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April 10, 2019

Via Email: [LChastain@tbpr.org](mailto:LChastain@tbpr.org)  
Tennessee Board of Professional Responsibility  
10 Cadillac Drive, Suite 220  
Brentwood, Tennessee 37027

**RE: Comment on Formal Ethics Opinion 2019-F-167**

Dear Members of the Board of Professional Responsibility:

Thank you for soliciting public comments on Formal Ethics Opinion 2019-F-167 (the "Opinion"). We write to add our professional perspectives on the Opinion. Among us, we have decades of experience representing product manufacturers, including virtually every domestic and foreign manufacturer who has sold cars and light trucks in the United States in the past 30 years. We write not as representatives of a particular client, however, but as members of the Tennessee bar. This letter reflects our views, not the views of any of our clients.

The Opinion appears to be based on a number of assumptions that are either incorrect or that fail to consider the perspective of the automotive product liability bar as a whole. This letter will address three of those assumptions: (1) that "[t]he most compelling evidence when establishing the existence of a defect in a vehicle is the existence of other similar incidents," Opinion at 2; (2) that attorneys who represent plaintiffs in automotive product liability cases must acquire vehicles to avoid spoliation; and (3) that automotive manufacturers can enforce an attorney's promise to later destroy a vehicle that has been the subject of a product liability case.

None of us has ever encountered a case where "[t]he most compelling evidence when establishing a defect in a vehicle is the existence of other similar incidents." This assertion, which the Opinion offers with no evidence or analysis, ignores the burden of proof in a product liability action. A plaintiff who has filed a product liability action over alleged defects in her vehicle must prove that her vehicle was defective or in an unreasonably dangerous condition when it left the manufacturer's control and that the alleged defect injured her. She need not prove, and even plaintiffs who prevail at trial often do not prove, that some other vehicle was defective. For this reason, courts across the country routinely exclude so-called "other incident" evidence under a wide variety of rules of evidence including but certainly not limited to Rules 401, 402, 403, 701, 801, and 802. See, e.g., *H.B. Hunt Transport, Inc. v. Gen. Motors Corp.*, 243 F.3d 441, 445 (8th Cir. 2001); *Johnson v. Ford Motor Co.*, 988 F.2d 573, 579-80 (5th Cir. 1993); *Nachtsheim v. Beech Aircraft Corp.*, 847 F.2d 1261, 1268-70 (7th Cir. 1988); *Blevins v. New Holland N. Am, Inc.*, 128 F. Supp. 2d 952, 960-61 (W.D. Va. 2001); *Watson v. Ford Motor Co.*, 699 S.E.2d 169, 179-80 (S.C. 2010); *Nissan Motor Corp. v. Armstrong*, 145 S.W.3d 131, 140-43 (Tex. 2004). A plaintiff

who cannot point to evidence of a defect in *her* vehicle often faces summary judgment regardless of what evidence about other vehicles might demonstrate.

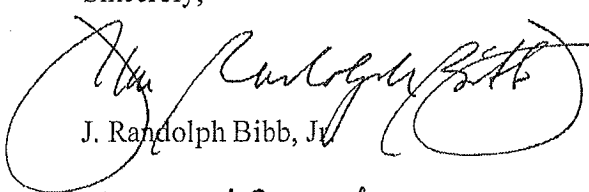
The Opinion also relies on a second assumption that is less explicitly stated but no more accurate than the assumption concerning the utility of "other incident" evidence. Specifically, the Opinion assumes that attorney purchase and storage of vehicles involved in automotive product liability cases is somehow required to ensure preservation of the vehicle. Again, our experience is the opposite. By far, the two most common entities who store vehicles during the pendency of product liability cases are plaintiffs themselves and their insurance companies. Many insurance companies will place vehicles on a "legal hold" for the duration of the case at a storage facility like CoPart or Insurance Auto Auctions based on a simple written request from either party to the case. Attorneys and parties doubtless have duties of evidence preservation, but while there may be some cases where an attorney's duty requires acquiring a vehicle, those cases are the exception, not the rule. In addition, attorney purchases of vehicles raise concerns under RPC 1.8(i) that the Opinion does not address at all. Attorney purchases of vehicles involved in product liability cases are neither required nor common.

