

# BOARD NOTES

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## First Quarter 2013



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### Greeting from Lela Hollabaugh, Board Chair

It is my pleasure as Chair of the Board of Professional Responsibility to announce the resumption of publication of *Board Notes*, which will appear biannually. Our distribution will be by email and *Board Notes* will be available on our website at [www.tbpr.org](http://www.tbpr.org). We anticipate this publication will be both educational and informative to members of the bar and the public.

# Consumer Assistance Program Celebrates 10<sup>th</sup> Anniversary

In 2012, the Consumer Assistance Program (CAP) of the Tennessee Board of Professional Responsibility celebrated its 10<sup>th</sup> anniversary. CAP was created in March of 2002 to help legal consumers who may have questions about legal representation or problems with their attorneys. CAP informally mediates these difficult situations in a way that encourages explanations and communication between parties. CAP will not take on cases in which an attorney has been accused of serious ethical violations but will instead refer such cases to Disciplinary Counsel for investigation.

While CAP cannot and does not provide legal advice or lawyer recommendations, it does supply consumers with basic information concerning attorneys and the legal system, acting, to some degree, as a customer service office for the legal profession in Tennessee. The program also recommends outside agencies and resources for clients such as fee dispute committees, lawyer referral services, and pro bono entities. Many of the consumers of legal services who contact CAP are often confused about the legal system or communications they have had with their attorney. CAP provides a place for these consumers to ask simple questions.

As it strives to be an efficient and effective program for

clients, CAP also acts as an early warning system for attorneys, allowing them to correct problems with their practice, their communications with their clients, or their own conduct before any of it breaches ethical standards. By encouraging explanation and communication between clients and attorneys at the early stages of client dissatisfaction, CAP hopes to resolve client/attorney disagreements before they result in a disciplinary complaint.

Since its inception in 2002, the Consumer Assistance Program has been directed by Beverly Phillips Sharpe. Prior to her assumption of this position in 2001, she was in private practice for 18 years in Knoxville, Tennessee. She maintained a general civil practice with a concentration in personal injury, domestic relations and bankruptcy. Ms. Sharpe holds a Bachelors Degree in music from the University of North Texas and received her Doctorate of Jurisprudence from the University of Tennessee. As Director of CAP, Ms. Sharpe has developed and directed the program from its beginnings in March, 2002, casting a strong vision of consumer protection and customer service for CAP.

In its first ten years, CAP has handled a total of 42,061 cases and has been involved in 99,452 informal mediations or advising actions. The majority of cases

handled by CAP involve criminal, domestic, general civil and personal injury law. In approximately 54,000 instances, CAP provided general information to the consumer that the consumer had not received from their attorney. Approximately 35,000 times, CAP mediated conflicts between clients and attorneys including fee disputes, the return of the client's file and documentation, misunderstandings and difficulties between clients and attorneys, and client's requests for action on their cases. For more information about the Consumer Assistance Program, please contact:

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# TLAP's Monitoring Program

By Laura McClendon, MA, CEAP

TLAP Executive

The Tennessee Lawyers Assistance Program is a free, confidential assistance program providing consultations, referrals, interventions, and crisis counseling for lawyers, judges, bar applicants and law students. The Tennessee Lawyers Assistance Program ("TLAP") was established by order of the Tennessee Supreme Court in 1999. The mission and general structure of TLAP are set forth in Rule 33 of the Tennessee Supreme Court Rules.

TLAP services address a range of health and personal issues, such as stress, burnout, anxiety, depression and other mood disorders, anger management, trauma, grief, struggles with life balance, substance abuse, and behavioral addictions including eating disorders, gambling, and sex addiction. TLAP's work contributes to the protection of the public and the improvement of the integrity and reputation of the legal profession. Statistics support that assistance to an affected lawyer often prevents future ethical violations, thereby reducing the number of disciplinary actions.

TLAP also provides evaluation and monitoring services for attorneys whose misconduct may be related to a substance abuse or psychological impairment. Monitoring agreements are behavioral contracts that provide formal guidelines designed to ensure that the contract participant maintains good mental health and abstinence from mind and mood altering substances. Monitoring agreements may require attendance in a 12-Step or other appropriate support group, therapy, psychiatric supervision, medication management, monthly reporting, drug testing, and peer assistance. Agreements may or may not have a reporting designee to whom reports of compliance or noncompliance are provided by TLAP.

There are three types of TLAP monitoring agreements. The first is a voluntary monitoring agreement that is designed to assist individuals who desire structure and accountability in their recovery process. There is no reporting designee listed in the agreement. The contract participant may request letters of compliance from TLAP for the participant to provide to outside sources as he or she deems appropriate. These compliance reports may be helpful with divorce or custody cases, employment issues, or any other situation in which the participant desires to provide documented evidence of rehabilitation.

The second type of agreement, while also voluntary, requires TLAP to report to a non-disciplinary authority. In certain situations, an attorney or law student's impairment may come to the attention of an employer or law school dean. If the conduct does not rise to the level of an ethical violation

requiring reporting to the appropriate disciplinary body, TLAP will offer monitoring services at the request of the employer or law school. The agreement incorporates all the usual monitoring and testing provisions, however, the reporting designee also receives a copy of the monitoring agreement, may request status reports, and will be notified if the participant becomes substantially noncompliant. If TLAP or the contract participant terminates the agreement, the reporting designee is notified. In cases of non-compliance or early termination of the agreement, the employer or dean will decide what sanctions, if any, are appropriate, usually after consultation with TLAP staff.

The third type of monitoring agreement requires mandatory reporting to disciplinary or licensing authority. The disciplinary or licensing authority, such as the Board of Law Examiners, Board of Professional Responsibility, or Board of Judicial Conduct, may request TLAP to conduct an evaluation of a law student, attorney or judge. The request is provided in writing from the disciplinary authority to both TLAP and the referred attorney, and may also be by court order. If monitoring is recommended by TLAP, the disciplinary or licensing authority is listed as the reporting designee. The reporting designee must be notified if the referred law student, attorney or judge becomes substantially noncompliant with the terms of the agreement. If the reporting designee is the Board of Professional Responsibility, TLAP is required to provide an affidavit of the facts of the substantial noncompliance, and disciplinary counsel may petition the Supreme Court to issue an order imposing a temporary 4.3 suspension of the contract participant. Upon conclusion of a proceeding of any licensing or disciplinary authority, the monitoring agreement shall end, unless continued monitoring is required for a specified period of time following the conclusion of the proceeding.

Monitoring agreements, although an important aspect of the TLAP program, are only a small portion of TLAP services. Roughly 22% of TLAP participants are currently under a monitoring agreement. Most TLAP clients receive confidential counseling and assistance without ever needing to enter into a formal agreement.

A vast majority of calls to TLAP are in regards to a colleague or family member who may have a problem. The goal of TLAP is to assist attorneys well before they enter into the disciplinary process, or end up on the front page of the paper. In order to reach this goal, it is important that colleagues be willing to contact TLAP as soon as they see warning signs of potential impairment issues. As a compassionate member of a self-governing profession, everyone needs to stand ready to throw a life-line well before the situation becomes a headline.

