



FILED

2011 APR -7 PM 12:13

APPELLATE COURT CLERK  
NASHVILLE

April 7, 2011

The Honorable Michael Catalano  
Clerk, Tennessee Supreme Court  
Supreme Court Building, Room 100  
401 Seventh Avenue North  
Nashville, TN 37219

IN RE: AMENDMENT TO RULE 7, SECTION 14.01 -  
RULES OF THE TENNESSEE SUPREME COURT  
No. M2011-00526-SC-RL2-RL

AND

AMENDMENTS TO RULE 9, SECTIONS 1.3, 8.3,  
13.7 AND 16.1 - RULES OF THE TENNESSEE  
SUPREME COURT  
No. M2011-00527-SC-RL2-RL

Dear Mike:

Attached please find an original and six copies of the Comment of the Tennessee Bar Association in reference to the above matters.

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

Very truly yours,

Allan F. Ramsaur  
Executive Director

cc: Sam D. Elliott  
William L. Harbison  
Brian S. Faughnan  
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IN THE SUPREME COURT OF TENNESSEE  
AT NASHVILLE

FILED

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IN RE: AMENDMENTS TO RULE 7, SECTION 14.01 AND TO  
RULE 9, SECTIONS 1.3, 8.3, 13.7, AND 16.1,  
RULES OF THE TENNESSEE SUPREME COURT

APPELLATE COURT CLERK  
NASHVILLE

Nos. M2011-00526-SC-RL2-RL and  
M2011-00527-SC-RL2-RL

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COMMENT OF THE TENNESSEE BAR ASSOCIATION

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The Tennessee Bar Association (“TBA”) submits this Comment in response to the Court’s invitation extended to the bench, the bar, and the public to submit comments concerning proposed amendments to Tenn. Sup. Ct. R. 7 and Tenn. Sup. Ct. R. 9. Those proposed amendments address the requirements for seeking the Court’s review of any action of the Board of Law Examiners and concerning judicial review of the judgment of a hearing panel respectively.

Although the proposed revisions are not limited to Rule 9, it appears to the TBA in light of the Court’s recent decision in Board v. Cawood, 330 S.W.3d 608 (Tenn. 2010), that the proposed revisions are motivated by a desire to address and remove confusion regarding what is necessary to perfect an appeal from administrative proceedings regarding issues involving the licensure of lawyers.

While the proposed revisions to Rule 9 would eliminate any reference to Tenn. Code Ann. § 27-9-101 and any reference to “certiorari,” and the proposed revision to Rule 7 would delete the reference to review “under the common law writ of certiorari,” the TBA has some concern that the proposed revisions, as currently drafted, may create even further confusion by being construed as offering no real guidance as to what constitutes a “petition for review”

sufficient to trigger appellate jurisdiction. The TBA's concern is that the proposed revised rules could be read to impose no specific requirements at all, save for the title of the pleading having to be "Petition for Review." While the proposed revised Rule 9, Section 1.3 would read "filing a petition for review in accordance with Section 1.4," Section 1.4 currently only addresses where a filing must take place, Circuit or Chancery Court where the respondent's office was located when charges were filed by the BPR, and not what the filing must contain by way of content. The proposed revised Rule 7, Section 14.01 offers no cross-reference of any sort and appears to indicate only what a petition for review is not—it is not a common law writ of certiorari—as opposed to what it is.

Unless the Court's intention is for the only requirement for perfecting an appeal in these instances be captioning the filing as a "Petition for Review," the TBA respectfully suggests that the Court identify any such specific additional requirements in the language of the revised rules themselves. In light of the importance both of proceedings seeking review of decisions of the Board of Law Examiners and judicial proceedings seeking review of judgments of hearing panels in disciplinary matters, the TBA believes that including any such specific requirements contemplated by the Court in the language of the rules would assist parties in such proceedings and minimize the potential for future problems such as the one addressed in Cawood.

The TBA appreciates the opportunity to provide comment to this Court on these important issues and stands ready, should the Court desire any drafting assistance, to offer further assistance or a further proposal for how any specific requirements identified by the Court would be best incorporated into the proposed revisions under consideration.

