T H E

T E N N E S S E E

L A W

I N S T I T U T E

PRESENTS

THE

FORTY-EIGHTH ANNUAL

REVIEW SEMINAR

SPEAKERS

Sarah Y. Sheppeard, a shareholder of Lewis, Thomason, King, Krieg and Waldrop PC, is the 2019-2020 President of the Tennessee Bar Association. She is a Past-President of the Knoxville Bar Association and a Rule 31 Mediator listed by the Tennessee Supreme Court. She has a diverse civil practice, with a focus on domestic cases. She was a member of the Tennessee Law Review, and is a Fellow of the American, Tennessee, and Knoxville Bar Foundations. She is a recipient of the TBA's President's Award, the KBA's Governor's award, and the Don Paine Lawyer Legacy Award.

Lucian T. Pera of Memphis is a member of Adams and Reese LLP. His practice includes commercial litigation and media law, as well as counseling and representing lawyers and law firms on questions of legal ethics. He chaired the TBA committee that drafted Tennessee current ethics rules and served on the committee that substantially revised the ABA Model Rules of Professional Conduct in 2002. He has served as Treasurer of the ABA and as President of the TBA.

Wade V. Davies is the Managing Partner at Ritchie, Dillard, Davies & Johnson, P.C. in Knoxville. His practice is primarily criminal defense. He is a Fellow of the American College of Trial Lawyers and serves on the Federal Criminal Procedure Committee. He has served two terms as a member of the Board of Professional Responsibility. He is a past President of the Knoxville Bar Association and is serving his third term on the Board of Directors of the Tennessee Association of Criminal Defense Lawyers.

THE ONES WE MISS

Donald F. Paine started the Tennessee Law Institute in 1972 and was our mentor, chief researcher, beloved leader and great friend to the bench and bar alike, even as he fought cancer for over 34 years. His death in November of 2013 left a huge void in our hearts, but his research techniques and teaching style have continued, making TLI the quality program it has been for over four decades.

John A. Walker, Jr. joined TLI in its second year and was an integral part of the commercial law aspects of our program until his retirement for health reasons in 2011. John passed away in September 2016.

John M. Smartt, although never a lecturer, was TLI's administrator for fifteen years. He was our ringmaster, cheerleader, and was even known to talk a legal secretary into pulling an attorney out of a deposition for an important message: "Joe, I see you haven't signed up for the seminar yet, and I sure wouldn't want you to miss it!" Ironically, John's death was within a week of Don's.

We miss them all, as we continue to carry on the mission of TLI.

ETHICS AND PROFESSIONALISM

I. The Client-Lawyer Relationship (Rules 1.1 - 1.18)

A. Competence, Rule 1.1

In re Doll, Board Release of Information.

Robert Allen Doll, III, of Nashville was suspended for ninety days.

"Mr. Doll failed to timely prepare a Qualified Domestic Relations Order in a divorce case after being ordered to do so. In an unrelated matter, Mr. Doll was convicted of a serious crime and summarily suspended by the Tennessee Supreme Court on May 31, 2017, pursuant to Tenn. Sup. Ct. R. 9, Section 22.3. He was required to notify the divorce client of that suspension but he failed to do so. That suspension remains in effect pending Mr. Doll's appeal of the conviction."

Mr. Doll violated RPCs 1.1 (diligence), and 8.4(a) and (g) (misconduct).

In re Ingram, Board Release of Information.

LaTrena Davis Ingram of Collierville, was publicly censured.

"In the representation of a client in pursuing a medical malpractice claim, Ms. Ingram failed to comply with Tennessee's statutory pre-suit requirements, which led to the dismissal of the lawsuit. On appeal, Ms. Ingram failed to file a transcript or statement of the evidence as required by the Tennessee Rules of Appellate Procedure, which resulted in the dismissal of the appeal and the assessment of court costs against her client."

Ms. Ingram violated RPCs 1.1 (competence), 1.3 (diligence), 3.2 (expediting litigation), and 3.4(c) (disobedience to an obligation under the rules of a tribunal).

In re Pulley, Board Release of Information.

Karl Emmanuel Pulley of Nashville was publicly censured.

"In representing a client in a criminal case, Mr. Pulley failed to request a jury instruction as to the lesser offense of facilitation, which was fairly raised by the proof thereby waiving any chance his client had of being convicted of a lesser charge. In response to a post-conviction petition in which Mr. Pulley's client alleged that Mr. Pulley rendered constitutionally deficient representation, the State, rather than attempting to defend the convictions, entered into an agreed order vacating the convictions and the client was permitted to enter a plea to a lesser charge for a shorter sentence."

Mr. Pulley violated RPCs 1.1 (competence) and 1.3 (diligence).

In re Shipley, Board Release of Information.

Elizabeth Ann Shipley of Cookeville was publicly censured and directed to refund $1,500 in attorney fees to her former clients.

"Ms. Shipley represented clients in defense of a boundary line suit. Ms. Shipley failed to file an answer or enter an appearance in the action, which led to entry of a default judgment. Ms. Shipley failed to take prompt remedial action once notified of the default judgment or protect her clients' interests following her discharge as counsel. Ms. Shipley also failed to maintain good communication with her clients throughout the representation."

Ms. Shipley has violated RPCs 1.1 (competence), 1.3 (diligence), 1.4(a) (communication), 1.16(d) (declining or terminating representation), and 3.4(c) (fairness to opposing party and counsel).

ABA Formal Opinion 482, Ethical Obligations Related to Disasters (Sept. 19. 2019).

"The Rules of Professional Conduct apply to lawyers affected by disasters. Model Rule 1.4 (communication) requires lawyers to take reasonable steps to communicate with clients after a disaster. Model Rule 1.1 (competence) requires lawyers to develop sufficient competence in technology to meet their obligations under the Rules after a disaster. Model Rule 1.15 (safekeeping property) requires lawyers to protect trust accounts, documents and property the lawyer is holding for clients or third parties. Model Rule 5.5 (multijurisdictional practice) limits practice by lawyers displaced by a disaster. Model Rules 7.1 through 7.3 limit lawyers' advertising directed to and solicitation of disaster victims. By proper advance preparation and planning and taking advantage of available technology during recovery efforts, lawyers can reduce their risk of violating the Rules of Professional Conduct after a disaster."

B. Diligence, Rule 1.3

In re Bailey, Board Release of Information.

Erich Webb Bailey of Nashville was publicly censured and required to enter into a monitoring agreement with the Tennessee Lawyers Assistance Program, based on a conditional guilty plea.

"On October 4, 2017, a Petition for Discipline was filed against Mr. Bailey alleging that when he represented the mother in a child custody dispute, he failed to communicate with his client and failed to appear in court when the matter was set for hearing."

Mr. Bailey violated RPCs 1.3 (diligence), 1.4 (communication), and 8.4 (misconduct).

In re Boyd, Board Release of Information.

Daniel Graham Boyd of Rogersville was publicly censured, based on a conditional guilty plea.

"On June 22, 2018, the Board filed a Petition for Discipline alleging that Mr. Boyd failed to diligently represent his clients in a boundary line dispute and failed to adequately communicate with them."

Mr. Boyd violated RPCs 1.3 (diligence), 1.4 (communication), 3.2 (expediting litigation) and 8.4(a) (misconduct).

In re Dawson, Board Release of Information.

Wendell Cornelius Dawson of Nashville was publicly censured.

"Mr. Dawson represented a client applying for cancellation of removal before the immigration court. Although Mr. Dawson presented documentation to the court concerning his client's presence in the United States, he failed to call any witnesses other than his client at the final hearing to satisfy the significant burden of showing exceptional and extremely unusual hardship. Likewise, Mr. Dawson did not diligently represent his client in his appeal. He did not meet with his client to discuss the appeal, and his brief was one page in which he generally argued, without citations to authority or the record, that his client had testified to his presence in the country and the hardship his children would suffer if he were removed from the United States."

Mr. Dawson violated RPC 1.3 (diligence).

In re Hatmaker, Board Release of Information.

Michael Glen Hatmaker of Jacksboro was suspended for five years, with a minimum of four years to be served as an active suspension and the remainder on probation, conditioned on satisfaction of an outstanding judgment and engagement of a practice monitor, based on a conditional guilty plea.

"Mr. Hatmaker executed a conditional guilty plea acknowledging he made material misrepresentations to clients and opposing counsel, failed to expedite litigation and diligently represent clients, failed to reasonably communicate with clients, and failed to properly maintain client funds in his trust account."

Mr. Hatmaker violated RPCs 1.3 (diligence), 1.4 (communication), 1.5 (fees), 1.15 (safekeeping property and funds), and 8.4 (misconduct).

In re Latta, Board Release of Information.

Kevin S. Latta, of Columbia was publicly censured and required to engage a practice monitor for one year.

"Mr. Latta represented a criminal defendant in post-trial proceedings and on appeal. Over the course of two years, he failed to respond in any way to five orders from the court of appeals instructing him to inform the court of the status of the appeal, and he failed to respond to three court orders setting deadlines to file his appellate brief. Mr. Latta also failed to adequately communicate with and respond to inquiries from his client. In mitigation, the court permitted the client's appeal to move forward."

Mr. Latta violated RPCs 1.3 (diligence), 3.4(c) (fairness to opposing party and counsel), 1.4 (communication) and 8.4(d) (prejudice to the administration of justice).

In re Lenihan, Board Release of Information.

Brennan Patrick Lenihan of Oak Ridge was publicly censured and required to engage a practice monitor and issue refunds to affected clients.

"In three separate cases, Mr. Lenihan engaged in a pattern of neglecting client matters. In the first case, Mr. Lenihan ignored his client's attempts to obtain information about their case as well as requests from the Board's Consumer Assistance Program during this time period. In the second case, Mr. Lenihan allowed deadlines that were important to his clients to pass, he did not provide

them with draft pleadings as they requested, and he did not reply to a number of their text messages inquiring as to the status of the matter. In the third case, Mr. Lenihan did not complete his client's amendment to a custody order, he ignored her numerous attempts to communicate with him for several months, including her request for her file and a refund of fees paid, and he ignored inquiries from the Board's Consumer Assistance Program as well. In addition, Mr. Lenihan failed to respond timely to a disciplinary complaint."

Mr. Lenihan violated RPCs 1.2 (scope of representation), 1.3 (diligence), 1.4 (communication), 1.5 (unreasonable fee), 1.16 (terminating representation) and 8.1 (disciplinary matters).

In re Lucas, Board Release of Information.

Randy Paul Lucas of Gallatin was suspended for three years, with six months on active suspension and the remainder on probation, and required to engage a practice monitor during.

"The complaint alleged that Mr. Lucas agreed to represent a client in a personal injury case but failed to take any action on his client's behalf thereby allowing the statute of limitations in this case to expire. Mr. Lucas failed to maintain consistent communication with this client and made repeated misrepresentations to this client. Mr. Lucas entered a Conditional Guilty Plea in this matter, and made a payment to the affected client as compensation for his loss."

Mr. Lucas violated RPCs 1.1 (competence), 1.3 (diligence), 1.4 (communication), 1.8 (conflict of interest), and 8.4 (a), (c) and (d) (misconduct).

In re McNulty, Board Release of Information.

Michael John McNulty of Cleveland was disbarred and required to pay restitution to one client in the amount of $1,125.

"On January 29, 2018, a Petition for Discipline was filed against Michael John McNulty containing two complaints of ethical misconduct. In the first complaint, Mr. McNulty received $1,125 for legal services but provided minimal services and ultimately abandoned the representation of the client. As a result of Mr. McNulty's abandonment, the client was compelled to hire new counsel. In the second complaint, Mr. McNulty falsified an email communication related to a client's matter. Mr. McNulty sent an email to a medical provider which purported to be sent from an attorney who no longer worked at Mr. McNulty's firm. Mr. McNulty did not answer the Petition for Discipline or appear at the final hearing."

Mr. McNulty violated RPCs 1.3 (diligence), 1.4 (communications), 1.5(a) (fees), 1.16(d) (declining and terminating representation), 4.1(a) (truthfulness in statements to others), 8.1(b) (bar admission and disciplinary matters), and 8.4(a) and (c) (misconduct).

In re Nigussie, Board Release of Information.

Aschalew Guadie Nigussie of Decatur, Georgia, was disbarred and required to pay restitution to a client.

"A Petition for Discipline consisting of two complaints of misconduct was filed August 14, 2017. The complaints allege Mr. Nigussie accepted fees from clients, performed little if any work on their behalf and abandoned the cases when he ceased communicating with them. Mr. Nigussie

did not respond to the Petition for Discipline and an Order for Default Judgment was entered against Mr. Nigussie."

Mr. Nigussie violated RPCs 1.3 (diligence), 1.4 (communication), 1.5(f) (fees), 1.16(d) (terminating representation), 8.1(b) (disciplinary matters) and 8.4(a) and (d) (conduct that is prejudicial to the administration of justice).

In re Orfield, Board Release of Information.

Howard Robert Clyde Orfield Bristol was disbarred and required to pay restitution to a client and consult with the Tennessee Lawyers Assistance Program.