If you or someone you know may require TLAP assistance, please call 1-877-424-TLAP.

# Professional Privilege Tax – Change in 2013

The Tennessee Department of Revenue has released the following notice regarding an electronic filing mandate for all active licensees subject to the professional privilege tax (see below). The notice also states that annual Professional Privilege Tax statements will **not** be mailed to active licensees in 2013. The due date for the annual \$400.00 Professional Privilege Tax is still June 1<sup>st</sup>.

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STATE OF TENNESSEE  
DEPARTMENT OF REVENUE  
ANDREW JACKSON STATE OFFICE BUILDING  
NASHVILLE, TENNESSEE 37242

## New Electronic Filing Requirements for Professional Privilege Tax

All professional privilege tax returns filed on or after January 1, 2013, must be filed electronically. Professional privilege tax returns can be filed electronically either by individuals, or by companies who file and pay for multiple individuals.

The department will not be mailing taxpayers a Professional Privilege Tax Return for the \$400 tax due June 1, 2013.

For a step-by-step guide to electronically file an individual professional privilege tax return, please visit our website at

<https://apps.tn.gov/privtx/>.

If you are a company filing and paying for multiple individuals, please visit our website at

<https://apps.tn.gov/privbatch/>.

Public Chapter 657 (2012) authorizes the commissioner to require that any return, report, claim, statement, application, or other document filed with the department, including any payment or remittance that accompanies such document, be submitted electronically in a manner approved by the commissioner beginning no sooner than ninety days after the commissioner has certified that a system is in place for the electronic submission of such document or payment.

These new electronic filing requirements will permit us to process your return and payment more timely and efficiently at a cost savings to the State. Should you have additional questions, feel free to contact our Electronic Commerce Unit at (866) 368-6374 for in-state calls or (615) 253-0704 for local or out-of-state calls.

Taxpayer Services Division

## Supreme Court Names Sandy Garrett as Chief Disciplinary Counsel

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On December 5, 2012, the Administrative Office of the Courts announced that Sandy Garrett, a 20-year veteran of the Tennessee Supreme Court's Board of Professional Responsibility (BPR) was named chief disciplinary counsel of the organization.

"Sandy's record of service to the legal profession and the public through her work with the BPR makes her uniquely qualified to step into this most important role," said Chief Justice Gary R. Wade.

In her role as senior litigation counsel, Garrett was responsible for some of the more challenging litigation cases in the office and provided training to BPR attorneys.

"I want to thank the Supreme Court for this exciting opportunity to serve the Board of Professional Responsibility and the Court as the new chief disciplinary counsel," Garrett said. "This is a chance to continue to further my goals for the organization and continue to do what I love every day."

One of Garrett's goals is to ensure that the organization continues to address the concerns of all parties involved in the disciplinary process for attorneys.

Garrett has served in various roles with the BPR since 1992. A graduate of the University of Tennessee and Vanderbilt University School of Law, she is a member of the Tennessee Bar Association and the National Organization of Bar Counsel.

Garrett was selected from a field of 21 applicants. Nancy Jones had served as the chief disciplinary counsel before stepping down to serve as general counsel at the Tennessee Department of Commerce and Insurance in September.

## **James A. Vick Appointed Deputy Chief Disciplinary Counsel – Investigation Krisann Hodges Appointed Deputy Chief Disciplinary Counsel – Litigation**

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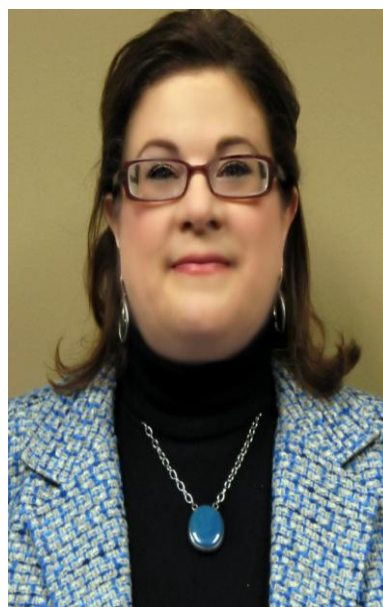
The Board of Professional Responsibility of the Supreme Court of Tennessee is pleased to announce that Disciplinary Counsel James A. Vick has been appointed as Deputy Chief Disciplinary Counsel of Investigation, and Disciplinary Counsel Krisann Hodges has been appointed as Deputy Chief Disciplinary Counsel of Litigation.

Mr. Vick joined the Board as Disciplinary Counsel in 1996. Previously, Mr. Vick prosecuted felony criminal cases in Louisville, Kentucky and practiced in the area of products liability with the Nashville firm of Maddin, Miller & McCune. Mr. Vick will also continue to serve as Ethics Counsel for the Board, responding to numerous attorney inquiries each week as well as drafting Formal Ethics Opinions and traveling the state presenting Continuing Legal Education programs to Tennessee attorneys.

Ms. Hodges joined the Board as Disciplinary Counsel in 2007 as a member of the litigation section. Prior to that, Ms. Hodges served as Regional General Counsel for the Department of Children’s Services. Her legal experience includes emphasis on general civil litigation and administrative law. Ms. Hodges will continue to litigate disciplinary cases and appeals for the Board.



**James A. Vick**



**Krisann Hodges**



# Disciplinary Actions

• (September 2012 – December 2012)

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## Disbarments and Suspensions

### *Thomas E. Cowan, Jr. (Carter County)*

On November 19, 2012, the Supreme Court disbarred Mr. Cowan, thereby affirming the decision of the Chancery Court of Carter County finding that Mr. Cowan should be disbarred from the practice of law for his misconduct. Mr. Cowan was temporarily suspended on March 1, 2010, after his plea of guilty to a serious crime, the willful attempt to defeat or evade payment of taxes.

### *Bobby Dean Davis (Davidson County)*

Bobby Dean Davis was disbarred from the practice of law by the Tennessee Supreme Court on November 20, 2012 after a Hearing Panel for the Board determined that Mr. Davis accepted fees and failed to perform any legal work for four clients. Mr. Davis' failure to communicate with one client resulted in a default judgment being entered against the client. Mr. Davis failed to respond to the Board's Petition for Discipline and did not appear for the final hearing. Mr. Davis' conduct violated Rules of Professional Conduct 1.1 (competence), 1.3 (diligence), 1.4 (communication), 1.5(a) (fees), 1.16(d) (declining and terminating representation), 3.2 (expediting litigation), 8.1(b) (bar admission and disciplinary matters), and 8.4(a) and (d) (misconduct).