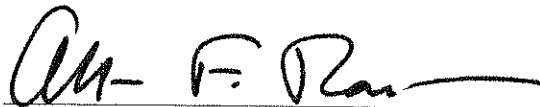
Respectfully Submitted,

By: /s/ by permission

Sam D. Elliott (9431), President  
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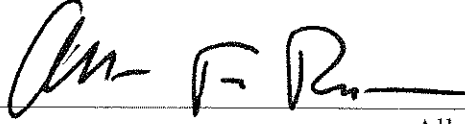
Allan F. Ramsaur (5764), Executive Director  
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Brian S. Faughnan (19379), Chair  
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Tennessee Bar Association  
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& Mitchell, PLLC  
2900 One Commerce Square  
40 South Main Street  
Memphis, TN 38103  
(901) 525-8721

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 on April 7, 2011.

A handwritten signature in black ink, appearing to read "Allan F. Ramsaur", written over a horizontal line.

Allan F. Ramsaur

LAW OFFICES OF  
**HERBERT S. MONCIER**

ATTORNEY AT LAW  
SUITE 775, BANK OF AMERICA  
550 MAIN AVENUE  
KNOXVILLE, TENNESSEE 37902

**RECEIVED BY FAX**  
**DATE: 4/8/11**

DAVID S. WIGLER  
ADAM S. MONCIER

OFFICE: (865) 546-7746  
FAX: (865) 546-7765  
moncier@moncierlaw.com

April 8, 2011

**Via Telefax 615-532-8757**

04/05/

Mike Catalano  
Appellate Court Clerk  
Supreme Court Building  
401 7th Avenue North  
Nashville, TN 37219-1407

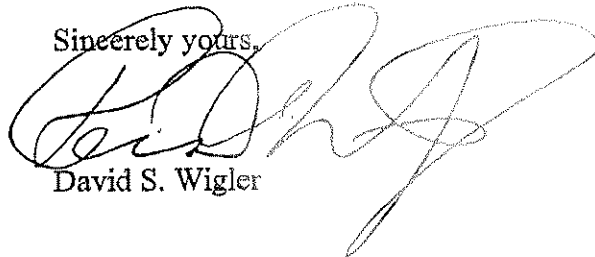
Re: M2011-00526-SC-RL2-RL and  
M2011-00527-SC-RL2-RL

Dear Mr. Catalano:

DAVID  
ADAM

Attached please find a written comment on behalf of Herbert S. Moncier concerning proposed amendments to Tenn. Sup. Ct. R. 9.

Sincerely yours,



David S. Wigler

DSW:rch

Enclosure

DAVID  
ADAM

RECEIVED BY FAX

DATE: 4/8/11IN THE SUPREME COURT OF TENNESSEE  
AT NASHVILLEIN RE: AMENDMENTS TO RULE 9,  
SECTIONS 1, 3, 8.3, 13.7, AND 16.1,  
RULES OF THE TENNESSEE SUPREME COURTNos. M2011-00526-SC-RL2-RL and  
M2011-00527-SC-RL2-RL

04/08/11

## COMMENT OF HERBERT S. MONCIER

Comes now Herbert S. Moncier, through the undersigned counsel, and submits this Comment in response to the Court's invitation extended to the bench, the bar, and the public to submit comments concerning proposed amendments to Tenn. Sup. Ct. Rule 9. The proposed amendments to Rule 9 are apparently intended to omit the requirements of *Board of Professional Responsibility v. Cawood*, 330 S.W.3d 608 (Tenn. 2010) that a petition for a writ of certiorari from the judgment of a hearing panel be "sworn to" and state that "it is the first application for the writ."

*DISCLOSURE OF PERSONAL INTEREST*

Before commenting on the proposed rule change, Mr. Moncier discloses his personal interest in this very issue, in that his appeal from the dismissal by the trial court pursuant to *Cawood* of his Petition for Certiorari is currently pending before this Court. *In re Herbert S. Moncier*, E2011-00616-SC-R3-BP. The Board has also filed a Protocol Memorandum and Mr. Moncier has responded with a motion for stay in *In re Herbert S. Moncier*, E2011-00595-SC-BPR-BP so that his appeal and other challenges to the proceedings below can be heard.

The *Cawood* issue has serious consequences for Mr. Moncier because before *Cawood* was decided by this Court, the trial court had reversed the most serious of the Hearing Panel's findings and remanded his case to the Hearing Panel to consider imposing appropriate, presumably less serious, discipline. The trial court's remand for consideration of new discipline was pending before the Hearing Panel when on December 20, 2010, this Court rendered its opinion in *Cawood*.

