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October 30, 2012

Mr. Michael W. Catalano
Appellate Court Clerk
401 Seventh Avenue, North
100 Supreme Court Building
Nashville, Tennessee 37219

VIA FEDERAL EXPRESS
(615) 741-2681

Re: In re: The Adoption of Amended Tennessee Supreme Court Rule 9, Docket No. M2012-01648-SC-RL2-RL – Comments of the Tennessee Lawyer Assistance Program

Dear Mr. Catalano:

As Chairman of the Commission of the Tennessee Lawyer Assistance Program ("TLAP"), I am writing to provide you with the comments of the TLAP Commission on proposed new Tennessee Supreme Court Rule 9 ("New Rule 9"). After careful review and consideration of New Rule 9, the TLAP Commission recommends that certain revisions be made to Sections 12, 13, 14 and 36 of New Rule 9 to facilitate the work of TLAP in conjunction with the Tennessee Board of Professional Responsibility during the disciplinary process. The TLAP Commission's proposed revisions are set forth on the enclosed comparative draft of Sections 12, 13, 14 and 36 of New Rule 9.

If you have any questions regarding the enclosed comments of the TLAP Commission on New Rule 9, or if we need to further discuss this matter, please do not hesitate give me a call.

Yours truly,

James M. Cornelius, Jr.

JMC/jmc

Enclosure

587251v1

TLAP Proposed Rule Changes to Rule 9, October 30, 2012

Rule 9. Disciplinary Enforcement.

Section 12. Types of Discipline

12.3. (a) **Temporary Suspension**. On petition of Disciplinary Counsel and supported by an affidavit demonstrating facts personally known to affiant showing that an attorney has misappropriated funds to the attorney's own use, has failed to respond to the Board or Disciplinary Counsel concerning a complaint of misconduct has failed to substantially comply with a Tennessee Lawyer Assistance Program monitoring agreement requiring mandatory reporting to the BPR~~contract entered into with the Tennessee Lawyer Assistance Program~~ pursuant to Section 36.1, or otherwise poses a threat of substantial harm to the public, the Court may issue an order with such notice as the Court may prescribe imposing temporary conditions of probation on said attorney or temporarily suspending said attorney, or both.

Section 13. Diversion of Disciplinary Cases

13.1 Authority of Board. The Board is hereby authorized to establish practice and professionalism enhancement programs to which eligible disciplinary cases may be diverted as an alternative to disciplinary sanction. The Board is also

authorized to require a respondent attorney to enter into a Tennessee Lawyer Assistance Program monitoring agreement requiring mandatory reporting to the BPR as a condition of diversion under this section. Further, such monitoring agreement may in the board's discretion qualify as a practice and professionalism enhancement program or a part thereof.

Section 14. Probation

(a) Probation. In the discretion of the hearing panel or a reviewing court, the imposition of a suspension for a fixed period (Section 12.2) may be deferred in conjunction with a fixed period of probation. The conditions of probation shall be stated in writing in the judgment of the hearing panel or court. The conditions of probation may require the respondent attorney to enter into an agreement with the Tennessee Lawyer Assistance Program requiring mandatory reporting to the BPR. Probation shall be used only in cases where there is little likelihood that the respondent attorney will harm the public during the period of rehabilitation and where the conditions of probation can be adequately supervised. The hearing panel or reviewing court may require as a condition of probation the assignment of a practice monitor for the purposes and pursuant to the procedures set forth in Section 12.9. The respondent attorney shall pay the costs associated with probation, including but not limited to a reasonable fee to the practice monitor.

Section 36. Tennessee Lawyer Assistance Program

The Tennessee Lawyers Assistance Program (TLAP) was established by the Court to provide immediate and continuing help to attorneys, judges, bar applicants, and law students who suffer from physical or mental disabilities that result from disease, disorder, trauma, or age and that impair their ability to practice or serve.

36.1. Referrals to TLAP.

(a) Pursuant to Rule 33.07(A) of the Rules of the Tennessee Supreme Court, the Board, its hearing panels or Disciplinary Counsel may provide a written referral to TLAP of any attorney who the Board, hearing panel, or Disciplinary Counsel (collectively, "the BPR") determines:

(1) has failed to respond to a disciplinary complaint;

(2) has received three or more complaints within a period of twelve months;

(3) has received a complaint that includes multiple failures to appear or to respond or to take any other action in compliance with established rules or time guidelines;

(4) has pleaded impairment or disability as a defense to a complaint;

(5) has exhibited behavior or has engaged in behavior that, in the BPR's determination, warrants consultation and, if recommended by TLAP, further assessment, evaluation, treatment, assistance, or monitoring.;

(6) is seeking readmission or reinstatement where there is a question of either prior or present impairment or disability; or

(7) is requesting TLAP's involvement.

(b) The Executive Director of TLAP shall review any referral by the BPR. If the Executive Director of TLAP deems that assistance and monitoring of an attorney is appropriate, the Executive Director will make reasonable efforts to enter into a Monitoring~~/Advocacy~~ Agreement ("Agreement") with the attorney pursuant to Rule 33.05(E) of the Rules of the Tennessee Supreme Court. If the Executive Director of TLAP determines that TLAP assistance is not appropriate, for whatever reason, the Executive Director shall report that determination to the BPR, without further elaboration and without disclosure of information otherwise confidential under Rule 33.10.

(c) The BPR will provide written notification to the Executive Director of TLAP that TLAP's assistance will be or has been recommended in any matter pending before the BPR or when TLAP has an ongoing relationship with an attorney who has a matter pending before the BPR. The BPR will provide such notification prior to the date of any hearing and will further provide notice of any

hearing date. The Executive Director of TLAP or his or her representative may attend any such hearing.

(d) The BPR will provide written notification to the Executive Director of TLAP of any provision concerning the participation of TLAP included in any proposed order submitted by the BPR to the Court or any other agreement between the Respondent and the BPR and its disciplinary counsel, informal or otherwise, in which TLAP is required. The Executive Director of TLAP will notify the BPR of any requested modification of the order and may decline involvement. If the Executive Director of TLAP declines involvement of TLAP, the BPR shall not include TLAP's participation in any proposed order submitted to the Court. Neither the BPR nor any hearing panel of the BPR shall include TLAP in any proposed order submitted by the BPR to the Tennessee Supreme Court unless TLAP has given notice to BPR disciplinary counsel or the Respondent or Respondent's counsel that TLAP will accept involvement in the matter. In any proposed order submitted by the BPR to the Tennessee Supreme Court that includes TLAP involvement, the proposed order shall specifically state that TLAP has been consulted and that TLAP has accepted involvement in the matter, and the proposed order shall contain a certificate of service stating the date and manner in which the proposed order was served upon the Executive Director of TLAP.

(e) Pursuant to Rule 33.07–(B) of the Rules of the Tennessee Supreme Court, TLAP will provide the BPR with the following information:

(1) TLAP will notify the BPR of a referred attorney's failure to establish contact with TLAP or enter into a recommended Agreement.

(2) If the attorney enters into an Agreement with TLAP which requires mandatory reporting to the BPR, TLAP will provide a copy of the Agreement to the BPR. Such Agreement will provide for notification by TLAP to the BPR of substantial non-compliance with any of the terms or conditions of the Agreement. Contemporaneously with any such notification, the Executive Director of TLAP may make such recommendation to the BPR as TLAP deems appropriate.

(3) Upon request of the BPR, TLAP will provide the BPR with a status report of monitoring and compliance pursuant to the Agreement. When appropriate, the BPR will obtain from TLAP's Executive Director a recommendation concerning the attorney's compliance with any Agreement.

BOARD OF PROFESSIONAL RESPONSIBILITY
of the
SUPREME COURT OF TENNESSEE

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January 25, 2013

Honorable Michael W. Catalano
Chief Clerk, Supreme Court of Tennessee
401 Seventh Avenue North, Suite 100
Nashville, TN 37219-1407

Dear Mr. Catalano:

Enclosed please find the original and one copy of the Comments of the Board of Professional Responsibility to Proposed Amendments to Tenn. Sup. Ct. R. 9.

Respectfully,

Sandy Garrett

Sandy L. Garrett, Esq.
Chief Disciplinary Counsel

SLG:jt

Enclosures

cc w/encl: Honorable Cornelia A. Clark, Justice, Supreme Court of Tennessee
Allan Ramsaur, TBA Executive Director
Lela Hollabaugh, Chair, Board of Professional Responsibility

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE:	**THE ADOPTION OF AMENDED TENNESSEE SUPREME COURT RULE 9**	**) No. M2012-01648-SC-RL2-RL**

COMMENTS OF THE BOARD OF PROFESSIONAL RESPONSIBILITY TO PROPOSED AMENDMENTS TO TENN. SUP. CT. R. 9

Comes the Board of Professional Responsibility of the Supreme Court of Tennessee ("Board"), pursuant to the Order filed August 8, 2012, requesting comments regarding the proposed revisions of Amended Tenn. Sup. Ct. R. 9, and submits the following comments. The Board approves of proposed changes to Tenn. Sup. Ct. R. 9 not specifically addressed herein.

Rule 9. Disciplinary Enforcement.

Section 2. Definitions. Hearing panels: Panels of three district committee members selected by the Chair of the Board, or its designee, to hear matters pursuant to provisions of this Rule.

Comment: The Board proposes that "hearing panels" be selected by "the Chair of the Board or its designee," as opposed to the Board. Sec. 15.2(d) provides that the hearing panel is "assigned by the Chair" and "the Chair shall select them." The change proposed herein is also proposed in Sec. 6.4 and Sec. 15.2(d).

Protocol memorandum: A memorandum prepared by ~~the Board~~ Disciplinary Counsel and provided to the Court pursuant to the provisions of this Rule. . . .

Comment: The Board proposes that "Disciplinary Counsel" prepare the protocol memorandum, not "the Board." Disciplinary Counsel represents the Board during formal proceedings and is the one who prepares the memorandum.

Section 4.3. The Board shall act only with the concurrence of seven or more members. . . . ~~Decisions of the Board whether or not to appeal from the judgment of a hearing panel or of a trial judge, as provided in Section 33.1, shall be made in accord with the foregoing procedure~~. If an appeal has been authorized by the foregoing procedure, any member of the Board may demand that the question of whether or not the appeal should be dismissed be placed upon the agenda for consideration at any regular meeting of the Board or special meeting convened for other business.

Comment: The Board proposes that the indicated language be stricken. Inclusion of this language may cause confusion by incorrectly implying a limitation that "[d]ecisions of the Board whether or not to appeal from the judgment of a hearing panel" are the only decisions to be made in accord with the "foregoing procedure."

Section 4.5. The Board shall exercise the powers and perform the duties conferred and imposed upon it by this Rule, including the power and duty: . . . (b)To adopt written internal operating procedures . . . . The Board shall quarterly ~~file~~ send a report ~~with~~ to

the liaison Justice of the Court demonstrating substantial compliance with the operating procedures.

Comment: The Board proposes adding the indicated language to provide specificity about to whom the Board shall provide its quarterly reports.

~~(e) To assign members of the district committees appointed within each disciplinary district to conduct disciplinary hearings and to review and approve or modify recommendations by Disciplinary Counsel for dismissals or private informal admonitions.~~

Comment: The Board proposes that Sec. 4.5(c) be deleted in its entirety as a duty of the Board, because it conflicts with Sec. 15.2(d) which provides that the hearing panel is selected by the Chair of the Board.

(f) The Board may delegate to a committee or panel of its members or to the Chief Disciplinary Counsel any administrative duty conferred or imposed by this Rule.

Comment: The Board proposes adding "or to the Chief Disciplinary Counsel" consistent with a specific power and duty of Chief Disciplinary Counsel as provided in Sec. 7.2(b).

Section 4.6. Board members shall not take part in any matter in which ~~a judge, similarly situated, would have to recuse himself or herself in accordance with Tenn. Sup. Ct. R. 10.~~ their impartiality might be reasonably questioned, including but not limited to

the circumstances provided in Tenn. Sup. Ct. R. 10, Rule 2.11(A) and Tenn. Sup. Ct. R. 10B, Section 1.

Comment: The Board proposes removing the indicated language requiring a Board member to recuse himself or herself for the same reasons a judge would do so pursuant to Tenn. Sup. Ct. R. 10. As provided in Sec. 4.5, the Board often does not sit as a tribunal in carrying out its responsibilities. Board members frequently recuse themselves from consideration of matters. The rule as stated would create a burdensome recusal process that could impede the decision-making ability of the members of the Board. The proposed rule incorporates Tenn. Sup. Ct. R. 10 in its entirety, including an accelerated interlocutory appeal as of right. The proposed rule does not provide in what court an interlocutory appeal would be filed in disciplinary matters. Case law provides that there is no interlocutory appeal in disciplinary matters. In re Caldwell, 256 S.W.3d 656 (Tenn. 2008). The Board proposes inserting language that Board members shall not take part in any matter in which "their impartiality might be reasonably questioned, including but not limited to the circumstances provided in Tenn. Sup. Ct. R. 10, Rule 2.11(A) and Tenn. Sup. Ct. R. 10B, Sec. 1," eliminating the accelerated interlocutory appeal.

Section 5.4. In performing its responsibilities under Section 5.1, the Board shall exercise the powers and perform the ordinary and necessary duties usually carried out by ethics advisory bodies. The Board shall: . . . (a) By the concurrence of a majority of its members . . . issue and distribute Formal Ethics Opinions . . . except that an opinion may

not be issued in a matter that is known to the Board to be pending before a court or in a pending disciplinary proceeding.

Comment: The Board proposes the addition of the indicated language to clarify that the Board shall not issue ethics opinions if the matter is known by the Board to be the subject of a pending court or disciplinary proceeding.

(e) Adopt such rules as it considers appropriate relating to the procedures to be used in considering inquiries and expressing opinions, including procedures for ~~classifying~~ clarifying opinions or declining requests for opinions.

Comment: It is assumed that "classifying" should be "clarifying."

Section 6.4. Formal hearings upon charges of misconduct shall be conducted by a hearing panel consisting of three district committee members ~~designated~~ selected by the Chair of the Board or its designee pursuant to Section 15.2. . . .

Comment: The Board proposes that the language be changed to reflect that a hearing panel be "selected" by the "Chair of the Board or its designee." The definition of "hearing panel" in Sec. 2 provides that a panel be "selected." Proposed Sec. 15.2(d) provides that the hearing panel is "assigned by the Chair" of the Board and "the Chair shall select them." The proposed change is also proposed to the definition of "hearing panel" in Sec. 2 and in Sec. 15.2(d).

Section 6.5. District committee members, whether acting as the reviewing committee member or as a hearing panel member, shall not take part in any matter in which ~~a judge, similarly situated, would have to recuse himself or herself in accordance with Tenn. Sup. Ct. R. 10.~~ their impartiality might be reasonably questioned, including but not limited to the circumstances provided in Tenn. Sup. Ct. R. 10, Rule 2.11(A) and Tenn. Sup. Ct. R. 10B, Section 1.

Comment: The Board proposes removing the indicated language requiring a district committee member to recuse himself or herself for the same reasons a judge would do so pursuant to Tenn. Sup. Ct. R. 10. District committee members frequently recuse themselves. The rule as stated would create a burdensome recusal process that could impede the ability of district committee members to fulfill their duties under Sec. 6. The proposed rule incorporates Tenn. Sup. Ct. R. 10 in its entirety, including an accelerated interlocutory appeal as of right. The proposed rule does not provide in what court an interlocutory appeal would be filed in disciplinary matters. Case law provides that there is no interlocutory appeal in disciplinary matters. In re Caldwell, 256 S.W.3d 656 (Tenn. 2008). The Board proposes inserting language that district committee members shall not take part in any matter in which "their impartiality might be reasonably questioned, including but not limited to the circumstances provided in Tenn. Sup. Ct. R. 10, Rule 2.11(A) and Tenn. Sup. Ct. R. 10B, Sec. 1," eliminating the accelerated interlocutory appeal.

Section 8.1. Any attorney admitted to practice in this State, including any formerly admitted attorney with respect to acts committed prior to ~~resignation,~~ suspension, disbarment, or transfer to inactive status . . .

Comment: The Board proposes that "resignation" be deleted. There is no provision in the Rules for "resignation" of attorneys.

Section 9.3. If an attorney is practicing in this State under authority of Rules of Professional Conduct 5.5(c), or if an attorney is practicing in this State under authority of Rules of Professional Conduct 5.5(d) and does not maintain an office in this State:

(a) Hearing panel proceedings ~~shall~~ may occur in ~~the~~ any disciplinary district in which the conduct that forms the basis of the complaint against the attorney occurred.

Comment: Conduct which forms the basis of the complaint may have occurred in more than one jurisdiction. The Board proposes that the rule provide that the hearing panel proceeding may occur in any such district.

(c) Unappealed final trial court judgments disbarring or suspending the attorney for any period of time ~~in excess of three months, or for a period of time of three months or less with conditions~~, shall be forwarded to the Nashville office of the Clerk of the Supreme Court as specified in Section 15.4(d) of this Rule.

Comment: The Board proposes to simplify the Rule by striking the indicated language, which would remove the distinction between suspensions "in excess of three

months or for a period of time of three months or less with conditions" from other suspensions. The Board currently does not treat these two types of suspensions differently and files all such orders with the Court. Corresponding changes are proposed for Sections 15.4(b) and (d).

Section 10.1. Every attorney admitted to practice before the Court, except those exempt under Section 10.2, shall pay to the Board on or before the ~~last~~ first day of the attorney's birth month an annual fee for each year beginning January 1, 2012. . . . The annual registration fee for each attorney shall be $140, payable on or before the ~~last~~ first day of the attorney's birth month . . . .

Comment: The Board proposes changing "last" to "first" day of the birth month. The Board's software registration system was recently programmed at an estimated cost of $60,000 to identify attorneys based on the "first" day of their birth month, and the new registration process has been advertised and implemented as such for almost one year. A change to the last day of the month payment would require special software programming to implement the varying numerical last days of the month. The change would cost substantial time and money for the Board to reprogram its system and cause potential confusion within the Bar.

Section 10.3. To facilitate the collection of the annual fee provided for in Section 10.1, all persons required by this Rule to pay an annual fee shall, on or before the ~~last~~

first day of their birth month, file with the Board at its central office a registration statement. . . .

Comment: The Board proposes changing "last" to "first" day of the birth month, so that the registration statement is filed with the fee as proposed in Sec. 10.1.

