

IN THE SUPREME COURT OF TENNESSEE  
AT NASHVILLE

**IN RE: AMENDMENT TO RULE 9,  
RULES OF THE TENNESSEE SUPREME COURT**

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**Filed: April 25, 2006**

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**ORDER**

The ethical rules governing lawyers licensed to practice law in Tennessee are set out in Rule 8 of the Rules of the Tennessee Supreme Court. The disciplinary system for enforcing those ethical rules is established and regulated by Rule 9 of the Rules of the Tennessee Supreme Court. Effective March 1, 2003, the Court amended Rule 8 by adopting the new “Tennessee Rules of Professional Conduct,” which replaced in their entirety the previous set of ethical rules governing Tennessee lawyers. With the adoption of the new ethical rules, the Supreme Court decided that the disciplinary enforcement system should be evaluated to see how it might be improved.

In May 2003, the Court appointed the Board of Professional Responsibility (“BPR”) Advisory Committee and directed the Committee to conduct a thorough and systematic review and evaluation of the structure, function and operation of the Board of Professional Responsibility and the Office of Disciplinary Counsel. The Court also invited the American Bar Association’s Standing Committee on Professional Discipline to conduct a separate review and evaluation of the system of disciplinary enforcement in Tennessee. The ABA Standing Committee submitted its report and recommendations to the Court in August 2003. The BPR Advisory Committee submitted its report and recommendations to the Court in June 2004. Following the filing of the BPR Advisory Committee’s report and recommendations, the Court solicited public comments concerning the proposals contained in the two committees’ respective reports. During the public comment period, the Court received written responses from a number of individuals and organizations.

In 2005, while the Court’s final action on a comprehensive revision of Rule 9 was pending, the BPR and the Tennessee Lawyer Assistance Program (“TLAP”) filed a joint petition proposing certain amendments to Rule 9, Section 28, and to Rule 33, Section 33.08, of the Rules of the Tennessee Supreme Court. The proposed amendments pertained to the interactions between the BPR and the TLAP. Due to the joint petition filed by the TLAP and the BPR, the Court postponed final action on the comprehensive revision of Rule 9 and solicited public comments on the BPR/TLAP’s proposed amendments. The public comment period expired on March 31, 2006.

After considering the respective reports and recommendations of the BPR Advisory Committee and the ABA Standing Committee, as well as the BPR/TLAP’s joint petition and all the public comments regarding the two reports and the joint petition, the Court concludes that the current version of Tennessee Supreme Court Rule 9 should be replaced by the attached revised Rule

9 (Appendix A). The Court also concludes that it should adopt the attached amendments to Rule 33 (Appendix B) and the attached new Rule 10A (Appendix C). (New Rule 10A is merely a transfer of current Rule 9, Section 26.6, into a new separate rule.)

With the adoption of revised Rule 9 (and the related amendments to Rule 33 and the new Rule 10A), the Court has completed the first in-depth evaluation and modification of the disciplinary enforcement system in Tennessee since the establishment of the Board of Professional Responsibility. The Court expresses its gratitude to the BPR Advisory Committee, the ABA Standing Committee, the BPR, the TLAP, and the various individuals and organizations who submitted written comments regarding the reports and/or the joint petition; their collective contributions have been of invaluable assistance to the Court in our effort to improve the disciplinary enforcement system for the benefit of the public and the members of the legal profession.

IT IS THEREFORE ORDERED that this Court adopts the attached amendments to Rule 9 (Appendix A) and Rule 33 (Appendix B) and adopts the attached new Rule 10A (Appendix C), effective July 1, 2006.

With the filing of this order, the Appellate Court Clerk is directed to close the following two matters: In Re: Report and Recommendations of the Board of Professional Responsibility Advisory Committee, No. M2004-01600-SC-RL2-BP, and In Re: Proposed Amendments to Rule 9, Section 28, and to Rule 33, Section 33.08, Rules of the Tennessee Supreme Court, No. M2005-02674-SC-OT-RL. The costs in these two matters are waived by the Court.

FOR THE COURT:

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WILLIAM M. BARKER, CHIEF JUSTICE

## *APPENDIX A*

**[Delete existing Rule 9, Tenn. Sup. Ct. R., in its entirety and replace it with the following new Rule 9:]**

### **Rule 9. Disciplinary enforcement.**

#### MISCONDUCT

##### **Section 1. Jurisdiction**

**1.1.** Any attorney admitted to practice law in this State and any attorney specially admitted by a court of this State for a particular proceeding is subject to the disciplinary jurisdiction of the Supreme Court, the Board of Professional Responsibility, the district committees and hearing panels hereinafter established, and the circuit and chancery court.

**1.2.** Nothing herein contained shall be construed to deny to any court such powers as are necessary for that court to maintain control over proceedings conducted before it, such as the power of contempt, nor to prohibit any bar association from censuring, suspending or expelling its members from membership.

##### **Review**

**1.3.** The respondent-attorney (hereinafter “respondent”) or the Board may have a review of the judgment of a hearing panel in the manner provided by Tenn. Code Ann. § 27-9-101 et seq., except as otherwise provided herein. 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 panel are made, the trial court is authorized to take such additional proof as may be necessary to resolve such allegations. The court may affirm the decision of the panel or remand the case for further proceedings. The court may reverse or modify the decision if the rights of the petitioner have been prejudiced because the panel’s findings, inferences, conclusions or decisions are: (1) in violation of constitutional or statutory provisions; (2) in excess of the 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 panel as to the weight of the evidence on questions of fact. Either party dissatisfied with the decree of the circuit or chancery court may prosecute an appeal directly to the Supreme 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. Prior decisions of this 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.

**1.4.** An appeal from the recommendation or judgment of a hearing panel must be filed in the circuit or chancery court of the county wherein the office of respondent was located at the time the charges were filed with the Board.

**1.5.** The Chief Justice shall designate a trial judge or chancellor, regular or retired, who shall not reside within the geographic boundaries of the chancery division or circuit court wherein the office of the respondent was located at the time the charges were filed with the Board. It shall be this judge's or chancellor's duty to try the case and enter judgment upon the minutes of the circuit or chancery court of the county where the case is heard, and the judgment shall be effective as if the special judge were the regular presiding judge of said court. The duty is imposed upon the clerks and the regular trial judge to promptly notify the Chief Justice of the filing of an appeal in disciplinary cases.

**1.6.** The judgment of the hearing panel may be stayed in the discretion of the hearing panel, pending any judicial review pursuant to Section 1.3. Upon the filing of a petition for review pursuant to Section 1.3, and in the event the judgment is not stayed by the hearing panel, the trial court in its discretion may stay the hearing panel's judgment upon motion of a party.

The final judgment of the trial court may be stayed in the discretion of the trial court, pending an appeal. In the event the trial court does not issue a stay pending appeal, the Supreme Court may issue a stay upon motion of a party.

## **Section 2. Disciplinary Districts**

Disciplinary jurisdiction in this State shall be divided into the following districts:

District I--the counties of Johnson, Carter, Cocke, Greene, Hancock, Grainger, Jefferson, Sullivan, Washington, Unicoi, Hawkins, Claiborne, Hamblen and Sevier.

District II--the counties of Campbell, Anderson, Roane, Blount, Morgan, Union, Knox, Loudon and Scott.

District III--the counties of Polk, Hamilton, Sequatchie, Bledsoe, Meigs, Monroe, Bradley, Marion, Grundy, Rhea and McMinn.

District IV--the counties of White, Van Buren, Pickett, Putnam, Overton, Clay, Franklin, Moore, Bedford, Rutherford, Wilson, Trousdale, Warren, Fentress, Cumberland, Smith, Jackson, Coffee, Lincoln, Marshall, Cannon, DeKalb and Macon.

District V--the county of Davidson.

District VI--the counties of Giles, Wayne, Lewis, Maury, Humphreys, Cheatham, Montgomery, Robertson, Lawrence, Perry, Hickman, Dickson, Houston, Stewart, Sumner and Williamson.

District VII--the counties of Henry, Carroll, Henderson, Hardeman, Hardin, Benton, Decatur, Chester, Fayette, McNairy and Madison.

District VIII--the counties of Weakley, Lake, Gibson, Haywood, Tipton, Obion, Dyer, Crockett and Lauderdale.

District IX--the county of Shelby.

### **Section 3. Grounds for Discipline**

**3.1.** The license to practice law in this State is a continuing proclamation by the Court that the holder is fit to be entrusted with professional and judicial matters, and to aid in the administration of justice as an attorney and as an officer of the Court. It is the duty of every recipient of that privilege to act at all times, both professionally and personally, in conformity with the standards imposed upon members of the bar as conditions for the privilege to practice law.

**3.2.** Acts or omissions by an attorney, individually or in concert with any other person or persons, which violate the Attorney's Oath of Office or the Rules of Professional Conduct of the State of Tennessee shall constitute misconduct and shall be grounds for discipline, whether or not the act or omission occurred in the course of an attorney-client relationship.

**3.3.** Conviction of a serious crime shall similarly be grounds for discipline as set forth in Section 14.

**3.4.** Adjudication that a lawyer has willfully refused to comply with a court order entered in a case in which the lawyer is a party shall be grounds for discipline as set forth in Section 32.

