BOARD OF PROFESSIONAL RESPONSIBILITY
of the
SUPREME COURT OF TENNESSEE

SANDY L. GARRETT
CHIEF DISCIPLINARY COUNSEL
KRISANN HODGES
DEPUTY CHIEF DISCIPLINARY COUNSEL - LITIGATION
JAMES A. VICK
DEPUTY CHIEF DISCIPL INARY COUNSEL - INVESTIGATION
ETHICS COUNSEL
BEVERLY P. SHARPE
CONSUMER COUNSEL DIRECTOR

10 CADILLAC DRIVE, S UITE 220
BRENTWOOD, TENNESSEE 37027
(615) 361-7500
(800) 486-5714
FAX: (615) 367-2480
ethics@tbpr.org
www.tbpr.org

KEVIN D. BALKWILL
ELIZABETH C. GARBER
PRESTON SHIPP
EILEEN BURKHALTER SM ITH
RACHEL L. WATERHOUSE
A. RUSSELL WILLIS
DISCIPLINARY COUNSEL

M2012-1648-SC-RL2-RL

May 31, 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 Second Supplemental Comments of the Board of Professional Responsibi lity to Proposed Amendments to Tenn. Sup. Ct. R. 9 .

Respectfully,

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 Directo r
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

SECOND 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 this Court's Order filed April 18, 2013, respectfully submits the following comments to proposed Tenn. Sup. Ct. R. 9.

Rule 9. Disciplinary Enforcement.

Section 2. Definitions

Serious crime: The term "serious crime" as used in Section 22 of this Rule shall include any felony ~~under~~as defined by the laws of Tennessee[1] 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

[1] Green font indicates the Board's most recent proposed changes. Red and blue font indicates prior changes to the proposed Rule.

Lisa Marsh - RE: Second Supplemental Comments of the BPR to Proposed Amendments to Rule 9

From:	Julie Turner <JTurner@tbpr.org>
To:	Lisa Marsh <Lisa.Marsh@tncourts.gov>, Lisa Hazlett-Wallace <lhazlett@tnc...
Date:	05/31/2013 2:51 PM
Subject:	RE: Second Supplemental Comments of the BPR to Proposed Amendments to Rule 9
CC:	Sandy Garrett <sgarrett@tbpr.org>
Attachments:	Cover Letter 2nd Supplemental Comments Rule 9 5-31-13.pdf; Rule 9 2nd Supplemental Comments to SC Rule 9 5-31-2013.pdf

Attached please find the Second Supplemental Comments of the Board of Professional Responsibility to Proposed Amendments to Tenn. Sup. Ct. Rule 9. Also attached is a cover letter to Chief Clerk Michael Catalano.

Respectfully,

Julie Turner
Executive Assistant to Chief Disciplinary Counsel
Board of Professional Responsibility
of the Supreme Court of Tennessee
10 Cadillac Drive, Suite 220
Brentwood, TN 37027
Phone: 1-615-361-7500, ext. 209 or 1-800-486-5714
Fax: 1-615-367-2480
Email: jturner@tbpr.org

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**

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income tax returns, willful tax evasion, deceit, bribery, extortion, misappropriation, theft, or an attempt or a conspiracy or solicitation of another to commit a "serious crime."

Comment: The Board concurs with the Tennessee Bar Association and respectfully suggests that serious crimes should not be restricted to felonies defined by Tennessee law. Attorneys are regularly convicted of felonies in Federal Court and the definition should clearly include those charges.

Section 7. Disciplinary Counsel

7.3(d): To investigate and to present in a timely manner all proceedings with respect to petitions for reinstatement of suspended or disbarred attorneys or attorneys transferred to inactive status because of disability, or with respect to petitions for voluntary surrenders of law licenses before hearing panels, **panels** the Board, trial courts, and the Court.

Comment: Panels as defined in Section 2 of this Rule hear petitions to dissolve temporary suspensions pursuant to Section 12.3 and therefore should be included in this section.

Section 9. Multijuridictional Practice

9.3(a): Hearing panel **and 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: This provision should include panels as defined in Section 2 of this Rule which hear petitions for temporary suspension pursuant to Section 12.3.

~~**(c) UThe trial court shall file in the Nashville office of the Clerk of the Supreme Court a Notice of Submission with an attached copy of an unappealed final trial court judgment disbarring or suspending 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 deleting Section 9.3(c) since the same requirements are reflected in Section 15.4(d).

Section 10. Periodic Assessment of Attorneys

Section 10.2 There shall be exempted from the application of this rule:…

(b): Retired attorneys.

Comment: The Board currently defines "retired" as an attorney who is 65 years of age or older; or who is 50 years of age or older and inactive with the Tennessee Commission on Continuing Legal Education & Specialization and has not practiced law for 15 years or more. Other jurisdictions simply define "retired" as an attorney 62 years of age or older, neither holding judicial office or engaged in the practice of law. The Board and attorneys would benefit from the Court's including a definition of "retired" in Section 2 of this Rule.

Section 10.5: The Board **monthly**~~**periodically**~~ shall compile lists of attorneys who have failed to timely pay the annual registration fee required by Section 10.1 or have failed to timely file the annual registration statement required by Section 10.3. The Board shall send to each attorney listed thereon an Annual Registration Fee/Statement Delinquency Notice (the "Notice"). The Notice shall state that the attorney has failed to timely pay the annual registration fee required by Tenn. Sup. Ct. R. 9, Section 10.1, or has failed to timely file the annual registration statement required by Tenn. Sup. Ct. R. 9, Section 10.3, and that the attorney's license therefore is subject to suspension pursuant to Tenn. Sup. Ct. R. 9, Section 10.6. The Notice shall be sent to the attorney by a form of United States mail providing delivery confirmation, at the primary **or preferred** 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 respectfully suggests "periodically" be replaced with "monthly" which is the frequency by which the Board compiles these lists of attorneys who have failed to timely pay their registration fee. Tenn. Sup. Ct. R. 43, which was amended on February 20, 2013, uses the term "preferred" address when referring to an attorney's address. The Board's registration database and annual registration statements sent to all attorneys use the term "primary" address. Adding the phrase "or preferred" makes the terminology in Tenn. Sup. Ct. R. 43 and this Rule consistent.

Section 10.6(e): An attorney suspended by the Court pursuant to Subsection (c) and whose suspension continues for one year or more must seek reinstatement under Section 30.

Comment: The Board's registration records reflect that 375 attorneys have been suspended for nonpayment of the registration fee for one year or more and then reinstated. While requiring those attorneys who have been suspended for one year or more for nonpayment of the registration fee to have a reinstatement proceeding will document by Order the attorney's reinstatement, it will slow the reinstatement process. Additionally, those reinstatement proceedings will require hearings necessitating time and expenses for Disciplinary Counsel and Hearing Panels.

Section 10.8 Upon the Board's written approval of an application to assume inactive status, the attorney shall be removed from the roll of those classified as active until and unless the attorney requests and is granted reinstatement to the active rolls. Reinstatement following inactive status which continues for a period of less than one year shall not require a reinstatement proceeding pursuant to Section 30 or an order of the Court. Reinstatement following inactive status which continues for a period of one year or more shall require a reinstatement proceeding pursuant to Section 30 and an order of the Court. ~~**Reinstatement shall be granted unless the attorney is subject to an outstanding order of suspension or disbarment or has been on inactive status for five years or more, upon the payment of any assessment in effect for the year the**~~

~~request is made and any arrears accumulated prior to transfer to inactive status.~~ Reinstatement following inactive status which continues for a period of one year or more shall require a reinstatement proceeding pursuant to Section 30 and an order of the Court. ~~Attorneys who have been suspended or on inactive status for over five years before filing a petition for reinstatement to active status may be required, in the discretion of the Court, to establish proof of competency and learning in law which proof may include certification by the Board of Law Examiners of the successful completion of an examination for admission to practice subsequent to the date of suspension or transfer to inactive status.~~

Comment: The Board respectfully proposes striking this sentence since it appears to be inconsistent with the remainder of this section.

12.2. (a) **Suspension**. Suspension generally is the removal of an attorney from the practice of law for a specified minimum period of time. Suspension may be for a~~n~~ ~~appropriate~~ fixed period of time, ~~or or~~for a~~n appropriate~~ fixed period of time and an indefinite period to be determined by the conditions proposed by the judgment.

~~(1) A suspension, or for an indefinite period to be determined by the conditions required for reinstatement under the Rule.~~ **The imposition of a portion but not all of a suspension for a fixed period of time may be deferred in conjunction with a period of probation pursuant to Section 14. A suspension order must result in some cessation of the practice of law for not less than 30 days.**

(1) No attorney suspended under any Section of this Rule shall resume practice until reinstated by order of the Court. **Except as otherwise provided in this Rule, ~~A~~ a** suspension **~~imposed under any Section of this Rule and~~** which continues for a period of less than one year shall not require proof of rehabilitation or a reinstatement proceeding pursuant to Section 30; a suspension imposed under any Section of this Rule and which **~~continues~~ removes an attorney from the practice of law** for a period of one year or more shall require proof of rehabilitation to be demonstrated in a reinstatement proceeding pursuant to Section 30.

(2) No suspension shall be ordered for a specific period less than thirty days or in excess of five years.

(3) All suspensions regardless of duration shall be public and shall be subject to the provisions of Section 28, unless otherwise expressly provided in this Rule.

~~(4) The imposition of a portion but not all of a suspension for a fixed period of time may be deferred in conjunction with a period of probation ordered pursuant to Section 14. A suspension order must result in some cessation of the practice of law.~~

(b) No suspension shall be made retroactive, except that a suspension may be made retroactive to a date on which an attorney was temporarily suspended pursuant to Section 12.3 or Section 22 if the attorney was not subsequently reinstated from such temporary suspension.

Comment: The Board proposes striking the language creating the possibility of an indefinite suspension since that creates the possibility of an inconsistency with the minimum suspension period of 30 days set forth in 12.2(a)(2). The Board's proposed

revisions to Section 12 reconfigure some of the existing language while adding the provision that the cessation of the practice of law "may not be for a period less than 30 days." This proposed added language is consistent with the minimum period of suspension as provided in Section 12.2(a)(2).

Section 12.5 Private Reprimand. Private reprimand is a form of non-public discipline which declares the conduct of the attorney improper, but does not limit the attorney's privilege to practice law. A private reprimand may be imposed when there is harm or risk of harm to the client**, public, legal system or the profession,** and the respondent attorney has previously received a private informal admonition for the same **or similar** misconduct and repeats the misconduct; or, when there are several similar acts of minor misconduct within the same time frame, but relating to different ~~**clients**~~ **matters.**

Comment: The ABA Standards for Imposing Lawyer Sanctions which Hearing Panels are required to consider pursuant to Section 15.4(a) provide that discipline may be imposed as a result of harm or potential harm to the public, legal system or profession. The Board's suggested changes broaden the otherwise restrictive definition of a private reprimand.

Section 12.6 Private Informal Admonition. Private informal admonition is a form of non-public discipline which declares the conduct of the attorney improper, but does not limit the attorney's privilege to practice law. Private informal admonition may be

imposed when there is harm or risk of harm to the client**, public, legal system or the profession,** but the misconduct appears to be an isolated incident or is minor.

Comment: The ABA Standards for Imposing Lawyer Sanctions which hearing panels are required to consider pursuant to Section 15.4(a) provide that discipline may be imposed as a result of harm or potential harm to the public, legal system or profession.

12.7. **Restitution.** Upon order of a hearing panel, panel or court, or upon stipulation of the parties, and in addition to any other type of discipline imposed, the respondent attorney may be required to make restitution to persons or entities financially injured as a result of the respondent attorney's misconduct. In the event that a person or entity financially injured as a result of the respondent attorney's misconduct has received any payment from the Tennessee Lawyers' Fund for Client Protection, the order or stipulation shall provide that the Fund shall be reimbursed to the extent of such payment by the Fund.

Comment: Panels as defined in Section 2 may also order restitution in hearings on temporary suspensions pursuant to Section 12.3. The Board suggests adding language similar to the provision in Section 13 creating a mechanism for the Board to reinstitute proceedings should the attorney fail to comply with the conditions imposed.

Section 12.8 Upon order of a hearing panel, **panel** or court, or upon stipulation of the ~~parties~~respondent attorney and Disciplinary Counsel 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. **If a respondent attorney fails to fully comply with the conditions placed upon the public discipline imposed, the Board may reopen its disciplinary file and conduct further proceedings under those rules.**

Comment: Panels as defined in Section 2 may also impose conditions in hearings on temporary suspensions pursuant to Section 12.3. The Board suggests adding language in Section 12.8 similar to the provision in Section 13 which creates a mechanism for the Board to reinstitute proceedings should the attorney fail to comply with the conditions imposed.

Sections 12.9 Practice Monitors.

(a) If a practice monitor is required as a condition of public discipline pursuant to Section 12.8, or as a condition of probation pursuant to Section 14, or as a condition of reinstatement pursuant to Section 30, the judgment or order of the hearing panel, **panel** and the Order of Enforcement, ~~or~~ Order of Reinstatement, or other judgment or order of the reviewing court shall specify the duties and responsibilities of the practice monitor.

(b) The duties and responsibilities of a practice monitor may include, but shall not be limited to, supervision of the respondent or petitioning attorney's compliance with any conditions of discipline, probation, or reinstatement; and, the respondent or petitioning attorney's compliance with trust account rules, accounting procedures, office management procedures, 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, panel or reviewing court determines to be appropriate and consistent with the violation(s) for which the respondent or petitioning attorney was disciplined. 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

Comment: The Board respectfully suggests Section 12.9 should be amended to allow panels as defined in Section 2 to recommend practice monitors and/or impose conditions pursuant to Section 12.3(d) during hearings on temporary suspensions.

Section 12.9(d) The respondent or petitioning attorney shall be responsible for and shall pay a reasonable fee to the practice monitor, and the payment of such fee shall be a condition of reinstatement pursuant to Section 30. The practice monitor ~~**shall**~~**may** make application to the Board **Chair** for an award of fees and shall file with the application an affidavit or a declaration under penalty of perjury and such other documentary evidence as the practice monitor deems appropriate documenting the hours expended and the fees incurred, and shall serve a copy of the same on the respondent or petitioning attorney. Such proof shall create a rebuttable presumption as to the necessity and reasonableness of the hours expended and the fees incurred. The respondent or petitioning attorney may within fifteen days after the practice monitor's application submit to the Board and serve on the practice monitor any response in opposition to the application for an award of fees. The burden shall be upon respondent or petitioning attorney to prove by a preponderance

of the evidence that the hours expended or fees incurred by the practice monitor were unnecessary or unreasonable. The practice monitor or the respondent or petitioning attorney may request a hearing before a ~~hearing p~~**Pp**anel in which event, the ~~hearing p~~**Ppane**l shall promptly schedule the same. The ~~hearing p~~**Pp**anel shall within fifteen days from the conclusion of such hearing submit to the Board its findings and judgment with respect to the practice monitor's application for the award of fees. There shall be no petition for rehearing. The Board shall review the Panel's findings and judgment and shall either enter the **Pp**anel's judgment or modify the same and enter judgment as modified. In the event no hearing is requested, the Board shall within fifteen days from the date on which the respondent or petitioning attorney's response is due or is submitted, whichever is earlier, enter a judgment with respect to the practice monitor's application for the award of fees. There shall be no other or further relief with respect to an application for the award of practice monitor fees. Nothing herein shall prohibit the practice monitor from providing these services pro bono.

Comment: Revising this language from "shall" to "may" is consistent with the recently added provision in the last sentence in Section 12.9(d) allowing practice monitors to provide these services pro bono. The Board suggests that the practice monitor's application may not require consideration by the entire Board and instead could be reviewed by the Board Chair.

~~(a)~~**Section 14.1** **Probation.** In the discretion of the hearing panel, **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. 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. Subject to Section 36.1(d), the hearing panel, **panel** or reviewing court may require the respondent attorney to enter into a monitoring agreement with the Tennessee Lawyer Assistance Program requiring mandatory reporting to Disciplinary Counsel. The hearing panel, **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.

Comment: A panel as defined in Section 2 may consider probation regarding reinstatement of an attorney temporarily suspended pursuant to Section 12.3(d).

Section 15.2. (d) Following the service of the answer to the Petition, or upon failure to answer, the matter shall be assigned by the Chair of the Board to a hearing panel. ~~In assigning the members of~~The Chair of the Board, or in the absence of the Chair the Vice-Chair of the Board, shall select 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~~; i~~. The hearing panel shall be selected pursuant to written procedures approved by the Board. If there is an insufficient number of committee members in that

district who are able to serve on the hearing panel, the Chair, or **Vice-Chair** ~~its designee~~ may appoint one or more members from the district committee of an adjoining district to serve on the panel.

Comment: The Board suggests changing "designee" to Vice-Chair consistent with the similar revision to Section 15.2(d).

Section 15.3. (a) In every case, the hearing panel shall submit its findings and judgment, in the form of a final decree of a trial court, to the Board within thirty days after the conclusion of the hearing. The hearing panel's findings and judgment shall contain a notice that the findings and judgment may be appealed pursuant to Section 33. **The Executive Secretary shall serve a**~~A~~ copy of the hearing panel's findings and judgment~~**shall be served**~~ upon Disciplinary Counsel, the respondent attorney and the respondent attorney's counsel of record pursuant to Section 18.2. The hearing panel may make a written request to the Chair for an extension of time within which to file its findings and judgment. In the event that the hearing panel does not submit its findings and judgment within thirty days or such other time as extended by the Chair, Disciplinary Counsel shall report the same to the Court. The failure of the hearing panel to meet this deadline, however, shall not be grounds for dismissal of the Petition.

~~(c) I~~However, if the Board makes application to the hearing panel for the assessment of costs pursuant to Section 31, ~~any appeal pursuant to Section 33 must be filed within sixty days of the entry of the hearing panel's judgment on the application~~the

making of such application shall **not** extend the time for taking steps in the regular appellate process under Section 33.1(a).

Comment: Specifying that the Executive Secretary will serve the Hearing Panel's finding and judgment clarifies who has the duty created in Section 15.3(a). The Board respectfully suggests amending Section 15.3(b) so the cost proceeding does not extend the time for filing an appeal, similar to Tenn.R.Civ.P. 54.04 regarding discretionary costs.

Sections 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 **or received a Public Censure** ~~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 **or a Public Censure**~~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~~in the Nashville office of the Clerk of the Supreme Court a Notice of Submission with attached 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~~A copy of the proposed Order of Enforcement and the Protocol Memorandum shall be served upon the respondent attorney and the respondent attorney'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 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 proceeding be prepared and filed with the Court for its consideration.

(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 **or imposing a Public Censure** ~~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~~file in the Nashville office of the Clerk of the Supreme Court a Notice of Submission with an attached copy of its judgment, and the Court shall enter an Order of Enforcement of said decree.

Comment: Public censures should also be included in Section 15.4(b) and (d) with suspensions and disbarments since Section 15.4(a) permits Hearing Panels to impose public censures.

Section 17. Immunity Members of the Board, district committee members, Disciplinary Counsel ~~and~~, staff, and practice monitors 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~~. The immunity granted in this Section shall not be construed to limit any other form of immunity available to any covered person.

Comment: The Board concurs with the Tennessee Bar Association in the belief that deleting this language would have a chilling effect on immunity otherwise provided to complainants and witnesses.

Section 18. Service

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

Comment: Tenn. Sup. Ct. R. 43, which was amended on February 20, 2013, uses the term "preferred" address when referring to an attorney's address. The Board's registration database and annual registration statements sent to all attorneys use the term "primary" address. Adding the phrase "or preferred" makes the terminology in Tenn. Sup. Ct. R. 43 and this Rule consistent.

19.2. Subpoenas **issued prior to formal proceedings** shall clearly indicate on their face that the subpoenas are issued in connection with a confidential investigation under this Rule and that it may be regarded as contempt of the Court or grounds for discipline under this Rule for a person subpoenaed to in any way breach the confidentiality of the investigation. The scope of the confidentiality of the investigation shall be governed by Section 32. It shall not be regarded as a breach of confidentiality for a person subpoenaed to consult with an attorney.

Comment: This proposed added language clarifies that only subpoenas issued prior to formal proceedings are confidential.

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 **in writing**. Upon being informed that an attorney 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~~shall file in the Nashville office of the Clerk of the Supreme Court a Notice of Submission with an attached copy of such disciplinary order.

Comment: Attorneys should provide Disciplinary Counsel with written notice of their receipt of discipline in other jurisdictions.

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

26.~~2~~3. Upon receipt of the list of attorneys transmitted by the Department of Revenue, the Chief Disciplinary Counsel shall send each attorney listed thereon a Privilege Tax Delinquency Notice (the "Notice"), stating that the Department of Revenue has informed the ~~Board~~Chief Disciplinary Counsel that the attorney has failed, for two or more consecutive years, to pay the privilege tax imposed by Tenn. Code Ann. § 67-4-1702 and that the attorney's license is therefore subject to suspension. The Notice shall be sent to the attorney by a form of United States mail providing delivery confirmation, at the primary **or preferred** 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.

26. ~~3~~4. (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~~file in the Nashville office of the Clerk of the Supreme Court a Notice of Submission with an attached copy of 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~~Chief Disciplinary Counsel 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~~Chief Disciplinary Counsel 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).

(c) Upon the Court's review and approval of the proposed Suspension Order, the Court will file the Order summarily suspending the license to practice law of each attorney listed in the Order. The suspension shall remain in effect 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 the Two Hundred Dollar ($200.00) reinstatement fee~~, and until the attorney is reinstated pursuant to Subsection (d). An attorney who fails to resolve the suspension within thirty days of the Court's filing of the Suspension Order shall comply with the requirements of Section 28.

Comment: Tenn. Sup. Ct. R. 43, which was amended on February 20, 2013, uses the term "preferred" address when referring to an attorney's address. The Board's registration database and annual registration statements sent to all attorneys use the term "primary" address. Adding the phrase "or preferred" makes the terminology in Tenn. Sup. Ct. R. 43 and this Rule consistent.

Deleting the $200 reinstatement fee in Section 26.4 would result in a $7,800 loss of revenue to the Board[2]. Additionally, deleting the $200 reinstatement fee in this Rule is inconsistent with penalties for continuing legal education set forth in Tenn. Sup. Ct. R. 21, Section 7.04 and penalties for IOLTA included in Tenn. Sup. Ct. R. 43, Sections 15 and 16.

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

28.1. Effective Date of Order. Orders imposing disbarment, suspension, transfers to disability inactive status, are effective on a date ten days after the date of the order, except for **temporary suspensions and administrative suspensions for non-payment of the Board's annual registration fee; IOLTA non-compliance; failure to**

[2] The $7,800 amount is based on information from the Board's 2012 registration numbers.

pay the Professional Privilege Tax; and non-compliance with continuing legal education requirements. ~~and temporary suspensions where the Court finds that immediate disbarment, suspension, or temporary suspension is necessary to protect the public.~~

Comment: The Board respectfully asserts that temporary suspensions and administrative suspensions should be effective immediately.

Section 30. Reinstatement

30.1.(a) No attorney ~~suspended~~ disbarred, suspended under any section of this Rule, or who has assumed inactive status which has continued for one year or more ~~or disbarred~~, may resume practice until reinstated by order of the Court~~, except as provided in Section 10.6.~~

~~(b) Any attorney suspended for less than one year or for an indefinite period to be determined by the conditions imposed by the judgment may resume practice without reinstatement after filing an affidavit 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.~~

(b) Any attorney removed from the practice of law for less than one year or for an indefinite period to be determined by the conditions imposed by the judgment may resume practice without reinstatement after filing an affidavit 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.

Comment: Because these safeguards stricken in 30.1 are not addressed elsewhere in the Rule, the Board proposes this language should remain in the Rule.

30.3. (a) Reinstatements from administrative suspensions for non-payment of the Board's annual registration fee are pursuant to Section 10.6 of this Rule;

(b) Reinstatements from administrative suspensions for IOLTA noncompliance are pursuant to Sections 15 and 16 of Tenn. Sup. Ct. R. 43;

(c) Reinstatements from administrative suspensions for failure to pay the Professional Privilege Tax are pursuant to Section 26.4(d)(e) and (f) of this Rule;

(d) Reinstatements from inactive status are pursuant to Section 10.8 of this Rule;

(e) Reinstatements from disability inactive status are pursuant to Section 27(d) and (e) of this Rule;

(f) Reinstatements from temporary suspensions are pursuant to Section 12.3(d) of this Rule;

(g) Reinstatements from administrative suspensions for non-compliance with continuing legal education requirements are pursuant to Section 7 of Tenn. Sup. Ct. R. 21;

(h) ~~P~~Except for reinstatement from suspensions which continue for less than one year **under Section 12.2**, from inactive status assumed under Section 10.7 which continues for less than one year, from disability inactive status under Section 27, and from suspensions under Section 7 of Rule 21 of the Rules of the Supreme Court, all 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 for reinstatement. The petition for reinstatement shall be filed with the Board and served upon Disciplinary Counsel promptly. Upon receipt of the petition, Disciplinary Counsel shall investigate the matter and file and serve upon the petitioning attorney a responsive pleading to the petition. The Board shall promptly refer the petition to a hearing panel in the disciplinary district in which the petitioning attorney maintained an office at the time of the disbarment or suspension. The hearing panel shall schedule a hearing at which the petitioning attorney shall have the burden of demonstrating by clear and convincing evidence that the petitioning attorney has the moral qualifications, competency and learning in law required for admission to practice law in this state and that the resumption of the practice of law within the state will not be detrimental to the integrity and standing of the bar or the administration of justice, or subversive to the public interest. ~~**However, reinstatement from inactive status shall be granted unless the attorney is subject to**~~

~~an outstanding order of suspension or disbarment or has been on inactive status for over five years, upon the payment of any assessment in effect for the year the request is made and any arrears accumulated prior to transfer to inactive status.~~ The hearing panel shall within thirty days file a report containing its findings and decision and transmit its report, together with the record, to the Board. There shall be no petition for rehearing. Either party dissatisfied with the hearing panel's decision may appeal as provided in Section 33.

Comment: The Board proposes adding language in Section 30.3 cross-referencing all reinstatements provided for in other sections. The Board suggests including the phrase "under Section 12.2" to Section 30.3(h) to clarify the suspensions of less than one year not requiring reinstatement proceedings. The Board proposes deleting the language regarding reinstatements from inactive status in Section 30.3 since the same provision is included in Section 10.8.

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)~~**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).**

Comment: Lastly, the Board respectfully suggests that the possible terms/conditions of reinstatement identified in Section 30.8 are not specified elsewhere in the Rule and should remain in the Rule.

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 declaration under penalty of perjury 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. 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. The burden shall be upon respondent or petitioning attorney to prove by a preponderance of the evidence that the hours expended or costs incurred by Disciplinary Counsel were unnecessary or unreasonable. 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 to the Board its findings and judgment with respect to Disciplinary Counsel's application for the assessment of costs. There shall be no petition for rehearing. The making of an application under this Section shall **not** extend the time for taking steps in the regular appellate process under Section 33.1(a).

