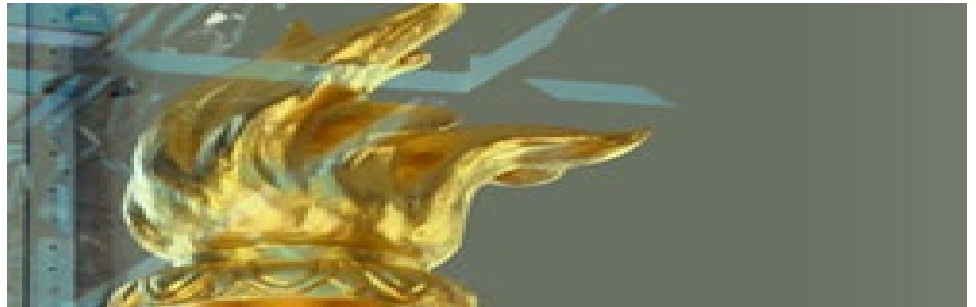


BOARD NOTES

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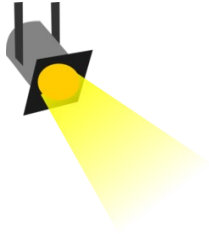
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Greeting from Jennifer S. Hagerman

Chair, Board of Professional Responsibility

The Board of Professional Responsibility, through its excellent staff and many dedicated volunteers, seeks to protect and assist the public, attorneys and the judiciary by providing information and resources about the Rules of Professional Conduct, the disciplinary process and the judicial system in general. I am honored to serve as the newly appointed Chairperson of the Board, which is comprised of 12 members from all three Grand Divisions of our State, and to succeed Floyd Flippin, who served as Chairman for the past three years. The entire Board wishes to express our appreciation and gratitude to Mr. Flippin for his numerous hours of service, legal expertise and, most notably, his positive and focused demeanor as he led the Board through uncertain times during the pandemic. We would also like to thank the approximately 170 Hearing Panel Members, who have varied law practices in cities and towns throughout the State and ensure the fair application of the disciplinary rules. The Board is fortunate to have the strong support and partnership of Justice Holly Kirby, who serves as the Tennessee Supreme Court liaison to the Board, and the exceptional and steady leadership of Chief Disciplinary Counsel and Executive Director Sandy Garrett. Finally, and most importantly, the outstanding staff members provide excellent consumer assistance, offer invaluable guidance to attorneys, investigate possible violations of the Rules, and prepare and handle disciplinary proceedings all the way through to the Tennessee Supreme Court. The Board appreciates the opportunity to serve the fine lawyers of Tennessee, and we hope that the information contained within this edition of Board Notes will be of assistance to all the groups we serve.



TLAP's Efficacy Rates Reflect Best Practices

Buddy Stockwell, Executive Director
Tennessee Lawyer Assistance Program

When the Tennessee Supreme Court Justices hired me in 2020 to run the Court's TLAP program, at the outset I was given specific marching orders to support the Court in providing a top-tier program to the profession. TLAP reviewed its operations top to bottom. At the Court's directive, and informed by national medical experts and clinical studies, TLAP's programming has been successfully revitalized to reflect the current "Gold Standard" for assisting licensed professionals and protecting the public.

Confirming the success of TLAP's progress, we are very excited to announce that in FY 2021-2022 TLAP's monitoring program generated an unprecedented 85% no-relapse success rate in alcoholism and addiction cases.

While astonishing, and perhaps even unbelievable to some (considering relapse is often accepted as the likely outcome of addiction treatment for the general public), an 85% no-relapse recovery rate is in fact the expected outcome in monitoring programs that implement best practices for licensed professionals.

At the core of TLAP's current programming, individualized services are key. The facilitation of objective and reliable diagnostics and treatment is provided on a case-by-case basis. It is imperative that individualized diagnostics, and treatment if indicated, provide a solid foundation that precedes TLAP monitoring. Also, TLAP has upgraded the terms of its monitoring agreements, adjusted lengths of monitoring to reflect clinical best practices, and includes individualized components as needed.

Monitoring is purely clinical. It is not punishment or probation. It is clinically designed to support long-term recovery without relapse, not only during the monitoring period but going forward in life thereafter. Think of monitoring as post-surgery antibiotics that should be fully completed even if you are feeling better. A

number of TLAP's monitoring participants are totally confidential and voluntary, and are not involved in any bar admissions or disciplinary matters. They are not bound to TLAP and are fully protected by confidentiality. They can always quit monitoring at any time with no questions asked, but most want the benefit of TLAP and its 85% no-relapse recovery rate.

Of course, in addition to supporting recovery and mental health, monitoring also provides the participant with an opportunity to generate an independent and objective record of fitness to practice if need be. TLAP compliance supports the possibility of licensure or reinstatement despite a prior history of impairment and/or impairment-related unethical conduct.

Change is difficult, especially when standards and requirements are enhanced. The disease of addiction always seeks to negotiate "an easier, softer, way" and bristles when it is denied.

The most challenging TLAP monitoring cases involve formal referrals to TLAP by the Board of Law Examiners (BLE) or Board of Professional Responsibility (BPR). Per Court Rules, these regulatory agencies can make an official referral to TLAP.

Some of these official referrals do not want help and want no part of TLAP. Others want to design their own attenuated monitoring program and have TLAP endorse it. Still others try to bully and attack TLAP, instead of cooperating. A fair amount of fragmented, negative, and inaccurate misinformation gets spread around about TLAP in these cases. Behind the scenes, however, you can rest assured that there is always a complete record that supports TLAP's recommendations.

To ensure that accurate information is available about TLAP and its monitoring services, TLAP's website includes a Frequently Asked Questions (FAQ) page located at: <https://tlap.org/faqs/> If you or someone you know has a question or concern about TLAP that is not answered on the website, please call us directly and we will be happy to help.

It is heartwarming to witness the progress of TLAP's monitoring participants. In the fullness of time, even formal BLE and BPR referrals who were initially angry about TLAP monitoring can and do come to appreciate TLAP's invaluable support. The following is a sampling of feedback from a person formally referred to TLAP (presented here anonymously and with permission). This person has completed a journey that began in resistance, transitioned to cooperation, and arrived at appreciation and gratitude:

"I was so incredibly lucky to have TLAP on my side and in my corner. I was not happy or in the best state of mind when I came to them in the beginning, and I could not have been easy to work with. But now, I cannot thank the staff at the Tennessee Lawyers Assistance Program enough for everything they have done for me. For over two years they have collaborated with me, guiding and helping me with my struggles, giving me perspective and encouragement, holding me accountable, and never giving up on me. More importantly, they never let me give up on myself. They understood my struggles and never judged. They genuinely cared about me, and I could feel that they were just as invested in helping me reach my goals and digging myself out of the hole that I had created as I was. They gave me hope and courage and always reminded me that if I just continue to do the next right thing I will be exactly right where I am supposed to be!"

And while a lot of discussion ensues about TLAP's monitoring in cases involving disciplinary referrals, it is very important for the profession to know that those cases are by far the smallest percentage of TLAP's case load. The majority of TLAP's support is rendered quietly behind the scenes in totally confidential cases wherein the person has discretely reached out to TLAP voluntarily and needs TLAP's help. In total privacy, all of us begin working collaboratively together toward solutions and recovery.

In fact, in FY 2021-2022, fifty-six percent (56%) of TLAP's new cases were totally confidential self-referrals, and thirteen percent (13%) were confidential cases referred by concerned third parties (such as friends, family, or law firm members).

Thus, the vast majority of TLAP's cases do not have any BLE or BPR involvement. Twelve percent (12%) of TLAP's cases were BLE referrals, and another twelve percent (12%) were BPR referrals. Seven percent (7%) were referrals from Law School Deans, Judges, the Board of Judicial Conduct, and other state LAPs.

Also, of important note, fifty-three percent (53%) of TLAP's new cases were limited to mental health issues such as depression and anxiety. These cases did not have any component of alcohol or drug issues. Only thirty-three percent (33%) of TLAP's new cases last year included Substance Use Disorders. The other fourteen percent (14%) of cases presented with a myriad of issues such as marital conflict, financial distress, performance productivity, cognitive impairment, stress, eating disorder, domestic abuse, and compulsive behaviors.

These statistics bear witness to the fact that issues such as depression, anxiety, compassion fatigue, burnout, vicarious trauma, and others have outstripped alcohol and addiction issues in our profession.

In response to all of these mental health issues, TLAP, like many other state LAPs, has long been a full-service, comprehensive support program that facilitates help with any type of mental health issue. In fact, TLAP even offers a brand-new category of monitoring support via Mental Health Monitoring Agreements tailored to support recovery from issues such as depression or anxiety.

Another very important development is the creation of the new TLAP Foundation. It is an independent 501(c)(3) corporation that was formed under the auspices of the Supreme Court with a mission to provide loans and financial support to participants who do not have health insurance or cannot otherwise afford to follow TLAP's recommendations. This component of support is indispensable to providing a path forward in cases where the participant is fully cooperative and wants to take advantage of TLAP but does not have the financial ability to do so.