### **Section 4. Types of Discipline**

Misconduct shall be grounds for:

**4.1.** Disbarment; or

**4.2.** Suspension for an appropriate fixed period of time, or for an appropriate fixed period of time and an indefinite period concurrently or thereafter to be determined by the conditions imposed by the judgment. A suspension of less than one year shall not require proof of rehabilitation; a suspension of one year or more shall require proof of rehabilitation to be demonstrated in a reinstatement proceeding. No suspension shall be ordered for a specific period less than thirty days or in excess of five years. All suspensions regardless of duration shall be public and shall be subject to the provisions of Section 18. The imposition of a suspension for a fixed

period of time may be suspended in conjunction with a period of probation ordered pursuant to Section 8.5;

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

Any order of temporary probation which restricts the attorney maintaining a trust account shall, when served on any bank maintaining an account against which said attorney may make withdrawals, serve an injunction to prevent said bank from making further payment from such account or accounts on any obligation except in accordance with restrictions imposed by the Court. Any order of temporary suspension issued under this rule shall preclude the attorney from accepting any new cases but shall not preclude such attorney from continuing to represent existing clients during the first 30 days after issuance of such temporary order; however, any fees tendered to such attorney during such 30 day period shall be deposited in a trust fund from which withdrawals may be made only in accordance with restrictions imposed by the Court.

The attorney may for good cause request dissolution or amendment of any such temporary order by petition filed with the Supreme Court, a copy of which will be served on the Disciplinary Counsel. Such petition for dissolution shall be set for immediate hearing before the Board of Professional Responsibility or a panel of three members, at least two of whom shall be members of the Board of Professional Responsibility and one of whom may be a district committee member from the same disciplinary district as the respondent, designated by the Chair of the Board or, in the Chair's absence, the Vice-Chair. No more than one non-lawyer Board member may serve on the panel. The Board or its designated panel shall hear such petition forthwith and submit its report and recommendation to the Supreme Court with the utmost speed consistent with due process. Upon receipt of the foregoing report, the Supreme Court shall modify its order if appropriate and continue such provision of the order as may be appropriate until final disposition of all pending disciplinary charges against said attorney;

**4.4.** Public censure; or

**4.5.** Private reprimand; or

**4.6.** Private informal admonition.

**4.7. 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 may be required to make restitution to persons or entities financially injured as a result of the respondent's misconduct.

## **Section 5. The Board of Professional Responsibility of the Supreme Court of Tennessee**

**5.1.** The Supreme Court shall appoint a twelve member Board to be known as "The Board of Professional Responsibility of the Supreme Court of Tennessee" (hereinafter referred to as the "Board") which shall consist of:

(a) Three resident lawyers admitted to practice in this state and one public (non-lawyer) member appointed for an initial term of three years; and

(b) Three resident lawyers admitted to practice in this state and one public member appointed for an initial term of two years; and

(c) Three resident lawyers admitted to practice in this state and one public member appointed for an initial term of one year.

Subsequent terms of all members shall be for three years. No member shall serve for more than two consecutive three-year terms. Vacancies shall be filled by the Supreme Court. There shall be one lawyer member from each disciplinary district. There shall be one public member from each of the three grand divisions of the state.

**5.2.** The Supreme Court shall designate one member as Chair of the Board and another member as Vice-Chair.

**5.3.** The Board shall act only with the concurrence of seven or more members. Seven members shall constitute a quorum. Decisions of the Board to appeal from the judgment of a hearing panel or of a trial judge, as provided in Section 1.3, may be made in accord with the following procedure. If Disciplinary Counsel recommends an appeal and time restraints are such that a regular or special meeting of the Board is impractical, Disciplinary Counsel shall circulate to the members of the Board in writing the reasons for the recommendation supported by a factual report. Board members may communicate their vote for or against appeal by telephone, facsimile, telegraph, or regular mail. Any member of the Board may request that Disciplinary Counsel convene a telephone conference of the Board, whereupon such conference must be convened with at least a quorum so conferring. An affirmative vote of seven (7) members of the Board shall be necessary to authorize an appeal. If an appeal has been authorized by the foregoing procedure, any member of the Board may demand that the question of whether or not the appeal should be dismissed be placed upon the agenda for consideration at any regular meeting of the Board or special meeting convened for other business.

**5.4.** Members shall receive no compensation for their services but may be reimbursed for their travel and other expenses incidental to the performance of their duties.

**5.5.** The Board shall exercise the powers and perform the duties conferred and imposed upon it by these disciplinary rules, including the power and duty:

(a) To consider and investigate any alleged ground for discipline or alleged incapacity of any attorney called to its attention, or upon its own motion, and to take such action with respect thereto as shall be appropriate to effectuate the purposes of these disciplinary rules.

(b) To adopt written guidelines to ensure the efficient and timely resolution of complaints, investigations, and formal proceedings, which guidelines shall be approved by the Court, and to monitor Disciplinary Counsel's and the hearing panels' continuing compliance with those guidelines. The Board shall quarterly file a report with the Court demonstrating substantial compliance with the guidelines.

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

(d) To review, upon application by Disciplinary Counsel, a determination by the reviewing member of a district committee that a matter should be concluded by dismissal or by private informal admonition without the institution of formal charges.

(e) To privately reprimand attorneys for misconduct.

(f) To adopt rules of procedure not inconsistent with these rules.

(g) The Board shall, to the extent it deems feasible, consult with officers of local bar associations concerning any appointment it is authorized to make under these rules.

## **Section 6. District Committees**

**6.1.** The Supreme Court shall appoint one district committee within each disciplinary district. Each district committee shall consist of not less than five members, nor more than thirty members of the bar of this state who maintain an office for the practice of law within that district or, if not actively engaged in the practice of law, reside within that district. Members of district committees may be recommended by the Board of Professional Responsibility, or the president or board of directors of the local bar associations in each district.

**6.2.** Terms of members of each district committee shall be for three years, and such terms shall be staggered so that one third of the members rotate off the committee each year; provided that shorter terms may be designated where necessary to observe the above rotation practice. Members whose terms have expired shall continue to serve with respect to any formal hearing commenced prior to the expiration of their terms until the conclusion of such hearing, regardless of whether their successors have been appointed. A member who has served two consecutive three-year terms may be reappointed after the expiration of one year.

**6.3.** A member of the district committee shall approve or modify recommendations by Disciplinary Counsel for dismissals and informal admonitions.



**6.4.** Formal hearings upon charges of misconduct shall be conducted by a hearing panel consisting of three district committee members designated by the Board pursuant to Section 8.2. Such panel shall submit its findings and judgment to the Board. Each hearing panel shall elect its own Chair. The hearing panel shall act only with the concurrence of a majority of its members.

**6.5.** 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.

## **Section 7. Disciplinary Counsel**

**7.1.** The Court shall appoint a lawyer admitted to practice in the state to serve as chief Disciplinary Counsel, who shall serve at the pleasure of the Court. Following his or her appointment by the Court, the chief Disciplinary Counsel shall report to the Board, which shall conduct regular performance evaluations of the chief Disciplinary Counsel and report such evaluations to the Court. Neither the chief Disciplinary Counsel nor full-time staff Disciplinary Counsel shall engage in private practice; however, the Board and the Court may agree to a reasonable period of transition after appointment.

**7.2.** Disciplinary Counsel shall have the power and duty:

(a) With the approval of the Board, to employ and supervise staff needed for the performance of counsel's duties.

(b) To investigate all matters involving possible misconduct.

(c) To dispose of all matters involving alleged misconduct by either dismissal, informal admonition, or the prosecution of formal charges before a hearing panel. Except in matters requiring dismissal because the complaint is frivolous and clearly unfounded on its face or falls outside the Board's jurisdiction, no disposition shall be recommended or undertaken by Disciplinary Counsel until the accused attorney shall have been afforded the opportunity to state a position with respect to the allegations against the attorney.

(d) To prosecute in a timely manner all disciplinary proceedings and proceedings to determine incapacity of attorneys before hearing panels, trial courts, and the Supreme Court.

(e) To investigate, file pleadings, and appear at hearings conducted 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, and to cross-examine witnesses testifying in support of any such petitions, and to marshal and present available evidence, if any, in opposition thereto.

(f) To file with the Supreme Court certificates of conviction of attorneys for crimes.

(g) To maintain permanent records of all matters processed and the disposition thereof.

(h) To give advisory ethics opinions to members of the bar pursuant to Section 26.

(i) To implement the written guidelines adopted by the Board and approved by the Court pursuant to Section 5.5(b), and to file reports with the Board on a monthly basis demonstrating Disciplinary Counsel's substantial compliance with the guidelines.

## PROCEDURE

### **Section 8. Investigation**

**8.1.** All complaints must be submitted in writing. The Board, however, is authorized to investigate information coming from a source other than a written complaint if the Board deems the information sufficiently credible or verifiable through objective means. The Board shall provide the respondent with a complete copy of the original complaint.

All investigations, whether upon complaint or otherwise, shall be initiated and conducted by Disciplinary Counsel. Upon the conclusion of an investigation, Disciplinary Counsel may recommend dismissal, informal admonition of the attorney concerned, or a private reprimand, public censure or prosecution of formal charges before a hearing panel.

If the recommended disposition is dismissal or informal admonition, it shall be reviewed by the reviewing member of the district committee in the appropriate disciplinary district who may approve or modify it. Disciplinary Counsel may appeal to the Board the action of the district committee member.

If the recommended disposition is private reprimand, public censure, or prosecution of formal charges before a hearing panel, the Board shall review the recommendation and approve or modify it. The Board may determine whether a matter should be concluded by dismissal or informal admonition; may recommend a private reprimand or public censure; or, may direct that a formal proceeding be instituted before a hearing panel in the appropriate disciplinary district and assign it to a hearing panel for that purpose.

A respondent shall not be entitled to appeal an informal admonition approved by the reviewing district committee member or imposed by the Board; similarly, a respondent may not appeal a recommended private reprimand or public censure by the Board. In either case, however, the respondent may, within twenty (20) days of notice thereof, demand as of right that a formal proceeding be instituted before a hearing panel in the appropriate disciplinary district. In the event of such demand, the informal admonition shall be vacated or the recommended private reprimand or public censure shall be withdrawn, and the matter shall be disposed of in the same manner as any other formal hearing instituted before a hearing panel.