(b) In the event that a judgment as set forth in Subsection (a) is appealed to the circuit or chancery court pursuant to Section 33 and the Board is the prevailing party in such appeal, Disciplinary Counsel may make application to the circuit or chancery court for the assessment against the respondent or petitioning attorney of the necessary and reasonable costs of the trial court proceedings, including court reporter's expenses for appearances and transcription of all hearings and depositions and the hourly charge of Disciplinary Counsel for the trial court proceedings. Disciplinary Counsel shall file any such application within fifteen days from the circuit or chancery court's decree and shall serve a copy of such application on respondent or petitioning attorney and the attorney's counsel of record. The application shall be accompanied by an affidavit or declaration under penalty of perjury and such other documentary evidence as Disciplinary Counsel deems appropriate documenting the hours expended and the costs incurred by Disciplinary Counsel for the trial court proceedings. Such proof shall create a rebuttable presumption as to the necessity and reasonableness of the hours expended and the costs incurred. The respondent or petitioning attorney may within fifteen days after

Disciplinary counsel's application file and serve on Disciplinary Counsel any response in opposition to the application for an assessment of costs. The burden shall be upon the respondent or petitioning attorney to prove by a preponderance of the evidence that the hours expended or costs incurred by Disciplinary Counsel were unnecessary or unreasonable. The circuit or chancery court may consider the application on the written submissions alone or may, in the court's discretion, conduct a hearing on the application. In the event the circuit or chancery court considers the application on the written submissions alone, the court shall within fifteen days from the date on which the respondent or petitioning attorney's response is due or submitted, whichever is earlier, enter and serve on the parties its findings and judgment with respect to the application for the assessment of costs. In the event the circuit or chancery court conducts a hearing on the application for costs, the court shall within fifteen days from the date of the hearing enter and serve on the parties its findings and judgment with respect to the application for the assessment of costs. The filing of an application under this Section shall **not** extend the time for appeal to the Court under Section 33.1(d) and Tenn. R. App. P. 4.

(~~d~~e) The hourly charges of Disciplinary Counsel on formal proceedings shall be assessed at ~~**the rates set forth in Tenn. Sup. Ct. R. 13, Section 29(c)(1) for compensation of counsel appointed for indigent criminal defendants in non-capital cases.**~~**reasonable rates determined by the Court.**

(~~e~~f) Payment of the costs and fees assessed pursuant to this Section shall be required as a condition precedent to reinstatement of the respondent or petitioning attorney. In the discretion of the Chief Disciplinary Counsel, the respondent or

petitioning attorney may, upon a showing of extraordinary need, be permitted to pay costs in periodic payments. If a payment plan is permitted, the respondent or petitioning attorney also shall pay the Board interest at the statutory rate. If for any reason, the respondent or petitioning attorney does not abide by the terms of the payment plan, the Chief Disciplinary Counsel shall revoke the plan and the respondent or petitioning attorney shall be required to pay the balance of any unpaid assessment of costs within thirty days thereof.

(g) Attorneys successfully defending some or all disciplinary charges filed by the Board may not recover attorney fees and costs from the Board.

Comment: The Board respectfully objects to delaying the disciplinary proceeding in Section 31.3(a) and (b) by extending the appeal based on the Board's application for costs. Regarding Section 31.3(e), the Board reiterates its position that attorneys being prosecuted for misconduct are not indigent. Reducing Disciplinary Counsels' rate of compensation to rates for counsel for indigent defendants set forth in Tenn. Sup. Ct. R. 13 will lower the total costs recovered by the Board, which may adversely impact the annual fee charged all attorneys and not just attorneys found to be guilty of misconduct. Nevertheless, should the Court apply the rates in Tenn. Sup. Ct. R. 13, Section 2(c)(1) to disciplinary proceedings, then the Court should make clear that the Board is not limited to maximum compensation limits set forth in Tenn. Sup. Ct. R. 13, Section 2(d)(1). Finally, the Board proposes language in Section 31.3(g) clarifying that attorneys successfully defending some or all disciplinary charges may not seek to recover attorney fees and costs from the Board.

Section 32. Confidentiality

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, **correspondence,** 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~~ or open for public inspection.**

~~(a) a recommendation is made 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~~

~~(b) a petition to initiate a formal disciplinary proceeding is filed pursuant to Section 15.2; or~~

~~(c) the respondent attorney requests in writing submitted to Disciplinary Counsel or the Board that the matter be public; or~~

~~(d) the investigation is predicated upon conviction of the respondent attorney for a crime; or~~

~~(e) in matters involving alleged disability, the Court enters an order transferring the respondent attorney to disability inactive status pursuant to Section 27.~~

32.2 Upon (a) the Board's imposition of public discipline without the initiation of a formal disciplinary proceeding pursuant to Section 15.2, or (b) the

filing of a petition for formal discipline pursuant to Section 15.2, the following documents, subject to the provisions of any protective order which may be entered pursuant to Section 32.4, shall be public records and open for public inspection:

(i) all pleadings, petitions, motions, orders, correspondence, exhibits, transcripts or documents filed in the formal disciplinary proceeding;

(ii) the written complaint(s) and any additional or supplemental written submissions received by the Board;

(iii) the written response(s) to the complaint received by the Board;

(iv) the formal written public discipline imposed by the Board in the matter.

32.3 Upon the receipt by the Board of a written request from a respondent-attorney that a pending matter be made public, the following documents, subject to the provisions of any protective order which may be entered pursuant to Section 32.6, shall be public records and open for public inspection:

(i) all pleadings, petitions, motions, orders, correspondence, exhibits, transcripts or documents filed in the formal disciplinary proceeding;

(ii) the written complaint(s) and any additional or supplemental written submissions received by the Board;

(iii) the written response(s) to the complaint received by the Board;

(iv) the formal written public discipline imposed by the Board in the matter.

32.~~2~~4. In disability proceedings referred to in Sections 27 **~~and 32.1(e),~~** the order transferring the respondent attorney to disability inactive status shall become a public record upon filing; however, all other documents relating to the respondent attorney's disability proceeding, including any subsequent petition for reinstatement after transfer to disability inactive status, shall not be public records and shall be kept confidential. An order granting a petition for reinstatement after transfer to disability inactive status shall become a public record upon filing.

32.~~3~~5. **Notwithstanding anything to the contrary herein, ~~A~~all** work product and work files (including **but not limited to** internal memoranda, correspondence, **emails,** notes**, investigative notes, statements and reports**, 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 shall not be subject to the provisions of Section**s ~~32.1~~32.2 and 32.3.**

32.~~4~~6. In order to protect the interests of a complainant, respondent or petitioning attorney, witness, or third party, the Board may, at any stage of the proceedings, upon application of any person and for good cause shown, issue a protective order prohibiting the disclosure of specific information or documents, or the closure of any hearing, and direct that the proceedings be conducted so as to implement the order, including requiring that the hearing be conducted in such a way as to preserve the confidentiality of the

information that is the subject of the application. After the initiation of a formal proceeding, any such application shall be filed with and decided by the assigned hearing panel.

32.~~5~~7. All participants in any matter, investigation, or proceeding shall conduct themselves so as to maintain confidentiality. However, unless a protective order has been entered, nothing in this Section or this Rule shall prohibit the complainant, respondent or petitioning attorney, or any witness from disclosing the existence or substance of a complaint, matter, investigation, or proceeding under this Rule or from disclosing any documents or correspondence filed by, served on, or provided to that person.

The Board, district committee members, hearing panel 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 **as may be provided under Sections 32.2 and 32.3~~that in the event of any of the circumstances set forth in Section 32.1(a)-(3), Disciplinary Counsel may disclose the pendency, general subject matter, and status of the matter~~.**

32.~~6~~8. In those disciplinary proceedings in which an appeal is taken pursuant to Section 33, the records and hearing in the circuit or chancery court and in the Court shall be public to the same extent as in all other cases.

32.~~7~~9. The provisions of this Rule shall not be construed to deny access to relevant information to authorized agencies investigating the qualifications of judicial candidates; or to other jurisdictions investigating qualifications for admission to practice; or to law enforcement agencies investigating qualifications for government employment; or to prevent the Board from reporting evidence of a crime by an attorney or other person to courts or law enforcement agencies; or to prevent the Board from reporting to the Tennessee Lawyer Assistance Program evidence of a disability that impairs the ability of an attorney to practice or serve; or to prevent the Board or Disciplinary Counsel from making available to the Tennessee Lawyers' Fund for Client Protection relevant information; or to prevent the Board or Disciplinary Counsel from defending any action or proceeding now pending or hereafter brought against either of them. In addition, ~~the Board~~Chief Disciplinary Counsel shall transmit notice of all public discipline imposed by the Court on an attorney or the transfer to inactive status due to disability of an attorney to the National Discipline Data Bank maintained by the American Bar Association.

32.~~8~~10. Nothing in this Section is intended to limit or repeal any confidentiality or privilege afforded by other law.

Comment: The Board proposes to modify Sections 32.1 through 32.3 of the confidentiality rule to specify the documents which are confidential, privileged and not public records. The Board recognizes its competing duties to provide access to public documents while maintaining the confidentiality of confidential and privileged records.

33.1. (a) The respondent or petitioning attorney or the Board may appeal the judgment of a hearing panel by filing within sixty days of the ~~date~~**entry** of the hearing panel's judgment a Petition for Review in the circuit or chancery court of the county in which the office of the respondent or petitioning attorney was located at the time the charges were filed with the Board**. Tennessee Rule of Civil Procedure 6.05 does not extend the time for filing on appeal.** If the respondent or petitioning attorney was located outside this State, the Petition for Review shall be filed in the circuit court or chancery court of Davidson County, Tennessee. ~~**If a timely application for the assessment of costs is made under Section 31.3(a), the time for appeal for all parties shall run from the hearing panel's submission of its findings and judgment with respect to the application for the assessment of costs. A Petition for Review filed prior to the hearing panel's submission of its findings and judgment with respect to the application for the assessment of costs shall be deemed to be premature and shall be treated as filed after the submission of the hearing panel's findings and judgment with respect to the assessment of costs and on the day thereof.**~~

(b) The review shall be on the transcript of the evidence before the hearing panel and its findings and judgment. If allegations of irregularities in the procedure before the hearing panel are made, the trial court is authorized to take such additional proof as may be necessary to resolve such allegations. **The trial court may, in its discretion, permit discovery on appeals limited only to allegations of irregularities in the proceeding.** The court may affirm the decision of the hearing panel or remand the case for further proceedings. The court may reverse or modify the decision if the rights of the party filing

the Petition for Review have been prejudiced because the hearing panel's findings, inferences, conclusions or decisions are: (1) in violation of constitutional or statutory provisions; (2) in excess of the hearing panel's jurisdiction; (3) made upon unlawful procedure; (4) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or (5) unsupported by evidence which is both substantial and material in the light of the entire record. In determining the substantiality of evidence, the court shall take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the hearing panel as to the weight of the evidence on questions of fact.

(c) There shall be no petitions for rehearing in the trial court.

(d) Either party dissatisfied with the decree of the circuit or chancery court may prosecute an appeal directly to the Court where the cause shall be heard upon the transcript of the record from the circuit or chancery court, which shall include the transcript of evidence before the hearing panel. ~~**If a timely application for the assessment of costs is made under Section 31.3(b), the time for appeal for all parties shall run from the trial court's entry of its findings and judgment with respect to the application for the assessment of costs. A Notice of Appeal filed prior to the trial court's entry of its findings and judgment with respect to the application for the assessment of costs shall be deemed to be premature and shall be treated as filed after the entry of the trial court's findings and judgment with respect to the assessment of costs and on the day thereof.**~~Prior decisions of the Court holding that appeal of disciplinary proceedings must be taken to the Court of Appeals because Tenn.

Code Ann. § 16-4-108 so requires are expressly overruled. Except as otherwise provided in this Rule, Tenn. R. App. P. 24, 25, 26, 27, 28, 29 and 30 shall apply to such appeals to this Court.

Comment: The Board proposes substituting "entry" of the hearing panel's Judgment for "date" in Section 33.1(a) for clarity. The Board proposes to clarify that Tenn. R. Civ. P. 6.05 does not extend the time for filing an appeal and respectfully objects to delaying the disciplinary proceeding by extending the appeal based on the Board's application for costs. Finally, the Board proposes adding language to Section 33.1(b) prescribing the limited scope of discovery on appeals.

Respectfully submitted,

Lela Hollabaugh By SG w/permission

LELA M. HOLLABAUGH (#014894)
Chairman of the Board of Professional Responsibility of the Supreme Court of Tennessee

Bradley Arant Boult Cummings, LLP
1600 Division Street, Suite 700
Nashville, TN 37203
Tel: 615-244-2582

Sandy Garrett

SANDY GARRETT (#013863)
Chief Disciplinary Counsel of the Board of Professional Responsibility of the Supreme Court of Tennessee

10 Cadillac Drive, Suite 220
Brentwood, TN 37027
Tel: 615-361-7500

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 31st day of May, 2013.

Lela Hollabaugh By SG w/ permission
LELA HOLLABAUGH (#014894)
Chair

Sandy Garrett
SANDY L. GARRETT (#013863)
Chief Disciplinary Counsel

LAW OFFICE
FAMILY LAW CENTER
1646 Westgate Circle Suite 101
Brentwood, Tennessee 37027
615-661-0122
Fax 615-661-0197
www.TennFamilyLaw.com

June 10, 2013

Mike Catalano, Clerk
Tenn. Appellate Courts
100 Supreme Court Bldg
401 7th Ave North
Nashville, TN 37219-1407

RE: Order for public comments entered April 18, 2013
On proposed revisions to Tenn. Supreme Court Rule 9
M2012-01648-SC-RL2-RL

Dear Clerk,

Attached are my comments on the proposed revisions to Rule 9 along with supporting documents. For your convenience I have scanned these documents to the attached disc for posting to the AOC website.

Sincerely,

Connie Reguli

S:\BPR 10-01042\2013 Rule 9 review\130609-let to clerk.docx

Request for extension of time for public comment

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE: PROPOSED REVISIONS TO TSCR 9 **No. M2012 1648 SC RL2 RL**

MOTION TO EXTEND TIME FOR REVIEW AND COMMENTS.

Now comes movant, CONNIE REGULI, and files this request for an extension of time for public comments on the proposed revisions to TRSC Rule 9.

This is the critical issue that affects the working lives of thousands of attorney licensed to practice law in this State. Many probably do no understand the limitations that these new revisions place on their ability to maintain their licenses and the infringement upon their constitution due process rights in the event of a challenge to their license.

I have circulated my review and comments for other attorney to make contributing remarks.

Further, currently under consideration in the Court of Appeals is the case of *Reguli v. Vick*, M2012 2709 COA R3 CV, wherein the State of Tennessee is attempting to conceal from attorneys the ex parte communication with hearing panel members. Once this opinion is published more attorneys will understand the implications that this has to their livelihood.

Counsel respectfully requests an addition 90 days for review and comment.

This is the 10 day of JUNE 2013.

Respectfully submitted,

Connie Reguli #016867
Attorney at Law
LawCare- Family Law Center, P.C.
1646 Westgate Circle, Ste 101
Brentwood, TN 37027
615-661-0122
615-661-0197 FAX

Comments on proposed Rule 9

To be filed:

1. Request for extension of time for public comment
2. Comments on proposed Rule 9
3. Memorandum on the Standard of Proof
4. Memorandum on the failure to comply with T.C.A. § 16-3-404 and TN Supreme Court opinion entered May 24, 2013
5. Order entered by Chancellor Lyle on November 28, 2012 requiring the BPR to release secret emails.
6. Memorandum against BPR's ability to assess fees (to be supplemented)
7. Reported case allowing BPR to assess Attorney's with fee.
8. BPR lease from office in Nashville; lease from office in Brentwood, Budget provided in Open Records Request

Comments on the Proposed Rule 9:

Before this Court is a proposed revision to Rule 9 of the Tennessee Supreme Court for the disciplinary enforcement of attorneys. These proposed revisions were posted on April 18, 2013 and are open for public comment until June 14, 2013. These revisions are at best troubling and at worst demonstrate that the direction taken by the Supreme Court, if approved, is to give this governing board more power and less accountability than they already exhibit.

First, one must review this process by its functions to understand the inter-relationships between the Supreme Court, the Board, the Disciplinary Counsel, the district committees, the hearing panels, and the reviewing panels. Then, by analogy, those functions can be compared to other legal processes to demonstrate what due process issues are at stake.

First, Rule 9 establishes the "Board". Section 4. The Board consists of 12 persons who are selected and appointed by the Supreme Court. They serve a term of three years and can serve out the remainder of the term they are appointed in plus two consecutive terms. They are eligible for reappointment can be reappointed after an absence of three years. The duty of the Board is to

meet once per quarter and review the cases presented by the Disciplinary Counsel. The Board members are not paid by the State.

Next, Rule 9 establishes the district committees. A district must have at least five district committee members. (Most districts have many more than five.) They are selected by and appointed by the Supreme Court. These are attorneys practicing throughout the state (however they do not need to be practicing attorneys) who are selected to serve within the disciplinary district where they practice. They serve a term of three years and can serve two terms back to back. Then theycan be reappointed after an absence of one year. The duty of the district committee members is to serve in the capacity of a "reviewing committee" or as a "hearing panel". The district committee members are not paid by the State, however, they do get paid for mileage if required to travel to have a hearing. Reviewing committees are those that review the disciplinary counsel's decision to dismiss a case. Hearing panels are those that sit as judges in a disciplinary hearing brought against an attorney. Section 6.1 and 6.2

Next, Rule 9 established the chief disciplinary counsel and all other associated counsel employed by the State of Tennessee to investigate and prosecute attorneys for misconduct. The Chief Disciplinary Counsel is selected by the Supreme Court. The other attorneys in the office are selected by the Chief Disciplinary Counsel and approved by the Supreme Court.

If one is familiar with the criminal justice system, the Board serves in the capacity of the Grand Jury, wherein the disciplinary counsel presents cases to the Board that they want to go forward with by filing a petition against the attorney turning the disciplinary proceeding into a public record. The difference is that the disciplinary counsel is not required to put on any proof to the Board as one would do before the Grand Jury. They merely present the case as they see it and most likely embellished by their opinion of the case. This process is done in secret.

If the case proceeds to the filing of a petition, the Board Chair selects a "hearing panel" from the district committee members to serve as judges. They have the power to punish the attorney up to and including total disbarment. Once they have entered a ruling, the losing party must appeal (via a Writ) to the Chancery Court who will only consider the evidence on the record. The Chancery Court need only find that there is substantial evidence to support those

conclusions. Substantial evidence in law is a very low standard. To overturn the panel decision, the appealing party must show that the rights of the respondent attorney have been prejudiced because of (1) violations of constitutional rights (2) excess of panel's jurisdiction (3) arbitrary or capriciousness characterized as abuse of discretion (4) made upon unlawful procedure or (5) not supported by the evidence. (Section 8)

Recently I have conducted my own investigation on the Board and the application of the current Rule 9. This investigation has included several Open Records Requests to inquire as to the Board's strict compliance with the Rule as it is written. And to determine if they were fulfilling their duties to attorneys as well as exercising their power.

1. I asked the BPR to produce all of the required annual performance reviews on Nancy Jones who served in the position of chief disciplinary counsel from 2007 through 2012. This is a requirement under the current Section 7.1 There were NONE.

2. I asked the BPR to produce all of the applications to serve in the position of Board member and district committee member since 2009. Guess what, there were NONE again.

3. I then learned through reading the quarterly minutes from the Board meetings that nominations for district committee members comes from the Board itself. This translates into the Grand Jury soliciting for nominations for the judges they want to serve over the indictments that they hand out.

4. As I reviewed Section 8.2, I read that the hearing panels were to be selected on a "rotating" basis. I sought records from the Chair of the Board, Lela Hollabaugh, to confirm that she was complying with the strict requirements to put the district committee members in rotation. Guess what, there are NONE again.

5. Then I discovered that the Board published on its website policies and procedures that allowed the Chair of the Board to select hearing panels members on a "random" basis. Which was in direct contradiction to the strict requirements of Section 8.2.

6. Then I discovered that the Supreme Court had never approved the policies and procedures published by the Board on their website. In December 2012, they finally changed them.

7. Then I discovered that the secretary for the disciplinary counsel had been sending ex parte emails to potential hearing panel members asking them to serve on the hearing panel

giving them "their side of the story". This is equivalent to the District Attorney sending the judge a summary of the case without disclosing that to the criminal defendant. Imagine how much fun that would be if the DA could tell the judge what a scum bag he was bringing to his court before one ounce of evidence was heard. When an open records request was made to get these ex parte emails on several attorney who had faced disciplinary actions over the last three years, the State of Tennessee Attorney General's office said NO. Although Chancellor Lyle granted the request for the emails, the State of Tennessee Attorney General (who is also appointed by the Supreme Court) defended the Board's failure to disclose these emails on appeal.

As I reviewed the proposed revisions to Rule 9, it is astounding that these revisions are intended to give the Board more power and less accountability.

The first glaring change is the elimination of the word "duty" in Section 4.5. Section 4.5 give the Board certain "powers and duties". The Board seeks to eliminate the word "duty" and even adds language that "The powers and duties set forth in this Section are NOT duties owed to or enforceable by a respondent or petitioning attorney by means of claim, or defense, or otherwise." Seriously.....why have rules at all.....? This means that an attorney cannot complain that the hearing panel has not been properly appointed or that any district committee member has extended his term, or that the Board has a duty to disclose any ex parte communication,etc.

Section 4.6 has limited a responding attorney's right to ask a Board member to recuse themselves. The prior rule stated that a Board member would not take part in any matter in which a judge would have to recuse themselves. However, the revision specifically denies the attorney the right to pursue recusal under TRSC Rule 10B. Now, since most of the Board's activities are done in secret anyway, this seems insignificant because you do not know when the disciplinary counsel is going to present your case to the Board. However, it takes away a significant right of the responding attorney.

Section 12 sets out the authority of the hearing panel to suspend an attorney and then established conditions of probation. The rule does not define or limit these conditions of probation. I know of an attorney who was suspended for a short term but then told that he would

have to take a class in ethics at an ABA approved law school before he could be readmitted to practice law. This set up an impossibility for the attorney. He attempted to meet these criteria by contacting Vanderbilt and Memphis School of Law but both declined to offer him the class. Nowhere in the rule does it prohibit a hearing panel from setting impossible conditions.

Section 12.8 allows the panel to require a "practice monitor." The rule gives a list of duties and responsibilities that can be assigned to the practice monitor and the attorney must pay the cost. Upon the presentation of an affidavit of fees, there is a rebuttable presumption that these fees are necessary and reasonable.

Section 14.2 gives the panel the right to revoke the probation of the attorney. However, no burden of proof is set forth in the rule.

Section 15.1 provides that a "reviewing committee" must approve of a dismissal submitted by the disciplinary counsel. This reviewing committee is derived from the district committee members, that same pool of individuals who serve on hearing panels. Here is the conflict. A respondent attorney is never informed of the committee members who have reviewed these "dismissals". The very same person could be serving on a hearing panel against the attorney without ever being required to disclose this prior relationship. Imagine if the district attorney sent investigation materials to the judge in secret asking the judge to approve their decision not to prosecute a case and then took the same defendant before the judge a few months later on a different case. Is that judge now a "neutral" tribunal? Of course not. That judge has information about the defendant outside of the matter to be heard that they acquired secretly. This practice must stop completely. I know this happens I have experienced. It.

Section 15.1 also provides that this reviewing committee or disciplinary counsel may impose an informal private admonition and the respondent attorney has NO right to appeal. This is a total violation of due process. Sanctions are imposed without a hearing and without notice to the attorney. However, if a complaint is dismissed the complainant has the right to appeal the decision of dismissal. This is certainly a futile exercise, however, because the only remedy is for the Board (or a committee of three Board members) reviews the decision to dismiss the complaint. Seriously, how often do you think that overturn their decision. Why is this a problem; because there are NO standards for prosecution within the disciplinary system. If one

is indicted for criminal behavior, they know exactly what conduct the State must prove. And they also know that the State will have obligation to show a certain mental state of the defendant when the crime was committed. They also know exactly what the potential punishment will be if they are convicted of a crime. Title 39 and 40 of the Tennessee code lays out the criminal process. However, TRSC Rule 8 is so vague and ambiguous that the panel members can stretch them and mold them to mean whatever they wish; such as "interference with the administration of justice". I have also seen selective prosecution against attorneys when similar conduct has occurred. Is lying to the Judge a violation? Is putting false information in a pleading a violation? Is submitting an incorrect order a violation? The BPR selectively decides which attorneys to punish even under similar circumstances. The proposed Rule 9 now confirms that an attorney has NO right to appeal a private reprimand.

Section 15.2 is now being amended to allow the chair of the Board, "or its designee" (whatever that means) to select a hearing panel from the district committee members. The Board is going to be allowed to set up its own policies and procedures for making this selection. This NOW allows the Board (aka serving as the "Grand Jury") to pick the "Judges" however, they choose. The current rule provides that they use a "rotating" selection process. The requirement to use a rotating selection takes away some of the risk of selective appointment. However, after seeking records on how the rotating selection process works, it is clear there is NO rotating selection. So, the BPR wants to remove this requirement giving them complete and total control on the selection process by writing policies that they can keep secret.

Recently, it has been discovered that the Executive Secretary who is employed by the State and works in the office of disciplinary counsel (who also serves as the "clerk" of the disciplinary "court") has been sending ex parte emails to potential hearing panel members, telling them that their name has come up in a "random" selection and then giving them a summary of the disciplinary counsel's view of the case. These emails are never disclosed to the respondent attorney. This practice has been in place for years. Once this was discovered, these emails were requested through the Open Records Act and the BPR refused to produce them. Even when Chancellor Lyle required the BPR to comply, they refused to do so and sought an appeal. In the proposed revisions, the Board wants to specifically ALLOW ex parte communication between the Board, district committee members and the Executive Secretary.

This rule does not include providing these emails to disciplinary counsel or the respondent attorney, but the history shows that these emails were routinely provided to disciplinary counsel but NOT the attorneys. Allowing this ex parte communication is equivalent to the Grand Jury and the Clerk of the Court being able to communicate with the Judge about a defendant about to enter his courtroom without EVER making known to the defendant that this communication has occurred.

Section 15.3 requires the hearing panel to submit findings and recommendations within 30 days of the hearing. However, failure to do so means nothing. This rule specifically states that failure to do so does not result in a dismissal of the petition. It results in nothing. Frankly, the hearing panel does not have to comply and there is no recourse for the respondent attorney. It is noteworthy here to explain that the disciplinary counsel is not required to disclose to the attorney the sanctions that they wish to impose. They can just throw out the allegations and leave it to the discretion of the hearing panel to select a sanction. The hearing panel is required to follow the ABA (American Bar Association) guidelines. These guidelines require that the disciplinary counsel make a showing of damages if they seek long-term suspension or disbarment. I sat through an entire hearing where the disciplinary counsel pronounced that they were seeking disbarment and they failed to make a showing of ANY damages. The ambiguity of the rules and the thresholds required for imposing sanctions tremble at the cliff of one's due process rights. In any other legal proceedings attorneys can research case law to find similar factual situations to establish thresholds. Let's say child custody; an attorney can look for similar patterns in prior reported cases to give the court guidance. However, there is NO similar system of reported discipline to allow a respondent attorney to prepare. I have created disciplinary charts pulling all letter of discipline over the last three years. However, I do not have access to cases in which similar fact patterns may have resulted in a dismissal. Since all panels operate independently, they have limited experience from which they can draw their own comparison. This increases the exposure to subjective decisions that are inconsistent.