Section 10.5. The Board periodically shall compile lists of attorneys who have failed to timely pay the annual registration fee. . . . The Notice shall be sent to the attorney. . . at the primary address shown in the attorney's most recent registration statement filed pursuant to Section 10.3 or at the attorney's last known address, and at the email address shown in the attorney's most recent registration statement filed pursuant to Section 10.3 or at the attorney's last known email address.

Comment: The Board proposes the addition of the indicated language to accurately reflect current practice and to be consistent with the requirement for personal service of a petition in a disciplinary proceeding set forth in Sec. 18.1.

Section 10.7. An attorney who claims an exemption under Section 10.2 (a), (b), (d), or (e) shall file with the Board an application to assume inactive status and discontinue the practice of law in this state. . . . An attorney who assumes inactive status under an exemption granted by Section 10.2(a), (d), or (e) shall pay to the Board, on or before the ~~last~~ first day of that attorney's birth month, an annual inactive-status fee set at one-half of the annual registration fee assessed under Section 10.1 for each year the attorney remains inactive. Inactive attorneys who fail to timely pay the annual inactive fee and

submit the registration form prescribed by the Board will be mailed a Delinquency Notice and be subject to delinquent compliance fees and suspension as provided in Section 10.5 and 10.6. . . .

Comment: The Board proposes changing the date on which an attorney must pay his registration fee from the "last" to the "first" as indicated for the same reasons set forth in the comment to Sec. 10.1. The Board further proposes the addition of the indicated language. The proposed rule provides the Board no remedy if an inactive attorney fails to pay the registration fee.

Sec. 10.6(a) requires the payment by an active attorney of a delinquent compliance fee of $100. Because the registration fee for inactive attorneys is one-half the registration fee of active attorneys, the Court may want to consider reducing the delinquency compliance fee for attorneys on inactive status.

Section 10.9. The courts of this State are charged with the responsibility of insuring that no suspended, disbarred or inactive attorney be permitted to file any document, paper or pleading or otherwise practice therein.

Comment: The Board proposes that "disbarred, or inactive" attorneys also be prohibited from the stated conduct to prevent the unauthorized practice of law.

Section 11.1. Acts or omissions by an attorney, individually or in concert with any other person or persons, which violate the Attorney's Oath of Office or the Rules of

Professional Conduct of the State of Tennessee, including acts prior to ~~resignation,~~ suspension, disbarment, or transfer to inactive status on other grounds, and acts subsequent to ~~resignation,~~ suspension, disbarment, or transfer to inactive status which acts amount to the practice of law, shall constitute misconduct and shall be grounds for discipline, whether or not the act or omission occurred in the course of an attorney-client relationship.

Comment: The Board proposes that "resignation" be deleted. There is no provision in the Rules for "resignation" of attorneys.

12.3 (a) On petition of Disciplinary Counsel and supported by an affidavit demonstrating facts personally known to affiant. . . the Court may issue an order effective on the day of its entry with such notice as the Court may prescribe imposing temporary conditions of probation on said attorney or temporarily suspending said attorney, or both.

Comment: The Board proposes the addition of the indicated language to make an order of temporary suspension effective on the day of the entry of the order. A temporary suspension is filed arising out of circumstances which dictate that it be effective immediately. Sec. 12.3(c) permits an attorney to continue to represent existing clients for thirty days after the effective date of the order.

(d) The attorney may for good cause request dissolution or amendment of any such order . . . a copy of which shall ~~will~~ be served on Disciplinary Counsel.

Comment: It is assumed that "will" is a typographical error.

Section 12.8. Upon order of a hearing panel or court, or upon stipulation of the parties in matters which are or are not in formal proceedings, conditions consistent with the purpose of this Rule and with the Rules of Professional Conduct, including but not limited to the requirement of a practice monitor pursuant to the procedures set forth in Section 12.9, may be placed upon the imposition of any form of public discipline. The duties and requirements of a practice monitor shall be stated in writing in the judgment of the hearing panel or court.

Comment: The Board proposes adding the indicated language in the first sentence to clarify that agreement by the parties in all matters which provide for any form of public discipline, including those which do not arise from formal charges, may include conditions. The Board proposes adding the last sentence to provide that the duties and responsibilities of a practice monitor be set forth in the judgment of the hearing panel or court, consistent with the same requirement regarding conditions of probation in Section 14(a). Rule 12.9 requires including the duties and responsibilities of a practice monitor in the Order of Enforcement, but does not specifically address the judgment of a hearing panel or court.

Section 12.9 (a) If a practice monitor is required as a condition of public discipline pursuant to Section 12.8, or as a condition or probation pursuant to Section 14, or as a

condition or reinstatement pursuant to Section 30, the Order of Enforcement~~,~~ or Order of Reinstatement~~,~~ shall specify the duties and responsibilities of the practice monitor.

Comment: The Board proposes removing the commas as indicated to clarify that the order requiring the practice monitor shall set forth the duties and responsibilities.

(b) The duties and responsibilities of a practice monitor may include . . . and any other matters involving the respondent or petitioning attorney's practice of law which the parties, by stipulation or agreement, or the hearing panel or reviewing court determines to be appropriate and consistent with the violation(s) for which the respondent or petitioning attorney was disciplined.

Comment: The Board proposes adding the indicated language to also permit the parties to stipulate to particular duties and responsibilities of a practice monitor.

(d) The respondent or petitioning attorney shall be responsible for and shall pay a reasonable fee to the practice monitor . . . . The practice monitor shall make application to the Board for an award of fees . . . . The practice monitor or the respondent or petitioning attorney may request a hearing before ~~a hearing panel~~ a panel of three members, at least two of whom shall be members of the Board and one of whom may be a district committee member from the same disciplinary district as the respondent, designated by the Chair of the Board, or, in the Chair's absence, the Vice-Chair , in which event, the ~~hearing~~ panel shall promptly schedule the same. The ~~hearing~~ panel shall within fifteen days from the conclusion of such hearing. . . . The Board shall within

fifteen days from the date on which the respondent or petitioning attorney's response is due . . . enter a judgment with respect to the practice monitor's application for the award of fees. Nothing herein shall prohibit the practice monitor from providing these services pro bono.

Comment: The Board proposes that a hearing on a practice monitor's request for fees be heard by a panel of three members, at least two of which are Board members and one may be a district committee member, consistent with panels provided in Sec. 12.3(d) to hear a petition for dissolution of a temporary suspension.

The Board further proposes adding a final sentence to this section to allow that a practice monitor may provide services pro bono. There are instances in which probation and a practice monitor are appropriate but the respondent is not able to pay the fee of a practice monitor. Requiring the respondent to do so would render probation an unavailable alternative.

Section 14 (b) In the event the respondent attorney violates or otherwise fails to meet any condition of probation, Disciplinary Counsel is authorized to file a petition to revoke probation. Upon the filing of such a petition, the respondent attorney shall have the opportunity to appear and be heard before ~~a duly constituted panel of the Board~~ a panel of three members, at least two of whom shall be members of the Board and one of whom may be a district committee member from the same disciplinary district as the respondent, designated by the Chair of the Board, or, in the Chair's absence, the Vice-

Chair. . . . The only issue in such a proceeding is whether probation is to be revoked; the original judgment imposing the fixed period of probation may not be reconsidered. As an alternative to revocation, the panel may impose additional conditions on probation, including requiring a practice monitor. Having conducted such a hearing, the panel shall file an order within thirty days; this order must include the basis for the panel's decision . . . .

Comment: The Board proposes that a hearing on a violation of probation be heard by a panel of three members, at least two of which are Board members and one may be a district committee member, consistent with panels provided in Sec. 12.3(d) to hear a petition for dissolution of a temporary suspension.

The Board proposes that language be added as indicated to permit a hearing panel to impose conditions on probation as an alternative to revocation. For example, in some cases a hearing panel has denied a petition to revoke probation on the condition of the implementation of a practice monitor.

Section 15.1(d) If the recommended disposition is private reprimand, public censure, or prosecution of formal charges before a hearing panel, the Board shall review the recommendation and approve or modify it. . . . The Board may determine whether a matter should be concluded by dismissal or private informal admonition; may recommend a private reprimand or public censure; or, may direct that a formal

proceeding be instituted ~~before a hearing panel in the appropriate disciplinary district and assign it to a hearing panel for that purpose~~.

Comment: The Board proposes that the indicated language be removed. The procedures for institution of a formal proceeding are set forth in Sec. 15.2 and the indicated language is unnecessary.

(f) If Disciplinary Counsel recommends disposition by dismissal, and if that recommended disposition is approved by the reviewing member of the district committee . . . . A complainant who is not satisfied with the disposition of the matter may appeal in writing to the Board within thirty days. . . . The Board, or a committee of its members, may approve, modify, or disapprove the disposition, or direct that the matter be investigated further.

Comment: The Board proposes that it be permitted to delegate the review of an approved recommendation by disciplinary counsel to a committee of its members.

Section 15.2 (b) A copy of the Petition shall be served upon the respondent attorney pursuant to Section 18.1 The respondent attorney shall serve an answer upon Disciplinary Counsel pursuant to Section 18.2 and file the original with the Board within thirty days after the service of the Petition, unless such time is extended by the agreement of Disciplinary Counsel or by leave of the ~~hearing panel assigned to hear the matter~~ Chair of the Board. In the event the respondent attorney fails to answer, the charges shall be deemed admitted. Relief from a Judgment of Default for failure to serve an answer to the

Petition within thirty days shall be determined by the hearing panel in the same manner such motions are determined by Tennessee Rules of Civil Procedure 55.02.

Comment: The Board proposes that the Chair of the Board grant extensions of time in this instance because a hearing panel would not yet have been selected pursuant to Sec. 15.2(d).

The Board further proposes adding "by the hearing panel" in the last sentence to clarify who shall determine relief from Judgment of Default.

(c) A copy of any Amended Petition or Supplemental Petition shall be served on the respondent attorney pursuant to Section 18.2. The respondent attorney shall serve an answer on Disciplinary Counsel pursuant to Section 18.2 and file the original with the Board within ~~fifteen~~ thirty days after service of the Amended Petition or Supplemental Petition, unless such time is extended by the agreement of Disciplinary Counsel or by leave of the hearing panel assigned to hear the matter.

Comment: The Board proposes that "fifteen" be changed to "thirty" to simplify the process and avoid routine requests for extensions of time to answer amended petitions.

(d) Following the service of the answer to the Petition, or upon failure to answer, the matter shall be assigned by the Chair to a hearing panel. ~~In assigning the members of the hearing panel, t~~The Chair, or its designee, shall select ~~them on a random basis~~ the hearing panel from the members of the district committee in the district in which the respondent

practices law;. The hearing panel shall be selected pursuant to written procedures approved by the Board in a manner to uphold and promote the independence, integrity and impartiality of the panel. ~~i~~If there is an insufficient number of committee members in that district who are able to serve on the hearing panel, the Chair, or its designee, may appoint one or more members from the district committee of an adjoining district to serve on the panel. A district committee member may advise the Executive Secretary of the Board if he or she is unable to serve on a hearing panel for any reason.

Comment: The Board proposes that hearing panels be selected pursuant to written procedures approved by the Board to ensure impartiality, instead of "on a random basis." There are a number of circumstances which could be considered in the selection of a hearing panel, including whether the district committee member is available and/or willing to serve, whether the district committee member is already serving on one or more other panels, whether more than one member of the same firm is selected for the same panel, or whether a disciplinary complaint is pending against a district committee member. Although the Board believes without merit, it could be argued that taking any of these matters into consideration could defeat the "random" nature of selection of the panel.

The Board further proposes the indicated language be added to specifically permit district committee members to decline selection to a hearing panel.

(e) A pre-hearing conference shall be held within sixty days of the filing date of any Petition commencing a formal proceeding, or within thirty days of the filing of the answer if an extension has been granted.

Comment: The Board proposes the indicated language to provide for the option of the conference being held within thirty days of the answer.

(g) In hearings on formal charges of misconduct, ~~Disciplinary Counsel~~ the Board must prove the case by a preponderance of the evidence.

Comment: The Board proposes changing "Disciplinary Counsel" to "the Board" to correctly reflect the parties to the formal proceedings.

Section 15.4 (b) If the judgment of the hearing panel is that the respondent attorney shall be disbarred or suspended for any period of time ~~in excess of three months, or for a period of time of three months or less with conditions for reinstatement~~, and no appeal is perfected within the time allowed , or if there is a settlement providing for a disbarment or suspension for any period of time ~~in excess of three months, or for a period of time of three months or less with conditions for reinstatement~~, at any stage of disciplinary proceedings, the Board shall file with the Court copies of the Petition, the judgment or settlement, the proposed Order of Enforcement, and a Protocol Memorandum as defined in Section 2. . . .

Comment: The Board proposes to simplify the Rule by striking the indicated language, which would remove the distinction between suspensions "in excess of three months or for a period of time of three months or less with conditions" from other suspensions. The Board currently does not treat these two types of suspensions differently and files all such orders with the Court. Corresponding changes are suggested for Sec. 9.3(c) and 15.4(d).

(d) If the judgment of a hearing panel is appealed to the circuit or chancery court pursuant to Section 33 and the trial court enters a judgment disbarring or suspending the respondent attorney for any period of time ~~in excess of three months, or for a period of time of three months or less with conditions for reinstatement~~, and no appeal is perfected within the time allowed, the trial court shall forward for filing a copy of its judgment to the Nashville office of the Clerk of the Supreme Court, and the Court shall enter an Order of Enforcement of said decree.

Comment: The Board proposes to simplify the Rule by striking the indicated language, which would remove the distinction between suspensions "in excess of three months or for a period of time of three months or less with conditions" from other suspensions. The Board currently does not treat these two types of suspensions differently and files all such orders with the Court. Corresponding changes are suggested for Sec. 9.3(c) and 15.4(b).

~~(e) All other final decrees of hearing panels or trial courts shall be forwarded for filing to the Nashville office of the Clerk of the Supreme Court for entry by the Court of an Order of Enforcement.~~

Comment: The Board proposes that Sec. 15.4(e) be stricken as unnecessary due to proposed changes to 15.4(b) and (d) removing the distinction of suspensions "in excess of three months or for a period of time of three months or less with conditions."

Section 16.1 (a) Complaints against Disciplinary Counsel or a district committee member alleging violations of the Attorney's Oath of Office or the Rules of Professional Conduct shall be submitted directly to the Board. The Chair of the Board shall review such complaints to determine whether an investigation shall be opened.

(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 the Board appointed by the Chair and Vice Chair. . . .

(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 the Board appointed by the Chair and 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 to Special Disciplinary Counsel.

Comment: The Board proposes the addition of language in Sec. 16.1(a) to allow the Board Chair to determine whether an investigation should be conducted. This allows for the possibility of an administrative dismissal of a complaint which is frivolous and clearly unfounded on its face or falling outside the jurisdiction of the Board as provided in Sec. 7.3(b).

The Board objects to the investigation of complaints against Disciplinary Counsel and district committee members being conducted in the same manner. The Board proposes adding, as indicated, an additional subsection, Sec. 16.1(d), addressing investigation of district committee members separately from investigation of complaints against Disciplinary Counsel. Investigation of complaints against district committee members should not be required to be conducted by members of the Board, but should be conducted by Disciplinary Counsel pursuant to the procedures set forth in Section 15. There are more than 150 district committee members. It could be burdensome to the Board to investigate complaints against district committee members. Disciplinary counsel now conducts investigations of district committee members and should continue to do so. Review and approval by a committee of the Board of the findings of the Disciplinary Counsel's investigation of a district committee member would suffice to ensure the propriety of the investigation.

Section 17. Members of the Board, district committee members, Disciplinary Counsel and staff shall be immune from civil suit for any conduct in the course of their official duties. Complainants and witnesses shall be immune from civil suit with respect to any communications to the Board . . . ~~unless the information which the complainant or witness provides in such communication or such testimony is false and the complainant or witness had actual knowledge of the falsity~~.

Comment: The Board proposes striking the language as indicated. The proposed language would permit complainants to be sued civilly by a respondent simply by alleging that the information provided by the complainant was false. This provision will have a chilling effect on the submission of complaints which are most often submitted by non-lawyer clients.

Section 18.1. The Petition in any disciplinary proceeding shall be served on the respondent attorney by personal service by any person authorized ~~by the Chair of the Board~~ to do so pursuant to the Tennessee Rules of Civil Procedure, or by any form of United States mail providing delivery confirmation . . . .

Comment: The Board proposes simplifying the Section by allowing any person authorized to serve process under the Tennessee Rules of Civil Procedure to do so. The Board does not see the necessity of approval of the Chair of the Board for service of the Petition.

Section 19.4. Any attack on the validity, scope, or protective order regarding ~~of~~ a subpoena so issued shall be filed, heard and determined by the court in which enforcement of the subpoena is being sought.

Comment: The Board proposes the addition of the indicated language to specifically state that the court shall handled attacks on subpoenas issued by it, and not the hearing panel.

Section 22.1. Upon being advised that an attorney subject to the disciplinary jurisdiction of the Court has been convicted of a crime, Disciplinary Counsel shall obtain ~~an affidavit with~~ a certified copy of the judgment, guilty plea or other adequate proof of the conviction and forward it to the Nashville office of the Clerk of the Supreme Court.

Comment: The Board proposes the removal of the requirement that Disciplinary Counsel obtain "an affidavit with a certified copy of the Judgment, guilty plea or other adequate proof of conviction." From whom would the affidavit be required? The requirement of an affidavit is unnecessary and burdensome if a certified copy of the judgment or guilty plea or other adequate proof of conviction is provided. Language such as "upon filing with the court of a certified copy of the judgment or guilty plea or affidavit containing other adequate proof demonstrating . . ." would be appropriate.

In addition to Sec. 22.1, the Board recommends the removal of the "affidavit" requirement in each of the following sections: Sec. 22.2(a), 22.3, 22.4, and 22.5 for the same reasons.

Section 26.2. Upon receipt of the list of attorneys transmitted by the Department of Revenue, the Chief Disciplinary Counsel shall send each attorney . . . a Privilege Tax Delinquency Notice . . . stating that the Department of Revenue has informed the ~~Board~~ Chief Disciplinary Counsel that the attorney has failed . . . to pay. . . . The Notice shall be sent to the attorney . . . at the primary address shown in the attorney's most recent registration statement filed pursuant to Section 10.3.

Comment: The Board proposes changing "the Board" to "the Chief Disciplinary Counsel" as indicated to clarify who the Department of Revenue contacts.