Against the backdrop of all the above, it is clear that TLAP has made significant progress in implementing best practices as a full-service professionals'

program. Of course, TLAP's staff could not have moved the program forward without strong leadership and endorsement by the Tennessee Supreme Court, Administrative Office of the Courts, TLAP Commission and Advisory Members, TLAP Foundation, and all of TLAP's Peer Monitors and Volunteers. But for their strong support, TLAP could not have achieved these exciting advances in 2022.

TLAP is also very grateful for the opportunity to serve other stakeholders in the profession such as the Board of Law Examiners, Board of Professional Responsibility, and Tennessee Bar Association. TLAP certainly appreciates their strong support as well. It is TLAP's humble honor to be of service and it is TLAP's pledge to always maintain the integrity and reliability of its programming, not only to support recovery at exceptional rates but also to help protect the public from the harm that impaired professionals can cause.

There is still much work to do!

In 2023 TLAP will remain focused on educating the profession about TLAP's programming and TLAP will continue on its mission to develop and provide the best and most effective life and career-saving services possible to the lawyers, judges, law firms, and law students in Tennessee.

Responding to Orders Compelling Disclosure of Confidential Client Information

Steven J. Christopher¹

This article will provide guidance to attorneys who are served with an order seeking to compel disclosure of confidential client information. This circumstance requires attorneys to comply with the directives of the tribunal, while also fulfilling their ethical obligation to protect confidential client information.

Confidentiality of Client Information

Confidentiality is the principal duty that is implicated when an attorney is served with a court order for production of client information. The duty of confidentiality encompasses any information relating to the representation of the client.² This duty is broader than attorney-client privilege, discussed infra, which generally applies only to attorney-client communications for the provision of legal advice or services.³

Attorneys have a duty to protect client information from unauthorized disclosure.⁴ Any information relating to the representation of current clients may be disclosed only if the client provides informed consent to disclosure, if the disclosure is impliedly authorized to carry out the representation, or if disclosure is permitted by one of the circumstances defined at RPC 1.6(b), or required by one of the circumstances defined at RPC 1.6(c).⁵ Even when disclosure is permitted or required, the attorney may only disclose whatever information is reasonably necessary to effectuate the purpose of disclosure.

¹ Deputy Chief Disciplinary Counsel of Investigations at the Tennessee Board of Professional Responsibility of the Supreme Court of Tennessee.

² Tenn. Sup. Ct. R. 8, Rule 1.6(a). The Tennessee Rules of Professional Conduct, codified at Rule 8 of the Tennessee Supreme Court Rules, will be cited as RPC __.

³ See RPC 1.6, Comment [3].

⁴ RPC 1.6(d).

⁵ RPC 1.6(a)(1)-(3).

The attorney's duty of confidentiality regarding former clients is defined at RPC 1.9(c). Attorneys are prohibited from revealing information relating to the representation of former clients or using any such information to the disadvantage of the former client unless the former client provides informed consent, confirmed in writing, disclosure would be required or permitted in the circumstance of a present client, or where the information has become "generally known."⁶

The only significant distinction for purposes of disclosure of confidential information for current and former clients is the "generally known" exception. However, for practical purposes, the generally known exception will seldom be relevant in the context of judicially compelled disclosure. Information falls within the generally known exception when the information would be available through some publicly available means.⁷ Comment [8a] of RPC 1.9 confirms, for example, that information contained in books or records in public libraries, public-record depositories, etc. is generally known if the particular information is obtainable through publicly available indexes and similar methods of access.⁸ Additionally, information is not generally known when a person could obtain the information only by means of special knowledge or substantial difficulty and expense.⁹

Given the difficulty of seeking to compel disclosure of client information subject to RPC 1.6 or RPC 1.9 through adjudication, it would be expected that the party seeking disclosure would avail themselves of any alternative publicly available means of obtaining the

⁶ RPC 1.9(c).

⁷ RPC 1.9, Comment [8a]. Whether information is generally known depends upon all the circumstances relevant in obtaining the information. *Id.* The "generally known" exception was the subject matter of ABA Formal Ethics Opinion 479. The ABA Ethics Committee suggests a very narrow reading of the exception, stated that information is generally known for purposes of Model Rule 1.9 if the information is "widely recognized by members of the public in the relevant geographic area; or is widely recognized in the former client's industry, profession, or trade." Further, the ABA Committee stated that "information that is publicly available is not necessary generally known."

⁸ RPC 1.9, Comment [8a].

⁹ *Id.*

documentation. Similarly, a tribunal reviewing a request from a party for disclosure of confidential client information might decline to do so when the information at issue falls within the “generally known” exception and can be accessed through publicly available means.

In addition to protecting the confidentiality of information for current and former clients, attorneys are equally responsible for protecting the information of prospective clients.¹⁰ A prospective client is an individual who consults with an attorney about the possibility of forming an attorney-client relationship.¹¹ An attorney served with a judicial instrument seeking information obtained from an individual who met with the attorney for the purpose of seeking legal assistance or for whom the attorney provided consultation where no attorney-client relationship was established should carefully review RPC 1.18 and its comments to determine whether the individual falls within the definition of a prospective client and is entitled to the protections defined at RPC 1.6 and RPC 1.9.

Duty to Safeguard Client Property

Orders seeking to compel client information frequently request production of documentation in the client’s paper and/or digital file. Tennessee recognizes that the client file is the property of the client.¹² Moreover, Tennessee has adopted the “entire file” approach which recognizes that the client file includes all documentation obtained during the representation, including attorney work papers and internal memos.¹³ A request to compel client file materials thereby implicates an attorney’s obligation to safeguard client property defined at RPC 1.15 in addition to their obligation to protect confidential information from disclosure. Attorneys

¹⁰ RPC 1.18(b).

¹¹ RPC 1.18(a).

¹² RPC 1.15, Comment [1](confirming that attorneys are required to safeguard client property using the care of a fiduciary).

¹³ Tenn. Formal Ethics Op. 2015-F-160.

subject to court orders involving compelled disclosure of client file information should be cognizant of this fiduciary obligation as they proceed.

The Mandatory Exception to Confidentiality for Judicially Compelled Disclosure

The principal ethical rule that addresses judicially compelled disclosure of information is RPC 1.6(c)(2), which requires the disclosure of client information to comply with an “order of a tribunal,” but only after the lawyer has asserted on behalf of the client all non-frivolous claims that the information sought by the tribunal is protected from disclosure by the attorney-client privilege or other applicable law.¹⁴ Tennessee’s RPC 1.6(c)(2) is based upon American Bar Association Model Rule (hereinafter, “Model Rule”) 1.6(b)(6), which provides that a lawyer may reveal information relating to the representation of the client to the extent the lawyer reasonably believes necessary to comply with “other law or a court order.”

Model Rule 1.6(b)(6) differs from Tennessee’s rule in two significant respects. The Model Rule is discretionary rather than mandatory. The Model Rule additionally does not, on its face, require the attorney to raise applicable defenses and disclose confidential information only when these defenses are denied. However, when the American Bar Association Standing Committee on Ethics and Professional Responsibility (hereinafter, the “ABA Committee”) provided guidance on Model Rule 1.6(b)(6) in its Formal Opinion 473, the ABA Committee confirmed the need for attorneys to raise privilege and other defenses absent informed consent from the client. The ABA Committee reasoned that taking this action was required to fulfill attorney’s overriding requirement to protect client confidential information.¹⁵

Notification to the Client

When served with an instrument compelling disclosure of information, the attorney should first provide notice to the current or former client. The client is the holder of the

¹⁴ RPC 1.6(c)(2).

¹⁵ ABA Formal Op. 473 (Feb. 17, 2016).

confidentiality privilege and attorney-client privilege and should be notified so that they can be advised of the option of claiming or waiving their privilege.¹⁶

For current clients, notification of an order to compel confidential information also is required for compliance with an attorney's overriding communication duties.¹⁷ Attorneys are required to keep clients reasonably informed about the status of the matter, and to promptly inform the client of any decision or circumstance with respect to which the client's informed consent is required.¹⁸

After providing notice to the client of the order, the attorney should engage in an analysis of whether any valid defenses to disclosure exist, described infra. It is crucial that such analysis be completed, and the results discussed with the client, prior to the client deciding whether to waive confidentiality and attorney-client privilege. For the client's waiver decision to be fully informed, the client must be provided with sufficient information about whether meritorious grounds exist to objecting to disclosure. Informed consent is defined as "agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."¹⁹ While the specifics for informed consent will vary depending on the circumstances, informed consent in the context of a confidentiality waiver will generally require the provision of information to the client of the anticipated advantages and disadvantages to disclosure, and confirmation of options and alternatives.²⁰

If a current or former client cannot be located for purposes of notification or does not respond to the notification, the attorney is required to consider and raise applicable defenses to

¹⁶ See Smith County. Educ. Assoc. v. Anderson, 676 S.W.2d 328, 333 (Tenn. 1984).