If Disciplinary Counsel's recommended disposition is dismissal or informal admonition, and if that recommended disposition is approved by the reviewing member of the district committee in the appropriate disciplinary district, notice of the disposition shall be provided by Disciplinary

Counsel to the complainant. A complainant who is not satisfied with the disposition of the matter may appeal in writing to the Board within thirty (30) days of receipt of notice of the reviewing member's approval of the recommended disposition. The Board may approve, modify or disapprove the disposition, or direct that the matter be investigated further.

### **Formal Hearing**

**8.2.** Formal disciplinary proceedings before a hearing panel shall be instituted by Disciplinary Counsel by filing with the Board a petition which shall be sufficiently clear and specific to inform the respondent of the alleged misconduct. A petition to initiate a formal disciplinary proceeding shall not include allegations of any private discipline previously imposed against the respondent.

A copy of the petition shall be served upon the respondent. The respondent shall serve an answer upon Disciplinary Counsel and file the original with the Board within 20 days after the service of the petition, unless such time is extended by the Chair. In the event the respondent fails to answer, the charges shall be deemed admitted; provided, however, that a respondent who fails to answer within the time provided may obtain permission of the Chair to file an answer if such failure to file an answer was attributable to mistake, inadvertence, surprise or excusable neglect.

Following the service of the answer or upon failure to answer, the matter shall be assigned by the Chair to a hearing panel. In assigning the members of the hearing panel, the Chair shall select them on a rotating basis from the members of the district committee in the district in which the respondent practices law; if there is an insufficient number of committee members in that district who are able to serve on the hearing panel, the Chair may appoint one or more members from the district committee of an adjoining district to serve on the panel.

If there are any issues of fact raised by the pleadings or if the respondent requests the opportunity to be heard, the hearing panel shall serve a notice of hearing upon Disciplinary Counsel and the respondent, or the respondent's counsel, stating the date and place of the hearing at least 15 days in advance thereof. The notice of hearing shall advise the respondent that the respondent is entitled to be represented by counsel, to cross-examine witnesses and to present evidence in the respondent's own behalf.

In a hearing panel's hearing on the petition, Disciplinary Counsel may submit evidence of prior discipline against the respondent, including prior private discipline, as an aggravating circumstance. Such evidence may be introduced to the extent it is otherwise admissible under the Tennessee Rules of Evidence. Pursuant to Section 25.4, the respondent may apply for a protective order concerning the admission of evidence of prior private discipline.

In hearings on formal charges of misconduct, Disciplinary Counsel must prove the case by a preponderance of the evidence.

**8.3.** The hearing panel shall, in every case, submit its findings and judgment, in the form of a final decree of a trial court, to the Board within 15 days after the conclusion of its hearing. The Board shall immediately serve a copy of the findings and judgment of the hearing panel upon the

respondent and the respondent's counsel of record. Any petition for certiorari therefrom must be filed in the circuit or chancery court having jurisdiction within 60 days of the mailing or service of such judgment.

**8.4.** If the hearing panel finds one or more grounds for discipline of the respondent, the panel's judgment shall specify the type of discipline imposed: disbarment (Section 4.1), suspension (Section 4.2), or public censure (Section 4.4). In the discretion of the hearing panel, the imposition of a suspension for a fixed period of time (Section 4.2) may be suspended in conjunction with a period of probation ordered pursuant to Section 8.5. In addition to imposing one of the foregoing types of discipline, the hearing panel may order restitution (Section 4.7). Temporary suspension (Section 4.3), private reprimand (Section 4.5), and private informal admonition (Section 4.6) are not available types of discipline following a formal disciplinary proceeding. In determining the appropriate type of discipline, the hearing panel shall consider the applicable provisions of the *ABA Standards for Imposing Lawyer Sanctions*.

If the judgment of the hearing panel is that the respondent shall be disbarred or suspended for any period of time in excess of three months and no appeal therefrom is perfected within the time allowed therefor, or if there is a settlement providing for a disbarment or suspension for any period of time in excess of three months, at any stage of disciplinary proceedings, the Board shall forward a copy of the judgment or settlement to the Supreme Court of Tennessee. 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.

If the Court finds that the punishment appears to be inadequate or excessive, it shall issue an order advising the Board and the respondent that it proposes to increase or to decrease the punishment. If the Court proposes to increase the punishment, the respondent attorney shall have twenty (20) days from the date of the order to file a brief and request oral argument; if the proposal is to decrease the punishment, the Board shall have twenty (20) days within which to file a brief and request oral argument. Reply briefs shall be due within twenty (20) days of the filing of the brief of the party upon whom the burden of persuasion rests. If oral argument is requested it shall be promptly granted. Upon termination of such proceedings as are requested the Court may modify the judgment of the hearing panel or the settlement in such manner as it deems appropriate.

If the judgment of a hearing panel is appealed to the circuit or chancery court and the trial court enters a judgment disbarring or suspending respondent for any period of time in excess of three (3) months and no appeal therefrom is perfected within the time allowed therefor, the trial court shall forward a copy of its judgment to the office of the clerk of the Supreme Court in the grand division in which the respondent maintains or maintained an office for the practice of law, and this Court shall enter an order of enforcement of said decree.

All other decrees of hearing panels or trial courts shall be duly recorded in permanent records to be maintained by the Board, and shall have the force and effect of an order of this Court. Should any respondent fail to fully comply with such decree, the Board shall immediately forward the decree of this Court for enforcement together with a report of noncompliance.

**8.5. Probation.** In the discretion of the hearing panel or a reviewing court, the imposition of a suspension for a fixed period (Section 4.2) may be suspended 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 will harm the public during the period of rehabilitation and where the conditions of probation can be adequately supervised. A probation monitor may be designated to supervise the respondent's compliance with the conditions of probation. The respondent shall pay the costs associated with probation, including without limitation a reasonable fee for the probation monitor.

In the event the respondent violates or otherwise fails to meet any condition of probation, Disciplinary Counsel is authorized to file a petition to revoke probation. Upon the filing of such a petition, a revocation hearing shall be conducted in the same manner as a hearing on a petition to initiate a formal disciplinary proceeding filed pursuant to Section 8.2. The only issue in such a proceeding is whether probation is to be revoked; the original judgment imposing the fixed period of probation may not be reconsidered.

Probation shall terminate upon the expiration of the fixed period of probation. Probation may be terminated earlier by the tribunal (hearing panel or court) which imposed the period of probation upon the filing of a motion and an affidavit by respondent showing compliance with all the conditions of probation and an affidavit by the probation monitor, if one is designated, stating that probation is no longer necessary and summarizing the basis for that statement. Disciplinary Counsel shall file a response to any such motion to terminate probation. The tribunal may conduct whatever hearings are necessary to decide the motion to terminate probation. The tribunal's ruling on the motion may be appealed pursuant to Section 1.3.

## **Section 9. Complaints Against Board Members, District Committee Members, or Disciplinary Counsel**

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

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

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

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

**9.3.** Nothing herein contained shall be deemed to exempt any attorney admitted to practice in the State of Tennessee from complaints which present a violation of the Attorney's Oath of Office or the Rules of Professional Conduct.

**9.4.** The investigation of complaints submitted under Section 9.2 of Rule 9 against attorney members of the Board shall proceed in accordance with the procedures contained in Section 8 of Rule 9, with the following modifications:

(a) A special Disciplinary Counsel, whom the Chief Justice shall appoint, shall take the place and perform the functions of Disciplinary Counsel.

(b) One member of the Court, whom the Chief Justice shall designate, shall take the place and perform all the functions of the Board contained in Rule 9, which shall include, for the purposes of this section, the review of recommendations of dismissal or informal admonition. The member so designated shall not participate with the Court in any subsequent proceedings in the same case.

(c) If the recommendation, as approved or modified, includes the institution of formal proceedings before a hearing panel, or if the attorney demands such formal proceedings as of right, then the Chief Justice shall at that time appoint three persons to act as a special hearing panel. The special hearing panel shall take the place and perform the functions of the hearing panel as provided in Sections 6 and 8 of Rule 9. The special Disciplinary Counsel shall continue to represent the Board and proceed as provided in Sections 7 and 8 of Rule 9.

(d) The respondent or the Board may obtain review of the judgment of the special hearing panel as provided in Sections 1.3, 1.4, 1.5, and 8.3 of Rule 9.

### **Section 10. Refusal of Complainant to Proceed, Compromise, etc.**

Neither unwillingness nor neglect of the complainant to sign a complaint or to prosecute a charge, nor settlement or compromise between the complainant and the attorney or restitution by the attorney, shall, in itself, justify abatement of the processing of any complaint.

### **Section 11. Matters Involving Related Pending Civil or Criminal Litigation**

Processing of disciplinary complaints shall not be deferred or abated because of substantial similarity to the material allegations made in other pending criminal or civil litigation or because the substance of the complaint relates to the respondent's alleged conduct in pending litigation, unless authorized by the Board in its discretion, for good cause shown.

### **Section 12. Service**

**12.1.** Service upon the respondent of the petition in any disciplinary proceeding shall be made by personal service by any person authorized by the Chair of the Board, or by registered or certified mail at the address shown in the most recent registration statement filed by respondent pursuant to Section 20.5 or other last known address.

**12.2.** Service of any other papers or notices required by these Rules shall, unless otherwise provided by these Rules, be made in accordance with Rule 5.02, Tennessee Rules of Civil Procedure.

### **Section 13. Subpoena Power, Witnesses and Pre-trial Proceedings**

**13.1.** Any member of a hearing panel in matters before it, and Disciplinary Counsel in matters under investigation, may administer oaths and affirmations and may obtain from the circuit or chancery court having jurisdiction subpoenas to compel the attendance of witnesses and the production of pertinent books, papers and documents. A respondent may, similarly, obtain subpoenas to compel the attendance of witnesses and the production of pertinent books, papers and documents before a hearing panel after formal disciplinary proceedings are instituted.