The Board further proposes the addition of "primary" to accurately reflect current practice in mailing a Privilege Tax Delinquency Notice and to be consistent with the requirement for personal service of a petition in a disciplinary proceeding set forth in Sec. 18.1.

Section 26.3 (b) Within thirty days of the expiration of the time for an attorney to respond to the Notice . . . . The proposed Suspension Order shall list all attorneys who . . . failed to demonstrate to the satisfaction of the ~~Board~~ Chief Disciplinary Counsel that they had paid . . . or, failed to demonstrate to the satisfaction of the ~~Board~~ Chief Disciplinary Counsel that the Notice had been sent in error.

Comment: The Board proposes changing "the Board" to "the Chief Disciplinary Counsel" as indicated to clarify the current procedure. The Board does not see the necessity of the involvement of the Board in activities described in this subsection.

(d) An attorney suspended by the Court pursuant to Subsection (c) who wishes to be reinstated ~~may~~ shall file with the Board an application for reinstatement of the attorney's license to practice law demonstrating that the attorney has paid all delinquent privilege taxes and any interest and penalties . . . or, alternatively, demonstrating that the Suspension Order was entered in error as to the attorney. If the application is satisfactory to ~~the Board~~ the Chief Disciplinary Counsel and if the attorney otherwise is eligible for reinstatement, ~~the Board, or~~ the Chief Disciplinary Counsel ~~acting on its behalf,~~ shall promptly prepare and send to the Court a proposed Reinstatement Order. The proposed Reinstatement Order shall provide . . . as of the date of entry of the Suspension Order if that Order was entered in error.

(e) If the application for reinstatement is denied by the Chief Disciplinary Counsel, the attorney seeking reinstatement shall appeal to the Board, or a committee of its members, within 15 days of notice of the denial. The Board, or a committee of its members, shall review the documentation provided by the attorney and approve or reverse the determination of the Chief Disciplinary Counsel.

Comment: The Board proposes that the Section be changed as indicated to allow the Chief Disciplinary Counsel to conduct the first determination of whether an attorney suspended under this Section should be reinstated. The Board proposes adding a new subsection, Sec. 26.3(e), providing an appeal of the denial of reinstatement by the Chief Disciplinary Counsel to the Board or a committee of its members.

Additional language is proposed in the first sentence of subsection (d) so that the Section cannot be misinterpreted to mean that an attorney who wishes to be reinstated can choose not to file an application for reinstatement.

Section 27.3. ~~If t~~The Board may petitions the Court to determine whether an attorney is incapacitated from continuing the practice of law by reason of mental infirmity or illness or because of addiction to drugs or intoxicants, and~~, or if~~ an attorney, with no disciplinary proceeding or complaint pending, may petitions to be transferred to disability inactive status~~.~~. If such petition is filed, the Court may take or direct such action as it deems necessary or proper to determine whether the attorney is so incapacitated. . . .

Comment: The Board proposes that the Section be changed as indicated to state affirmatively that a petition for disability may be filed by the Board or by an attorney.

Section 27.4 (a) If, during the course of a disciplinary investigation or proceeding, the respondent attorney contends that the he/she is suffering from a disability by reason of mental or physical infirmity or illness . . . such contention shall place at issue the respondent attorney's capacity to continue to practice law. Disciplinary counsel, the respondent attorney or the attorney for the respondent attorney shall notify the Court of such contention within ten days of learning of the contention, if the Court has not been otherwise notified. The Court thereupon shall enter an order immediately transferring the respondent attorney to disability inactive status . . . .

Comment: The Board proposes adding the indicated language to ensure that the Court is timely notified of a contention of disability by a respondent attorney during a disciplinary investigation or formal proceeding.

Section 27.7 (a) No attorney transferred to disability inactive status . . . may resume active status until reinstated by order of the Court. Any attorney transferred to disability inactive status . . . shall be entitled to petition for reinstatement. . . . The petitioner shall serve a copy of the petition upon Disciplinary Counsel, who shall investigate the matter and file an answer to the petition within sixty days. The answer shall include a recommendation as to whether the petition should be granted without a hearing or referred to a hearing panel for a hearing.

Comment: The Board proposes adding the indicated language to provide a definite time within which an answer will be filed.

Section 28.1. Orders imposing disbarment, suspension, or transfers to disability inactive status~~, or temporary suspension~~ are effective on a date ten days after the date of the order, except where the Court finds that immediate disbarment, or suspension~~, or temporary suspension~~ is necessary to the public.

Comment: The Board proposes the deletion of temporary suspensions from this Section. A petition for temporary suspension filed pursuant to Sec. 12.3 arises out of circumstances which dictate that the suspension be effective immediately. The Board has proposed a change to Sec. 12.3(a) to provide that the effective date of an order of

temporary suspension be the date of entry of the order. Sec. 12.3(c) permits an attorney to continue to represent existing clients for thirty days after the effective date of the order.

Section 28.2. By no later than the effective date of the order, the respondent attorney shall notify . . . of the order of the Court and that the attorney is therefore disqualified to act as attorney after the effective date of the order except as permitted by Section 12.3(c).

. . .

Comment: The Board proposes the indicated language to account for instances encompassed in Section 12.3(c), which permits a temporarily suspended attorney to continue to represent existing clients during the first thirty days after the effective date of the order of suspension.

Section 28.7. ~~In the event another attorney does not become attorney of record on behalf of the client before the effective date of the order, t~~The respondent attorney shall within ten days after the effective date of the order move ~~in~~ the court, agency or tribunal in which the proceeding is pending for leave to withdraw or file a motion or agreed order to substitute counsel. The respondent attorney shall ~~in that event~~ file with the court, agency, or tribunal before which the proceeding is pending a copy of the motion or notice to opposing counsel or adverse parties, including the place of residence and all mailing addresses of the client of the respondent attorney.

Comment: The Board proposes that "in the event that another attorney does not become attorney of record on behalf of the client . . ." be struck from the proposed rule.

The language can be misinterpreted to mean that if another attorney does become attorney of record for the client before the effective date of the order, the suspended attorney does not have to move to withdraw. The suspended attorney should be required to withdraw. The Board proposes the indicated language to provide that as an alternative to moving the court for leave to withdraw, a respondent attorney may file a motion or agreed order to substitute counsel.

It is assumed that "in" in the first sentence is a typographical error.

Section 28.8. Prior to the effective date of the order, if not immediately, the respondent attorney shall not undertake any new legal matters. By no later than the effective date of the order the respondent attorney shall cease to maintain a presence or occupy an office where the practice of law is conducted, except as provided in Section 12.3(c) . . . .

Comment: The Board proposes the addition of the indicated language to account for Sec. 12.3(c), which permits a temporarily suspended attorney to continue to represent existing clients during the first thirty days after the effective date of the order of suspension.

Section 29.1. If an attorney has been transferred to disability inactive status, placed on temporary suspension, suspended, or disbarred . . . or if an attorney has disappeared, abandoned a law practice, or died, or is alleged to be disabled or incapacitated from continuing the practice of law . . . . The Presiding Judge thereafter . . . shall appoint an

attorney or attorneys ("Receiver Attorneys") to take custody of the files of the lawyer and inventory the same, advise the clients of the death, ~~and/or~~ disability, transfer to inactive status, suspension, disbarment, disappearance, or abandonment of the attorney . . . .

Comment: The Board proposes that the indicated language be added to instruct a Receiver Attorney to advise clients of the status of the attorney. The current language provides notice only in the event of "death and/or disability of the attorney."

Section 29.3. Any Receiver Attorney so appointed shall not be permitted to disclose any information contained in any files inventoried without the consent of the client to whom the file relates or orders of the Presiding Judge, except as necessary to carry out the orders of the court which appointed the Receiver Attorney to make the inventory. The inventory should include ~~both~~ open and/or closed files in the discretion of the Presiding Judge.

Comment: The Board proposes that the last sentence be changed as indicated to make inventory of closed files discretionary with the Presiding Judge.

Section 30.3. Petitions for reinstatement by a disbarred or suspended attorney shall be filed under this Section, regardless of when or under what procedure the suspension or disbarment occurred. ~~The qualifications and requirements for reinstatement existing when the suspension was entered shall apply to any subsequent reinstatement proceeding~~. No application for reinstatement shall be filed more than ninety days prior to the time the disbarred or suspended attorney shall first be eligible . . . .

Comment: The Board proposes that the second sentence be stricken because it is confusing and is subject to misinterpretation. The language could be argued to mean that a condition of reinstatement should be limited to prior standards. The language could be used, for instance, to argue that an attorney applying for reinstatement need only take the bar exam in use at the time when the suspension was entered, which is not the intent of the Rule.

Section 31.3 (a) In the event that a judgment of disbarment, suspension, public censure, private reprimand, temporary suspension, disability inactive status, reinstatement, or denial of reinstatement results from formal proceedings, Disciplinary Counsel shall . . . make application to the hearing panel for the assessment against the respondent or petitioning attorney of ~~the~~ any necessary and reasonable costs of the proceedings, including costs for any or all complaints of misconduct whether or not discipline was imposed, including court reporter's expenses. . . and shall serve a copy of such application on respondent or petitioning attorney and the petitioning attorney's counsel of record pursuant to Section 18.2. . . The respondent or petitioning attorney may within fifteen days after Disciplinary Counsel's application submit to the hearing panel and serve on Disciplinary Counsel pursuant to Section 18.2 any response in opposition to the application for an assessment of costs. . . . ~~Disciplinary Counsel or the respondent or petitioning attorney may request a hearing before the hearing panel, in which event, the hearing panel shall promptly schedule the same.~~ The hearing panel shall ~~within fifteen days from the conclusion of such hearing, or in the event no hearing is requested,~~ within

fifteen days from the date on which the respondent or petitioning attorney's response is due or is submitted, whichever is earlier, submit its findings and judgment with respect to Disciplinary Counsel's application for the assessment of costs.

Comment: The Board proposes the addition of the indicated language in the first sentence to permit Disciplinary Counsel to petition for its costs related to any or all complaints of misconduct whether or not discipline is imposed.

The Board opposes the process set forth in the proposed rule for the award of necessary and reasonable costs of the disciplinary proceeding. The proposed rule provides for the availability of a separate hearing to determine the reasonable costs, a process which itself increases the time and expense devoted to the hearing process by disciplinary counsel, respondent, hearing committee members and the court reporter. Since January 1, 2011, the Court has entered 99 Orders of Enforcement assessing costs, many of which arose out of agreed resolutions which did not require a hearing. The proposed rule provides the opportunity for a hearing in potentially all cases, including those which did not initially require a hearing, incurring additional time and travel for disciplinary counsel, respondents, hearing committee members, and court reporter, resulting in additional fees and expenses. The Board proposes deleting the provision requiring the hearing and instead proposes that the hearing panel issue its findings and judgment based on disciplinary counsel's application and any response filed by the respondent or petitioning attorney. Current Sec. 24.3 provides a sufficient procedure for review of reimbursement of costs.

As stated, Sec. 31.3(a) appears to provide for the possibility of two judgments, one arising out of the disciplinary hearing and the other arising from the assessment of costs. Clarification should be provided regarding whether separate judgments are intended and, if so, whether a judgment can be entered imposing disciplinary sanctions while the application for costs and expenses is pending.

(d) The hourly charges of Disciplinary Counsel on formal proceedings shall be assessed ~~at the rates set forth in Tenn. Sup. Ct. R. 13, Section2(c)(1) for compensation of counsel appointed for indigent criminal defendants in non- capital cases~~ at reasonable rates to be determined by the Court.

Comment: The Board proposes that the language "at the rates set forth in Tenn. Sup. Ct. R. 13, Section2(c)(1) for compensation of counsel appointed for indigent criminal defendants in non- capital cases" be stricken and replaced with "at reasonable rates to be determined by the Court." Respondent attorneys are not indigent and there are no other similarities between Disciplinary Counsel and private attorneys appointed to represent indigent defendants described in Tenn. Sup. Ct. R. 13. Reduction in the cost awarded against such attorneys could result in an increase in fees required to be paid to the Board by all attorneys. Costs are not awarded against respondents if charges are determined to be without merit. Respondents who have been found to have violated the Rules of Professional Conduct and against whom sanctions are imposed should bear the primary burden of pursuit of such charges.

Section 32.3. All work product and work files (including internal memoranda, correspondence, notes and similar documents and files) of the Board, district committee members, and Disciplinary Counsel shall be confidential and privileged, ~~and~~ shall not be public records, and are not subject to the provisions of Sec. 32.1.

Comment: It has been argued by respondent attorneys that the documents identified in this section become public if one of the provisions in Sec. 32.1 has been met. The confidentiality and privilege granted to "work product and work files" of the Board, district committee members, and Disciplinary Counsel by Sec. 32.3 should stand separate and apart from the confidentiality provisions of Sec. 32.1.

Section 32.5. All participants in any matter, investigation, or proceeding shall conduct themselves so as to maintain confidentiality. . . . The Board, district committee members, Disciplinary Counsel, their assistants, staff and employees shall maintain confidentiality with respect to all pending matters, investigations and proceedings arising under this Rule, except that in the event of any of the circumstances set forth in Section 32.1(a)-(e), Disciplinary Counsel, their assistants, staff and employees, may disclose the pendency, general subject matter, and status of the matter.

Comment: The Board proposes the addition of the indicated language to include assistants, staff and employees of Disciplinary Counsel consistent with the prior language of the rule.

Section 32.7. The provisions of this Rule shall not be construed to deny access to relevant information to authorized agencies . . . . In addition, the ~~Board~~ Chief Disciplinary Counsel shall transmit notice of all public discipline . . . to the National Discipline Data Bank maintained by the American Bar Association.

Comment: The Board proposes the addition of the indicated language to clarify who actually transmits such notice.

Section 33.2. The Chief Justice shall designate a trial judge or chancellor, regular or retired, ~~who shall not reside within the geographic boundaries of the chancery division or circuit court wherein the office of the respondent or petitioning attorney was located at the time the charges were filed with the Board~~. to review the case in the manner set forth in Section 33.1 and to enter judgment upon the minutes of the circuit or chancery court of the county where the case is heard . . . .

Comment: The Board proposes that the indicated language be stricken. The limited number of available judges should not be further restricted by geographic boundaries. The Board feels this restriction is unnecessary and creates a burden to locate an available judge.

Section 35.2 (a) Whenever Disciplinary Counsel has probable cause to believe the bank accounts of an attorney . . . Disciplinary Counsel shall ~~request the approval of the Chair or Vice-Chair of the Board to~~ initiate an investigation for the purpose of verifying the accuracy and integrity of all bank accounts maintained by the attorney. ~~If the Chair~~

~~of Vice-Chair approves, Disciplinary Counsel shall proceed to verify the accuracy of the bank accounts~~.

Comment: The Board proposes that the indicated language be stricken because it is unnecessary for the Board to be involved in the initiation of such an investigation.

Section 36.1 (b) The Executive Director of TLAP shall review any referral by the BPR. . . . If the Executive Director of TLAP determines that TLAP assistance is not appropriate . . . the Executive Director shall report that determination in writing to the BPR. . . .

Comment: The Board proposes that the Executive Director of TLAP report his or her determination in writing, if it is determined that TLAP assistance is not appropriate.

(c) The BPR will provide written notification to the Executive Director of TLAP that TLAP's assistance will be or has been recommended in any matter pending before the BPR or when the BPR knows TLAP has an on going relationship with an attorney.

Comment: The Board proposes that the indicated language be added for clarification.

(d) The BPR will provide written notification to the Executive Director . . . . If the Executive Director of TLAP declines involvement of TLAP, the BPR shall not include TLAP's participation in any proposed order submitted to the Court. Both the BPR and

TLAP will timely provide this information to the other to prevent unnecessary delay of the disciplinary process.

Comment: The Board proposes that the indicated language be added for clarification.

Respectfully submitted,

Lela Hollabaugh By SG w/ permission
LELA M. HOLLABAUGH (#014894)
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CERTIFICATE OF SERVICE

I certify that the foregoing has been mailed to Allan F. Ramsaur, Esq., Executive Director, Tennessee Bar Association, 221 4th Ave. N., Ste. 400, Nashville, Tennessee, 37219, by U.S. mail, on this the 25th day of January, 2013.

Lela Hollabaugh By SG w/permission

LELA HOLLABAUGH (#014894)
Chair

Sandy Garrett

SANDY L. GARRETT (#013863)
Chief Disciplinary Counsel

TENNESSEE BAR ASSOCIATION

February 8, 2013

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

IN RE: THE ADOPTION OF AMENDED TENNESSEE SUPREME COURT RULE 9

Dear Mike:

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

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

Very truly yours,

Allan F. Ramsaur
Executive Director

cc: Jackie Dixon, TBA President
Brian Faughnan, Chair, TBA Standing Committee on Ethics & Professional Responsibility
Paul Ney, TBA General Counsel
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IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

FILED
2013 FEB -8 AM 9:47
SUPREME COURT CLERK
NASHVILLE

IN RE: THE ADOPTION OF AMENDED TENNESSEE SUPREME COURT RULE 9

No. M2012-01648-SC-RL2-RL

COMMENT OF THE TENNESSEE BAR ASSOCIATION

The Tennessee Bar Association ("TBA"), by and through its President, Jacqueline B. Dixon; Chair, TBA Standing Committee on Ethics and Professional Responsibility, Brian S. Faughnan; General Counsel, Paul C. Ney; and Executive Director, Allan F. Ramsaur, in response to this Court's Order entered August 8, 2012, submits the following comment regarding The Adoption of Amended Tennessee Supreme Court Rule 9 ("Proposed Rule 9"):

Though this Court certainly needs no words of commendation from the TBA, the TBA would very much like to commend the Court for its undertaking, hard work, and thoughtfulness in pursuing an overhaul of Tenn. Sup. Ct. R. 9. The TBA strongly believes that the Court's Proposed Rule 9 would represent a vast improvement of the organization, architecture, and clarity of an extremely important process for Tennessee attorneys and the pubic-at-large – the disciplinary process. The TBA also wishes to express its gratitude for the Court's determination to specifically reference the standards for recusal set out in Tenn. Sup. Ct. R. 10 in Proposed Rule 9.