"After accepting fee payments for representation in a Chapter 7 Bankruptcy case, Mr. Orfield ceased communicating with his client and failed to perform the services for which he was paid. Mr. Orfield later offered to refund the full balance of the fee paid by the client, but has not done so."

Mr. Orfield violated RPCs 1.3 (diligence), 1.4 (communication), 1.5 (fees), 1.16 (termination of representation), 3.2 (expediting litigation), 8.1 (disciplinary matters), and 8.4(a) and (d) (misconduct).

In re Springer, Board Release of Information.

Paul James Springer, Sr., of Memphis was disbarred and required to pay restitution to clients of $21,855.00.

"A Petition for Discipline consisting of four complaints was filed February 14, 2017, and a Supplemental Petition consisting of seven complaints was filed August 14, 2017.

"After a hearing upon the disciplinary petitions, a Hearing Panel determined Mr. Springer failed to reasonably communicate with his clients, failed to attend scheduled meetings, failed to notify clients of court dates, failed to respond to motions, discovery requests, and show cause orders, continued to practice law after suspension of his license, failed to notify clients of his suspension, failed to withdraw as attorney of record, failed to refund unearned retainers, failed to provide substantive professional services to his clients, failed to file suit in a timely manner, and made material misrepresentations to clients regarding the status of their case."

Mr. Springer violated RPCs 1.1 (competence), 1.2 (scope of representation and allocation of authority between client and lawyer), 1.3 (diligence), 1.4 (communication), 1.7 (conflict of interest), 1.16 (declining or terminating representation), 4.2 (communication with a person represented by counsel), 8.1 (bar admission and disciplinary matters), and 8.4 (misconduct).

In re Suttle, Board Release of Information.

Shantell S. Suttle of Shelby County was publicly censured and required to refund $2,000 to one client.

"Ms. Suttle failed to timely file a client's personal injury lawsuit and also failed to respond to requests for information from her client for three months in late 2016 and for six months in 2017. In another client matter, Ms. Suttle failed to timely pursue the closing of an estate after the initial

filing opening the matter. Ms. Suttle took no action on the estate for more than a year, and failed to timely file an accounting. Ms. Suttle also failed to respond to requests for information from her client for eight months. The client paid Ms. Suttle a $2,300 fee for the estate matter."

Ms. Suttle violated RPCs 1.3 (diligence) and 1.4 (communication).

In re Velasquez, Board Release of Information.

Elizabeth Catherine Velasquez of Sevierville was suspended for five years with three years to be served on active suspension and the remainder on probation, and required to pay restitution to a former client, engage a practice monitor, and contact the Tennessee Lawyer's Assistance Program.

"A hearing panel determined that Ms. Velasquez failed to communicate and diligently represent her client. Ms. Velasquez abandoned the client's case. Ms. Velasquez did not respond to the Petition for Discipline and an Order for Default Judgment was entered against her."

Ms. Velasquez violated RPCs 1.1 (competence), 1.2 (scope of representation and allocation of authority), 1.3 (diligence), 1.4 (communication), 1.5(a) (fees), 1.16(d) (declining or terminating representation), 3.2 (expediting representation), 8.1(b) (bar admission and disciplinary matters), and 8.4(a) and (d) (misconduct).

In re Ward, Board Release of Information.

Alan George Ward of Camden was publicly censured.

"Mr. Ward failed to timely file a Motion for New Trial for a criminal client which limited appellate review solely to sufficiency of the evidence. Mr. Ward then failed to timely file an appeal which resulted in the dismissal of his client's appeal. Mr. Ward also failed to timely file appellate briefs for the client even after being directed to do so by the court."

Mr. Ward violated RPCs 1.3 (diligence), 3.2 (expediting litigation), 3.4(c) (disobeying obligation under rules of a tribunal), and 8.4(a) and (d) (misconduct).

C. Communication, Rule 1.4

In re Davis, Board Release of Information.

Daphne Michelle Davis of Mount Juliet was suspended for three years and required to pay restitution to a client, based on a conditional guilty plea.

"A Petition for Discipline was filed against Ms. Davis on May 18, 2018, alleging that Ms. Davis missed a court date in General Sessions Court resulting in a default judgment against her client in the amount of $25,151.50. After appealing the case to Circuit Court, she unilaterally cancelled a mediation and failed to inform her client of the date the case was set for hearing. Ms. Davis failed to appear, and the appeal was dismissed. Ms. Davis did not inform her client who learned about the dismissal when he received a copy of the judgment from opposing counsel. In another complaint, Ms. Davis promised to refund a fee to her client, but failed to do so until the client filed a complaint with the Board. Finally, Ms. Davis was appointed to represent a client in Criminal Court who entered into a diversion program and as part of probation, was required to

pay $1,968.50 in court costs. The client requested Ms. Davis' assistance in seeking a waiver or reduction of the court costs. Ms. Davis sent the client a questionnaire to complete and return, which the client did. Thereafter, Ms. Davis ceased communicating with her client. Ms. Davis did not respond to the Board in this case."

Ms. Davis violated RPCs 1.2(a) (scope of representation), 1.3 (diligence), 1.4 (communication), l.5(a), (b) and (f), (fees), 1.16(d) and (f) (terminating representation), 3.2 (expediting litigation) 8.l(b) (bar and disciplinary matters) and 8.4(a), (b), (c), and (d) (misconduct).

In re Ford, Board Release of Information.

Carla Ann Kent Ford of Murfreesboro was suspended from the practice of law for five years and required to pay restitution to two former clients.

"On August 11, 2017, the Board filed a Petition for Discipline against Ms. Ford containing three complaints of misconduct. The complaints allege Ms. Ford failed to communicate and diligently represent her clients, and in two of the cases failed to provide written fee agreements. Further, following Ms. Ford's summary suspension in May 2016, Ms. Ford failed to adequately notify her client of her suspension. Ms. Ford did not respond to the Petition for Discipline and an Order for Default Judgment was entered against Ms. Ford."

Ms. Ford violated RPCs 1.3 (diligence), 1.4 (communication), 1.5(a) and (f) (fees), and 1.16(d) (terminating representation).

In re Hopson, Board Release of Information.

Angela Joy Hopson of Jackson was suspended for two years, with thirty days to be served as active suspension and the remainder on probation, and to engage a practice monitor.

The Board of Professional Responsibility filed a Petition for Discipline against Ms. Hopson based upon one complaint of ethical misconduct arising from her representation of a criminal defendant. A hearing panel determined that Ms. Hopson failed to properly manage communication with her client who was incarcerated, causing the client and his family to contact the trial court on multiple occasions with their complaints.

Ms. Hopson violated RPCs 1.4(a)(3) and (4) (communication).

D. Fees, Rule 1.5

Moore v. Board of Professional Responsibility, S.W.3d (Tenn., Bivins, 2019.

"On January 23, 2013, the Law Firm entered into a written fee agreement with Ms. Day ('the Fee Agreement'). Attorney signed the Fee Agreement on behalf of the Law Firm. The Fee Agreement pertained to the firm's representation of Ms. Day in a personal injury matter arising in Tennessee ('the Lawsuit'). Ms. Day had filed a *pro se* complaint prior to hiring the Law Firm.

"Relevant to the issues before us, the Fee Agreement provided that Ms. Day would pay her attorneys a forty percent contingency fee if recovery were made, plus expenses, or forty-five percent if recovery were made after appeal, plus expenses. The Fee Agreement also contained the following provision:

> d. Should I [Ms. Day] refuse to make any settlement which my attorneys advise me is reasonable and should be taken, then I understand that I am responsible for their fee on the basis of that offer, unless they waive this provision.

"('the Settlement Offer Provision'). The Fee Agreement contains no provision for a fee based on an hourly charge.

"In early February 2015, Attorney received an offer to settle the Lawsuit for the sum of $12,500. Attorney testified that he determined Ms. Day should accept this offer after hearing her testify during her deposition, after reviewing her medical bills, after considering the facts surrounding her fall, and upon taking into consideration that the defendant was the Miriam Child Development Center, 'a portion of the United Methodist Church.' Attorney stated that, taking these factors into account, it was his professional judgment that a jury would not have 'high sympathy' for Ms. Day and that 'she was going to have some problems proving liability.'

"Accordingly, Attorney advised Ms. Day to accept the $12,500 offer. Attorney testified that he and the other lawyer that was assisting him on the case 'tried and … tried' to explain to Ms. Day their reasons for advising her to accept the offer. Although Attorney described his client as both 'very intelligent' and 'very strong-willed,' he stated that Ms. Day 'would not listen to reason' regarding the worth of her claim. After their fruitless discussions, Attorney determined that they were at an impasse and that he should withdraw, allowing Ms. Day to seek new counsel.

"On March 13, 2015, Attorney filed a 'Motion to Withdraw as Counsel and Assert Lien' ('the First Motion') which averred the following:

> 1. Plaintiff and her counsel of record have reached an impasse on how to proceed with her case and it would be in Plaintiff's best interest to retain new counsel.
>
> 2. Specifically, Plaintiff refuses to adhere to the advice of counsel, making it impossible to continue representation of counsel [sic].
>
> 3. Plaintiff has also expressed that she no longer desires to be represented by The Moore Law Group, P.C. [sic].
>
> 4. Plaintiff will suffer no prejudice if her current counsel is allowed to withdraw and assert a lien of $13,605.00 for 45.35 hours of work at $300 an hour for attorney's fees, and $2,428.52 for expenses. See attached Exhibit 'A' (Time Slip).
>
> WHEREFORE PREMISES CONSIDERED, Plaintiff's Counsel moves for an Order granting its withdrawal and noting its total lien of $16,033.52.

"The trial court heard the First Motion on March 23, 2015, and Ms. Day was in attendance. According to Attorney, Ms. Day told the court that she 'wanted [Attorney] to stay in the case.' Attorney told the court that he 'wanted to be out,' and the trial court granted his motion to withdraw. The trial court did not rule on the lien request.

"Less than two weeks later, on April 2, 2015, Attorney filed a 'Motion to Assert Lien' in the Lawsuit ('the Second Motion'). The Second Motion requested the trial court

> to enter Notice into the record of this matter, and to all parties and their counsel, of [the Law Firm's] charging and retaining lien against and with respect to attorney's fees and expenses by Plaintiff, Linda Day, and any/all of its assigns or successors in interest, attorneys, or parties in privy in regard to the subject matter of this action, whether by settlement, judgment, order, decree, or otherwise.…

"The Second Motion asserted that Ms. Day 'presently owes [the Law Firm] the sum of $18,123.91 (51.65 hours of work at $300 an hour for attorneys' fees and $2,628.91 for expenses) for the performance of legal services and expenditure of costs and expenses for the benefit of [Ms. Day].…' The Second Motion also asserted that it was 'filed without waiver or release of any right, privilege, or interest of the Firm with regard to the subject matter of fees and expenses owed it by [Ms. Day], or any other matter.'

"Regarding the Second Motion, Attorney testified that he 'never called the motion up to be heard.' Attorney explained that his 'intent was to wait to see when she settled and then call the motion up.' He added, 'I was not going to have it heard until I knew there was a recovery.'

"On May 4, 2016, after the BPR had received Ms. Day's complaint against Attorney, Attorney filed a pleading in the Lawsuit styled 'Amended Motion to Assert Lien' ('the Third Motion'). The Third Motion differed from the Second Motion insofar as it asserted that Ms. Day 'presently owes [the Law Firm] the sum of $7,428.91 ($4,800 in attorneys' fees, which is 40% of the $12,000 offer counsel suggested [Ms. Day] accept and $2,628.91 for expenses) for the performance of legal services and expenditure of costs and expenses for the benefit of [Ms. Day].…' Attorney testified that, at the time he filed the Third Motion, he was not aware that Ms. Day had nonsuited the Lawsuit. The Third Motion was never heard. The record contains no order from the trial court noting any lien requested by Attorney.

"Attorney testified that Ms. Day had paid him no attorney fees to date and that he waived any claim to fees relating to the Lawsuit.

"In addition to testifying, Attorney introduced into evidence a portion of a deposition taken of Ms. Day in which she acknowledged that, had she accepted an offer of settlement and a recovery were made, she would have owed Attorney a contingency fee.

"After considering all of the proof, the Panel issued a comprehensive seventeen-page written judgment filed on August 31, 2017. The Panel concluded that Attorney 'made an agreement for and has sought to collect an unreasonable fee in violation of Rule 1.5(a) & (c)' because '[t]he fee under the Fee Agreement was not contingent on the outcome of the case, but rather, it was contingent on [Attorney's] recommendation of a settlement offer which he deemed reasonable.' The Panel also concluded that Attorney 'violated Rule 1.8(i) because [Ms.] Day became obligated when [Attorney] advised [Ms.] Day that the settlement offer from UNC was "reasonable and should be taken."' The Panel explained that, '[i]f "contingent" fee agreements with provisions similar to paragraph d of the Fee Agreement were allowed under the Rules of Professional Conduct, it would have a chilling effect on the client's ability to decide whether to accept an offer which was inconsistent with his or her objectives,' and that, '[r]egardless of [Attorney's] position that he had never applied paragraph d as written, and the Hearing Panel's acceptance of that position, the Fee Agreement as written is overbearing and overreaching.'