**13.2.** Subpoenas shall clearly indicate on their face that the subpoenas are issued in connection with a confidential investigation under these Rules and that it may be regarded as contempt of the Supreme Court or grounds for discipline under these Rules 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 25. It shall not be regarded as a breach of confidentiality for a person subpoenaed to consult with an attorney.

**13.3.** The circuit or chancery court in which the attendance or production is required may, upon proper application, enforce the attendance and testimony of any witness and the production of any documents so subpoenaed. Subpoena and witness fees and mileage shall be the same as in the courts of this state.

**13.4.** Any attack on the validity of a subpoena so issued shall be heard and determined by the court wherein enforcement of the subpoena is being sought.

**13.5.** Discovery proceedings by the respondent-attorney, prior to institution of proceedings for a formal hearing, may be had upon the order of the Chair of the Board for good cause shown.

**13.6.** A pre-hearing conference shall be held within sixty (60) days of the filing date of any petition commencing a formal proceeding. The pre-hearing conference shall be conducted by the chair of the assigned hearing panel and at least one other member of the panel, but it may be conducted via telephone or video conference. In the pre-hearing conference, the panel shall schedule deadlines for discovery, the filing of motions, and the exchange of witness and exhibit lists, and it also shall set the trial date. The panel may discuss with and accept from the parties stipulations of fact and/or stipulations regarding the authenticity of documents and exhibits, may narrow the issues presented by the pleadings, and may address any other matter the panel deems appropriate in the management of the proceeding. Subsequent pre-hearing conferences may be held

in the discretion of the panel, acting on its own initiative or upon motion of a party. Within five (5) days of each pre-hearing conference, the chair of the hearing panel shall file an order reciting the actions taken by the panel during the conference, including any deadlines imposed and the date set for trial.

**13.7.** With the approval of the hearing panel, testimony may be taken by deposition or by interrogatories if the witness is not subject to service or subpoena or is unable to attend or testify at the hearing because of age, illness or other infirmity. A complete record of the testimony so taken shall be made and preserved, but need not be transcribed unless needed for appeal or certiorari.

**13.8.** The subpoena and deposition procedures shall be subject to the protective requirements of confidentiality provided in Section 25.

### **Section 14. Attorneys Convicted of Crimes**

**14.1.** Upon the filing with the Supreme Court of a certificate demonstrating that an attorney who is a defendant in a criminal case involving a serious crime, as defined in Section 14.2 herein, has entered a plea of nolo contendere or a plea of guilty or has been found guilty by verdict of the jury, or the trial court sitting without a jury, the Court shall enter an order immediately suspending the attorney. Such suspension shall take place regardless of the pendency of a motion for new trial or other action in the trial court and regardless of the pendency of an appeal. Such suspension shall remain in effect pending final disposition of a disciplinary proceeding to be commenced upon such finding of guilt.

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

**14.3.** A certificate of a conviction of an attorney for any crime shall be conclusive evidence of the commission of that crime in any disciplinary proceeding instituted against the attorney based upon the conviction.

**14.4.** Upon the receipt of a certificate of conviction of an attorney for a serious crime, the Court shall, in addition to suspending the attorney in accordance with the provisions of Section 14.1 of this Rule, also refer the matter to the Board for the institution of a formal proceeding before a hearing panel in which the sole issue to be determined shall be the extent of the final discipline to be imposed, provided that a disciplinary proceeding so instituted will not be brought to hearing until all appeals from the conviction are concluded.

**14.5.** Upon receipt of a certificate of a conviction of an attorney for a crime not constituting a serious crime, the Court shall refer the matter to the Board for whatever action it may deem warranted, including the institution of an investigation by Disciplinary Counsel, or a formal



proceeding before a hearing panel, provided, however, that the Court may in its discretion make no reference with respect to convictions for minor offenses.

**14.6.** An attorney suspended under the provisions of Section 14.1 of this Rule will be reinstated immediately upon the filing of a certificate demonstrating that the underlying conviction of a serious crime has been reversed but the reinstatement will not terminate any formal proceeding then pending against the attorney, the disposition for which shall be determined by the hearing panel and the Board on the basis of the available evidence.

**14.7.** The clerk of any court in this state in which an attorney is convicted of a crime shall within ten days of said conviction transmit a certificate thereof to this Court.

**14.8.** Upon being advised that an attorney subject to the disciplinary jurisdiction of this Court has been convicted of a crime, Disciplinary Counsel shall determine whether the clerk of the court where the conviction occurred has forwarded a certificate to this Court in accordance with the provision of Section 14.7 of this Rule. If the certificate has not been forwarded by the clerk or if the conviction occurred in another jurisdiction, it shall be the responsibility of the Disciplinary Counsel to obtain a certificate of the conviction and to transmit it to this Court.

**14.9.** An order suspending an attorney from the practice of law pursuant to this Rule shall not constitute a suspension of the attorney for the purpose of Section 18 unless this Court shall so order.

### **Section 15. Disbarment by Consent of Attorneys Under Disciplinary Investigation or Prosecution**

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

(a) The attorney's consent is freely and voluntarily rendered; the attorney is not being subjected to coercion or duress; the attorney is fully aware of the implications of submitting consent;

(b) The attorney is aware that there is a presently pending investigation into, or proceeding involving allegations that there exist grounds for discipline the nature of which the attorney shall specifically set forth;

(c) The attorney acknowledges that the material facts so alleged are true; and,

(d) The attorney consents because the attorney knows that if charges were predicated upon the matters under investigation, or if the proceeding were prosecuted, no successful defense could be made.

**15.2.** Upon receipt of the required affidavit, the Board shall file it with this Court and this Court shall enter an order disbaring the attorney on consent.

**15.3.** The order disbaring the attorney on consent shall be a matter of public record. However, the affidavit required under the provisions of 15.1(a) above shall not be publicly disclosed or made available for use in any other proceeding except upon order of this Court.

### **Section 16. Discipline by Consent**

**16.1.** An attorney against whom formal charges have been served may at any stage of the proceedings before the Board, hearing panel or trial court, thereafter tender a conditional guilty plea to the petition or to a particular count thereof in exchange for a stated form of punishment. Such a tendered plea shall be submitted to Disciplinary Counsel and approved or rejected by the Board upon recommendation of the hearing panel if the matter has been assigned for hearing, or shall be approved or rejected by the trial court if a petition for certiorari has been filed; subject, however, in either event, to final approval or rejection by this Court if the stated form of punishment includes disbarment, suspension or public reprimand.

**16.2.** A continuance in a hearing panel proceeding, or before a trial court, on the basis of such a tender shall be granted only with the concurrence of Disciplinary Counsel. Approval of such a tendered plea by the Board or trial court and, if required, by this Court shall divest the hearing panel or trial court of further jurisdiction. The final order of discipline shall be predicated upon the petition and an approved tendered conditional guilty plea.

### **Section 17. Reciprocal Discipline**

**17.1.** All attorneys subject to the provisions of this Rule shall, upon being subjected to professional disciplinary action in another jurisdiction, promptly inform Disciplinary Counsel of such action. Upon being informed that an attorney subject to the provisions of these Rules has been subjected to discipline in another jurisdiction, Disciplinary Counsel shall obtain a certified copy of such disciplinary order and file the same with the Board and with this Court.

**17.2.** Upon receipt of a certified copy of an order demonstrating that an attorney admitted to practice in this State has been disciplined in another jurisdiction, this Court shall forthwith issue a notice directed to the attorney containing:

(a) A copy of said order from the other jurisdiction; and

(b) An order directing that the attorney inform the Court, within 30 days from service of the notice, of any claim by the attorney predicated upon the grounds set forth in Section 17.4 hereof that the imposition of the identical discipline in this state would be unwarranted and the reasons therefor.

**17.3.** In the event the discipline imposed in the other jurisdiction has been stayed there, any reciprocal discipline imposed in this state shall be deferred until such stay expires.

**17.4.** Upon the expiration of 30 days from service of the notice issued pursuant to the provisions of 17.2 above, this Court shall impose the identical discipline unless Disciplinary Counsel

or the attorney demonstrates, or this Court finds that upon the face of the record upon which the discipline is predicated it clearly appears:

(a) That the procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or

(b) That there was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that the Court could not, consistent with its duty, accept as final the conclusion on that subject; or

(c) That the misconduct established warrants substantially different discipline in this state.

Where this Court determines that any of said elements exist, this Court shall enter such other order as it deems appropriate.

**17.5.** In all other respects, a final adjudication in another jurisdiction that an attorney has been guilty of misconduct shall establish conclusively the misconduct for purposes of a disciplinary proceeding in this state.

### **Section 18. Notice to Clients, Adverse Parties, and Other Counsel**

**18.1. *Recipients of Notice; Contents.*** Within ten days after the date of the order of this Court imposing discipline, transfer to disability inactive status, or interim suspension, a respondent lawyer who has been disbarred, suspended, transferred to disability inactive status, or placed on interim suspension pursuant to Section 4.3 of this rule, shall notify or cause to be notified by registered or certified mail, return receipt requested,

(a) all clients being represented in pending matters;

(b) all co-counsel in pending matters; and

(c) all opposing counsel in pending matters, or in the absence of opposing counsel, the adverse parties, of the order of the Court and that the lawyer is therefore disqualified to act as lawyer after the effective date of the order. The notice to be given to the lawyer(s) for an adverse party, or, in the absence of opposing counsel, the adverse parties, shall state the last known address of the client of the respondent.

**18.2. *Special Notice.*** The Court may direct the issuance of notice to such financial institutions or others as may be necessary to protect the interests of clients or other members of the public.

**18.3. *Duty to Maintain Records.*** The respondent shall keep and maintain records of the steps taken to accomplish the requirements of Sections 18.1 and 18.2 and shall make those records available to the Disciplinary Counsel on request.

**18.4. *Return of Client Property.*** The respondent shall deliver to all clients any papers or other property to which they are entitled and shall notify them and any counsel representing them of a suitable time and place where the papers and other property may be obtained, calling attention to any urgency for obtaining the papers or other property.