¹⁷ RPC 1.4(a)(3).

¹⁸ RPC 1.4(a)(1) and RPC 1.4(a)(3).

¹⁹ RPC 1.0(e); RPC 1.0, Comment [6]-[7].

²⁰ RPC 1.0, Comment [6].

disclosure of the information. The current or former client's declination to respond to a notification is insufficient to establish a waiver of confidentiality.

Conflicts of Interest

Prior to meeting with the client to discuss the order compelling disclosure of information, the attorney should consider any potential concurrent conflict of interest that exists. The information at issue might implicate the attorney's own conduct as well as the client, and create potential personal exposure for the attorney. If this is the case, the attorney should carefully consider whether there is a significant risk that their personal interest arising out of their own potential exposure and culpability could materially limit their provision of objective and sound legal advice to the client regarding waiver of confidentiality.²¹ If an attorney concludes that a concurrent conflict exists, a waiver may only be obtained from the client if permitted by RPC 1.7(b). Otherwise, the attorney should refer the client to other counsel to be properly advised of their options regarding confidentiality waiver and the viability of any defenses to disclosure if confidentiality is not waived.

Referral to Other Counsel

There may be circumstances where an attorney may not have the requisite experience to advise the client about potential defenses to disclosure and defend the client in the underlying legal proceeding if the client chooses not to waive their privilege. This would not be true in the typical case where an attorney is served with an order compelling information in a proceeding where the attorney is counsel of record. However, there could be circumstances where an attorney is served with an order seeking client information in a legal proceeding involving an area of substantive law unfamiliar to the attorney, or where the attorney solely handles transactional work and lacks sufficient courtroom experience to competently raise applicable defenses to disclosure.

²¹ A concurrent conflict exists where there is a substantial risk that the attorney's responsibilities to a client will be materially limited by a personal interest of the attorney. RPC 1.7(a)(2).

It is not improper for an attorney without requisite experience to handle a legal matter, if they engage in sufficient research of applicable substantive and procedural law to provide competent representation and/or associate with experienced counsel.²² However, the timeframe for responding to an order compelling disclosure is typically limited, so attorneys with insufficient relevant experience would need to prioritize the research and consultation with outside counsel required to provide competent representation to the client. Additionally, while attorneys without requisite experience may proceed to advise the client and adjudicate any defenses if they engage in suitable research and consultation, their lack of experience should be disclosed promptly to the client, to provide the client with the opportunity to consult with counsel with relevant expertise.

Whether An Attorney Can Charge a Fee for Defending Against Disclosure

The Tennessee Rules of Professional Conduct do not address the issue of whether an attorney may charge a fee for advising the client of any defenses to the court order, and/or representing the client in defense of the order. It would generally be appropriate to charge a present or former client for work in advising and defending against the court order, provided that the client consents to the billing arrangement and the fee otherwise complies with the Tennessee Rules of Professional Conduct. However, while it is not per se improper to charge a fee for this work, RPC 1.6(c)(2) ethically obligates the lawyer to raise any applicable defenses prior to disclosure of the information. An attorney is not relieved from their obligations defined at RPC 1.6(c)(2) if the client cannot be located or a suitable fee arrangement cannot be reached.

Any fee arrangement must be objectively reasonable based upon the factors codified at RPC 1.5(a), and the fee arrangement would need to be clarified with the client at the outset or within a reasonable amount of time after, as required by RPC 1.5(b). For current clients, the provision of advice and representation in defense of disclosure may fall within the parameters

²² RPC 1.1, Comment [2] (“a lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar...A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through association of a lawyer of established competence in the field in question”).

of the existing fee agreement. For example, if an attorney agrees to represent a client in a legal proceeding for a flat fee, covering any work that needs to be completed through trial or settlement, the legal work involved in connection with the order compelling disclosure would fall within the scope of the fee agreement. Charging a fee for the work would constitute an unreasonable fee in violation of RPC 1.5(a). In contrast, if an attorney agrees to represent a client in the same legal proceeding through a billing arrangement, it would be proper for the attorney to charge the client for the time billed for the work in advising and defending the client in connection with the order.

Defenses to the Applicability of RPC 1.6(c)(2)

An attorney served with a court order where RPC 1.6(c)(2) is implicated is required to raise all nonfrivolous defenses to disclosure if the client does not waive confidentiality and attorney-client privilege. The attorney should particularly consider whether any defense can be raised to the applicability of RPC 1.6(c)(2) itself (i.e. whether the instrument compelling disclosure of information is an “order” entered by a “tribunal”). Aside from RPC 1.6(c)(2), attorneys are only required to disclose information relating to the representation of a client to prevent reasonably certain death or substantial bodily harm (RPC 1.6(c)(1)), under circumstances triggered by RPC 3.3 (candor to a tribunal), RPC 4.1 (misrepresentation to a third party), or where disclosure is required by “other applicable law.”²³ Consequently, if RPC 1.6(c)(2) is deemed inapplicable and no other mandatory ground for disclosure applies, the attorney would have an independent ground to contest disclosure.

In most cases implicating RPC 1.6(c)(2), there will not be any nonfrivolous argument to raise regarding the applicability of RPC 1.6(c)(2), such as the circumstance where an order is entered in a civil proceeding following the Court’s granting of a motion to compel the information at issue. However, where the instrument at issue is not entered by a judicial official, there may

²³ RPC 1.6(c)(1)-(3).

be a basis to argue that the instrument is not an “order.”²⁴ Counsel should review applicable law and commentary to determine whether any meritorious arguments can be raised on this issue.

Depending upon the forum of the legal proceeding where the instrument is issued, there may be a meritorious argument that the entity which has issued the instrument is not a “tribunal.” A “tribunal” is broadly defined as follows:

“Tribunal” denotes a court (including a special master, referee, judicial commissioner, or other similar judicial official presiding over a court proceeding), an arbitrator in a binding arbitration proceeding, or a legislative body, administrative agency, or other body acting in an adjudicative capacity. A legislative body, administrative agency, or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.²⁵

In most cases, it will be self-evident that the body compelling disclosure is a “tribunal.” However, in circumstances where this is not self-evident, the attorney should carefully consider whether the information is being compelled by an entity that falls outside the definition.

Defenses to Disclosure Based Upon Attorney-Client Privilege

RPC 1.6(c)(2) requires the attorney served with an order to consider any defenses to disclosure that exist based upon attorney-client privilege. Attorney-client privilege in Tennessee is an evidentiary doctrine which provides as follows:

No attorney, solicitor, or counselor shall be permitted, in giving testimony against a client or person who consulted the attorney, solicitor or counselor professionally, to disclose any communication made to the

²⁴ The term “order” is not defined in the Tennessee Rules of Professional Conduct and the comments to RPC 1.6 do not provide guidance on the manner of construing the term within the context of RPC 1.6(c)(2).

²⁵ RPC 1.0(m).

attorney, solicitor, or counselor as such by such person during the pendency of the suit, before or afterward, to the person's injury.²⁶

The privilege covers communications by the client to the lawyer and covers communications by the attorney to the client if the attorney's communication is responding to a confidential client communication or if the attorney statement would otherwise directly or indirectly reveal confidential client communications if disclosed.²⁷

The policy rationale of the attorney-client privilege is to encourage frank discussion between attorney and client.²⁸ Prohibiting attorneys from court compelled disclosure of client communications heightens client confidence in making sensitive disclosures to their attorneys, which in turn facilitates attorneys having a full picture of their client's legal position, putting the attorney in a position to fully advise the client.

As the privilege applies only to attorney-client communication, significant information that is subject to judicial compulsion may not fall within the scope of attorney-client privilege, such as certain inter office communications, attorney work product, and other documentation in the client's file. Moreover, while having broad application to communications, the privilege does not encompass all communications between attorney and client.²⁹ Instead, the party asserting the privilege must prove that the communications at issue were made in the context of an attorney client relationship and with the intent that the communications remain

²⁶ TENN. CODE ANN. § 23-3-105. The following discussion of the attorney-client privilege and its exceptions is not intended to be comprehensive or exhaustive, and attorneys with potential privilege defenses should make thorough review of applicable Tennessee legal authority.

²⁷ State v. Buford, 216 S.W.3d 323 (Tenn. 2007); Boyd v. Comdata Network, Inc., 88 S.W.3d 203, 213 (Tenn. Ct. App. 2002).

²⁸ Federal Ins. Co. v. Arthur Anderson & Co., 816, S.W.2d 328, 330 (Tenn. 1991); The Tennessean v. Tennessee Dept. of Personnel, M2005-02578-COA-R3-CV, 2007 WL 1241337, at *5 (Tenn. Ct. App. April 27, 2007)("[t]he policy behind recognition of the [attorney client privilege] is that the administration of justice requires that communications between clients and attorneys be free of concern that the communication would be publicly disclosed."); Boyd v. Comdata Network, Inc., 88 S.W.3d at 202.