It is also important to note that the Tennessee Rules of Appellate procedure do not apply in disciplinary hearings. This means that there is NO right to interlocutory appeal of interim decisions made by the panel, such as on the denial of evidence, or demanding that the panel provide support that there has been compliance in their selection. Once the panel has made a

decision there is no right to petition for rehearing as allowed in other courts. This rule also applies to the Chancery court review of the panel decision. This limits the rights of the respondent attorney.

This section provides that attorneys can be assessed with the costs of the prosecution, which of course, is equivalent to paying the prosecutor to prosecute the defendant. This creates a monetary incentive to the office of disciplinary counsel. It is reflected in their budget that these funds go into their budget for expenses to run their office. Their office is also supported by the annual fees paid by attorneys. The BPR is independent from the State Treasury. If the attorneys are already paying to fund the office of disciplinary counsel why are attorneys required to pay additional expenses. This entire financial scheme is troubling. The Tennessee constitution is clear that only the Legislative branch can impose a tax on the people which includes a privilege tax paid for licensure to certain professions which includes attorneys. Attorneys are required to pay the State Treasury a privilege tax to maintain their license AND a tax to the BPR. When the Supreme Court's "taxation" was challenged in the court system, the Supreme Court said it did have the right to impose this "tax". Imagine that..... The Legislature has never been asked to pass a law that prohibits this taxation. The Supreme Court's "supreme" and self-assigned power to tax also means that they can raise those taxes whenever they want and without justification. This tax has increased six fold since its inception without explanation.A review of the past budget shows that the office of the disciplinary counsel needed extra money to move from their office in Nashville to Brentwood in 2011 incurring a monthly rental fee of over $20,000 per month. Now why is it that the Administrative Office of the Courts and the office of disciplinary counsel are maintained in high-end private office buildings? Why can't they office on the State office complex in downtown Nashville that houses all other departments of government?

This requirement to pay fees is unconstitutional and should be eliminated. See also Section 31 of the proposed rule 9.

Section 15 also describes how that when there is a suspension or disbarment, the Board shall file with the Supreme Court clerk the petition, the judgment, the order of enforcement and the protocol memorandum. This means that they should NOT be filing the anything with the Supreme Court short of a suspension. However, this is not the case. Even when there is a public censure, the Board files these pleadings with the Supreme Court. That means that the documents

are now public documents. Even though the rule implies that all investigations are confidential until a petition is filed, the disciplinary counsel attaches ALL communication received in the complaint even if only a small issue contained within is sanctionable. This is an attempt to convert confidential investigation notes into public records. This practice should be stopped immediately. Once it has occurred, the respondent attorney has no recourse.

Section 17 provides that members of the Board, district committee members, disciplinary counsel, staff, and "practice monitors" shall be immune from civil suit for any conduct in the course of their official duties. It also provides that complainants and witnesses shall be immune from civil suit with respect to all of their communication regarding a complaint on an attorney. So the question is "why" should this immunity be provided and what is the Supreme Court's authority for granting immunity. Each person serving in their respective capacities have obligations and should be held accountable. As stated above, currently this system is operating independent of the State Treasury. If a disciplinary counsel commits malpractice or is allegedly bringing actions maliciously they should be held accountable. Where there is no risk, there is no accountability. Complainants proffering salacious and unsupported statements should also be facing civil sanctions if there is finding that these statements were false. This would eliminate a multitude of complaints from disgruntled litigants who just want their money back.

Section 19.6 provides that a person not subject to a subpoena may provide testimony by written interrogatory. This means that disciplinary counsel can present the testimony of the prosecuting witness by interrogatory and the respondent attorney cannot confront that witness face-to-face for cross examination. This method should only be allowed if the respondent attorney agrees.

Section 32 – (previously Section 25) describes the confidentiality of the disciplinary proceedings. It has previously been held by the Supreme Court that the confidentiality requirements are for the protection of the responding attorney, however, the Board's intent is to insulate the disciplinary counsel and its agents from having to disclose their email communications regarding the case. Section 32.3 states that 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 or subject to disclosure even to the respondent

attorney. WOW, that puts the "Grand Jury", potential "judges" and "prosecuting attorneys" in direct communication with each other ex parte and without disclosure to the respondent attorney. I have already shown that this is exactly what has happened for years. It was only through a serendipitous disclosure of a singular email that I was able to establish this practice. Each and every attorney who has been the subject of discipline is entitled to these records. There is no reason for there to be ex parte communication between these functions. All records and communication should be available to respondent attorneys.

Other issues:

Standard of Proof: Rule 9 sets forth that the standard of proof for a finding of misconduct is a "preponderance of the evidence". Once the hearing panel has submitted its findings and conclusions, the party dissatisfied with the ruling may file a writ to the Chancery court alleging that the findings of the hearing panel are arbitrary or capricious (or otherwise state above). The appeal is taken on the record and the standard of proof for upholding the hearing panel findings is that the court need only find that substantial evidence supports the findings. Substantial evidence is held by our courts to be merely above a scintilla of evidence. The only time additional evidence can be presented to the reviewing court is if the appealing party claims irregularity in the proceedings.

The attached memorandum describes that this lower burden of proof is unconstitutional. The standard of proof for imposing discipline on an attorney should be clear and convincing. Further, the responding attorney should be either beprovided all of the appellate protections provided under the Uniform Administrative Procedures Act (UAPA) in Title 4 of the Tennessee Code or appellate relief under the Tennessee Rules of Appellate procedure, including the opportunity to seek interlocutory appeal in intermediate orders. An attorney attempting to protect his license (and his ability to practice law) stand in no different position that a doctor or dentist or nurse or plumber. Any other licensed professional in this state faces a Board or panel set up under the Executive Branch of Government. Their disciplinary proceedings are subject to the UAPA. The Supreme court defends this violation of equal protection by professing that they have exclusive and inherent jurisdiction to control the courts including the practice of law and those who practice before them. This power also give them the ability to create a system the

targets those who elect to represent their client vigorously even when those legal positions are contrary to the policies adopted by the Courts.

The Supreme Court in Tennessee has demonstrated their defiance of the Legislature in that T.C.A. § 16-3-404 requires that all rules proposed by the Supreme Court must be approved by both houses of the General Assembly. Rule 9 for the discipline of attorneys has never been adopted by the Legislature and yet, when confronted with this very issue, the Supreme Court ignored the provisions of the law and used case law to support their position that that inherent and exclusive control over the practice of law made that rule exempt from the statutory requirement. I say why doesn't the law apply? There are no exceptions in the code.

The practice and intent of this system is to silence those who would defend the rights of litigants and the rights endowed by the constitution. The discipline of attorney should be entirely removed from the judicial branch and placed back under the authority of the executive branch as for any other profession.

Even if left under the control of the Judiciary certain changes must be made:

This Court should consider eliminating the district committees. All attorneys who have admitted for practice in the State of Tennessee should make themselves available to serve as a "jury of your peers" in determining the discipline against an attorney. The selection should occur on a random selection in a manner that does NOT include the Board or the disciplinary counsel. These attorneys should be given no information about the case other than the name of the respondent attorney and the names of all persons who may be called to testify. In the alternative, the district committee members should be by application and every attorney who is licensed to practice law will serve on a rotating basis for no more than three years period.

The Board members should also be limited to three years period. There should be no opportunity to build an incestuous team of cohorts within the system. The positions for the Board should be posted on the AOC website. Any attorney who has served as a district committee member will have the right to serve. Final selection of the Board members would come by a vote from the members of the bar.

Disciplinary counsel should also be limited to the term in which they can be employed in this position. They should be limited to five years and then they must move on.

All disciplinary complaints should be put into a searchable format giving the allegations and the actions taken against the respondent attorney. The name of the attorney can be extracted for the purposes of confidentiality. But any attorney accused of misconduct would have access to the file of any case in which he can show a substantial similarity in the action brought against him. Protecting confidentiality is easy. Attorneys are used to protective orders and the file can easily be protected from public scrutiny where the complaints have been dismissed. Each attorney should have the right to defend his license by showing that the Board dismissed a complaint on similar conduct. I have seen selective prosecution even when similar conduct has been dismissed.

The burden of proof should be raised to clear and convincing evidence consistent with constitutional protections.

The Rule of Professional Conduct in TRSC Rule 8 should be subject to challenge. Certain rules impose on an attorney's constitutional right to contract and advertise their services. Similar restrictions are not placed on other professions. Other rules are vague and ambiguous leaving attorneys to guess at what conduct would constitute misconduct. Others invade the privacy of an attorney's law practice such as making it unethical to refuse to provide any document asked for by the disciplinary counsel regardless of the relevance to the complaint.

The Board should be prohibited from creating its own set of internal rules other than rules of order for the handling of its own meetings.

The Board should have to be accountable to the bar for strict compliance with the rules. Removing the word "duty" from Rule 9 regarding the powers of the Board is unconscionable. The purpose of the Board is to uphold the integrity of the legal profession there should be nothing about its work that is secret. Even its secret meetings where they consider filing formal petitions against attorneys; why are these secret? Any attorney being accused of misconduct should have notice and the right to appear in any meeting which involves their right to practice law.

Finally, every attorney should have the right to file a counterclaim against the BPR for attorney'sfees (even compensation for their own time) when they prevail in having the petition or any of the charges dismissed. The Equal Access to Justice Statute found in Title 29 provides relief for small businesses to seek attorney's fees when they have been pursued by other state agencies. Private practice attorneys are no different. They have to employ a staff, pay their own rent, insurance, and other expenses. Restricting access to this relief for attorneys is a violation of equal protection.

Memorandum on the Standard of Proof

MEMORANDUM FOR DETERMINATION OF STANDARD OF PROOF AND OBJECTION ON CONSTITUTIONAL GROUNDS

Comes the Respondent, _____, and respectfully objects to any adjudication herein against her upon any standard of proof other than clear and convincing evidence, and moves for an order of this panel, or by the appropriate court to which this issue should be referred by the panel prior to any order of adjudication being entered against Respondent, that Tenn. Sup. Court Rule 9, Secs 8.2 and 1.3 are repugnant to the due process guarantees of the Amendment XIV of the US Constitution and Art. 1, Sec. 17 of the Tennessee Constitution, for the following reasons:

1) Respondent has a strong **property interest** in her license to practice law in the State, and any adjudication against her will damage the value of her license and her ability to earn income. Further, any suspension, temporary or permanent, will completely nullify her ability to earn an income. The United States Supreme Court has defined the boundaries of a "property interest" in the context of the Fourteenth Amendment: To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it...Property interests, of course are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Braswell v. Shoreline Fire Depart.* DC No. CV 08-00924-RSM, for publication 9th Cir., quoting *Bd. of Regents of State Colls v. Roth*, 408 US 564, 577 (1972). A person "has a liberty interest in employment protected by the Due Process

Clause" if "the dismissal effectively precludes future work in the individual's chosen profession." Id.

2) Under Rule 9, Sec 8.2, this panel can adjudicate a disciplinary finding against Respondent upon only a **preponderance of evidence**. Under Rule 9, Sec. 1.3, any appellate review of this panel's decision is limited and applies extraordinary deference to the panel's findings. The reviewing court may only review the evidence in the record and can only overturn the panel if it finds that the panel's decision is *arbitrary, capricious and characterized by an abuse of discretion.*

3) Not only does the lower standard of proof impinge upon the Constitutional protections of due process for the Respondent in a panel hearing, but in Tennessee, the Respondent faces the extremely difficult position of successfully challenging the panel findings on appeal, which have been based on the lower preponderance of evidence standard.

4) Therefore, the preponderance of evidence standard of proof deprives Respondent of her state and federal due process rights, especially in light of the stringent deferential review provided in Tennessee.

5) These proceedings are quasi-criminal in nature. As explained in *Nguyen v. Dept. of Health, Medical Quality Assurance Com.*, 29 P3d 689 (Wash 2001), quasi-criminal professional disciplinary licensing hearings must be based on a clear and convincing standard of proof to comport with the due process analysis set forth by the US Supreme Court in *Mathews v. Eldridge*, 424 US 319, 96 S. Ct 893 (1976); and *Santosky v. Kramer*, 455 US 745; 102 S. Ct. 1388 (1982). See also, *Ongom v. Dept of Health,* 148 P3d 1029 (Wash. 2006); *Johnson v. Board of Governors*, 913 P2d 1339 (Okla. 1996). Attorneys are entitled to fundamental due process in disciplinary proceedings. *In re Ruffalo*, 390 US

544, 88 S. Ct. 12222 (1968), Rule 11(7) of the Montana Rules for Lawyer Disciplinary Enforcement which requires proof by clear and convincing evidence; *Matter of Halprin*, 244 Mont. 363, 367; 798 P2d 80, 82 (1990); *In re La Fountain*, 738 P. 2d 472, 475 (1987). Accordingly, clear and convincing proof is the appropriate due process standard in this proceeding. *State ex rel. Okla Bar Assoc. v. Farrant,* 867 P2d 1279 (Okla. 1994). See also Attorney Disbarment Proceedings and the Standard of Proof, 24 Hofstra L. Rev. 275 (1995), arguing that because of the severe nature of disbarment, [attorney] disciplinary action mandates a higher standard of proof, notwithstanding.... Thus, the "clear and convincing" standard is uniquely suited for attorney disbarment proceedings[1], where the allegations of wrongdoing are quasi-criminal in nature, the interests at stake are more substantial than mere loss of money, the defendant risks a tarnished reputation and the individual's right to his continued livelihood is jeopardized..." Id. [See also *Iowa Supreme Court Attorney Disciplinary Bd. v. Rickabaugh,* 2007, 728 N. W. 2d 375 and Iowa Ct. R. 35.4, showing that even where a standard of "clear and convincing" is not required, the state is required to prove disciplinary violations by a convincing preponderance of the evidence, which burden is less than proof beyond a reasonable doubt but more than the preponderance standard required in the usual civil case.]

[1] This article also points out that the American Bar Association "Model Rules for Lawyer Disciplinary Enforcement, Rule 18(3)" require that "formal charges of misconduct, lesser misconduct, petitions for reinstatement and readmission, and petitions for transfer to and from disability inactive status shall be established **by clear and convincing evidence**." (See Attached). Tenn. Rules of the Supreme Court Rule 9, Section 8.4 require the hearing panel to consider the applicable provisions of the ABA Standards for Imposing Lawyer Sanctions. It defies logic as to why the Tenn. Sup. Ct. Rule would require the application of ABA standards in one section and ignore the Model Rules for application of the Standard of Proof.

6) Accordingly, this panel should rule that clear and convincing proof is the proper constitutional standard, or refer the issue of law to the appropriate court, for such a determination.

7) Finally, under Tennessee case law, "structural constitutional errors that compromise the integrity of the judicial process itself are not harmless." They involve defects in the trial mechanism. These errors deprive citizens of basic protections. Structural constitutional errors are not amenable to harmless error review and require an automatic reversal when they occur. *State v. Rodriquez*, 254 SW 3d 361, 371 (Tenn. 2008)

8) In *Strunk v. Lewis Coal Co.*, the trial court was reversed where is had applied the wrong standard of proof. The trial court had found that the finding of guilt by a preponderance of the evidence on a contempt action was a violation of due process and had to be reversed. The court noted that the alleged contempt was criminal rather than civil in nature. Once it had been determined that the contempt was criminal in nature, the law required that defendants' guilt be established beyond a reasonable doubt. The trial court correctly recognized the criminal nature of the proceeding, but it explicitly invoked the wrong standard of proof. Thus, defendants were **denied due process** of law guaranteed under both the state and federal constitutions and their assignment of error had to be sustained. *Strunk v. Lewis Coal Co.*, 547 S.W.2d 252 (Tenn. Crim. App. 1976)

WHEREFORE RESPONDENT PRAYS THAT THIS PANEL OR ANOTHER APPROPRIATE TRIBUNAL:

Find that Tenn. Sup. Ct. Rule 9, Sec 8.2, which dictates that the standard of proof upon which the respondent should be tried in a disciplinary proceeding of "preponderance of

evidence" violates the Respondent's right to due process under Amendment XIV of the US Constitution and Art.1, Sec. 17 of the Tennessee Constitution.

APPENDIX

CASE LAW

Braswell v. Shoreline Fire Depart. DC No. CV 08-00924-RSM, for publication 9th Cir.

Nguyen v. Dept. of Health, Medical Quality Assurance Com., 29 P3d 689 (Wash 2001)

Mathews v. Eldridge, 424 US 319, 96 S. Ct 893 (1976)

Santosky v. Kramer, 455 US 745; 102 S. Ct. 1388 (1982)

Ongom v. Dept of Health, 148 P3d 1029 (Wash. 2006)

Johnson v. Board of Governors, 913 P2d 1339 (Okla. 1996)

In re Ruffalo, 390 US 544, 88 S. Ct. 12222 (1968)

Rule 11(7) of the Montana Rules for Lawyer Disciplinary Enforcement

Matter of Halprin, 244 Mont. 363, 367; 798 P2d 80, 82 (1990)

In re La Fountain, 738 P. 2d 472, 475 (1987)

State ex rel. Okla Bar Assoc. v. Farrant, 867 P2d 1279 (Okla. 1994)

Attorney Disbarment Proceedings and the Standard of Proof, 24 Hofstra l. Rev. 275 (1995)

Model Rules for Lawyer Disciplinary Enforcement, Rule 18(3)

Iowa Supreme Court Attorney Disciplinary Bd. v. Rickabaugh, 2007, 728 N. W. 2d 375

Iowa Ct. R. 35.10

Memorandum on the failure to comply with T.C.A. § 16-3-404 and TN Supreme Court opinion entered May 24, 2013

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE
January 3, 2013 Session

HERBERT S. MONCIER v. BOARD OF PROFESSIONAL RESPONSIBILITY

Direct Appeal from the Board of Professional Responsibility Panel
No. 2011-2058-2-NJ(24)

No. E2012-00340-SC-R3-BP

ORDER

This case was heard on January 3, 2013. On May 15, 2013, the appellant, Herbert S. Moncier, filed a "Notice to Tennessee Attorney General" and a "Tenn. R. App. P. 22 Motion To Pretermit This Appeal And Set Aside The Monetary Judgment For Lack of Subject Matter Jurisdiction." On May 24, 2013, the Tennessee Attorney General and Reporter, whom Mr. Moncier served with the May 15, 2013 Notice and Motion, filed a response. The Board of Professional Responsibility also filed a response on May 24, 2013, adopting in its entirety the response filed by the Attorney General and Reporter.

Mr. Moncier asserts that this Court lacks subject matter jurisdiction because the Tennessee General Assembly has never approved Tennessee Supreme Court Rule 9, section 24.3. We need only quote from prior decisions of this Court to illustrate the utter fallacy of Mr. Moncier's assertion. "[T]his Court exercises original jurisdiction over issues pertaining to the practice of law." Petition of Burson, 909 S.W.2d 768, 773 (Tenn. 1995). "The Supreme Court is the source of authority of the Board of Professional Responsibility and all of its functions." Hughes v. Bd. of Prof'l Responsibility, 259 S.W.3d 631, 640 (Tenn. 2008) (citing Brown v. Bd. of Prof'l Responsibility, 29 S.W.3d 445, 449 (Tenn. 2000)). "The Supreme Court of Tennessee has original and exclusive jurisdiction to promulgate its own Rules. Its rule making authority embraces the admission and supervision of members of the Bar of the State of Tennessee." Petition of Tennessee Bar Ass'n, 539 S.W.2d 805, 807 (Tenn. 1976); see also Belmont v. Bd. of Law Examiners, 511 S.W.2d 461, 462 (Tenn.1974) ("[T]his Court has the inherent power to prescribe and administer rules pertaining to the licensing and admission of attorneys and as a necessary corollary thereto, no other court in

Tennessee can construe or determine the applicability of a rule used to implement that power."); Petition of Youngblood, 895 S.W.2d 322, 325 (Tenn. 1995) (same).

Any other non-jurisdictional issue Mr. Moncier purports to raise by his May 15, 2013 Motion is waived. Parties may not raise non-jurisdictional issues for the first time on appeal. Dye v. Witco Corp., 216 S.W.3d 317, 321 (Tenn. 2007); Black v. Blount, 938 S.W.2d 394, 403 (Tenn. 1996). Parties certainly may not raise such issues for the first time in a motion filed after briefing and oral argument in an appellate court.

Accordingly, Mr. Moncier's May 15, 2013 Motion is DENIED.

PER CURIAM

Supreme Court - Eastern Division
P. O. Box 444
505 Main Street, Suite 200
Knoxville, TN 37901-0444
(865)594-6700

Sandra Jane Leach Garrett
TN Board of Professional Responsibility
10 Cadillac Drive, Suite 220
Brentwood, TN 37027

Date Printed: 05/24/2013
Notice Date: 05/24/2013
Case Style: Herbert S. Moncier vs. Board of Professional Responsibility
Case Number: E2012-00340-SC-R3-BP
Action: Date Filed: 05/24/2013 COURT ORDER FILED: Other: Filed - See Comment Below ::
Trial Court: Knox County Circuit Court **Trial Court Number:** 201120582NJ24

The Appellate Court Clerk's Office has entered the above action in the Justice Information Tracking System.
Mr. Moncier's May 15, 2013 motion is DENIED.

JMN

C: Talmage Mims Watts
Herbert S Moncier

In The

Tennessee Supreme Court

HERBERT S. MONCIER	)	
	)	
Appellant,	)	
	)	
V.	)	No. E2012-00340-SC-R2-BP
	)	
BOARD OF PROFESSIONAL RESPONSIBILITY	)	
FOR THIS COURT	)	
	)	
Appellee.	)	

Tenn. R. App. P. 22 Motion To Pretermit This Appeal And Set Aside The Monetary Judgment For Lack Of Subject Matter Jurisdiction

Pursuant To Tenn. R. App. P. 22, Appellant moves this Court pretermit this appeal and vacate the monetary judgment against Appellant for lack of subject matter jurisdiction because Tenn. R. Sup. Ct. 9, § 24.3 was not effective at the time of the entry as being approved by the Legislature as required by Tenn. Code Ann. § 16-3-404 and was otherwise unconstitutional pursuant to Tenn. Const. Art. II, § 2; Tenn. Const. Art. II, § 3, cl. 1; Art. VI, § 2, cl. 4; Art. VI, § 3, cl. 2; and Art. XI, § 16.

Foreword

Appellant has the highest regard for the Office of this Court and its Members. Appellant presents the constitutional issues in this Motion professionally, respectfully, in good faith and not for any improper purpose or motive.

Appellant acknowledges the Constitutional questions presented bear on actions and rulings of prior and present Members of this Court. Appellant further acknowledges that the present Members of this Court have an interest in the exercise of what they believe to be the Court's powers. The doctrine of *in propria causa nemo judex* translated by Black's Law Dictionary, 5th Edition means,"No one can be judge in his own cause." This doctrine, whether part of due process or not, lends itself to a determination of whether the members of this Court should address issues presented in this Motion.

In this Motion, Appellant relies on specific provisions of the Constitution of Tennessee and statutes of the Legislature that have not been previously addressed by any court in Tennessee.The issues presented as to theconstitutionality of this Court's rules are of first impression that have not been addressed specifically in prior opinions of this Court pertaining to the practice of law before the Courts of this State.[1]

Appellant recognizes that the present Members of this Court have no intention to abuse any power of legislation by Rules enacted by the Court without approval of the Legislature. However, Appellant suggests that the present Members of this Court must be vigilant to guard against a slippery slope created by this Court (1) holding that it has exclusive

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[1]Belmont v. Board of Law Examiners, 511 S.W.2d 461, 463 (Tenn. 1974); Smith County Education Ass'n v. Anderson, 676 S.W.2d 328, 333 (Tenn. 1984); Brown v. Bd. of Prof'l Responsibility, 29 S.W.3d 445, 449 (Tenn. 2000); Ed. of Prof"l Responsibility v. Love, 256S.W.3d 644,651 (Tenn. 2008); Memphis and Shelby Cty. Bar Ass'n. v. Vick, 290 S.W.2d 871, 875 (Tenn. Ct. App. 1955); Doe v. Bd. of Prof'l Responsibility, 104 S.W.3d 465, 470 (Tenn. 2003); Barger v. Brock, 535 S.W.2d 337, 341-42 (Tenn. 1976).

power to prescribe law by Rules without legislative approval; (3) enforcing those Rules; and (e) being theoriginal and exclusive jurisdiction to adjudicate the meaning, validity and constitutionality of Rules the Court unilaterally enact. Respectfully, placing legislative, executive and judicial functions of government in one body is dangerous to the Republic form of government adopted by the people of Tennessee by their Constitution.

Appellant sincerely requests that, if this Court chooses not to disqualify itself because of the nature of the issues presentedthat bear on the Court's own jurisdiction, that this Court do so impartially, and set aside any interest the Court may have in its powerto enact rules without the authority of the Legislature.

Statement Of The Case

Appellant has pending appeals of right from Chancery Court's dismissal of claims that Appellant's hearing panel and the BOPR violated the Legislature's Open Meetings Act. It is Appellant's claim in those appeals that the creation of the BOPR and hearing panels can be traced to the Legislature[2] because Tenn. Code Ann. § 16-3-404 requires that the Legislature approve all Supreme Court Rules, including Tenn. Sup. Ct. R. 9 which created those bodies.

On April 10, 2013, during oral argument before Court of Appeals in the pending appeal in *Herbert S. Moncier and Law Office of Herbert S. Moncier v. Board of Professional Responsibility of the Supreme Court of Tennessee*, M2012-00779-COA-R3-CV, Judge Andy D. Bennett of the Middle Section asserted that the Legislature has not approved the Supreme Court Rules. Whether Tenn. Sup. Ct. R. 24.3 was effective as having been approved by the Legislature had not been presented or briefed by the parties to this appeal.

It now appears to Appellant that Judge Bennett was correct, i.e., the Tennessee Supreme Court Rules have not been approved by the Legislatureas Tenn. Code Ann. § 16-3-404 requires. Accordingly,pursuant to that statute, Supreme Court Rule24.3 was not effective at the time the judgment that is the subject of this appeal was entered against Appellant, and there was no subject matter jurisdiction for entry of such judgment.

Appellant proffers that the official Code adopted by the Codes Commission reflects that the Tennessee Supreme Court rules became effective January 28, 1981; Appellant has located Resolutions of the Legislature approving amendments to the Tennessee Rules of Civil Procedure; Rules of Criminal Procedure; Rules of Evidence; and Rules of Appellate

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[2] In *Dorrier v. Dark, Tenn.*, 537 S.W.2d 888, 892 (1976) this Court held "It is clear that for the purpose of this Act, [Open Meetings Act] the Legislature intended to include any board, commission, committee, agency, authority or any other body, by whatever name, whose origin and authority may be traced to State, City or County legislative action . . ."

Procedure;that Appellant has been able to locate Resolutions of the Legislature urging the Tennessee Supreme Court not to adopt certain specified Rules of the Supreme Court; but that Appellant has been unable to locate a Resolution of the Legislature approving the Tennessee Supreme Court Rules generally, or Rule 9, § 24.3 which provided subject matter jurisdiction for the judgment entered against Appellant that is the subject of this appeal.