## Disbarments and Suspensions

### *Terry D. Dycus (Fayette County)*

Mr. Dycus' law license was suspended by the Court on November 27, 2012, for a period of one year with forty-five (45) days active suspension and the remainder served on probation. Mr. Dycus was also ordered to perform ten (10) hours of *pro bono* services and complete additional continuing education and contact Tennessee Lawyers Assistance Program. While working for the District Attorney's office, Mr. Dycus engaged in inappropriate conversations of a sexual nature with two criminal defendants being prosecuted by his office. While Mr. Dycus was not the Assistant District Attorney on the defendants' cases, he was aware that they were both represented by counsel and he did not have permission to speak with either defendant. Mr. Dycus was found to have violated Rules of Professional Conduct 4.2 (communication with a person represented by counsel) and 8.4(a) and (d) (misconduct).

### *John Douglas Godbee (Hawkins County)*

On October 4, 2012, the Supreme Court temporarily suspended the law license of Mr. Godbee after a Hearing Panel of the Board determined that Mr. Godbee posed a threat of substantial harm to the public.

## **Disbarments and Suspensions**

### ***John Douglas Godbee (Hawkins County)***

Mr. Godbee was disbarred by the Supreme Court on November 15, 2012, after Mr. Godbee entered a Conditional Guilty Plea in response to the Board's Petition for Discipline alleging that Mr. Godbee, while acting as assistant district attorney, solicited and/or received sexual favors from female defendants in exchange for consideration on their cases. Mr. Godbee's actions violated Rules of Professional Conduct 4.2 (communication with a person represented by counsel) and 8.4 (misconduct).

### ***Fred T. Hanzelik (Hamilton County)***

On October 18, 2012, Mr. Hanzelik's law license was suspended for one year with six months active suspension and the remaining six months to be served on probation. Mr. Hanzelik entered a Conditional Guilty Plea after the Board charged him with neglect of clients' cases, failure to act with reasonable diligence and promptness when representing clients, and failure to adequately communicate with clients. Mr. Hanzelik's actions violate Rules of Professional Conduct 1.3 (diligence), 1.4 (communication), 3.2 (expediting litigation), 3.4 (fairness to opposing party and counsel) and 8.4 (misconduct).

### ***Fred T. Hanzelik (Hamilton County)***

On September 27, 2012, the Supreme Court affirmed the order of Hamilton County Chancery Court and the decision of a Hearing Panel of the Board imposing a forty-five day suspension for Mr. Hanzelik for

## **Disbarments and Suspensions**

attempting to bill a client twice for the same legal service, failing to act with reasonable diligence and promptness in representing a client, failing to adequately communicate with a client, charging an unreasonable fee, and failing to respond to inquiries from the Board. Mr. Hanzelik's actions violated Rules of Professional Conduct 1.5 (fees), 1.3 (diligence), 1.4 (communication), 3.2 (expediting litigation) and 8.1 (disciplinary matters).

### ***M. Josiah Hoover (Knox County)***

On November 16, 2012, the Tennessee Supreme Court entered a Judgment disbaring Mr. Hoover, affirming the judgment of the Knox County Chancery Court and a Hearing Panel for the Board recommending Mr. Hoover's disbarment after the Board filed a Petition for Discipline against Mr. Hoover based on five complaints alleging negligence, filing frivolous litigation, incompetence, failure to communicate with clients, and failure to comply with court orders and rules. The Supreme Court found "on multiple occasions Hoover knowingly failed to perform services for his clients and violated his professional duties, which caused serious or potential serious injuries to his clients and the legal system."

### ***Samuel Franklin Lain (Anderson County)***

Mr. Lain's license to practice law was suspended by the Supreme Court on October 17, 2012, retroactive to August 22, 2011, and indefinitely thereafter until certain conditions have been met, including participation in the



## **Disbarments and Suspensions**

### ***Samuel Franklin Lain (continued)***

Tennessee Lawyers Assistance Program. The Court found Mr. Lain appeared in court in an impaired condition and was unable to competently represent his clients, did not have necessary papers for a client whom he was representing in an uncontested divorce, allowed his client to prepare answers to interrogatories which were very prejudicial to the client, and wrote unprofessional and incompetent objections on the discovery responses provided to the opposing party. Mr. Lain appeared before court while his license was suspended for failure to meet registration requirements and CLE requirements. Mr. Lain's actions violated Rules of Professional Conduct 1.1 (competence), 1.3 (diligence), 3.4(d) (fairness to opposing party and counsel), 5.5 (unauthorized practice of law), and 8.4(a) and (d) (misconduct).

### ***Shannon A. Jones (Crockett County)***

Mr. Jones' license to practice law was suspended on October 18, 2012, for a period of three years. Mr. Jones was temporarily suspended in December, 2011, based upon charges involving conspiracy to manufacture and possess methamphetamine with the intent to distribute, in violation of 21 U.S.C. § 846. A Petition for Final Discipline was filed on January 10, 2012. In addition to the suspension of his law license, Mr. Jones was ordered to remain compliant with the terms and requirements of his Tennessee Lawyers Assistance Program monitoring agreement.

## **Disbarments and Suspensions**

### ***David Garrett Mullins (Sullivan County)***

On November 30, 2012, the Supreme Court suspended the law license of David Garrett Mullins after a Hearing Panel of the Board of Professional Responsibility entered a Judgment finding Mr. Mullins had neglected client matters, failed to communicate with clients, practiced law while suspended, and accepted fees, then abandoned his clients' cases. The Court ordered Mr. Mullins to pay \$15,445 in restitution to former clients.

### ***Anthony Bernard Norris (Shelby County)***

Mr. Norris' license to practice law was suspended by the Supreme Court for five (5) years on October 8, 2012. Mr. Norris' law license was administratively suspended in 1995 for failure to comply with his annual CLE obligations and he has been continuously suspended since that time. In 1998, Mr. Norris assisted in the formation of the law firm, Bruce, Norris, & Bass, PLLC, but disassociated from the firm in 2001. In 2000, Mr. Norris began serving as vice president and General Counsel for Worldwide Label and Packaging, LLC. Mr. Norris publicly held himself out as General Counsel and engaged in the practice of law while his license to practice law was suspended. Mr. Norris discontinued his role as General Counsel when he was elected Chairman and appointed President of Worldwide Label and Packaging, LLC, on January 23, 2012. Mr. Norris' actions violated Rules of Professional Conduct 5.5(a) (unauthorized practice of law).

## **Disbarments and Suspensions**

### ***James Franklin Taylor (Hawkins County)***

On October 26, 2012, the Supreme Court suspended Mr. Taylor's law license based upon his plea of guilty to a serious crime, felony theft, and ordered the Board to institute formal proceedings to determine the extent of final discipline to be imposed as a result of his conviction.

### ***Gary Wayne Vandever (Wilson County)***

On October 1, 2012, the Supreme Court disbarred Mr. Vandever retroactive to his November 24, 2010, temporary suspension. Mr. Vandever consented to disbarment because he could not successfully defend himself on charges filed against him by the Board after he was convicted of three (3) counts of theft of property over \$60,000, due to misappropriation of funds for his own use and benefit. Mr. Vandever's actions violated Rules of Professional Conduct 8.4(a), (b), (c) and (d) (misconduct).