²⁹ Bryan v. State, 848 S.W.2d 72, 80 (Tenn. Crim. App. 1992).

confidential.³⁰ The privilege does not extend to communications between an attorney and a client when they contain advice based upon public information rather than confidential information relating to the representation.³¹ The privilege does not extend to general questions of law when no facts are disclosed or inferred implicating the client.³²

Other limitations on the doctrine have been recognized. The privilege is inapplicable when the client communication is made to further an illegal act.³³ If the client discloses the information, this is deemed to waive the privilege.³⁴ Waiver may also have occurred when the communications are made in the presence of a third party.³⁵ In addition to express waiver of confidentiality by the client, the privilege may be deemed impliedly waived through a client's affirmative act where the client put the protected information at issue by making it relevant to the proceeding and the application of the privilege would deny the opposing party access to information vital to their defense.³⁶

Consider Any Other Applicable Potential Defenses

Attorneys seeking to avoid judicial compulsion of information are also required to consider any other defenses based upon "applicable law."³⁷ Additional defenses may be based in

³⁰ Bryan v. State, 848 S.W.2d at 80; State ex rel. Flowers, 209 S.W.3d 595, 616 (Tenn. Ct. App. 2006).

³¹ Bryan v. State 848 S.W.2d at 80 (citing Congoleum Industries, Inc. v. G.A.F. Corp., 49 F.R.D. 82, 85-86 (E.D. Pa. 1969), aff'd, 478 F.2d 1398 (3d Cir. 1973)).

³² Jackson v. State, 293 S.W. 539, 540 (Tenn. 1927).

³³ Id.

³⁴ State v. Buford, 216 S.W.3d 323, 326 (Tenn. 2007).

³⁵ State ex rel. Flowers, 209 S.W.3d 595 at 616.

³⁶ Bryan v. State, 848 S.W.2d at 80.

³⁷ RPC 1.6(c)(2).

the substantive law of the legal proceeding where the information is sought, or the procedural law governing the legal proceeding. Attorneys who are unfamiliar with the substantive or procedural law of the legal proceeding where the confidential information is sought should consult with and/or refer the client to specialized counsel.

An example of a commonly applicable additional defense to disclosure is the work product doctrine, which protects documentation prepared by the attorney in anticipation of litigation.³⁸ The work product doctrine is codified at Tenn. R. Civ. P. 26.02, and limits disclosure of information prepared in anticipation of litigation. A party seeking such information is required to make a showing that they have a substantial need for the documentation and are unable without due hardship to obtain the substantial equivalent of the materials at issue. The work product doctrine includes reports made by a client where the documents have been prepared in anticipation of litigation.³⁹

Like the attorney-client privilege, the work product doctrine is qualified and subject to various limitations.⁴⁰ For example, the work product protection may be waived when the client voluntarily discloses the information.⁴¹ The protections can additionally be waived by implication under various circumstances.⁴² The scope of any waiver is construed on equitable principles.⁴³

³⁸ Arnold v. City of Chattanooga, 19 S.W.3d 779, 783 (Tenn. Ct. App. 1999)(citing Vythoukas v. Vanderbilt University Hospital, 693 S.W.2d 350 (Tenn. Ct. App. 1985)).

³⁹ Arnold v. City of Chattanooga, 19 S.W.3d at 783 (Tenn. Ct. App. 1999)(citing Downing v. Bowater, 846 S.W.2d 265 (Tenn. Ct. App. 1992)).

⁴⁰ Vythoukas v. Vanderbilt University Hospital, 693 S.W.2d at 350.

⁴¹ Campbell County Bd. of Educ. v. Brownlee-Kesterson, Inc., 677 S.W.2d 457, 463 (Tenn. Ct. App. 1984)(attorney waived work product protection through disclosure to opposing party).

⁴² Arnold v. City of Chattanooga, 19 S.W.3d at 788 (citing Granite Partners, L.P. v. Bear Stearns & Co., 184 F.R.D. 49 (S.D.N.Y. 1999)).

⁴³ Id.

The Requirement to Decline from Pursuit of Frivolous Defenses

Any additional defenses raised to disclosure must be meritorious, as the attorney's obligation to raise defenses is subject to RPC 3.1. RPC 3.1 prohibits an attorney from asserting an argument on behalf of a client unless after reasonable inquiry the lawyer has a basis in law and fact for doing so that is not frivolous.⁴⁴ RPC 3.1 is not implicated solely due to an attorney's perception that the defense asserted might not ultimately prevail, provided that the attorney is able to make a good faith argument based upon existing law or an argument for the modification of existing law.⁴⁵ The client should be provided with notice of the attorney's perception of the relative likelihood of success of the argument(s) raised, so that the client can give appropriate consideration in determining how they wish to proceed.

Requirements Following Judicial Denial of Defenses to Disclosure

If any applicable defenses are raised and denied by the tribunal, the attorney is required by RPC 1.6(c)(2) to disclose whatever information is responsive to the order. However, prior to doing so, the attorney should review any appellate, post-trial, or reconsideration mechanisms that are available through the applicable rules of court or analogous rules of an administrative proceeding.

RPC 1.6 and its comments do not address whether the attorney is required to exhaust appeal remedies, and any appeal or other further review sought would be subject to RPC 3.1. The attorney should consider the applicable standard of review in their analysis of the merit of any appeal or request for review. The attorney should consult with the client about any available appeal avenues, providing appropriate analysis of the likelihood of success. Attorneys without specialized experience in appellate work may wish to consult with outside counsel or refer the client to outside counsel for consultation on this issue.

⁴⁴ RPC 3.1. See also RPC 3.1, Comment [1] (“the advocate has a duty to use legal procedure for the fullest benefit of the client’s cause, but also a duty not to abuse legal procedure”).

⁴⁵ RPC 3.1, Comment [2].

Further Inquiry

If you have questions about the content of this article, you may contact the author at schristopher@tbpr.org or (615) 361-7500, extension 203. Questions about the article may also be directed to the Board's Ethics Counsel, Laura Chastain, at lchastain@tbpr.org, or (615) 361-7500, extension 212.



Board of Professional Responsibility New Board Members

Ginger Wilson Buchanan received her law degree from the University of Tennessee College of Law in 1995 and has been in solo practice since 1996, focusing on estate planning, probate, real estate and business organization. She served as the Bradley County Commissioner from 2003 to 2006 and was appointed by former Governor Phil Bredesen to the Tennessee Circuit Court 10th Judicial District in 2008.

Ginger currently serves as the Vice Chair on the Board of Directors for the Community Foundation of Cleveland and Bradley County. She is also active with the Pro Bono Program of Legal Aid in Tennessee and is a current member of the Rotary Club of Cleveland, where she previously served as Club President. Ginger is a member of First United Methodist Church of Cleveland.

Dr. Carol Johnson-Dean recently stepped down as Interim President of LeMoyne-Owen College. Prior to her role as Interim President, she served as the Executive Director of New Leaders, South Region, a national organization providing leadership development for aspiring principals and teacher leaders.

Dr. Johnson Dean began her career as a teacher, principal and served as Superintendent of Boston Public Schools, Memphis City Schools, Minneapolis Public Schools and St. Louis Park, MN Public Schools. She was named Minnesota Superintendent of the Year and the Tennessee PTA Superintendent of the Year. She has served on the Harvard University Urban Superintendent's Advisory Board; the University of Michigan School of Education/Dean's Advisory Board and she has served on both the College Board and the Spencer Foundation Board (Chicago).

In 2023, she received the Memphis Theological Seminary President's Humanitarian Award and was recognized by the Brownsville, TN Chapter of the National Society of the DAR at their Women in American History Reception. Dr. Johnson Dean earned a bachelor's degree in Elementary Education from Fisk

University, (Nashville, TN) and master's and doctorate degrees from the University of Minnesota.

Dr. Johnson Dean currently serves on the national boards of Facing History and City Year, and locally on the Assisi Foundation, Overton Park Conservancy, First 8 Advisory, and the Memphis Teacher Residency Boards. As a member of the Memphis Symphony Orchestra Board, she has served as past co-chair of the education committee and is a member of the MSO/Circle of Friends. She is a member of the University of Memphis College of Education Advisory Board, the University of Minnesota Alumni Association Board and the TN HBCU Success Advisory Board. Dr. Johnson is also a member of the Memphis Alumnae Chapter of Delta Sigma Theta Sorority, and the Memphis Chapter of the Links, Inc.

Dr. Johnson Dean grew up in Brownsville, TN. She is married to Dr. Willie Dean, a retired YMCA executive, who is a graduate of Memphis City Schools and the University of Memphis. Together, they share six adult children, and are members of St. Andrew AME Church in Memphis, TN.

Mr. R. Culver Schmid is the Office Managing Shareholder of the Knoxville Office of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, a law firm with over 600 attorneys and 22 offices. His legal career involves serving as a corporate and business attorney with a focus on finance, municipal corporations, real estate development and commercial transactions. Culver has substantial experience representing political candidates and campaign committees on election law matters including campaign finance issues.