Appellant has provided the Tennessee Attorney General notice of this Motion for the Attorney General to perform the statutory duty of that Office "to defend the constitutionality and validity of all legislation of statewide applicability [in this case Tenn. Code Ann. § 16-3-404] . . . enacted by the general assembly, except in those instances where he is of the opinion that such legislation is not constitutional, in which event the attorney general and reporter shall so certify to the speaker of each house of the general assembly." Tenn. Code Ann. § 8-6-109(b)(9).

Appellant has included a index to the contents of this Motion and Memorandum in the appendix to this Motion.

Memorandum In Support Of Motion

I. There is No Subject Matter Jurisdiction For The Monetary Judgment Against Appellant Because Tenn. Sup. Ct. R. 9, § 24.3 Had Not Been Approved By The Legislature As Required By Tenn. Code Ann. § 16-3-404 And Was Not Effective At The Time Of The Judgment Was Entered Against Appellant.

Tenn. Const. Art. VI, § 2, cl. 4, provides:

". . . The jurisdiction of this [Supreme Court] Court shall be appellate only, under such restrictions and regulations as may from time to time be prescribed by law; but it may possess such other jurisdiction as is now conferred by law on the present Supreme Court. . . ."[34]

Tenn. Const. Art. VI, § 3, cl. 2, provides:

". . . The Legislature shall have power to prescribe such rules as may be necessary to carry out the provisions of section two of this article. . . ."[5]

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[3] Tenn. Const. Art. VI, Sec. 2. Supreme court.

> The Supreme Court shall consist of five Judges, of whom not more than two shall reside in any one of the grand divisions of the State. The Judges shall designate one of their own number who shall preside as Chief Justice. The concurrence of three of the Judges shall in every case be necessary to a decision. **The jurisdiction of this Court shall be appellate only, under such restrictions and regulations as may from time to time be prescribed by law; but it may possess such other jurisdiction as is now conferred by law on the present Supreme Court.**Said Court shall be held at Knoxville, Nashville and Jackson.

[4] By practice it appears that the phrase "under such restrictions and regulations as may from time to time be prescribed by law" does not modify the provision "The jurisdiction of this [Supreme Court] shall be appellant only" but instead provides that new laws can enlarge the jurisdiction of the Supreme Court beyond being "appellate only."

[5]Tenn. Const. Art. VI. Sec. 3. Supreme court judges.

> The Judges of the Supreme Court shall be elected by the qualified voters of the State. The Legislature shall have power to prescribe such rules as may be necessary to carry out the provisions of section two of this article. Every Judge of the Supreme Court shall be thirty-five years of age, and shall before his election have been a resident of the State for five years. His term of service shall be eight years.

Tenn. Code Ann. § 16-3-401.Supreme Court Rules of Practice.

> The supreme court may make rules of practice for the better disposal of business before it.

Tenn. Code Ann. § 16-3-404. Effective date of rules -- Approval of rules by general assembly.

> The supreme court shall fix the effective date of all its rules; provided, that the rules shall not take effect until they have been reported to the general assembly by the chief justice at or after the beginning of a regular session of the general assembly, but not later than February 1 during the session, and until they have been approved by resolutions of both the house of representatives and the senate.

The issue presented in thismotion is whether Rule 9, § 24.3 was effective at the time the monetary judgment,that is the subject of this appeal,was entered against Appellant.[6]If Rule 9, § 24.3was not effective,there was no subject matter jurisdiction for the judgment to be enteredand that judgment is void.[7]

Subject Matter Jurisdiction Cannot Be Waived

Subject matter jurisdiction may be raised at any time by the parties or by the appellate court *suasponte* on appeal. *County of Shelby v. City of Memphis*, 365 S.W.2d 291 (Tenn. 1963). Issues of lack of subject matter jurisdiction may be raised at any time, even on appeal when not raised in the trial court and pursuant to Rule 13(b) T.R.A.P., appellate courts have the duty to review the subject matter jurisdiction even if not raised as an issue on appeal.

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[6] It remains unclear whether the BOPR assessed the monetary judgment pursuant to Rule 9, § 24.3, ¶ 1 and this Court enforced that judgment or whether this Court entered an original judgment on June 1, 2011. Regardless of where he judgment originated, if Rule 9, § 24.3 was not approved by the Legislature it was not effective and there was no subject matter jurisdiction. If the judgment originated in this Court then Tenn. R. Civ. P. 60.02(2) or Tenn. Code Ann. § 16-3-206 would apply for this Court to void the judgment.

[7] In this direct appeal, Appellant claims that this Court did not have subject matter jurisdiction to enter the Rule 9, § 24.3 judgment because, pursuant to Rule 9, § 8.4, ¶ 2, Appellant had two direct appeals pending at the time this Court entered its June 1, 2011, enforcement of the hearing panel judgment that included the monetary judgment. Appellant claims that there was both a denial of pre and post judgment due process.

State v. Segraves, 837 S.W.2d 615, 616 (Tenn. Crim. App. 1992).The parties cannot confer subject matter jurisdiction on a court by either appearance, plea, consent, silence, or waiver. *Dishmon v. Shelby State Cmty, Coll.,* 15 S.W.3d 477, 480 (Tenn. Ct. App. 1999).

In *Bd. of Prof'l Responsibility of the Tenn. Supreme Court v. Cawood*, 330 S.W.3d 608 (Tenn. 2010)this Court held that the Tenn. Code Ann. §§ 27-8-104 and 27-8-106 statutory requirements for a writ of common law certiorari are jurisdictional for Rule 9 judicial review of an attorney hearing panel judgment.[8] The same is true of the Legislature's requirement under Tenn. Code Ann. § 16-3-404 that Rule 9 is not effective until approved by the Legislature.[9]

II. BOPR Panel Members Were Not Lawfully And Constitutionally Appointed.

In Issue VI of Appellant's direct appeal, Appellant challenges the BOPR panel members who heard Appellant's petition as "not being a duly constituted panel" as required by Rule 9, § 24.3, ¶ 2, because they had not been sworn as required by Tenn. Const. Art. X, § 1.[10]

It now appears that the BOPR members had not been lawfully appointed because Rule 9, that created the BOPR, had not been approved by the Legislature as required by Tenn. Code. Ann. § 16-3-404 addressed in Issue I, *supra.* Accordingly, if the judgment originated with an assessment by the BOPR pursuant to Rule 9, § 24.3, ¶ 1, the BOPR members were not lawfully and constitutionally appointed and the judgment is void.

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[8] This Court later held in *Talley v. Bd. of Prof'l Responsibility*, 358 S.W.3d 185 (Tenn. 2011) that the requirement "This is the first application for the writ" could be waived; however the requirement the application for the common law writ be under oath required by the constitution could not. In this case the constitutional power of the Legislature in Tenn. Const. Art. VI, § 3, cl. 2 exercised in Tenn. Code Ann. § 16-3-404 required that Rule 9 be approved by the Legislature prior to being effective. Accordingly, just as Appellant did not file his Petition for Judicial Review under oath, this Court did not obtain approval of Rule 24.3 by the Legislature and there is no subject matter jurisdiction for the monetary judgment entered under that ineffective rule.

[9] As discussed *infra* Tenn. Const. Art. VI, § 3, cl. 2 provides the Legislature authority to enact Tenn. Code Ann. § 16-3-404.

[10] Appellant also challenges the Panel Members as being disqualified.

Rule 9 BOPR members, while not acting *de jure*, may be acting *de facto*. *De jure* applies to officials who arelawfully and constitutionally acting.In this case it appears that the office of Rule 9, § 24.3 panel members were not approved by the Legislature as required by Tenn. Code Ann. § 16-3-404.[11]However,officersmay be acting *de facto* as to third parties. *See Jordan v. Knox County*, 213 S.W.3d 751, 774 (Tenn. 2007).[12]

Ina criminal habeas corpus[13] case in *Bankston v. State*, 908 S.W.2d 194, 196 (Tenn. 1995) this Court held:

> The difference between judges *de jure* and *de facto* and the general rule concerning the validity of the acts of a judge *de facto* can be summarized as follows:
>
> A judge *de jure* is one who is exercising the office of a judge as a matter of right. In order to become a judge *de jure,* one must satisfy three requirements: he must possess the legal qualifications for the judicial office in question; he must be lawfully chosen to such office; and he must have qualified himself to perform the duties of such office according to the mode prescribed by law.
>
> A judge *de facto* is One acting with the color of right and who is regarded as, and has the reputation of, exercising the judicial function he assumes. He differs, on the one hand, from a mere usurper of an office who undertakes to act without any color of right: and on the other hand, from an officer *de jure* who is in all respects legally appointed and qualified to exercise the office ...
>
> 48A C.J.S. *Judges* § 2 (1981).

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[11] As addressed in Appellant's brief, the BOPR did not assess attorney fees as required by Rule 24.3, ¶ 1. This Court entered the judgment based on an invoice from Disciplinary Counsel. Accordingly, whether the BOPR was lawfully or constitutionally effective because Tenn. Code Ann. § 16-3-404 approval by the Legislature is addressed *infra*.

[12] It is beyond the scope of this appeal whether the hearing panel in Appellant's case had subject matter jurisdiction. Appellants' have an issue pending before this Court as to whether Appellants' direct appeal from the hearing panel judgment divested this Court of subject matter jurisdiction to enforce the hearing panel judgment. If this Court were to agree, and if Appellants' direct appeal was reinstated, then Appellant would be able to present the issue in the direct appeal. Otherwise, Tenn. R. Civ. P. 60.02(2) would apply.

[13] *Bankston* did not consider Tenn. R. Civ. P. 60.02(3) or (5) and Tenn. Code Ann. § 16-3-206 applies o this Court.

> Because the doctrine of *de facto* officers extends to judges, a judge de *facto* is a judge *de jure* as to all parties except the state, and, ... his official acts, before he is ousted from office, are binding on third parties and the public.

This Court went on to hold in *Bankston* that a *de facto* judgment is valid against third parties that do not challenge the lawfulness, or constitutionality, of the authority in the trial court or on direct appeal. By this Motion, Appellant challenge the validity and constitutionality of the appointment of the BOPR members in this direct appeal, because the office of BOPR member created by Rule 9was not effective at the time the judgment was entered and this Court's legislation by Rule 9 is otherwise unconstitutional.

III. Tennessee Supreme Court Rule 9, § 24.3ConstitutesLegislation That Invades The Tenn. Const. Art. II, 3, cl. 1; Art. VI. § 2, cl. 4 ; and Art. VI. § 3, cl. 2 Authority Of The Legislature In Violaiton Of Tenn. Const. II, § 2.

The Legislature exercised its Tenn. Const. Art. VI, § 3, cl. 2 powers.

> Tenn. Code Ann. § 16-3-201. Jurisdiction.
>
> (a) The jurisdiction of the court [Supreme Court] is appellate only, under restrictions and regulations that from time to time are prescribed by law; but it may possess other jurisdiction that is now conferred by law upon the present supreme court.
>
> (b) The court has no original jurisdiction, but appeals and writs of error, or other proceedings for the correction of errors, lie from the inferior courts and court of appeals, within each division, to the supreme court as provided by this code.
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> . . .[14]

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[14] 16-3-201. Jurisdiction.

(a) The jurisdiction of the court is appellate only, under restrictions and regulations that from time to time are prescribed by law; but it may possess other jurisdiction that is now conferred by law upon the present supreme court.

(b) The court has no original jurisdiction, but appeals and writs of error, or other proceedings for the correction of errors, lie from the inferior courts and court of appeals, within each division, to the supreme court as provided by this code.

(c) The court also has jurisdiction over all interlocutory appeals arising out of matters over which the court has exclusive jurisdiction.

The Tennessee Constitutional Power To Legislate

Tenn. Const. Art. II, § 3, cl. 1, provides:

"The Legislative authority of this State shall be vested in a General Assembly, which shall consist of a Senate and House of Representatives,. . ."

The Tennessee Constitutional Jurisdiction Of The Supreme Court

Tenn. Const. Art. VI, § 2, cl. 4, provides:

". . . The jurisdiction of this [Supreme Court] Court shall be appellate only, under such restrictions and regulations as may from time to time be prescribed by law; but it may possess such other jurisdiction as is now conferred by law on the present Supreme Court. . . ."[15][16]

(d)(1) The supreme court may, upon the motion of any party, assume jurisdiction over an undecided case in which a notice of appeal or an application for interlocutory or extraordinary appeal is filed before any intermediate state appellate court.

(2) Subdivision (d)(1) applies only to cases of unusual public importance in which there is a special need for expedited decision and that involve:

(A) State taxes;

(B) The right to hold or retain public office; or

(C) Issues of constitutional law.

(3) The supreme court may, upon its own motion, when there is a compelling public interest, assume jurisdiction over an undecided case in which a notice of appeal is filed with an intermediate state appellate court.

(4) The supreme court may by order take actions necessary or appropriate to the exercise of the authority vested by this section.

(e) Appeals of actions under title 2, chapter 17 relative to election contests shall be to the court of appeals in accordance with the Tennessee rules of appellate procedure.

[15] Tenn. Const. Art. VI, Sec. 2. Supreme court.

> The Supreme Court shall consist of five Judges, of whom not more than two shall reside in any one of the grand divisions of the State. The Judges shall designate one of their own number who shall preside as Chief Justice. The concurrence of three of the Judges shall in every case be necessary to a decision. **The jurisdiction of this Court shall be appellate only, under such restrictions and regulations as may from time to time be prescribed by law; but it may possess such other jurisdiction as is now conferred by law on the present Supreme Court.**Said Court shall be held at Knoxville, Nashville and Jackson.

[16] By practice it appears that the phrase "under such restrictions and regulations as may from time to time be prescribed by law" does not modify the provision "The jurisdiction of this [Supreme Court]

The Tennessee Constitutional Power Of The Legislature Over The Jurisdiction Of The Supreme Court

As discussed above, Tenn. Const. Art. VI, § 3, cl. 2, provides:

> ". . . The Legislature shall have power to prescribe such rules as may be necessary to carry out the provisions of section two of this article. . . ."[17]

The Tennessee Constitutional Exercise OfPower By The Legislature Over The Jurisdiction Of The Supreme Court

Pursuant to its exercise of its constitutional powers provided the Legislature by Tenn. Const. Art. II, § 3, cl. 1; Art. VI, § 2, cl. 4; and Art. VI, § 3, cl. 2, the Legislature enacted Title 16, Chapter 3 of Tennessee's Code. Title 16, Chapters 1 and 2 include multiple statutes that pertain to Tennessee's courts and judicial system.

Pursuant to Art. II, § 3, cl. 1the Legislature enacted multiple provisions of Title 16, Chapter 3, Parts 1, 2 and 3 that pertain to the jurisdiction and proceedings of this Court. Among those provisions, the Legislature prescribed by statute the jurisdiction of this Court and provided for authority of this Court to correct inadvertence, oversight or vacate its judgments where upon the face of the record no cause of action existed against the party.

> Tenn. Code Ann. § 16-3-201. Jurisdiction.
>
> (a) The jurisdiction of the court is appellate only, under restrictions and regulations that from time to time are prescribed by law; but it may possess other jurisdiction that is now conferred by law upon the present supreme court.

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shall be appellant only" but instead provides that new laws can enlarge the jurisdiction of the Supreme Court beyond being "appellate only."

[17]Tenn. Const. Art. VI. Sec. 3. Supreme court judges.

> The Judges of the Supreme Court shall be elected by the qualified voters of the State. The Legislature shall have power to prescribe such rules as may be necessary to carry out the provisions of section two of this article. Every Judge of the Supreme Court shall be thirty-five years of age, and shall before his election have been a resident of the State for five years. His term of service shall be eight years.

(b) The court has no original jurisdiction, but appeals and writs of error, or other proceedings for the correction of errors, lie from the inferior courts and court of appeals, within each division, to the supreme court as provided by this code.

. . .[18]

Tenn. Code Ann. § 16-3-206. Vacating judgment.

In all cases in which the supreme court may give judgment or decree through inadvertence and oversight, when upon the face of the record no cause of action existed against the party, the court may, upon its own motion, vacate the judgment or decree.

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[18] 16-3-201. Jurisdiction.

(a) The jurisdiction of the court is appellate only, under restrictions and regulations that from time to time are prescribed by law; but it may possess other jurisdiction that is now conferred by law upon the present supreme court.

(b) The court has no original jurisdiction, but appeals and writs of error, or other proceedings for the correction of errors, lie from the inferior courts and court of appeals, within each division, to the supreme court as provided by this code.

(c) The court also has jurisdiction over all interlocutory appeals arising out of matters over which the court has exclusive jurisdiction.

(d)(1) The supreme court may, upon the motion of any party, assume jurisdiction over an undecided case in which a notice of appeal or an application for interlocutory or extraordinary appeal is filed before any intermediate state appellate court.

(2) Subdivision (d)(1) applies only to cases of unusual public importance in which there is a special need for expedited decision and that involve:

(A) State taxes;

(B) The right to hold or retain public office; or

(C) Issues of constitutional law.

(3) The supreme court may, upon its own motion, when there is a compelling public interest, assume jurisdiction over an undecided case in which a notice of appeal is filed with an intermediate state appellate court.

(4) The supreme court may by order take actions necessary or appropriate to the exercise of the authority vested by this section.

(e) Appeals of actions under title 2, chapter 17 relative to election contests shall be to the court of appeals in accordance with the Tennessee rules of appellate procedure.

Regarding the rule making authority of the Court:

Tenn. Code Ann. § 16-3-307. Rules for terms and transfers.

The court is empowered to make all necessary rules to carry out the purposes of §§ 16-2-104, 16-3-305, and 16-3-306, and to expedite the hearing of cases.

Tenn. Code Ann. § 16-3-401.Supreme Court Rules of Practice.

The supreme court may make rules of practice for the better disposal of business before it.

Tenn. Code Ann. § 16-3-402. Other courts -- General rules of practice.

The supreme court has the power to prescribe by general rules the forms of process, writs, pleadings and motions, and the practice and procedure in all of the courts of this state in all civil and criminal suits, actions and proceedings.

Tenn. Code Ann. § 16-3-403. Rules not to affect substantive rights -- Consistency with constitutions.

The rules prescribed by the supreme court pursuant to § 16-3-402 shall not abridge, enlarge or modify any substantive right, and shall be consistent with the constitutions of the United States and Tennessee.

Tenn. Code Ann. § 16-3-404. Effective date of rules -- Approval of rules by general assembly.

The supreme court shall fix the effective date of all its rules; provided, that the rules shall not take effect until they have been reported to the general assembly by the chief justice at or after the beginning of a regular session of the general assembly, but not later than February 1 during the session, and until they have been approved by resolutions of both the house of representatives and the senate.

Tenn. Code Ann. § 16-3-405. Publication of rules.

All rules adopted by the supreme court shall be published in the Tennessee Code Annotated and may be publicized both before and after becoming effective in a manner that the supreme court deems appropriate.

16-3-406. Laws in conflict with rules nullified.

After the rules have become effective, all laws in conflict with the rules shall be of no further force or effect.

Title 16, Part 5 pertains to this Court's supervisory powers over lower courts.

Tenn. Code Ann. § 16-3-501. Inferior courts -- Supervisory control.

In order to ensure the harmonious, efficient and uniform operation of the judicial system of the state, the supreme court is granted and clothed with general supervisory control over all the inferior courts of the state.

Tenn. Code Ann. § 16-3-502. Supervisory procedures.

In addition to other constitutional, statutory and inherent power, but not restrictive thereof, the supreme court may:

(1) Designate the administrative director of the courts as the chief administrative officer of the courts of the state;

(2) Direct the administrative director of the courts to take all action or to perform duties that are necessary for the orderly administration of justice within the state, whether or not herein or elsewhere enumerated;

(3) Direct the administrative director of the courts to provide administrative support to all of the courts of the state through an administrative office of the courts in order to:

(A) Designate and assign temporarily any judge or chancellor to hold or sit as a member of any court, of comparable dignity or equal or higher level, for any good and sufficient reason;

(B) Maintain a roster of retired judges who are willing and able to undertake special duties from time to time and to designate or assign them appropriate judicial duties;

(C) Make a careful and continuing survey of the dockets of the circuit, criminal, chancery and other similar courts of record, and to report at periodic intervals to the court, and annually to the general assembly, information that is public record;

(D) Take affirmative and appropriate action to correct and alleviate any imbalance in caseloads among the various judicial districts of the state; and

(E) Take affirmative and appropriate action to correct or alleviate any condition or situation adversely affecting the administration of justice within the state;

(4) Adopt, upon the recommendation of the administrative director of the courts, an annual plan providing for the orientation of newly elected or appointed judges of trial or appellate courts of record and for the appropriate continuing legal education and training of the judges; and

(5) Establish and implement a policy concerning the prevention of sexual harassment. This policy shall include training workshops and the establishment of a hearing procedure.

Nothing in those powers includes discipline of attorneys; adopting Supreme Court Rules; or creating boards of non-judges to carry out any of the powers of the Supreme Court.

Tenn. Code Ann. § 16-3-503. Inherent power of court.

The general assembly declares that this part is declaratory of the common law as it existed at the time of the adoption of the constitution of Tennessee and of the power inherent in a court of last resort.

This provision refers to "Inherent powers" relating to the Part 5 "Supervision of Inferior Courts", not discipline of attorneys or creation of non-judge Boards to discipline attorneys. There is no statute that defines an "inherent" power of this Court at the time of the adoption of the constitution of Tennessee, or in a court of last resort, disciplining attorneys or creating boards consisting of non-judges to carry out a power of the Supreme Court, such as the BOPR.

Tenn. Code Ann. § 16-3-504.

16-3-504. Plenary and discretionary powers.

This part shall constitute a broad conference of full, plenary and discretionary power upon the supreme court.

Again, as with § 16-3-503 "inherent authority", this plenary and discretionary powers statute pertains to Part 5 "Supervision Of Inferior Courts." This statute does not pertain to disciplining attorneys or creating boards consisting of non-judges to carry out a power of the Supreme Court, such as the BOPR and the Legislature has not provided a rule or statute permitting this Court jurisdiction to exercise "Plenary and discretionary powers" to do so.

The Legislature Providing For " Inherent" and "Plenary And Discretionary Powers" For This Court To Supervise Inferior Courts Excludes The Legislature Granting This Court "Inherent" Or "Plenary And Discretionary Powers" To Discipline Attorneys Or Create Boards Of Non-Judges To Do So

As discussed *supra* Tenn. Const. Art. VI, § 2, cl. 4 provides

> . . . The jurisdiction of this Court shall be appellate only, under such restrictions and regulations as may from time to time be prescribed by law; but it may possess such other jurisdiction as is now conferred by law on the present Supreme Court. . . .

Also as discussed, Title 16, Part 5 pertains to the Supreme Court supervising lower courts, not discipline of attorneys or creation of boards of non-judges to do so. It is instructive, however, that regarding the supervision of lower courts "Inherent" and "Plenary" powers are treated separately in Tenn. Code Ann. §§ 16-3-504 and 505. "Inherent" jurisdiction is described by the Legislature in § 16-3-504 as "the common law as it existed at the time of the adoption of the constitution of Tennessee and of the power inherent in a court of last resort." This description appears to be the same as Tenn. Const. Art. VI, § 2, cl. 4 "The jurisdiction of this Court shall be appellate only, . . . but it may possess such other jurisdiction as is now conferred by law on the present Supreme Court."

The importance of this definition of "inherent" jurisdiction is that Tenn. Const. Art. VI, § 3, cl. 2, provides the Legislature power to provide rules necessary for this Court to exercise its "inherent" jurisdiction under Art. VI, § 2, cl. 4. That the Legislature did so with regard to the "inherent" jurisdiction to supervise lower courts demonstrates the Legislature's intent that any Rule of the Supreme Court adopted pursuant to Tenn. Code Ann. § 16-3-401 the Supreme Court may adopt for its "inherent" authority be approved by the Legislature pursuant to Tenn. Code Ann. § 16-3-404. Accordingly, if this Court had "inherent" authority to discipline attorneys at common law, the Legislature required pursuant to required by Tenn. Code Ann. §

16-3-404, that any board created by Rule 9 enacted by the Supreme Court pursuant to Tenn. Code Ann. § 16-3-401, be approved by the Legislature before becoming effective.

"Plenary" is defined by Black's Law Dictionary, 9th Edition, as "Full; complete; entire authority."Once again, the "plenary" powers provided this Court by Tenn. Code Ann. § 16-3-405 pertain only Part 5 supervision of lower courts and does not pertain to discipline of attorneys or creation of boards by this Court to do so. By the Legislature not providing this Court "Plenary" power over the discipline of attorneys or the creation of the BOPR to do so removes any authority of the Legislature granting this Court "Plenary" or discretionary power to do so.

Further, Appellant claims that the Legislature cannot either abrogate its Tenn. Const. Art. II, § 3, cl. 1, power of Legislation to the Supreme Court by granting the Supreme Court "Plenary" authority. Nor does any grant of "Plenary" authority nullify the Legislature's Tenn. Const. Art. VI, § 3, cl. 2 power to prescribe rules necessary for the Supreme Court to exercise its jurisdiction under Tenn. Const. Art. VI, § 2, cl. 4 whether that jurisdiction be prescribed by law or "inherent."

Any "Inherent" Authority Of This Court To Discipline Attorneys At Common Law Did Not Include Appointing Or Delegating To Boards Or Tribunals Of Non-Judges

Appellee's claim, and this Courthas previously held, that the discipline of attorneys is within the "inherent" authority of this Court. Taking "inherent" to mean Tenn. Const. Art. VI, § 2, cl. 4, jurisdiction of this Court at common law, there was no authority at common law for a Supreme Court, or the Tennessee Supreme Court, to appoint or delegate to boards or hearing panels of non-judgesany "inherent" authority of this Court todiscipline attorneys. Accordingly, Appellant claims that any Supreme Court common law "inherent" authority to discipline attorneys did not include jurisdiction or powerof the Supreme Court to

create a BOPR to perform that duty, or to act as a tribunal pursuant to Rule 9, § 24.3 or to enter monetary judgments against attorneys.

Tenn. Code Ann. § 16-3-402 Rules Of "The Practice And Procedure

It appears that the Tennessee Rules of Civil, Criminal, Appellate Practice and the Tennessee Rules of Evidence have been approved by the Legislature as required by Tenn. Code Ann. § 16-3-404.

Again, Tenn. Code Ann. §16-3-401 provides:

> Tenn. Code Ann. § 16-3-401. Supreme court rules of practice.
>
> The supreme court may make rules of practice for the better disposal of business before it.

As discussed *supra*, Tenn. Const. Art. VI, § 3, cl. 2 provides the Legislature power to enact this statute:

> The Legislature shall have power to prescribe such rules as may be necessary to carry out the provisions of section two of this article.

Also as discussed Tenn. Code Ann.§ 16-3-402 provides, in relevant part:

> Tenn. Code Ann. § 16-3-402. Other courts -- General rules of practice.
>
> The supreme court has the power to prescribe by general rules . . . the practice . . . in all of the courts of this state in all civil and criminal suits, actions and proceedings.

If Appellant were not licensed, then Appellant could not "practice . . . in all of the courts of this state." The Supreme Court would not have jurisdiction to discipline Appellant unless Appellant was licensed to "practice . . . in all of the courts of this state." The predicate to Rule 9 discipline is Tenn. Sup. Ct. R. 8, RPC 8.4 that among other things defines attorney conduct subject to discipline as being that conduct that is prejudicial to the administration of

justice or to courts..[19]Accordingly, § 16-3-402 "general rules [for] the practice . . . in all of the courts of this state" includes Rule 9 discipline of attorneys and § 16-3-404 requires such rules to be approved by the Legislature prior to those rules becoming effective.