Although the TBA strongly supports the majority of the Court's Proposed Rule 9 revisions, there are some aspects that the TBA believes can be improved upon further and, in that

spirit, submits this Comment and has divided its suggestions into three sections:[1] (1) a request that the Court take this opportunity to have Tennessee join the overwhelming majority of U.S. jurisdictions and adopt a "clear and convincing evidence" standard of proof in disciplinary proceedings in lieu of the current "preponderance of the evidence" standard; (2) a redline of additional specific revisions to Proposed Rule 9 that the TBA would ask the Court to adopt to address typographical problems or other internal inconsistencies in Proposed Rule 9 that can invariably crop up when undertaking a project as large as the redrafting of a court rule with this many provisions as well as a few other proposals for substantive changes; and (3) a section addressing a few other aspects of Proposed Rule 9 about which the TBA does not presently have a specific proposal in redline form but does have questions and concerns and about which the TBA requests that the Court undertake further consideration prior to adoption of any new version of Rule 9.

I. TENNESSEE SHOULD JOIN THE MAJORITY OF U.S. JURISDICTIONS IN REQUIRING "CLEAR AND CONVINCING EVIDENCE" IN ATTORNEY DISCIPLINARY PROCEEDINGS.

The United States Supreme Court recognized more than forty years ago that attorney disciplinary proceedings are "quasi-criminal" in nature. In re Ruffalo, 390 U.S. 544, modified on other grounds, 392 U.S. 919 (1968). In connection with its overhaul and improvement of Tenn. Sup. Ct. R. 9, the Court should take this opportunity to jettison the "preponderance of the evidence" standard for the imposition of discipline against an attorney's license and join the majority of United States jurisdictions by implementing the "clear and convincing evidence"

[1] With respect to Section 29 of Proposed Rule 9, the TBA is submitting a separate comment that outlines the work that has been undertaken by a special subcommittee of the TBA's Standing Committee on Ethics and Professional Responsibility and that includes the TBA's comments and proposal for a further improvement of that section relating to appointing counsel to protect the interests of clients when a lawyer has died, disappeared, become disable or incapacitated, etc.

standard in its place. In so doing, the Court would not only be aligning itself with forty other jurisdictions, but also would eliminate entirely the risk that Tennessee's reliance upon the preponderance standard does not pass constitutional muster in terms of the requirements of procedural due process. Further, the TBA believes it is worth noting that the "clear and convincing evidence" standard was the standard for judicial disciplinary proceedings used under the former Court of the Judiciary process and under the newly-adopted Board of Judicial Conduct statute. In re Bell, 344 S.W.3d 304, 314 (Tenn. 2011) (citing Tenn. Code Ann. § 17-5-308(d)).

With respect to its continuing reliance upon the mere preponderance of the evidence standard in attorney disciplinary proceedings, Tennessee finds itself in increasingly isolated company as one of only ten states that continue to use that standard.[2] In contrast to the approach held to by a minority of jurisdictions, the District of Columbia and nearly forty states[3] follow the

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[2] See Procedures of Ark. Sup. Ct. Regarding Prof'l Conduct of Attorneys § 7.B; Ky. Sup. Ct. R. 3.330; Me. Bar. R. 7.2(b)(4); Mass. R. Bd. of Bar Examiners § 3.28; Mich. Ct. R. 9.115(J)(3); Mo. Sup. Ct. R. 5.15(a); In re D'Angelo, 733 P.2d 360 (N.M. 1986); Matter of Friedman, 196 A.D. 2d 280 (N.Y. App. Div., 1st Dept. 1995); Tex. R. Disc. P. 2.17(M).

Iowa appears to use its own standard that falls somewhere between preponderance of the evidence and clear and convincing evidence which it refers to as "a convincing preponderance of the evidence." Bd. of Prof'l Ethics v. Mattson, 558 N.W.2d 193, 194 (Iowa 1997). Likewise, Washington appears to have its own unique standard of a "clear preponderance." Wash. R. for Enforcement of Lawyer Conduct 10.14(b).

[3] See Ala. R. Disc. Pro. 19(a); Ak. Bar. R. 22(e); Az. Sup. Ct. R. 48(d); Cal. St. Bar. R. P. 213; Colo. R. Civ. P. 251.18(d); Lewis v. Statewide Grievance Comm., 669 A.2d 1202 (Conn. 1996); Del. Lawyers' R. of Disc. P. 15(c); D.C. Bar. R. XI, § 8(f); Fla. Standards for Imposing Lawyer Sanctions 1.3; Ga. R. Prof. Cond. Procedural Rule 4-221(e)(2); Haw. Sup. Ct. R. 2.7(c); Idaho Bar Comm'n R. 525(e); Ill. Sup. Ct. R. 753(c)(6); Ind. R. for Discipline of Attorneys 23, § 14(i); Kan. Sup. Ct. R. 211(f); La. Sup. Ct. R. XIX, § 18(C); Md. Ct. Rule 16-757(b); In re Getty, 452 N.W.2d 694 (Minn. 1990); Miss. State Bar R. Disc. 8.6; Mont. R. for Lawyer Disc. Enforcement R. 22(B); State ex rel. Counsel for Disc. v. Herzog, 762 N.W.2d 608 (Neb. 2009); Nev. Sup. Ct. R. 105(2)(E); N.H. Sup. Ct. R. 37A(III)(d); In re Breslin, 793 A.2d 645 (N.J. 2002); N.C. St. Bar Rules and Regs. B. § 0114(U); N.D. R. Lawyer Disc. 3.5(C); Ohio R. Gov. of the Bar. V §6a(F)(2)(a); Okla. Statutes, Title 5, Appendix 1A § 6.12(c); Or. St. Bar Rules of Procedure 5.2; Office of Disc. Counsel v. Shovall, 592 A.2d 1285 (Pa. 1991); Carter v. Folcarelli, 402 A.2d 1175 (R.I. 1979); S.C. Rules for Lawyer Disc. Enforcement 8; Utah Sup. Ct. R. of Prof'l Practice 14-517(b); Vt. Admin. Order 9, R. 16(C); Va. Sup. Ct. R. Part 6, Section IV, ¶ 13; In re Halverson, 998

approach set out in the ABA Model Rules for Lawyer Disciplinary Enforcement: proof by clear and convincing evidence is required for discipline against an attorney's license to be imposed.[4] That standard prevails with respect to disciplinary proceedings in many federal courts as well.[5]

The constitutional dimensions of this issue revolve around the requirements of procedural due process and implicate both Article I, § 8 of the Tennessee Constitution and the Fourteenth Amendment of the United States Constitution. See generally Matthews v. Eldridge, 424 U.S. 319 (1976); see also Nguyen v. Wash. Dept. of Health Med. Quality Assurance Comm., 29 P.3d 689 (Wash. 2001) (concluding that preponderance of the evidence standard did not afford sufficient due process in disciplinary hearing); Ettinger v. Bd. of Med. Quality Assurance, 185 Cal. Rptr. 601 (Cal. Ct. App. 1982) (holding that when discipline of a professional license is at stake clear and convincing evidence is the appropriate procedural standard). Although the right to practice law in Tennessee is subject to licensing, there can be little doubt that it must be treated as a property interest belonging to an attorney for purposes of evaluating the requirements of procedural due process. Cf. Martin v. Sizemore, 78 S.W.3d 249 (Tenn. Ct. App. 2001) (characterizing an architect's professional license as being a property interest for purposes of procedural due process). Attorneys have a further weighty interest to support an argument that procedural due process requires imposition of the clear and convincing evidence standard – a

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P.2d 833 (Wash. 2000); W. Va. R. Lawyer Disc. P. 3.7; Wisc. Sup. Ct. R. 22.38; Wyo. State Bar Disciplinary Code 19(c).

[4] ABA Model Rules for Lawyer Disc. Enforcement R. 18(c).

[5] See, e.g., In re Crayton, 192 B.R. 970 (B.A.P. 9th Cir. 1996); In re Medrano, 956 F.2d 101 (5th Cir. 1992); In re Ryder, 381 F.2d 713, aff'g 263 F. Supp. 360 (4th Cir. 1967); In re Fisher 179 F.2d 361 (7th Cir. 1950); Romero-Barcelo v. Acevedo-Vila, 275 F. Supp. 2d 177 (D.P.R. 2003); New England Ins. Co. v. Sylvia, 783 F. Supp. 6 (D.N.H. 1991); U.S.D.C. Conn. Local Rule 83.2(d)(5); U.S.D.C. D.C. Local Rule, Civil 83.16(d)(8); U.S.D.C. Kan. Local Rule 83.6.3(f)(2)(D); U.S.D.C. Mont. Local Rule 83.14(d)(5)(E); U.S.D.C. S.D.N.Y. Local Rule 1.5(b).

liberty interest in their professional reputation. See Paul v. Davis, 424 U.S. 693 (1976) (concluding that reputation tied to a person's employment is a cognizable liberty interest).

Tenn. Sup. Ct. R. 9 (as well as Proposed Rule 9) already requires the clear and convincing evidence standard in two instances which both involve imposition of the burden on attorneys involved in such proceedings: (1) attorneys seeking reinstatement of their law license must demonstrate their entitlement to reinstatement by clear and convincing evidence (Tenn. Sup. Ct. R. 9, § 19.3 & Proposed Rule 9 § 30.3); and (2) attorneys who have had their license put into disability inactive status must prove by clear and convincing evidence that their license can be returned to active status (Tenn. Sup. Ct. R. 9, § 21.6 & Proposed Rule 9 § 27.7).

In order to implement this change in the standard of proof, Proposed Rule 9 would need to be revised in three places:

Section 15. Initiation, Investigation, and Hearing

15.2. (g) In hearings on formal charges of misconduct, Disciplinary Counsel must prove a violation of the rules by the respondent attorney by clear and convincing ~~the case by a preponderance of the~~evidence.

Section 27. Proceedings Where an Attorney Is Declared to Be Incompetent or Is Alleged to Be Incapacitated

27.3. If the Board petitions the Court to determine whether an attorney is incapacitated from continuing the practice of law by reason of mental infirmity or illness or because of addiction to drugs or intoxicants, or if an attorney, with no disciplinary proceeding or complaint pending, petitions to be transferred to disability inactive status, the Court may take or direct such action as it deems necessary or proper to determine whether the attorney is so incapacitated, including the examination of the attorney by such qualified medical experts as the Court shall designate or assignment to a hearing panel for a formal hearing to determine the issue of capacity. If the Board petitions the Court, the burden of proof shall be upon the Board and clear and convincing evidence shall be required~~by a preponderance of the evidence~~. If, upon due consideration of the matter, the Court concludes that the attorney is incapacitated from continuing to practice law, it shall enter an order transferring the attorney to disability inactive status on the ground of such disability for an indefinite period and until the further

order of the Court. If the Board files a petition pursuant to this Section while a disciplinary proceeding is pending against the respondent attorney, the disciplinary proceeding shall be suspended pending the determination as to the attorney's alleged incapacity.

27.4. (a) If, during the course of a disciplinary investigation or proceeding, the respondent attorney contends that ~~the~~ he/she is suffering from a disability by reason of mental or physical infirmity or illness, or because of addiction to drugs or intoxicants, which disability makes it impossible for the respondent attorney to respond to or defend against the complaint, such contention shall place at issue the respondent attorney's capacity to continue to practice law. The Court thereupon shall enter an order immediately transferring the respondent attorney to disability inactive status for an indefinite period and until the further order of the Court. The Court may take or direct such action as it deems necessary or proper to make a determination as to the respondent attorney's capacity to continue to practice law and to respond to or defend against the complaint, including the examination of the respondent attorney by such qualified medical experts as the Court shall designate or the referral of the matter to a hearing panel for a formal hearing to determine the respondent attorney's capacity to continue to practice law and to respond to or defend against the complaint. In any such proceeding, the burden of proof shall rest upon the respondent attorney and clear and convincing evidence shall be required~~by a preponderance of the evidence~~.

Absent adoption of a standard of proof based upon clear and convincing evidence, the risk will remain in Tennessee that an attorney deprived of their license to practice law through proceedings in which only a preponderance of evidence was required to adjudicate guilt could have the disciplinary proceedings against them overturned as unconstitutional. The TBA believes that the time has come for adoption of this weightier standard to eliminate the risk of any constitutional deficiency and that requiring that "there is no serious or substantial doubt about the correctness of conclusions drawn from the evidence[6]" before imposition of discipline against a lawyer's license is not too much to ask given the property and liberty interests at stake in such proceedings.

II. THE TBA HAS IDENTIFIED A NUMBER OF OTHER REVISIONS TO PROPOSED RULE 9 THAT IT BELIEVES THE COURT SHOULD ADOPT.

[6] Grindstaff v. State, 297 S.W.3d 208, 216 (Tenn. 2009).

In addition to revising Proposed Rule 9 with respect to the standard of proof in disciplinary proceedings as discussed above, the TBA would request that the Court make the following revisions to Proposed Rule 9 prior to adoption. The TBA has set forth its suggested revisions, in the order they arise in Proposed Rule 9 reflected with underlined text to reflect proposed additions and ~~struck through text~~ to reflect proposed deletions. To the extent the TBA believes that the reasoning for any proposed revision is not straightforward, the TBA has interlineated an explanation behind the rationale of its proposal directly underneath the relevant portion of its redline.

Section 2. Definitions

. . .

Complainant: A person who alleges misconduct by an attorney, including misconduct by Disciplinary Counsel and attorney members of the Board and members of the district committees.

. . .

Hearing panels: Panels of three district committee members selected by the Chair of the Board to hear matters pursuant to provisions of this Rule.

. . .

Serious crime: The term "serious crime" as used in Section 22 of this Rule shall include any felony ~~under the laws of Tennessee~~and any other crime a necessary element of which, as determined by the statutory or common law definition of such crime, involves improper conduct as an attorney, interference with the administration of justice, false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, or an attempt or a conspiracy or solicitation of another to commit a "serious crime."

. . .

TBA RATIONALE FOR PROPOSED CHANGE TO DEFINITION OF "SERIOUS CRIME": The TBA believes that the provisions in Section 22 that can lead to the immediate,

temporary suspension of attorneys for conviction of certain crime should extend to all felonies, not just felonies under Tennessee law.

Section 4. The Board of Professional Responsibility of the Supreme Court of Tennessee

. . .

4.6. A Board members shall not take part in any matter in which a judge, similarly situated, would have to recuse himself or herself in accordance with Tenn. Sup. Ct. R. 10.

Section 5. Ethics Opinions

. . .

5.4. In performing its responsibilities under Section 5.1, the Board shall exercise the powers and perform the ordinary and necessary duties usually carried out by ethics advisory bodies. The Board shall:

. . .

(e) Adopts such rules as it considers appropriate relating to the procedures to be used in considering inquiries and expressing opinions, including procedures for clarssifying opinions or declining requests for opinions.

. . .

Section 6. District Committees

6.1. The Court shall appoint one district committee within each disciplinary district. Each district committee shall consist of not fewerless than five members of the bar of this state who maintain an office for the practice of law within that district. Members of district committees may be recommended by the Board, or by the president or board of directors of the local bar associations in each district.

. . .

6.5. A District committee members, whether acting as the reviewing committee member or as a hearing panel member, shall not take part in any matter in which a judge, similarly situated, would have to recuse himself or herself in accordance with Tenn. Sup. Ct. R. 10.

Section 7. Disciplinary Counsel

. . .

7.2. Chief Disciplinary Counsel shall have the power and duty, with the approval of the Board:

(a) To employ and supervise staff needed for the performance of Disciplinary Ceounsel's duties.

. . .

7.3. Disciplinary Counsel shall have the power and duty:

. . .

(c) To present in a timely manner all disciplinary proceedings before hearing panels, the Board, trial courts, and the Court and alland proceedings to determine incapacity of attorneys before hearing panels, ~~the Board,~~ trial courts, and the Court.

. . .

TBA RATIONALE FOR PROPOSED CHANGE TO SECTION 7.3: The TBA does not believe that it would make sense for the Board to be able to make determinations about whether an attorney is incapacitated and has revised this provision to make clear that such presentations would be made by Disciplinary Counsel only to hearing panels, trial courts, and the Court.

Section 8. Jursidiction

8.1 . . . Any attorney not admitted to practice law in this State nor specially admitted to practice law in this State but who engages in the practice of law in this State shall be subject to the imposition of civil remedies and criminal prosecution

. . . .

. . .

Section 9. Multijurisdictional Practice.

. . .

9.3. If an attorney is practicing in this State under authority of RPC 5.5(c), or if an attorney is practicing in this State under authority of RPC 5.5(d) and does not maintain an office in this State:

(a) Hearing panel proceedings ~~shall~~may occur in anythe disciplinary district in which the conduct that forms the basis of the complaint against the attorney occurred.

. . .

Section 10. Periodic Assessment of Attorneys

10.1. Every attorney admitted to practice before the Court, except those exempt under Section 10.2, shall pay to the Board on or before the first~~last~~ day of the attorney's birth month an annual fee for each year beginning January 1, 2012. . . . Withdrawals from those funds shall be made by the Board only for the purpose of defraying the costs of disciplinary administration and enforcement of this~~ose~~ R~~r~~ules, and for such other related purposes as this Court may from time to time authorize or direct.

. . .

10.3. To facilitate the collection of the annual fee provided for in Section 10.1, all person required by this Rule to pay an annual fee shall, on or before the first~~last~~ day of their birth month, file with the Board at its central office a registration statement, on a form prescribed by the Court, setting forth the attorney's current residence, office, and office email addresses~~s~~, and such other information as the Court may from time to time direct . . . .

. . .

10.6. (a) Each attorney to whom a Notice is sent pursuant to Section 10.5 shall file with the Board within thirty days of the date of delivery of the Notice ~~an affidavit with~~supporting documentation, including sworn proof if necessary, demonstrating that the attorney has paid the annual registration fee or has filed the annual registration statement, and has paid a delinquent compliance fee of One Hundred Dollars ($100.00) to ~~defray~~the Board~~'s costs in issuing the Notice~~; or, alternatively, demonstrating that the Notice was sent to the attorney in error, the attorney having timely paid the annual registration fee or having timely filed the annual registration statement.

. . .

(d) . . . . The proposed Reinstatement Order shall provide that the attorney's reinstatement is effective as of the date of the attorney's payment of all delinquent registration fees or the date of the attorney's filing of the delinquent registration statement, and the attorney's payment of the One Hundred Dollar

($100.00) delinquent compliance fee; or, alternatively, as of the date of entry of the Suspension Order if that Order was entered in error. An attorney resolves a suspension within thirty days for purposes of Section 10.6(c) if a proposed Reinstatement Order has been sent to the Court within thirty days of the Court's filing of the Suspension Order.

. . .

