel to the complainant that the complaint has been resolved by private reprimand and that the matter is confidential under Section 32. The complainant has no right to appeal a disposition by private reprimand under this Section.

(5) The respondent attorney shall not be entitled to appeal diversion, a private informal admonition, ~~approved by the Reviewing Justice; similarly, the respondent attorney may not appeal~~ a private reprimand or public censure approved or imposed by the ~~Reviewing Justice~~ special Board. ~~In either case,~~ However, the respondent attorney may, within twenty days of notice thereof, demand as of right that a formal proceeding be instituted before a special hearing panel. In the event of such demand, the diversion or private informal admonition shall be vacated or the recommended private reprimand or public censure shall be withdrawn, and the matter shall be disposed of in the same manner as any other formal hearing instituted before a hearing panel.

~~(e)~~ (b) If the recommendation, as approved or modified by the ~~Reviewing Justice~~ special Board, includes the institution of formal proceedings before a hearing panel, or if the respondent attorney demands in writing to the Chief Justice such formal proceedings as of right, then the Chief Justice shall at that time appoint three persons to act as a special hearing panel. The special hearing panel shall take the place and perform all of the functions of the hearing panel as provided in Sections 6 and 15. The Special Disciplinary Counsel shall continue to perform the functions of Disciplinary Counsel and shall proceed in accordance with the provisions of this Rule governing formal proceedings.

~~(d)~~ (c) There shall be no petition for rehearing. The respondent attorney or Special Disciplinary Counsel may appeal the judgment of the special hearing panel as provided in Section 33.