The Legislature Has Approved Other Boards And Agencies Of The Supreme Court

It is instructive that the Legislature has provided for the following boards, commissions and agencies of this Court.

Title 16, Ch. 3, Part 6 - Advisory Commission on Rules.

Title 16, Ch. 3, Part 7 - Court Building Commissions

Title 16, Ch. 3, Part 8 - Administrative Office of the Courts

Title 16, Ch. 3, Part 9 - Private Probation Services Council

Title 16, Ch. 3, Part 10 - Automated Court System Hardware Replacement Loan Fund

Title 16, Ch. 3, Part 21 - Judicial Organizations {Judicial Council)

Title 17, Ch. 2, Part 3 - Special Judges

Title 17, Ch. 3, Part 1 - Judicial Conferences

Tenn. Code Ann. § 17-4-102 - Judicial Nomination commission (not renewed in 2013)

Title 17, Ch. 5 - Board of Judicial Conduct

Tenn. Code Ann. § 17-5-301 - Court of Judiciary Disciplinary Counsel

[19]*See* Tenn. R. Civ. P. 11.02 and Tenn. R. Crim. P. 42 and 44.

The BOPR May Be The Only Known Agency Or Tribunal That Has Been Created By The Supreme Court Without Approval Of The Legislature

Appellant is not familiar will all of the boards, commissions or agencies of this Court. However, from those known to Appellant, it appears that the BOPR may the only function of this Court that has not been approved by the Legislature.

The Board Of Judicial Conduct

Possibly the most instructive action of the Legislature was in 2012 creating the Board of Judicial Conduct and the office of its Disciplinary Counsel. That legislation bears striking resemblance to Tenn. Sup. Ct. R. 8 and 9.

There is a significant difference, however, between judicial conduct and attorney conduct. Tenn. Code Ann. § 16-3-504 provides that the "inherent" jurisdiction of the Tennessee Supreme Court at common law includes:

> Tenn. Code Ann. § 16-3-501. Inferior courts -- Supervisory control.
>
> In order to ensure the harmonious, efficient and uniform operation of the judicial system of the state, the supreme court is granted and clothed with general supervisory control over all the inferior courts of the state.

As discussed previously, the Legislature has not provided that this Court has "inherent authority" jurisdiction to discipline attorneys or create boards of non-judges with the power to do so.

IV. The Adoption Of Rule 9, § 24.3 By The Supreme Court Without Authority Of The Legislature Violated Tenn. Const. Art. II, § 2 Separation Of The Powers Of Tennessee's Departments Of Government.

Tennessee divides its Government into three Departments.

> Tenn. Const. ArtII.§ 1 Division of powers.
>
> The powers of the Government shall be divided into three distinct departments: the Legislative, Executive, and Judicial.

Tenn. Const. ArtII. § 2. Limitation of powers.

> No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted."

Tenn. Const. Art. II, § 3, cl. 1 provides:

> Sec. 3. Legislative authority -- Term of office.
>
> The Legislative authority of this State shall be vested in a General Assembly, which shall consist of a Senate and House of Representatives, . . .[20]

Tenn. Const. Art. VI, § 2, cl. 4 provides:

> . . . The jurisdiction of this Court shall be appellate only, under such restrictions and regulations as may from time to time be prescribed by law; but it may possess such other jurisdiction as is now conferred by law on the present Supreme Court. . . .

A reasonable person reading Rule 9 would view that rule as being legislation.

Ironically, the Appellees have previously argued in this and in related appeals, that the Art. II, § 2 separation of powers clause, prohibits the Legislature from requiring the BOPR, or its Hearing Panels to comply with the Legislature's Open Meetings Act. Having now learned that the Supreme Court may not have obtained authority from the Legislature to enact Rule 9, the shoe is on the other foot, i.e., the Supreme Court has invaded the power of the Legislature in adopting Rule 9.

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[20]Sec. 3. Legislative authority -- Term of office.

The Legislative authority of this State shall be vested in a General Assembly, which shall consist of a Senate and House of Representatives, both dependent on the people. Representatives shall hold office for two years and Senators for four years from the day of the general election, except that the Speaker of the Senate and the Speaker of the House of Representatives, each shall hold his office as Speaker for two years or until his successor is elected and qualified, provided however, that in the first general election after adoption of this amendment Senators elected in districts designated by even numbers shall be elected for four years and those elected in districts designated by odd numbers shall be elected for two years. In a county having more than one senatorial district, the districts shall be numbered consecutively.

In addition to Tenn. Const. Art. II, § 3, cl. 1 power to legislate, Tenn. Const. Art. VI, § 3, cl. 2, provides the Legislature power to establish rules necessary for the Supreme Court to exercise its jurisdiction. Appellant contends that the statutes cited *supra* were constitutionally within the power of the Legislature. Accordingly, it is Appellant's claim that this Court's adoption of Rules such as Rule 9, § 24.3, without approval of the Legislature, violates Tenn. Const. Art. II, § 2,the separation of powers clause.

V. Tenn. Const. Art. VI, § 1 Requires The Legislature Ordain And Establish The BOPR As A Subordinate Tribunal Or Corporate Court Of The Supreme Court.

The BOPR Rule 9, § 24.3 Judicial Function Is An InferiorCourt to The Supreme Court

Tenn. Const. Art. VI, Sec. 1. Judicial power.

> The judicial power of this State shall be vested in one Supreme Court and in such Circuit, Chancery **and other inferior Courts as the Legislature shall from time to time, ordain and establish**; in the Judges thereof, and in Justices of the Peace. **The Legislature may also vest such jurisdiction in Corporation Courts as may be deemed necessary.**Courts to be held by Justices of the Peace may also be established.

It has been the position of the Tennessee Attorney Generals in Appellant's cases that the BOPR is a "creature of the judiciary." Appellant claims that the BOPR, in the context of Rule 9, § 24.3, therefore becomes an inferior court to this Court, or the functional equivalent of an "inferior court" to this Court. As such, Art. VI, § 1 requires that the judicial functions of the BOPR be ordained and established by the Legislature.

Because Art. VI, § 2, cl. 4, limits the Supreme Court's jurisdiction to be "appellate only" it follows that any tribunal that is subject to appellate review by the Supreme Court, such as the BOPR Rule 9, § 24.3 function, is an "inferior court" within the meaning of Art. VI, § 1.

The Court in *Team Design v. Gottlieb*, 104 S.W.3d 512, 526 (Tenn. Ct. App. 2002), (reversed on other grounds) defined a Tenn. Const. Art. I, § 17 Court to include "some system of well established judicature, to which all of the citizens of the state may resort for the enforcement of rights denied, or redress of wrongs done them."

> [T]hat the purpose of Tenn. Const. art. I, § 17 is to establish court proceedings according to the course of the common law, or some system of well established judicature, to which all of the citizens of the state may resort for the enforcement of rights denied, or redress of wrongs done them. *Staples v. Brown*, 113 Tenn. 639, 644, 85 S.W. 254, 255 (1905).

*Team Design v. Gottlie*b, 104 S.W.3d 512, 526 (Tenn. Ct. App. 2002)

> Although the courts have no jurisdiction to review the judgments of inferior tribunals whose acts or findings are final and conclusive, the courts may require the tribunal to act within the law of its creation, without fraud, and with opportunity for a full and fair hearing. McKee v. Board of Elections, 173 Tenn. 276, 116 S.W.2d 1033, 117 S.W.2d 755 (1938).
>
> Thus, it behooves the courts, and it is their duty under the Constitution, to secure to every citizen (including groups of citizens) the right to be dealt with, not only by the courts, but by all governmental agencies in accordance with due process.

Polk County v. State Board of Equalization, 484 S.W.2d 49, 56 (Tenn. Ct. App. 1972)

A narrow construction of the Art. VI, § 1 phrase "inferior court" would result in a "master" appointed by Tenn. R. Civ. P. 53 not being considered part of a "court." Appellants suggest that there is scant difference between a "master" appointed by a trial court and the BOPR appointed by the Supreme Court.

Pursuant to the BOPR Policies and Procedures § 3.13, the Hearing Panel is to function as a trial court. BOPR Policy and Procedure § provides:

> 3.13 Hearing Panel Should Function as a Trial Court
>
> The Chair and all participants should take such steps as appropriate to ensure the maintenance of order, decorum, judicial temperament and avoidance of ex parte communications between the hearing panel and respondent or counsel for respondent and Disciplinary Counsel. In that regard, the Chair and all members of the hearing panel shall be bound by the following Canons of Judicial Conduct, which are codified in Rule 10 of the Supreme Court Rules: Canon 1 (integrity and independence of the judiciary); Canon 2 (avoidance of the appearance of impropriety); and Canon 3 (perform judicial duties impartially and diligently).

Tenn. Sup. Ct. Rule 9, § 24.3 provides that Orders of the BOPR assessing costs are to be enforced as an order of a circuit or chancery court. On November 28, 2012, Davidson County Chancellor Ellen Hobbs-Lyle issued a memorandum opinion in *Connie Reguli v. James Vick, Lela Hollabaugh, and Tennessee Board of Professional Responsibility*, Davidson Chancery No. 12-1583-III (November 28, 2012)(copy attached Appx. I, p.]describing the roles of the parties in Rule 9 proceedings as follows:

> The principle which informs the Court's ruling is that the Board; Chair and Disciplinary Counsel are the entities designated by the Supreme Court Rules to oppose the respondent attorney indefending against formal disciplinary charges. These entities, then, have an interest adverse to the respondent attorney. *Distinguishable are the district committee members who serve as the equivalent of trial judges to conduct the hearings and decide the disciplinary complaints. Theirs is a neutral role. In analogous proceedings under Tennessee law of civil lawsuits and administrative contested case hearings, communications of adverse parties and their counsel to and from the judge are not confidential.*Those communications must be disclosed to the opposing/adverse party. The same holds true,this Courtconcludes, indisciplinary proceedings.

Appellee cannot have it both ways. Appellee cannot claim the BOPR is a part of the judiciary, but then claim that the BOPR is not an inferior tribunal to this Court. If the BOPR is a part of the judiciary and has the power access judgments and adjudicate claims such as in Rule 9, § 24.3, then the BOPR is subject to the Tenn. Const. Art. VI, § 1, cl. 2, "ordain and establishment" clause power of the Legislature. It is Appellant's claims that the BOPR has not ordained or established the BOPR and therefore the BOPR did not have lawful or constitutional power to assess a monetary judgment against Appellant pursuant to Rule 24.3 or adjudicate claims under that rule.

The BOPR Rule 9, § 24.3 Judicial Function is a Corporate Court of the Supreme Court

A tribunal created pursuant to the authority of a charter is a "corporate court." According to the Attorney Generals arguing Appellant's cases, the Supreme Court has "inherent power" to create the BOPR.Both the "common law" and the "subsequent law" jurisdiction of the Supreme Court are controlled by Tenn. Const. Art. VI, § 2, cl. 4. This constitutional jurisdiction of this Court constitutes the functional equivalent of the "charter" of the Supreme Court.

If Art. VI, § 2, cl. 4, provides the Supreme Court authority to create the Hearing Panel, that tribunal became a "corporate court."[21] Tenn. Const. Art. VI, § 1, cl. 2, provides the Legislature power to create "corporation courts" to carry out that jurisdictionThe Legislature has not done so.

Accordingly, Appellant claims that the BOPR, as an adjudicatory body pursuant to Rule 9, § 24.3,is unlawful and unconstitutional pursuant to Tenn. Const. Art. VI, § 1, cl. 2 as having been neither ordained orestablished by the Legislature.

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[21] This Court construed the term "corporation" in Tenn. Code Ann. § 29-35-102 to refer to a public corporation.CC*SeeState ex rel 11 Citizens v. Thompson,* 246 S.W.2d 59, 63 (Tenn. 1952)

VI. Tenn. Const. Art. I, §§ 8 or 17 Bill Of Rights Are Excepted Out Of The Powers Of This Court By Tenn. Const. Art. XI, § 16.

The Tennessee Constitution Bill Of Rights Are Excepted Out Of The Jurisdiction Of This Court

Appellant relies on Tenn. Const. Art. XI, § 16 regarding this Court's decision whether it canlegislate by Rules without approval of the Legislature:

> Sec. 16. Bill of rights to remain inviolate.
>
> The declaration of rights hereto prefixed is declared to be a part of the Constitution of this State, and shall never be violated on any pretence whatever. And to guard against transgression of the high powers we have delegated, we declare that everything in the bill of rights contained, is excepted out of the General powers of government, and shall forever remain inviolate.

Tenn. Const. Art. I, § 8 Bill of Right To The Law Of The Land

Appellant relies on the "law of the land" Bill of Right provided Tenn. Const. Art. I, § 8 that the Legislature has power to legislatethe jurisdiction of this Court pursuant to Tenn. Const. Art. VI, § 3, cl. 2; Tenn. Const. Art. VI, § 2, cl. 4,: and Tenn. Const. Art. II, § 3, cl. 1.

> Sec. 8. No man to be disturbed but by law.
>
> That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land.

The clear and unambiguous language of Tenn. Const. Art. II, § 3, cl. 1; Art. VI, § 2, cl. 4; and Art. VI, § 3, cl. 2 provides the Legislature constitutional power to enact Rules necessary for the Supreme Court to exercise its jurisdiction. It is Appellant's claim that any Rule of this Court that takes from Appellant his property, including Rule 9, § 24.3,that this Court enacts without the approval of the Legislature, is unconstitutional pursuant to Tenn. Const. Art. XI, § 16 by denying Appellant his Art.I, § 8 right to the "law of the land".

Tenn. Const. Art. I, § 17 Bill of Right To A Remedy In Court For Injuries

Appellant also relies on his bill of right provided him by Tenn. Const. Art. I, § 17, to a remedy at law for being injured by a judgment based on an ineffective rule of this court.

> Sec. 17. Open courts -- Redress of injuries -- Suits against the State.
>
> That all courts shall be open; and every man, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial, or delay. Suits may be brought against the State in such manner and in such courts as the Legislature may by law direct.

It is Appellants' claim that the Supreme Court cannot legislate by Rule 9, § 24.3 power in a board to assess a monetary judgment against Appellant without the approval of the Legislature and thatArt. I, §17 Bill of Right guarantees Appellant a remedy in Tennessee' courts for injuries incurred by the violations for the provisions of the constitution and statutes by the judgment entered in this case against Appellant.

The Meaning Of Tenn. Const. Art. XI, § 16

Quite possibly, Tenn. Const. Art. XI, § 16 is the most powerful provision of our Construction, second only or equal to Tenn. Const. Art. I, § 1.Regarding the meaning of Tenn. Const. Art. XI, § 16 Justice Frank F. Drowota, III, in a dissent wrote:

> I cannot forget that not only is ours a government of laws rather than humans, but it is also a limited government whose legitimacy and survival depend on its remaining within the letter and spirit of the Constitution. See Hughes v. State, 176 Tenn. 330, 339, 141 S.W.2d 477, 480 (1940); Hampton v. State, 148 Tenn. 155, 159, 252 S.W. 1007, 1008 (1923).

State v. Jennette, 706 S.W.2d 614, 623, (Tenn. 1986).

In *Vollmer v. Memphis*, 792 S.W.2d 446, 448, (Tenn. 1990) the Court stated "Article 11, § 16 confirms the rights established by Article I and stresses the determination of our founding fathers that the declaration of rights established by that section shall remain inviolate . . ." Tenn.

Const. Art. XI, § 16, prohibits the Governor from executing a power of that office that violates a provision of the Tennessee Constitution. *Joiner v. Browning,* 30 F. Supp. 512 (U.S. Dist. Ct. WD Tenn 1939).[22]

In *Keith v. State Funding Boar*d, 155 S.W. 142, 153 (Tenn. 1913)then Chief Justice Neal opined:

> Perhaps it does not matter practically whether, taking article 2 section 3,[23] in connection with article 11, section 16, it shall be held that legislative powers are delegated, or, adopting the principle of general constitutional construction, that they are inherent; since it is clear that, whether delegated or inherent, the constitution saddled upon the legislative power[24] certain specific restrictions, and that in addition there are other restrictions to be implied from various sections of the constitution which need not be here referred to. It seems to me, therefore, bootless to inquire whether there can be any restrictions on inherent power. The power which our legislature possesses, no matter how described, must be held as restrained by every positive limitation imposed upon it in the constitution, to say nothing of implied restrictions. Any principle of construction which goes beyond this makes the constitution nothing more than blank paper, or at least nothing more than an instrument that can be whittled and carved at the will of the legislature, with the sanction of the courts. Our only safety lies in adhering to a strict construction. It is only thus that we can avoid the dangers against which the people intended to protect themselves. It is only thus that our feet can be guided by the lamp of experience. There is sometimes manifested a tendency to a latitudinous construction, in order to obtain what at the time seems a great present benefit to the State. Such tendency influences, occasionally, even the minds of wise and patriotic men; but others, we shall hope equally as wise and patriotic, feel that it is best to stand by the ancient landmarks, and profit by the wisdom garnered from the past by the experience of the people of the State, as formulated and preserved in the venerable instrument whose terms we are considering today.

*Keith v. State Funding Boar*d, 155 S.W. 142, 153 (Tenn. 1913)

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[22] Tenn. Const. Art. II, § 1 vest the Tennessee Executive, Legislative and Judicial Departments with the "powers of government".

[23] In this case, article 1, section 17.

[24]In this case, the judiciary and legislative power.

This Court in *Cox v. Huddleston*, 914 S.W.2d 501, 502 (Tenn. 1995) addressed the Art. II, § 2 separation of power's argument and held that the legislature's tax on the privilege to practice law the legislature created by the statute did not violate the separation of powers clause.

> The authority of the Supreme Court to regulate and control the practice of law is derived from the grant of judicial power in Article VI, Sec. 1 of the Tennessee Constitution. *Barger v. Brock*, 535 S.W.2d 337, 340 (Tenn. 1976). "The inherent right of Courts to prescribe qualifications necessary for the practice of law does not mean that the Legislature is without authority in that field." *Petition for Rule of Court Activating, Integrating and Unifying the State Bar of Tennessee*, 199 Tenn. 78, 282 S.W.2d 782, 784 (1955).However, ". . . where the legislative enactment is in direct conflict with and totally abrogates the Court's authority with regard to the practice of law, the statute is unconstitutional." *Newton v. Cox*, 878 S.W.2d 105, 111 (Tenn. 1994).

Nothing in Tenn. Code Ann. § 16-3-404 comes close to being in "direct conflict with and abrogat[ing] the Court's authority with regard to the practice of law." Indeed, if the Legislature withheld its authority to a specific provision of the Rules then the constitutional question would arise as to whether the Legislature's withholding its authority violated Tenn. Const. Art. VI, § 3, cl. 2 as withholding a rule "necessary" for this Court to exercise its Tenn. Const. Art. VI, § 2, cl. 4 jurisdiction or would the withholding approval be "in direct conflict with and totally abrogate the Court's authority with regard to the practice of law."

Regarding the authority of the Supreme Court to act without approval of the Legislature the Court held:

> Indeed, Tenn. Code Ann. §§ 16-3-503 & 504 (1994), declare that this Court possesses the broad conference of full, plenary, and discretionary inherent power that existed at common law at the time of the adoption of our Constitution.

In re Burson, 909 S.W.2d 768, 772-773 (Tenn. 1995).

Tenn. Const. Art. VI, § 2, cl. 4, limits the common law jurisdiction of the Supreme Court to be "appellate only." Art. VI, § 2, cl. 4,"appellate only" constitutional limitation on the jurisdiction of the Supreme Court, after adoption of the constitution, does not include the administrative duty of disciplining attorneys. Accordingly, there is a reasonable basis for Appellant to claim that Tenn. Const. Art. VI, § 2, cl. 4, divested the Supreme Court of any common law jurisdiction to discipline attorneys, absent a rule prescribed by the Legislature.

Further, as has repeatedly been claimed by Appellant, there was no authority at common law, i.e., at the time of the adoption of the Tennessee Constitution, for the Supreme Court to delegate to ahearingpanelof non-judges to discipline attorneys; to otherwise create panels of non-judges to perform the Supreme Court's duties; or to enter monetary judgments against attorneys. Accordingly, the Art. VI, § 2, cl. 4, "jurisdiction as is now conferred by law on the present Supreme Court", i.e., the common law, does not provide the Supreme Court, created by Article VI,authority to create Hearing Panels.

Tenn. Const. Art. VI, § 2, cl. 4, provides that"appellate only" jurisdiction of the Supreme Court is subject to "restrictions and regulation as may from time to time be prescribed by law."Tenn. Const. Art. II, § 3 places authority to proscribe laws with the General Assembly.It is this provision, in combination with Art. VI, § 3, cl. 2, that grants theLegislature authority to proscribe by law the creation of Hearing Panels and Tenn. Code Ann. § 16-3-404.

As stated, Appellants claim that the Art. VI, § 2, cl. 4limits the Supreme Court's jurisdiction to be "appellate only." If Art. VI, § 2, cl. 4, "restrictions and regulation . . . provided by law" clause is viewed as providing the Supreme Court a source of jurisdiction other than its Art. VI, § 2 "appellate only" jurisdiction; the question becomes which of the Tenn. Const. Art. II, § 1 Departments of Tennessee government has authority to "prescribe by law" those "restrictions

and regulations" for non-appellate jurisdiction of the Supreme Court. Under the Tennessee Constitution, Art. II, § 1, there are three departments that have the powers of government, i.e., the Legislative, Executive and Judicial Departments. Appellant claims that Tenn. Const. Art. II, § 3, cl. 1, provides that the General Assembly the power to "proscribe by law" the jurisdiction of this court as that phrase is used in Tenn. Const. Art. VI, § 2, cl. 4.

To hold the Legislature does not have authority to "prescribe by law . . . restrictions and regulations" on the jurisdiction of the Supreme Court over matters other than its "appellate only" jurisdiction is to *sub silento* hold that only the Supreme Court can establish law to provide its post-common law and non-appellate jurisdiction. Respectfully, this construction would be a dangerous threat to the separation of the powers of Tennessee Government required by Tenn. Const. Art. II, § 2, and to the United States Republic form of government.Such a construction would create a government within Tennessee's government, i.e., a Supreme Court that has the power to Legislation to provide itself jurisdiction to do anything it wanted to do without approval by the Legislature; thenenforce that jurisdiction as the Executive; and to adjudicate that power as the Judiciary.

It is also instructive that the Legislature approves the Tennessee Rules of Appellate Procedure. *See 2013 Legislature HR 20035; SR0013.*Tenn. Sup. Ct. R. 1 provides that the Tennessee Rules of Appellate Procedure govern the practice before the Supreme Court. What this means is that the remaining 50 Supreme Court Rules do not pertain to the Art. VI, § 2, cl. 4, "appellate only" jurisdiction of the Supreme Court, but instead pertain to a wide range of administrative functions.

Again, Tenn. Code Ann. § 16-3-404 says that "**all** rules of the Supreme Court" must be approved by the legislature. That Act does not say that only Rules of Civil, Criminal and Appellate Procedure and Rules of Evidence are to be approved. Either Tenn. Code Ann. § 16-3-404 applies to the Supreme Court Rules or that statute is an unconstitutional exercise of the power of the Supreme Court to enact rules without the approval of the Legislature.

Conclusion

Appellant, for the reasons stated,respectfully requests this Court grant this motion to pretermit this appeal and vacate the monetary judgment against Appellant.

_____
Herbert S. Moncier
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day ofMay 2013, a true and correct copy of the foregoing brief was served on Appellees attorney Chief Disciplinary Counsel Sandra Garrett and Tennessee Attorney General Robert E. Cooper, Jr.

_____
Herbert S. Moncier

Appendix Of Contents

Order entered by Chancellor Lyle on November 28, 2012 requiring the BPR to release secret emails.

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY, PART III

CONNIE REGULI,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	**NO. 12-1583-III**
	)	
JAMES VICK, LELA HOLLABAUGH, and TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER GRANTING IN PART AND DENYING IN PART PUBLIC RECORDS REQUEST

This lawsuit was filed on behalf of an attorney, Connie Reguli. She seeks for the Court to order the governmental agency who disciplines attorneys, the Tennessee Board of Professional Responsibility (the "Board"), and its Chairperson (the "Chair"), and the attorney who prosecutes disciplinary cases ("Disciplinary Counsel") to produce records related to disciplinary petitions filed against her and 7 other attorneys by the Disciplinary Counsel. She also seeks production of records related to the Chair's selection process of attorneys to serve as members on the panel ("panel members") who rule upon and determine the sanction to impose in disciplinary petitions filed by the Disciplinary Counsel. Production of the records, the Plaintiff asserts, is required by the Tennessee Public Records Act, TENN. CODE ANN. §§ 10-7-503 and 505.

The Attorney General, on behalf of the Defendants, denies production is required asserting that (1) the requested records are exempted from production under the Act by a confidential records exception, and (2) part of the petition for production of records is premature as the statutory time for the Defendants' response does not expire until December 2012.

As required by law, TENN. CODE ANN. § 10-7-505(b), the Court on November 15, 2012, conducted a show cause hearing. In addition, the Court ordered that the disputed records be filed under seal for the Court's "private consideration of the evidence," in an *in camera* review. BLACK'S LAW DICTIONARY (9th ed. 2009) in camera inspection.

From the foregoing, the Court grants the petition in part and denies it in part:

— As to the Plaintiff's September 25, 2012 Records Request, the Court grants it. The Court concludes that the records do not fit within the confidentiality exception and shall be produced.

— As to the Plaintiff's September 19, 2012 Records Request to the Chair, the Court grants part of it: communications the Chair had with the district committee members regarding the recent disciplinary petition filed against the Plaintiff after that petition was filed shall be produced. These records, the Court concludes, do not fit within the confidentiality exception. The

remainder of the request is denied as either fitting within the confidentiality exception or not complying with the Act.

— As to the Plaintiff's October 24, 2012 Supplemental Records Request, the Court denies it. The Court concludes that the petition to compel production of these records is premature as the statutory reasonable time to respond does not expire until December 2012.

The principle which informs the Court's ruling is that the Board, Chair and Disciplinary Counsel are the entities designated by the Supreme Court Rules to oppose the respondent attorney in defending against formal disciplinary charges. These entities, then, have an interest adverse to the respondent attorney. Distinguishable are the district committee members who serve as the equivalent of trial judges to conduct the hearings and decide the disciplinary complaints. Theirs is a neutral role. In analogous proceedings under Tennessee law of civil lawsuits and administrative contested case hearings, communications of adverse parties and their counsel to and from the judge are not confidential. Those communications must be disclosed to the opposing/adverse party. The same holds true, this Court concludes, in disciplinary proceedings. After a formal disciplinary proceeding is initiated, the parties who are pressing and advocating the charges—the Board (and thus its Chair), Disciplinary Counsel and their staff secretary—cannot have confidential communications with panel member judges, no matter how benign. Those communications

can not be confidential and must be disclosed to assure neutrality of the panel judges and the appearance thereof.

The legal authority and reasoning on which the Court bases its decision are as follows.

Plaintiff's 3 Records Requests

In issue are records requests made by the Plaintiff, respectively, on September 25, September 19, and October 24 of 2012. They are quoted as follows.