TBA RATIONALE FOR PROPOSED CHANGES IN SECTION 10.6: The TBA here, and in a number of other places, has proposed revisions to acknowledge that Tennessee now permits sworn declarations in lieu of affidavits. The TBA also has no objection to the $100 fee but does not believe it is necessary to characterize the fee as "defraying" the cost of issuing such notice. Finally, in light of the provision in Section 10.6(c) providing that a suspension resolved within thirty days does not trigger certain notice requirements, the TBA has suggested additional language to clarify when a suspension is considered resolved for that purpose.

Section 11. Grounds for Discipline

11.1. Acts or omissions by an attorney, individually or in concert with any other person or persons, which violate ~~the Attorney's Oath of Office or~~ the Rules of Professional Conduct of the State of Tennessee, including acts prior to surrender of a law license~~resignation~~, suspension, disbarment, or transfer to inactive status on other grounds, and acts subsequent to surrender of a law license~~resignation~~, suspension, disbarment, or transfer to inactive status which acts amount to the practice of law, shall constitute misconduct and shall be grounds for discipline, whether or not the act or omission occurred in the course of an attorney-client relationship.

. . .

TBA RATIONALE FOR PROPOSED CHANGE TO SECTION 11.1: The Rules of Professional Conduct in Tennessee are thorough, well-crafted, and comprehensive. The TBA does not believe that lawyers should be subject to discipline over and above violations of those Rules on the basis of claims that conduct violates the Attorney's Oath of Office, which currently consists of the following language according to Tenn. Sup. Ct. R. 6: "I, _____, do

solemnly swear or affirm that I will support the Constitution of the United States and the Constitution of the State of Tennessee, and that I will truly and honestly demean myself in the practice of my profession to the best of my skill and abilities, so help me God." The TBA submits that attempting to impose discipline regarding compliance with such language would be difficult, at best, and should not be included in Proposed Rule 9.

Section 12. Types of Discipline

. . .

12.3. (a) **Temporary Suspension.** On petition of Disciplinary Counsel and supported by sworn proof~~an affidavit~~ demonstrating facts personally known to affiant or declarant showing that an attorney has misappropriated funds to the attorney's own use, has failed to respond to the Board of Disciplinary Counsel concerning a complaint of misconduct has failed to substantially comply with a ~~contract entered into with the~~Tennessee Lawyer Assistance Program monitoring agreement requiring mandatory reporting to the Board pursuant to Section 36.1, or otherwise poses a threat of substantial harm to the public, the Court may issue an order with such notice as the Court may prescribe imposing temporary conditions of probation on said attorney or temporarily suspending said attorney, or both.

. . .

12.8. Conditions. Upon order of a hearing panel or court, or upon stipulation of Respondent and Disciplinary Counsel~~the parties~~, conditions consistent with the purpose of this Rule and with the Rules of Professional Conduct, including but not limited to the requirement of a practice monitor pursuant to the procedures set forth in Section 12.9, may be placed upon the imposition of any form of public discipline.

. . .

Section 13. Diversion of Disciplinary Cases

13.1. Authority of Board. The Board is hereby authorized to establish practice and professionalism enhancement programs to which eligible disciplinary cases may be diverted as an alternative to disciplinary sanction. The Board is also authorized to require a respondent attorney to enter into a Tennessee Lawyer Assistance Program monitoring agreement requiring mandatory reporting to the Board as a condition of diversion under this section.

. . .

Section 14. Probation

14.1.~~(a)~~ Probation. In the discretion of the hearing panel or a reviewing court, the imposition of a suspension for a fixed period (Section 12.2) may be deferred in conjunction with a fixed period of probation. The conditions for probation shall be stated in writing in the judgment of the hearing panel or court and may include, if appropriate, requiring the respondent attorney to enter into a monitoring agreement with the Tennessee Lawyer Assistance Program requiring mandatory reporting to the Board. Probation shall be used only in cases where there is little likelihood that the respondent attorney will harm the public during the period of rehabilitation and where the conditions of probation can be adequately supervised. The hearing panel or reviewing court may require as a condition of probation the assignment of a practice monitor for the purposes and pursuant to the procedures set forth in Section 12.9. The respondent attorney shall pay the costs associated with probation, including but not limited to a reasonable fee to the practice monitor.

14.2. Revocation of Probation.~~(b)~~ In the event the respondent attorney violates or otherwise fails . . .

14.3. Termination.~~(c)~~ Probation shall terminate upon the expiration of . . . .

TBA RATIONALE FOR PROPOSED CHANGES TO SECTIONS 13 AND 14: The TBA has reviewed and agrees with a previously-filed comment submitted by TLAP and has included the substance of that proposal in this submission with minor revisions to conform to other changes in the Proposed Rule 9.

Section 15. Initiation, Investigation, and Hearing

15.1. (a) All complaints must be submitted in writing, must contain the identity of the complainant, and must be signed by the complainant. The Board shall provide the respondent attorney with a complete copy of the original complaint and of any additional or supplemental written submissions provided by the complainant. In the event that the Board's investigation is the result of information from a source other than a written complaint pursuant to Section 4.5(a), the Board shall notify the respondent attorney and provide a copy of such information.

. . .

(c) If Disciplinary Counsel recommends disposition by dismissal or private informal admonition, the reviewing member of the district committee in the appropriate disciplinary district shall review the recommendation and may approve, reject, or modify it . . . .

(d) If Disciplinary Counsel ~~the~~recommend~~sed~~ disposition by~~is~~ private reprimand~~,~~ or public censure, or recommends the prosecution of formal charges before a hearing panel, the Board shall review the recommendation and approve, reject, or modify it. . . .

. . .

(g) If Disciplinary Counsel recommends disposition by private informal admonition or private reprimand, and if that recommended disposition is approved by the reviewing member of the district committee in the appropriate disciplinary district, and if the respondent attorney does not demand a formal hearing, then the complainant shall be provided notice that the complaint has been resolved in a manner that is confidential under Section 32. This same notice will be provided to the complainant in the event of disposition by private reprimand. The complainant has no right to appeal a disposition by private informal admonition or private reprimand under this Section.

TBA RATIONALE FOR PROPOSED CHANGES TO SECTION 15.1: The TBA submits that interests of fairness and efficiency in the disciplinary process should also require that not only the first written submission from a complainant, but any further submissions from a complainant, should be provided to the respondent attorney as well. The TBA also submits that, for clarity, specific reference to the ability of a reviewing member to reject a recommendation should be added. Finally, it appears to the TBA that there is a gap in the Proposed Rule 9 as to what will be provided to complainant in the event of a private reprimand; thus, the TBA recommends that a complainant receive the same notice whether the private discipline imposed is a private reprimand or a private informal admonition.

15.2. (a) Formal disciplinary proceedings before a hearing panel shall be instituted by Disciplinary Counsel by filing with the Board a Petition for

Discipline (hereinafter "Petition") which shall be sufficiently clear and specific to inform the respondent attorney of the alleged misconduct. Disciplinary Counsel, ~~as needed~~with the consent of the respondent attorney or by leave of the hearing panel assigned to hear the matter, may file an Amended Petition(s) or Supplemental Petition(s). Amended Petitions ~~which~~arise out of the same facts and circumstances as the Petition~~but which change, delete or augment the existing allegations. Disciplinary Counsel, as needed and with the approval of the Board, may file~~Supplemental Petitions ~~which~~make new allegations and ~~which~~bring new charges arising from a different complaint(s) not previously included in a Petition. N~~o~~either ~~a~~ Petition ~~to initiate a formal disciplinary proceeding~~, ~~an~~Amended Petition, ~~nor a~~Supplemental Petition shall include allegations of any private discipline previously imposed against the respondent attorney.

(b) A copy of the Petition shall be served upon the respondent attorney pursuant to Section 18.1. The respondent attorney shall serve an answer upon Disciplinary Counsel pursuant to Section 18.2 and file the original with the Board within thirty days after the service of the Petition, unless such time is extended by the agreement of Disciplinary Counsel or by leave of the hearing panel assigned to hear the matter. The respondent attorney may file an amended answer with the consent of Disciplinary Counsel or by leave of the hearing panel assigned to hear the matter. In the event the respondent attorney fails to answer, the charges shall be deemed admitted and Disciplinary Counsel may move the hearing panel assigned to hear the matter for entry of a Judgment of Default. Relief from a Judgment of Default for failure to serve an answer to the Petition within thirty days shall be determined in the same manner such motions are determined by Tennessee Rules of Civil Procedure 55.02.

. . .

(d) Following the filing of~~service of the answer to~~ the Petition, ~~or upon failure to answer,~~the matter shall be assigned by the Chair to a hearing panel. In assigning the members of the hearing panel, the Chair shall select them on a random basis from the members of the district committee in the district in which the respondent practices law; if there is an insufficient number of committee members in that district who are able to serve on the hearing panel, the Chair may appoint one or more members from the district committee of an adjoining district to serve on the panel. In communicating the fact of assignment to members of the hearing panel, the Chair or the Chair's designee for the communication shall provide to members of the hearing panel only such information as would be needed for them to determine whether their recusal is required under Section 6.5.

. . .

TBA RATIONALE FOR PROPOSED CHANGES TO SECTION 15.2: Given the fact that Proposed Rule 9 contemplates the existence of a hearing panel to be able to rule on

certain motions that might be filed prior to the filing of an answer by a respondent attorney, including a motion for an extension of the answer deadline, the TBA proposes that a hearing panel be assigned after a Petition is filed rather than after an answer to a Petition has been filed. Proposed Rule 9 would create a rather one-sided landscape in terms of amended or supplemental pleadings. The TBA has proposed changes that would move the balance of treatment closer to an equal posture and in a way that would be more similar to the Tennessee Rules of Civil Procedure in which amendments to pleadings can be made by stipulation or upon an order granting leave entered by the body that acts as the tribunal, the hearing panel. In order to squarely address issues related to preliminary communications to initially assigned hearing panel members at the outset of proceedings – issues that have been the recent subject of litigation and the issuance of an opinion from at least one Chancery Court – the TBA has added language to address the limited type of information that should be communicated on an *ex parte* basis by the Board to members of a hearing panel.

15.3.

. . .

(b) The hearing panel~~Board~~ shall file its findings and judgment with the Board and immediately serve a copy ~~of the hearing panel's findings and judgment~~ upon Disciplinary Counsel and the respondent attorney's counsel of record (or ~~and~~ the respondent attorney if unrepresented)~~'s counsel of record~~ pursuant to Section 18.2. There shall be no petition for rehearing. Any appeal pursuant to Section 33 must be filed within sixty days of the entry of the hearing panel's judgment.

. . .

TBA RATIONALE FOR PROPOSED CHANGES TO SECTION 15.3: The TBA's proposed changes are intended to be more in keeping with the notion of the roles of each entity in the system so that, like a tribunal, the hearing panel will both file its ruling with the Board and

simultaneously serve a copy upon the other party to the proceeding rather than leaving it to the prosecuting party to have control over, and responsibility for, service of the ruling upon the party being prosecuted.

15.4.

. . .

(b) If a ~~the judgment of the hearing panel is that the~~respondent attorney is to~~shall~~ be disbarred or suspended for any period of time in excess of three months, or for a period of time of three months or less with conditions for reinstatement, whether pursuant to a judgment of a hearing panel where~~and~~ no appeal is perfected within the time allowed, or by ~~if there is~~a settlement at ~~providing for a disbarment or suspension for any period of time in excess of three months, or for a period of time of three months or less with conditions for reinstatement,~~any stage of disciplinary proceedings, the Board shall file with the Court copies of the Petition, the judgment or settlement, the proposed Order of Enforcement, and a Protocol Memorandum as defined in Section 2. The Board shall serve a copy of the proposed Order of Enforcement and the Protocol Memorandum upon the respondent attorney's counsel of record (or~~and~~ the respondent attorney if unrepresented)~~'s counsel of record~~ pursuant to Section 18.2. In all cases except those in which the sanction imposed is by agreement, the respondent attorney shall have ten days from service of the foregoing within which to file with the Court and serve upon Disciplinary Counsel pursuant to Section 18.2 a response to the Protocol Memorandum. Such response shall be limited to addressing the contents of~~contesting any alleged factual errors in~~ the Protocol Memorandum. The Court shall review the recommended punishment provided in such judgment or settlement with a view to attaining uniformity of punishment throughout the State and appropriateness of punishment under the circumstances of each particular case. The Court may direct that the transcript or record of any proceedings be prepared and filed with the Court for its consideration.

. . .

TBA RATIONALE FOR PROPOSED CHANGES TO SECTION 15.4: The first portion of the TBA's proposed changes is an attempt to streamline the language of this rule without altering the substance. The TBA also would suggest that, because the Protocol Memorandum addresses things beyond facts including items such as items about which opinions

can reasonably differ, such as instances of comparative discipline in similar cases, the other party to the proceeding should be permitted to respond to the entirety of the Protocol Memorandum.

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

16.1. (a) Complaints against Disciplinary Counsel or district committee members alleging violations of ~~the Attorney's Oath of Office or~~ the Rules of Professional Conduct shall be submitted directly to the Board.

. . .

16.2. (a) Complaints against attorney members of the Board alleging violations of ~~the Attorney's Oath of Office or~~ the Rules of Professional Conduct shall be submitted directly to the Chief Justice of the Court.

. . .

16.3.

. . .

(b) . . . (2) If Special Disciplinary Counsel's recommendation is private informal admonition or private reprimand, it shall be reviewed by the Reviewing Justice, who may approve, disapprove, 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 in a manner that is confidential under Section 32. The complainant has no right to appeal a disposition of a private informal admonition or private reprimand 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 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, or private reprimand; may approve or impose a ~~private reprimand or~~public censure; or may direct that a formal proceeding be instituted before a special hearing panel.

. . .

TBA RATIONALE FOR PROPOSED CHANGES TO SECTION 16.3: The TBA submits that without these revisions there would be gaps with respect to the treatment of private reprimands in these specialized circumstances.

Section 17. Immunity

Members of the Board, district committee members, Disciplinary Counsel and staff shall be immune from civil suit for any conduct in the course of their official duties. Complainants and witnesses shall be immune from civil suit with respect to any communications to the Board, district committee members, Disciplinary Counsel or staff relating to attorney misconduct or disability or any testimony in the proceedings regarding the same~~, unless the information which the complainant or witness provides in such communication or such testimony is false and the complainant or witness had actual knowledge of the falsity~~.

TBA RATIONALE FOR PROPOSED CHANGES TO SECTION 17: The TBA believes that diminishing the broad scope of immunity currently afforded to complainants and witnesses would have a chilling effect and should not be adopted.

Section 18. Service

18.1. In the event that the respondent attorney is already represented by counsel at the time of the filing of a Petition, counsel for the respondent attorney may agree to accept service on behalf of the respondent attorney. Otherwise, t~~T~~he Petition in any disciplinary proceeding shall be served on the respondent attorney by personal service by any person authorized by the Chair of the Board, or by any form of United States mail providing delivery confirmation, at the primary address shown in the most recent registration statement filed by the respondent attorney pursuant to Section 10.3 or at the respondent attorney's other last known address. If such service is not successfully completed, the Board shall undertake additional reasonable steps to obtain service, including but not limited to, personal service or service by mail at such alternative addresses as the Board may identify, or service by email at the email address shown in the most recent registration statement filed by the respondent attorney pursuant to Section 10.3 or such other email address as the Board may identify.

. . .

Section 19. Subpoena Power, Witnesses and Pre-trial Proceedings

. . .

19.5. Discovery proceedings by the respondent attorney, prior to the filing of a Petition for Disciplineinstitution of proceedings for a formal hearing, may be had upon the order of the Chair of the Board for good cause shown.

. . .

Section 22. Attorneys Convicted of Crimes

22.1. (a) Any attorney subject to the disciplinary jurisdiction of this Court, upon conviction of any serious crime, as defined in Section 2, shall within ten days of such conviction provide a copy of the judgment or guilty plea involved to Disciplinary Counsel.

(b) Upon receiving notice from an attorney pursuant to Section 22.1(a), or upon otherwise being advised that an attorney subject to the disciplinary jurisdiction of the Court has been convicted of a crime, Disciplinary Counsel shall obtain a an affidavit with a certified copy of the judgment, guilty plea or other adequate sworn proof of the conviction and forward it to the Nashville office of the Clerk of the Supreme Court.

22.2. (a) Upon the filing with the Court of an affidavit witha certified copy of the judgment, guilty plea, or other adequate sworn proof demonstrating that an attorney who is a defendant in a criminal case involving a serious crime, as defined in Section 2, has entered a plea of nolo contendere or a plea of guilty or has been found guilty by verdict of the jury, or the trial court sitting without a jury, the Court shall enter an order immediately suspending the attorney. Such suspension shall take place regardless of the pendency of a motion for new trial or other action in the trial court and regardless of the pendency of an appeal. Such suspension shall remain in effect pending final disposition of a disciplinary proceeding to be commenced upon such finding of guilt.

. . .

22.3. An certified copy of the judgment, guilty plea, or otheraffidavit with adequate sworn proof of a conviction of an attorney for any crime shall be conclusive evidence of the commission of that crime in any disciplinary proceeding instituted against the attorney based upon the conviction.

22.4. Upon the receipt of an certified copy of the judgment, guilty plea, or otheraffidavit with adequate sworn proof of conviction of an attorney for a serious crime, the Court shall, in addition to suspending the attorney in accordance with the provisions of Section 22.21, also refer the matter to the Board for the institution of a formal proceeding before a hearing panel in which the sole issue to be determined shall be the extent of the final discipline to be imposed, provided

that a disciplinary proceeding so instituted will not be brought to hearing until all appeals from the conviction are concluded.

22.5. Upon the receipt of ~~an~~ certified copy of the judgment, guilty plea, or other~~affidavit with~~ adequate sworn proof of a conviction of an attorney for a crime not constituting a serious crime, the Court shall refer the matter to the Board for whatever action the Board may deem warranted, including the institution of an investigation by Disciplinary Counsel, or a formal proceeding before a hearing panel, provided, however, that the Court may in its discretion make no reference with respect to convictions for minor offenses.

22.6. An order summarily suspending an attorney from the practice of law pursuant to Section 22.2~~1~~ shall constitute a suspension of the attorney for the purpose of Section 28.

22.7. An attorney suspended pursuant to Section 22.2~~1~~ shall receive credit for any period of suspension served pursuant to Section 22.2~~1~~ that preceded the commencement of the term of incarceration. Notwithstanding the provisions of Section 12.2, any suspension ~~or disbarment~~ordered pursuant to Section 22.2~~1~~ may be required to~~shall~~ be served consecutive to any period of incarceration imposed upon the attorney as a result of the attorney's conviction in the underlying criminal case.