Mr. Moncier has an additional personal interest in being heard on this issue, because Chief Disciplinary Counsel Nancy S. Jones has threatened new disciplinary action and personally served him with a notice pursuant to T.R.Civ.P. Rule 11.03 that the Board takes the position his notice of appeal is frivolous because the issue was decided in *Cawood*. (March 29, 2011 letter attached). Ms. Jones writes,

While there may be errors you perceive in your hearing panel judgment, since your original Petition for Judicial Review was defective and now may not be corrected, the Court should enter an order of enforcement without further delay, pursuant to Section 8.4 of Rule 9.

If within twenty-one days of the date of this communication you do not dismiss with prejudice the notice of appeal, the Board will file the attached motion and seek appropriate monetary and other sanctions against you. Please further be advised that should the Board's request for sanctions be granted, such order of the Court might form the basis for further disciplinary action against you.

*Id.*

*COMMENT ON THE RULE*

The proposed rule is ambiguous because while it eliminates any reference to Tenn. Code Ann. § 27-9-101, it does not expressly address the requirements of Tenn. Code Ann. § 27-8-106 that were incorporated as jurisdictional requirements by implication in *Cawood*. This



ambiguity could be eliminated with the statement that a petition for review from the judgment of a hearing panel need no longer be "sworn to" or state that "it is the first application for the writ."

Alternatively, the second paragraph of Section 1.3 of the current text of the rule expressly overrules prior decisions of this Court holding that Tenn. Code Ann. § 16-4-108 required appeals from disciplinary proceedings be taken to the Court of Appeals. By the same logic the new rule should expressly overrule prior decisions of this Court (*Cawood* and *Nebel*) adopting the requirements of Tenn. Code Ann. § 27-8-106 that a petition for review from the judgment of a hearing panel be "sworn to" and state that "it is the first application for the writ."

Respectfully, a third alternative is to defer action on the proposed amendments to Rule 9 while directing the parties in *In re Herbert S. Moncier*, E2011-00616-SC-R3-BP to brief a constitutional issue which was neither raised nor decided in *Cawood* or *Nebel*, to wit:

Whether the General Assembly has the power under the Separation of Powers Doctrine to impose as subject matter jurisdictional requirements the provisions of Tenn. Code Ann. § 27-8-106 that a petition for review from the judgment of a hearing panel be "sworn to" and state that "it is the first application for the writ."

If the General Assembly has this power, this Court might not have the authority by a mere rule change to abrogate the subject matter jurisdictional requirements. On the other hand, this Court possesses the "inherent supervisory power to regulate the practice of law" in Tennessee. *Brown v. Bd. of Prof'l Responsibility*, 29 S.W.3d 445, 449 (Tenn. 2000). If the General Assembly does *not* have the power to impose subject matter jurisdictional requirements for disciplinary appeals, *Cawood* was incorrectly decided and must be overruled.

There is precedent for a reversal of *Cawood* based upon a constitutional challenge that was not presented therein. See *Doe v. Bd. of Prof'l Responsibility*, 104 S.W.3d 465, 469 (Tenn. 2003), remanding for a contempt hearing involving violations of the confidentiality

requirement of Rule 9, section 25 of the Rules of the Supreme Court by a non-lawyer; and *Doe v. Doe*, 127 S.W.3d 728, 729 (Tenn. 2004), holding that section 25 of Rule 9 violates the free speech protections of Article I, section 19 of the Tennessee Constitution and the First Amendment to the United States Constitution.

The important point here is that a reversal of *Cawood* on constitutional grounds would render the proposed rule change unnecessary.

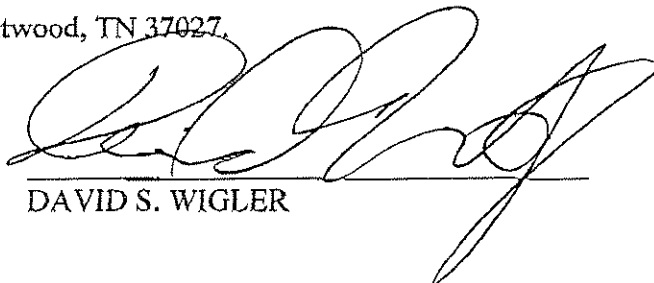
Respectfully submitted this 8<sup>th</sup> day of April, 2011.