"The Panel further concluded that

> in each of the three pleadings filed to assert liens …, [Attorney] violated the Rules of Professional Conduct both when he sought an attorney's lien for his firm in excess of the amount of the proposed settlement under the impermissible fee agreement and by basing the attorney's lien on a $300.00 per hour [fee] which [was] not provided for in any written fee agreement between [Attorney] and [Ms.] Day."

"With respect to the appropriate sanction, the Panel concluded that the evidence did not support any aggravating factors. The Panel applied a single mitigating factor, the absence of a prior disciplinary record. The Panel then imposed a public censure as 'the appropriate form of discipline in this matter.'

"On November 21, 2017, Attorney filed a petition for review of the Panel's decision in the Chancery Court of Shelby County."

"The chancery court determined that the Panel's decision was supported by substantial and material evidence. . . ."

"The Panel based its findings and conclusions that Attorney violated the Rules on the basis of (1) the actual language contained within the Fee Agreement and (2) the assertions contained in the motions that Attorney filed in an attempt to assert a lien for his fees and expenses. Attorney contends that his testimony at the hearing and portions of Ms. Day's deposition testimony contradict that language and those assertions and render the Panel's judgment unsupported by the evidence. We disagree.

"As set forth above, the Settlement Offer Provision of the Fee Agreement states, 'Should I [Ms. Day] refuse to make any settlement which my attorneys advise me is reasonable and should be taken, then I understand that I am responsible for their fee *on the basis of that offer*, unless they waive this provision' (emphasis added). We agree with the BPR that, '[a]t the least, this language is ambiguous and susceptible to two different interpretations.' The first interpretation is that Ms. Day became responsible for Attorney's fee when she refused to accept the recommended settlement, regardless of whether she eventually recovers anything, unless Attorney waives the Settlement Offer provision. The second interpretation is that, upon her making a recovery, Ms. Day owes Attorney a contingency fee based on the amount of the recommended offer, again unless Attorney waives the Settlement Offer Provision. In either event, absent Attorney's waiver, Ms. Day would owe Attorney a fee based on the original $12,500 settlement offer irrespective of the amount of her eventual recovery.

"Both interpretations result in a fee agreement that violates Rule 1.5. As set forth above, RPC 1.5(a) states that '[a] lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.' Additionally, RPC 1.5(c) provides as follows:

> A fee may be contingent on the *outcome* of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of *settlement, trial, or appeal*; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written

statement stating the *outcome* of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

"RPC 1.5(c) (emphases added).

"We agree with the Panel's conclusion that '[t]he fee under the Fee Agreement was not contingent on the outcome of the case, but rather, it was contingent on [Attorney's] recommendation of a settlement offer which he deemed reasonable. [Attorney], therefore, made an unreasonable fee agreement in violation of Rules 1.5(a) and 1.5(c).' Substantial and material evidence supports this conclusion by the Panel. Therefore, this conclusion was neither arbitrary nor capricious.

"Moreover, although Rule 1.2(a) states that '[a] lawyer shall abide by a client's decision whether to settle a matter,' the clear effect of the Settlement Offer Provision was to pressure the client to accept a settlement offer, if advised to do so by Attorney. . . . We agree with the Panel's assessment that 'the Fee Agreement as written is overbearing and overreaching.'"

"The Panel also concluded that the Settlement Offer Provision violated Rule 1.8(i), which provides that '[a] lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client.…' We agree with the Panel's conclusion. The Settlement Offer Provision gave Attorney a proprietary interest in any settlement offer that was made in the Lawsuit and that he recommended to Ms. Day because, based upon the plain language of the Settlement Offer Provision, Attorney thereby became entitled to a fee, regardless of whether she accepted the offer and regardless of whether she obtained any recovery whatsoever."

"We hold that substantial and material evidence supports the Panel's conclusion that Attorney 'violated Rule 1.8(i) because [Ms.] Day became obligated when [Attorney] advised [Ms.] Day that the settlement offer from UNC was "reasonable and should be taken."'

"Attorney protests that his testimony and Ms. Day's deposition testimony establish that neither of them understood the Fee Agreement as causing Attorney's fees and expenses to become payable regardless of Ms. Day's actual recovery. However, the actual text of the Second and Third Motions Attorney filed in attempts to establish his lien states that the amount he claimed in fees and expenses was 'presently owe[d].' We agree with the Panel and the chancery court that the plain language of these pleadings is material and substantial evidence that Attorney was construing the Fee Agreement in a manner that made his fees contingent not on Ms. Day's eventual recovery but rather on her refusal to accept the settlement offer that he advised her to take.

"In sum, the record supports the Panel's conclusions that Attorney violated RPC 1.5(a), RPC 1.5(c), and RPC 1.8(i). Accordingly, the record also supports the Panel's conclusion that Attorney thereby violated RPC 8.4(a) (rendering it 'professional misconduct for a lawyer to … violate or attempt to violate the Rules of Professional Conduct'). Attorney is entitled to no relief on his claims that the Panel acted arbitrarily and capriciously in determining that he violated the Rules."

In re Blackwell, Board Release of Information.

Douglas Neil Blackwell, II, of Cleveland was publicly censured.

"Mr. Blackwell accepted a refundable retainer fee from a client in a conservatorship proceeding without depositing the fee into his client trust account until earned. Mr. Blackwell failed to diligently represent his client's interest and failed to properly communicate with his client. Mr. Blackwell failed to include critical documentation with legal pleadings. After he was removed from representation, Mr. Blackwell failed to provide his former client with the client file. Mr. Blackwell's fee affidavit was found to be unreasonable and based upon misrepresentations."

Mr. Blackwell violated RPCs 1.1 (competence), 1.3 (diligence), 1.4 (communication), 1.5 (fees), 1.15 (safekeeping property), 1.16 (terminating representation), 3.2 (expediting litigation), 3.3 (candor toward tribunal), 8.1(b) (disciplinary matters), and 8.4(a), (c), and (d) (misconduct).

In re Gray, Board Release of Information.

Donald Brent Gray of Jacksboro was publicly censured and required to reimburse a client $2,750.

"Mr. Gray was appointed to represent an indigent criminal client in General Sessions Court and was required to represent the client throughout the proceedings, including any appeals, until the case had been concluded or he was granted permission to withdraw by the court. After the conclusion of the General Sessions case, the client was indicted and Mr. Gray improperly advised the client that he could no longer represent him unless a $10,000 retainer fee was paid. The client paid $2,750 toward the fee and no written fee agreement was memorialized nor did Mr. Gray deposit the funds into his trust account until the fee had been earned. Mr. Gray also failed to inform the Circuit Court that he had been appointed to represent the client in that court."

Mr. Gray violated RPCs 1.4 (communication), 1.5 (fees), 1.15 (safekeeping property), 1.16(c) (terminating representation), 3.3 (candor toward tribunal), and 8.4(a), (c), and (d) (misconduct).

In re Miller, Board Release of Information.

Thomas Howard Miller of Franklin was publicly censured and required to refund $2,500.00 in fees to his client.

"Mr. Miller failed to adequately communicate with his client, and failed to diligently address the client's needs. Mr. Miller's fee was unreasonable based upon the time and labor involved and lack of complexity of the case, the results obtained, and the failure to reduce the fee to a writing."

Mr. Miller violated RPCs 1.3 (diligence), 1.4 (communication), and 1.5 (fees).

In re Russell, Board Release of Misconduct.

Kimberly Diane Russell of Maryville was publicly censured and required to engage a practice monitor, based on a conditional guilty plea.

"Ms. Russell, while administratively suspended for CLE non-compliance, accepted a flat fee to prepare divorce documents for pro se divorce. Ms. Russell prepared documents for the divorce and did not enter a written fee agreement for the non-refundable fee."

Ms. Russell violated RPCs 1.4(a)(5) (communication), 1.5 (fees), 5.5 (unauthorized practice of law), and 8.4(a) (misconduct).

ABA Formal Opinion 484, A Lawyer's Obligations When Clients Use Companies or Brokers to Finance the Lawyer's Fee (Nov. 27, 2018).

"Lawyers may refer clients to fee financing companies or brokers in which the lawyers have no ownership or other financial interests provided they comply with Model Rules 1.2(c), 1.4(b), 1.5(a) and (b), 1.6, 1.7(a)(2), and 1.9(a). If a lawyer were to acquire an ownership or other financial interest in a finance company or brokerage and thereafter refer clients to that entity to finance the lawyer's fees, the lawyer would be entering into a business transaction with a client, or obtaining a security or pecuniary interest adverse to the client, or both. In that instance, the lawyer would also be required to comply with Model Rule 1.8(a)."

ABA Formal Opinion 487, Fee Division with Client's Prior Counsel (June 18, 2019).

"In a contingent fee matter, when a counsel (successor counsel) from one firm replaces a counsel (predecessor counsel) from another firm as counsel for the client, Rules 1.5(b) and (c) require that the successor counsel notify the client, in writing, that a portion of any contingent fee earned may be paid to the predecessor counsel. The successor counsel may not be able to state at the beginning of the representation the specific amount or percentage of a recovery, if any, that may be owed to the predecessor counsel unless the amount or percentage has been agreed by the client and both predecessor and successor counsels. The successor counsel is not bound by the requirements of Rule 1.5(e), either at the time of engagement or upon a recovery, because Rule 1.5(e) addresses situations where two lawyers are working on a case together, not situations where one lawyer is replacing another. Upon a monetary recovery, the successor counsel may only disburse a portion of the overall attorney's fee to the predecessor counsel with client consent or pursuant to an order of a tribunal of competent jurisdiction. If there is a dispute as to the amount due to the predecessor counsel under Rule 1.15(e) the disputed amount may have to remain in a client trust account until the matter is resolved. If successor counsel negotiates with predecessor counsel on the client's behalf, successor counsel must explain to the client the potential conflict of interest in the dual roles pursuant to Rule 1.7, where successor counsel has a personal interest in the amount predecessor counsel may receive or in the timing of the release of funds held pursuant to Rule 1.15(e)."

Texas State Bar Professional Ethics Committee Opinion No. 679 (Sept. 2018).

"May a lawyer renegotiate his fixed, flat fee for representing a client in litigation after the litigation is underway if the matter turns out to be greater in scope and complexity than the lawyer and client contemplated?"

"A Texas lawyer and his client agree in writing to a fixed, flat fee for the lawyer to represent the client in litigation. During the representation, the complexity and scope of the matter increase significantly beyond what the lawyer and client contemplated at the start of the engagement. The lawyer now wishes to renegotiate the fee arrangement."

"Rule 1.04 of the Texas Disciplinary Rules of Professional Conduct governs fees. Flat-fee agreements are not uncommon and are contemplated in the Rule. See Comment 3 to Rule 1.04. . . .

"Rule 1.04 and its comments do not expressly address the propriety of a lawyer's renegotiating fee agreements after representation has commenced. Texas courts, however, have done so. In

Jampole v. Matthews, 1997 WL 414637 (Tex. App.—Houston [1st Dist.] 1997, no writ), the court summarized Texas law as follows: 'An attorney and client may modify the fee agreement during the existence of the attorney-client relationship. However[,] a presumption of unfairness arises, and the attorney has the burden to show the fee modification is fair under the circumstances.' *Id*. at *10 (discussing *Archer v. Griffith*, 390 S.W.2d 735, 739 (Tex. 1964) . . . . This special scrutiny is required because the client is at a disadvantage: Changing lawyers during the representation is burdensome and '[a] client might hesitate to resist or even to suggest changes in new terms proposed by the lawyer, fearing the lawyer's resentment or believing that the proposals are meant to promote the client's good.' Restatement (Third) of the Law Governing Lawyers § 18, comment e (2000)."

"Consider, for example, a lawyer who represents a lender. The lawyer and the client have a flat-fee agreement under which the lawyer represents the lender in pursuing collection of delinquent promissory notes. The matters are either resolved by settlement or litigation that usually results in a summary judgment against the borrower. In one matter, however, a borrower and her lawyer file a counterclaim, asserting a class action against the lender for usury and other illegal conduct. The counterclaim alleges a class of hundreds of borrowers, the amount in controversy is enormous, and discovery in the case is expected to include numerous depositions, the exchange of thousands of documents, and require years to complete. In such a situation, neither the lawyer nor the client could reasonably anticipate that the scope of work to be included in the flat-fee agreement would be so grossly underestimated.

"Furthermore, based upon the history of their relationship, neither the lawyer nor the client expected that the lawyer's flat fee would include any work except pursuing delinquent accounts. Renegotiating the fee would therefore be 'fair under the circumstances.'

"On the other hand, modifying a fee agreement would likely be inappropriate in a situation like this: A lawyer agrees to represent a new client who was terminated from her employment and then went to work for her former employer's competitor. Based upon the facts disclosed by and discussed with the client, the lawyer concludes that the client has a basis for pursuing a claim for wrongful termination. The lawyer agrees to represent the client in bringing such claim for a fixed, flat fee. After filing suit on the client's behalf, the employer counterclaims, alleging that the client, during her employment, breached her non-disclosure agreement and her fiduciary duties by sharing the employer's trade secrets with her new employer.