TBA RATIONALE FOR PROPOSED CHANGES TO SECTION 22: The TBA believes that Proposed Rule 9 has a gap in it with respect to whom would provide notice of certain convictions of serious crimes and with respect to how any such obligation would otherwise be enforced if the duty were imposed upon a non-lawyer. The TBA believes that the responsibility for providing notification of a conviction of a serious crime should, like the obligation to provide notice of the receipt of discipline in another jurisdiction, fall upon the lawyer who has been so convicted. The TBA has otherwise left the procedures in place for what Disciplinary Counsel and the Court would do as to other crimes, not rising to the level of seriousness as to trigger the attorney's obligation to provide notice. The TBA also suggests that the reference to disbarment in Section 22.7 is confusing and unneeded and that the concept of a suspension having to be served consecutive to a period of incarceration should be an option, but should not be made mandatory by the rule.

Section 23. Disbarment by Consent of Attorneys Under Disciplinary Investigation or Prosecution

23.1. An attorney who is the subject of an investigation into, or a pending proceeding involving, allegations of misconduct may consent to disbarment, by delivering to the Board an affidavit or sworn declaration stating that such attorney desires to consent to disbarment and that:

23.2. Upon receipt of the required affidavit or sworn declaration, the Board shall file it with the Court and the Court shall enter an order disbarring the attorney on consent.

23.3. The order disbarring the attorney on consent shall be a matter of public record. However, the affidavit or sworn declaration required under Section 23.1 shall not be publicly disclosed or made available for use in any other proceeding except upon order of the Court.

Section 25. Reciprocal Discipline

25.1. ~~All attorneys subject to disciplinary jurisdiction pursuant to Section 8.1 shall, u~~Upon being subjected to professional disciplinary action in another jurisdiction while subject to the disciplinary jurisdiction of this Court pursuant to Section 8.1, an attorney shall promptly inform Disciplinary Counsel of such action. Upon being informed by~~that~~ an attorney of such disciplinary action~~subject to disciplinary jurisdiction pursuant to Section 8.1 has been subjected to discipline~~ in another jurisdiction~~while subject to disciplinary jurisdiction pursuant to Section 8.1~~, Disciplinary Counsel shall obtain a certified copy of such disciplinary order and file the same with the Board and with the Court.

25.2. Upon receipt of a certified copy of an order pursuant to Section 25.1~~demonstrating that an attorney subject to disciplinary jurisdiction pursuant to Section 8.1 has been disciplined in another jurisdiction while subject to disciplinary jurisdiction pursuant to Section 8.1~~, the Court shall forthwith serve upon the attorney in accordance with Section 18.1 a notice containing:

. . .

25.5. In all other respects, a final adjudication in another jurisdiction that an attorney subject to disciplinary jurisdiction pursuant to Section 8.1 has been guilty of misconduct ~~while subject to disciplinary jurisdiction pursuant to Section 8.1~~shall establish conclusively the misconduct for purposes of a disciplinary proceeding in this State.

TBA RATIONALE FOR PROPOSED CHANGES TO SECTION 25: The TBA believes that the many additional inclusions of "while subject to disciplinary jurisdiction" are superfluous and potentially confusing.

Section 26. Attorneys Failing to Comply with Tenn. Code Ann. §§ 67-4-1701-1710 (Privilege Tax Applicable to Persons Licensed to Practice Law)

. . .

26.3. (a) Each attorney to whom a Notice is sent pursuant to Section 26~~7~~.2 shall file with the Board within thirty days of the date of delivery of the Notice ~~an affidavit supported by~~documentary evidence, including sworn proof if necessary, showing that the attorney has paid the delinquent privilege taxes and any interest and penalties assessed by the Department of Revenue, and has paid to the Board a delinquent compliance fee of One Hundred Dollars ($100.00)~~ to defray the Board's costs in issuing the Notice~~; or, alternatively, demonstrating that the Notice was sent to the attorney in error, the attorney having timely paid the privilege taxes.

(b) Within thirty days of the expiration of the time for an attorney to respond to the Notice pursuant to Subsection (a) hereof, the Chief Disciplinary Counsel shall prepare and furnish to the Court a proposed Suspension Order. The proposed Suspension Order shall list all attorneys who were sent the Notice and who failed to respond; failed to demonstrate to the satisfaction of the Board that they had paid the delinquent privilege taxes and any interest and penalties, and had paid to the Board a delinquent compliance fee of One Hundred Dollars ($100.00)~~ to defray the Board's costs in issuing the Notice~~; or, failed to demonstrate to the satisfaction of the Board that the Notice had been sent in error. The proposed Suspension Order shall provide that the license to practice law of each attorney listed therein shall be suspended upon the Court's filing of the Order and that the license of each attorney listed therein shall remain suspended until the attorney pays the delinquent privilege taxes and any interest and penalties, and pays to the Board the One Hundred Dollar ($100.00) delinquent compliance fee and a separate reinstatement fee in the amount of Two Hundred Dollars ($200.00), and is reinstated pursuant to Subsection (d).

. . .

(d) An attorney suspended by the Court pursuant to Subsection (c) may file with the Board an application for reinstatement of the attorney's license to practice law demonstrating that the attorney has paid all the delinquent privilege taxes and any interest and penalties, and has paid to the Board the One Hundred

Dollar ($100.00) delinquent compliance fee and the Two Hundred Dollar ($200.00) reinstatement fee; or, alternatively, demonstrating that the Suspension Order was entered in error as to the attorney. If the application is satisfactory to the Board and if the attorney is otherwise eligible for reinstatement, the Board or the Chief Disciplinary Counsel acting on its behalf, shall promptly prepare and send to the Court a proposed Reinstatement Order. The proposed Reinstatement Order shall provide that the attorney's reinstatement is effective as of the date of the attorney's payment of all delinquent privilege taxes and any interest and penalties, and the attorney's payment to the Board of the One Hundred Dollar ($100.00) delinquent compliance fee and the Two Hundred Dollar ($200.00) reinstatement fee; or, alternatively, as of the date of entry of the Suspension Order if that Order was entered in error. An attorney resolves a suspension within thirty days for purposes of Section 26.3(c) if a proposed Reinstatement Order has been sent to the Court within thirty days of the Court's filing of the Suspension Order.

TBA RATIONALE FOR PROPOSED CHANGES TO SECTION 26.3: The TBA's rationale for these changes is the same as explained with respect to Section 10.6 above.

Section 27. Proceedings Where an Attorney Is Declared to Be Incompetent or Is Alleged to Be Incapacitated

. . .

27.2. Whenever during the course of an investigation pursuant to Section 15.1 or formal proceedings pursuant to Section 15.2, Disciplinary Counsel obtains information calling into question the mental or physical health of the respondent attorney that raises a substantial concern regarding the respondent attorney's capacity to continue the practice of law or to respond to or defend against a complaint, Disciplinary Counsel should request the respondent attorney to voluntarily agree to submit to an evaluation by the Tennessee Lawyers Assistance Program or examination by a qualified medical or mental health expert to determine respondent attorney's capacity and report the results of the examination to Disciplinary Counsel~~the Board~~ and to the respondent attorney and the respondent attorney's counsel. In the event the respondent attorney declines to submit to such evaluation or examination and reporting, Disciplinary Counsel should file a petition under seal with the Court for an order requiring the respondent attorney to submit to an evaluation by the Tennessee Lawyers Assistance Program or an examination by a qualified medical or mental health expert as the Court shall designate, the results of either of which shall be reported to Disciplinary Counsel~~the Board~~, the Court, and the respondent attorney and the respondent attorney's counsel. Failure to comply with an order issued under this Subsection may serve as the basis for temporary suspension pursuant to Section 12.3.

. . .

27.5. The Board shall cause a notice of transfer to disability inactive status to be published pursuant to Section 28.10~~1~~.

. . .

TBA RATIONALE FOR PROPOSED CHANGES TO SECTION 27: Given the potentially sensitive nature of the contents of a petition that would be filed by Disciplinary Counsel in these circumstances, the TBA submits that the rule should explicitly require that it be filed under seal.

Section 28. Notice to Clients, Adverse Parties, and Other Counsel

. . .

28.9. Sworn Statement~~Affidavit~~ Filed with Board. Within ten days after the effective date of the order, the respondent attorney shall file with the Board an affidavit or sworn declaration showing:

. . .

(d) Service of a copy of the affidavit or sworn declaration upon Disciplinary Counsel, which shall include proof of compliance with Section 28.2.

. . .

Section 30. Reinstatement

30.1. No attorney suspended for one year or more or disbarred may resume practice until reinstated by order of the Court~~, except as provided in Section 10.6~~. Any attorney suspended for a fixed period of time less than one year and ~~or for~~ an indefinite period to be determined by the conditions imposed by the judgment may resume practice ~~without reinstatement~~only after filing an affidavit or sworn declaration with the Board showing that the attorney has fully complied with the conditions imposed by the judgment, including the payment of costs incurred by the Board in the prosecution of the preceding disciplinary proceeding and any court costs assessed against the attorney in any appeal from such proceeding. Any other attorney suspended for a fixed period of time less than one year may resume practice upon expiration of the term of suspension.

. . .

TBA RATIONALE FOR PROPOSED CHANGES TO SECTION 30.1: The TBA submits that an attorney who is suspended for less than one year with no additional conditions should continue to be able to resume practice without having to file an affidavit or sworn declaration, as is the case under current Rule 9.

30.4. If it is the decision of the hearing panel that petitioning attorney be reinstated, the Board shall review the record and within sixty days either appeal as provided in Section 33 or transmit to the Court the record of the proceedings before the hearing panel together with its report approving same. The Court will take such action upon the record so transmitted as it deems appropriate. No attorney will be reinstated based upon a hearing panel decision until approved~~except~~ by order of the Court.

30.5. The hearing panel or reviewing court may impose conditions on the petitioning attorney's reinstatement, including, without limitation~~,~~: the making of partial or complete restitution to parties harmed by the petitioning attorney's misconduct which led to the suspension or disbarment; certification by the Board of Law Examiners of the successful completion of an examination for admission to practice; and, the assignment of a practice monitor for the purposes and pursuant to the procedures set forth in Section 12.9. The petitioning attorney shall pay the costs associated with the conditions of reinstatement, including without limitation a reasonable fee to the practice monitor pursuant to the procedures in Section 12.9(d).

. . .

30.8. If the petitioning attorney is found unfit to resume the practice of law, the petition shall be dismissed. If the petitioning attorney is found fit to resume the practice of law, the judgment shall reinstate the petitioning attorney; provided, however that the judgment may make such reinstatement conditional upon the payment of all or part of the costs of the proceeding~~, and upon the making of partial or complete restitution to parties harmed by the petitioning attorney's misconduct which led to the suspension or disbarment; and the reinstatement may be conditioned upon the furnishing of such proof of competency as may be required by the judgment, in the discretion of the Court, which proof may include certification by the Board of Law Examiners of the successful completion of examination for admission to practice. The reinstatement further may be conditioned upon the assignment of a practice monitor for the purposes and pursuant to the procedures set forth in Section 12.9. The petitioning attorney shall pay a reasonable fee to the practice monitor pursuant to the procedures in Section 12.9(d)~~.

TBA RATIONALE FOR PROPOSED CHANGES TO SECTION 30: The TBA suggests that the listed items upon which reinstatement may be conditioned upon need not be repeated in Section 30.8 and that it is cleaner to simply add a reference to restitution in Section 30.5.

Section 31. Expenses, Audit, Reimbursement of Costs

. . .

31.3. Reimbursement of Costs.

(a) In the event that a judgment of disbarment, suspension, public censure, private reprimand, temporary suspension, disability inactive status, reinstatement, or denial of reinstatement results from formal proceedings, Disciplinary Counsel shall within fifteen days from the hearing panel's submission of such judgment pursuant to Section 15.3 make application to the hearing panel for the assessment against the respondent or petitioning attorney of the necessary and reasonable costs of the proceedings, including court reporter's expenses for appearances and transcription of all hearings and depositions, the expenses of the hearing panel in the hearing of the cause, and the hourly charge of Disciplinary Counsel in investigating and prosecuting, and shall serve a copy of such application on respondent or petitioning attorney and the petitioning attorney's counsel of record pursuant to Section 18.2. The application shall be accompanied by an affidavit or sworn declaration and such other documentary evidence as Disciplinary Counsel deems appropriate documenting the hours expended and the costs incurred by Disciplinary Counsel in investigating and prosecuting the complaint or responding to the petition for reinstatement. Such proof shall create a rebuttable presumption as to the necessity and reasonableness of the hours expended and the costs incurred. . . .

. . .

Section 36. Tennessee Lawyer Assistance Program

36.1. Referrals to TLAP.

(a) Pursuant to Rule 33.07(A) of the Rules of the Tennessee Supreme Court, the Board, its hearing panels or Disciplinary Counsel may provide a written referral to TLAP of any attorney who the Board, hearing panel, or Disciplinary Counsel (collectively, "the BPR") determines:

. . .

(5) has exhibited behavior or has engaged in behavior that, in the BPR's determination, warrants consultation and, if recommended by TLAP, further assessment, evaluation, treatment, assistance, or monitoring;~~.~~

. . .

(b) The Executive Director of TLAP shall review any referral by the BPR. If the Executive Director of TLAP deems that assistance and monitoring of an attorney is appropriate, the Executive Director will make reasonable efforts to enter into a Monitoring~~/Advocacy~~ Agreement ("Agreement") with the attorney pursuant to Rule 33.05(E) of the Rules of the Tennessee Supreme Court. If the Executive Director of TLAP determines that TLAP assistance is not appropriate, for whatever reason, the Executive Director shall report that determination to the BPR, without further elaboration and without disclosure of information otherwise confidential under Rule 33.10.

. . .

(d) The BPR will provide written notification to the Executive Director of TLAP of any provision concerning the participation of TLAP included in any proposed order submitted by the BPR to the Court or any other agreement between the respondent attorney and the BPR, informal or otherwise, in which TLAP is required. The Executive Director of TLAP will notify the BPR of any requested modification of the order and may decline involvement. If the Executive Director of TLAP declines involvement of TLAP, the BPR shall not include TLAP's participation in any proposed order submitted to the Court. Neither the BPR nor any hearing panel shall include TLAP in any proposed order submitted to the Court unless TLAP has given notice to Disciplinary Counsel, the hearing panel, or the respondent attorney or respondent attorney's counsel that TLAP will accept involvement in the matter. In any proposed order submitted by BPR to the Court that includes TLAP involvement, the proposed order shall specifically state that TLAP has been consulted and that TLAP has accepted involvement in the matter, and the proposed order shall contain a certificate of service stating the date and manner in which the proposed order was served upon the Executive Director of TLAP.

(e) Pursuant to Rule 33.07-(B) of the Rules of the Tennessee Supreme Court, TLAP will provide the BPR with the following information:

(1) TLAP will notify the BPR of a referred attorney's failure to establish contact with TLAP or enter into a recommended Agreement.

(2) If the attorney enters into an Agreement with TLAP that requires mandatory reporting to the BPR, TLAP will provide a copy of the Agreement to the BPR. Such Agreement will provide for notification by TLAP to

the BPR of substantial non-compliance with any of the terms or conditions of the Agreement. Contemporaneously with any such notification, the Executive Director of TLAP may make such recommendation to the BPR as TLAP deems appropriate.

. . .

TBA RATIONALE FOR PROPOSED CHANGES TO SECTION 36: The TBA has reviewed and agrees with a previously-filed comment submitted by TLAP and has included the substance of that proposal in this submission.

III. THE TBA HAS QUESTIONS OR CONCERNS, BUT NO DEFINITE REVISIONS TO OFFER, REGARDING A FEW ASPECTS OF PROPOSED RULE 9.

Finally, there are just a few aspects of Proposed Rule 9 about which the TBA wishes to raise questions or express some concern. Although the TBA either does not have, or is not in a position presently to offer, any specific proposal in redline form as to any of these aspects of Proposed Rule 9, the TBA does request that the Court undertake further consideration prior to adoption of any new version of Rule 9.

In Section 8.1 of Proposed Rule 9, it would appear that the Proposed Rule is trying to address a particular situation regarding the scope of disciplinary jurisdiction that is suspected not to be covered by the language set forth in existing Tenn. Sup. Ct. R. 9, § 1.1. The TBA, however, does not believe that the language offered by the Court in the first sentence of Section 8.1 appears to be any improvement in terms of providing a clear description of jurisdiction. Without insight into what concern may be driving an attempt to revise the language used in Tenn. Sup. Ct. R. 9, § 1.1, the TBA unfortunately is not in a position to provide an alternative suggestion as to drafting and language. The TBA would request that the Court, whether it opts to reconsider the entirety of the language of the first sentence in Section 8.1 or not, drop the reference to "resignation" as there are no rules that provide for resignation by a lawyer from the

bar and that the Court replace that reference with the term "surrender of law license" consistent with Tenn. Sup. Ct. R. 7 if that is within the scope of what the Proposed Rule 9 intends.

In Section 10 of Proposed Rule 9, the TBA has some significant concerns with the consequences of two aspects of the Court's proposal, including what can be best categorized as concerns involving principles of federalism. Specifically, the TBA's concerns involve Sections 10.7 and 10.8 of Proposed Rule 9 and the impact those provisions would have, both separately and in combination, upon (1) federal judges who have placed their Tennessee license into inactive status; and (2) lawyers licensed in other states and also Tennessee who choose to put only their Tennessee license into inactive status.

Although the TBA acknowledges that Section 10.7 of Proposed Rule 9 is substantively identical to current Section 20.8 of Tenn. Sup. Ct. R. 9, those provisions with respect to the charge of an annual registration fee for inactive lawyers have only quite recently been enacted. The TBA does not recall the enactment being accompanied by any request for public comment from the Court and such provisions should be separately reviewed.

As to lawyers licensed in multiple states, the TBA's concern is one that has clear constitutional dimensions. Tenn. Sup. Ct. R. 8, RPC 5.5(d)(2) rightly provides that a lawyer, not licensed in Tennessee but licensed elsewhere, can practice law in Tennessee if authorized to do so by federal law. This means, for example, that a lawyer who is licensed only in Kentucky can practice in federal court in the Western District of Tennessee without a Tennessee license as long as they comply with the Local Rules of the Western District of Tennessee and either obtain full admission to the bar of the Western District or obtain permission to participate in a particular case. Yet, the proposed Rule 9 would prohibit the same lawyer from doing so if, in addition to being licensed in Kentucky the lawyer also had a Tennessee license but had put their Tennessee

license into inactive status. This different treatment could be the subject of a constitutional challenge, and the TBA is unclear, regardless, of how it is sought to be justified from a policy perspective.[7]

The TBA's concern with the treatment of federal judges who put their Tennessee license into inactive status is less a constitutional question and more a pure policy issue. The TBA wishes only to affirmatively raise the question for the Court's consideration of whether federal judges who put their Tennessee license into inactive status should still be required to pay an inactive status fee, as would be the case under Proposed Rule 9, or whether they should be treated for fee purposes the same as a retired attorney and not subject to such a fee.