## **Public Censures**

### ***Stanley R. Barnett (Blount County)***

On December 12, 2012, Mr. Blount was censured for failure to timely file a motion for a new trial after a client's criminal conviction and then, after his client filed a *pro se* Notice of Appeal, Mr. Barnett, without consulting the client, filed an appellate brief which raised issues that had been waived by his failure to file a timely appeal and failed to address the issue of sufficiency of the evidence.

## **Public Censures**

### ***Stanley R. Barnett (continued)***

The Court determined his actions violated Rules of Professional Conduct 1.1 (competence), 1.3 (diligence), 1.4 (communication), and 1.16 (terminating representation).

### ***James W. Clements (Hamilton County)***

On November 5, 2012, the Supreme Court publicly censured Mr. Clements for violation of Rules of Professional Conduct 1.1 (competence), 1.3 (diligence), 1.4 (communication), and 8.4 (misconduct). Mr. Clements agreed to represent a client in a case of possible nursing home neglect but failed to communicate with his client in a timely manner, failed to follow through with appropriate medical experts, withheld information from the client and failed to take reasonable steps to represent the client.

### ***Michael Scott Collins (Sumner County)***

On November 13, 2012, Mr. Collins was censured for entering into a representation agreement with a client that was vague, ambiguous, and without sufficient clarity for the client to understand the scope of Mr. Collins' representation. Mr. Collins also billed the client for work performed by a paralegal without first obtaining the client's consent. These acts were in violation of Rule 1.2 (scope of representation), 1.5 (fees), and 8.4 (misconduct).

## **Public Censures**

### ***Valerie Corder (Shelby County)***

On November 20, 2012, Valerie Corder was publicly censured by the Tennessee Supreme Court. Ms. Corder entered a Conditional Guilty Plea acknowledging violation of Rules of Professional Conduct 1.6 (terminating representation) and 8.4 (misconduct). Ms. Corder did not promptly withdraw after her client testified falsely at a deposition. At a subsequent hearing, Ms. Corder did not rely on the false testimony but did not correct the deposition testimony because the hearing was unexpectedly adjourned prior to its completion. Ms. Corder did not subsequently withdraw from that client's representation.

### ***Jami Keith Ferrell (Shelby)***

Mr. Ferrell failed to comply with the swearing-in requirements of Tenn. Sup. Ct. R. 6 in that he opened a law office in Tennessee and launched a website promoting his legal services prior to being sworn in on May 21, 2009. On November 1, 2012 Mr. Ferrell received a public censure for his actions which violated Rule of Professional Conduct 5.5(a) (unauthorized practice of law) and 8.4(a) misconduct.

### ***Hugh Edward Garrett (Davidson County)***

Mr. Garrett was publicly censured for failure to render competent representation, failure to act with reasonable diligence, failure to maintain reasonable communication

## **Public Censures**

### ***Hugh Edward Garrett (continued)***

with his client, and failure to make reasonable steps to expedite litigation after abandoning a client's case on appeal, ignoring the requests of the Court of Criminal Appeals to either file a brief or dismiss the matter. Mr. Garrett's actions violated Rules of Professional Conduct 1.1 (competence), 1.3 (diligence), 1.4 (communication), 3.2 (expediting litigation), and 8.4 (d) (misconduct).

### ***Robin Jeffrey Gordon (Davidson County)***

Mr. Gordon was publicly censured by the Supreme Court after he employed an attorney with a non-active Illinois law license, not licensed in Tennessee, to work as a paralegal in this office. The employee held himself out to clients as an attorney, gave detailed legal advice, issued receipts for his services to clients noting his services as an attorney, and provided business cards identifying himself as an attorney at law. Mr. Gordon billed clients for the time of the non-licensed attorney at an unreasonable rate and failed to ensure that the employee's conduct was not unauthorized practice of law. Mr. Gordon's actions violated Rules of Professional Conduct 1.5 (fees) and 5.3 (responsibilities regarding non-lawyer assistants).

## **Public Censures**

### ***Michael E. Latimore (Shelby County)***

Mr. Latimore received a Public Censure on October 29, 2012, for failure to communicate with his client, failure to diligently represent his client's interests, failure to inform his client that his license to practice law had been suspended, and failure to issue an appropriate refund. These acts were in violation of Rules of Professional Conduct 1.3 (diligence), 1.4 (communication), 1.5 (fees), 1.16 (declining or terminating representation), 8.1 (bar admission and disciplinary matters), 8.4 (misconduct).

### ***Lynda W. Simmons (Overton County)***

At the request of her client's daughter, Ms. Simmons prepared a deed transferring her client's real property to Ms. Simmons' husband. The client executed the deed, which Ms. Simmons did not intend to record unless the client was being improperly influenced. A year later, Ms. Simmons recorded the deed. At the request of the client, Ms. Simmons' husband executed a deed returning the property. Ms. Simmons also disclosed confidential information about her client. Ms. Simmons received a public censure on October 22, 2012, for violation of Rules of Professional Conduct 1.6 (confidential information) and 1.8 (conflict of interest).

### ***C. Leann Smith (Davidson County)***

Ms. Smith was censured on December 19, 2012, after being convicted of Driving Under the Influence, Second Offense, a violation of Rule of Professional Conduct 8.4(b) (misconduct).

## **Public Censures**

### ***William H. Thomas (Shelby County)***

On October 4, 2012, Mr. Thomas was publicly censured for failure to abide by an order of the court requiring him to comply with discovery requests in a civil proceeding in which Mr. Thomas was a party. Mr. Thomas' actions violated Rules of Professional Conduct 8.4 (d) and (g) (misconduct).

### ***John M. Wolfe, Jr. (Hamilton County)***

On October 22, 2012, Mr. Wolfe received a public censure. Mr. Wolfe settled a civil lawsuit without his client's permission, gave his client \$500, telling the client it was a payment from the defendant in the civil suit. He entered an agreed order of dismissal and failed to provide a copy of it to the client for over a year. By his actions, Mr. Wolfe violated Rules of Professional Conduct 1.2 (scope of representation), 1.4 (communication) and 8.4 (misconduct).

## **Reinstatements**

### ***Bradley H. Frakes (Davidson County)***

Bradley Frakes was reinstated by Order of the Supreme Court entered November 27, 2012 subject to conditions which included restitution to a former client and a practice monitor. Mr. Frakes had been suspended on November 21, 2011. Based on the Hearing Panel's recommendation, the Court found that Mr. Frakes has demonstrated the moral qualifications, competency and learning in the law required

## **Reinstatements**

### ***Bradley H. Frakes (continued)***

for the practice of law and that his resumption of practice of law will not be detrimental to the integrity or standing of the bar or administration of justice, or subversive to the public interest.