Culver has been active in the community in many capacities serving as Senior Warden of the Episcopal Church of the Ascension and Chairman of the Board of Trustees of the Episcopal School of Knoxville. He has also served as Chairman of Knoxville's Community Development Corporation and a member of Governor Bill Haslam's Council for Judicial Appointments. He received the Justice Joe W. Henry Memorial Award from the Tennessee Bar Association for his article entitled "Restoring Rights of Individuals Convicted of a Felony Crime: A Manual".

Culver is a graduate of the Webb School of Knoxville and a 1981 graduate of the College of Arts and Sciences at the University of Virginia. He received his law degree from the University of Tennessee College of Law.



Tennessee Lawyers' Fund for Client Protection New Board Members

Ellie Kittrell is the Director of Early Care and Education Systems at United Way of Greater Knoxville. In her role, she serves as a Bright Start TN fellow and is working with Tennesseans for Quality Early Education to facilitate Knoxville-Knox County's first-ever strategic plan for children birth through 3rd grade, recently launched as the Bright Steps Action Plan.

Ellie was co-founder and Executive Director of Muse Knoxville, a non-profit children's museum, and is a passionate advocate for early childhood and lifelong learning. She also enjoys empowering individuals to thrive in life, work, and play by helping them better understand and embrace their unique gifts.

Ellie and her husband, Matt (Director-CGI Knoxville), are parents to three sons Sam (Freshman-MTSU), Ben (Sophomore—LN STEM), and Zach (Sophomore—LN STEM).

Special Honors

2019 Arts and Culture Honoree, Tribute to Women, YWCA Knoxville & the Tennessee Valley

2018 Leadership Knoxville Class Honoree

2018 Bold Category Nominee, Girls, Inc. Tennessee Valley Elite Awards

2016 40 Under 40 Honoree, Greater Knoxville Business Journal

Chairman Sabi 'Doc' Kumar was elected to the Tennessee House of Representatives in 2014 and has been re-elected in each subsequent election every two years. He is presently the Chairman of the House Insurance Committee.

Dr Kumar is a recently retired general and vascular surgeon. He received his surgical training in Miami, FL, where he completed a Fellowship in Transplantation. He has several academic scientific papers to his credit. He is the inventor of the patented Kumar Clamp that is used in gallbladder surgery. He holds four other patents.

Dr. Kumar practiced surgery in Springfield, Robertson County, Tennessee from 1977-2020. He served as an attending surgeon at NorthCrest Medical Center and Skyline Medical center. He holds an academic appointment as Assistant Professor of Surgery at Vanderbilt University Medical Center.

Dr. Kumar has been married to his wife Linda for 42 years and they have a daughter who is an attorney. Dr. Kumar and his family are active in community affairs.

Telesa Taylor is Senior Associate General Counsel for the Tennessee Department of Human Services.

Telesa received her B.A. from Vanderbilt University in 1997, and a J.D. from Vanderbilt University Law School in 2000. Upon graduating from law school, she served as a judicial law clerk for the Honorable Holly M. Kirby, former Tennessee Court of Appeals Judge and current Tennessee Supreme Court Justice.

Prior to joining the Department of Human Services, Telesa worked in private practice, where she handled a variety of legal matters including personal injury, medical malpractice, employment discrimination, and class action litigation.

Since 2005, Telesa has represented the Department in family assistance issues, adult protective services matters, childcare licensing and assessment matters, vocational rehabilitation matters, employment and disciplinary matters, rule-making hearings, as well as other areas/litigation.

Telesa resides in Memphis, Tennessee where she is an active member of her community, barbecue aficionado, and avid fan of the Memphis Grizzlies and UofM Tigers.



Unidentified Funds Remitted to Tennessee Lawyers' Fund for Client Protection

Sandy Garrett, Chief Disciplinary Counsel

Since June 5, 2020, Tennessee attorneys have remitted \$221,876 in unidentified funds to Tennessee Lawyers' Fund for Client Protection pursuant to Tennessee Supreme Court Rule 8, RPC 1.15(f), allowing attorneys to remit unidentified funds in an IOLTA account to Lawyers' Fund after 12 months of unsuccessfully ascertaining ownership. [Read RPC 1.15\(f\)](#).

The purpose of Lawyers' Fund is to promote public confidence in the administration of justice and the integrity of the profession by reimbursing losses caused by the rare instances of dishonest conduct by attorneys.

The form to remit unidentified funds to Lawyers' Fund can be found on the Lawyers' Fund website at: <https://tlfcp.tn.gov/request-to-remit-unidentified-funds-to-tlfcpl/>.

Disciplinary and Licensure Actions

(October 2022 – March 2023)

PERMANENT DISBARMENTS

DAVID DWAYNE HARRIS, III, BPR #032607

DAVIDSON COUNTY LAWYER

Effective December 12, 2022, the Supreme Court of Tennessee permanently disbarred David Dwayne Harris from the practice of law and ordered him to pay all costs incurred by the Board of Professional Responsibility.

After a default hearing upon the disciplinary petition, a Hearing Panel found that Mr. Harris failed to do any work for the client; failed to expedite litigation; failed to reasonably communicate with his client; charged and collected an unreasonable fee; failed to deposit fees received into an IOLTA and/or trust accounts; failed to respond to the requests of Board for information related to the disciplinary complaint; and failed to participate in the disciplinary proceeding. The Hearing Panel determined the misconduct of Mr. Harris warranted disbarment.

The preponderance of the evidence established that Mr. Harris knowingly violated Tennessee Rules of Professional Conduct 1.3 (diligence), 1.4 (communication), 1.5 (fees), 1.15 (safekeeping property and funds), 1.16 (declining or terminating representation), 8.1 (bar admission and disciplinary matters), and 8.4(a) (misconduct).

JOHNNIE LOUIS JOHNSON, III, BPR #000092

TENNESSEE LAWYER

Effective October 18, 2022, Johnnie Louis Johnson, III, now a resident of Kingsland, Georgia, was disbarred by Order of Reciprocal Discipline entered by the Supreme Court of Tennessee on October 18, 2022. Mr. Johnson III was disbarred from the practice of law by order of the District of Columbia Court of Appeals, entered May 26, 2022. On September 12, 2022, the Supreme Court of Tennessee entered a Notice of Reciprocal Discipline directing Mr. Johnson to demonstrate to the Court, within thirty (30) days of receipt of the Notice, why the discipline imposed by the District of Columbia Court of Appeals should not be imposed by the Supreme Court of Tennessee. Mr. Johnson failed to respond to the directive of the Court.

Mr. Johnson must comply with the requirements of Tennessee Supreme Court Rule 9, Sections 28 and 30.4, regarding the obligations and responsibilities of disbarred attorneys. Mr. Johnson must pay the Court's

costs and expenses within ninety (90) days of the entry of the order.

JANET MONIQUE OKOYE, BPR #027923

TENNESSEE LAWYER

Effective January 6, 2023, the Supreme Court of Tennessee permanently disbarred Janet Monique Okoye from the practice of law and ordered her to pay all costs incurred by the Board of Professional Responsibility.

After a default hearing upon the disciplinary petition, a Hearing Panel found that Ms. Okoye failed to deposit client funds into an IOLTA or other trust account; failed to have an IOLTA or other trust account to keep clients funds; failed to comply with multiple court orders and Special Master reports to deposit funds in her possession with the Court Clerk; knowingly engaged in dishonesty and misrepresentation; failed to respond to the requests of Board for information related to the disciplinary complaint; and failed to participate in the disciplinary proceeding. The Hearing Panel determined the misconduct of Ms. Okoye warranted disbarment.

The preponderance of the evidence established that Ms. Okoye knowingly violated Tennessee Rules of Professional Conduct 1.3 (diligence), 1.4 (communication), 1.15(a), (c), and (e) (safekeeping property and funds), 3.4 (fairness to the opposing party and counsel), 8.1(b) (bar admission and disciplinary matters), and 8.4(c) (misconduct).

SUSPENSIONS

MELISSA ANN BAKER, BPR #035018

WILLIAMSON COUNTY

Effective February 6, 2023, the Supreme Court of Tennessee suspended Melissa Ann Baker from the practice of law for three (3) years, with one (1) year being active suspension pursuant to Tennessee Supreme Court Rule 9, Section 12.2, and the remainder served on probation conditioned upon the appointment of a practice monitor and compliance with any TLAP recommendations. Ms. Baker was also ordered to reimburse the Board of Professional Responsibility for the expenses and costs of this matter.

A Petition and Supplemental Petition for Discipline containing three complaints were filed by the Board against Ms. Baker. The Hearing Panel determined that Ms. Baker failed to file responses to a motion for Rule 11 sanctions and a motion for summary judgment, made material misrepresentations to the trial court

during oral argument, failed to file responses to a motion for sanctions and a motion to compel resulting in the dismissal of the client's case and failed to timely produce information to opposing counsel and filed several inappropriate motions in the juvenile court.