**18.5. *Effective Date of Order; Refund of Fees.*** Orders imposing disbarment, suspension, or transfers to disability inactive status are effective on a date ten days after the date of the order, except where the Court finds that immediate disbarment, suspension, or interim suspension is necessary to protect the public. The respondent shall refund within ten days after entry of the order any part of any fees, expenses, or costs paid in advance that has not been earned or expended, unless the order directs otherwise.

**18.6. *Withdrawal from Representation.*** In the event another lawyer does not become attorney of record on behalf of the client before the effective date of the disbarment, suspension, or interim suspension, it shall be the responsibility of the respondent to move in the court or agency in which the proceeding is pending for leave to withdraw. The respondent shall in that event file with the court, agency, or tribunal before which the litigation is pending a copy of the notice to opposing counsel or adverse parties, including the place of residence and all mailing addresses of the client of the respondent.

**18.7. *New Representation Prohibited.*** Prior to the effective date of the order, if not immediately, the respondent shall not undertake any new legal matters. Upon the effective date of the order, the respondent shall not maintain a presence or occupy an office where the practice of law is conducted. The respondent shall take such action as is necessary to cause the removal of any indicia of lawyer, counselor at law, legal assistant, law clerk, or similar title.

**18.8. *Affidavit Filed with Board.*** Within ten days after the effective date of the disbarment or suspension order, order of transfer to disability inactive status, or interim suspension, the respondent shall file with the Board of Professional Responsibility an affidavit showing:

- (a) Compliance with the provisions of the order and with these rules;
- (b) All other state, federal, and administrative jurisdictions to which the lawyer is admitted to practice;
- (c) Place of residence and all addresses where communications may thereafter be directed; and
- (d) Service of a copy of the affidavit upon Disciplinary Counsel, which shall include proof of compliance with § 18.1.

**18.9. *Reinstatement.*** Proof of compliance with these rules shall be a condition precedent to any petition for reinstatement.

**18.10. *Publication of Notice.*** The Board shall cause a notice of the disbarment, suspension, disability inactive status, or interim suspension to be given to all state judges, to a newspaper of

general circulation in each county in which the respondent attorney maintained an office for the practice of law, and in such other publications as the Board may determine to be appropriate.

### **Section 19. Reinstatement**

**19.1.** No attorney suspended for one year or more or disbarred may resume practice until reinstated by order of the Supreme Court, except as provided in Section 20.4. Any attorney suspended for less than one year and 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. Any attorney suspended for less than one year with no conditions imposed may resume practice without reinstatement.

**19.2.** A person who has been disbarred after hearing or by consent may not apply for reinstatement until the expiration of at least five years from the effective date of the disbarment.

**19.3.** Petitions for reinstatement by a disbarred or suspended attorney shall be filed under this Rule, regardless 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 90 days prior to the time eligible for reinstatement. Such petitions 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 a responsive pleading to the petition. The Board shall promptly refer the petition to a hearing panel in the disciplinary district in which the petitioner maintained an office at the time of the disbarment or suspension. The hearing panel shall schedule a hearing at which the petitioner shall have the burden of demonstrating by clear and convincing evidence that the 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. The hearing panel shall within 30 days file a report containing its findings and decision and transmit same, together with the record, to the Board. Either party dissatisfied with the hearing panel's decision may obtain review thereof, as provided in Section 1.3 hereof.

**19.4.** If it is the decision of the hearing panel that petitioner be reinstated, the Board shall review the record and within 60 days either appeal as provided in Section 1.3 hereof or transmit to this Court the record of the proceedings before the hearing panel together with its report approving same. This Court will take such action upon the record so transmitted as it deems appropriate. No attorney will be reinstated except by order of this Court.

**19.5.** In all proceedings upon a petition for reinstatement, cross-examination of the respondent-attorney's witnesses and the submission of evidence, if any, in opposition to the petition shall be conducted by Disciplinary Counsel.

**19.6.** Petitions for reinstatement under this Rule shall be accompanied by an advance cost deposit in an amount to be set from time-to-time by the Board to cover anticipated costs of the reinstatement proceeding. All advance cost deposits collected hereunder shall be deposited by the Board of Professional Responsibility with the State Treasurer; all such funds including earnings on investments and all interest and proceeds from said funds, if any, are deemed to be, and shall be designated as, funds belonging solely to the Board of Professional Responsibility. Withdrawals from those funds shall only be made by the Board of Professional Responsibility to cover costs of reinstatement proceedings, and reimbursement of advance cost deposits not expended. Such advance cost deposit funds shall be maintained, managed, and administered solely and exclusively by the Board of Professional Responsibility.

**19.7.** If the petitioner is found unfit to resume the practice of law, the petition shall be dismissed. If the petitioner is found fit to resume the practice of law, the judgment shall reinstate the petitioner; 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 petitioner'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 Supreme Court, which proof may include certification by the Board of Law Examiners of the successful completion of examination for admission to practice.

**19.8. *Successive Petitions.*** No petition for reinstatement under this Rule shall be filed within three years following an adverse judgment upon a petition for reinstatement filed by or on behalf of the same person.

## **Section 20. Periodic Assessment of Attorneys**

**20.1.** Every attorney admitted to practice before this Court, except those exempt under 20.2, shall pay to the Board of Professional Responsibility on or before March 1 of each year an annual fee for each year beginning in 1976 to be set by the Court from time to time.

All funds collected hereunder shall be deposited by the Board of Professional Responsibility with the State Treasurer; all such funds including earnings on investments and all interest and proceeds from said funds, if any, are deemed to be, and shall be designated as, funds belonging solely to the Board of Professional Responsibility. Withdrawals from those funds shall only be made by the Board of Professional Responsibility for the purpose of defraying the costs of disciplinary administration and enforcement of those rules, and for such other related purposes as this Court may from time to time authorize or direct.

The annual registration fee for each attorney shall be \$100 payable on January 2, 2002, but no later than March 1, 2002. The annual fee for 2003 shall be \$105 payable on January 2, 2003, but no later than March 1, 2003, and a like sum each year thereafter until otherwise ordered by the Court.

20.2 There shall be exempted from the application of this rule:

(a) [Stricken effective July 1, 1985.]

(b) Retired attorneys.

(c) Attorneys on temporary duty with the armed forces.

(d) Faculty members of Tennessee law schools who do not practice.

(e) Attorneys not engaged in the practice of law. The term, "the practice of law" shall be defined as any service rendered involving legal knowledge or legal advice, whether of representation, counsel or advocacy, in or out of court, rendered in respect to the rights, duties, regulations, liabilities or business relations of one requiring the services. It shall encompass all public and private positions in which the attorney may be called upon to examine the law or pass upon the legal effect of any act, document or law.

**20.3.** Any attorney who fails to timely pay the fee required under 20.1 above shall be summarily suspended, provided a notice of delinquency has been forwarded to the attorney by certified mail, return receipt requested, addressed to the attorney's last known business address at least 30 days prior to such suspension, unless the attorney shall have been excused on grounds of financial hardship pursuant to procedures to be established by the Board.

**20.4.** Any attorney suspended under the provisions of 20.3 above shall be reinstated without further order upon payment of all arrears and a penalty of 20% of the amount due from the date of the last payment to the date of the request for reinstatement.

**20.5.** To facilitate the collection of the annual fee provided for in 20.1 above, all persons required by this Rule to pay an annual fee shall, on or before March 1 of every year, commencing in 1976, file with the Board of Professional Responsibility of the Supreme Court of Tennessee at its central office a registration statement, on a form prescribed by this Court, setting forth a current residence and office addresses, and such other information as this Court may from time to time direct. In addition to such statement, every attorney shall file with the Board of Professional Responsibility of this Court a supplemental statement of any change in the information previously submitted within 30 days of such change. All persons first becoming subject to these Rules by admission to the practice of law before the courts of this state after January 1, 1976 shall file the statement required by this Rule at the time of admission; but no annual fee shall be payable until March 1 next following such date of admission.

**20.6.** Within 30 days of the receipt of a statement or supplement thereto filed by an attorney in accordance with the provisions of 20.5 above, the Board, acting through Disciplinary Counsel, shall acknowledge receipt thereof, on a form prescribed by this Court in order to enable the attorney on request to demonstrate compliance with the requirements of 20.1 and 20.5 above.

**20.7.** Any attorney who fails to file the statement or supplement thereto in accordance with the requirements of 20.5 above shall be summarily suspended; provided a notice of delinquency has been forwarded to the attorney by certified mail, return receipt requested, addressed to the attorney's last known business address at least 30 days prior to such suspension. The attorney shall remain

suspended until the attorney shall have complied therewith, whereupon the attorney shall be reinstated without further order.

**20.8.** An attorney who has retired or is not engaged in practice shall advise the Board of Professional Responsibility in writing that such attorney desires to assume inactive status and discontinue the practice of law. Upon the filing of such notice, the attorney shall no longer be eligible to practice law.

**20.9.** Upon the filing of a notice to assume inactive status, an 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 shall be granted unless the attorney is subject to an outstanding order of suspension or disbarment or has been in 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. 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 this 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.

**20.10.** The courts of this state are charged with the responsibility of insuring that no suspended attorney be permitted to file any document, paper or pleading or otherwise practice therein.

## DISABILITY

### **Section 21. Proceedings Where an Attorney Is Declared to Be Incompetent or Is Alleged to Be Incapacitated**

**21.1.** Where an attorney has been judicially declared incompetent or involuntarily committed on the grounds of incompetency or disability or detained or placed in the custody of a center for the treatment of mental illness after a probable cause hearing pursuant to the procedures set forth in Tenn. Code Ann. § 33-6-103, the Supreme Court, upon proper proof of the fact, shall enter an order transferring such attorney to disability inactive status effective immediately for an indefinite period until the further order of this Court. A copy of such order shall be served upon such attorney, the attorney's guardian, and/or the director of the institution to which the attorney had been committed in such manner as the Court may direct.

