

STATE OF TENNESSEE

OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

February 21, 2012

Opinion No. 12-17

Rights of Persons Who File Attorney Disciplinary Complaints

QUESTIONS

1. In attorney disciplinary proceedings under Tennessee Supreme Court Rule 9, what are the rights of a person (complainant) who files a disciplinary complaint against an attorney member of the Board of Professional Responsibility (Board) if that complaint is dismissed?
2. Do the confidentiality provisions of Section 25 of Rule 9 prohibit the disclosure to a complainant of the respondent attorney's response to the disciplinary complaint?
3. Is a complainant entitled to an explanation for the dismissal of a disciplinary complaint as approved by the Board or the Chief Justice of the Tennessee Supreme Court?
4. Is it constitutional for the Board or the Chief Justice, as the case may be, to review the complainant's appeal of the dismissal of a disciplinary complaint?

OPINIONS

1. The "rights" of a complainant arise from the provisions of Tennessee Supreme Court Rule 9, §§8 and 9. Section 8 applies to disciplinary complaints against attorneys in general. Section 9 applies to disciplinary complaints against attorney members of the Board, disciplinary counsel, and district committee members. Under both sections a complainant has the right (1) to file a written disciplinary complaint, (2) to receive notice from disciplinary counsel (§8) or special disciplinary counsel (§9) if the recommended disposition of the complaint is dismissal, and (3) if dissatisfied with the recommendation of dismissal, to appeal to the Board (§8) or the Chief Justice (§9) in writing within 30 days. *See* Tenn. Sup. Ct. Rule 9, §§8.1 and 9.4(b)(1). A complainant has no other rights in attorney disciplinary proceedings.

2. The answer to this question depends on whether the respondent attorney discloses the response or authorizes its disclosure, or whether disclosure is necessary to the investigation of the allegations of the disciplinary complaint. A respondent may disclose the responses to the disciplinary complaint or may request that the entire proceeding be made public. Tenn. Sup. Ct. Rule 9, §25.5 and 25.1(c). The Board, through disciplinary counsel, has a duty to investigate the allegations of a disciplinary complaint, and it is conceivable that the completion of the

investigation may, to some extent and in some fashion, require that reference be made to information derived from the response to the disciplinary complaint.

3. No. There is no requirement that a complainant be informed of the reasons that led to dismissal of a disciplinary complaint as approved by the Board or the Chief Justice.

4. Yes. First, the rights of a complainant are limited to the rights arising from Rule 9, §§8 and 9. Accordingly, no constitutional rights of the complainant are implicated by the dismissal of a disciplinary complaint. Second, the initial administrative handling of a disciplinary complaint by the Board or the Chief Justice, as the case may be, is ministerial rather than adjudicatory. Therefore, due process rights would not be compromised by the later review by the Board or the Chief Justice of a recommendation of dismissal, even if due process rights were implicated.

ANALYSIS

I. The Supreme Court and the Board of Professional Responsibility

Article VI, Section 1, of the Tennessee Constitution provides that “[t]he judicial power of this State shall be vested in one Supreme Court and in such Circuit, Chancery and other inferior courts as the Legislature shall from time to time, ordain and establish.” The Supreme Court is thus a direct creature of the Constitution and constitutes the supreme judicial tribunal of the State. *See Belmont v. Board of Law Examiners*, 511 S.W.2d 461, 463 (Tenn. 1974).

The licensing and regulation of attorneys practicing law in the courts of Tennessee are squarely within the inherent authority of the judicial branch of government. *Smith County Education Ass’n v. Anderson*, 676 S.W.2d 328, 333 (Tenn. 1984). The Supreme Court “has original and exclusive jurisdiction to promulgate its own Rules,” and “[i]ts . . . authority embraces the admission and supervision of members of the Bar of the State of Tennessee.” *Id.* (quoting *Petition of Tennessee Bar Ass’n*, 539 S.W.2d 805, 807 (Tenn. 1976)). The Supreme Court, “in the exercise of its constitutionally delegated authority, has promulgated rules and regulations governing the practice of law.” *Smith County Education Ass’n*, 676 S.W.2d at 333-34.

The Board was created when the Tennessee Supreme Court promulgated Rule 9 pursuant to its inherent supervisory authority to regulate the practice of law. *See Brown v. Board of Professional Responsibility*, 29 S.W.3d 445, 449 (Tenn. 2000); *Belmont v. Board of Law Examiners*, 511 S.W.2d 461, 462 (Tenn. 1974); Tenn. Sup. Ct. Rule 9, §5. The Board’s authority and all of its functions are derived from the Supreme Court. *Brown*, 29 S.W.3d at 449 (Tenn. 2000). The Board is an agent of the Tennessee Supreme Court, *Doe v. Board of Professional Responsibility*, 104 S.W.3d 465, 470 (Tenn. 2003), and is an arm of the State for purposes of sovereign immunity. *Rayburn v. Board of Professional Responsibility*, 300 S.W.3d 654, 663 (Tenn. 2009).