"In this situation, the lawyer and client do not have a longstanding relationship that forms the basis for their expectations about the fee. Their expectations are instead based upon the existing fee agreement alone. From the client's perspective, her agreement with her lawyer was for representation concerning all aspects of her relationship with her former employer. Under the circumstances, renegotiating the fee agreement would likely not be fair to the client. Additionally, a lawyer, after making a reasonable investigation, should have anticipated that the former employer might bring such counterclaims against the client.

"The fundamental nature of a flat or fixed fee is that there is risk to the lawyer that the legal work and time required may exceed what the lawyer might have earned if the lawyer instead billed by the hour. The client knows with certainty that the total fee charged, no matter how much lawyer time or effort is involved, will not exceed the fixed amount. The client's risk in a flat or fixed fee agreement is the possibility of paying more than the client would have paid under an hourly billing agreement if the lawyer is able to complete the representation is less time than originally

expected. Because the lawyer is better able to anticipate the time and legal work required, the lawyer should be mindful that he knowingly assumed this risk—and should not unreasonably seek to change the fee agreement simply because the lawyer agreed to a fixed fee that, in hindsight, is no longer adequate.

"The client's level of sophistication is another factor that the Committee concludes is relevant to considering whether renegotiating a fee agreement is 'fair under the circumstances.' As the above examples illustrate, an institutional client such as a lender is likely to have experience regarding litigation matters routinely involved in its business. An experienced client is therefore better informed about the costs associated with litigation and the fees charged for representation. By contrast, a client with little or no experience as a litigant has no such point of reference and is unlikely to know much about the potential scope of litigation or its expected costs.

"This Committee previously expressed the view that Rule 1.08(a), regarding business transactions between lawyer and client, does not apply to the transaction of establishing the lawyer-client relationship. See Professional Ethics Committee Opinion 586 (Oct. 2008) (concluding that a lawyer may include a binding arbitration clause in a fee agreement). Likewise, the Committee concludes here that Rule 1.08(a) does not apply to renegotiating a fee agreement. Nevertheless, as the Committee also noted in Opinion 586, '[a]s a general principle, all transactions between client and lawyer should be fair and reasonable to the client.' Comment 2 to Rule 1.08. Thus, any renegotiation of an existing fee agreement, although not a 'business transaction with a client' within the meaning of Rule 1.08(a), must still be on terms that are fair and reasonable for the client."

E. Confidentiality of Information, Rule 1.6

ABA Formal Opinion 483, Lawyers' Obligations After an Electronic Data Breach or Cyberattack (Oct. 17, 2018).

"Model Rule 1.4 requires lawyers to keep clients "reasonably informed" about the status of a matter and to explain matters "to the extent reasonably necessary to permit a client to make an informed decision regarding the representation." Model Rules 1.1, 1.6, 5.1 and 5.3, as amended in 2012, address the risks that accompany the benefits of the use of technology by lawyers. When a data breach occurs involving, or having a substantial likelihood of involving, material client information, lawyers have a duty to notify clients of the breach and to take other reasonable steps consistent with their obligations under these Model Rules."

Disciplinary Counsel v. Holmes, 155 Ohio St.3d 261, 120 N.E.3d 820 (Ohio 2018).

"Respondent Thomas Charles Holmes of Aurora, Ohio, Attorney Registration No. 0073794, was admitted to the practice of law in Ohio in 2001. Respondent Ashleigh Brie Kerr of Aurora, Ohio, Attorney Registration No. 0085992, was admitted to the practice of law in Ohio in 2010.

"In December 2017, relator, disciplinary counsel, charged Holmes and Kerr with violating the professional-conduct rules for improperly disclosing confidential client information. The Board of Professional Conduct considered the case on the parties' consent-to-discipline agreements."

"In their agreements, Holmes and Kerr stipulated that after meeting at a conference in November 2014, they commenced a personal relationship. At the time, they each primarily represented

public school districts in their respective law practices. Between January 2015 and November 2016, they exchanged more than a dozen e-mails in which they revealed client information to each other, including information protected by the work-product doctrine or the attorney-client privilege, although they were not employed by the same law firm and did not jointly represent any clients. In general, Kerr forwarded to Holmes e-mails from her clients requesting legal documents. In response, Holmes forwarded to Kerr e-mails that he had exchanged with his clients that included similar documents he had prepared for them. Holmes and Kerr stipulated that in about one-third of these e-mail exchanges, Holmes had ultimately completed Kerr's work for her.

"In June 2016, Holmes's law firm discovered that he had disclosed confidential client information to Kerr and as a result, removed him from the firm. A partner in Holmes's former law firm also filed a grievance against him, and the law firm's counsel notified Kerr's employer of the e-mail exchanges. Kerr consequently admitted to the partners of her firm that she and Holmes had exchanged client information and that he had assisted her with her work.

"Notwithstanding relator's commencement of an investigation, Kerr continued to send confidential client information to Holmes and he continued to assist her in preparing legal documents for her clients. In November 2016, Kerr resigned from her law firm.

"Based on this conduct, the parties stipulated that Holmes and Kerr violated Prof. Cond. R. 1.6(a) (prohibiting a lawyer from revealing information relating to the representation of a client, with exceptions not relevant here) and 8.4(h) (prohibiting a lawyer from engaging in conduct that adversely reflects on the lawyer's fitness to practice law). As aggravating factors, the parties agreed that Holmes and Kerr each engaged in a pattern of misconduct. *See* Gov. Bar R. V(13)(B)(3). The stipulated mitigating factors were both attorneys' absence of prior discipline, cooperative attitudes toward the disciplinary proceedings, and evidence of good character."

"We agree that Holmes and Kerr engaged in the stipulated misconduct and that based on our precedent, a stayed six-month suspension is appropriate. We therefore adopt the parties' consent-to-discipline agreements."

Disciplinary Counsel v. Shimko, 2019-Ohio-2881, ___ N.E.3d ___ (Ohio, July 18, 2019).

"Respondent, Timothy Andrew Shimko, of Westlake, Ohio, Attorney Registration No. 0006736, was admitted to the practice of law in Ohio in 1976."

"In a complaint certified to the Board of Professional Conduct on October 5, 2017, relator, disciplinary counsel, alleged that Shimko violated four professional-conduct rules by charging a clearly excessive fee, threatening to disclose confidential information to compel payment of that fee, and then disclosing that information to the potential detriment of his former client.

"After conducting a hearing, a three-member panel of the board issued a report finding that Shimko had engaged in the charged misconduct and recommending that he be suspended from the practice of law for two years with the second year stayed on the condition that he engage in no further misconduct. The board accepted the panel's findings of fact and misconduct."

"Based upon our independent review of the record, we find that Shimko's objections are without merit. Because the board's findings of fact and misconduct are supported by clear and convincing

evidence, we accept them. We find, however, that an indefinite suspension is the appropriate sanction in this case."

"In July 2015, fire destroyed a house that Richard Berris had been building for approximately 17 years. Berris, an engineer by trade, did not reside in the house, but he stored instruments, data, and books in its basement. At the time of the fire, Berris had two insurance policies. The first was a Nationwide commercial-property policy that covered his residence but provided only limited coverage for off-premises equipment. At his examination under oath ('EUO'), Berris acknowledged that he had filed a $500,000 claim under that policy for 'business related items' destroyed in the fire but that Nationwide had offered him only $10,000 on that claim. The second policy was an Allstate homeowner's policy that covered the fire-damaged premises but excluded coverage for business property. Berris filed a fire-related insurance claim with Allstate, which then arranged to examine Berris under oath in October 2015."

"On October 8, 2015, Berris telephoned Shimko seeking his representation at the EUO. During that phone call, there was no discussion of Shimko representing Berris beyond the EUO.

"Shimko sent Berris a letter stating that he would be happy to prepare him for, and represent him at, the EUO. Shimko stated that he would like to meet with Berris on October 20 and that his standard rate was $385 an hour. In response, Berris sent Shimko an e-mail in which he asked Shimko to conduct an intake interview at no charge, requested a written copy of Shimko's fee and services contract, and asked whether Shimko would be handling the matter personally or assigning it to another attorney in his firm.

"On October 18, Berris sent Shimko another e-mail stating that he had rescheduled the EUO for mid-November, because he had not heard from Shimko. The following day, Shimko responded by e-mail, stating:

> It is my recollection that we spoke at some length on the 8th of October, *for which I have not and will not charge you*. * * * I was expecting to receive and review your insurance policies before I prepared you. For that work, I quoted you an hourly rate of $385.00/hr.
>
> Up to this point in time, you have requested only that I prepare you for and accompany you to your EUO. For those services, I charge $385.00/hr. I anticipate that it will take me @ 1 1/2 hrs. to review your policies. From what you told me, there are at least two policies to read and analyze. I anticipate that it will take 1 1/2 hrs. to prepare you for the EUO. My experience tells me that your examination will last 2-3 hours. Unless your deposition runs longer, and if those are all the services you ask me to perform, I would anticipate sending you a bill for somewhere in the range of $2,300.

"(Emphasis added.)

"In that e-mail, Shimko acknowledged that Berris had not spoken to him about expanding the scope of his representation but also gave him a detailed explanation of the terms under which he would agree to handle the entire insurance claim.

"Shimko appeared and represented Berris at his EUO on November 12, 2015. The next day, he sent Berris an e-mail with a $4,350 bill for the services he had provided. At the conclusion of his

message, he stated, 'If you require any further services in the future, it would be my privilege to represent you.'

"Displeased by the amount of the bill, which was nearly double the original estimate, Berris wrote a letter to Shimko on December 11, 2015, stating that he was satisfied with Shimko's legal services, but not his billing practices. He explained that there were '[u]nexpected problems' with the bill, including a charge of $154 for the initial telephone conference, despite Shimko's representation that there would be no charge for that call, a $539 charge for Shimko's October 19 e-mail to Berris, and a previously undisclosed interest rate of 1.5 percent per month for fees not paid within 30 days. Berris stated that he would pay $3,300 in $500 monthly installments 'without penalty or interest.' He enclosed the first check for $500 and continued to send a check each month until the entire $3,300 had been sent. Shimko rejected Berris's proposed terms and threatened to place a lien on Berris's property and to foreclose on the lien if necessary.

"In January 2016, Shimko filed suit against Berris in the Cuyahoga County Court of Common Pleas to collect the remainder of his fees. On July 14, 2016, Berris's counsel wrote to Shimko and asked him to dismiss his complaint with prejudice. In a July 18 letter to Berris's counsel, Shimko responded by threatening to disclose confidential information that Berris had purportedly conveyed to him during the underlying legal representation. In that letter, Shimko claimed that while preparing for the EUO, Berris had told him that he had 'been conducting a substantial amount of business, doing significant development work and testing at the premises before' the fire. Shimko alleged that after he advised Berris that his insurance claims would be denied if he had used the premises for business purposes, Berris made false statements at his EUO to the effect that he had not worked or otherwise conducted business on the premises before they were damaged by the fire.

"Shimko further asserted to Berris's counsel that those facts were relevant to explain why he spent more time on Berris's case than originally estimated and that the facts were therefore not protected by the attorney-client privilege. He concluded his letter by stating:

> I suspect that my motion for summary judgment, a *public record*, which will not be long in coming, may have an impact beyond this litigation. Perhaps, Mr. Carr, it may have implications in your financial future, as well. I am giving your client his last break, and he would be wise to take it. After I file the motion for summary judgment, I cannot unwring [sic] that bell. If he wants to resolve this case, now would be a very propitious time for your client to do so.

"(Emphasis added.)

"In one of the briefs Shimko filed in his lawsuit against Berris, he claimed that the preparation for Berris's EUO took longer than he had estimated because Berris had the wrong insurance on his respective premises—a commercial policy where he lived and a homeowners policy where he worked. He then revealed that 'though [Berris] conducted a significant amount of business out of the premises, he claimed he did not run a business out of the damaged premises' at his EUO.

"The court presiding over the fee-dispute litigation found that Shimko spent a reasonable amount of time on Berris's representation. Nonetheless, the court found that it was unreasonable for Shimko to charge Berris $154 for his initial telephone conference and $539 for preparing the

e-mail regarding Berris's fee agreement. Moreover, the court did not award Shimko any of the 1.5 percent interest rate he had demanded from Berris."

"The panel found that Shimko violated Prof. Cond. R. 1.5(a) (prohibiting a lawyer from making an agreement for, charging, or collecting a clearly excessive fee) in three ways.

"First, Shimko charged Berris a $154 fee for the initial telephone conference after representing that there would be no charge for the call. The panel found that the charge was not inadvertent because when Berris challenged the charge, Shimko threatened to sue him, place a lien on his property, and foreclose on the property—and then Shimko filed suit. The panel noted that during the trial of the fee dispute, Shimko testified that he reneged on the agreement to waive that fee, stating: 'I changed my mind. * * * I decided to bill him after he treated me so badly in the examination under oath. I changed my mind.' And at his disciplinary hearing, Shimko testified, 'My word is my bond until I change it, I guess.' When questioned by a panel member, he eventually admitted, 'I shouldn't have done that.'