September 25 Request to the Board

1. The email communication between Rita Webb, and any other members of the Board, or attorneys at the Board of Professional Responsibility to and from all prospective and selected panel members on the following cases:

	Respondent	Case No.	Approximate Date of Petition	District or County
A	Connie Reguli	1804	Feb 2009	6
B	Connie Reguli	2035	April 2010	6
C	James D. R. Roberts	1807	March 2009	5
D	Cynthia A. Cheatham	1961	2010	Coffee
E	Robert T. Carter	00346	2011	Coffee
F	M. Josiah Hoover		Mar 26, 2012	Knox
G	Fletcher Long	2070	August 2011	6
H	F. Christopher Cawood		March 2007	Roane
I	Patricia Donice Butler	2117	May 2012	2

September 19, 2012 Records Request to the Chair

- Records of how you put the district committee members in rotation and how you communicate with them in the selection process.

- All email communications you have had with any of the district committee members or Rita Webb, or any other members of the Board or staff of the Board, including disciplinary counsel, regarding the recent petition filed by the Board naming me as the respondent.

October 24, 2012, Records Request to the Board

- Please provide for all districts, a list of all District Committee Members by District, including BPR number, year licensed to practice in Tennessee, current firm affiliation, and contact information. Give the start date and end date of each term served include the number of hearing panels on which they have served, for all districts of the State of Tennessee, beginning in 2008 until the present time.

- For each District Committee Member, please provide a listing of hearing panels on which each Member has served (by name of respondent, file number, district number of the respondent, and the date petition filed), beginning January 1, 2008 until the October 25, 2012.

- For each petition filed since January 1, 2008, provide all emails, unredacted, to or from any District Committee Member, to or from any person at the BPR or any Board Member (including the Chair), including but not limited to Rita Webb and disciplinary counsel, for the purposes of selecting a hearing panel.

- A list or chart of all petitions filed since January 1, 2008 by District giving the District Number, Docket Number, Respondent's name, HP chair (and his district) and HP members (and their districts), they [sic] number of months for disposition of the petition by the hearing panel from the date of filing, and the ultimate outcome of the HP decision.

- All applications received from those who have sought to serve or renew a position as a district committee member since January 1, 2008.

- All applications received from those who have sought to serve or renew a position as a member of the Disciplinary Board since January 1, 2008.
- All annual perform [sic] review of the Chief Disciplinary County [sic] since January 1, 2008.

Governing Law

Public Records Act

Tennessee law has for a long time provided citizens access to the records maintained by governmental agencies. TENN. CODE ANN. §§ 10-7-101, *et seq*. As explained by Justice Koch in *Swift v. Campbell*, 159 S.W.3d 565, 570-71 (Tenn. Ct. App. 2004), even before the first version of the Public Records Act was enacted by the Legislature, Tennessee had recognized the public's right to access and examine government documents. It was in 1957 that the Tennessee General Assembly codified this policy of public access with the first version of Tennessee's public records statute. Act of Mar. 18, 1957, ch. 285, 1957 Tenn. Pub. Acts 932 (codified as amended at TENN. CODE ANN. §§ 10–7–503 to –506 (1999 & Supp. 2003)). The overarching purpose of this legislation is "to promote public awareness of the government's actions and to ensure the accountability of government officials and agencies by facilitating the public's access to governmental records." *Swift*, 59 S.W.3d at 570 (Tenn. Ct. App. 2004) (citing *Memphis Publ'g Co. v. Cherokee Children & Family Servs., Inc.*, 87 S.W.3d at 74; *Memphis Publ'g Co. v. City of Memphis*, 871 S.W.2d 681, 687–88 (Tenn. 1994)).

In achieving the goal of accountability of government officials and agencies, the Legislature purposefully enacted the statute to encompass a broad scope and application:

> The public records statutes amount to a "clear mandate in favor of disclosure." *Tennessean v. Electric Power Bd.*, 979 S.W.2d 297, 305 (Tenn. 1998). They create a presumption that records described in Tenn. Code Ann. § 10-7-301(6) (Supp. 2003) and Tenn. Code Ann. § 10-7-503 are to be open to the public. *State v. Cawood*, 134 S.W.3d 159, 165 (Tenn. 2004); *Arnold v. City of Chattanooga*, 19 S.W.3d 779, 785 (Tenn. Ct. App. 1999). Accordingly, when access to governmental records is sought, the government must make the records available unless it can justify not disclosing the records by a preponderance of the evidence. Tenn. Code Ann. § 10–7–505(c).
>
> The scope and application of the public records statutes are purposefully broad. They are an "all encompassing legislative attempt to cover all printed matter created or received by government in its official capacity." *Griffin v. City of Knoxville*, 821 S.W.2d 921, 923 (Tenn. 1991) (*quoting Board of Educ. of Memphis City Schools v. Memphis Publ'g Co.*, 585 S.W.2d 629, 630 (Tenn. Ct. App. 1979)). Accordingly, the General Assembly has directed the courts to construe the public records statutes broadly "so as to give the fullest possible public access to public records." Tenn. Code Ann. § 10–7–505(d).

Swift, 159 S.W.3d at 570-71 (Tenn. Ct. App. 2004).

In applying the Act, Justice Koch stated that courts "must be guided by the clear legislative policy favoring disclosure. Thus, unless it is clear that disclosure of a record or class of records is excepted from disclosure, we must require disclosure even in the face of 'serious countervailing considerations [citations omitted].'" *Id.* at 572.

The Act provides that governmental agencies are required to provide access to their records to citizens, with some exceptions. One of those exceptions is "unless otherwise provided by state law":

> § 10-7-503. Inspection by citizens; confidentiality; availability; law enforcement personnel records
>
> (a)(1)(A) As used in this part and title 8, chapter 4, part 6, "public record or records" or "state record or records" means all documents, papers, letters, maps, books, photographs, microfilms, electronic data processing files and output, films, sound recordings or other material, regardless of physical form or characteristics, made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency.
>
> * * * *
>
> (2)(A) All state, county and municipal records shall, at all times during business hours, which for public hospitals shall be during the business hours of their administrative offices, be open for personal inspection by any citizen of this state, and those in charge of the records shall not refuse such right of inspection to any citizen, unless otherwise provided by state law.

TENN. CODE ANN. 10-7-503(a)(1)(A) and (a)(2)(A). This exception is the one asserted by the Defendants as precluding disclosure. The "state law" they invoke is Supreme Court Rule 9, § 25.

Supreme Court Rule 9, § 25

This Rule is part of the section of the Tennessee Supreme Court Rules which establishes the Board, the Chair, Disciplinary Counsel, the panel members, and the process

and procedure for disciplining attorneys. Section 25 is entitled "Confidentiality." It specifies which aspects of disciplinary proceedings are confidential.

Pertinent to the "otherwise provided by state law" exception to the Public Records Act is that section 25 contains two provisions which exempt records from disclosure. One provision relates to timing; the other relates to the nature/content of the record.

As to timing pertinent to this case, section 25.1(b) broadly exempts from disclosure records of the Board, district committee members and Disciplinary Counsel prior to a petition being filed to initiate a formal disciplinary proceeding but removes that confidentiality upon the filing of a disciplinary petition:

> Section 25. Confidentiality
>
> **25.1.** 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 [emphasis added]:
>
> * * * *
>
> (b) a petition to initiate a formal disciplinary proceeding is filed pursuant to Section 8.2 . . . .

Sup. Ct. Rules, Rule 9, § 25.1(b)

The second exception to disclosure relates to the nature/content of the record. This Court concludes that even after the disciplinary petition is filed, section 25.3 excludes from

disclosure all work product and work files of the Board, district committee members, and Disciplinary Counsel:

> **25.3.** 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.

Sup. Ct. Rules, Rule 9, § 25.3

Functions of Board Entities In Disciplinary Proceedings

The last governing law in this case pertains to the functions that entities of the Board of Professional Responsibility perform in a disciplinary proceeding.

The Board is comprised of 12 members appointed by the Tennessee Supreme Court. Sup. Ct. Rules, Rule 9, § 5. They consider and investigate grounds of discipline and take action on those.

Investigation, institution of formal disciplinary proceedings and prosecution of disciplinary proceedings is conducted by Disciplinary Counsel, appointed by the Supreme Court Rule 9, § 8.1. Formal proceedings are initiated by Disciplinary Counsel by filing a petition with the Board. Rule 9, § 8.2.

After the petition is filed (referred to hereinafter as "post-petition") and after the answer deadline, the Chair assigns the matter to a hearing panel selected from the district committee. Rule 9, § 8.2.

The "district committee" are attorneys appointed by the Supreme Court for each disciplinary district. Rule 9, § 6.1. The members of the district committee serve on the 3-person panels that conduct the hearings and decide the outcome of disciplinary petitions filed by Disciplinary Counsel. Rule 9, § 6.4. The assignment of committee members to a hearing panel is made by the Chair. Rule 9, § 8.2. The assignments are on a "rotating basis." *Id.* Accordingly, it is important to recognize for the analysis that follows that when the term "district committee" is used in the Supreme Court Rules, that term can include and encompass persons who will or are serving as members of the 3-person panel who decides the outcome of the disciplinary petitions and the discipline imposed.

If the panel's decision is appealed, it is to a circuit or chancery court. Rule 9, § 8.4. Also, the Supreme Court has the authority to alter the punishment imposed by the panel members. Rule 9, § 8.4.

Significant to the analysis that follows is that even though all of the foregoing are components of the attorney disciplinary scheme in Tennessee established in Rule 9 by the Tennessee Supreme Court, they serve independent and different roles. This is especially clear when their roles with respect to the charged attorney are examined.

The panel members, drawn from the district committees, perform the function of trial judges. They conduct the hearings and rule upon the charges. Even though their assignments to a panel are made by the Chair, they are on par with the Chair and Board as the district

committee the panel members are drawn from are appointed by the Tennessee Supreme Court. Their role as to the attorney being charged is as a neutral adjudicator.

The role of the Disciplinary Counsel as to the attorney being charged is an adverse one of prosecutor.

The role of the Board as to the attorney being charged is also an adverse one in two ways. First, Rule 9, §§ 1.3 and 5.3 provide that either the respondent attorney or the Board may appeal the panel decision to circuit or chancery court as a writ of certiorari. Secondly, on a Rule 9, § 8.4 Supreme Court review of discipline of the respondent attorney, the Board is the party named as adverse to the respondent attorney on the issue of increase or decrease of punishment. The Chair, then, as the member of the Board, as well, can have an interest adverse to the charged attorney.

Analysis

September 25, 2012 Records Request

This Records Request is the one that seeks email communications from: the Board, Disciplinary Counsel and/or their staff secretary Rita Webb, on one hand, to and from, on the other hand, prospective and selected panel members with respect to disciplinary petitions filed against the Plaintiff and 7 other attorneys.

Applying the foregoing law to the Plaintiff's September 25, 2012 Records Request, the Court sees that the timing provision of section 25.1(b) does not exempt production. The

records request was made post-petition, i.e. after disciplinary petitions had been filed against the attorneys listed in the request.

As to the nature/content exemption of work product and work files in section 25.3, it is at issue. Again, that exemption reads as follows:

> **25.3.** 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.

Sup. Ct. Rules, Rule 9, § 25.3 The dispute centers upon competing "intra" and "inter" constructions of the section 25.3 by the parties.

The Plaintiff argues that work product and work files are independent and separate as to each one of the entities: Board, district committee members, and Disciplinary Counsel. Thus, records of emails exchanged between the three entities do not constitute work product and work files, the Plaintiff argues.

The Defendants assert that emails exchanged between the three entities do come within the scope of section 25.3 as they comprise "internal memoranda, correspondence, notes and similar documents and files" of the "Board, district committee members, and Disciplinary Counsel." Rule 9, § 25.3.

The significance of the competing interpretations is that it is outcome determinative for the September 25, 2012 Records Request. That is because it is the practice of the Board, once a disciplinary petition has been filed, for Rita Webb, the secretary to the Disciplinary

Counsel[1] and the Chair (the "Secretary), to conduct a "conflicts check," that is to email district committee members to inquire whether they can serve as panel members. Disqualifiers for serving as a panel member include bias and partiality as to the respondent attorney or person who initially filed the complaint, other conflicts, and scheduling conflicts. It is the practice for .the Secretary to not only provide to the potential panel members identifying information of the persons involved but also to provide a description of the events and wrongdoing the respondent attorney is charged with. The members then determine whether they can serve as the panel members who shall conduct the disciplinary hearing, and they email their decision to the Secretary. From this "conflicts check" process, assignments are made designating the three member panel to conduct the disciplinary hearing as required by Supreme Court Rule 9, section 8.2.

The respondent attorney is not served with a copy of the Secretary's conflicts check communications with potential panel members. These communications are encompassed within the September 25, 2012 Records Request.

The Defendants contend that the Secretary's communications with potential panel members are work product and/or work files designated confidential and exempted from public disclosure pursuant to Supreme Court Rule 9, section 25.3.

[1]Rule 9, § 7.2 empowers and makes it the duty of Disciplinary Counsel, with the approval of the Board, "to employ and supervise staff needed to performance of counsel's duties." Apparently, to keep costs down, the secretary for the Disciplinary Counsel, Ms. Webb, also performs work for the Chair, who is an attorney in private practice.

The Plaintiff contends that, because the records are exchanged between participants in the process who have independent and separate functions, the records are not internal and are not work records. The exchange from the Secretary of the Office of Disciplinary Counsel, who prosecutes the charge against the respondent attorney, to potential panel members, who will judge and decide the charge, is not internal work, the Plaintiff argues.

In deciding this issue, the Court has determined that there is no direct, explicit answer in Rule 9. The Rule does not define "work file" nor does it state whether or not post-petition communications from the Secretary, Disciplinary Counsel or Board to potential panel members must be served on the respondent attorney.

Under these circumstances, the Court has studied all of the sections of Rule 9 and other rules and statutes referred to therein. From that research, the Court has concluded that the Plaintiff's interpretation of Rule 9, section 25.3 as applied to the September 25, 2012 Records Request is correct: the communications of the Secretary, the Board and/or Disciplinary Counsel to potential panel members post-petition do not come within the scope of sections 25.3's confidentiality provisions and are not exempt from public disclosure. The Court's conclusion is derived from these sources.

First, several provisions of Rule 9 distinguish the confidentiality of communications pre-filing of a disciplinary petition by Disciplinary Counsel and post-filing. As noted above,

section 25.1(b), in general terms, subject to section 25.3, removes the blanket confidentiality of disciplinary records from the investigation of a complaint after a petition is filed:

> 25.1. 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:
>
> * * * *
>
> (b) a petition to initiate a formal disciplinary proceeding is filed pursuant to Section 8.2 . . . .

Sup. Ct. Rules, Rule 9, § 25.1(b) As well, section 8.2 of Rule 9 requires that post-petition service of the petition and notice of the hearing be served on the respondent. Post-petition discovery may be had, and a pretrial conference is provided for. Sup. Ct. Rule 9, § 13.

The foregoing is significant to the Court because these provisions indicate that post-petition the proceeding against the respondent attorney closely resembles a lawsuit under the Tennessee Rules of Civil Procedure or a contested case hearing under the Uniform Administrative Procedure Act.

In both proceedings of a lawsuit or UAPA contested case hearing, communications between the decision maker, judge or administrative law judge or their staff, and only one of the attorneys are not permitted. The UAPA, TENN. CODE ANN. § 3-4-304, forbids it:

> § 4-5-304. Ex parte communications
>
> (a) Unless required for the disposition of ex parte matters specifically authorized by statute, an administrative judge, hearing officer or agency member serving in a contested case proceeding may not communicate,

directly or indirectly, regarding any issue in the proceeding, while the proceeding is pending, with any person without notice and opportunity for all parties to participate in the communication.

(b) Notwithstanding subsection (a), an administrative judge, hearing officer or agency member may communicate with agency members regarding a matter pending before the agency or may receive aid from staff assistants, members of the staff of the attorney general and reporter, or a licensed attorney, if such persons do not receive ex parte communications of a type that the administrative judge, hearing officer or agency members would be prohibited from receiving, and do not furnish, augment, diminish or modify the evidence in the record.

(c) Unless required for the disposition of ex parte matters specifically authorized by statute, no party to a contested case, and no other person may communicate, directly or indirectly, in connection with any issue in that proceeding, while the proceeding is pending, with any person serving as an administrative judge, hearing officer or agency member without notice and opportunity for all parties to participate in the communication.

(d) If, before serving as an administrative judge, hearing officer or agency member in a contested case, a person receives an ex parte communication of a type that may not properly be received while serving, the person, promptly after starting to serve, shall disclose the communication in the manner prescribed in subsection (e).

(e) An administrative judge, hearing officer or agency member who receives an ex parte communication in violation of this section shall place on the record of the pending matter all written communications received, all written responses to the communications, and a memorandum stating the substance of all oral communications received, all responses made, and the identity of each person from whom the person received an ex parte communication, and shall advise all parties that these matters have been placed on the record. Any party desiring to rebut the ex parte communication shall be allowed to do so, upon requesting the opportunity for rebuttal within ten (10) days after notice of the communication.

(f) An administrative judge, hearing officer or agency member who receives an ex parte communication in violation of this section may be disqualified if necessary to eliminate the effect of the communication.

(g) The agency shall, and any party may, report any willful violation of this section to appropriate authorities for any disciplinary proceedings provided by law. In addition, each agency by rule may provide for appropriate sanctions, including default, for any violations of this section.

TENN. CODE ANN. § 4-5-304 (West)

As well Supreme Court Rule 10, section 2.9 prohibits state court judges from such communications:

Rule 2.9. Ex Parte Communications

(A) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter, except as follows:

(1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:

(a) the judge reasonably believes that no party will gain procedural, substantive, or tactical advantage as a result of the ex parte communication; and

(b) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond.

(2) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge, if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties a reasonable opportunity to respond to the advice received.

(B) If a judge receives an unauthorized ex parte communication bearing upon the substance of a matter, the judge shall make provision promptly to

notify the parties of the substance of the communication and provide the parties with an opportunity to respond.

(C) A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed.

(D) A judge shall make reasonable efforts, including providing appropriate supervision, to ensure that this Rule is not violated by court staff, court officials, and others subject to the judge's direction and control.

TN R S CT Rule 10, RJC 2.9

In addition to the rules on *ex parte* communications which apply to state court judges and administrative law judges, another source considered by this Court is Supreme Court Rule 10, section 2.11 on recusal/disqualification. This Rule is referred to and incorporated by reference to apply to panel members in Rule 9, section 6.5.[2] Rule 10, section 2.11 requires a judge to announce their recusal. Presumably that announcement is served on all parties and attorneys. Subsection (D) requires a written order served on all parties in ruling on motions made by the parties to disqualify the judge.

The last source the Court has considered is the use of the term "work product" in the section 25.3 exception to disclosure asserted by the Defendants. In *Swift*, Justice Koch explained "work product" as:

> The central purpose of the work product doctrine is to protect an attorney's preparation for trial under the adversary system. The policy underlying the

[2]"District committee members, whether acting as a 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." Sup. Ct. Rules, Rule 9, § 6.5.

> doctrine is that lawyers preparing for litigation should be permitted to assemble information, to separate the relevant facts from the irrelevant, and to use the relevant facts to plan and prepare their strategy without undue and needless interference. *Boyd v. Comdata Network, Inc.*, 88 S.W.3d 203, 219-20 (Tenn. Ct. App. 2002). Thus, the doctrine protects parties from "learning of the adversary's mental impressions, conclusions, and legal theories of the case," *Memphis Publ'g Co. v. City of Memphis*, 871 S.W.2d at 689, and prevents a litigant "from taking a free ride on the research and thinking of his opponent's lawyer." *United States v. Frederick*, 182 F.3d 496, 500 (7th Cir. 1999).

Swift v. Campbell, 159 S.W.3d 565, 572 (Tenn. Ct. App. 2004).

From the ex parte communications rules applicable to state court judges and ALJs, the recusal rules for state court judges, and the definition of work product, this principle emerges: once an adversarial proceeding has been initiated, communications of adverse parties and their counsel to and from the adjudicator are not confidential. Those communications must be disclosed to the opposing/adverse party.

Using the model of these foregoing analogous proceedings to this case and applying it to the September 25, 2012 Records Request, the Court finds that: (1) the Plaintiff's records request for communications of the Secretary, Board or Disciplinary Counsel with potential panel members are sought for the time period of post-petition; (2) the Secretary is employed in the dual role of secretary for the Board and Chair, as well as for the Disciplinary Counsel, and thus is an agent of those entities; (3) as analyzed in the "Governing Law" section above, the Board and the Disciplinary Counsel have an interest that is adverse to that of the respondent attorney; (4) the panel members are the neutral adjudicators. Under these

circumstances and applying the above models, the outcome is that post-petition communications of the Disciplinary Counsel and Board and their Secretary to the panel members are not confidential and must be disclosed to the respondent attorney.

September 19, 2012 Records Request

As to the records request made by the Plaintiff on September 19, 2012, it was served on the Chair, and, as quoted above, seeks these records:

- Records of how you put the district committee members in rotation and how you communicate with them in the selection process.
- All email communications you have had with any of the district committee members or Rita Webb, or any other members of the Board or staff of the Board, including disciplinary counsel, regarding the recent petition filed by the Board naming me as the respondent.

The Court's analysis, first, is that the Chair is subject to the Public Records Act in that capacity and to the extent that she has in her possession, custody or control records of the governmental agency, the Board of Professional Responsibility.

As well, in keeping with its above application of Rule 9, section 25.3 to this case, the Court holds that the Chair's work product and work files confidentiality exemption does not apply to communications with potential panel members post-petition. The Chair is a member of the Board. That entity has an adverse interest to the respondent attorney; therefore the Chair has that same adverse interest. Accordingly, that part of the Request which seeks post-

petition emails from the Chair to "any of the district committee members . . . naming me [the Plaintiff] as the respondent" are not confidential and must be produced.

As to the other parts of the Request: emails from the Chair to the Secretary, or to any other member of the Board or to staff of the Board, the Court concludes they do come within the section 25.3 work product and/or work files confidentiality exception. This conclusion derives from the determination in the "Governing law" section above that the Board is a party adverse to the respondent certainly in the appeal to state court and/or in punishment proceedings by the Tennessee Supreme Court. Thus, applying the explanation of work product by Justice Koch, quoted above, this Court concludes that these emails from the Chair to the Secretary, other Board members, or Board staff members contain the mental processes, deliberations, and instructions preparatory to the position the Board must take in the case against the respondent attorney. These work files and work product are confidential and do not have to be disclosed.

The Court's final ruling as to the September 19, 2012 Records Request is that the first part of it "Records of how you put the district committee members in rotation and how you communicate with them in the selection process" does not require production by the Defendants because the Request does not comply with the Act. TENN. CODE ANN. § 10-7-503(a)(7)(B) requires that a request "be sufficiently detailed to enable the records custodian to identify the specific records to be located." The "of how" and "how" part of the Request obfuscates for the Court the records being requested. The Court is unable to

analyze, then, the proprietary of the request, and can not issue a ruling on this aspect of the September 19, 2012 Records Request.

October 24, 2012 Supplement Records Request

As to the Plaintiff's third records request, the Court concludes that under Tennessee Code Annotated section 10-7-503(a)(2)(B) the request is premature.

On the governmental agency's duty to respond, the Public Records Act contains the alternative of stating the reasonable time needed to respond to a request:

> (B) The custodian of a public record or the custodian's designee shall promptly make available for inspection any public record not specifically exempt from disclosure. In the event it is not practicable for the record to be promptly available for inspection, the custodian shall, within seven (7) business days:
>
> * * * *
>
> (iii) Furnish the requestor a completed records request response form developed by the office of open records counsel stating the time reasonably necessary to produce the record or information.

TENN. CODE ANN. § 10-7-503(a)(2)(B) (West).

The reasonable time the Defendants are allowed by the Act to respond has not expired. In so concluding, the Court adopts the Defendants' argument:

> Here, the record clearly reflects that the Defendants timely responded in accordance with the provisions of Tenn. Code Ann. § 10-7-503(a)(2)(B)(iii). Ms. Reguli's request was received by the Board on October 25 and the Board responded on November 1 producing some of the records requested and stating the time reasonably necessary – 30 days – to produce the remaining records

> requested. *See* Exhibit 8. The response was clearly sent within seven business days of receipt of Ms. Reguli's request. Moreover, the 30 day time period estimated by the Board to produce the remaining records request not [sic] expire until December 1st at the earliest. Thus, to date there has been no denial of Ms. Reguli's October 25 public records request . . . .

Response to Amended Petition for Access to Public Records, Filed November 14, 2012, at pp. 16-17.

Attorneys Fees Denied

The Plaintiff's request to recover attorneys' fees under section 10-7-505(g) of the Public Records Act is denied. Full knowledge by the governmental agency that disclosure of a record is required under the Act and willful refusal to disclose are required to award fees:

> (g) If the court finds that the governmental entity, or agent thereof, refusing to disclose a record, knew that such record was public and willfully refused to disclose it, such court may, in its discretion, assess all reasonable costs involved in obtaining the record, including reasonable attorneys' fees, against the nondisclosing governmental entity. In determining whether the action was willful, the court may consider any guidance provided to the records custodian by the office of open records counsel as created in title 8, chapter 4.

TENN. CODE ANN. § 10-7-505(g).

As set forth above, the scope of Rule 9, section 25.3 of the confidentiality of records exchanged between the Board, Chair, Disciplinary Counsel and their Secretary and potential panel members, is susceptible to interpretation the way the section is worded. Although the Court rejected the Defendants' interpretation and found that the Plaintiff's interpretation

prevailed, that outcome is not certain from the wording of the Rules. The Rules do not directly and clearly address the circumstances of this case. The Court had to look to other provisions of the Rules, and consult rules of other proceedings such as civil state court lawsuits and UAPA contested case hearing for guidance. Also, the Defendants voluntarily produced a number of records prior to this lawsuit being filed. Lastly, on some of the requests, the Court has ruled in favor of the Defendants withholding the documents. Under these circumstances, the Court concludes that the Defendants' refusal to produce all the records does not constitute a knowing and wilful violation of the Act.

1. It is therefore ORDERED that the Defendants shall produce the records sought by the Plaintiff in her September 25, 2012 Records Request.

2. It is further ORDERED that the Chair of the Board shall produce the records sought by the Plaintiff in the September 19, 2012 Records Request to the extent that the Chair has in her possession, custody or control records of her communications with potential panel members after the disciplinary petition was filed against the Plaintiff. The other records requested in the September 19, 2012 letter, the Court concludes, are not required to be produced under the Public Records Act.

3. It is also ORDERED that the Plaintiff's petition to this Court for production of records responsive to her October 24, 2012 Supplemental Records Request is denied as premature.

4. It is additionally ORDERED with respect to the records filed with the Court for *in camera* inspection:

- Those records shall remain on file but under seal for appellate review;
- Copies of the *in camera* records, labeled "Confidential," shall be produced by the Defendants as they fit within paragraphs 1 and, perhaps, 2 above, of this order; and
- Copies of the *in camera* records, labeled "Non-responsive" shall be reevaluated for production by Defendants in light of and applying the Court's orders above. Records that fit within the above order for production shall be produced. The Court places the task of reevaluation on Defendants because of time-constraints of the Court in expeditiously ruling on this matter. The Court's review of the documents labeled "Non-responsive" revealed that Attorney Reguli is mentioned or listed in some of those, indicating that the records may fit within the Court's order. Time did not permit the Court to thoroughly examine the records as to the other seven attorneys named in the September 19, 2012 Records Request.