In Section 12.2 of the Proposed Rule 9, the TBA has two separate but related concerns to express. The language of Section 12.2 would reduce the flexibility that would otherwise be available for the possibility that the appropriate discipline against a lawyer could involve a suspension where the entirety of the suspension was suspended or probated (*i.e.*, a suspension is imposed but the lawyer is never actively suspended from the practice of law). Even if it were only rare occasions where discipline of that nature would be appropriate, the TBA questions why the possibility should be foreclosed altogether. Second, if the possibility must be foreclosed, the TBA submits that the Court should consider whether to adopt an appropriate black-letter provision that would establish the minimum portion of a suspension that must be actively served, whether set as one day, ten days, thirty days, or some other different minimum number.

Finally, with respect to Section 12.9(c) of Proposed Rule 9, the TBA would ask the Court to consider whether the Court itself, and not the BPR, should be the entity afforded the ultimate

[7] The example offered by the TBA of the problem is just one such example. The constitutional difficulties associated with the Proposed Rule 9 are only magnified by the fact that different treatment would be afforded as to the ability to register as in-house counsel under RPC 5.5(d)(1) and to the ability to undertake any of the temporary services otherwise permitted under RPC 5.5(c).

discretion to determine and assign a practice monitor in the event that a respondent attorney proposes three potential practice monitors to the BPR and all three proposed practice monitors are rejected by the BPR. Otherwise, the mechanics of the procedure would appear to skew too strongly in favor of the BPR by giving it the sole discretion to reject all three proposed candidates and then the ability to make a selection of practice monitor that would be final and not subject to appeal.

CONCLUSION

The TBA strongly believes that the Proposed Rule 9 would, if adopted, be a vast improvement of the organization, architecture, and clarity of an extremely importance process for Tennessee lawyers and the public at large. The TBA likewise strongly believes that the Court's adoption of the TBA's proposed revisions set forth in this Comment will amount to an even further improvement to Tennessee's system of attorney discipline and regulation.

RESPECTFULLY SUBMITTED,

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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.

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TENNESSEE BAR
ASSOCIATION

February 8, 2013

The Honorable Michael Catalano
Clerk, Tennessee Supreme Court
Supreme Court Building, Room 100
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Nashville, TN 37219

IN RE: THE ADOPTION OF AMENDED
TENNESSEE SUPREME COURT
RULE 9, SECTION 29

Dear Mike:

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

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

Very truly yours,

Allan F. Ramsaur
Executive Director

cc: Jackie Dixon, TBA President
Brian Faughnan, Chair, TBA Standing Committee on Ethics & Professional Responsibility
Marissa Combs, Co-Chair, TBA Transition Subcommittee
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IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE: THE ADOPTION OF AMENDED TENNESSEE SUPREME COURT RULE 9

No. M2012-01648-SC-RL2-RL

COMMENT OF THE TENNESSEE BAR ASSOCIATION RE: SECTION 29

The Tennessee Bar Association ("TBA"), by and through its President, Jacqueline B. Dixon; Chair, TBA Standing Committee on Ethics and Professional Responsibility, Brian S. Faughnan, and Co-Chairs of the Transition Subcommittee, Marisa Combs and Hugh Kendall; General Counsel, Paul C. Ney; and Executive Director, Allan F. Ramsaur, in response to this Court's Order entered August 8, 2012, submits the following comment regarding The Adoption of Amended Tennessee Supreme Court Rule 9, Section 29 ("Proposed Section 29"):

The TBA thanks this Court for its timely work on this important issue—the transition procedure when a lawyer disappears, abandons a law practice, dies, or becomes disabled, suspended, or disbarred.[1] One of the TBA's most important current initiatives, begun during President Dixon's bar year, is to serve the attorneys of Tennessee by evaluating and revising the procedures and resources for transitioning a law practice.[2]

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[1] Transition procedure in the event of death, disability, abandonment, or disbarment is partially addressed by the current Rule 9, Section 22, which is patterned after the ABA Model Rule 28.

[2] As this Court is aware, the TBA suffered a great loss in 2011 when Past President Larry D. Wilks, a small-firm practitioner from Springfield, tragically passed away at the age of 56. While his death was unexpected, he was prepared. The fact of his passing influenced the TBA to think carefully about how it can carry his banner of "Serving Every Lawyer Every Day" forward by evaluating Tennessee's succession planning procedures and materials.

A specially organized Transition Subcommittee of the Standing Committee on Ethics and Professional Responsibility of the TBA was formed for this important task ("Subcommittee"). Ms. Dixon and Mr. Faughnan appointed attorneys Marisa Combs and Hugh Kendall to co-chair the Subcommittee. Additional Subcommittee members are Kevin D. Balkwill, Board of Professional Responsibility; William J. (Paz) Haynes, Bone McAllester Norton, PLLC; W. Lewis Jenkins, Jr., Wilkerson, Gauldin, Hayes, Jenkins & Dedmon; and David Wade, Martin, Tate, Morrow & Marston, PC. The Subcommittee began its work in June 2012 by studying the various approaches to succession planning of state bar associations across the country.[3]

The TBA provides some relevant statistics for the Court's consideration. As of September 10, 2012, the Tennessee Board of Professional Responsibility had 20,767 Active Attorneys, 33% of which were over age 55 and 22% of which were over age 60. Thirty percent of those attorneys had practiced over 25 years, and 21.5% had practiced over 30 years. Of the TBA's membership as of September 11, 2012, over 48% were over 55 years of age, 37% were over 60 years of age, 46% had practiced law over 25 years, and 37% had practiced law over 30 years. By a simple review of the numbers, it is apparent that a large quantity of lawyers, particularly those who practice in small firms or as solo practitioners, will need succession plans in the coming years. Like most states, Tennessee needs a comprehensive system for its attorneys to plan for transitioning out of practice.

The TBA's goal is to provide for the protection of client and lawyer interests rather than treat this solely as a lawyer disciplinary/enforcement matter. The TBA not only wants to address what happens when a lawyer becomes disbarred, disappeared, disabled, or deceased, but also to

[3] The National Organization of Bar Counsel and the Association of Professional Responsibility Lawyers appointed a Joint Committee on Aging Lawyers in August 2005 to study the challenges raised by aging lawyers and propose solutions and best practices for attorney grievance committees, bar associations, courts, and the Bar. Using their Final Report, published in May, 2007, as well as other available resources, the TBA set out to quantify the projected need for effective succession planning resources in Tennessee and establish the TBA's goals.

develop a system that will enable lawyers to take steps in advance of such an event in order to provide for continuation of the practice of law.

The TBA and this Court have an interest in ensuring that the process is clear and efficient, serves and protects the clients, and to the extent possible, provides for the lawyer's interests. Because the existing Tenn. S. Ct. R. 9, Section 22, primarily focuses on an inventory of client files, it does not meet the growing needs outlined above. It is being used inconsistently across the state, and thus the Subcommittee already had decided to seek the Court's revision by the time the Court released Proposed Section 29. The TBA also intends to publish materials for lawyers to use in preparing succession plans, including forms, checklists, and how-to guides for transition planning. Further, the TBA plans to develop educational and training materials and promote them state-wide so that lawyers will know how to implement a system and understand the operation of any future Section 29.

In short, the TBA is grateful for this Court's timely work with regard to Proposed Section 29. The draft of Section 29 created by this Court, if adopted, would be a vast improvement upon existing Section 22 of Rule 9. The TBA submits this comment to suggest that the Court instead adopt the TBA's proposed Section 29 only because it believes that it would serve to further improve upon the Court's own proposal. The TBA's comments herein draw from the Subcommittee's review of other states' materials as well as practical considerations from our members' experiences.

As with the Court's proposal, the TBA proposal generally recognizes the need for a clear mechanism for the appointment of a receiver attorney and the need for clearly delineated duties and powers for that person(s); addresses the importance of protecting privilege and confidentiality as to information accessed by the receiver attorney; provides clear authority with

respect to safeguarding and disbursing funds held in trust or otherwise and with respect to taking possession and disposing of client files; and protects those who would serve as receiver attorney from unwarranted exposure to liability.

The TBA believes it was able, working from the Court's own proposal, to address a number of other important issues and further refine some of the concepts recognized in the Court's own original proposal. The TBA's proposal is set out below, with comments and the rationale behind some aspects of the TBA's proposal placed in footnotes to the proposed provisions for the Court's review:

TBA PROPOSAL FOR RULE 9, SECTION 29

Section 29 – Appointment of a Receiver when an Attorney Becomes Unable to Continue the Practice of Law

The purpose of this rule is to protect clients and, to the extent possible and not inconsistent with the protection of clients, to protect the interests of the attorney to whom this rule applies.[4]

29.1 – Appointment of a Receiver Attorney

29.1(a) If an attorney who is licensed and engaged in the practice of law in this state (herein referred to as the "Affected Attorney") has: (1) resigned or been suspended or disbarred from the practice of law; (2) disappeared or abandoned the practice of law; (3) become disabled or incapacitated or otherwise become unable to continue the practice of law; or (4) died, and no partner, associate, executor, or other appropriate successor or representative is capable and available to continue or wind-down the Affected Attorney's law practice, the Board of Professional Responsibility, the Tennessee Bar Association or any local bar association, any

[4] In discussing the workability of Proposed Section 29.1, the Subcommittee sought to avoid ambiguity and thought it prudent to state that the first objective is protecting client interests, thus inserting a completely new purpose statement as revised Section 29.

attorney licensed to practice law in this state, or any other interested person may commence a proceeding in the Chancery, Circuit, or Probate Court for the County in which the Affected Attorney maintained an office for the practice of law for the appointment of an attorney who is licensed to practice law in this state and in good standing with the Board of Professional Responsibility to serve as a Receiver Attorney to wind-down the law practice of the Affected Attorney.[5]

29.1(b) The proceeding shall be commenced by the filing of a complaint setting forth the pertinent facts, which shall be verified or accompanied by the affidavit of a person having personal knowledge of the facts. To the extent practicable, the complaint and any accompanying affidavit shall be served upon the Affected Attorney or the guardian, conservator, or personal representative of the Affected Attorney if one has been appointed and qualified.[6]

29.1(c) If the court determines upon a showing by clear and convincing evidence that the appointment of a Receiver Attorney is necessary to protect the interests of the Affected Attorney's clients or the interests of the Affected Attorney, the court shall appoint one or more Receiver Attorneys. The order of the court may be appealed by the Affected Attorney or by the

[5] The TBA proposes that Section 29.1 provide more detailed guidance with respect to how and when a Receiver Attorney can come to be appointed, the standard of proof necessary, and the duties of the Court, and the TBA feels that placing that information in the same section is preferable. The TBA feels it is preferable to label the lawyer as an "Affected Attorney," as well as define the appropriate jurisdiction for such receivership proceeding. Further, the TBA feels it is appropriate to specifically list the persons or entities with standing to file such receivership proceeding, which may include opposing counsel in a case or any other person with knowledge. The TBA feels that the issues of confidentiality and client funds should be addressed in later sections rather than including them in Section 29.1(a) and recommends that those issues be broken out for the sake of clarity.

[6] The proposed revision set forth in 29.1(b) seeks to clarify the steps for initiating a receivership proceeding.

guardian or personal representative of the Affected Attorney, or by the complainant, in the same manner as any other civil trial court decision.[7]

29.2 – Duties and Authority of a Receiver Attorney

29.2(a) The Receiver Attorney shall: (1) take custody of the files, records, bank accounts, and other property of the Affected Attorney's law practice; (2) review the files and other papers to identify any pending matters; (3) notify all clients represented by the Affected Attorney in pending matters of the appointment of the Receiver Attorney and suggest that it may be in their best interest to obtain replacement counsel; (4) notify all courts and counsel involved in any pending matters, to the extent they can be reasonably identified, of the appointment of a Receiver Attorney for the Affected Attorney; (5) deliver the files, money, and other property belonging to the clients of the Affected Attorney pursuant to the client's directions, subject to the right to retain copies of such files or assert a retaining or charging lien against such files, money, or other property if fees or disbursements for past services rendered are owed to the Affected Attorney by the client; and (6) take such steps as seem indicated to protect the interests of the clients, the public, and, to the extent possible and not inconsistent with the protection of the Affected Attorney's clients, to protect the interests of the Affected Attorney. If the Receiver Attorney determines that conflicts of interest exist between the Receiver Attorney and a client of the Affected Attorney, the Receiver Attorney shall notify the court of the existence of the

[7] The TBA feels that a clear statement of the standard of proof is necessary and will ensure that courts across the state are consistent in their application of Section 29.

conflict of interest with regard to the particular matters and the Receiver Attorney shall take no action with regard to those cases or files.[8]

29.2(b) The order appointing the Receiver Attorney shall specifically authorize the Receiver Attorney to take custody of and act as signatory on any bank or investment accounts, safe deposit boxes, and other depositories maintained by the Affected Attorney in connection with the Affected Attorney's law practice, including trust accounts, escrow accounts, payroll accounts, IOLTA accounts, operating accounts, and special accounts, and to disburse funds to clients of the Affected Attorney or others entitled thereto, and take all appropriate actions with respect to such accounts.[9]

29.2(c) The Receiver Attorney shall take reasonable efforts to safeguard all property in the offices of the Affected Attorney and to collect any outstanding attorney's fees, costs, and expenses to which the Affected Attorney is entitled and shall make appropriate arrangements for the prompt resolution of any disputes concerning outstanding attorney's fees, costs, and expenses.[10]

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[8] The TBA anticipates that 29.2(a), which clearly defines the role of the Receiver Attorney, will better protect the client and Affected Attorney interests. Section 29.2(a) lays out six enumerated duties of the Receiver Attorney and also addresses how the Receiver Attorney should proceed if, after being appointed and beginning to work through the review of files, is determined to have a conflict with respect to particular files of the Affected Attorney.

[9] Section 29.2(b) addresses the potentially thorny issues associated with obtaining access to banking and other accounts, safety deposit boxes, and the like. The TBA has learned of several instances across the state wherein various types of accounts were encountered with some measure of difficulty for the Receiver Attorney. Section 29.2(b) specifically lists the various types of accounts in effort to assist banks and other financial institutions, courts, and Receiver Attorneys with safeguarding client property.

[10] Section 29.2(c) further addresses the Receiver Attorney's responsibility to safeguard all property, including collection of outstanding attorney's fees, costs, and expenses as well as resolving any fee disputes with the Affected Attorney's clients. Sections 29.2(c) and (d) affirmatively address the possibility that the Receiver attorney is stepping into a practice that should continue to have fee payments coming from clients of the Affected Attorney, and

29.2(d) To the extent possible, the Receiver Attorney shall assist and cooperate with the Affected Attorney and the guardian or personal representative of the Affected Attorney in the transition, sale, or winding-down of the Affected Attorney's law practice. The Receiver Attorney may purchase the law practice of the Affected Attorney only upon the court's approval of such sale.[11]

29.2(e) The court may order the Receiver Attorney to submit interim and final accountings, as it deems appropriate. The court may allow or direct portions of any accounting relating to the funds and confidential information of the clients of the Affected Attorney to be filed under seal.[12]

29.3 – Protection of Client Information and Privilege

The appointment of the Receiver Attorney shall not be deemed in any manner to create the relationship of attorney and client between the Receiver Attorney and any client of the Affected Attorney. However, the attorney-client privilege shall apply to all communications by or between the Receiver Attorney and the clients of the Affected Attorney to the same extent as it would have applied to any communications by or to the Affected Attorney, and the Receiver Attorney shall be governed by Rule 1.6 of the Tennessee Rules of Professional Conduct with respect to all

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the need for potential cooperation in winding down a practice, including making clear that a Receiver Attorney cannot purchase the law practice of an Affected Attorney without court approval of any such sale.

[11] Section 29.2(d) contemplates that the Receiver Attorney may often be someone different from the Affected Attorney's guardian or personal representative. As such, Section 29.2(d) recognizes that the practice of law is a business enterprise and that client interests which are protected under Section 29 should be appropriately balanced against the often conflicting or competing interests of the Affected Attorney and her heirs or dependents.

[12] Section 29.2(e) acknowledges the reality that multiple, interim accountings may be necessary and specifically discusses the need for permitting such filings to be made under seal to protect sensitive information about particular clients of the Affected Attorney. In surveying the various approaches to the question of file inventories or accountings, the TBA quickly recognized that the Affected Attorney's financial information should be protected, as well as the confidential information pertaining to sensitive clients (i.e. adoptive parents, clients investigated but never charged with a crime, etc.). To protect the information, Section 29.2(e) allows for it to be filed under seal if ordered by the Court.

information contained in the files of the Affected Attorney's clients and any information relating to the matters in which the clients were being represented by the Affected Attorney.[13]

29.4 – Protection of Client Files and Property

The court shall have jurisdiction over all of the files, records, and property of clients of the Affected Attorney and may make any orders necessary or appropriate to protect the interests of the clients of the Affected Attorney and, to the extent possible and not inconsistent with the protection of clients, the interests of the Affected Attorney, including, but not limited to, orders relating to the delivery, storage, or destruction of the client files of the Affected Attorney.[14]

29.5 – Fees and Expenses of the Receiver Attorney

29.5(a) The Receiver Attorney shall be entitled to reasonable fees in compensation for performance of the Receiver Attorney's duties and reimbursement for actual and reasonable costs incurred by the Receiver Attorney in connection with the performance of the Receiver Attorney's duties. Reimbursable expenses shall include, but not be limited to, the actual and reasonable costs incurred in connection with maintaining the staff, offices, and operation of the Affected Attorney's law practice and the employment of attorneys, accountants, and others

[13] The TBA believes that the importance of affording protection to client information necessitates a separate subsection that would comprehensively address the issue rather than have it partly discussed in multiple sections as in the Court's original proposal. Thus, Section 29.3 proposed by the TBA would make clear that even though the Receiver Attorney and the clients of the Affected Attorney would not be in an attorney-client relationship, all communications between the Receiver Attorney and such clients would be protected as privileged. The Receiver Attorney is subject to RPC 1.6 and must treat all information learned in that role as confidential. Further, the TBA is concerned about appropriately protecting client confidences, making clear to clients that the Receiver Attorney is not their "new lawyer," and limiting the liability of the Receiver Attorney. These concerns are addressed in Sections 29.3, 29.6, and 29.7, which are drafted in such a way as to be compatible.