## **Disability Inactive Status Transfers**

### ***Gail Otsby Mathes (Shelby County)***

The Tennessee Supreme Court ordered that Ms. Mathes' law license be transferred to disability inactive status on October 18, 2012.

BOARD OF PROFESSIONAL RESPONSIBILITY  
OF THE  
SUPREME COURT OF TENNESSEE

**FORMAL ETHICS OPINION 2012-F-91(c)**

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Inquiry is made concerning the ethical propriety of employment of lawyers admitted to practice in other jurisdictions but not admitted to practice in Tennessee.

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This opinion amends and modifies Tennessee Formal Opinion (TFEO) 2002-F-91(b) adopted December 31, 2002, which in turn amended TFEO 2002-F-91(a) adopted March 8, 2002, and TFEO 1985-F-91 adopted April 29, 1985.

TFEO 1985-F-91 arose out of the increasing tendency of lawyers to move between jurisdictions and the increasing specialization of the bar. Tennessee lawyers and law firms employ lawyers to work in their firms in Tennessee who have not been admitted to the practice of law in Tennessee. Even if such lawyers promptly apply for admission to practice law in Tennessee, because of the delays inherent in the admissions process, there could be a period of months between the date of their employment as a lawyer in Tennessee and the date of their admission to practice law in Tennessee. The question presented was, in what practices may lawyers licensed to practice law in another jurisdiction engage in Tennessee while awaiting admission to the practice of law in Tennessee? Because of changes in Rules of Supreme Court of Tennessee (SCR) and Rules of Professional Conduct (RPC), the answers to the questions provided in TFEO 2002-F-91(b) have changed substantially.

Included in the Supreme Court of Tennessee's "...inherent power is the essential and fundamental right to prescribe and administer rules pertaining to the licensing and admission of attorneys." *Petition of Burson*, 909 S.W.2d. 768, 773, (Tenn. 1995); *Sneed v. Board of Professional Responsibility*, 301 S.W.3d. 603, 612 (Tenn. 2010); *Hughes v. Board of Professional Responsibility*, 259 S.W.3d 631, 640 (Tenn. 2008). The Court "...possesses not only the inherent supervisory power to regulate the practice of law, but also the corollary power to prevent the unauthorized practice of law." *Petition of Burson*, supra, 909 S.W.2d. at 773. The Supreme Court of Tennessee (Supreme Court) possesses the exclusive authority to regulate the practice of law and define the unauthorized practice of law. *Tennessee Environmental v. Tennessee Water*, 254 S.W.3d 398, 403 (Tenn. Ct. App. 2007)(perm. app. denied 2008). Except as provided by the SCR, the practice of law in Tennessee by lawyers licensed in other jurisdictions who are not licensed to practice law in Tennessee constitutes the unauthorized practice of law.

SCR 7, Licensing of Attorneys, Section 1.01, prohibits any person from practicing law in Tennessee unless in accordance with SCR 7, as follows:

License Required. No person shall engage in the 'practice of law' or the 'law business' in Tennessee, except pursuant to the authority of this Court, as evidenced by a license issued in accordance with this Rule, or in accordance with the provisions of this Rule governing special or limited practice.<sup>1</sup>

Any person who has been admitted and licensed to practice law in other jurisdictions may seek admission to practice law in Tennessee by comity without examination, pursuant to SCR 7, Art. V, Persons Admitted in Other Jurisdictions Seeking Waiver of Examination. The Supreme Court amended SCR 7, Sec. 5.01, effective January 24, 2011, by adding the following:

...The application for comity admission shall be submitted to the Board of Law Examiners and approved prior to commencement of law business in Tennessee or employment as a lawyer in Tennessee. . .

(Emphasis added).

Lawyers licensed to practice law in other jurisdictions may also seek admission to practice law in Tennessee by examination, pursuant to SCR 7, Art. III, Application for Admission by Examination. SCR 7, Sec. 10.04 permits law graduates seeking admission in Tennessee by examination pursuant to SCR 7, Art. III, to engage in practice in Tennessee on a limited and conditional basis while awaiting admission by examination.

By its terms, SCR 7, Sec. 10.04 is applicable to any Tennessee resident who has graduated from an accredited or approved law school, whether admitted to practice law in another jurisdiction or not. But Sec. 10.04(b) permits limited practice in Tennessee only for the period through the date of announcement of the results of the second bar examination conducted after the individual graduated from law school. SCR 7, Sec. 10.04(b) admonishes trial judges that limited practice must accord strictly with the provisions of the rule and that no deviation would be permitted.<sup>2</sup>

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<sup>1</sup>Although SCR 7 does not provide definitions of “practice of law” and “law business,” the Supreme Court incorporated the definitions of those terms provided in Tennessee Code Annotated 23-3-101 into SCR 7, Sec. 1.01. *Petition of Burson*, supra, 909 S.W. 2d at 776.

T.C.A. 23-3-101. Chapter definitions. – As used in this chapter, unless the context otherwise requires: (1) “Law business” means the advising or counseling for valuable consideration of any person as to any secular law, the drawing or the procuring of or assisting in the drawing for valuable consideration of any paper, document or instrument affecting or relating to secular rights, the doing of any act for valuable consideration in a representative capacity, obtaining or tending to secure for any person any property or property rights whatsoever, or the soliciting of clients directly or indirectly to provide such services; (3) “Practice of law” means the appearance as an advocate in a representative capacity or the drawing of papers, pleading or documents or the performance of any act in such capacity in connection with proceedings pending or prospective before any court, commissioner, referee or any body, board, committee or commission constituted by law or having authority to settle controversies, or the soliciting of clients directly or indirectly to provide such services.

<sup>2</sup> The limited practice permitted by SCR7, Sec. 10.04 is more fully defined in TFE0 2002-F-91(b), which portion of the Opinion remains in effect.



Prior to the January 24, 2011, amendment to SCR 7, Sec 5.01, the Supreme Court adopted SCR 8, RPC 5.5, Unauthorized Practice of Law; Multijurisdictional Practice of Law, on September 29, 2010, effective January 1, 2011. Consistent with SCR 7, Sec. 1.01, SCR 8, RPC 5.5(a) prohibits a lawyer from engaging in the “...practice of law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assisting another in doing so.”

RPC 5.5(b) provides that “[a] lawyer who is not admitted to practice in this jurisdiction shall not: (1) except as authorized by these Rules or other law, establish an office or other systemic and continuous presence in this jurisdiction for the practice of law...” A lawyer who is not licensed in Tennessee, but who resides, has an office or other systematic and continuous presence in Tennessee or who is employed as a lawyer in Tennessee cannot provide legal services in Tennessee on a temporary basis pursuant to RPC 5.5(c).

RPC 5.5(d) permits a lawyer who is not admitted to practice in Tennessee, but who is licensed to practice in another jurisdiction, to provide legal services in Tennessee as follows, and to have “an office or other systematic and continuous presence” in Tennessee. Cmt.[5][15].