5. The deadline for the Defendants to produce the records ordered above is December 14, 2012.

ELLEN HOBBS LYLE
CHANCELLOR

cc: James D. R. Roberts
Janet Layman
Steven Hart
Janet Kleinfelter

Memorandum against BPR's ability to assess fees (to be supplemented)

Reported case allowing BPR to assess Attorney's with fee.

Positive
As of: Mar 13, 2013

Al S. BARGER et al. v. Ray L. BROCK, Jr., et al.

[NO NUMBER IN ORIGINAL]

Supreme Court of Tennessee

535 S.W.2d 337; 1976 Tenn. LEXIS 582

March 30, 1976

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff attorneys filed suit in the Chancery Court at Chattanooga (Tennessee) against defendants, supreme court and the attorney general, seeking a declaration that so much of Tenn. Sup. Ct. R. **42 as purported to levy a tax or license fee on plaintiffs or to suspend them from the practice** of law be declared unconstitutional and that **defendants be enjoined from imposing the tax or fee**. The court addressed the chancery court's jurisdiction.

OVERVIEW: The Tennessee Supreme Court promulgated Rule 42, which established a comprehensive disciplinary procedure to be funded and maintained by an annual license fee payable by members of the bar. A group of practicing attorneys filed a suit in the chancery court asking that so much of the rule as purported to levy a tax or annual license fee on the attorneys or to suspend them from the practice of law be declared void and that the supreme court and the attorney general be prohibited from imposing the tax or license fee. The court ordered the chancery court to dismiss the suit. The court held that the chancery court could not entertain any suit or action challenging the validity of a supreme court rule because such a suit would be in the nature of a bill of review or to impeach a judgment of the court and, in effect, would constitute an appeal to the chancery court from an action of the court. As a lower court, the chancery court was bound by decisions of the court. Further, the court had the authority to make rules governing the practice of law. The proper procedure for challenging the rule was to petition the court to vacate or modify the rule.

OUTCOME: The court ordered and directed the chancery court to enter an order of dismissal, taxing all costs to plaintiffs. It directed that all pleadings in the cause be delivered to the clerk of the supreme court and indicated that it would treat the pleadings as constituting a motion to vacate or modify the rule.

CORE TERMS: chancery, inferior, decree, license fee, disciplinary, tribunal, oral argument, notice, annual, judicial process, supersedeas, modify, practice of law, intervening petition, practicing, unify, full opportunity, bill of review, promulgate, announced, overrule, ordering, binding, vested, official capacity, annual fee, levy a tax, ex parte, interested parties, amicus curiae briefs

LexisNexis(R) Headnotes

Governments > Courts > Creation & Organization
[HN1] The Constitution of Tennessee provides in part that the judicial power of the state shall be vested in one supreme court and in such circuit, chancery and other inferior courts as the legislature shall from time to time, ordain and establish. *Tenn. Const. art. 6, § 1.* Thus the supreme court is a direct creature of the constitution and constitutes the supreme judicial tribunal of the state and is a court of last resort. All other courts are constitutionally inferior tribunals subject to the actions of the supreme court. Its adjudications are final and conclusive upon all questions determined by it, subject only to review, in appropriate cases by the Supreme Court of the United States.

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review
Governments > Courts > Judicial Precedents
[HN2] Inferior courts must abide the orders, decrees and precedents of higher courts. The Tennessee Court of Appeals has no authority to overrule or modify Tennessee Supreme Court's opinions.

Civil Procedure > Judgments > Relief From Judgment > Bills of Review
Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review
Governments > Courts > Judicial Precedents
[HN3] No bill of review lies in the chancery court to review a decree of the supreme court.

Civil Procedure > Judgments > Relief From Judgment > Bills of Review
Governments > Courts > Authority to Adjudicate
[HN4] The inferior courts of Tennessee may not entertain any suit or action challenging the validity of any rule of the supreme court.

Civil Procedure > Justiciability > Standing > General Overview
Governments > Courts > Rule Application & Interpretation
[HN5] When any individual deems any rule of court to be objectionable from any standpoint, it is his privilege to petition the court for its elimination or modification.

JUDGES: **[**1]** Cooper, Henry, Brock and Harbison, JJ., concurring.

OPINION BY: PER CURIAM

OPINION

[*338] OPINION AND ORDER

This action involves the right or power of the Chancery Court to declare a Rule of the Supreme Court to be violative of the Constitution of Tennessee and enjoin its enforcement.

The plaintiffs, Al S. Barger, Leon W. Davis, Jr., U. L. McDonald, Joe M. Parker and Richard H. Winningham are practicing attorneys in Chattanooga, Hamilton County, Tennessee and are solicitors and officers of this Court.

The defendants, Ray L. Brock, Jr., Robert E. Cooper, William H. D. Fones, William J. Harbison and Joseph W. Henry, constitute the Supreme Court of Tennessee and are sued in their official capacity as such Court. There is no allegation or suggestion that they, or any of them, have any pecuniary or property interest in the issues here presented. [1]

1 *Constitution of Tennessee, Art. 6, Sec. 11; Chumbley v. Peoples Bank & Trust Co., 165 Tenn. 655, 57 S.W.2d 787 (1933).*

The defendant, R. A. Ashley, is sued in **[**2]** his official capacity as the Attorney General of the State of Tennessee and is made a party "in case the Court should find it necessary to pass upon the constitutionality of any statute of the State of Tennessee."

I.

Inter alia, the Complaint filed over the signature of Thomas A. Harris, their solicitor of record, and also a solicitor and officer of this Court, alleges:

> *At some time unknown to the plaintiffs, and without notice to them*, the **[*339]** defendant Justices as the Supreme Court of Tennessee undertook consideration of an original "petition" presented to said Court *under circumstances not fully known to your plaintiffs*, calling for the defendants to impose an annual "license fee" or *tax* upon the plaintiffs and all other attorneys practicing within the State of Tennessee. Your plaintiffs are advised that on December 18, 1975, the defendants adopted a *so-called* "Rule of Court" called "Rule 42," which in Section 20 thereof purports to levy an annual fee or *tax* upon all practicing attorneys in this State.

It is further alleged with respect to this Court:

> (Their) *ex parte* action in purporting to *levy a tax* on lawyers is wholly **[**3]** without and beyond their authority and is an *exercise of arbitrary power* which is prohibited by our Constitution . . ..

They further allege:

> The portions of "Rule 42" purporting to impose a *tax* or "annual fee" on lawyers are void as an *affront to the Constitution of the State of Tennessee* . . ..

It is alleged that only the Legislature has the power to tax, citing Article 2, § 28, Article 2, § 2, and Article 6, § 2.

The prayer is (1) "that so much of Rule 42 as purports to levy a tax or 'annual license fee' on the plaintiffs, or to suspend them from the practice of law, be declared void as contravening the Constitution of this State"; (2) that "the defendant Justices be enjoined from imposing the tax or license fee" and (3) for such other relief as "the Constitution of the State and the preservation of liberty may require." There is no prayer for process.

II.

On 9 May 1974, the Tennessee Bar Association filed a petition in this Court requesting and recommending the adoption of a Rule of Court establishing a comprehensive disciplinary procedure to be funded and maintained by an annual license fee payable by members of the Bar.

On 6 November 1974, thirteen **[**4]** (13) members of the Bar of this Court filed an intervening petition urging that this Court promulgate a Rule organizing, unifying or integrating the State Bar of Tennessee.

By supplemental petition filed 12 December 1974, the Bar Association asserted the inadequacy of the then Rule 42 and urged the Court to replace it with Rules of Disciplinary Enforcement exhibited with the petition.

This Court, being acutely aware of the impact of these recommendations upon the members of the Bar and their direct relationship to the public welfare, and being desirous of giving all concerned a full opportunity to be heard, and being unwilling to proceed on an *ex parte* basis and without notice, entered an order on 22 November 1974, granting leave to all interested parties to file *amicus curiae* briefs and gave notice that oral argument would be heard upon the issues thus presented. Pursuant to this solicitation, numerous briefs, affidavits and letters in support of or opposition to these proposals were filed.

We digress at this juncture to address the matter of whether the profession had notice of these proceedings. First, it should be pointed out that at all stages, the news media, by **[**5]** editorial comment and by news stories, gave these matters massive publicity.

The voluntary Tennessee Bar Association [2] kept its membership fully informed through its most excellent publications.

> 2 Three of the five plaintiffs are members of the Tennessee Bar Association as is their attorney of record.

The December 1974 issue of the *Tennessee Lawyer* (Vol. 23, No. 4) devoted the entire front page to a story headlined INTERVENING PETITION TO UNIFY T.B.A. FILED BY GROUP OF LAWYERS. **[*340]** The ensuing story pointed out that this petition was filed "In the pending matter of: *In Re: The Petition of the Tennessee Bar Association, Ex Parte.*" The concluding paragraph reads as follows:

> The Court has granted interested parties leave to file amicus curiae briefs. Those supporting the petitions are to be filed on or before December 27, 1974, those in opposition on or before January 17, 1975. The Court will hear oral arguments on Thursday, January 23, 1975. Proponents will be heard from 9:00 a.m. until **[**6]** noon. Those opposing will be heard from 1:30 p.m. to 4:30 p.m. Lawyers desiring to present oral argument should notify the Clerk of the Court at Nashville. [3]

> 3 This paragraph, with slight modification was taken from the Court's order of 22 November 1974.

Oral argument was heard on 23 January 1975, and at this time the Court was the beneficiary of numerous presentations and all issues were fully and ably discussed. It is of significance that among those appearing at the Bar of this Court was the then President of the Chattanooga Bar Association. It is of further significance that the Chattanooga Bar Association filed an intervening petition.

Again realizing that these were issues of overriding professional and public concern, the Court [4] conducted numerous conferences and proceeded with deliberation in its consideration of these vital matters. Finally, after all concerned had been afforded full opportunity to be heard in person, by petition, letter, affidavit and brief, the Court on 18 December **[**7]** 1975, three hundred and twenty-nine (329) days after argument, released its opinion, which *inter alia* announced the adoption of Rule 42, relating to Disciplinary Enforcement. See *In Re: Petition of Tennessee Bar Association, etc., 532 S.W.2d 224 (Tenn.1975).*

> 4 The Honorable C. S. Carney was designated to sit upon this Court vice Mr. Justice Henry, who recused himself from consideration of the matter of unification of the Bar. After this Court promulgated

its opinion of 18 December 1975, Justice Henry signed the order adopting Rule 42.

The basic legal issue presented to the Court was its right, power and authority to unify the Bar and/or adopt a disciplinary rule. The Court's ruling was clear:

> We respectfully overrule all issues raised in this proceeding questioning the authority of the Court to unify the bar of this state or to require annual registration and license fees as a condition to the continued practice of law.

The holding in this case, is the established law of Tennessee and **[**8]** is binding upon all the courts of the state.

III.

Tennessee's judicial structure is established by our constitution and statutes on a three-tiered basis. In ascending order of power and authority they are: (1) *nisi prius* or trial courts (circuit and chancery); (2) intermediate appellate courts (Court of Appeals and Court of Criminal Appeals) and (3) a Supreme Court.

[HN1] **The Constitution of Tennessee obviously contemplates the supremacy of the Supreme Court.**

> The judicial power of this State shall be vested in one Supreme Court and in such Circuit, Chancery and other inferior Courts as the Legislature shall from time to time, ordain and establish; . . . (Art. 6, Sec. 1).

Thus the Supreme Court is a direct creature of the Constitution and constitutes the supreme judicial tribunal of the state and is a court of last resort. All other courts are constitutionally inferior tribunals subject to the actions of the Supreme Court. Its adjudications are final and conclusive upon all questions determined by it, subject only to review, in appropriate cases by the Supreme Court of the United States. *Railroad v. Bryne, 119 Tenn. 278, 104 S.W. 460 (1907).*

Chancellor Gibson lists **[**9]** the *Great* Duties of the Supreme Court. See § 1376, *Gibson's* **[*341]** *Suits in Chancery*, Fifth Edition (1956). One of these "great duties", to the extent here applicable, is:

> To keep . . . the courts . . . within their constitutional and lawful jurisdiction.

In the ensuing section he discusses the objects of the people in ordering and establishing the Supreme Court. He suggests that the first object was:

> (To) have a tribunal to supervise all the other Courts of the State; to keep them within the limits of the law and the Constitution . . .

Then by footnote 17 to the same section he lists the considerations prompting the Court. Among these:

> To so rule that all inferior courts will be kept within the orbits of their respective jurisdictions.

Judge Abraham Caruthers, in *History of a Lawsuit*, Sec. 20 (Eighth Edition 1963) expresses it thusly:

> The power to enforce its judgments includes the power to protect them from interference, and the Court may use any process to secure that protection and enforcement; *the court is supreme in fact as well as in name.*

It is a controlling principle that [HN2] inferior courts must abide **[**10]** the orders, decrees and precedents of higher courts. The slightest deviation from this rigid rule would disrupt and destroy the sanctity of the judicial process. There would be no finality or stability in the law and the court system would be chaotic in its operation and unstable and inconsistent in its decisions. Personal and property rights would be insecure and litigation would know no end.

Fortunately our courts recognize and apply the rule that lower courts are bound by the decisions of higher courts. As held in *Bloodworth v. Stuart, 221 Tenn. 567, 428 S.W.2d 786 (1968)* "the Court of Appeals has no authority to overrule or modify Supreme Court's opinions."

The principle by which the procedural aspects of this case must be controlled was announced by the Supreme Court, meeting in Sparta, in August 1832, in *Dibrell v. Eastland, 11 Tenn. 507.* A Circuit Judge had ordered the issuance of a supersedeas of a decree of the Supreme Court ordering property sold for the satisfaction of certain money judgments.

The opinion of Chief Justice John Catron, who later served as an Associate Justice of the Supreme Court of the United States for twenty-eight years, is a model of brevity **[**11]** and clarity. It reads, in full, as follows:

> This Court is of opinion, that a circuit judge has no power or jurisdiction to grant an order for a supersedeas to the judgments or decrees of this Court, more than a justice of the county court has power and jurisdiction to cause to be superseded the decrees and judgments of the circuit courts. The power did not exist in this case, and it will equally apply to every decree and judgment, civil and criminal, that the Supreme Court has or may render. Let the supersedeas be quashed. *11 Tenn. at 507.*

In *Hurt v. Long, 90 Tenn. 445, 16 S.W. 968 (1891)*, the Court, in passing upon a bill filed in chancery court to review a decree of the Supreme Court, said:

> (That) exact question was made in a case at Knoxville in 1847. It was there held that [HN3] no bill of review lies in the chancery court to review a decree of the supreme court. *Wallen v. Huff*, Thomp.Tenn.Cas. 21.
>
> This is obviously correct, as, among the numerous methods for the correction of errors of law and fact committed in the inferior courts, the appeal is the last and final one, and it could not be on any ground assumed that this might be tried; and then all **[**12]** the others, practically included in this, might be tried again. This practice would be productive of intolerable evil, and would make litigation endless . . . *90 Tenn. at 449, 16 S.W. at 969.*

In *Ser-Nestler, Inc. v. General Finance Loan Company, 167 So.2d 230 (Fla.App.1974)*, involving a Florida rule of civil procedure, the Court said:

> **[*342]** The Supreme Court is vested with the sole authority to promulgate, rescind and modify the rules, and until the rules are changed by the source of authority, they remain inviolate. *167 So.2d at 232.*

In *Soft Water Utilities, Inc. v. LeFevre, 159 Ind. App. 529, 293 N.E.2d 788 (Ind.App.1973)* the Court, referring to a rule of the Supreme Court, said:

> The rules of the Supreme Court are binding on the courts as well as on the litigants. No court except the Supreme Court can alter, amend or change the rules. No inferior court may circumvent the rules and thereby avoid them. *293 N.E.2d at 790.*

Again, in *Alexander v. Delgado, 84 N.M. 717, 507 P.2d 778 (1973)*, the Court made this pithy observation:

> (It) is not considered good form for a lower court to reverse a superior one. Such actions are unsettling **[**13]** in the law which we ought to strive to make certain, and result in a disorderly judicial process. *507 P.2d at 779.*

The authority of this Court to make rules governing the practice of law is traditional, inherent and statutory. Such power is indispensable to the orderly administration of justice.

We hold that [HN4] the inferior courts of the state may not entertain any suit or action challenging the validity of any Rule of this Court. Such a suit would be in the nature of a bill of review or to impeach a judgment of this Court, and, in effect, would constitute an appeal to the chancery court from the action of this Court. Such a proceeding is unknown to the law.

This is not to say, however, that there can be no relief from a Rule of this Court deemed to be arbitrary, illegal or improvident.

This Court welcomes the continuing criticisms of its Rules. They never become final, and are always subject to change. We solicit advice and suggestions from the Bench and Bar for their improvement. [HN5] When any individual deems any Rule of Court to be objectionable from any standpoint, it is his privilege to petition the Court for its elimination or modification. Indeed, it is the duty of the **[**14]** solicitors at the Bar of this Court to make suggestions and recommendations on the orderly administration of the appellate judicial process.

IV.

We would be false to our duty and recreant to our trust as the people's highest tribunal if we were to permit this suit to stand.

Accordingly, we order and direct the Chancery Court at Chattanooga to enter instanter an order of dismissal, taxing all accrued costs to the parties plaintiff. A certified copy of the order so entered will be forwarded to the Clerk of this Court at Nashville.

However, in order that the parties may have their insistences considered, we direct that all pleadings in this cause be delivered to the Clerk of this Court at Nashville forthwith. This

Court will treat the pleadings as constituting a motion to vacate or modify Rule 42.

This matter will be docketed for oral argument, in Knoxville, at the heel of the calendar on 7 May 1976. Briefs will be filed with the Clerk in Nashville by 23 April 1976. The sole issue before the Court is the constitutionality of Rule 42.

COOPER, HENRY, BROCK and HARBISON, JJ., concurring.

M2013-01648-SC-RL2

ROBERTS & LAYMAN

ATTORNEYS AT LAW
1700 HAYES STREET, SUITE 303
NASHVILLE, TENNESSEE 37203
OFFICE: (615) 242-2002
FAX: (615) 242-2042

June 13, 2013

Mr. Michael Catalano
Clerk of the Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, Tennessee 37201

Original

Re: Comments to proposed changes to Tenn. R. Sup. Ct. 9

Dear Mr. Catalano:

Please accept these comments to the proposed changes to Tenn. R. Sup. Ct. 9. We have also read and reviewed the comments submitted by Attorney Connie Reguli and we adopt those comments as if restated verbatim herein.

Duty

The proposed revisions would relieve both the Board and Disciplinary Counsel of any duty to act or to fulfill the responsibilities which the Rule establishes. As the enforcer of the duties conferred upon all attorneys in this state, the Board and Disciplinary Counsel should not be exempt from the requirement of fulfilling a duty of compliance with the Court's rules and the law.

There is a perception in the legal community that the Board and Disciplinary Counsel act when they want and against whom they want, rather than according to the Rules. Multi-year vendettas are launched against some attorneys for alleged "violations" that the Board cannot even articulate, while real acts violating the Rules of Professional Conduct and causing harm to clients and other litigants are ignored if the Respondent attorney is properly "connected." There is also a perception that the Board "hoards" minor infractions for years and lies-in-wait for what they perceive to be an opportune time to bring forth infractions up to a decade old. Giving the Board more leeway (by eliminating the "duty to act") to ignore their previously established duties on a selective basis does nothing to promote confidence in the Board or legal profession.

Most lawyers justifiably believe that the "key" to avoiding investigation or prosecution is to have a firm member be on the Disciplinary Committee. I personally was involved in a situation where I uncovered that an attorney had made false representations that a key document was an original. I confronted this person and demanded as explanation as to why I was not required under the Rules to file an ethics complaint. The accused's response was to turn me into the Board claiming I had violated the RPC by "threating" to file a complaint. The Board conducted an extensive

investigation of me, but refused to take action against the attorney who committed the fraud on the Court. Coincidentally, this person was a member of the District Committee at the time his fraud was exposed and at the time the Board refused to investigate his conduct.

Eliminating the Board and Disciplinary Counsel's "duty" to act will not further the purpose for which the disciplinary system was created, but will rather give a free pass to the agencies to pick and choose whom and what it wishes to investigate and prosecute. The Board's actions are already perceived by many to be arbitrary and capricious. Lowering the standard for their conduct will not help this situation.

Separation

The entities for discipline in Tennessee consist of the Board of Professional Responsibility, Disciplinary Counsel and District Committees from whom Hearing Panels are chosen. Presently, there is very little separation among these entities. As proposed, the changes to Rule 9 would further cloud the interaction, rather than making a clearer demarcation of each from the others.

Intentionally blurring the lines separating the Board [i.e Grand Jury], the Prosecutors [District Attorney], and the Hearing Panels [Judges] will do nothing to instill confidence in the judicial system. Due Process requires that these entities be keep separate so as to provide justice, and the appearance of justice to the parties.

In that regard, we would point the Court and others to the system implemented for discipline in Kentucky. As set forth in the Brief of the Appellee in *Reguli v. Vick*, the Kentucky system creates a series of checks and balances by which the various parts of the disciplinary process work independently from each other.

This is further explained in this excerpt from Ms. Reguli's brief:

> The chief overseer of attorney discipline for Kentucky is the Kentucky Bar Association. It is located at 514 West Main Street, Frankfort, Kentucky 40601-1812. (See SCR 3.025).
>
> The "Board" (sometimes referred to as the "Board of Governors") is the "governing body of the Association and the agent for the Court for the purpose of administering and enforcing the Rules. It shall consist of the President, the President-Elect, the Vice President, the immediate Past President, the Chair of the Young Lawyer's Section and two attorneys elected from the membership of the Association in each appellate district of the state as presently existing or hereafter created." (SCR 3.070). While the Kentucky "Board" might be analogous to the Board of Professional Responsibility for Tennessee, it is markedly different in its make-up and selection process. While the Tennessee Board of Professional Responsibility is appointed entirely by the Supreme Court (Tenn. R. Sup. Ct. 9, §5.1), the Kentucky board is elected by its membership. (See SCR 3.070 contained in Appendix G hereto).
>
> The Kentucky Board of Governors appoints "Bar Counsel" who are "responsible for investigating and prosecuting all disciplinary cases and such other duties as the Board may designate.")See SCR 3.155 contained in Appendix

G hereto). In Tennessee, the Chief Disciplinary Counsel is appointed by the Supreme Court, and is allowed to hire assistant counsel. Tenn. R. Sup. Ct. 9, §7.

In Kentucky, the Board of Governors also appoints a "Disciplinary Clerk" who is responsible for accepting the filing of charges issued by the Inquiry Commission, pleadings or other paper[s], issuing process, and the preparation and maintenance of the records of each disciplinary proceeding, other than the files of the Office of Bar Counsel, and other duties as are assigned by the Board." (See SCR 3.157 contained in Appendix G hereto). This is easily distinguishable from Tennessee because a. Tennessee's rules make no such provision for a clerk, and b. our rules make provisions for the issuances of subpoenas through the "circuit or chancery court having jurisdiction" to do so... (Tenn. R. Sup. Ct. 9, §13.1). If the Tennessee Rules contemplated a clerk such as Kentucky has, an express provision for the clerk (including the issuance of process and subpoenas) would be made, rather than delegated to a court with "jurisdiction."

It is also notable that the Kentucky Disciplinary Clerk is expressly authorized to maintain the records of disciplinary cases, with the exception of the files from the Bar Counsel. This is significant to the present case because Ms. Webb's assumed duties as the Clerk provide no provision at all for her to be separated from the files of our Disciplinary Counsel; in fact, she works for the Disciplinary Counsel, in their office and on their payroll.

Lastly, the Kentucky system is notably different from ours in that a nine-member Inquiry Commission investigates matters and decides whether charges should be brought by the Bar Counsel. The members of this Commission are appointed by the Chief Justice of the Supreme Court, and are a separate entity altogether from the Bar Counsel or the Disciplinary Clerk. The actual cases are then heard by a Trial Commissioner who is appointed by the Clerk from the "Trial Commission," a panel of judges appointed by the Supreme Court. (See the chart, similar to that of "Demonstrative A" prepared by Ms. Reguli and presented to the trial court in this matter, which is attached hereto as part of Appendix H, showing the set-up of the Kentucky disciplinary system.)
Brief of the Appellee, *Reguli v. Vick*, M2012-02709-COA-R3-CV.

For convenience, we have attached to this letter copies of the relevant portions of the referenced Appendix as well as the chart showing the "separation of powers" found in the Kentucky disciplinary process.

Ex Parte Communication

As proposed, the amended Rule 9 would **ALLOW** the Prosecutor Disciplinary Counsel to make *ex parte* communications with the Hearing Panel Judges on any matter it deems "clerical." The Board of Professional Responsibility should not be allowed to circumvent the rules to which all other parts of the legal system must adhere. If the "Executive Secretary" is to be treated as a neutral party, that person should be made a clerk of the court, rather than an employee of the Office of Disciplinary Counsel.

Neither the Board nor Disciplinary Counsel can be trusted to decide what is "clerical" and is "not-clerical." Despite the clear prohibition in Rule 9 and the Board's own policies (As well as in the RPC and the Judicial Canons), the Board has systematically engaged in thousands of ex-parte communications to the detriment of Respondents.

As support for this position, we have attached a copy of an *ex parte* email obtained via a valid Open Records Act request showing the interaction between the prosecutor Office of Disciplinary Counsel and the Hearing Panel Judges. In this email, the Disciplinary Counsel prosecutor (through the "Executive Secretary") intentionally and willfully attempted to bias the hearing panel members by asserting "facts" which were unproven, allegations which the Respondent should have been given an opportunity to rebut. However, the Respondent never knew of these *ex parte* communications and had no opportunity to challenge the same.

In the Brief of the Appellee filed in *Reguli v Vick*, Ms. Reguli articulated the issue of systemic *ex parte* emails as follows:

> Ms. Reguli's request asked for emails relating to eight (8) respondent attorneys. As a result of that request, when ordered to do so by the Court, the Board turned over 424 Bates Stamped pages. (R.341). That means that there are approximately sixty (60) pages of *ex parte* emails between Ms. Webb and/or Ms. Hollabaugh and Hearing Panel Judges **in each case**.
>
> Another records request revealed that since 2005, there have been approximately 372 Respondents attorneys against whom the Board has filed prosecutorial cases.
>
> ***
>
> Ms. Reguli submits that each one of these [372] Respondents should have been given notice of the communications between the Board/Disciplinary Counsel and the Hearing Panel Judges for their respective cases. Many of these cases are now concluded, without the Respondent attorney having been afforded meaningful due process in the selection of his or her Hearing Panel Judges. An average of sixty (60) pages of *ex parte* emails per Respondent were sent between the prosecutor's office and the judges, and were never revealed to the Respondent. Sixty (60) pages per Respondent.
>
> Sixty (60) pages per respondent of communications prohibited by Tenn. R. Sup. Ct. 8, RPC 3.5, Impartiality and Decorum of the Tribunal.
>
> Sixty (60) pages per respondent of communications prohibited by Tenn. R. Sup. Ct. 10, Canon 2, Rule 2.9, Ex Parte Communication. This rule also mandates disclosure of the offending communications, even though no such disclosure or subsequent recusals have ever been made.
>
> Sixty (60) pages per respondent of communications prohibited by the Board's own policies, §3.13.