The Rules of Professional Conduct, which were promulgated by the Supreme Court to govern the ethical and professional behavior of attorneys engaged in the practice of law in

Tennessee, are set forth in Tennessee Supreme Court Rule 8. Rule 9, entitled Disciplinary Enforcement, creates the Board of Professional Responsibility (§5.1), prescribes its duties (§5.5), prescribes the duties of disciplinary counsel (§7), defines the procedures by which alleged violations of Rule 8 are to be determined (§§8 and 9), and defines the various forms of discipline that may be imposed on attorneys found to have violated Rule 8 (§4). *See* Tenn. Sup. Ct. Rule 9.

The Board is authorized to

exercise the powers and perform the duties conferred and imposed upon it by these disciplinary rules, including the power and duty:

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

Id. §5.5. The “ground(s) for discipline” referred to above consist of any violation of an attorney’s oath of office or the Rules of Professional Conduct (set forth at Rule 8). *See id.* §3.2. Thus, the primary purpose of Rule 9 is to provide the infrastructure and procedures for the enforcement of the standards of ethical and professional conduct prescribed by Rule 8.

II. Initial Handling of Disciplinary Complaints

When a disciplinary complaint is filed against an attorney, the Board, through disciplinary counsel, has a duty to investigate the complaint. *Id.*, §§5.5(a), 7.2(b), 8.1, 9.2(a), and 9.4. Following the investigation, disciplinary counsel has a number of options, including a recommendation that the complaint be dismissed. *Id.* A recommendation of dismissal must be reviewed by a district committee member,¹ and, if approved, disciplinary counsel must provide to the complainant notice of the recommendation of dismissal. The complainant then may appeal in writing to the Board, which may approve, modify, or disapprove the recommendation. *Id.*; *Flowers v. Board of Professional Responsibility*, 314 S.W. 3d 882, 891-92 (Tenn. 2010). Regardless of the Board’s disposition, the rights of the complainant are concluded. The complainant has no further right of appeal or review. *Fletcher v. Board of Professional Responsibility*, 915 S.W.2d 448, 450 (Tenn. Ct. App. 1995). A complainant thus instigates a proceeding through which the appropriate licensing agency, in this case the Tennessee Supreme Court, determines whether the attorney in question has violated any of the conditions of his or her license. The complainant is not a party to this action.

Section 9 of Rule 9 provides the specific procedures for handling disciplinary complaints filed against attorney Board members. Those procedures generally are the same as those under

¹ Rule 9 divides disciplinary jurisdiction into nine separate districts in Tennessee. Tenn. Sup. Ct. Rule 9, §2. The Supreme Court appoints one district committee within each district. *Id.* §6. The committee “shall consist of not less than five members, nor more than thirty members of the bar of this State who maintain an office for the practice of law within that district or, if not actively engaged in the practice of law, reside within that district.” *Id.*

Section 8, but with certain modifications, including (1) the disciplinary complaint is filed with the Chief Justice of the Supreme Court, §9.2(b), rather than with the Board; (2) the Chief Justice appoints a special disciplinary counsel to perform the duties ordinarily performed by staff disciplinary counsel, §9.4(a); and (3) the Chief Justice appoints an Associate Justice to serve in the capacity of the Board for purposes of the specific proceeding against the Board member, which Associate Justice does not participate in the potential eventual review of the judgment of a special hearing panel, §§9.4(b) and (c). Tenn. Sup. Ct. Rule 9, §9. These modifications address the inherent conflict with the Board addressing a complaint against one of its own members.

If the appointed special disciplinary counsel recommends dismissal of the complaint, the designated Associate Justice (serving in the capacity of the Board) must review that recommendation. If the recommendation of dismissal is approved, special disciplinary counsel must notify the complainant, and the complainant may appeal to the Chief Justice. *Id.* §§9.4(b) and (b)(1). Regardless of the disposition by the Chief Justice, the complainant has no further rights. The only matter subject to further review through petition to a trial court is a judgment of a hearing panel or special hearing panel, and the only parties with standing to seek such review are the respondent attorney/Board member or the Board/special disciplinary counsel. *Id.* §§1.3 and 9.4(d); *Brown v. Board of Professional Responsibility*, 29 S.W.3d 445, 449 (Tenn. 2000); *Fletcher*, 915 S.W.2d at 450; *Flowers*, 314 S.W. 3d at 892-93.