"Second, the panel took issue with Shimko's $539 charge for his October 19 e-mail. Because that e-mail only memorialized his fee agreement with Berris and conveyed an offer to represent Berris in future litigation, the panel determined that the charge was unreasonable and clearly excessive. Finally, the panel also found that Shimko's 1.5 percent monthly-interest charge on any unpaid balance of Berris's fee after 30 days was unreasonable and clearly excessive because that term was not set forth in their fee agreement.

"The panel also found that in his efforts to collect his fees, Shimko violated multiple professional-conduct rules by threatening to disclose and then intentionally revealing confidential information when he stated that Berris's testimony at the EUO was inconsistent with his confidential statements to Shimko—all the while knowing that that disclosure could damage Berris's pending insurance claim with Allstate.

"The panel determined that by threatening to disclose Berris's confidential information and then actually disclosing it in a public filing without making any effort to limit who could access that information, Shimko violated Prof. Cond. R. 1.9(c)(1) (prohibiting a lawyer from using information relating to the representation of a former client to the disadvantage of the former client unless the information has become generally known or disclosure is permitted by rule), 1.9(c)(2) (prohibiting a lawyer from revealing information relating to the representation of a former client except as permitted or required by rule), and 8.4(h) (prohibiting a lawyer from engaging in conduct that adversely reflects on the lawyer's fitness to practice law).

"The board adopted the panel's findings of fact and misconduct."

"Although the panel in this case did not specifically cite *Squire*, it nonetheless considered whether the information in question was confidential until Shimko disclosed it. Having determined that it was, the panel then considered whether Shimko's disclosure of that information was authorized by Prof. Cond. R. 1.6(b)(5)—in other words, whether Shimko's belief that the disclosure was necessary to establish his claim for fees was reasonable.

"On these facts, we overrule Shimko's first objection to the panel's report.

"As his second objection, Shimko contends that the information he disclosed was not confidential at the time he disclosed it for several reasons. For the reasons that follow, we reject his arguments.

"First, Shimko argues that the information was not confidential, because it had been published in three newspaper articles in July 2015 and was therefore generally known. *See* Prof. Cond. R. 1.9(c)(1) (permitting a lawyer to use information relating to the representation to the disadvantage of the former client when the information has become generally known). The articles cited by Shimko do report Berris's statements to reporters shortly after the fire destroyed his property, but the panel found that those articles did not establish that Berris's alleged false statements were common knowledge. . . . This information is generally consistent with Berris's testimony at his EUO. Therefore, we agree with the panel that these newspaper articles do not support Shimko's claim that Berris's purported use of the fire-damaged premises for business purposes was 'generally known.'

"Alternatively, Shimko argues that neither Berris nor counsel he retained to defend him in the fee-dispute litigation treated the disclosed information as confidential because they published Berris's misconduct in the grievance they filed with relator on July 26, 2016, and introduced that information in 'open court' while defending against Shimko's lawsuit in Cuyahoga County. Further, Shimko asserts that Berris waived any privilege attached to the communications when he testified at his EUO, and that the information was never confidential or privileged because it was communicated with an intent to use the attorney-client relationship to commit a fraud.

"The panel rejected Shimko's claim that Berris disclosed the confidential information by filing a grievance with relator while the fee-dispute litigation remained pending because pursuant to Gov. Bar R. V(8), all grievances remain confidential until a certified complaint is filed with the board."

"Prof. Cond. R. 1.6(a) prohibits a lawyer from 'reveal[ing] information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted * * * or required by * * * this rule.' The protection afforded by the rule is broader than the attorney-client privilege and 'applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.' Prof. Cond. R. 1.6, Comment 3. Thus, even if Shimko could have been compelled to testify on these matters, he had an ongoing duty to maintain their confidentiality in other contexts."

"After weighing the conflicting testimony, the panel found Berris 'to be the more believable party in this matter' and expressly rejected Shimko's claims that Berris lied under oath. Ultimately, the panel was convinced—as are we—that the sole purpose of Shimko's threats and subsequent exposure of confidential information was not to prevent Berris from using his legal services to commit insurance fraud, *see* Prof. Cond. R. 1.6(b)(3), but to compel Berris to pay his fee. On these facts, we overrule Shimko's second objection to the panel's report and find that Shimko threatened to disclose and actually disclosed confidential information related to his representation of Berris."

"In his third objection, Shimko claims that he reasonably believed that he could disclose Berris's confidential information to establish the legitimacy of his fees and to refute Berris's allegations that his billing practices were unreasonable, unethical, and 'laughable.'"

"The panel rejected Shimko's professed belief that all of his disclosures of confidential information were necessary to establish Shimko's fee claim in his lawsuit against Berris. On the contrary, the panel noted that Berris's alleged lies did not require Shimko to perform any additional work and that none of the time billed related to the allegedly false statements. We agree, and we also find that the timing of Shimko's disclosure likewise refutes his claim that the disclosure was necessary to defend against allegations that he engaged in unethical conduct. In fact, the only allegations that had been levied against Shimko at the time he first disclosed Berris's confidential information were that he had improperly charged Berris for preparing his engagement letter and for a telephone conference that he had previously represented would be provided free of charge, that an additional $357 of his remaining fee was unreasonable, and that his complaint and motion for default judgment were 'frivolous.' On these facts, we conclude that Shimko could not *reasonably* believe that all of his disclosures of confidential information were necessary—as contemplated in Prof. Cond. R. 1.6(b)(5)—to establish his fee claim, to defend himself against a criminal charge or civil claim, or to respond to allegations in a proceeding concerning his representation of Berris.

"Even if we were to find that Shimko reasonably believed that his disclosure of confidential information was necessary to collect his fees, the comments to Prof. Cond. R. 1.6 explain that when practicable, if a lawyer believes that disclosure of confidential client information is necessary, 'the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure,' and that a 'disclosure adverse to the client's interest should be no greater than * * * necessary to accomplish the purpose.' Prof. Cond. R. 1.6, Comment 16. The comment further provides, 'If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.' *Id.*"

F. Conflict of Interest: Current Clients, Rule 1.7

In re Cody, Board Release of Information.

Homer L. Cody of Memphis was disbarred.

"This is the fifth disciplinary proceeding brought against Mr. Cody arising from his representation of one client. The first case resulted in a public censure. The second resulted in a 180-day suspension. The third resulted in a one-year suspension. The fourth resulted in a two-year suspension. While the first two suspensions were in effect, Mr. Cody filed two pleadings on behalf of the client in the Chancery Court for Shelby County. After the third suspension took effect, Mr. Cody filed an additional pleading in the case. In addition to his unauthorized practice of law, by filing pleadings on behalf of the client, Mr. Cody continued his conflict of interest that formed the basis for the previous suspensions."

Mr. Cody violated RPCs 1.7(a) (conflict of interest), 5.5(a) (unauthorized practice of law), and 8.4(a), (b) and (g) (misconduct).

Pee Wee Wisdom Child Development Center, Inc. v. Slatery, No. W2017-02437-COA-R3-CV (Tenn. Ct. App., Gibson, Jan. 3, 2019), perm. app. denied May 16, 2019.

"This appeal involves a suspended attorney's [Homer L. Cody] attempt to file a petition *pro se* in a case in which he was not a party. The trial court denied the petition *sua sponte*, concluding that the suspended attorney was not a party to the original action, he did not file a petition to intervene, and he was using the *pro se* petition as a subterfuge to circumvent his suspension from the practice of law. The suspended attorney appeals. We affirm."

In re Woodward, Board Release of Information.

Justin Grey Woodward of Chattanooga was publicly censured.

"Mr. Woodward represented a client in a domestic relations matter. During the representation, Mr. Woodward created a conflict of interest by exchanging sexually explicit text messages and emails with his client. There was a significant risk that Mr. Woodward's personal interests materially limited his representation of the client.

"By these acts, Justin Grey Woodward created a concurrent conflict of interest in his representation of this client in violation of Rule 1.7(a)(2) (conflict of interest)."

Dr. Falk Pharma GmbH v. GeneriCo LLC, 916 F.3d 975 (Fed. Cir. 2019).

"At issue are three motions to disqualify Katten Muchin Rosenman LLP as counsel for Mylan Pharmaceuticals Inc. ('Mylan') in three appeals before this court. Valeant Pharmaceuticals International, Inc. ('Valeant-CA') and Salix Pharmaceuticals, Inc. ('Salix') move to disqualify in *Valeant Pharmaceuticals International, Inc. v. Mylan Pharmaceuticals Inc.*, No. 2018-2097 ('*Valeant II*'), Salix moves to disqualify in *Salix Pharmaceuticals, Inc. v. Mylan Pharmaceuticals Inc.*, Nos. 2017-2636, 2018-1320 ('*Salix II* '), and Valeant-CA and Salix move to disqualify in *Dr. Falk Pharma GmbH v. GeneriCo, LLC*, No. 2017-2312 ('*Dr. Falk II* '). Because we find that Katten has an ongoing attorney-client relationship with Valeant-CA and its subsidiaries, including Salix, we conclude that Katten's representation of Mylan in these appeals presents concurrent conflicts of interest. Therefore, we grant the motions to disqualify."

"The motions to disqualify stem from Katten's representation of Bausch & Lomb Inc. ('Bausch & Lomb'), a corporate affiliate of Valeant-CA and Salix (collectively, 'movants'), in a trademark litigation and its concurrent representation of Mylan, adverse to movants, in the pending appeals. Specifically, Katten signed an engagement letter with Bausch & Lomb that broadly defined Katten's client as any Valeant entity. Attorneys Deepro Mukerjee and Lance Soderstrom represented Mylan during various stages of the *Valeant*, *Salix*, and *Dr. Falk* proceedings—first, as attorneys from Alston & Bird LLP, but later, as attorneys from Katten. The parties agree that Mukerjee and Soderstrom moved to Katten as of May 3, 2018. The parties, the engagement letter, and the procedural history are detailed below."

"The parties relevant to the motions to disqualify include, Valeant-CA, Valeant Pharmaceuticals International ('Valeant-DE'), Salix, and Bausch & Lomb. Valeant-CA, a Canadian corporation and the movant in *Valeant II* and *Dr. Falk II*, is the ultimate parent of these entities. Specifically, Salix—a movant in all three appeals—is a wholly-owned subsidiary of Salix Pharmaceuticals, Limited, which is a wholly-owned subsidiary of Valeant-DE, which is an indirect, wholly-owned subsidiary of Valeant-CA. Bausch & Lomb is also an indirect subsidiary of Valeant-CA and an affiliate of the above-listed entities.

"Valeant-CA contends that it has been a longstanding client of Katten, both directly and through its subsidiaries. Specifically, movants allege that a concurrent conflict arises in all three appeals from Katten's ongoing representation of Bausch & Lomb in a trademark matter regarding the mark MOISTURE EYES. A partner in Katten's Chicago office has been representing Bausch & Lomb since 2001. . . . ('The only affiliate that Katten identified as a current client was Bausch & Lomb, Inc. … [A] partner in Katten's Chicago office[ ] has been representing Bausch & Lomb on trademark, copyright and advertising issues since 2001.')."

"In the course of representing Bausch & Lomb, Katten signed a general engagement letter 'governing the overall relationship between [Katten] and Valeant Pharmaceuticals International, Inc.'—i.e., Valeant-CA. . . . This engagement letter incorporates by reference Valeant's Outside Counsel Guidelines."

"Section 1.1 of the OC Guidelines states that '[t]hese guidelines will govern the relationship between Valeant Pharmaceuticals International[, i.e. Valeant-DE], its subsidiaries and affiliates … and outside counsel.'"

"The OC Guidelines also specify that 'Valeant expects a significant degree of loyalty from its key external firms,' defined as 'firms with 12 month billings exceeding one million dollars.'. . . These key firms should 'not represent any party in any matters where such party's interests conflict with the interests of any Valeant entity.'. . . Finally, the OC Guidelines state that they 'will continue to apply unless revoked in writing by either party or modified by a subsequent letter signed by Valeant General Counsel and outside counsel.'"

"Mukerjee and Soderstrom, then at Alston & Bird, represented Mylan throughout the district court litigation. On May 3, 2018, Mylan notified the district court that Mukerjee and Soderstrom had left Alston & Bird to join Katten. On May 25, 2018, Valeant-CA filed a motion to disqualify Katten in the district court action. Mylan timely appealed the district court's summary judgment on June 22, 2018. Valeant-CA then filed a motion to disqualify Katten in this court on July 9, 2018, and the district court stayed a decision on the motion to disqualify pending before it. We stayed the parties' briefing on the merits in this appeal pending our decision on the motion."

"Movants contend that Katten's representation of Bausch & Lomb presents a concurrent conflict with Katten's representation of Mylan against Valeant-CA and Salix in either of two ways—first, they contend that the engagement letter creates an ongoing relationship between Katten and Valeant-CA, including all of its subsidiaries; and second, they contend that all Valeant-CA subsidiaries are so interrelated that representation of one constitutes representation of all. Accordingly, Valeant-CA and Salix move to disqualify Katten as counsel in these appeals."