- (d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:
  - (1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or
  - (2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

The amendment to SCR 7, Sec. 5.01, which prohibits a lawyer admitted in another jurisdiction and seeking admission in Tennessee by comity from “...the commencement of law business in Tennessee or employment as a lawyer in Tennessee...” until the application for comity is approved was not intended to prohibit attorneys from providing legal services in Tennessee pursuant to RPC 5.5(d).<sup>3</sup>

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<sup>3</sup> In construing rules of the Supreme Court of Tennessee, the rules of statutory construction apply. *Keough v. State*, 356 S.W.3d 366, 371 (Tenn. 2011); *Doe v. Bd. Of Professional Responsibility*, 104 S.W.3d 465, 469 (Tenn. 2003) (applying the rules of statutory construction to Tennessee Supreme Court Rule 9); *Board of Professional Responsibility v. Love*, 256 S.W.3d 644, 651-652 (Tenn. 2008) (applied rules of statutory construction to construe Tennessee Supreme Court Rule 9). In construing rules of the Supreme Court the goal is to ascertain and give effect to the Court’s intent in adopting its rules. *Thomas v. Oldfield*, 279 S.W.3d 259, 261 (Tenn. 2009).

We assume that whenever the legislature enacts a provision, it is aware of other statutes relating to the same subject matter. *Wilson v. Johnson County*, 879 S.W.2d 807, 810 (Tenn. 1994). Unless the newer statute expressly repeals or amends the old one, the new provision is presumed to be in accord with the same policy embodied in the prior statutes; thus, “statutes ‘in pari materia’ – those relating to the same subject or having a common purpose – are to be construed together, and the construction of one such statute, if doubtful, may be aided by considering the words and legislative intent indicated by the language of another statute.” *Id.* at 809. If a conflict exists, specific statutory provisions will be given effect over conflicting general provisions. *Arnwine v. Union County Board Of Education*, 120 S.W.3d 804, 809 (Tenn. 2003). Statutes on the same subject, although in apparent conflict, are construed to be in harmony if reasonably possible. *In re Akins*, 87 S.W.3d 488, 493 (Tenn. 2002)

Pursuant to the provisions of SCR 7 discussed herein above, two categories into which non-resident lawyers licensed to practice law in other jurisdictions who are applying for admission to practice law in Tennessee<sup>4</sup> fall are:

(1) Lawyers applying for admission in Tennessee by comity, pursuant to SCR 7, Art. V;

SCR 7, Art. V, Sec. 5.01 specifically prohibits lawyers who are applying for admission by comity, from commencement of law business in Tennessee or employment as a lawyer in Tennessee until the application for comity has been approved. Such lawyers may, however, provide legal services in Tennessee as permitted by RPC 5.5(d).

(2) Lawyers applying for admission in Tennessee by examination, pursuant to SCR 7, Art. III, who are not eligible or not permitted to practice in Tennessee on a limited basis pursuant to SCR 7, Sec. 10.04.<sup>5</sup>

Non-resident lawyers who are applying for admission by examination pursuant to SCR 7, Art. III, but who are not permitted to practice in Tennessee on a limited basis pursuant to SCR 7, Sec. 10.04, cannot engage in the limited practices and court appearances permitted by SCR 7, Sec. 10.04(a)(b). SCR 7, Sec. 1.01 does not grant authority to lawyers in category (2) to practice law in Tennessee to any greater extent or degree than lawyers in category (1) applying for admission by comity. Therefore, lawyers who are applying for admission in Tennessee by examination, who are not permitted to practice in Tennessee on a limited basis pursuant to SCR 7, Sec 10.04, cannot commence law business in Tennessee or be employed as a lawyer in Tennessee until admission by examination in Tennessee is approved. Such lawyers may, however, provide legal services in Tennessee as permitted by RPC 5.5(d).

This 30th day of July, 2012.

ETHICS COMMITTEE:

Michael Callaway

William Bovender

Wade Davies

**APPROVED AND ADOPTED BY THE BOARD**

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*Shorts v. Bartholomew*, 278 S.W.3d 268, 277 (Tenn. 2009). See also; *Hayes v. Gibson County*, 288 S.W.3d. 334, 337, 338 (Tenn. 2009); *Brundage v. Cumberland County*, 357 S.W.3d 361, 365 (Tenn. 2011).

<sup>4</sup> Lawyers licensed in other jurisdictions who provide legal services in Tennessee as in house counsel pursuant to RPC 5.5(d)(1) are required to be registered pursuant to SCR 7, Sec.10.01, as opposed to being admitted to the practice of law in Tennessee by comity pursuant to SCR 7, Art. V, or by examination pursuant to SCR 7, Art. III.

<sup>5</sup> Lawyers who reside in the state and apply for admission in Tennessee by examination pursuant to SCR 7, Art. III can be permitted to practice in Tennessee on a limited and conditional basis pursuant to SCR 7, Sec. 10.04.

BOARD OF PROFESSIONAL RESPONSIBILITY  
OF THE  
SUPREME COURT OF TENNESSEE

**FORMAL ETHICS OPINION 2012-F-155**

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Can district attorneys ethically comply with the requirements of T.C.A. 40-32-101(a)?

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A formal ethics opinion has been requested by a district attorney regarding T.C.A. 40-32-101(g), enacted effective July 1, 2012. The statute provides the means by which a person may obtain expungement of public records of conviction of an eligible criminal offense. Section (g)(1) enumerates the criminal offenses eligible to be expunged, as well as those excluded from consideration. Section (g)(2) provides the criteria for an offense to be expunged, including: (A) having never been convicted of any other criminal offense, including in federal and/or other states courts; (B) the lapse of five years since the completion of the sentence imposed for the subject offense, and; (C) that all requirements of the sentence have been fulfilled.

Section (g)(3) requires a person seeking expungement of a conviction to petition the court in which the person was convicted; that upon filing, the clerk shall serve the petition on the district attorney general; and that within 60 days "...the district attorney may submit recommendations to the court and provide a copy of such recommendations to the petitioner." Section (g)(4) provides that both the petitioner and the district attorney may file evidence with the court relating to the petition. Section (g)(5) requires the court to consider all evidence and weigh the interest of the petitioner and the best interest of justice and public safety. Section (g)(7) requires that by September 1, 2012, the district attorneys general conference create a simple form to enable a lay person to petition the court for expungement.

Section (g)(8) provides, in part, that "[t]he petition and proposed order shall be prepared by the office of the district attorney general and given to the petitioner to be filed with the clerk of the court..." Section (g)(10) provides that 40/45% of the \$350 filing fee paid to the clerk by the petitioner is to be paid to the district attorneys expungement fund. Section (g)(11) establishes the fund "...to defray the expense incurred for the required records search and preparation of the petition and proposed order...". The sequence set forth in the statute requires the district attorney to prepare the petition and order and give same to the petitioner before the petitioner files the petition and order with the clerk and pays the fee, part of which is for the records check. Whether the required records check will be conducted and the results reported to the district attorney before the district attorney prepares the petition and order and gives same to the petitioner for filing cannot be determined.