**21.2.** Whenever the Board shall petition this Court to determine whether an attorney is incapacitated from continuing the practice of law by reason of mental infirmity or illness or because of addiction to drugs or intoxicants, or whenever an attorney, with no disciplinary proceeding or complaint pending, shall petition to be transferred to disability inactive status, the Court may take or direct such action as it deems necessary or proper to determine whether the attorney is so incapacitated, including the examination of the attorney by such qualified medical experts as the Court shall designate or assignment to a hearing panel for a formal hearing to determine the issue of capacity. If, upon due consideration of the matter, the Court concludes that the attorney is



incapacitated from continuing to practice law, it shall enter an order transferring the attorney to disability inactive status on the ground of such disability for an indefinite period and until the further order of this Court. If the Board files a petition pursuant to this section while a disciplinary proceeding is pending against the respondent, the disciplinary proceeding shall be suspended pending the determination as to the attorney's alleged incapacity.

**21.3.** If, during the course of a disciplinary investigation or proceeding, the respondent contends that the respondent is suffering from a disability by reason of mental or physical infirmity or illness, or because of addiction to drugs or intoxicants, which disability makes it impossible for the respondent to respond to or defend against the complaint, such contention shall place at issue the respondent's capacity to continue to practice law. The Court thereupon shall enter an order immediately transferring the respondent to disability inactive status for an indefinite period and until the further order of this Court. The Court may take or direct such action as it deems necessary or proper to make a determination as to the respondent's capacity to continue to practice law and to respond to or defend against the complaint, including the examination of the respondent by such qualified medical experts as the Court shall designate or the referral of the matter to a hearing panel for a formal hearing to determine the respondent's capacity to continue to practice law and to respond to or defend against the complaint.

If the Court or hearing panel shall determine that the respondent is incapacitated from responding to or defending against the complaint, the Court or hearing panel shall take such action as it deems proper and advisable, including a direction for the suspension of the disciplinary proceeding against the respondent.

**21.4.** The Board shall cause a notice of transfer to disability inactive status to be published in the legal journal and in a newspaper of general circulation in each county in which the disabled attorney maintained an office for the practice of law.

**21.5.** The Board shall promptly transmit a certified copy of the order of transfer to disability inactive status to the judges of all of the courts in the counties in which the disabled attorney maintained a law practice.

Whenever an attorney has been transferred to disability inactive status pursuant to either Section 21.1 or 21.3 of this Rule; or, whenever the Board, pursuant to Section 21.2, petitions this Court to determine that an attorney is disabled or incapacitated from continuing the practice of law, the Board shall request such action under the provisions of Section 22 as may be indicated in order to protect the interests of the disabled or alleged disabled attorney and the attorney's clients.

**21.6.** No attorney transferred to disability inactive status under the provisions of this Rule may resume active status until reinstated by order of this Court. Any attorney transferred to disability inactive status under the provisions of this Rule shall be entitled to petition for reinstatement to active status once a year or at such shorter intervals as this Court may direct in the order transferring the respondent to disability inactive status or any modification thereof. Such petition shall be granted by the Court upon a showing by clear and convincing evidence that the attorney's disability has been removed and the attorney is fit to resume the practice of law. Upon such application, the Court may take or direct such action as it deems necessary or proper to a

determination of whether the attorney's disability has been removed including a direction for an examination of the attorney by such qualified medical experts as the Court shall designate. In its discretion, the Court may direct that the expense of such an examination shall be paid by the attorney, and that the attorney establish proof of competence 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.

**21.7.** Where an attorney has been transferred to disability inactive status by an order in accordance with the provisions of 21.1 above and, thereafter, in proceedings duly taken, the attorney has been judicially declared to be competent, this Court may dispense with further evidence that the attorney's disability has been removed and may direct the attorney's reinstatement to active status upon such terms as are deemed proper and advisable.

**21.8.** In a proceeding seeking a transfer to disability inactive status under this Section, the burden of proof shall rest with the Board. In a proceeding seeking an order of reinstatement to active status under this Section, the burden of proof shall rest with the attorney.

**21.9.** The filing of a petition for reinstatement to active status by an attorney transferred to disability inactive status because of disability shall be deemed to constitute a waiver of any doctor-patient privilege with respect to any treatment of the attorney during the period of disability. The attorney shall be required to disclose the name of every psychiatrist, psychologist, physician and hospital or other institution by whom or in which the attorney has been examined or treated since the transfer to disability inactive status, and shall furnish to this Court written consent to each to divulge such information and records as requested by court appointed medical experts.

**Section 22. Appointment of Counsel to Protect Clients' Interests  
When Their Lawyer Has Been Transferred to Disability Inactive  
Status, Placed on Interim Suspension, Suspended or Disbarred,  
or Has Disappeared, Abandoned a Law Practice, or Died,  
or is Alleged to be Disabled or Incapacitated  
Pursuant to Section 21.2**

**22.1. *Inventory of Lawyer Files.*** If a lawyer has been transferred to disability inactive status, placed on interim suspension, suspended, or disbarred, and there is evidence that he or she has not complied with Section 18 of this Rule; or if a lawyer has disappeared, abandoned a law practice, or died, or is alleged to be disabled or incapacitated from continuing the practice of law pursuant to Section 21.2; and no partner, executor, or other responsible party capable of conducting the lawyer's affairs is known to exist, the presiding judge in the judicial district in which the lawyer maintained a practice, upon proper proof of the fact, shall appoint a lawyer or lawyers to inventory the files of the lawyer, and to take such action as seems indicated to protect the interests of the lawyer and his or her clients.

**22.2. *Protection for Records Subject to Inventory.*** Any lawyer so appointed shall not be permitted to disclose any information contained in any files inventoried without the consent of the

client to whom the file relates, except as necessary to carry out the order of the court which appointed the lawyer to make the inventory.

### **Section 23. Additional Rules of Procedure**

**23.1.** The transcript of a record shall be made available to the respondent at respondent's expense on request made to Disciplinary Counsel. However, if there is no appeal from the judgment of the hearing panel, the hearing shall not be transcribed unless requested by one of the parties, which party shall pay the expense of transcription. The court reporter shall preserve the shorthand record of the proceedings until the time for appeal has expired.

**23.2.** Except as is otherwise provided in these rules, time is directory and not jurisdictional. Time limitations are administrative, not jurisdictional. Failure to observe such directory time intervals may result in contempt of the agency having jurisdiction but will not justify abatement of any disciplinary investigation or proceeding.

**23.3.** Except as otherwise provided in these Rules, the Tennessee Rules of Civil Procedure and the Tennessee Rules of Evidence apply in disciplinary cases.

## MISCELLANEOUS PROVISIONS

### **Section 24. Expenses, Audit, Reimbursement of Costs**

**24.1. Expenses.** The salaries of Disciplinary Counsel and staff, their expenses, administrative costs, and the expenses of the members of the Board and of members of the district committees shall be paid by the Board out of the funds collected under the provisions of Rule 9.

**24.2. Audit.** The Board shall annually obtain an independent audit by a certified public accountant of the funds entrusted to it and their disposition and shall file a copy of such audit with this Court.

**24.3. Reimbursement of Costs.** 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, the Board shall assess against the respondent the 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 the matter.

The respondent attorney may petition the Board for relief from costs within thirty days of receipt of the final bill of costs or on the termination of any action upon which the disciplinary proceeding was based, whichever occurs last. In seeking relief, the respondent attorney shall have the opportunity to appear and be heard before the Board or a duly constituted panel thereof. Having conducted such a hearing, the Board shall file an order within thirty days; this order must include the basis for the Board's decision. An order reflecting the decision shall be treated as a decree of the

circuit or chancery court and, as such, is appealable to the Tennessee Supreme Court under Rule 9, § 1.3, Rules of the Supreme Court.

The hourly charges of Disciplinary Counsel on formal proceedings filed prior to January 27, 1992, shall be assessed at \$20 per hour for investigative time and \$30 per hour for trial time. The hourly charges of Disciplinary Counsel on formal proceedings filed on or after January 27, 1992, shall be assessed at \$30 per hour for investigative time incurred prior to the filing of formal proceedings and \$80 per hour in connection with formal proceedings.

Payment of the costs assessed by the Board pursuant to this rule shall be required as a condition precedent to reinstatement of the respondent attorney.

### **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:

(a) a recommendation for the imposition of public discipline, without the initiation of a formal disciplinary proceeding pursuant to Section 8.2, is filed with the Supreme Court by the Board; or

(b) a petition to initiate a formal disciplinary proceeding is filed pursuant to Section 8.2; or

(c) the respondent-attorney requests 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, this Court enters an order transferring the respondent-attorney to disability inactive status pursuant to Section 21.

**25.2.** In disability proceedings referred to in Section 25.1(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.

**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.

**25.4.** In order to protect the interests of a complainant, respondent, witness, or third party, the Board of Professional Responsibility 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.

**25.5.** 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 these Rules shall prohibit the complainant, respondent-attorney, or any witness from disclosing the existence or substance of a complaint, matter, investigation, or proceeding under these Rules or from disclosing any documents or correspondence filed by, served on, or provided to that person.

**25.6.** In those disciplinary proceedings in which judicial review is sought pursuant to Section 1.3, the records and hearing in the circuit or chancery court and in this Court shall be public to the same extent as other cases.

**25.7.** 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 a lawyer to practice or serve; 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 Supreme 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.

**25.8.** Nothing in this Section is intended to limit or repeal any confidentiality or privilege afforded by other law.

## **Section 26. Ethics Opinions**

**26.1.** The Board of Professional Responsibility shall be divided into three geographic ethics committees with each being responsible for issuing ethics opinions from time to time as designated by the Board.