David S. Wigler, BPR# 014525  
Attorney for Herbert S. Moncier  
Suite 775, Bank of America Center  
550 Main Street  
Knoxville, Tennessee 37902  
(865) 546-7746 - voice  
(865) 546-7765 - facsimile

**CERTIFICATE OF SERVICE**

I hereby certify that on the date written above, a true and correct copy of the foregoing has been served by U.S. Mail upon Nancy S. Jones, Board of Professional Responsibility, 10 Cadillac Drive, Suite 220, Brentwood, TN 37027.

  
DAVID S. WIGLER



# BOARD OF PROFESSIONAL RESPONSIBILITY of the SUPREME COURT OF TENNESSEE

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ELIZABETH C. MOORE  
PRESTON SHIPP  
RANDALL J. SPIVEY  
DISCIPLINARY COUNSEL

March 29, 2011

Herbert S. Moncier

04/08/ Bank of America Center  
550 Main Avenue, Suite 775  
Knoxville, TN, 37902



RE: Notice of Appeal, Sup. Ct. Docket No. E2001-00616-SC-R3-BP  
Motion for Stay of Enforcement of Discipline,  
Sup. Ct. Docket No. M2011-00595-SC-BPR-BP

NANCY S.  
CHIEF DISC.  
RACHEL L.  
DEPUTY CH.  
SANDY L.  
SENIOR LIT.  
JAMES A.  
ETHICS COU.  
BEVERLY P.  
CONSUMER

Dear Mr. Moncier:

This letter constitutes notice, as required by Tenn. R. Civ. P. 11.03, that the Board of Professional Responsibility takes the position that your Notice of Appeal, E2001-00616-SC-R3-BP, filed in the Supreme Court on March 10, 2011, is in violation of Rule 11.02 because it is not based on a nonfrivolous argument for the extension, modification, or reversal of existing law and was filed for the sole and improper purpose to cause unnecessary delay in the imposition of the discipline deemed appropriate by the Hearing Panel in Docket No. 2008-1766-2-SG, as stated in the Panel's 44-page Judgment filed January 13, 2010.



The legal positions of the Board in this regard are fully set forth in the attached Memorandum of Law in Support of Motion to Dismiss Appeal. You are in no different position than Tom Nebel, a lawyer who was disbarred by the hearing panel in his case and whose appeal was dismissed by the Court, pursuant to *Board of Professional Responsibility v. Cawood*, 330 S.W.3d 608 (Tenn. 2010), even though his appeal had been fully briefed and argued before the Court. While there may errors you perceive in your hearing panel judgment, since your original Petition for Judicial Review was defective and now may not be corrected, the Court should enter an order of enforcement without further delay, pursuant to Section 8.4 of Rule 9.

NANCY S.  
CHIEF DISC.  
RACHEL L.  
DEPUTY CH.  
SANDY L.  
SENIOR LIT.  
JAMES A.  
ETHICS COU.  
BEVERLY P.  
CONSUMER

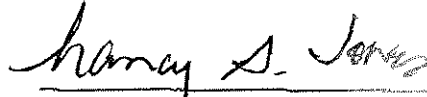
If within twenty-one days of the date of this communication you do not dismiss with prejudice the Notice of Appeal, the Board will file the attached motion and seek appropriate monetary and other sanctions against you. Please further be advised that should the Board's request for sanctions be granted, such order of the Court might form the basis for further disciplinary action against you. In that event, in any subsequent disciplinary proceeding, you will no longer be eligible for credit for the mitigating factor of having no prior discipline.



NANCY S.  
CHIEF DISC.  
RACHEL L.  
DEPUTY CH.  
SANDY L.  
SENIOR LIT.  
JAMES A.

Please direct all further communications regarding your matters to my attention. Upon the Court's issuance of the order of enforcement, please contact me to discuss the appropriate experienced criminal defense attorney in your area to be designated as your practice monitor, as directed by the panel.

Sincerely,



---

Nancy S. Jones, BPR #013863  
Chief Disciplinary Counsel  
Board of Professional Responsibility  
10 Cadillac Drive, Suite 220  
Brentwood, Tennessee 37027  
(615) 695-0927

cc: Sandy Garrett  
Enclosure