Compliance by the office of the district attorney with T.C.A. 40-32-101(g) raises several ethics issues and concerns. The resolution of those issues depends on whether the preparation of the petition and order by the office of the district attorney as required by the statute forms an attorney/client relationship between the district attorney and the petitioner or are simply administrative functions which do not entail the formation of such an attorney/client relationship. If an attorney/client relationship is formed between the district attorney and the petitioner, duties provided in Supreme Court Rule 8, Rules of Professional Conduct (RPC), including Competence, RPC 1.1,<sup>1</sup> Diligence, RPC 1.3,<sup>2</sup> Communication, RPC 1.4,<sup>3</sup> Confidentiality, RPC 1.6,<sup>4</sup> Conflicts of Interest, RPC 1.7,<sup>5</sup>

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<sup>1</sup> RPC 1.1 provides:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

<sup>2</sup> RPC 1.3 provides:

A lawyer shall act with reasonable diligence and promptness in representing a client.

<sup>3</sup> RPC 1.4 provides:

- (a) A lawyer shall:
  - (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in RPC 1.0(e), is required by these Rules;
  - (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
  - (3) keep the client reasonably informed about the status of the matter;
  - (4) promptly comply with reasonable requests for information; and
  - (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

<sup>4</sup> RPC 1.6(a) provides:

- (a) A lawyer shall not reveal information relating to the representation of a client unless:
  - (1) the client gives informed consent;
  - (2) the disclosure is impliedly authorized in order to carry out the representation; or
  - (3) the disclosure is permitted by paragraph (b) or required by paragraph (c).

Cmt. [3] to RPC 1.6 provides that "[t]he confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all communication relating to the representation, whatever its source." There is no public records exception to the confidentiality rule with respect to current clients.

<sup>5</sup> RPC 1.7 (a)(b) provide:

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
  - (1) the representation of one client will be directly adverse to another client; or
  - (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
- (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

1.8(b)<sup>6</sup> and 1.9,<sup>7</sup> Meritorious Claims and Contentions, RPC 3.1,<sup>8</sup> and Candor Toward the Tribunal, RPC 3.3,<sup>9</sup> would be imposed upon the district attorney, even if the functions are performed by non-lawyer staff.<sup>10</sup>

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- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

<sup>6</sup> RPC 1.8(b) provides:

- (b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client, unless the client gives informed consent, except as permitted or required by these Rules.

<sup>7</sup> RPC 1.9 (a)(c) provide:

- (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.
- (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter reveal information relating to the representation or use such information to the disadvantage of the former client unless (1) the former client gives informed consent, confirmed in writing, or (2) these Rules would permit or require the lawyer to do so with respect to a client, or (3) the information has become generally known.

<sup>8</sup> RPC 3.1 provides:

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless after reasonable inquiry the lawyer has a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

<sup>9</sup> RPC 3.3 (a)(1) prohibits a lawyer from making a false statement of fact or law to a tribunal, (b) prohibits offering evidence that the lawyer knows to be false, (c) prohibits a lawyer from affirming the validity of any evidence of or otherwise using any evidence the lawyer knows to be false, and (e)(f) require an attorney to withdraw from the representation of the client if the lawyer knows that the client intends to perpetrate a crime or fraud upon the tribunal or otherwise commit an offense against the administration of justice.

<sup>10</sup> RPC 5.3(a)(b)(c) provide:

With respect to a non lawyer employed or retained by or associated with a lawyer:

- (a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer;
- (b) a lawyer having direct supervisory authority over a nonlawyer shall make reasonable efforts to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer; and
- (c) a lawyer shall be responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

T.C.A. 8-7-103 provides the “Duties” of the district attorney. The client of the district attorney is the state of Tennessee. See, Tennessee Formal Ethics Opinion (TFEO) 2002-F-146 (a public prosecutor has as his client the state). “Tempered only by their impartial search for justice, prosecutors are to keep the interest of the State as their preeminent concern.” State v. White, 114 S.W. 3d 469, 477 (Tenn. 2003).

TFEO 2002-F-146 held that “the duties of a state prosecutor or assistant and such lawyer’s duties as criminal defense counsel in a state court are clearly in conflict.” The opinion quoted from an ABA Formal Opinion and states, in part:

A public prosecutor has as his client the state. It is obvious therefore that he cannot appear for any defendant in cases in which the state is an adverse party. The second paragraph of Canon 6 provides in substance that a lawyer cannot represent conflicting interests “except by express consent of all concerned given after a full disclosure of the facts.” In Opinion 16 it was held that the prosecutor could not represent both the public and the defendant, and that a law firm cannot serve two masters, because, “The positions are inherently antagonistic and this would be so irrespective of Canon 6. No question of consent can be involved as the public is concerned and it cannot consent.”

This Board has expressly adopted the reasoning of the ABA as set forth above in the past, and agrees with the ABA’s holding that the two positions are so inherently antagonistic, there can be, no consent to, or waiver of the conflict by the public. Even though the provision of Canon 6 of the old Canons of Professional Ethics are not identical to this state’s Code of Professional Responsibility, similarly, there can be no consent to such a conflict by the public in Tennessee.

Applying the former Code of Professional Responsibility, the Supreme Court referenced TFEO 2002-F-146 in State v. White, supra, 114 S.W. 3d. 469 and stated in part:

This court has clarified that an actual conflict of interest includes any circumstances in which an attorney cannot exercise his or her independent professional judgment free of “compromising interests and loyalties.” *See Culbreath*, 30 S.W.3d at 312-13; *see also* Tenn. R. Sup. Ct. 8, EC 5-1. In the context of multiple employment, for example, an actual conflict arises where an attorney’s continuance of such employment “would be likely to involve the lawyer in representing differing interests.” Tenn. Sup. Ct. R. 8, DR 5-105(B). If a conflict exists, it may only be cured if “it is obvious

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- (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
  - (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the nonlawyer is employed, or has direct supervisory authority over the nonlawyer, and knows of the nonlawyer’s conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

that the lawyer can adequately represent the interest of each [client] and if each [client] consents to the representation after full disclosure of the possible effect of such representation on the exercise of a lawyer's independent professional judgment on behalf of each." Tenn. Sup. Ct. R. 8, DR 5-105(C).

Id. at 476-477.

. . . The Disciplinary Rules preventing conflicts of interests were specifically designed to free the lawyer's judgment from such "compromising interests and loyalties." Tenn. R. Sup. Ct. 8, EC 5-1; *see also Blackwood*, 46 S.W.3d at 187; *Culbreath*, 30 S.W.3d at 312-13.

Id. at 478.