The Panel determined the above conduct of Ms. Baker violated Tennessee Rules of Professional Conduct 1.1 (competence), 1.3 (diligence), 1.4(a) and (b) (communication), 3.1 (meritorious claims), 3.2 (expediting litigation), 3.3(a)(1) (candor toward tribunal), 3.4(c) (fairness to opposing party and counsel), 4.2 (communication with a person represented by counsel), 4.4(a) (respect for rights of third persons), and 8.4 (a), (c) and (d) (misconduct).

Ms. Baker must comply with the requirements of Tennessee Supreme Court Rule 9, Sections 28 and 30.4, regarding the obligations and responsibilities of suspended attorneys and the procedure for reinstatement.

JOSEPH H. CRABTREE, JR. BPR #011451

MCMINN COUNTY

On November 22, 2022, the Supreme Court of Tennessee entered an order suspending Joseph H. Crabtree, Jr., immediately from the practice of law in Tennessee for a period of three (3) years, with one (1) year served on active suspension and the remaining two (2) years on probation. For the first year of probation, he must engage a practice monitor at his own expense. As conditions of reinstatement, he must complete six (6) hours of Continuing Legal Education on ethics and six (6) hours on law office management, in addition to the normal annual CLE requirements, pay restitution to two (2) former clients, and reimburse the Tennessee Lawyers Fund for Client Protection for any funds that it may pay to the complainants.

The Supreme Court found that Mr. Crabtree failed to correct erroneous advice he had given to a client and allowed the statute of limitations to expire on the client's claim and failed to advise the same client to seek independent legal advice before negotiating and completing a settlement of the client's legal malpractice claim. In other cases, he failed to communicate with clients, failed to perform work that he was hired to do, failed to distribute settlement proceeds after depositing them into his trust account, failed to respond to court orders resulting in his clients becoming liable for attorney's fees, and failed over an extended period of time to communicate with clients or keep them informed about their cases. In addition, he failed to file a personal injury suit before the statute of limitations expired, failed to respond to disciplinary counsel's request for information, and failed to repay attorney's fees received for work never performed.

The Supreme Court found Mr. Crabtree's conduct violated Tennessee Rules of Professional Conduct 1.1 (competence), 1.3 (diligence), 1.4 (communication), 1.8 (h) (conflict of interest), 3.2 (expediting litigation),

3.4 (c) (fairness to opposing party and counsel), 8.1 (b) (disciplinary matters), and 8.4 (a), (c), and (d) (misconduct).

Pursuant to Tennessee Supreme Court Rule 9, Section 28.1, the suspension is effective upon entry of the order by the Court. Mr. Crabtree must comply with the requirements of Tennessee Supreme Court Rule 9, Sections 28 and 30.4, regarding the obligations and responsibilities of suspended attorneys and the procedure for reinstatement.

RYAN BODIFORD FEENEY, BPR #020073

TENNESSEE LAWYER

Effective February 6, 2023, the Supreme Court of Tennessee suspended Ryan Bodiford Feeny from the practice of law for six (6) months, with first thirty (30) days being as an active suspension pursuant to Tennessee Supreme Court Rule 9, Section 12.2, and the remainder served on probation.

A Petition for Discipline containing one complaint was filed, alleging Mr. Feeny failed to communicate reasonably with his clients regarding prior suspensions, failed to withdraw from representation during his prior suspensions, and knowingly practiced law on multiple occasions during his prior suspensions.

Mr. Feeny executed a conditional guilty plea acknowledging his conduct violated Tennessee Rules of Professional Conduct 1.4 (communication), 1.16 (terminating representation), and 5.5 (unauthorized practice of law).

Mr. Feeny must comply with the requirements of Tennessee Supreme Court Rule 9, Sections 28 and 30.4 regarding the obligations and responsibilities of suspended attorneys and the procedure for reinstatement.

A. SAIS PHILLIPS FINNEY, BPR #028845

SHELBY COUNTY

Effective December 5, 2022, the Supreme Court of Tennessee suspended A. Sais Phillips Finney from the practice of law for four (4) years with three (3) years being an active suspension and the remaining one (1) year on probation pursuant to Tennessee Supreme Court, Rule 9, Section 12.2. During the one (1) year probationary period, Ms. Finney shall employ and utilize, at her own cost, a practice monitor in accordance with all requirements of Tennessee Supreme Court Rule 9, Section 12.9.

A Petition for Discipline consisting of two (2) complaints was filed by the Board alleging that Ms. Finney failed to reasonably communicate with her clients regarding the status of their case, charged an excessive fee for the work performed and failed to refund all or a portion of retainers. Ms. Finney has

knowingly committed the following violations of the Rules of Professional Conduct: 1.4(a) (communication), 1.5(a) (fees), 1.16(d)(6) (declining and terminating representation), and 8.4(d) (misconduct).

Ms. Finney must comply with the requirements of Tennessee Supreme Court Rule 9, Sections 28 and 30.4, regarding the obligations and responsibilities of suspended attorneys and the procedure for reinstatement.

BRIAN KIRK KELSEY, BPR #022874

SHELBY COUNTY

On December 8, 2022, the Tennessee Supreme Court suspended Brian Kirk Kelsey from the practice of law until further orders of the Court pursuant to Tennessee Supreme Court Rule 9, Section 22.3. Mr. Kelsey pled Guilty to two (2) felonies involving conspiracy to defraud the United States and aiding and abetting the acceptance of excessive contributions.

Pursuant to the Order of the Supreme Court, the matter has been referred to the Board to institute formal proceedings to determine the extent of the final discipline to be imposed upon Mr. Kelsey as a result of his plea of guilty to conduct constituting a serious crime as defined by Tennessee Supreme Court Rule 9, Section 2.

Mr. Kelsey must comply with the requirements of Tennessee Supreme Court Rule 9, Section 28, regarding the obligations and responsibilities of suspended attorneys.

TEMPORARY SUSPENSIONS

GARY LEE ANDERSON, BPR #004515

KNOX COUNTY

On November 17, 2022, the Supreme Court of Tennessee temporarily suspended Gary Lee Anderson from the practice of law upon finding that Mr. Anderson failed to respond to the Board of Professional Responsibility concerning two (2) complaints of misconduct. Section 12.3 of Supreme Court Rule 9 provides for the immediate summary suspension of an attorney's license to practice law in cases of an attorney's failure to respond to a complaint of misconduct.

Mr. Anderson is immediately precluded from accepting any new cases, and he must cease representing existing clients by December 17, 2022. After December 17, 2022, Mr. Anderson shall not use any indicia of lawyer, legal assistant, or law clerk nor maintain a presence wherein the practice of law is conducted. Mr.

Anderson must notify all clients being represented in pending matters, as well as co-counsel and opposing counsel, of the Supreme Court's Order suspending his law license, and is required to deliver to all clients any papers or property to which they are entitled.

Mr. Anderson must comply with the requirements of Tennessee Supreme Court Rule 9, Sections 28 and 12.3(d), regarding the obligations and responsibilities of temporarily suspended attorneys and the procedure for reinstatement.

This suspension remains in effect until dissolution or modification by the Supreme Court. Mr. Anderson may, for good cause, request dissolution or modification of the suspension by petition to the Supreme Court.

ERIC JOHN MONTIERTH, BPR #031679

CAMPBELL COUNTY

On September 23, 2022, the Supreme Court of Tennessee temporarily suspended Eric John Montierth from the practice of law upon finding that Mr. Montierth failed to respond to the Board of Professional Responsibility concerning three (3) complaints of professional misconduct. Section 12.3 of Supreme Court Rule 9 provides for the immediate suspension of an attorney's license to practice law in cases of an attorney's misappropriation of funds, failure to respond to a complaint of misconduct, failure to substantially comply with a Tennessee Lawyer Assistance Program monitoring agreement or otherwise posing a threat of substantial harm to the public.

Mr. Montierth is immediately precluded from accepting any new cases, and he must cease representing existing clients by October 23, 2022. After October 23, 2022, Mr. Montierth shall not use any indicia of lawyer, legal assistant, or law clerk nor maintain a presence wherein the practice of law is conducted. Mr. Montierth must notify all clients being represented in pending matters, as well as co-counsel and opposing counsel, of the Supreme Court's Order suspending his law license, and is required to deliver to all clients any papers or property to which they are entitled.

Mr. Montierth must comply with the requirements of Tennessee Supreme Court Rule 9, Sections 28 and 12.3(d), regarding the obligations and responsibilities of temporarily suspended attorneys and the procedure for reinstatement.

This suspension remains in effect until dissolution or modification by the Supreme Court. Mr. Montierth may, for good cause, request dissolution or modification of the suspension by petition to the Supreme Court.