[14] Section 29.4 as proposed by the TBA is largely similar to the Court's Proposed Section 29.5 because it addresses the Court's jurisdiction over the files being inventoried by the Receiver Attorney and the Court's ultimate ability to authorize arrangements for retaining or destroying files.

retained by the Receiver Attorney in connection with carrying out the Receiver Attorney's duties.

29.5(b) The Receiver Attorney shall file an application for fees and expenses with the court, which shall determine the amount of such fees and reimbursement. The application shall be accompanied by an accounting in a form and substance acceptable to the court of all funds and property coming into the custody of the Receiver Attorney.[15]

29.5(c) Any fees and expenses awarded by the court to the Receiver Attorney shall be paid by the Affected Attorney or the estate of the Affected Attorney or from such other available sources as the court may direct. The order of the court awarding the fees and expenses shall be a judgment against the Affected Attorney or the estate of the Affected Attorney. The judgment shall be a lien upon all property of the Affected Attorney or the estate of the Affected Attorney retroactive to the date of filing of the complaint for the appointment of a Receiver Attorney under this Rule. The judgment lien is subordinate to possessory liens and to non-possessory liens and security interests created prior to its taking effect and may be foreclosed upon in the manner prescribed by law.

[15] While the TBA expects and hopes that many attorneys will be willing to take on the duties of a Receiver Attorney on a pro bono basis, the TBA believes that the potential for a Receiver Attorney to be compensated for the work they perform should be addressed. The TBA desires to provide for reimbursement of the Receiver Attorney for the often substantial work involved in acting as Receiver Attorney where appropriate, recognizing that reimbursement may often be impractical for a variety of reasons. The TBA feels that when a Receiver Attorney seeks such reimbursement, it should be approved by the Court as described in Section 29.5(b) and paid by the Affected Attorney or her estate as set forth in Section 29.5(c). The TBA feels that the Court's award should be reduced to a judgment to enable the Receiver Attorney to reasonably collect against the Affected Attorney or her estate, particularly in the event of a disagreement between the Receiver Attorney and the Affected Attorney or her estate.

29.6 – Limitation of Liability

Any person serving as a Receiver Attorney under this Rule shall be immune from suit for any conduct undertaken in good faith in the course of the official duties of the Receiver Attorney.[16]

29.7 - Employment of the Receiver as Attorney for a Client

A Receiver Attorney shall not, without the informed written consent of the client and the permission of the court, represent a client in a pending matter in which the client was represented by the Affected Attorney, other than to temporarily protect the interests of the client, or unless and until the Receiver Attorney has concluded the purchase of the law practice of the Affected Attorney. Any written consent by the client shall include an acknowledgment that the client is not obligated to use the Receiver Attorney.[17]

29.8 – Advanced Designation of a Receiver or Successor Attorney

An attorney may designate in advance another attorney by contract, appointment, or other arrangement to handle or assist in the continued operation, sale, or closing of the attorney's law practice in the event of such attorney's death, incapacity or unavailability. In the event an attorney to whom this rule applies has made adequate provision for the protection of his or her clients, such provision shall govern to the extent consistent with this Rule unless the court

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[16] The TBA's Section 29.6 would provide immunity from suit for Receiver Attorneys whose conduct is undertaken in good faith. Further, the TBA does not believe the same level of immunity should be extended to persons who may file a petition or otherwise trigger the proceedings that could lead to appointment of a Receiver Attorney given the potential for abuse or process. The TBA considered alternative provisions, including the requirement of liability insurance for the Receiver Attorney as set forth in some states, which could be unworkable if such insurance is not readily available in the marketplace. Finally, the TBA feels the rule should read in such a way that a non-lawyer client or family member of Affected Attorney may understand it on its face, regardless of their familiarity with judicial immunity concepts.

[17] Sections 29.7, 29.8, and 29.9 of the TBA proposal address three issues not addressed in the Court's proposal. Section 29.7 addresses under what circumstances can a client of the Affected Attorney decide to hire someone who was appointed as a Receiver Attorney to act fully as the new attorney for that client.

determines, upon a showing of good cause, that the provisions for the appointment of a Receiver Attorney under this Rule should be invoked. After a complaint for the appointment of a Receiver Attorney has been filed, the Affected Attorney or the guardian, conservator, or personal representative of the Affected Attorney may designate a successor attorney and the court shall respect such designation unless the court determines, upon a showing of good cause, that such designation should be set aside.[18]

29.9 - Effect on Pending Cases

Upon entry of the order appointing a Receiver Attorney, any applicable statute of limitations, deadline, time limit, or return date for a filing as it relates to the clients of the Affected Attorney shall be tolled during the period from the date of the filing of the complaint for the appointment of a Receiver Attorney until the first regular business day that is not less than sixty (60) days after the date of the entry of the order appointing the Receiver Attorney, if it would otherwise expire before the extended date.[19]

[18] The TBA seeks to encourage all attorneys to plan ahead of time for situations such as death or disability. Section 29.8—consistent with the TBA's strong belief that the best way to deal with the important issue of succession planning is to actually plan for it in advance—specifically would authorize such advance designations consistent with the requirements of Section 29. Therefore, Section 29.8 addresses the interplay between Section 29 and contractual succession plans while providing a mechanism for the Court to set the contract aside for good cause.

[19] Section 29.9 seeks to mitigate the time pressure that can be placed upon a Receiver Attorney and further protect the interests of clients of an Affected Attorney by providing a short window of time in which the running of deadlines that would otherwise affect the client of an Affected Attorney are tolled. Revised Section 29.9 would only extend limitations and deadlines beginning the day that the Complaint for a Receiver Attorney is filed.

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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.

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IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE: THE ADOPTION OF AMENDED TENNESSEE SUPREME COURT RULE 9

No. M2012-01648-SC-RL2-RL – Filed: August 8, 2012

RESPONSE TO REQUESTS FOR WRITTEN COMMENTS

These comments are submitted on behalf of the undersigned Assistant Attorney General in response to the August 8, 2012, Order soliciting written comments regarding revisions to Tenn. Sup. Ct. R. 9.

SECTION 2.

DEFINITIONS

Line 23-24: "Order of Enforcement" should be defined.

SECTION 4.

THE BOARD OF PROFESSIONAL RESPONSIBILITY
OF THE SUPREME COURT OF TENNESSEE

Line 123: Add: The duties in this subsection shall not be construed as duties owed to or enforceable by a respondent or petitioning attorney by means of claim, or defense, or otherwise.

Line 133-34: Delete subsection (f) and replace with: (f) The Board may delegate to a committee or panel of its members, or to disciplinary counsel, as the case may be, any administrative duty conferred or imposed by this Rule, including duties stated in Section 4.5(a). [*See* Sections 7.2(b) and 7.3. Note: What is an "administrative duty?"]

SECTION 7.

DISCIPLINARY COUNSEL

Line 254-1: Add : (i) to the extent not otherwise provided by this Rule or an operative order of a hearing panel or court, to monitor compliance with and to implement any condition of probation assigned pursuant to the provisions of Sections 12.9 or 14.

SECTION 12.

TYPES OF DISCIPLINE

Line 514: Add after "substantial harm to the public": or harm to a client, or tribunal, or the legal profession, or the administration of justice,

Line 533: Add after "shall be set for immediate hearing": ,which hearing, at the discretion of disciplinary counsel, or the Chair, or the Vice-chair of the Board, may be heard by either. Strike "before."

Line 571: Add after "of Reinstatement": or other operative order of a hearing panel or court,

Line 579: Add: The practice monitor shall make periodic reports to disciplinary counsel at such times or intervals as may be prescribed by disciplinary counsel and as also as deemed necessary or desirable by the practice monitor.

Line 579: Add: An Order of Enforcement or other operative order defining the duties and responsibilities of a practice monitor shall constitute "other law" within the meaning of Tenn. Sup. Ct. R. 8, RPC 1.6(c)(3).

Line 606: The term "hearing panel" requires clarification as to its composition and how it is to be selected.

SECTION 14.

PROBATION

Line 676: Add: A respondent or petitioning attorney at all times must comply with any condition of probation contained in the judgment of a hearing panel or court as interpreted and implemented by the Board, disciplinary counsel, or a practice monitor, as the case may be, or, in the alternative, may elect to serve the entire fixed period of suspension in a non-probationary status. In the event that the respondent or petitioning attorney should disagree with or need clarification of any such interpretation or implementation, the respondent or petitioning attorney may request in writing to the Board a clarification or modification. The Board shall respond promptly in writing. The decision of the Board shall be final and non-appealable.

Line 680: The term "panel of the Board" requires specification as to composition.

Note: Because of the time required to implement and make executory the provisions of subsections (b) and (c), they are of little or no utility if the period of probation is short, especially if a respondent attorney appeals the ruling of a panel of the Board. Also, the rule does not state what a panel of the Board or the Supreme Court may do to address the period of time during which the respondent was in violation. Is the period of fixed suspension to be extended by the period of the violation? The rule should state, at least in general terms, the discretion that a panel of the Board or the Supreme Court may exercise to formulate in appropriate cases a penalty for the violation.

SECTION 15.

INITIATION, INVESTIGATION, AND HEARING

Line 701: Add after "original complaint": and shall open an investigative file.

Line 704: Add: If a complaint is submitted by or based upon the personal knowledge of disciplinary counsel, a board member, or a district committee member, such person is a potential witness and is disqualified from any further involvement in the investigation, prosecution, or disposition of such complaint, except in the capacity of a witness.

Line 745: Add: The complainant has no other or further right of appeal or review under this Rule or otherwise.

Line 753: Strike "instituted" and substitute "commenced"

Line 753: Add before "Board": executive secretary for the

Line 779-782: Replace existing text with the following: Before Disciplinary Counsel files the petition with the executive secretary, the matter shall be assigned to a hearing panel comprised of members of the district committee in the district in which the respondent practices law. Members of the hearing panel shall be selected on a revolving basis in accordance with written procedures adopted and designed by the Board to ensure impartiality. (This solves a confidentiality issue and prevents *ex parte* contact among members of the Board, disciplinary counsel, staff, and potential hearing panel members after a petition is filed.)

SECTION 17.

IMMUNITY

Line 971: Add after "staff": and probation monitors

Line 972: Add after "duties.": The immunity granted in this section shall not be construed to limit any other form of immunity available to any covered person.

SECTION 32.

CONFIDENTIALITY

Line 1667: Add after "Section 15.2": (a) and a hearing panel for such proceeding is assigned pursuant to Section 15.2(d).

Line 1668: Add after "requests": in writing submitted to disciplinary counsel or the Board

Line 1703-1705: Delete and replace with: except that: (1) in the event of any of the circumstances set forth in Section 32.1(a)-(e), disciplinary counsel may disclose the pendency, general subject matter, and status of the matter; (2) disciplinary counsel may disclose such information which, in the discretion of disciplinary counsel, is necessary to be disclosed to fulfill disciplinary counsel's duty to investigate complaints; and (3) the Board or disciplinary counsel, as the case may be, may disclose such information, which, in their discretion, is necessary to be disclosed to make a meaningful referral to TLAP pursuant to Section 36.1.

SECTION 34.

ADDITIONAL RULES OF PROCEDURE

Line 1796: Add after "hearing panel": and become applicable upon the commencement of formal disciplinary proceedings under Section 15.2.

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IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE: THE ADOPTION OF AMENDED TENNESSEE SUPREME COURT RULE 9

No. M2012-01648-SC-RL2-RL

ORDER

By Order entered August 8, 2012, the Court solicited public comment on the above-styled proposal and established February 8, 2013 as the deadline for submitting written comments. The Board of Professional Responsibility submitted comments prior to this deadline. On March 28, 2013, the Board filed a motion for permission to late file supplemental comments on the above-styled proposal, together with its supplemental comments. Upon due consideration, the Board's motion is granted and the supplemental comments are deemed filed. This Order shall be posted to the Court's website.

PER CURIAM

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE: THE ADOPTION OF AMENDED TENNESSEE SUPREME COURT RULE 9	))))	**No. M2012-01648-SC-RL2-RL**

SUPPLEMENTAL COMMENTS OF THE BOARD OF PROFESSIONAL RESPONSIBILITY TO PROPOSED AMENDMENTS TO TENN. SUP. CT. R. 9

The Board of Professional Responsibility of the Supreme Court of Tennessee ("Board"), pursuant to the Order filed August 8, 2012, respectfully submits the following supplemental rule changes and comments.

The Board appreciates the consideration and comments by the Tennessee Bar Association regarding proposed changes to Tenn. Sup. Ct. R. 9. The Board responds herein to two comments made by the Tennessee Bar Association. The lack of reference to any other comment made by the Tennessee Bar Association is not intended as an endorsement of nor opposition to those comments.

Rule 9. Disciplinary Enforcement.

Section 15. The Tennessee Bar Association proposed as follows:

> (g) If Disciplinary Counsel recommends disposition by private informal admonition <u>or private reprimand,</u> and if that recommended disposition is approved by the reviewing member of the district committee in the

appropriate disciplinary district, and if the respondent attorney does not demand a formal hearing, then the complainant shall be provided notice that the complaint has been resolved in a manner that is confidential under Section 32. This same notice will be provided to the complainant in the event of disposition by private reprimand. The complainant has no right to appeal a disposition by private informal admonition or private reprimand under this Section.

Comment: The Tennessee Bar Association has proposed that "private reprimand" be inserted in and added to Sec. 15(g). The addition of "private reprimand" in this section is inconsistent with the structure of the disciplinary process provided by these rules. The addition of a "private reprimand" to this section would reflect that "private reprimand...is approved by the reviewing member of the district committee..." A recommendation of a private reprimand is not reviewed by a district committee member. A recommendation of private informal admonition is reviewed by a district committee member. See Sec. 6.3 and 15.1(g). A recommendation for private reprimand is reviewed by the Board of Professional Responsibility. See Sec. 15.1(d). If the intent of the addition is to provide for notice to complainants who file complaints which result in private reprimand, the change could be made in Sec. 15.1(d).

Section 15.3. The Tennessee Bar Association proposed as follows:

(b) The hearing panel~~Board~~ shall file its findings and judgment with the Board and immediately serve a copy ~~of the hearing panel's findings and judgment~~ upon Disciplinary Counsel and the respondent attorney's counsel of record (or ~~and~~ the respondent attorney if unrepresented)~~'s counsel of record~~ pursuant to Section 18.2. There shall be no petition for rehearing. Any appeal pursuant to Section 33 must be filed within sixty days of the entry of the hearing panel's judgment.

Comment: The Board opposes a requirement that the hearing panel serve copies of their judgment to the parties. Hearing committee members are volunteers who serve an important function. The filing and serving of findings and judgment are administrative tasks which can be performed by individuals employed by the Board.

Section 32.1. All matters, investigations, or proceedings involving allegations of misconduct by or the disability of an attorney, including all hearings and all information, records, minutes, files or other documents of the Board, district committee members and Disciplinary Counsel shall be confidential and privileged, and shall not be public records, until or unless:

(a) A recommendation for the imposition of public discipline, without the initiation of a formal disciplinary proceeding pursuant to Section 15.2, ~~is filed with the Court by the Board;~~ or

Comment: When the Board imposes public discipline without the initiation of a formal disciplinary proceeding, that public discipline is not filed with the Court by the Board.

Section 34.3. (a) Except as otherwise provided in this rule, the Tennessee Rules of Civil Procedure and the Tennessee Rules of Evidence apply in disciplinary case proceedings before the hearing panel.

(b) Regardless of the forum in which the proceeding is pending, Disciplinary Counsel's work product shall not be required to be produced, nor shall a member of the

hearing panel or the Board, the Chief Disciplinary Counsel, or the staff be subject to deposition, including Tenn.R.Civ.P.30.02(6) depositions, or compelled to give testimony, unless ordered by the trial court upon a showing by the requesting party of substantial need and an inability to obtain substantially equivalent materials by other means without undue hardship during an appeal pursuant to Section 33.

Comment: This proposed change clarifies that the prohibitions provided in the rule are applicable in proceedings before a hearing panel as well as trial court. Without the added language, it might be asserted that the prohibitions are not applicable in proceedings before the hearing panel.

Respectfully submitted,

Lela Hollabaugh By SG w/permission

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CERTIFICATE OF SERVICE

I certify that the foregoing has been mailed to Allan F. Ramsaur, Esq., Executive Director, Tennessee Bar Association, 221 4th Ave. N., Ste. 400, Nashville, Tennessee, 37219, by U.S. mail, on this the 28th day of March, 2013.

Lela Hollabaugh By SG w/ permission

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June 12, 2013

VIA EMAIL & U.S. MAIL

Mr. Michael W. Catalano, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

Re: Comment of The Knoxville Bar Association
Regarding the Proposed Amendment to Rule 8, RPC 8.4

Dear Mr. Catalano:

Pursuant to the Supreme Court's Order soliciting comments on additional revisions to Supreme Court Rule 9, the Knoxville Bar Association respectfully submits this comment in support of the adoption of Rule 9, Section 29 regarding the appointment of a receiver when an attorney becomes unable to continue the practice of law.

The Knoxville Bar Association, through its Professionalism Committee, has studied this issue for a number of years and actively participated in helping to draft the previous version of the rule. The Professionalism Committee and the Board of the Knoxville Bar Association have carefully reviewed the new proposed draft of Section 29 and find that it satisfies the primary concerns raised by the KBA in its previous submissions, including the method by which an interested party may commence a proceeding seeking the appointment of a receiver and the limitation of liability for the receiver.

It is the position of the Knoxville Bar Association that the Court may wish in the future to consider what other sources of funding may be available to compensate a receiver. Section 29.6(c) provides that the fees and expenses shall be paid by the affected attorney or from such other available sources; however, the next sentence says the order awarding fees and expenses shall be a judgment against the affected attorney or the estate, which would seem to be preclude fees and expenses being awarded from another available source.

Sincerely yours,

Heidi A. Barcus

Heidi A. Barcus, President
Knoxville Bar Association

cc: Hon. John Weaver, Co-Chair, KBA Professionalism Committee
Garry Ferraris, Co-Chair, KBA Professionalism Committee