Finally, the Opinion implicitly assumes the enforceability of an agreement between a law firm and automotive manufacturer that an allegedly defective vehicle will not be repaired and returned to service. The Opinion recognizes that automotive manufacturers have a legitimate interest in ensuring that allegedly defective vehicles are not returned to service. The Opinion falls short, however, in that it only addresses this interest by suggesting that the law firm's promise to destroy the vehicle and not return it to service is sufficient.

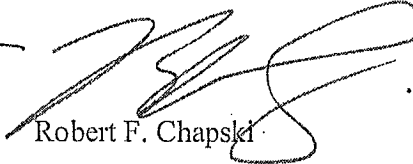
When a plaintiff owns a vehicle, the parties may obviously negotiate destruction of the vehicle as part of a settlement agreement. The automotive manufacturer may enforce that agreement through the enforcement mechanism to which the parties agreed as part of the settlement agreement. That is not so when an attorney owns a vehicle. Under Formal Ethics Opinion 98-F-141, attorneys may not be parties to settlement agreements. Thus, the automotive manufacturer has no contractual basis to enforce the law firm's promise that it will not permit the vehicle to be returned to service. Without a contract, the law firm's promise is likely void for lack of consideration, meaning that the automotive manufacturer has no legal basis for enforcement at all. Thus, the Opinion prevents automotive manufacturers from pursuing their legitimate interest in ensuring that allegedly defective vehicles are not returned to service.

Thank you again for soliciting public comments on the Opinion. We hope that our observations will assist the Board in developing an ethics opinion that is useful to all attorneys.

Sincerely,



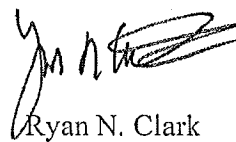
J. Randolph Bibb, Jr.



Robert F. Chapski



Whitney Henry Kimerling



Ryan N. Clark

April 9, 2019

Mark P. Chalos  
Partner  
mchalos@lchb.com

VIA EMAIL  
LCHASTAIN@TBPR.ORG

Laura Chastain  
Board of Professional Responsibility of the Supreme Court of Tennessee  
10 Cadillac Drive, Suite 220  
Brentwood, TN 37027

RE: Comments re: Draft Formal Ethics Opinion 2019-F-167

Dear Ms. Chastain:

I am writing in response to the Board's request for public comments regarding draft Formal Ethics Opinion 2019-F-167 - Confidentiality Provisions in Settlement Agreements.<sup>1</sup> As a lawyer who has represented both defendants and plaintiffs in products liability actions, I support the conclusions of the Board's draft opinion: settlements that require a lawyer to destroy key physical evidence as a material condition should be considered improper under Tennessee's ethics rules. The draft opinion provides valuable going-forward guidance for Tennessee attorneys.

As an initial matter, in my practice I represent businesses, municipalities, injured persons, Native American tribes, and health benefit funds in individual cases and class action litigation in federal and state courts. Over the course of the 21 years I have been practicing law in Tennessee, I have represented defendants and plaintiffs in products liability lawsuits involving serious injuries and deaths. I have also worked cooperatively with federal and state agencies, as well as non-governmental organizations, that seek to protect the public safety. As such, I am familiar with the importance of physical evidence and related information being shared appropriately, particularly when public safety is at stake.

First, as outlined in the draft opinion, the Board's reasoning and conclusion is consistent with prior guidance from the Board, including wherein the Board concluded that it would be improper for attorneys to propose or accept certain confidentiality terms that would prohibit a lawyer from any future use of information learned during the representation, such as referencing the incident central to the plaintiff's case, the year, make, and model of the subject

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<sup>1</sup> The opinions expressed in this letter are mine alone, and they are not necessarily the opinions of my law firm or any other organization with which I am affiliated.

vehicle, or the identity of the defendant. Formal Ethics Opinion 2018-F-166. The draft opinion is also consistent with ABA Formal Opinion 93-371, which explains that both direct and indirect restrictions on a lawyer's ability to practice might run afoul of the Rules of Professional Conduct. In short, this Board's and the ABA's prior interpretations of the Rules of Professional Conduct, as well as the public policy concerns that underlie those opinions, squarely support the draft opinion at issue.