DANA L. NERO, BPR #025042

DAVIDSON COUNTY

On October 7, 2022, the Supreme Court of Tennessee temporarily suspended Dana L. Nero from the practice of law upon finding that Ms. Nero failed to respond to Disciplinary Counsel concerning a complaint of misconduct. Section 12.3(a) of Supreme Court Rule 9 provides for the immediate summary suspension of an attorney's license to practice law in cases where an attorney fails to respond to Disciplinary Counsel concerning a complaint of misconduct.

Ms. Nero is immediately precluded from accepting any new cases, and she must cease representing existing clients by November 6, 2022. After November 6, 2022, Ms. Nero shall not use any indicia of lawyer, legal assistant, or law clerk, nor maintain a presence wherein the practice of law is conducted.

Ms. Nero must notify all clients being represented in pending matters, as well as co-counsel and opposing counsel, of the Supreme Court's Order suspending her law license and is required to deliver to all clients any papers or property to which they are entitled.

This suspension remains in effect until dissolution or modification by the Supreme Court. Ms. Nero may for good cause request dissolution or modification of the suspension by petition to the Supreme Court.

JENNIFER M. PORTH, BPR #026537

WILSON COUNTY

On August 11, 2022, the Supreme Court of Tennessee temporarily suspended Jennifer M. Porth from the practice of law upon finding Ms. Porth misappropriated client funds, failed to respond to the Board regarding a complaint of misconduct and posed a threat of substantial harm to the public. Section 12.3 of Supreme Court Rule 9 provides for the immediate summary suspension of an attorney's license to practice law in cases of an attorney misappropriating client funds, posing a threat of substantial harm to the public, or failing to respond to the Board regarding a complaint of misconduct.

Ms. Porth is immediately precluded from accepting any new cases and shall cease representing existing clients by September 10, 2022. After September 10, 2022, Ms. Porth shall not use any indicia of lawyer, legal assistant, or law clerk, nor maintain a presence where the practice of law is conducted.

Ms. Porth must notify all clients being represented in pending matters, as well as co-counsel and opposing counsel of the Supreme Court's Order suspending her law license. Ms. Porth is required to deliver to all clients any papers or property to which they are entitled.

Ms. Porth must comply with the requirements of Tennessee Supreme Court Rule 9, Sections 28 and 12.3(d), regarding the obligations and responsibilities of temporarily suspended attorneys and the procedure for reinstatement.

This suspension remains in effect until dissolution or modification by the Supreme Court. Ms. Porth may, for good cause, request dissolution or modification of the suspension by petition to the Supreme Court.

ELLIOTT JAMES SCHUCHARDT, #027016

KNOX COUNTY

On September 21, 2022, the Supreme Court of Tennessee temporarily suspended Elliott James Schuchardt from the practice of law upon finding that Mr. Schuchardt poses a threat of substantial harm to the public. Section 12.3 of Supreme Court Rule 9 provides for the immediate summary suspension of an attorney's license to practice law in cases where an attorney poses a threat of substantial harm to the public.

Mr. Schuchardt is immediately precluded from accepting any new cases, and he must cease representing existing clients by October 21, 2022. After October 21, 2022, Mr. Schuchardt shall not use any indicia of lawyer, legal assistant, or law clerk nor maintain a presence where the practice of law is conducted.

Mr. Schuchardt must notify all clients being represented in pending matters, as well as co-counsel and opposing counsel, of the Supreme Court's Order suspending his law license. Mr. Schuchardt is required to deliver to all clients any papers or property to which they are entitled.

Mr. Schuchardt must comply with the requirements of Tennessee Supreme Court Rule 9, Sections 28 and 12.3(d), regarding the obligations and responsibilities of temporarily suspended attorneys and the procedure for reinstatement.

This suspension remains in effect until dissolution or modification by the Supreme Court. Mr. Schuchardt may for good cause request dissolution or modification of the suspension by petition to the Supreme Court.

DANIEL FORREST WILKINS, BPR #025753

KNOX COUNTY LAWYER

On September 15, 2022, the Supreme Court of Tennessee temporarily suspended Daniel Forrest Wilkins from the practice of law upon finding that Mr. Wilkins failed to respond to the Board regarding a complaint of misconduct. Section 12.3 of Supreme Court Rule 9 provides for the immediate summary

suspension of an attorney's license to practice law in cases of an attorney's failure to respond to the Board regarding a complaint of misconduct.

Mr. Wilkins is immediately precluded from accepting any new cases, and he must cease representing existing clients by October 15, 2022. After October 15, 2022, Mr. Wilkins shall not use any indicia of a lawyer, legal assistant, or law clerk nor maintain a presence where the practice of law is conducted.

Mr. Wilkins must notify all clients being represented in pending matters, as well as co-counsel and opposing counsel, of the Supreme Court's Order suspending his license to practice law. Mr. Wilkins is required to deliver to all clients any papers or property to which they are entitled.

Mr. Wilkins must comply with the requirements of Tennessee Supreme Court Rule 9, §§ 28 and 12.3(d) regarding the obligations and responsibilities of temporarily suspended attorneys and the procedure for reinstatement.

This suspension remains in effect until dissolution or modification by the Supreme Court. Mr. Wilkins may, for good cause, request dissolution or modification of the suspension by petition to the Supreme Court.

PUBLIC CENSURES

CHARLES MARTIN DUKE, BPR #023607

DAVIDSON COUNTY

On October 11, 2022, Charles Martin Duke, an attorney licensed to practice law in Tennessee, received a Public Censure from the Board of Professional Responsibility of the Tennessee Supreme Court.

Mr. Duke agreed to represent a client in probating an estate. An order of guardianship was entered in connection with the handling of the probate estate which required, in pertinent part, that realty within the probate estate be sold and the proceeds deposited with the Court Clerk. Through an inadvertent error, the proceeds were deposited into a bank account opened and maintained by the client in connection with the probate proceeding. After becoming aware of the error, Mr. Duke failed to take proper action to facilitate the transfer of the funds to the Court Clerk or to amend the order of guardianship. Mr. Duke also failed to maintain good communication with his client during the representation.

By these acts, Mr. Duke has violated Rules of Professional Conduct 1.3 (diligent representation), and 1.4 (communication), and is hereby Publicly Censured for these violations.

A Public Censure is a rebuke and warning to the attorney, but it does not affect the attorney's ability to practice law.

ISAIAH SKIP GANT, BPR #025790

DAVIDSON COUNTY

On October 6, 2022, Isaiah Skip Gant, an attorney licensed to practice law in Tennessee, received a Public Censure from the Board of Professional Responsibility of the Tennessee Supreme Court.

Mr. Gant represented a criminal defendant who was convicted of the crimes with which he was charged. After the conviction of his client, Mr. Gant spoke with attorneys for another defendant charged with related crimes, and Mr. Gant told those attorneys that their client was innocent of the charges. This implied that Mr. Gant's client was not innocent. While a motion for new trial was pending for his own client, Mr. Gant had an *ex parte* meeting with the presiding judge and told him that Mr. Gant believed the other defendant was innocent of the charges. Mr. Gant did not have permission of his client to reveal information related to the representation and did not inform his client of these conversations. Mr. Gant continued to represent his client after these conversations.

During the representation of his criminal client, Mr. Gant became aware that a document had been obtained by an attorney for another defendant which contained information related to the representation of Mr. Gant's client. Mr. Gant took some steps to retrieve the document, but he did not report the conduct of the other attorney to the Board of Professional Responsibility for violating the Rules of Professional Conduct.

By these acts, Isaiah Skip Gant has violated Rules of Professional Conduct 1.4 (communication), 1.6 (confidentiality), 1.7 (conflict of interest), 3.5 (impartiality of the tribunal), 8.3 (reporting professional misconduct) and 8.4(d) (prejudice to the administration of justice) and is hereby Publicly Censured for these violations.

A Public Censure is a rebuke and warning to the attorney, but it does not affect the attorney's ability to practice law.

DAVID R. HUGGINS, BPR #014901

SHELBY COUNTY

On February 3, 2023, David R. Huggins, an attorney licensed to practice law in Tennessee, received a Public Censure from the Board of Professional Responsibility of the Tennessee Supreme Court.

Mr. Huggins represented a client in a criminal case. Mr. Huggins failed to take proper action in the case, failed to expedite litigation, and failed to follow court rules and orders. Mr. Huggins also engaged in the unauthorized practice of law and did not comply with court directives.

By these acts, Mr. Huggins violated Rules of Professional Conduct 1.3 (diligence), 3.2 (expediting litigation), 3.4 (knowing violation of an obligation under the rules of a tribunal), 5.5(a) (unauthorized practice of law), and 8.4(d) (misconduct) and is hereby Publicly Censured for these violations.

A Public Censure is a rebuke and warning to the attorney, but it does not affect the attorney's ability to practice law.

JOE RICHARD JUDKINS, BPR #005548

ANDERSON COUNTY

On November 15, 2022, Joe Richard Judkins, an attorney licensed to practice law in Tennessee, received a Public Censure from the Supreme Court of Tennessee and was ordered to pay the costs and fees of the Board of Professional Responsibility.