"Indeed, Comment 34 to Rule 1.7, which addresses 'organizational clients,' states:

> A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. *See* Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, *unless the circumstances are such that the affiliate should also be considered a client of the lawyer*, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the

> organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

"Model Rules of Prof'l Conduct R. 1.7 cmt. 34 (Am. Bar Ass'n 2018) (emphasis added). Circumstances in which an affiliate is considered a client of a lawyer can arise by express agreement or when affiliates are so interrelated that representation of one constitutes representation of all. *GSI Commerce Sols., Inc. v. BabyCenter, LLC*, 618 F.3d 204, 210–12 (2d Cir. 2010) (finding that client and client's corporate affiliate were so interrelated such that 'representation adverse to a client's corporate affiliate implicate[d] the duty of loyalty owed to the client')."

"Katten's representation of Mylan adverse to Valeant-CA and Salix in *Valeant II* and its ongoing representation of Bausch & Lomb, an affiliate of movants, presents a concurrent conflict of interest in violation of Rule 1.7. This is true even though movants are affiliates of Bausch & Lomb because the terms of the engagement letter and movants' demonstration of interrelatedness between the various Valeant affiliates presents circumstances such that movants should also be considered a client of Katten."

"The express terms of the engagement letter and accompanying OC Guidelines indicate that Katten formed such a relationship with the movants when it signed the engagement letter for the Bausch & Lomb trademark litigation. Specifically, the engagement letter states that it 'represents the general terms of engagement governing the overall relationship between [Katten] and Valeant Pharmaceuticals International, Inc.,' i.e. Valeant-CA. . . . This sentence, on its face, demonstrates that Katten's relationship extends beyond just Bausch & Lomb to at least Valeant-CA.

"The OC Guidelines, which are expressly incorporated into the engagement letter, further extend the relationship to include any Valeant entity. Section 1.1 of the OC Guidelines states that the guidelines 'will govern the relationship between Valeant[-DE], its subsidiaries and affiliates, … and outside counsel.'. . . And section 1.2 of the OC Guidelines requires that Katten complete a conflict check 'before representation of [Valeant-DE and its subsidiaries and affiliates] commences.'. . . While these sections reference Valeant-DE and not Valeant-CA, the phrase 'its subsidiaries and affiliates' encompasses Valeant-CA because Valeant-CA is the parent company, i.e. affiliate, of Valeant-DE. That same phrase also encompasses another movant in *Valeant II*, Salix, because Salix is a subsidiary of Valeant-DE. For these reasons, the engagement letter creates an ongoing relationship between Katten and both Valeant-CA and Salix."

"Even if there were any plausible ambiguity in the engagement letter, Mylan's arguments would still fail because Valeant-CA, Salix, and Bausch & Lomb have demonstrated that the three entities are sufficiently interrelated to give rise to a corporate affiliate conflict.

"The relevant regional circuits have not previously set out factors governing corporate interrelatedness in this context. In *GSI Commerce Solutions, Inc. v. BabyCenter, L.L.C.*, 618 F.3d 204, 211–12 (2d Cir. 2010), the Second Circuit considered the circumstances in which 'representation adverse to a client's corporate affiliate implicates the duty of loyalty owed to the client.' *Id.* at 210. It found that the factors relevant to this inquiry include '(i) the degree of operational commonality between affiliated entities, and (ii) the extent to which one depends financially on the other.' *Id.* Regarding the first factor, it noted that 'courts have considered the extent to which entities rely on a common infrastructure,' focusing 'on shared or dependent control over legal and management issues,' which 'reflects the view that neither management nor in-house legal counsel should, without their consent, have to place their trust in outside counsel

in one matter while opposing the same counsel in another.' *Id.* Regarding the second factor, it noted that, 'several courts have considered the extent to which an adverse outcome in the matter at issue would result in substantial and measurable loss to the client or its affiliate.' *Id.* at 211."

"In the absence of evidence to the contrary, we conclude that the relevant regional circuits would likely find the Second Circuit's reasoning persuasive and would therefore adopt its factors here. In particular, we find that they would agree that shared or dependent control over operational and legal matters between the affiliates is significant to the inquiry. Accordingly, we apply the Second Circuit's interrelatedness test to the facts in this case, and find that Valeant-CA, Salix, and Bausch & Lomb all share a high degree of operational commonality and are financially interdependent."

"Valeant-CA and Bausch & Lomb 'have a common infrastructure whereby [Valeant-CA] provides administrative and general support services to Bausch & Lomb. This includes 'accounting, cash management, employee benefits, finance, human resources, travel, computer systems, insurance, and payroll services.'. . . The two also 'share the same in-house Valeant legal department.'. . . Robert Gorman, the Vice President and Head of Global Intellectual Property at Valeant-CA, is a member of the shared legal department and is 'responsible for managing and controlling all of their IP related matters and disputes.'. . . The current Vice President and Assistant General Counsel at Valeant-CA and former Vice President and Assistant General Counsel at Bausch & Lomb, John F. Lafave, states that, since his 'transition to the current position at [Valeant-CA] in 2013, [he] still use[s his] email address at bausch.com.'. . . Finally, Valeant-CA's public filings to the U.S. Securities and Exchange Commission ('SEC') from May 8, 2018 show that Bausch & Lomb contributed over $1 billion to Valeant-CA's reported revenues for the first quarter of 2018. . . . This all demonstrates that Valeant-CA and Bausch & Lomb share a high degree of operational commonality and are financially interdependent.

"The same is true with regard to Salix and Valeant-CA. Salix and Valeant-CA also share an in-house legal department; indeed, Salix does not have its own legal department. . . . Valeant-CA and Salix share a common infrastructure whereby Valeant-CA provides administrative and general support services to Salix, such as accounting, cash management, employee benefits, finance, human resources, travel, computer systems, insurance, and payroll services. . . . The two entities are also financially interdependent because Salix's sales directly affect Valeant-CA's bottom line. Specifically, Valeant-CA's SEC filings demonstrate that its 'revenue depends on Salix's gastrointestinal product sales,' the sales of Salix products in the U.S. totaled $593 million of Valeant-CA's revenue from branded prescription products for the first quarter of 2018, and Salix's drug Apriso® is the second-highest revenue producer of Valeant-CA's branded prescription drugs. . . . All of this demonstrates that Valeant-CA and Salix share a high degree of operational commonality and are financially interdependent. For these reasons, we find that Valeant-CA, Bausch & Lomb, and Salix are sufficiently interrelated to give rise to a corporate affiliate conflict."

"Again, even if there were an ambiguity in the engagement letter, which there is not, Katten's representation of Mylan adverse to Salix would still give rise to a conflict of interest. This is because Katten and Bausch & Lomb undisputedly have an attorney-client relationship and Bausch & Lomb, Salix, and Valeant-CA are sufficiently interrelated to give rise to a corporate affiliate conflict."

"For the reasons stated above, we find that Katten's representation of Bausch & Lomb in the trademark litigation presents a concurrent conflict of interest with its representation of Mylan in

Valeant II, *Salix II*, and *Dr. Falk II*. Under Rule 1.7, Katten may not represent Mylan in these appeals unless it previously obtained informed and written consent from both clients. Katten has failed to do that here, and therefore has violated Rule 1.7."

G. Conflict of Interest: Current Clients; Specific Rules, Rule 1.8

In re Brooks, Board Release of Information.

Dennis Dwayne Brooks of Jonesborough was publicly censured.

"Mr. Brooks entered into an agreement to publish a book about the convictions of three people for murder, after he was successful in getting murder convictions as the lead prosecutor in the matters. Mr. Brooks' book was published prior to the conclusions of the appeals of two of the convictions. After Mr. Brooks' book was published, one of the defendants filed a motion for a new trial and a writ of error coram nobis alleging that the book contained evidence which had not been provided to the defense. The appeals of two of the convictions were stayed for 18 months pending a hearing on these matters."

Mr. Brooks is in violation of RPCs 1.8 (conflict of interest) and 8.4(d) (prejudice to the administration of justice).

In re Garrison, Board Release of Information.

Lewis K. Garrison of Memphis was publicly censured.

"Mr. Garrison represented a client in a personal injury claim arising from an automobile accident. Mr. Garrison provided financial assistance to his client by paying the deposit so that the client might obtain a rental car and by advancing money to the client from a settlement with which to pay the client's rent. Mr. Garrison had been disciplined on four prior occasions for improperly providing financial assistance to clients."

Mr. Garrison violated RPCs 1.8(e) (conflict of interest) and 8.4(a) (misconduct).

In re King, Board Release of Information.

James Gregory King of Nashville was publicly censured and required to refund $2,500 in attorney fees to a relative of a client.

"In the representation of a client in a domestic relations proceeding, Mr. King failed to take proper action to comply with a scheduling order which led to the dismissal of the client's petition. Prior to the hearing on the motion to dismiss, Mr. King made misleading statements to his client about the nature and significance of the motion and hearing. Mr. King also accepted a refundable fee from a relative of the client without the client's knowledge and consent and failed to deposit this fee into his escrow account."

Mr. King violated RPCs 1.1 (competence), 1.3 (diligence), 1.4(a) (communication), 1.8(f) (accepting fees or direction from a third party), 1.15(c) (safeguarding client funds), and 3.2 (expediting litigation).

In re Tull, Board Release of Information.

Timothy Alan Tull of Spring Hill was publicly censured and required to pay restitution of $2,000 and engage a practice monitor, based on a conditional guilty plea.

"Mr. Tull, prior to the client's execution of a written waiver, failed to advise the client of potential conflicts of interest or the desirability of seeking independent legal advice, and further failed to provide the client with the opportunity to seek independent legal advice. Mr. Tull also failed to reasonably communicate with another client regarding the resolution of a discovery motion and the imposition of sanctions against the client."

Mr. Tull violated RPCs 1.4 (communication) and 1.8(a)(2) (conflict of interest).

New York State Bar Association Committee on Professional Ethics, Ethics Opinion 1156, Securing Fee Obligation with Mortgage Against Divorce Client's Property (Nov. 2018).

"The inquirer represents a client in a domestic relations matter that resulted in a judgment of divorce. The inquirer's legal services for the client are almost complete, although the representation continues. The client owes the inquirer legal fees for the services provided to date.

"The client is not readily able to make timely payment of the fees owed to the inquirer. The client is sole owner of a house in New York State which the client intends to sell as soon as possible, a transaction consistent with the client's rights under the divorce judgment. The client has requested that the inquirer defer payment of the outstanding legal fees until the client sells the house, with the fees to be paid from the sale proceeds.

"Discussions between the client and the inquirer have led to a tentative understanding, which the inquirer would like to incorporate into a written agreement, to be signed by both parties as a revision of the original retainer agreement. The proposed revision would provide: (1) that the inquirer would accept a specified amount – significantly less than the amount currently owed – in full payment of the fee obligation; (2) that the inquirer would take a mortgage against the house in the amount of the reduced fees; and (3), recognizing that the client may not be able to sell the house immediately, the inquirer would charge no interest on the fee balance for approximately seven months, after which interest at a low rate would start to accrue.

"In a divorce matter in which there is a judgment, may an attorney and a client, without court approval, amend the retainer agreement to give the attorney a mortgage against property of the client in order to secure the client's obligation to pay accrued legal fees in that matter?

"Legal fees are always subject to certain general provisions of the New York Rules of Professional Conduct (the 'Rules'), among them Rule 1.5(a), which prohibits fees that are excessive. The conduct proposed in this inquiry is subject to those general provisions, but also to two more specific ones as discussed below.Business transactions with clients under Rule 1.8(a)

"Rule 1.8(a) is triggered when three conditions are met: (i) there is a 'business transaction' between lawyer and client; (ii) they have 'differing interests therein'; and (iii) the client 'expects the lawyer to exercise professional judgment therein for the protection of the client.'

"When those conditions are met, then Rule 1.8(a) requires that the transaction be 'fair and reasonable to the client'; that the terms of the transaction be fully disclosed in writing in a manner that can be reasonably understood by the client; that the client be advised in writing of the desirability of seeking, and is given a reasonable opportunity to seek, the advice of independent legal counsel on the transaction; and that the client, in a signed writing, give informed consent to the essential terms of the transaction and the lawyer's role therein, including whether the lawyer is representing the client in the transaction.

"The facts of the current inquiry meet the three conditions that trigger application of Rule 1.8(a). First, the proposed agreement would constitute a 'business transaction.' An amendment to a retainer agreement, made during the course of representation, can constitute a business transaction in some circumstances, as we have previously discussed. See N.Y. State 910 ¶¶ 19-26 (2012) (listing factors bearing on whether a retainer amendment constitutes a business transaction).

"Moreover, '[w]hen a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a).' Rule 1.8, Cmt. [16]; see Rule 1.8, Cmt. [4C] ('The requirements of the Rule ordinarily must be met … when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of the lawyer's fee'); N.Y. State 1104 ¶ 4 (2016); N.Y. State 910 ¶ 16 (2012); ABA Op. 11-458; ABA Op. 02-427; N.Y. City 1988-7 (interpreting predecessor provisions). Hence, the proposed revision is a business transaction between a lawyer and a client governed by Rule 1.8(a).

"The second condition of Rule 1.8(a) is met also. In reaching their agreement, the inquirer and the client will have occasion to negotiate terms that may be more favorable to one or the other. For example, the provisions for interest on unpaid balances may be more or less stringent. There could also be terms relating to possible foreclosure on the mortgage. Thus, the parties have 'differing interests' in the transaction, as that term is defined in Rule 1.0(f).