**26.2.** Each committee shall act under the rules it may from time to time promulgate, but shall act only with the concurrence of two or more members.

**26.3.** Members of each ethics committee shall receive no compensation for their services but may be reimbursed for their travel and other expenses incidental to the performance of their duties.

**26.4.** Each ethics committee shall exercise the powers and perform the ordinary and necessary duties usually carried out by ethics advisory bodies. Each shall:

(a) By the concurrence of a majority of its members issue and publish Formal Ethics Opinions on proper professional conduct, either on its own initiative or when requested to do so by a member of the bar or by an officer or a committee or any other state or local bar association, except that an opinion may not be issued in a matter that is pending before a court or a pending disciplinary proceeding;

(b) Periodically publish its issued Formal Ethics Opinions to the legal profession in summary or complete form;

(c) On request, advise or otherwise help any state or local bar association in their activities relating to the interpretation of the Rules of Professional Conduct;

(d) Recommend appropriate amendments to or clarification of the Rules of Professional Conduct, if it considers them advisable;

(e) Employ such professional and/or clerical help necessary to carry out its duties; and

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

**26.5.** (a) A Formal Ethics Opinion issued and published by the ethics committee shall bind the committee, the person requesting the opinion, and the Board of Professional Responsibility, and shall constitute a body of principles and objectives upon which members of the bar can rely for guidance in many specific situations.

(b) Requests for Formal Ethics Opinions shall be addressed to the Board of Professional Responsibility in writing, stating the factual situation in detail, accompanied by a short brief or memorandum citing the Rules of Court or Professional Conduct involved and any other pertinent authorities and shall contain a certificate with the opinion that the matters are not pending in any court or disciplinary proceeding.

(c) An advisory ethics opinion may be issued by Disciplinary Counsel orally when there is readily available precedent. The opinion shall not be binding on the ethics committee, the Board of Professional Responsibility, or the Court and shall offer no security to the person requesting it.

## **Section 27. Immunity**

**27.1.** Communications to the board, district committee members or Disciplinary Counsel relating to lawyer misconduct or disability and testimony given in the proceedings shall be absolutely privileged, and no civil lawsuit predicated thereon may be instituted against any complainant or witnesses. Members of the board, district committee members, Disciplinary Counsel and staff shall be immune from civil suit for any conduct in the course of their official duties.

## **Section 28. Tennessee Lawyer Assistance Program**

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

### **28.1. Referrals to TLAP.**

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

- (1) has failed to respond to a disciplinary complaint;
- (2) has received three or more complaints within a period of 12 months;
- (3) has received a complaint that includes multiple failures to appear or to respond or to take any other action in compliance with established rules or time guidelines;
- (4) has pleaded impairment or disability as a defense to a complaint;
- (5) has exhibited behavior or has engaged in behavior that, in the BPR's determination, warrants consultation and, if recommended by TLAP, further assessment, evaluation, treatment, assistance, or monitoring.
- (6) is seeking readmission or reinstatement where there is a question of either prior or present impairment or disability; or
- (7) is requesting TLAP's involvement.

(b) The Executive Director of TLAP shall review any referral by the BPR. If the Executive Director of TLAP deems that assistance and monitoring of an attorney is appropriate, the Executive Director will make reasonable efforts to enter into a Monitoring/Advocacy Agreement ("Agreement") with the attorney pursuant to Rule 33.05(E) of the Rules of the Tennessee Supreme

Court. If the Executive Director of TLAP determines that TLAP assistance is not appropriate, for whatever reason, the Executive Director shall report that determination to the BPR, without further elaboration and without disclosure of information otherwise confidential under Rule 33.10.

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

(d) The BPR will provide written notification to the Executive Director of TLAP of any provision concerning the participation of TLAP included in any proposed order submitted by the BPR to the Tennessee Supreme Court. The Executive Director of TLAP will notify the BPR of any requested modification of the order and may decline involvement. If the Executive Director of TLAP declines involvement of TLAP, the BPR shall not include TLAP's participation in any proposed order submitted to the Supreme Court.

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

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

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

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

**28.2. *Autonomy.*** The BPR and TLAP shall remain completely independent, and the activities of one shall in no way be construed to limit or impede the activities of the other.

## **Section 29. Detection and Prevention of Trust Account Violations**



**29.1. Maintenance of Trust Funds in Approved Financial Institutions; Overdraft Notification.**

*(a) Clearly Identified Trust Accounts in Approved Financial Institutions Required.*

(1) Attorneys who practice law in Tennessee shall deposit all funds held in trust in this jurisdiction in accounts clearly identified as "trust" or "escrow" accounts, referred to herein as "trust accounts," and shall take all steps necessary to inform the depository institution of the purpose and identity of the accounts. Funds held in trust include funds held in any fiduciary capacity in connection with a representation, whether as trustee, agent, guardian, executor or otherwise. Attorney trust accounts shall be maintained only in financial institutions approved by the Board of Professional Responsibility, provided however nothing herein shall be construed as limiting any statutory provisions dealing with the investment of trust and/or estate assets, or the investment authority granted in any instrument creating a fiduciary relationship.

(2) Every lawyer engaged in the practice of law in Tennessee shall maintain and preserve for a period of at least five years, after final disposition of the underlying matter, the records of the accounts, including checkbooks, canceled checks, check stubs, vouchers, ledgers, journals, closing statements, accounting or other statements of disbursements rendered to clients or other parties with regard to trust funds or similar equivalent records clearly and expressly reflecting the date, amount, source and explanation for all receipts, withdrawals, deliveries and disbursements of the funds or other property of a client. The five year period for preserving records created herein is only intended for the application of this rule and does not alter, change or amend any other requirements for record-keeping as may be required by other laws, statutes or regulations.

*(b) Overdraft Notification Agreement and Acknowledgment of Authorization Required.* A financial institution shall be approved as a depository for attorney trust accounts if it files with the Board an acknowledgment of the attorney's constructive consent of disclosure of their trust account financial records as a condition of their admission to practice law, and the financial institution's agreement, in a form provided by the Board to report to the Board whenever any properly payable instrument is presented against an attorney trust account containing insufficient funds, irrespective of whether or not the instrument is honored. The Board shall establish rules governing approval and termination of approved status for financial institutions, and shall annually publish a list of approved financial institutions. No trust account shall be maintained in any financial institution that does not acknowledge constructive authorization by the attorney and agree to so report. Any such acknowledgment and agreement shall apply to all branches of the financial institution and shall not be canceled except upon thirty days notice in writing to the Board.

*(c) Overdraft Reports.* The overdraft notification agreement shall provide that all reports made by the financial institution shall be in the following format:

(1) In the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor, and should include a copy of the dishonored instrument, if such a copy is normally provided to depositors;

(2) In the case of instruments that are presented against insufficient funds but which instruments are honored, the report shall identify the financial institution, the attorney or law firm, the account number, the date of presentation for payment, and the date paid, as well as the amount of overdraft created thereby.

(d) *Timing of Reports.* Reports under paragraph C shall be made simultaneously with, and within the time provided by law for notice of dishonor, if any. If an instrument presented against insufficient funds is honored, then the report shall be made within five banking days of the date of presentation for payment against insufficient funds.

(e) *Consent by Lawyers.* Every lawyer practicing or admitted to practice in this jurisdiction shall, as a condition thereof, be conclusively deemed, under the financial records privacy laws, other similar laws, or otherwise, to have designated the Board of Professional Responsibility as their agent for the purpose of disclosure of financial records by financial institutions relating to their trust accounts; conclusively deemed to have authorized disclosure of financial records relating to their trust accounts to the Board of Professional Responsibility; and, conclusively deemed to have consented to the reporting and production of financial records requirements contemplated or mandated by Sections 29.1 or 29.2 of this rule.

(f) *No Liability Created.* Nothing herein shall create or operate as a liability of any kind or nature against any financial institution for any of its actions or omissions in reporting overdrafts or insufficient funds to the Board.

(g) *Costs.* Nothing herein shall preclude a financial institution from charging a particular lawyer or law firm for the reasonable cost of producing the reports and records required by this rule.

(h) *Definitions.* For the purpose of this rule:

(1) "Financial institution" includes a bank, savings and loan association, credit union, savings bank, and any other business or person that accepts for deposit funds held in trust by attorneys.

(2) "Properly payable" refers to an instrument which, if presented in the normal course of business, is in a form requiring payment under the laws of this jurisdiction.

(3) "Notice of dishonor" refers to the notice that a financial institution is required to give, under the laws of this jurisdiction, upon presentation of an instrument that the institution dishonors.

## **29.2. Verification of Bank Accounts.**

(a) *Generally.* Whenever Disciplinary Counsel has probable cause to believe that bank accounts of a lawyer that contain, should contain or have contained funds belonging to clients have not been properly maintained or that the funds have not been properly handled, Disciplinary Counsel shall request the approval of the Chair or Vice-Chair of the Board to initiate an investigation for the purpose of verifying the accuracy and integrity of all bank accounts maintained by the lawyer. If the Chair or Vice-Chair approves, counsel shall proceed to verify the accuracy of the bank accounts.

(b) *Confidentiality.* Investigations, examinations, and verifications shall be conducted so as to preserve the private and confidential nature of the lawyer's records insofar as is consistent with these rules and the lawyer-client privilege; however, no assertion of attorney-client privilege or confidentiality will prevent an inspection or audit of a trust account as provided in this rule.

### **Section 30. Diversion of Disciplinary Cases**

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

**30.2. Types of Disciplinary Cases Eligible for Diversion.** Disciplinary cases that otherwise would be disposed of by a private informal admonition or a private reprimand are eligible for diversion to practice and professionalism enhancement programs.

**30.3. Limitation on Diversion.** A respondent who has been the subject of a prior diversion within five (5) years shall not be eligible for diversion.