T.C.A. 40-12-10 (g)(3)(4)(5) create potentially adversarial and conflicting interest between the duties to be performed by the district attorney for the petitioner on the one hand and for the state on the other. If by preparing the petition and order as required by the statute an attorney/client relationship is formed between the district attorney and the petitioner, the district attorney will be faced in every instance with the potential for a conflict of interest. RPC 1.7.<sup>5</sup>

In order for the office of the district attorney to prepare the petition and order, the petitioner will necessarily provide information to the district attorney regarding the subject conviction, when the sentence was completed, whether the petitioner has any other convictions and other information required for preparation of the petition and order. As stated above, the required records check may or may not be performed prior to district attorney preparing the petition and order and giving same to the petitioner for filing. If the district attorney determines that the criminal offense does not fall within those eligible for expungement pursuant to section (g)(1) or if the petitioner does not meet the requirements of section (g)(2), it would be the duty of the district attorney in his representation of the state to oppose the petition for expungement filed by the petitioner. If an attorney/client relationship was formed between the district attorney and the petitioner, RPC 1.6(a)<sup>4</sup> and RPC 1.8(b)<sup>6</sup> would preclude the district attorney from using information relating to the representation of the petitioner/client to the disadvantage of the petitioner/client or to pursue an interest against the petitioner/client to recommend or seek denial of the petition, as permitted by sections (g)(3)(4) and as the duties owed by the district attorney to the state would require. If the information provided by the petitioner/client and/or the required records check reflects that the petition lacks merit, the district attorney would be precluded by the RPC 3.1<sup>8</sup> from preparing an unmeritorious petition and order. RPC 3.3(a)(1),(b),(c)<sup>9</sup> would preclude the district attorney from going forward with the representation of the petitioner/client on the bases of information which the district attorney knows to be false. If the representation by the district attorney ceased and the petitioner went forward with the petition on the basis of false information, the district attorney would be precluded by RPC 1.9(a)(c)<sup>7</sup> from revealing or using information relating to the former representation of the petitioner/client to the



disadvantage of the petitioner/former client in recommending or seeking to defeat the petition.

RPC 1.7 (a)(1)(2)<sup>5</sup> precludes the district attorney from accepting representation of the petitioner because the representation of the petitioner and the state with respect to expungement would be directly adverse or there is a significant risk that the representation of one client would be substantially limited by the districts attorney's representation of the other. One client's interest would necessarily be compromised by the interest of the other. The conflict of interest could not be waived because the district attorney could not provide competent and diligent representation to both the petitioner and the state of Tennessee, as required by RPC 1.7(b)(1)<sup>5</sup> for waiver. See also, TFEO 2002-F-146 herein above.

In order for the district attorney to perform the functions required by T.C.A. 40-32-101(g), the district attorney must avoid forming an attorney/client relationship with the petitioner<sup>11</sup> and, thereby, avoid the conflict of interest and other duties which would be imposed by the Rules of Professional Conduct. The district attorney should advise the petitioner that the district attorney represents the state in the matter and clarify the district attorney's role in the matter that by preparing the petition and order the district attorney does not represent the petitioner.<sup>12</sup> The district attorney should obtain an acknowledgement from the petitioner that the petitioner does not become a client of the district attorney by the district attorney performing the functions required by the statute and that none of the duties imposed upon an attorney/client relationship by the Rules of Professional Conduct, including confidentiality and conflicts of interest, attach as a consequence of performing the functions required by the statute. This acknowledgement could be included in the form required by section (g)(7) and petition for expungement prepared by the office of the district attorney general.<sup>10</sup>

The district attorney should request information from the petitioner only to the extent necessary to prepare the petition for expungement and resulting order and should not give

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<sup>11</sup> The Restatement of the Law, The Law Governing Lawyers (2000) §14 provides:

A relationship of client and lawyer arises when:

- (1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either
  - (a) the lawyer manifests to the person consent to do so; or
  - (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services; or
- (2) a tribunal with power to do so appoints the lawyer to provide the services.

<sup>12</sup> RPC 4.3 provides:

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interest of such a person are, or have a reasonable possibility of being, in conflict with the interest of the client.

legal advice to the petitioner regarding the petition.<sup>12</sup> The district attorney could advise the petitioner that they can seek the advice of other counsel.<sup>12</sup> Section (g)(3) requires that a copy of the recommendation to the court be provided to the petitioner. It would be acceptable to advise the petitioner that given information provided to and collected by the district attorney, that it does not appear that the petition meets the requirements for expungement.

The request for formal ethics opinion posed the following questions, which are answered as follows:

1. Can the District Attorney General or members of their staff prepare petitions to expunge criminal records on behalf of criminal defendants?

ANSWER: Yes, but only if the district attorney advises the petitioner that the district attorney represents the state and does not represent the petitioner and advises the petitioner that they may seek the advice of independent counsel, consistent with this opinion.

2. Can the District Attorney General or members of their staff prepare petitions to expunge criminal records on behalf of criminal defendants knowing that the District Attorney General will potentially oppose the petition?

ANSWER: Yes, but only if the district attorney does not know that information contained in the petition and order prepared by the district attorney is false, consistent with this opinion.

3. Does the District Attorney have an ethical obligation to tell a defendant that his petition does not qualify for expungement?

ANSWER: Not if no attorney/client relationship exists.

4. Does the District Attorney have an ethical obligation to tell the defendant that we will be representing the State and filing a pleading to dismiss the petition?

ANSWER: Yes, consistent with RPC 4.3.

5. Does the District Attorney who prepares a petition on behalf of a criminal defendant become an advocate for that defendant as to the petition?

ANSWER: No, consistent with this opinion.

6. Can the District Attorney General ethically prepare a petition for submission to a court when the District Attorney General knows that the petition does not qualify for expungement.

ANSWER: The district attorney cannot assist the petitioner in preparation of fraudulent petition.

7. Should the District Attorney General advise a criminal defendant seeking to have a petition prepared by the District Attorney General to seek advice from independent counsel?

ANSWER: Yes, consistent with RPC 4.3.

8. What if any conflict of interest exists for the District Attorney General when he or she knows that a criminal defendant will have to pay the \$350 filing fee and that the District Attorney's Conference will receive forty-five percent of the fee but it is virtually guaranteed that the petition will be denied and the defendant will gain nothing from the expenditure of these funds?

ANSWER: None if prepared consistent with this opinion.

This 21st day of September, 2012.

ETHICS COMMITTEE:

Russ Parkes

Susan McGannon

Francis Guess

**APPROVED AND ADOPTED BY THE BOARD**

## **The Tennessee Supreme Court Proposes Amendments to Tennessee Supreme Court Rule 9**

On August 8, 2012, the Supreme Court filed an Order proposing substantial revisions to Tennessee Supreme Court Rule 9, which sets out the rules governing the disciplinary enforcement of Tennessee attorneys. The proposed Supreme Court Rule 9 may be viewed in its entirety at [http://www.tncourts.gov/sites/default/files/order\\_and\\_appendix-rule\\_9\\_amendment-comments-8-8-12.pdf](http://www.tncourts.gov/sites/default/files/order_and_appendix-rule_9_amendment-comments-8-8-12.pdf). The deadline for written comments to the Supreme Court's proposed Rule 9 is February 8, 2013.