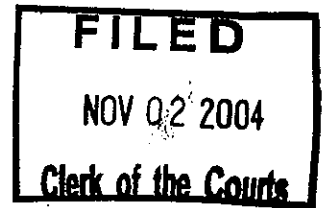


IN THE SUPREME COURT OF TENNESSEE  
AT NASHVILLE



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

---

No. M2004-00382-SC-RL2-RL

---

**ORDER**

On February 19, 2004, the Court released its opinion in John Doe v. Jane Doe, 127 S.W.3d 728 (Tenn. 2004), holding that the confidentiality requirement set out in section 25 of Rule 9, Tenn. S. Ct. R., violated the free speech protections of Article I, section 19 of the Tennessee Constitution and of the First Amendment to the United States Constitution. The Court simultaneously entered an order publishing for public comment a proposed amendment to Rule 9, section 25, to address the constitutional concerns discussed in the opinion. The order provided that the proposed amendment would serve as an interim rule pending the Court's final action on the amendment.

The period for public comments expired on August 2, 2004. Comments were submitted by the Attorney General and Reporter, the Board of Professional Responsibility, the Tennessee Bar Association, the Knoxville Bar Association, and by three individual attorneys. In addition to the comments regarding the proposed amendment, the Court also received a separate proposal to amend two sections of Rule 9, a proposal submitted by the Disciplinary Counsel of the Board of Professional Responsibility and the Chair of the Tennessee Lawyer Assistance Program ("TLAP"); that proposal would address the interaction between the BPR and the TLAP. After considering all

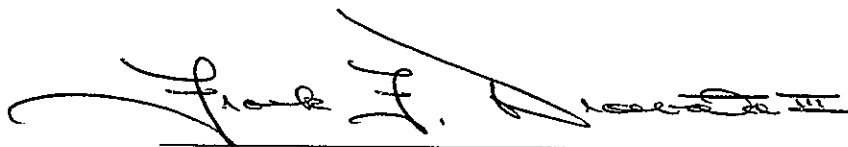
of the comments regarding the proposed amendment, as well as the separate proposal pertaining to the BPR and the TLAP, the Court finds that Rule 9 should be amended as set out in the attached Appendix A.

Accordingly, Rule 9 of the Rules of the Tennessee Supreme Court is hereby amended as set out in the attached Appendix A. With the following exception, the amendments set out in Appendix A shall apply only to complaints or petitions for discipline filed on or after the date of this order. Section 25.5, as amended, shall apply both prospectively and retroactively.

The Clerk is directed to provide a copy of this order, including Appendix A, to the Administrative Office of the Courts, and the AOC is directed to post the order and appendix on the Tennessee Supreme Court's website.

IT IS SO ORDERED.

FOR THE COURT:



FRANK F. DROWOTA, III, CHIEF JUSTICE

## *APPENDIX A*

### *Amendments to Rule 9, Rules of the Tennessee Supreme Court*

#### **Section 4.3. Temporary suspension.**

[amend the current first sentence of Section 4.3 to read as follows:]

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

#### **Section 8. Investigation.**

[amend the current Section 8 to read as follows:]

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

All investigations, whether upon complaint or otherwise, shall be initiated by the Board, acting through its Chair or Vice-Chair, and conducted by Disciplinary Counsel. Upon the conclusion of an investigation, Disciplinary Counsel may recommend dismissal, informal admonition of the attorney concerned, or a private reprimand, public censure or prosecution of formal charges before a hearing committee. If the recommended disposition is dismissal or informal admonition, it shall be reviewed by the reviewing member of a hearing committee in the appropriate Disciplinary District who may approve or modify it. Disciplinary Counsel may appeal to the Board the action of the hearing committee member. If the recommended disposition is private reprimand, public censure, or prosecution of formal charges before a hearing committee, the Board shall review the recommendation and approve or modify it. The Board may determine whether a matter should be concluded by dismissal or informal admonition; may recommend a private reprimand or public censure; or, may direct that a formal proceeding be instituted before a hearing committee in the appropriate Disciplinary District and assign it to a hearing committee for that purpose. A respondent-attorney (hereafter "respondent") shall not be entitled to appeal an informal admonition approved by the reviewing hearing committee member or imposed by the Board; similarly, a

respondent may not appeal a recommended private reprimand or public censure by the Board. In either case, however, the respondent may, within twenty (20) days of notice thereof, demand as of right that a formal proceeding be instituted before a hearing committee in the appropriate Disciplinary District. In the event of such demand, the informal admonition shall be vacated or the recommended private reprimand or public censure shall be withdrawn, and the matter shall be disposed of in the same manner as any other formal hearing instituted before a hearing committee.

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

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

Following the service of the answer or upon failure to answer, the matter shall be assigned by the Chair to a hearing committee.

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

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

8.3. The hearing committee shall, in every case, submit its findings and judgment, in the form of a final decree of a trial court, to the Board within 15 days

after the conclusion of its hearing. The Board shall immediately serve a copy of the findings and judgment of the hearing committee upon the respondent and the respondent's counsel of record. Any petition for certiorari therefrom must be filed in the circuit or chancery court having jurisdiction within 60 days of the mailing or service of such judgment.