**30.4. Approval of Diversion.** The Board of Professional Responsibility shall not offer a respondent the opportunity to divert a disciplinary case to a practice and professionalism enhancement program unless the Board or a combination of Disciplinary Counsel and a district committee member concur.

**30.5. Contents of Diversion Recommendation.** If a diversion recommendation is approved as provided in Section 30.4, the recommendation shall state the practice and professionalism enhancement program(s) to which the respondent shall be diverted, shall state the general purpose for the diversion, and that the costs thereof shall be paid by the respondent.

**30.6. Service of Recommendation on and Review by Respondent.** If a diversion recommendation is approved as provided in Section 30.4, the recommendation shall be served on the respondent who may accept or reject a diversion recommendation in the same manner as provided for in Section 8 of Rule 9. The respondent shall not have the right to reject any specific requirement of a practice and professionalism enhancement program.

**30.7. Effect of Rejection of Recommendation by Respondent.** In the event that a respondent rejects a diversion recommendation the matter shall be returned for further proceedings under these rules.

**30.8. Authority of Hearing Panel to Refer a Matter to a Practice and Professionalism Enhancement Program.** Nothing in this rule shall preclude a hearing panel from referring a disciplinary matter to a practice and professionalism enhancement program as a part of a disciplinary sanction.

**30.9. Effect of Diversion.** When the recommendation of diversion becomes final, the respondent shall enter the practice and professionalism enhancement program(s) and complete the

requirements thereof. Upon respondent's completion of the practice and professionalism enhancement program(s), the Board of Professional Responsibility shall terminate its investigation into the matter and its disciplinary files shall be closed indicating the diversion unless the diversion is ordered in addition to other discipline. Diversion into the practice and professionalism enhancement program shall not constitute a disciplinary sanction and shall remain confidential.

**30.10.** *Effect of Failure to Complete the Practice and Professionalism Enhancement Program.* If a respondent fails to fully complete all requirements of the practice and professionalism enhancement program(s) to which the respondent was diverted, including the payment of costs thereof, the Board of Professional Responsibility may reopen its disciplinary file and conduct further proceedings under these rules. Failure to complete the practice and professionalism enhancement program shall be considered as a matter of aggravation when imposing a disciplinary sanction.

### **Section 31. Attorneys Adjudged to have Willfully Refused to Comply with a Court Order**

**31.1.** A certified copy of a court order adjudicating, upon notice and hearing, that a lawyer has willfully refused to comply with a court order, entered in a case in which the lawyer is a party, may be filed forthwith with the clerk of the Supreme Court by the clerk or judge of the court in which the order was entered, or by any party to the case in which the order was entered, or by any other party having an interest in the case, or by Disciplinary Counsel of the Board of Professional Responsibility. Upon the filing of such order, the Supreme Court will enter an order immediately suspending the lawyer from the practice of law. Such suspension shall remain in effect until such time as this Court may determine that the lawyer has complied with the terms of the original order or until such time prior to compliance as the interest of justice may require. The lawyer may at any time make application for relief.

**31.2.** Summary suspension pursuant to Section 32.1 shall be in addition to any other proceeding and any other sanction or punishment imposed pursuant to law.

**31.3.** An order suspending a lawyer from the practice of law pursuant to this Section 32 shall not constitute a suspension of the lawyer for the purpose of Section 18 unless this Court shall so order.

## *APPENDIX B*

**[Amend existing Rule 33, Tenn. Sup. Ct. R., as follows:]**

**[Delete existing Paragraph B of Rule 33.07 and replace it with the following new Paragraph B:]**

**B. Progress Reports.** When TLAP accepts a referral under Rule 33.07(A), TLAP may provide progress reports or reports of non-compliance. Notwithstanding Rule 33.10, these reports may be used as evidence in any proceeding or appeal relating to such referral from the Tennessee Board of Professional Responsibility, the Tennessee Court of the Judiciary, the Tennessee Board of Law Examiners or a disciplinary agency with disciplinary authority.

**[Delete existing Rule 33.08 and replace it with the following new Rule 33.08:]**

### **33.08 Local Impaired Lawyer Assistance Programs**

Subject to this rule and approval by TLAP, any bar association or other approved entity may establish an impaired lawyer program for the purpose of assisting lawyers with substance abuse problems, mental illness, or other impairments that may affect the lawyer's professional conduct. These programs are not agents of TLAP and have no authority to bind TLAP by their actions. Such approved programs shall operate as follows:

A. The program shall be governed by a committee which consists of not less than five (5) members, one of whom shall be designated as chair and one as vice-chair.

B. No member of the impaired lawyer program shall be a member of a district committee of the Board of Professional Responsibility of the Tennessee Supreme Court.

C. The program may investigate and evaluate allegations of substance abuse or mental impairment brought to its attention. Should the investigation or evaluation indicate that the lawyer does in fact suffer from substance abuse or mental impairment, the program may confer with the lawyer who is the subject of such allegation and make a recommendation to such lawyer. Such recommendation may include the sources of help for such problems.

D. The program may create and facilitate lawyer support groups and meetings.

E. The program shall provide peer assistance only and shall not accept referrals for monitoring as a probationary or provisional condition imposed upon a lawyer by any court or disciplinary authority. The program shall refer lawyers in need of monitoring to TLAP. However, any monitoring contract executed by a local impaired lawyer program prior to the effective date of this amendment may continue until the end of the term of the contract.

F. The program shall maintain statistics of the number of referrals it receives. These statistics shall be reported in writing to the Director of the Tennessee Lawyers Assistance Program not later than July 31 of each calendar year.

**[Delete existing Rule 33.10 and replace it with the following new Rule 33.10:]**

**33.10 Confidentiality.**

A. Information and actions taken by TLAP or by local impaired lawyer assistance programs approved under Rule 33.08 shall be privileged and held in strictest confidence and shall not be disclosed or required to be disclosed to any person or entity outside of TLAP or the local impaired lawyer assistance program approved under Rule 33.08, unless such disclosure is authorized by the member of the legal profession to whom it relates or as provided in Rule 33.07(B). Except as provided in Rule 33.07(B), such information and actions shall be excluded as evidence in any complaint, investigation or proceeding before the Tennessee Board of Professional Responsibility, Tennessee Court of the Judiciary, Tennessee Board of Law Examiners or other disciplinary agency with jurisdiction.

B. Commission members, employees, and agents, including volunteers recruited under Rule 33.04, and committee members, employees, and agents, including volunteers of local impaired lawyer assistance programs approved under Section 33.08, shall be deemed to be participating in "a lawyers assistance program approved by the Tennessee Supreme Court" as provided in Tenn. Code Ann. § 23-4-103(1), and all information furnished to the program shall be governed by Tenn. Code Ann. §§ 23-4-104 and 23-4-105.

**[Delete existing Rule 33.11 and replace it with the following new Rule 33.11:]**

**33.11 Immunity.**

A. Any person reporting information to commission members, employees or agents, including volunteers recruited under Rule 33.04, or to committee members, employees, or agents, including volunteers of local impaired lawyer assistance programs approved under Rule 33.08, shall be entitled to the immunities and presumptions under Tenn. Code Ann. §§ 23-4-101, 23-4-102 and 23-4-103 and the immunity provided under Rule 9, Section 27.

B. Commission members, employees and agents, including volunteers recruited under Rule 33.04, as well as committee members, employees, and agents, including volunteers of local impaired lawyer assistance programs approved under Rule 33.08, shall be entitled to the immunities and presumptions under Tenn. Code Ann. §§ 23-4-101, 23-4-102 and 23-4-103 and the immunity provided under Rule 9, Section 27.

C. Commission members, employees and agents, including volunteers recruited under Rule 33.04, and committee members, employees, and agents, including volunteers of local impaired

lawyer assistance programs approved under Rule 33.08, are relieved of any duty of disclosure of information to authorities imposed by Tennessee Supreme Court Rule 8, RPC 8.3(a).

## *APPENDIX C*

**[Adopt the following new Rule 10A, Tenn. Sup. Ct. R.:]**

### **Rule 10A. Judicial Ethics Opinions.**

**Section 10A.1.** (a) There is hereby created a committee which shall be known as the Judicial Ethics Committee to consist of five (5) members appointed by this Court as follows:

One (1) judge from the Court of Appeals or Court of Criminal Appeals;

One (1) trial judge from each grand division of the state; and

One (1) general sessions judge licensed to practice law in this state.

(b) The committee shall select its own chair.

(c) Each member shall serve for a term of four (4) years. Vacancies on the committee for an unexpired term shall be filled for the remainder of the term.

**Section 10A.2.** The committee shall act under the rules it may from time to time promulgate, but shall act only with the concurrence of three (3) or more members.

**Section 10A.3.** Members of the committee shall receive no compensation for their services but may be reimbursed by the Administrative Office of the Courts for their travel and other expenses incidental to the performance of their duties.

**Section 10A.4** The committee shall exercise the powers and perform the ordinary and necessary duties usually carried out by judicial ethics advisory bodies. By the concurrence of a majority of its members it shall issue Formal Ethics Opinions on proper professional conduct when requested to do so by a judge who is governed by the Code of Judicial Conduct, except that an opinion may not be issued in a matter that is the subject of a pending disciplinary proceeding. Formal Ethics Opinions shall be filed by the committee in the Administrative Office of the Courts. Said office shall distribute a copy of such opinions to all judges governed by the Code of Judicial Conduct or see that such opinions are published in a publication generally available to judges.

**Section 10A.5.** Requests for Formal Ethics Opinions shall be addressed to the committee in writing, stating the factual situation in detail, accompanied by a short brief or memorandum citing the Canons of the Code of Judicial Conduct involved and any other pertinent authorities and shall contain a certificate with the opinion that the matter is not the subject of a pending disciplinary proceeding.



**Section 10A.6.** A Formal Ethics Opinion shall constitute a body of principles and objectives upon which judges can rely for guidance.