"The final condition is that client expects the lawyer to exercise professional judgment therein for the protection of the client. The client may well be an unsophisticated party not versed in contracts or negotiations over legal fees. Under these circumstances, it is foreseeable that the client will expect the inquirer to act in the client's interest. See N.Y. 1104 ¶ 6 (2016) ('Here, the client may be looking to the lawyer's professional judgment to understand the significance of the proposed mortgage and promissory note to the services for which the lawyer is being engaged.'); N.Y. City 1988-7 ([I]t would be unrealistic to conclude that a client would not expect his or her lawyer to exercise professional judgment for the client in drafting the mortgage agreement.').

"Because the three conditions are met, the inquirer is subject to the requirements of Rule 1.8(a). The first requirement is that the transaction be fair and reasonable to the client. The inquiry does not include the text of the proposed agreement. As summarized to us, the proposed agreement does not sound obviously unfair in any way, but the inquirer would have to consider all the terms – such as the details relating to interest and possible foreclosure – to determine that the transaction is fair and reasonable to the client.

"Similarly, the inquirer would need to consider the entire text to assess compliance with the requirement that the agreement be written in a manner that can be reasonably understood by the client. As discussed above, it is also necessary that the written agreement include certain specific provisions. It must describe not only the essential terms of the transaction but also the inquirer's role therein, and whether the inquirer is representing the client in the transaction. Finally, the writing must advise the client of the desirability of seeking, and the client must be given a reasonable opportunity to seek, the advice of independent legal counsel on the transaction. . . .

"We have no occasion to discuss any ethical considerations with respect to possible execution on the mortgage."

D.C. Bar Ethics Opinion 375, Ethical Considerations of Crowdfunding (Nov. 2018).

"Lawyers are generally free to represent clients who pay for legal services through crowdfunding. The ethical implications of crowdfunding a legal representation vary depending on the lawyer's level of involvement in the crowdfunding."

"The Committee has received numerous inquiries asking whether and how lawyers may ethically raise money (or accept money raised) via crowdfunding to pay for legal services for one or more clients. In general, crowdfunding is the process of raising money from third parties for the benefit of another. While the term is most often used to describe the practice of raising small amounts of money from numerous people through social media and other platforms, as used in this opinion, 'crowdfunding' refers to the solicitation and acceptance of such funds to pay for someone else's legal representation."

"Crowdfunding is generally structured in one of two ways: 1) equity-based funding, in which the investor retains an ownership interest in either the recipient (here, the law firm or its client) or in future recoveries/earnings/profits of the firm or matter, or 2) donation-based funding, in which the donor receives no financial interest in the legal matter, but may receive other incentives. This opinion focuses solely on donation-based funding and does not address equity-based funding, though some of the same ethical considerations apply."

"The Committee notes, at the outset, that the ethical implications of crowdfunding a legal representation vary depending on the lawyer's level of involvement in the crowdfunding.

"I. Lawyer's Receipt of Funds Raised by Client

"There is nothing in the Rules prohibiting a lawyer from accepting funds from a client who has raised or is raising money through crowdfunding. It is not unusual for clients to rely on money collected from family or friends to pay for legal services. . . . However, because there may be heightened risk of fraud, money laundering, and other criminal activities in connection with any such exchange of funds, a lawyer should be cognizant of such risks and take reasonable precautions to avoid unwittingly engaging or assisting in unethical or illegal conduct.

"For lawyers, ethical risk accompanies the legal risk. When illegal conduct of a client is suspected or known, specific ethical duties arise under the Rules. For example, when a lawyer suspects or knows that a client has obtained funds to pay for the legal representation in a manner that is illegal or otherwise poses risk for the client, the lawyer has ethical obligations to counsel the client on

such risks and/or the limits of what the lawyer is able to do for the client under the ethics rules and in light of the lawyer's own obligation to comply with the law.

"A lawyer should consider counseling his or her client regarding disclosures to third parties. Crowdfunding typically entails some level of disclosure to third parties about the predicate need for counsel. Because of their financial support, crowdfunding contributors may be interested in the status of or information about the client's matter. Due to the risk of waiver of the attorney-client privilege, or simply for strategic reasons, a lawyer who knows that a client is crowdfunding should provide the appropriate level of guidance to the client regarding disclosures to third parties, whether such disclosures occur on a social media platform or privately in discussions with friends and family."

"II. Crowdfunding by a Lawyer

"A lawyer who undertakes or exerts control over the crowdfunding effort has specific ethical responsibilities under the Rules.

"A. Lawyer's Acceptance of Fees from Third Parties

"Whether a lawyer may accept compensation from third parties for legal fees is governed by the requirements of Rule 1.8(e). The Rule states that,

"A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) The client gives informed consent after consultation;
(2) There is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
(3) Information relating to representation of a client is protected as required by Rule 1.6.

"Thus, when a lawyer assists a client in crowdfunding a legal representation, each provision of Rule 1.8(e) must be met. With respect to Rule 1.8(e)(1), 'informed consent' is a defined term under Rule 1.0(e), and 'denotes the 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.'

"Under Rule 1.8(e)(2), the lawyer must ensure there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship. Rule 5.4(c) also prohibits a lawyer from allowing a person who pays the lawyer to provide legal services to a third party from 'direct[ing] or regulat[ing] the lawyer's professional judgment in rendering such legal services.' In the context of crowdfunding, a lawyer may not allow donors, whether family members or strangers, to exert undue influence with respect to the objectives of the representation or the legal strategies employed. This duty remains unchanged notwithstanding the social media and other connections that often accompany crowdfunding.

"In addition to the guidance a lawyer provides to the client regarding disclosures to third parties (as discussed in part I), under Rule 1.8(e)(3) a lawyer is also prohibited from voluntarily sharing a client's confidential information with donors. Rule 1.6 provides that, in the absence of the

client's informed consent or other enumerated exception, a lawyer shall not use or reveal a client's confidences or secrets."

"B. Fee Agreements

"Although it may be tempting to forgo a written engagement agreement in a crowdfunded representation that has the appearance of being 'free' from the client's perspective, lawyers must meet the requirements of Rule 1.5 regarding fees. Specifically, Rule 1.5(b) requires that, '[w]hen the lawyer has not regularly represented the client, the basis or rate of the fee, the scope of the lawyer's representation, and the expenses for which the client will be responsible shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation.' Even when a lawyer has regularly represented a client such that a written engagement agreement may not be required, crowdfunding can trigger areas of confusion that may not be present in a traditional client-self pay situation, such as ownership of excess crowdfunds raised and responsibility for payment if crowdfunds fall short of legal fees and expenses incurred. Accordingly, the Committee strongly encourages lawyers to have a written fee agreement for every representation involving crowdfunding by the lawyer.

"C. Communications with Donors and Prospective Donors

"A lawyer who conducts the crowdfunding on behalf of a client must ensure that the communications used to solicit the funds are truthful. The level of detail and transparency required will depend on the circumstances but must take into account Rule 1.6 and any other confidentiality obligations. For instance, a lawyer should avoid providing specific information about how the funds will be used to effectuate the legal strategy. A lawyer's professional obligations to exercise his or her independent judgment and to zealously represent the client remain paramount, regardless of the source of the funds. The Committee recommends informing contributors that their donated funds are nonrefundable, that they will not receive confidential information about the client's matter, and that they may not interfere with or otherwise exert control over the lawyer's work.

"D. Management of Funds

"The fact that crowdfunds come from sources other than the client does not alter the fact that they are client funds and must be treated as such consistent with the Rules.

"Funds collected on behalf of a client by the lawyer through crowdfunding must be treated as advanced fees. Unless there is an agreement with the client under Rule 1.15(e), these funds must be placed in trust for the client, as required by Rules 1.15(a) and (b). The lawyer should invoice the client and transfer funds to the operating account only as fees are earned and expenses incurred, or as otherwise consistent with the guidance provided in D.C. Legal Ethics Opinion 355. A lawyer should monitor any fundraising activity that he or she controls, as a lawyer who solicits and receives excessive funds on behalf of his or her client may run the risk of violating one or more ethics rules. To mitigate this risk, a lawyer should have a plan (approved by the client) to terminate crowdfunding when it appears that sufficient funds have been raised.

"Although lawyers are generally able to seek informed consent, under Rule 1.15(e), to place unearned fees and expenses in a lawyer's or law firm's operating account rather than the trust account, the Committee recommends caution around this exception when crowdfunding.

Crowdfunding increases the risk that a lawyer could be perceived as seeking an unreasonable fee under Rule 1.5(a). This is in part because of the ease by which the amount of money in excess of what is required to fund the representation may be raised and in part because some clients may exercise less scrutiny over the lawyer's bills since the client is not personally, or at least not solely, responsible for payment. Placing crowdfunds in a trust account until the lawyer earns the fee or incurs the expense ensures that there is a clear delineation of lawyer funds and client funds.

"Crowdfunding may also increase the risk of disputed ownership of funds. For example, if a donor claims that he or she donated more money than intended, or directed it to the wrong recipient, a lawyer would mitigate his or her ethical risk by ensuring such funds remain in trust until they are earned.

"In the absence of an appropriate agreement, unearned crowdfunds are the property of the client and should be returned to the client upon the matter's conclusion or termination of the representation, unless the client directs the lawyer to do otherwise. . . . Pursuant to Rule 1.5(b), this point should be addressed with clients in engagement agreements and may be included in disclosures to donors, subject to Rule 1.6."

"The Committee believes it would be unethical for a lawyer personally to claim unearned crowdfunds at the conclusion of a representation. . . . A lawyer who claims unearned fees at the conclusion of such a representation risks violating Rule 1.5(a)."

H. Conflict of Interest: Government Employees, Rule 1.11

State v. Orrick, No. M2017-01856-CCA-R9-CD (Tenn. Crim. App., Montgomery, Oct. 15, 2018), perm. app. denied Feb. 21, 2019.

"On October 2, 2015, the Defendant was indicted on four counts of rape of a child and four counts of aggravated sexual battery. . . . On November 10, 2015, Felicia Walkup was appointed to represent the Defendant. On December 2, 2015, Ms. Walkup filed a motion to reduce the Defendant's bond, and the trial court denied the motion on December 18, 2015. On January 6, 2016, Ms. Walkup sought permission to withdraw as counsel because she had accepted a position as an Assistant District Attorney General for the Seventeenth Judicial District. Ms. Walkup was permitted to withdraw, and the Defendant's present counsel was appointed on January 13, 2016.

"On April 5, 2017, the Defendant filed a motion to disqualify the Office of the District Attorney General for the Thirty-first Judicial District due to a conflict of interests. The defense alleged that Ms. Walkup was an Assistant District Attorney General for the Thirty-First Judicial District and argued that the district attorney general's office should be vicariously disqualified from prosecuting the Defendant because Ms. Walkup had been substantially involved in the Defendant's representation.

"At the motion hearing, the defense relied upon Rule of Professional Conduct 1.10(d), the general rule regarding imputation of conflicts of interests, as the basis for disqualifying the district attorney general's office. The defense argued that Ms. Walkup was substantially involved in the Defendant's representation until she 'left for public office,' that her representation was related to a proceeding in which the State's and the Defendant's interests were adverse, and that the proceeding remained pending. The defense argued that Rule of Professional Conduct 1.11, the special rule regarding conflicts of interests for former and current government officers and

employees, did not apply in this case because this Rule protected the government's confidential information, not the Defendant's confidential information."

"The Defendant testified that he and Felicia Walkup had private, confidential conversations about the facts of this case and that he wrote her letters containing private information during her representation. On cross-examination, the Defendant stated that Ms. Walkup represented him from November 4, 2015, to January 11, 2016, and that the only court proceeding held during this time was related to a motion to reduce his bond.

"Felicia Walkup testified that she obtained her license to practice law in 2001 and that she previously worked for the Coffee County District Attorney's Office before entering private practice in Warren County. . . . She said that she began working for the District Attorney General for the Seventeenth Judicial District on January 11, that she worked there for six months, and that she transferred to the Office of the District Attorney General for the Thirty-First Judicial District, which included Warren County.

"Ms. Walkup testified that when she began working for the Warren County District Attorney's Office, she spoke with District Attorney General Zavogiannis about conflicts of interests stemming from pending cases in which she had previously served as defense counsel. Ms. Walkup denied that they discussed the cases with specificity and noted that she did not know which of her previous cases had been resolved or remained pending. She said that based upon their discussion, she would have no involvement with her previous cases."

"In its written order granting the motion to disqualify, the trial court found that Ms. Walkup was substantially involved in the Defendant's representation, that her previous representation was in connection with an adjudicative proceeding that was directly adverse to the interests of the district attorney's office, and that the case remained pending at the time Ms. Walkup began her employment with the district attorney's office. As a result, the court determined that Ms. Walkup's conflict of interests was imputed upon the district attorney's office. The court disagreed with the State's assertion that Rule 1.11(d) and Comment [2] were controlling authority and found that Rule 1.11(d) was inapplicable to this case, although the court recognized a 'conflict' between the language of Rule 1.11(d) and Comment [2].