Second, in addition to the Rules cited and applied in the draft opinion (RPC 3.4(a) and 5.6(b)), the conclusions of the draft opinion are also consistent with Tennessee attorneys' obligations to promote and to be dedicated to the "public good." Rules of Professional Conduct Preamble, paragraph 1. As the Rules recognize, Tennessee attorneys are called to be "expert[s] in law pursuing a learned art in service to clients and in the spirit of public service." *Id.* As such, at the least, the Rules' spirit suggests that Tennessee attorneys should not contribute, even unintentionally, to concealing by agreement from the public material information about potentially life threatening dangers.

And the concern about concealing dangers from the public is not merely speculative. When settling litigation, defendants - often large corporate manufacturers - or their insurers frequently insist that the settlement and all facts surrounding it remain secret. Recent history includes numerous examples of secret litigation settlements allowing dangerous products to continue to pose safety risks to the public. For example, in the following instances it appears that early lawsuits were settled in secret and, following those secret settlements, many deaths and injuries occurred:

- **Takata's exploding airbags** – Twenty-four deaths worldwide and hundreds of serious injuries have been linked to exploding airbags that were in tens of millions of vehicles. It appears that Takata and automakers privately settled early wrongful death lawsuits regarding the airbags before the airbags were recalled, despite Takata knowing about the defect in their airbags since 2000. In February 2017, Takata pleaded guilty to fraud for covering up the defects.
  - <https://www.news.com.au/technology/innovation/motoring/motoring-news/takata-alleged-to-have-known-about-airbag-defects-as-early-as-2000/news-story/080fdfd29b8931eb113fa9701d8f1785>;
  - <https://www.craigslist.com/article/20141118/NEWS01/141119793/takata-airbag-settlements-keep-details-from-other-victims>
- **GM ignition switch defect** - Deaths of at least 124 people have been linked to allegedly defective ignition switches in more than 30 million GM vehicles worldwide. GM secretly settled its first wrongful death suit that related to the alleged ignition switch defect in 2005, nine years before a safety recall was finally initiated.

- o <https://www.usatoday.com/story/opinion/2014/03/10/sealed-settlements-general-motors-priests-bridgestone-firestone-editorials-debates/6270853/>
- o <https://www.usatoday.com/story/money/cars/2017/10/20/gm-settles-deadly-ignition-switch-cases-120-million/777831001/>
- **Goodyear G159 RV Tires** – Deaths of at least 89 people in recreational vehicle (RV) wrecks have been linked to allegedly defective Goodyear tires. Goodyear apparently knew about an alleged defect in its tires since 2002 and privately settled cases many years before the federal regulators launched a safety investigation in 2018.
  - o <https://jalopnik.com/why-didnt-goodyear-recall-an-rv-tire-thats-linked-to-at-1826608206>
  - o <https://www.clevescene.com/cleveland/investigation-goodyears-20-year-quest-to-keep-details-of-deaths-and-settlements-from-the-worst-tire-ever-made-secret/Content?oid=16384525>

These tragedies are, unfortunately, only representative examples of the type of harm that could result from excessive secrecy in litigation settlements. As the Rules clearly state, Tennessee lawyers – regardless of which litigation party they represent – should not make agreements that unduly restrict lawyers’ ability to represent persons or the public’s access to justice. Similarly, Tennessee lawyers should not contribute to hiding safety risks from the public and potentially endangering lives. In so holding, the Board’s draft opinion is consistent with the letter and spirit of the Rules of Professional Conduct.

Thank you.

Sincerely,



Mark P. Chalos

**Laura Chastain**

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**From:** Herschel Rosenberg <hrosen@hrosen.net>  
**Sent:** Wednesday, April 03, 2019 3:17 PM  
**To:** Laura Chastain  
**Subject:** FORMAL ETHICS OPINION-2019-F-167

Dear Mrs. Chastain,  
PROPOSED OPINION

I AM TOTALLY IN FAVOR OF THE  
Herschel L.Rosenberg

## Laura Chastain

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**From:** Thomas Greer <tgreer@BaileyGreer.com>  
**Sent:** Wednesday, April 03, 2019 11:51 AM  
**To:** Laura Chastain  
**Subject:** FEO 2019-F-167

Ms. Chastain –

I'm writing in support of the draft Formal Ethics Opinion 2019-F-167.