III. Confidentiality in Rule 9 Proceedings

Section 25 of Rule 9 provides in pertinent part:

25.1 All matters, investigations, or proceedings involving allegations of misconduct by or the disability of an attorney, including all hearings and all information, records, minutes, files or other documents of the Board, district committee members and Disciplinary Counsel shall be confidential and privileged, and shall not be public records, until or unless:

- (a) a recommendation for the imposition of public discipline, without the initiation of a formal disciplinary proceeding pursuant to Section 8.2, is filed with the Supreme Court by the Board; or
- (b) a petition to initiate a formal disciplinary proceeding is filed pursuant to Section 8.2; or
- (c) the respondent-attorney requests that the matter be public; or
- (d) the investigation is predicated upon conviction of the respondent-attorney for a crime; or
- (e) in matters involving alleged disability, this Court enters an order transferring the respondent-attorney to disability inactive status pursuant to Section 21.

...

25.3 All work product and work files (including internal memoranda, correspondence, notes and similar documents and files) of the Board, district committee members, and Disciplinary Counsel shall be confidential and privileged and shall not be public records.

...

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

Tenn. Sup. Ct. Rule 9, §§25.1, 25.3 and 25.5.

These provisions, subject to the stated exceptions and limitations, generally provide for the confidentiality of all information pertaining to attorney disciplinary proceedings. For purposes of the questions addressed in this opinion, exceptions to this broad confidentiality exist when a respondent-attorney requests that the proceedings be made public (§25.1(c)) or when a respondent-attorney discloses his or her response to a disciplinary complaint. (§25.5). *Id.* Otherwise, Section 25 requires confidentiality, unless the completion of the investigation required by sections 5.5(a), 7.2(b), 8.1, 9.2(a), and 9.4 may, to some extent and in some fashion, require that reference be made to information derived from the response to the disciplinary complaint.

The Tennessee Supreme Court has previously articulated the strong policy reasons for requiring that matters related to attorney investigations generally remain confidential, stating:

The purposes underlying confidentiality are obvious. Foremost, the rule serves to protect both the complainant from possible recriminations and the attorney from unsubstantiated charges while a thorough investigation is conducted. Moreover, removing or unnecessarily qualifying the confidentiality requirement would eliminate many sources of information and reduce complaints received by the Board from lay citizens, litigants, lawyers, and judges. Finally, the rule serves to protect public confidence in the judicial system by preventing disclosure of a charge until the directives of section 25 are satisfied.

Doe, 104 S.W.3d at 472.

Rule 9 and its accompanying provisions related to maintaining the confidentiality of investigative records were adopted by the Tennessee Supreme Court pursuant to its “inherent

supervisory power to regulate the practice of law.” *Id.* at 469-70 (citing *Brown*, 29 S.W.3d at 449, quoting *In re Burson*, 909 S.W.2d 768, 773 (Tenn. 1995)). The provisions of Rule 9 relating to confidentiality constitute an exception to the general requirement under Tennessee law that all state records are open for public inspection. Specifically Tenn. Code Ann. § 10-7-503(a)(2)(A) requires that all state records be open for public inspection “unless otherwise provided by state law.” Rule 9, adopted by the Supreme Court pursuant to its inherent authority to regulate the practice of law, is a state law mandating that certain records be maintained as confidential. *See The Tennessean v. Tennessee Department of Personnel*, No. M2005-02578-COA-R3-CV, 2007 WL 1241337, at 6-8 (Tenn. Ct. App. Apr. 27, 2007) (noting that the Supreme Court’s rules requiring the maintenance of certain records as confidential constitute a state law exception to the general rule that State records are open to the public).

IV. Review by Board or Chief Justice of Recommendation of Dismissal

The rights of a complainant arise from the provisions of Tennessee Supreme Court Rule 9, §§8 and 9. These rights are limited to filing a complaint, receiving notice of a recommendation of dismissal, and appealing that recommendation to the Board or the Chief Justice, as the case may be. A complainant has no other or further right of appeal or review, *Fletcher*, 915 S.W.2d at 450, and Rule 9 provides no authority to complain of any failure of the Board to act. *Id.* Accordingly, no constitutional rights of the complainant are implicated by the dismissal of a disciplinary complaint.

When a disciplinary complaint is filed it is first investigated by staff disciplinary counsel or special disciplinary counsel. Rule 9, §§8.1 and 9.4(a). The initial receipt of the complaint by the Board or the Chief Justice (§9.2(b)), as the case may be, is a routine matter that involves no decision-making as to its allegations. The initial handling is thus administrative and ministerial rather than adjudicatory in nature. It is only when the complaint returns to the Board or the Chief Justice for review of a recommendation of dismissal that any decision-making on their part on the merits is involved. Therefore, no constitutional rights of the respondent-attorney are compromised when the Board or the Chief Justice is involved with both the initial receipt of the complaint and later review of a recommendation of dismissal.

ROBERT E. COOPER, JR.
Attorney General and Reporter

WILLIAM E. YOUNG
Solicitor General

TALMAGE M. WATTS
Assistant Attorney General

Requested by:

The Honorable Eddie Bass
State Representative
109 War Memorial Building
Nashville, TN 37243