8.4. If the hearing committee finds one or more grounds for discipline of the respondent, the committee's judgment shall specify the type of discipline imposed: disbarment (Section 4.1), suspension (Section 4.2), or public censure (Section 4.4). Temporary suspension (Section 4.3), private reprimand (Section 4.5), and private informal admonition (Section 4.6) are not available types of discipline following a formal disciplinary proceeding.

If the judgment of the hearing committee is that the respondent shall be disbarred or suspended for any period of time in excess of three months and no appeal therefrom is perfected within the time allowed therefor, or if there is a settlement providing for a disbarment or suspension for any period of time in excess of three months, at any stage of disciplinary proceedings, the Board shall forward a copy of the judgment or settlement to the Supreme Court of Tennessee. The Court shall review the recommended punishment provided in such judgment or settlement with a view to attaining uniformity of punishment throughout the state and appropriateness of punishment under the circumstances of each particular case. The Court may direct that the transcript or record of any proceeding be prepared and filed with the Court for its consideration.

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

If the judgment of a hearing committee is appealed to the circuit or chancery court and the trial court enters a judgment disbarring or suspending respondent for any period of time in excess of three (3) months and no appeal therefrom is perfected within the time allowed therefor, the trial court shall forward a copy of its judgment to the Clerk of the Supreme Court for the grand division in which the respondent

maintains or maintained an office for the practice of law, and this Court shall enter an order of enforcement of said decree.

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

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

[amend the current Section 13.2 to read as follows:]

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

**Section 25. Confidentiality**

[delete the current Section 25 in its entirety and replace it with the following new Section 25:]

1           25.1. All matters, investigations, or proceedings involving allegations of  
2 misconduct by or the disability of an attorney, including all hearings and all  
3 information, records, minutes, files or other documents of the Board, Hearing  
4 Committee Members and Disciplinary Counsel shall be confidential and privileged,  
5 and shall not be public records, until or unless:

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

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

11                   (c) the respondent-attorney requests that the matter be public;  
12 or

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

15 (e) in matters involving alleged disability, this Court enters  
16 an order transferring the respondent-attorney to disability inactive  
17 status pursuant to Section 21.

18 25.2. In disability proceedings referred to in Section 25.1(e), the order  
19 transferring the respondent-attorney to disability inactive status shall become a public  
20 record upon filing; however, all other documents relating to the respondent-attorney's  
21 disability proceeding, including any subsequent petition for reinstatement after  
22 transfer to disability inactive status, shall not be public records and shall be kept  
23 confidential. An order granting a petition for reinstatement after transfer to disability  
24 inactive status shall become a public record upon filing.

25 25.3. All work product and work files (including internal memoranda,  
26 correspondence, notes and similar documents and files) of the Board, Hearing  
27 Committee Members, and Disciplinary Counsel shall be confidential and privileged  
28 and shall not be public records.

29 25.4. In order to protect the interests of a complainant, respondent, witness,  
30 or third party, the Board of Professional Responsibility may, at any stage of the  
31 proceedings, upon application of any person and for good cause shown, issue a  
32 protective order prohibiting the disclosure of specific information or documents, or  
33 the closure of any hearing, and direct that the proceedings be conducted so as to  
34 implement the order, including requiring that the hearing be conducted in such a way  
35 as to preserve the confidentiality of the information that is the subject of the  
36 application.

37 25.5. All participants in any matter, investigation, or proceeding shall  
38 conduct themselves so as to maintain confidentiality. However, unless a protective  
39 order has been entered, nothing in this Section or these Rules shall prohibit the  
40 complainant, respondent-attorney, or any witness from disclosing the existence or  
41 substance of a complaint, matter, investigation, or proceeding under these Rules or  
42 from disclosing any documents or correspondence filed by, served on, or provided  
43 to that person.

44 25.6. In those disciplinary proceedings in which judicial review is sought  
45 pursuant to Section 1.3, the records and hearing in the Circuit or Chancery Court and  
46 in this Court shall be public to the same extent as other cases.

47 25.7. The provisions of this rule shall not be construed to deny access to  
48 relevant information to authorized agencies investigating the qualifications of judicial  
49 candidates; or to other jurisdictions investigating qualifications for admission to  
50 practice; or to law enforcement agencies investigating qualifications for government  
51 employment; or to prevent the Board from reporting evidence of a crime by an

52 attorney or other person to courts or law enforcement agencies; or to prevent the  
53 Board from reporting to the Tennessee Lawyer Assistance Program evidence of a  
54 disability that impairs the ability of a lawyer to practice or serve; or to prevent the  
55 Board or Disciplinary Counsel from defending any action or proceeding now pending  
56 or hereafter brought against either of them. In addition, the Board shall transmit  
57 notice of all public discipline imposed by the Supreme Court on an attorney or the  
58 transfer to inactive status due to disability of an attorney to the National Discipline  
59 Data Bank maintained by the American Bar Association.

60 25.8. Nothing in this Section is intended to limit or repeal any confidentiality  
61 or privilege afforded by other law.

62 *[END OF APPENDIX A]*