I have been faced with the defendant's insistence that a product be destroyed as a condition of settlement several times. This presents a very difficult dilemma for the lawyer. The injured client typically does not care about the product, but the destruction of the product often hampers other litigation the lawyer is handling or will likely be handling in the future. The measures cited in the draft opinion in which the firm agrees not to place the product back in service and ultimately destroy the product is ample protection for the defendant. If indeed a product is ever placed back in service and someone is injured, the firm, not the defendant, would be liable. Further, the public policy considerations cited in the draft opinion are all well-reasoned and all lean in favor of the Board's ultimate conclusion.

In short, I am wholeheartedly in favor of this draft opinion and I commend the Board for taking action on this subject.



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# GARY K. SMITH LAW, PLLC

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April 1, 2019

VIA EMAIL LChastain@tbpr.org

Tennessee Board of Professional Responsibility  
10 Cadillac Drive #220  
Brentwood, Tennessee 37027

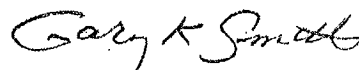
RE: Formal Ethics Opinion 2016-F-161 and 2019-F-167 (draft)

Dear Members of the Board:

I am writing the Board with respect to the above issue regarding settlement conditions requiring the destruction of records or evidence. I have been practicing for forty-six years and exclusively do plaintiffs' high stakes litigation in the area of medical negligence, insurance bad faith, products liability, and other catastrophic negligence cases. It is not at all unusual upon the settlement of these cases for the defendants to require the return or the destruction of the evidence. Even during the pendency of these cases, proposed protective orders propose similar restrictions. I have never agreed to those for the reasons that are articulated well in the above Opinions. I consider it to be a violation of the code of conduct to have any restriction placed on my ability to represent future clients. Moreover, I also need to protect the integrity of my file. In the hopefully unlikely event that there could be a malpractice claim or an ethics complaint, I certainly need the integrity of my file to be protected. I strongly urge the adoption of the rule.

Yours truly,

GARY K. SMITH LAW, PLLC



GARY K. SMITH, BPR No. 8124

GKS/sec

**Laura Chastain**

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**From:** bkramer@appersoncrump.com  
**Sent:** Monday, April 01, 2019 10:47 AM  
**To:** Laura Chastain  
**Subject:** Draft Formal Ethics Opinion - destruction of evidence as condition of Settlement

Ms. Chastain

I have reviewed the proposed FEO and am of the opinion that it should be adopted and issued by the Board as in the public interest to protect the integrity of the judicial fact finding process and the independence of attorneys in protecting their clients.

Thank you for consideration of my thoughts.

*Bruce S. Kramer*

Apperson Crump, PLC  
6070 Poplar Ave, Suite 600  
Memphis, TN 38119  
901-756-6300

## Laura Chastain

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**From:** Wade R. Orr <worr@luedeka.com>  
**Sent:** Monday, March 25, 2019 4:16 PM  
**To:** Laura Chastain  
**Subject:** Solicited Comments to the most recent TBPR Opinion  
**Attachments:** draft\_feo\_2019-f-167.pdf

Ms. Chastain,

This is to note my approval of the attached draft opinion regarding whether it is ethical for corporate auto manufacturer-defendant to insert language into a Release and Settlement Agreement which forces the Plaintiff/Plaintiff's attorney to destroy a defective vehicle post-settlement. I think the Board rightly reasons in the draft opinion that this is unethical when the vehicle can be used as evidence in a subsequent case.

Thanks,  
Wade

### Wade R. Orr

*Intellectual Property Attorney*



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## Laura Chastain

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**From:** William cremins <wmcremins@gmail.com>  
**Sent:** Friday, March 15, 2019 9:45 AM  
**To:** Laura Chastain  
**Subject:** 2019-F-167 proposed ethical requirement to destroy products liability subject car

I think this proposal is unrelated to ethical lawyering. I think this is a means of helping makers of defective products avoid responsibility for making dangerous or defective products. The proposed requirement ought not be required of any lawyer.

Bill Cremins

**Laura Chastain**

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**From:** Chuck Yezbak <yezbak@yezbaklaw.com>  
**Sent:** Thursday, March 14, 2019 3:30 PM  
**To:** Laura Chastain  
**Subject:** Draft-FEO-2019-F-167

This is a well reasoned opinion and I support its adoption.

Chuck Yezbak  
Yezbak Law Offices  
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