Mr. Judkins represented a client in a divorce action. Following a disagreement between attorney and client, Mr. Judkins' client discharged him and retained new counsel. Mr. Judkins refused to immediately transfer the client file to his client's new counsel and asserted an attorney's lien in the litigation and over the file materials, pursuant to Tennessee common law and Tennessee Code Annotated § 23-2-102, for the purpose of securing the payment of his fees and the reimbursement of his expenses for his service as counsel. While the assertion of these lien rights was lawful, Mr. Judkins' delay in transferring certain client file materials violated his duties to his former client under Rule of Professional Conduct 1.16(d) (terminating representation).

Mr. Judkins additionally failed to adequately communicate with his client about the terms of the fees to be paid or the manner in which such fees would be paid, failed to provide updates as to the accrual of fees at regular intervals during the representation, and did not notify his client as to the amount of fees owed until after his representation was terminated, in violation of Rule of Professional Conduct 1.4 (communication)

Finally, in an attempt to assert and defend his valid attorney's lien for fees, Mr. Judkins sought and received permission from the Court to intervene in the litigation. Following his intervention, he attempted to participate in the litigation beyond the extent the Court deemed was necessary to assert and defend his lien rights, in violation of Rules of Professional Conduct 8.4(a) and (d) (misconduct).

A Public Censure is a rebuke and warning to the attorney, but it does not affect the attorney's ability to practice law.

HERBERT SANFORD MONCIER, BPR #001910

KNOX COUNTY

On October 31, 2022, Herbert Sanford Moncier, an attorney licensed to practice law in Tennessee, received a Public Censure from the Board of Professional Responsibility of the Tennessee Supreme Court.

Mr. Moncier brought a *qui tam* false claims action on behalf of a client for recovery of funds for Knox County, Tennessee. If the lawsuit was successful, the client would share in any recovery, and Mr. Moncier would receive attorney fees. The client also had a federal suit against Knox County alleging employment violations. Mr. Moncier did not represent the client in the federal suit, which was ordered to mediation. At mediation, the client entered into a monetary settlement of the federal lawsuit. As part of the settlement, the client agreed to dismiss with prejudice the state false claims action. Mr. Moncier opposed his client's decision to settle that state false claims action. He argued in opposition to the settlement agreement and the dismissal with prejudice. The state court dismissed the client's false claims action with prejudice.

After the conclusion of the representation, Mr. Moncier filed a second *qui tam* suit in state court on his own behalf complaining of false claims allegedly made by his former client, Knox County officials, and the former client's attorneys in settling the first state false claims action. The second false claims action was substantially related to the first false claims action. Mr. Moncier acted as his own attorney in the second false claims action and had a personal interest in the second false claims action. Mr. Moncier initially named his former client as a defendant in the second false claims action, but then he voluntarily withdrew the complaint against his former client. The court entered an order disqualifying Mr. Moncier from representing the interests of Knox County in the second false claims action. The court ordered Mr. Moncier to retain successor counsel in the second false claims action. Mr. Moncier failed to comply with the trial court's order prohibiting him from representing himself and requiring him to obtain successor counsel. Mr. Moncier filed pleadings to alter or amend the orders disqualifying him and requiring him to retain successor counsel. The court dismissed the second false claims action.

By these acts, Mr. Moncier, has violated Rules of Professional Conduct 1.2(a) (scope of representation and allocation of authority between client and lawyer), 1.3 (diligence), 1.7 (conflict of interest: current clients), 1.9 (duties to former clients), 3.1 (meritorious claims and contentions), 3.4(c) (fairness to opposing party and counsel), and 8.4(g) (misconduct) and is hereby Publicly Censured for this violation.

A Public Censure is a rebuke and warning to the attorney, but it does not affect the attorney's ability to practice law.

CHRISTOPHER SHAWN ROBERTS, BPR #033510

ROANE COUNTY

On October 13, 2022, Christopher Shawn Roberts, an attorney licensed to practice law in Tennessee, received a Public Censure from the Board of Professional Responsibility of the Tennessee Supreme Court.

Mr. Roberts was retained to represent a client in a bankruptcy proceeding. Mr. Roberts failed to take proper action and failed to expedite litigation concerning the foreclosure of the clients' home. Mr. Roberts also did not respond or communicate to inquiries from his client concerning the foreclosure, failed to keep his clients updated on the status of their bankruptcy proceeding, effectively abandoned the representation and failed to withdraw from the representation.

By these acts, Mr. Roberts has violated Rules of Professional Conduct 1.3 (diligence), 1.4 (communication), 1.16 (declining or terminating representation), and 3.2 (expediting litigation) and is hereby Publicly Censured for these violations.

A Public Censure is a rebuke and warning to the attorney, but it does not affect the attorney's ability to practice law.

PUBLICLY REPRIMANDED

JUSTIN GREY WOODWARD, BPR #0026709

TENNESSEE LAWYER

Justin Grey Woodward of Springfield, Virginia was publicly reprimanded by Order of Reciprocal Discipline entered by the Supreme Court of Tennessee on November 30, 2022. Mr. Woodward received a public reprimand issued by the Georgia State Bar Disciplinary Board on January 19, 2022, for failing to timely or adequately respond to clients and negligently managing his trust account, which inadvertently caused two (2) overdrafts in his trust account in violation of Georgia RPC 1.2(a) (Scope of Representation); 1.4 (Communication); and 1.15(I) (a) and (II)(b) (Safekeeping of Property).

On October 21, 2022, this Court entered a Notice of Reciprocal Discipline directing Mr. Woodward to inform this Court, within thirty (30) days of receipt of the Notice, why the discipline imposed by the Georgia State Bar Disciplinary Board should not be imposed by this Court. Mr. Woodward did not file a response with the Court as ordered.

A Public Reprimand (Public Censure) is a rebuke and warning to the attorney, but it does not affect the attorney's ability to practice law.

REINSTATEMENTS

JOHN MARTIN DRAKE, BPR #030532

DAVIDSON COUNTY

By Order of the Tennessee Supreme Court entered September 23, 2022, John Martin Drake was reinstated to the active practice of law.

On April 28, 2017, John Martin Drake was suspended by the Supreme Court of Tennessee for two (2) years. Mr. Drake filed a Petition for Reinstatement to the practice of law pursuant to Tennessee Supreme Court Rule 9, Section 30.4(d), on March 15, 2022. After a final hearing on the merits, a Hearing Panel found Mr. Drake had demonstrated by clear and convincing evidence that he had the moral qualifications, competency, and learning in law required for admission to practice law in this state, and his resumption of the practice of law within the state would 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 conditioned Mr. Drake's reinstatement to the active practice of law upon serving a two (2) year period of probation during which he completes five (5) additional CLE hours per year applicable to the area of law in which he intends to practice and engage a mentor in the area of law who shall provide a written report to the Board every six (6) months.

STEPHANIE DERRICK GRAY, BPR #025929

DAVIDSON COUNTY

By Order of the Tennessee Supreme Court entered July 13, 2022, Stephanie Derrick Gray was reinstated to the active practice of law.

On June 2, 2014, Ms. Gray was placed on disability inactive status by the Supreme Court of Tennessee. Ms. Gray filed a Petition for Reinstatement to Active Status to the practice of law pursuant to Tennessee Supreme Court Rule 9, Section 12.7(b). The Board found the Petition was satisfactory and submitted an Order of Reinstatement to the Court.

NATHAN SCOTT MOORE, BPR #022530

DAVIDSON COUNTY

By Order of the Tennessee Supreme Court entered October 28, 2022, Nathan Scott Moore was reinstated to the active practice of law with conditions.

On April 14, 2014, Nathan Scott Moore was suspended by the Supreme Court of Tennessee for two (2) years with three (3) months served as an active suspension and the remainder on probation. Mr. Moore filed a Petition for Reinstatement to the practice of law pursuant to Tennessee Supreme Court Rule 9, Section 30.4(d) on October 1, 2021. After a final hearing on the merits, a Hearing Panel found Mr. Moore had demonstrated by clear and convincing evidence that he had the moral qualifications, competency, and learning in law required for admission to practice law in this state, and his resumption of the practice of law within the state would 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 conditioned Mr. Moore's reinstatement to the active practice of law upon his engagement of a practice monitor for a period of one (1) year and compliance with a monitoring agreement as recommended by the Tennessee Lawyer Assistance Program (TLAP).

DANIEL FORREST WILKINS, BPR #025753

KNOX COUNTY

By Order of the Tennessee Supreme Court entered October 11, 2022, Daniel Forrest Wilkins was reinstated to the active practice of law.

On September 15, 2022, Mr. Wilkins was temporarily suspended for failure to respond to the Board of Professional Responsibility. On October 3, 2022, Mr. Wilkins provided a response to the Board and filed a Petition for Dissolution of Order of Temporary Suspension and for Reinstatement to Practice Law. The Board filed a response on October 7, 2022, acknowledging a substantive response from Mr. Wilkins was received, which the Board deemed sufficient for dissolution of the temporary suspension.