Sixty (60) pages per respondent of communications denying due process to men and women who have been officers of the Courts of Tennessee, subject to its rules and discipline, and who did not and could not have received a fair trial.

In essence, this sixty-page average means that since 2005, Ms. Webb (and her predecessor, Ms. Woodruff), and in some instances, Ms. Hollabaugh or other Board Chairs, have likely compiled more than 22,300 pages of *ex parte* emails. Twenty-Two Thousand, Three Hundred pages of emails that would not be allowed in Circuit Court, Chancery Court or any other Court of this State. Twenty-Two Thousand, Three Hundred pages of emails which would require the recusal of a trial judge in any other court. Twenty-Two Thousand, Three Hundred pages of emails which violate the very rules the Board was created to uphold and protect.

Twenty-Two Thousand, Three Hundred pages of notice and due process never afforded these 372 Respondent attorneys.

Twenty-Two Thousand, Three Hundred pages of facts sent to judges about a case with no notice or opportunity to be heard.

Twenty-Two Thousand, Three Hundred pages of unethical conduct, all in the name of "Professional Responsibility."

Twenty-Two Thousand, Three Hundred pages of emails detailing "what the [Board] is up to" and to which Ms. Reguli (and the public) are entitled to see.

"[P]rocess which is a mere gesture is not due process." (See *Mullane v. Central Hanover Bank*, 339 U.S. 306, 315, 70 S.Ct. 652, 657 (U.S., 1950). The agency empowered and authorized by the Supreme Court to regulate and oversee the practice of law has categorically and systematically denied its own members meaningful due process. Three Hundred and Seventy-two[1] lives – real lives and real careers – affected by these dishonest and unethical actions. This Court must not allow this miscarriage of justice to continue.

Brief of the Appellee, *Reguli v. Vick, citation supra.*

If the Board and Disciplinary Counsel are willing to engage in this level of unethical, illegal, and unconstitutional behavior when the prohibitions are crystal clear, it is foolhardy and dangerous to give the Board and Disciplinary Counsel the power to decide for itself which *ex parte* communications are now permissible. Surely Twenty-Two Thousand, Three Hundred pages of *ex parte* emails are sufficient to show that *allowing ex parte* communications will result in a serious lack of Due Process in the Disciplinary System.

[1] This number only represents Petitions. Since the scope of the Board's behavior remains unknown, the real number of persons affected cannot be determined in this brief.

Confidentiality

These proposed changes do not address issues with confidentiality. In *Doe v. BPR,* the Court was clear that the purpose of confidentiality as set forth in Rule 9 is to protect the respondents and complainants, not the Board or Disciplinary counsel:

> The purposes underlying confidentiality are obvious. Foremost, the rule serves to protect both the complainant from possible recriminations and the attorney from unsubstantiated charges while a thorough investigation is conducted. Moreover, removing or unnecessarily qualifying the confidentiality requirement would eliminate many sources of information and reduce complaints received by the Board from lay citizens, litigants, lawyers, and judges. Finally, the rule serves to protect public confidence in the judicial system by preventing disclosure of a charge until the directives of **section 25** are satisfied.
> *Doe v. Board of Professional Responsibility of the Supreme Court of Tennessee*, 104 S. W. 3d 465, 472-3 (Tenn., 2003) (underline added).

Despite the Court's unambiguous purpose, the Board and Disciplinary Counsel have repeatedly used the confidentiality provisions of Rule 9 to cover up their own actions, rather than to protect the reputation of a Respondent Attorney or Complainant. In *Doe*, the Attorney General argued vehemently in favor of the Respondent Attorney's right to protection, yet has completely abandoned that position in *Reguli v. Vick* as a means of protecting the Board and Disciplinary Counsel from exposure for its unethical and illicit activities. (See Brief of the Appellant, *Reguli v. Vick*).

At the very least, in this rule change process, the Court should clearly define "work files" so that the Board and Disciplinary Counsel, as well as the Respondent Attorneys, have a clear picture of exactly what is confidential, what documents or other items of the Board and Disciplinary Counsel are "work product or work files" and what documents or other items the Respondent Attorney is entitled to obtain.

This must also work in connection with the separation of powers issue. It is un-American to allow the prosecutor and judges to work together, but to have all those communications kept secret from the accused. For over 200 years Due Process has required that prosecutors refrain from engaging in secret *ex parte* communications with judges.

We would suggest that Section 32 (section 25 in the present Rule 9) be rewritten in its entirety to fully explain 1. The purpose of confidentiality, 2. The separation which must exist among the Board, Disciplinary Counsel and the Hearing Panel judges, 3. To clearly define "work product and work files" as those terms relate to the Board, district committee members (and Hearing Panel judges) and the Disciplinary Counsel, and 4. To set parameters by which all parties involved in a matter should conduct themselves (including with regard to *ex parte* communication) and for which documents or other items are available through discovery or other means to the Respondent Attorney.

There is no benefit to society to allow the Board to keep its actions secret – ever. As this Court clearly set forth in *Doe,* the purpose for the confidentiality provisions is to protect Respondent Attorneys and Complainants from baseless allegations, not to protect the Board or Disciplinary Counsel when they choose not to follow the rules they were created to enforce. In any Board

prosecution, the Respondent should be allowed to waive ALL confidentially at any time and about ALL matters. The Board should not have any secrets, especially in regard to its own conduct.

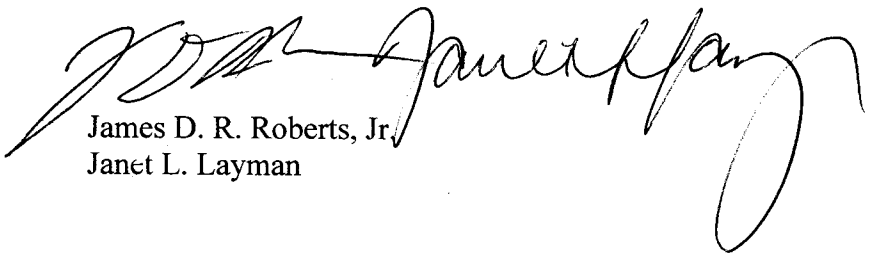
The Board has been caught red-handed engaging in serious and serial unethical behavior. It is not surprising that its first step is an attempt to amend the rules to make their past behavior acceptable. The Board should not be allowed to re-write the rules until after it has disclosed all *ex parte* communications to public scrutiny, or in such a way as to legitimize their own unethical behavior.

Conclusion

This letter does not address all our concerns with the proposed changes, nor does it address changes, such as the rules regarding confidentiality, which we believe should be addressed. We agree with Ms. Reguli that more time is necessary for a review of the proposed changes. We also submit that the Court should solicit proposed changes from the bar for comment and review.

If we may be of further assistance, please do not hesitate to call upon us.

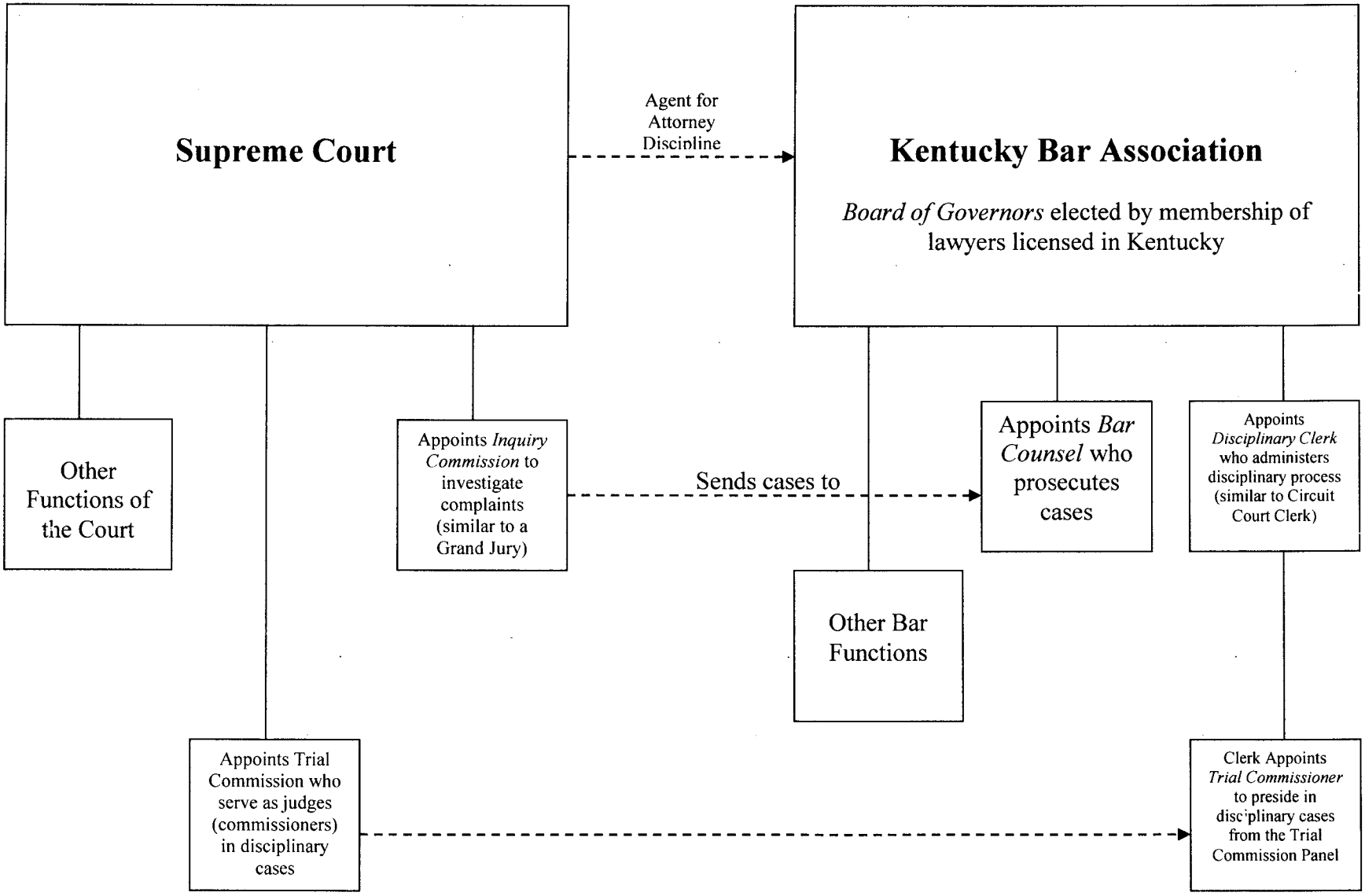
Sincerely,



James D. R. Roberts, Jr.
Janet L. Layman

Cc: Connie Reguli

KENTUCKY



See Kentucky Supreme Court Rules and Kentucky Bar Association v. Harris 269 S.W. 3d 414 (KY., 2008)

Kentucky
Rules for Set up
of Disciplinary System

KENTUCKY BAR ASSOCIATION
RULES OF THE SUPREME COURT OF KENTUCKY

PRACTICE OF LAW

SCR 3.025 Kentucky Bar Association

The mission and purpose of the association is to maintain a proper discipline of the members of the bar in accordance with these rules and with the principles of the legal profession as a public calling, to initiate and supervise, with the approval of the court, appropriate means to insure a continuing high standard of professional competence on the part of the members of the bar, and to bear a substantial and continuing responsibility for promoting the efficiency and improvement of the judicial system.

HISTORY: Adopted by Order 80-3, eff. 12-31-80

KENTUCKY BAR ASSOCIATION
RULES OF THE SUPREME COURT OF KENTUCKY

PRACTICE OF LAW

SCR 3.070 The board; functions and membership

The Board is the governing body of the Association and the agent of the Court for the purpose of administering and enforcing the Rules. It shall consist of the President, the President-Elect, the Vice President, the immediate Past President, the Chair of the Young Lawyer's Section, and two attorneys elected from the membership of the Association in each appellate district of the state as presently existing or hereafter created.

HISTORY: Amended by Order 2005-10, eff. 1-1-06; prior amendments eff. 9-15-90 (Order 90-1), 1-1-78, 7-2-71

KENTUCKY BAR ASSOCIATION
RULES OF THE SUPREME COURT OF KENTUCKY

PRACTICE OF LAW

SCR 3.080 Selection and tenure of board of governors; filling vacancies on the board

The elected members of the board for each appellate district shall be nominated and elected, in the manner prescribed in the bylaws, by the members of the association residing in the appellate district. Each governor shall hold office for two years and/or until his successor is elected and qualified. No governor who has served three consecutive full terms, after July 1, 1971, shall be eligible to again serve without at least one term of said office intervening. The terms of the two governors from each appellate district shall expire in alternate years. Bylaws shall provide for an annual election, to be held simultaneously in all appellate districts in which more than one person has been nominated as governor, for the purpose of electing successors to those governors whose terms of office shall expire. Any vacancy on the board may be filled for the remainder of the term in such manner as the bylaws may prescribe. The KENTUCKY BENCH & BAR shall in the April and July issues prior to the expiration of the term of governor carry a notice to the membership of the expiration.

HISTORY: Amended eff. 1-1-78; prior amendment eff. 7-2-71

KENTUCKY BAR ASSOCIATION
RULES OF THE SUPREME COURT OF KENTUCKY

PRACTICE OF LAW

SCR 3.090 Duties and powers of the board

It shall be the board's duty to perform the functions prescribed in Rule 3.070, and it shall have power to do everything necessary or appropriate to enable it to perform those functions. The board shall adopt bylaws, subject to the approval of the court and not in conflict with these rules, relating to the performance of its functions and providing for the conduct of its business. The board's power to perform its function as the governing body of the association expressly includes the power to engage in any program designed to educate and inform the bar and the public.

HISTORY: Amended eff. 1-1-78; prior amendment eff. 7-2-71

KENTUCKY BAR ASSOCIATION
RULES OF THE SUPREME COURT OF KENTUCKY

PRACTICE OF LAW

SCR 3.155 Appointment and duties of Bar Counsel

(1) The Board shall appoint a Bar Counsel and such Deputy Bar Counsel as may from time to time be appropriate. Bar Counsel shall be responsible for investigating and prosecuting all disciplinary cases and such other duties as the Board may designate.

(2) Bar Counsel, and such Deputies as may be appointed, shall serve at the pleasure of the Board.

(3) Bar Counsel and all Deputies shall be attorneys licensed to practice law in the Commonwealth.

(4) The Board may employ such Bar Counsel staff as may be appropriate.

(5) Annually, on or before November 1, the Inquiry Commission shall submit to the Board a recommended budget for the succeeding fiscal year along with any recommended changes in annual membership dues to cover costs of administering the duties of the Inquiry Commission and the office of Bar Counsel.

HISTORY: Adopted by Order 98-1, eff. 10-1-98

KENTUCKY BAR ASSOCIATION
RULES OF THE SUPREME COURT OF KENTUCKY

PRACTICE OF LAW

SCR 3.157 Appointment and duties of Disciplinary Clerk

The Board shall appoint a Disciplinary Clerk and such Deputy Clerks as may from time to time become appropriate. The disciplinary Clerk shall have such qualifications as the Board deems appropriate, and shall be responsible for accepting the filing of charges issued by the Inquiry Commission, pleadings or other paper, issuing process, and the preparation and maintenance of the records of each disciplinary proceeding, other than the files of the Office of Bar Counsel, and other duties as are assigned by the Board.

HISTORY: Amended by Order 2007-007, eff. 2-1-08; adopted eff. 10-1-98 (Order 98-1)

KENTUCKY BAR ASSOCIATION
RULES OF THE SUPREME COURT OF KENTUCKY

PRACTICE OF LAW

SCR 3.140 Appointment of Inquiry commission

(1) The Chief Justice, with the consent of the Court, shall appoint an Inquiry Commission consisting of nine persons, six of whom shall be lawyers possessing the qualifications of a Circuit Judge and three of whom shall be citizens of the Commonwealth of at least thirty (30) years of age who are not lawyers. One lawyer member shall be designated by the Chief Justice as Chair of the Commission and of each panel. No lawyer members shall serve more than two (2) consecutive terms of three (3) years. No non-lawyer member shall serve more than three (3) consecutive terms of two (2) years.

(2) The Commission shall meet and act in panels of three (3) persons comprised of two (2) lawyers and one (1) non-lawyer to promptly dispose of all complaints and matters referred to it pursuant to SCR 3.170. When the Commission meets in a panel of three (3), any two (2) members must be present in order that a quorum exist. At least one (1) panel of the Commission shall meet each month if there is unresolved business to conduct.

(3) The terms of the lawyer and non-lawyer members of the Inquiry Commission shall be appointed by the Chief Justice, with the consent of the Court, in such a manner that their terms shall be staggered.

(4) The Inquiry Commission may adopt administrative regulations for the discharge of its responsibility subject to approval of the Court during its regular term. The Commission shall meet as a whole for administrative purposes, at which six (6) persons shall constitute a quorum. The Commission, through its administrative regulations, will provide for the rotation of its members among the different panels.

HISTORY; Amended by Order 98-1, eff. 10-1-98; prior amendments eff. 9-15-90 (Order 90-1), 4-1-82, 1-1-78, 7-2-71

KENTUCKY BAR ASSOCIATION
RULES OF THE SUPREME COURT OF KENTUCKY

PRACTICE OF LAW

SCR 3.225 Appointment of Trial Commission

The Chief Justice shall appoint, subject to the approval of the Supreme Court, from among the membership of the Bar Association, a Trial Commission and shall designate a chair from the Commission. Members of the Trial Commission shall be lawyers licensed in the Commonwealth who possess the qualifications of a Circuit Judge. To the extent practicable, the Chief Justice shall, with the consent of the Court, appoint Trial Commissioners from each appellate district. Such Trial Commissioners shall be authorized to serve terms of two (2) years.

HISTORY: Amended by Order 2012-01, eff. 3-1-12; prior amendments eff. 1-1-06 (Order 2005-10), 11-2-04 (Order2004-6), 10-1-98 (Order 98-1)

KENTUCKY BAR ASSOCIATION
RULES OF THE SUPREME COURT OF KENTUCKY

PRACTICE OF LAW

SCR 3.230 Procedure when answer raises issues of fact

After an answer is filed raising issues of fact, the Disciplinary Clerk shall appoint the next available member of the Trial Commission to serve as a commissioner upon approval by the Chief Justice. The Trial Commissioner shall reside in a different Supreme Court district from that of the Respondent. The Disciplinary Clerk shall immediately notify the Trial Commissioner of his/her appointment and provide the Trial Commissioner a copy of the pleadings.

HISTORY: Amended by Order 2007-007, eff. 2-1-08; prior amendments eff. 10-1-98 (Order 98-1), 1-1-87; (Order 86-3), 1-1-78, 7-2-71

KENTUCKY BAR ASSOCIATION
RULES OF THE SUPREME COURT OF KENTUCKY

PRACTICE OF LAW

SCR 3.240 Notice of appointment of Trial Commissioner and hearing

(1) Upon the appointment of a Trial Commissioner, the Disciplinary Clerk shall notify the parties of his/her name and address. The Trial Commissioner shall fix the time and place of the hearing and the Disciplinary Clerk shall give notice thereof to the parties. Such hearing shall be not less than thirty (30) days, nor more than sixty (60) days, after the date of the notice, but for good cause shown, or by agreement, said time may be extended by the Trial Commissioner.

(2) Any time, not later than ten (10) days after the appointment of a Trial Commissioner or at such point in the proceeding that facts become known sufficient for such challenge, the Respondent may, by motion, challenge for cause the Trial Commissioner. If the challenge is such as might disqualify a Circuit Judge, the Chief Justice shall relieve the challenged member and direct the Disciplinary Clerk to immediately fill the vacancy.

(3) The Trial Commissioner may convene a pretrial conference. The Trial Commissioner shall have the authority to demand the appearance of counsel representing the respective parties at the pretrial conference or such other conferences as he/she may convene in person or by telephone for the purpose of disposing of pretrial matters or motions.

HISTORY: Amended by Order 2005-10, eff. 1-1-06; prior amendments eff. 10-1-98 (Order 98-1), 1-1-78, 7-2-71

KENTUCKY BAR ASSOCIATION
OFFICE OF BAR COUNSEL

The Kentucky Bar Association is seeking an attorney licensed in Kentucky with a minimum of eight years experience to fill the position of CHIEF BAR COUNSEL. The Chief Bar Counsel serves at the pleasure of the Board of Governors and reports to the Executive Director. Chief Bar Counsel is responsible for the operation of the Office of Bar Counsel that processes all levels of attorney disciplinary matters governed by Rule 3 of the Supreme Court of Kentucky and the Rules of Professional Conduct. The Office of Bar Counsel also provides support to the Inquiry Commission, Trustees of the Clients' Security Fund and advises the Executive Director regarding questions of unauthorized practice of law. Other duties may be assigned to the Chief Bar Counsel by the Board of Governors or Executive Director.

Private law practice and administrative experienee are desired. The Office of Bar Counsel currently has eight (8) full-time lawyer positions, nine (9) full-time legal assistants and administrative staff positions and five (5) paralegal positions. Employees of the Kentucky Bar Association are not permitted to have outside law practice. Annual salary: Low 90's plus benefits which include vacation leave, sick leave, paid single health insurance and participation in Kentucky Employees' Retirement System. Please mail original and five (5) copies of resume and recent legal writing sample to be received on or before application deadline of Tuesday, May 1, 2012 to:

John D. Meyers
Executive Director
Kentucky Bar Association
514 West Main Street
Frankfort, Kentucky 406011812

Equal Opportunity Employer

On or about April 2[illegible], 2010, the Respondent [illegible]
[illegible] in federal court. At that time, the Co[illegible]
[illegible] the representation [illegible]
[illegible]. In a letter dated April 2[illegible], 2010, the Respondent [illegible]
[illegible] September 16, 2009, retainer agreement in the [illegible]
[illegible] that was deemed earned upon receipt. The Respondent also [illegible]
initial payment of $2,000 and a subsequent payment of $2,850. The Respondent [illegible]
portion of the $4,850 he had received, as it was allegedly deemed earned upon receipt. The Compl[illegible]
the only agreements of which he was aware were the initial agreement dated May 2[illegible], 2008, which pro[illegible]
a retainer fee of $1,000 to file a lawsuit in Knox County Circuit Court, and the agreement dated June [illegible]
which provided for a flat fee of $1,500 for the appeal of the denial of unemployment benefits. The Com[illegible]
denies any knowledge of the agreement dated September 16, 2009.

Please let me know if you have a conflict that would prevent you from serving on this panel.

Thank you.

[illegible] Webb
Executive Secretary
Board of Professional Responsibility
of the Supreme Court of Tennessee
[illegible] Drive, Suite 220
[illegible], TN 37027
[illegible]-531-[illegible]
[illegible]

June 14, 2013

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

221 FOURTH AVE. N.
SUITE 300
NASHVILLE, TN 37219

(615) 741-3097

In Re: The Adoption of Amended Tennessee Supreme Court Rule 9
Docket No M2012-01648-SC-RL2-RL

Dear Mr. Catalano;

Attached please find the original and six copies of the Comment of the Tennessee Lawyers Fund for Client Protection in reference to the above matter,

Sincerely;

Judy Bond-McKissack

Judy Bond-McKissack
Executive Director

cc: Laura Keeton, Board Chairperson
Cornelia Clark, Liaison Justice
TLFCP Distribution List

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

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

M2013-00767-SC-BPR-BP

COMMENT OF THE TENNESSEE LAWYERS FUND FOR CLIENT PROTECTION

The Tennessee Lawyers Fund for Client Protection (Fund) by and through its Executive Director, Judy L. Bond-McKissack, offers this comment and alternative language to the proposed Sections 12.7 of Rule 9, Rules of the Tennessee Supreme Court concerning restitution based on attorney misconduct and the proposed Section 32.7 of Rule 9, Rules of the Tennessee Supreme Court, concerning making relevant information available to the Tennessee Lawyers' Fund for Client Protection as part of the investigation of claims filed by claimants for losses caused by dishonest conduct committed in Tennessee by lawyers licensed to practice in Tennessee.

The Fund is pleased to have the opportunity to comment on the proposed amendments. Rule 25, Section 10.04 allows the Board of Professional Responsibility to furnish to the Fund a report of its investigation of matters relevant to claims filed with the Fund relating to dishonest conduct by attorney s licensed to practice in this state. The Fund proposes the following language as an alternative to the proposed amendment to Section 12.7 on which the Court invited comment:

12.7. Restitution. Upon order of a hearing panel or court, or upon stipulation of the parties, and in addition to any other type of discipline imposed, the respondent attorney may be required to

make restitution to persons or entities financially injured as a result of the respondent attorney's misconduct. In the event that a person or entity financially injured as a result of the respondent attorney's misconduct has received any payment or has a claim pending before the Tennessee Lawyers' Fund for Client Protection, the order or stipulation shall provide that the Fund shall be reimbursed to the extent of such payment by the Fund.

The Fund believes that the proposed language will allow the Fund to carry out its mandate under Rule 25 in the most efficient manner without the necessity of having to request an amendment to any order providing for restitution to an injured claimant.

The Fund proposes the following language as an alternative to the proposed amendment to Section32.7 on which the Court invited comment.

32.7. The provisions of this Rule shall not be construed to deny access to relevant information to authorized agencies investigating the qualifications of judicial candidates; or to other jurisdictions investigating qualifications for admission to practice; or to law enforcement agencies investigating qualifications for government employment; or to prevent the Board from reporting evidence of a crime by an attorney or other person to courts or law enforcement agencies; or to prevent the Board from reporting to the Tennessee Lawyer Assistance Program evidence of a disability that impairs the ability of an attorney to practice or serve; or to prevent the Board or Disciplinary Counsel from making available to the Tennessee Lawyers' Fund for Client Protection information relevant to any claim pending before the Fund or to prevent the Board or Disciplinary Counsel from defending any action or proceeding now pending

or hereafter brought against either of them. In addition, the Board shall transmit notice of all public discipline imposed by the Court on an attorney or the transfer to inactive status due to disability of an attorney to the National Discipline Data Bank maintained by the American Bar Association.

The Fund believes that the proposed language will make it clear that information provided by the Board of Professional Responsibility is provided for the purpose of assisting the Fund to make informed decisions on claims pending before the Fund.

Respectfully Submitted;

TENNESSEE LAWYERS' FUND FOR CLIENT PROTECTION

By: Judy Bond-McKissack

Judy Bond-McKissack, BPR 009004
Executive Director
221 Fourth Ave., N., Ste. 300
Nashville, TN 37219

CERTIFICATE OF SERVICE

I certify that on this 14th day of June, 2013, I mailed a copy of this Comment to:

Sandra L. Garrett, Esquire
Chief Disciplinary Counsel
Board of Professional Responsibility
10 Cadillac Drive, Suite 220
Brentwood, TN 37027

Cornelia Clark
TLFCP Liaison Justice
Supreme Court Building, Suite 318
401 7th Avenue North
Nashville, TN 37219

Laura Keeton, Chairperson
Tennessee Lawyers' Fund for Client Protection
Keeton Law Office
20240 E Main St
PO BOX 647
Huntingdon, TN 38344-0647

Judy Bond-McKissack