"The State filed a motion requesting that the trial court reconsider its determinations and, alternatively, sought permission to seek an interlocutory appeal. . . . This court granted the State's request for an interlocutory appeal."

"On appeal, the State argues that offices of district attorneys general are not subject to a per se rule of disqualification based upon an imputed conflict of interests. In relying on *State v. Coulter*, 67 S.W.3d 3 (Tenn. Crim. App. 2001), *abrogated on other grounds by State v. Merriman*, 410 S.W.3d 779 (Tenn. 2013), the State argues that the trial court erred by applying Rule of Professional Conduct 1.10 and that Rule 1.11 applies to assistant district attorneys general. The Defendant responds that the trial court did not abuse its discretion by applying Rule 1.10 and by disqualifying the Office of the District Attorney General for the Thirty-First Judicial District."

"The practical implications of applying the per se rule of disqualification in Rule 1.10(d) and *Clinard* highlight the need for a special rule regarding a public attorney's conflicts of interests and vicarious disqualification of the entities for which the attorney works. Application of the per se disqualification in these cases would create an 'absurd result,' significantly impacting efficiency

of the administration of the criminal justice system. *See Doe*, 104 S.W.3d at 469. If vicarious disqualification of district attorneys general's offices were required each time a district attorney general employed a former criminal defense attorney, assuming the criterion of Rule 1.10(d)(1)-(3) are satisfied, the law enforcement function of prosecuting individuals accused of committing criminal offenses would become disrupted, routinely requiring the appointment of special prosecutors. Application of the per se rule of disqualification would also deter competent attorneys from entering public service as assistant district attorneys general, impeding a district attorney general's ability to hire competent attorneys while simultaneously complying with ethical standards. *See* Tenn. Sup. Ct. Rule 8, RPC 1.11, Cmt. [4] (2017). The provisions related to screening 'are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service.' *See* Tenn. Sup. Ct. Rule 8, RPC 1.11, Cmt. [4]."

"Based upon the foregoing, we conclude that Rule of Professional Conduct 1.11 is the applicable ethical authority when considering whether the conflict of interests of a disqualified assistant district attorney general should be vicariously imputed upon a district attorney general's office."

"We conclude that Tennessee Supreme Court Rule 8, Rule of Professional Conduct 1.10 is the general rule governing the imputation of conflicts of interests but that Rule 1.11, the specialized rule regarding public service attorneys, applies to whether a disqualified prosecutor's conflict of interests should be imputed upon a district attorney general's office. The record reflects that the trial court rejected Rule 1.11 as the applicable authority and that the court determined vicarious disqualification was required pursuant to Rule 1.10(d), although it also determined that the State had complied adequately with the screening procedures provided in Rule 1.10(c).

"The parties do not dispute that Ms. Walkup has an actual conflict of interests disqualifying her from participating in the Defendant's prosecution. *See* Tenn. Sup. Ct. Rule 8, RPC 1.11(d)(2)(i), 1.9(a) (2017). She testified at the motion hearing that she represented the Defendant between November 4, 2015, and January 11, 2016, that she prepared and filed a motion to reduce the Defendant's bond, and that her only court appearance in this case was related to the bond motion. She stated that she and the District Attorney General discussed her conflicts of interests stemming from pending cases in which she previously served as defense counsel. They did not discuss the cases with specificity, and Ms. Walkup understood after the discussion that she would not have any involvement in any of her previous cases. Ms. Walkup did not know which of her previous cases remained pending."

"The record reflects that Ms. Walkup was prohibited from participating in the prosecution of the Defendant and that she did not provide anyone working in the district attorney's office with information related to the Defendant's case. Ms. Walkup and the prosecutor did not communicate about this case, and any meetings about this case were held on a different floor from Ms. Walkup's office. The District Attorney General and Ms. Walkup discussed generally her conflicts of interests related to cases in which she previously served as defense counsel, and they decided she would have no involvement with those cases. The prosecutor's affidavit reflects that the District Attorney General instructed personnel not to communicate with Ms. Walkup about any pending case in which Ms. Walkup had served as defense counsel. The record does not reflect any improper communications occurred relative to the Defendant's case. Likewise, the Defendant's attorney and the victim's mother were notified in writing of Ms. Walkup's conflict of interests. Therefore, the record supports the trial court's determinations that Ms. Walkup had not participated in the prosecution, that she had not spoken to the prosecutor about the facts of the case, that Ms. Walkup had not disclosed the Defendant's confidential information, and that

adequate screening procedures had been instituted preventing the disclosure of confidential information. *See* Tenn. Sup. Ct. Rule 8, RPC 1.11(b)(1)-(4) (2017) (permitting screening and notice to avoid imputation for attorneys moving into government service in the same manner as provided for 'other' attorneys in RPC 1.10(c)); *see id.* 1.10(c)(1)-(4). As a result, the adequate screening procedures prevented the disclosure of the Defendant's confidential information, which is the primary concern in criminal cases. *See Coulter*, 67 S.W.3d at 32-33. Therefore, Ms. Walkup's disqualifying conflict of interests did not warrant vicarious disqualification of the District Attorney General's Office."

I. Safekeeping Property and Funds, Rule 1.15

Board of Professional Responsibility v. Sheppard, 556 S.W.3d 139 (Tenn., Lee, 2018).

"Michael Gibbs Sheppard graduated from law school in 1982. For many years, he worked for an insurance company in Ohio. In 1999, Mr. Sheppard was admitted to practice law in Tennessee. Six years later, he and attorney Perry A. Craft founded the law firm of Craft & Sheppard in Brentwood, Tennessee. Mr. Sheppard was the firm's managing partner and was responsible for oversight of the firm's financial records and trust account.

"Between 2009 and 2013, client funds in three cases were commingled with law firm funds. Client funds were not maintained in Craft & Sheppard's trust account but were transferred electronically to Craft & Sheppard's operating account to pay expenses.

"On November 17, 2014, the Board of Professional Responsibility ('Board') filed a Petition for Discipline against Mr. Sheppard, alleging that he had violated Rule 1.15 (safekeeping property and funds) and Rule 8.4 (misconduct) by, among other things, failing to maintain client funds in trust and by commingling client funds with law firm funds. In response, Mr. Sheppard did not dispute that he had mismanaged the trust account. He submitted, however, that his misconduct was not intentional but the result of his negligence and inexperience in trust account management. Mr. Sheppard also contended that the Board should not treat him any differently than his law partner, Mr. Craft, to whom the Board had issued only a public censure for his misconduct relating to the firm's trust account."

"On August 25, 2016, a hearing panel of the Board convened to hear the parties' evidence. Testimony focused mainly on the management of client funds received by Craft & Sheppard from settlements in the Utica, Shedd, and Ali cases.

"In 2003, Utica, an insurance company, hired Mr. Sheppard to represent its interests in a subrogation claim arising out of a fire loss. After Craft & Sheppard was established, Utica became a client of the firm and Mr. Craft began handling the matter. Mr. Craft eventually settled the case for $145,000, which was deposited in the firm's trust account in early February 2011. Utica and Craft & Sheppard disagreed about the amount of the attorney fee to be deducted from the settlement funds. Neither party had a copy of the fee agreement. The funds should have remained in trust until Utica and the firm resolved the fee dispute. *See* Tenn. Sup. Ct. R. 8, RPC 1.15(e). However by February 15, 2011, the funds in the trust account had fallen to $48,701.98; by February 28, 2011, the balance was only $7,077.58.

"On April 26, 2011, Mr. Sheppard sent Utica an email stating, '[t]he settlement funds reside in our trust account and no one has "used" these funds.' Yet bank records reflected that the firm's

trust account balance on that date was only $104,850.62. In June 2011, Mr. Craft emailed Utica assuring it that 'your funds are safe and secure in the firm's trust account.' The funds, however, were not safe and secure. Eventually, Utica and Craft & Sheppard settled their fee dispute for $130,000, each partner agreeing to pay Utica one-half of that amount. Mr. Sheppard filed for bankruptcy protection in March 2014, listing Utica as a creditor. He later settled his obligation to Utica for $27,000. According to Mr. Sheppard, Mr. Craft paid Utica only $30,000 of his share of the debt.

"In the second case, Donna Shedd hired Craft & Sheppard to handle a wrongful death lawsuit against a doctor and a hospital, arising out of her daughter's death. In July 2009, during the trial of the case, Ms. Shedd's claim against the doctor was settled for $1,000,000; the case against the hospital resulted in a defense verdict. Craft & Sheppard deposited the settlement funds in the trust account. The firm withdrew its one-third contingency fee and paid litigation expenses, leaving about $400,000 in the trust account for Ms. Shedd's share of the settlement. Shortly after Craft & Sheppard received the settlement funds, the father of Ms. Shedd's deceased daughter moved to intervene in the lawsuit seeking one-half of the settlement proceeds. The trial court denied the request and the father appealed. Mr. Craft represented Ms. Shedd on appeal.

"In mid-December 2009, while the appeal was pending, the firm paid Ms. Shedd $200,000 from the trust account, which was roughly one-half of the remaining settlement funds. Therefore, the trust account balance should have been at least $200,000. Yet on December 18, 2009, the balance was $56,830.19; on February 26, 2010, there was only $11,497.29 in the trust account; on March 29, 2013, the balance fell to $8,281.39; and by April 29, 2013, the trust account balance was $9,357.59. On July 11, 2013, Craft & Sheppard paid Ms. Shedd $208,022.37 after Mr. Sheppard borrowed $125,000 to cover the deficit in the firm's trust account.

"In the Ali case, Craft & Sheppard deposited $400,000 in its trust account from the settlement of the personal injury claim in late December 2009 and withdrew its attorney fee. Mr. Craft, who had handled the matter, entered into an arrangement to 'slow pay' the client's portion of the settlement proceeds. As of February 26, 2010, the trust account balance was only $11,497.29, far less than the amount of client funds that should have been in the trust account. Eventually, Craft & Sheppard overpaid the Ali client more than $27,000.

"Mr. Sheppard admitted in his testimony before the hearing panel that he had mismanaged the trust account by allowing client funds to be improperly transferred into the firm's operating account. He explained that his actions were not intentional but the result of lack of oversight, inexperience in trust account management, inadequate recordkeeping, personal family and financial problems, and lack of knowledge of Mr. Craft's arrangements with his clients. According to Mr. Sheppard, Mr. Craft mainly handled the Utica, Shedd, and Ali cases, and Mr. Sheppard was unfamiliar with the financial details of the cases. For example, Mr. Craft arranged the gradual payout of the Ali settlement without informing Mr. Sheppard, which resulted in an overpayment to the client.

"Mr. Sheppard insisted that he tried to keep Mr. Craft informed about the firm's finances by presenting him with written financial reports almost every day. The two reports admitted into evidence consist of one-page spreadsheets showing only the date, recipient, and amount of outstanding checks, as well as the balance of each of the firm's three bank accounts, including the firm's trust account.

"Mr. Sheppard denied intentionally misleading Utica when he assured it that the disputed funds remained in the trust account. He explained that he did not realize the gravity of his mismanagement until he had to borrow money to pay the settlement proceeds owed to Ms. Shedd. Mr. Sheppard also noted that he had continued working to pay off the substantial debt owed to the firm's creditors.

"Mr. Craft testified that he trusted Mr. Sheppard to manage the firm's finances. He denied ever seeing or accessing the firm's bank account records or making any online transfers between the trust account and the operating account, and claimed to have relied exclusively on Mr. Sheppard for financial information. According to Mr. Craft, only Mr. Sheppard or his son had access to the online bank account records. Mr. Craft left the firm in July 2013.

"A former Craft & Sheppard paralegal who worked for Mr. Craft after he left the firm testified that the firm's financial records were on a laptop computer maintained by Mr. Sheppard's son."

"The hearing panel found that Mr. Sheppard had failed to properly maintain and monitor client trust accounts, which resulted in the commingling of client funds, use of client funds to pay for operating expenses, and a diminished balance of client funds in the trust account. The hearing panel concluded that these actions constituted 'knowing' violations of Rules of Professional Conduct 1.15 and 8.4, and that Mr. Sheppard 'knowingly misled' at least one client about the status of the client's trust funds. The hearing panel, however, found no proof of 'intentional acts' that benefited Mr. Sheppard to the detriment of others or of 'acts or omissions [that] seriously injured his clients.'"

"Following a hearing in February 2017, the chancery court held that the hearing panel's decision to suspend Mr. Sheppard for knowingly mismanaging client funds did not conflict with the ABA Standards. The chancery court affirmed all mitigating factors identified by the hearing panel. Echoing the hearing panel's concern about the sanction imposed on Mr. Craft, the chancery court noted that a longer suspension for Mr. Sheppard would have been appropriate but for the lighter sanction imposed on Mr. Craft. The chancery court, however, found that there was substantial evidence of two aggravating factors: dishonest or selfish motive and substantial experience in law. And the chancery court found that 'there was harm' to Utica.

"Based on these findings, the chancery court modified the hearing panel's ruling. The chancery court decided that Mr. Sheppard should be suspended for one year, with the first sixty days to be served on active suspension and the remainder to be served on probation. After the one-year suspension period, Mr. Sheppard was to be on probation for another five years, with the first two years supervised by a practice monitor. Additionally, the chancery court prohibited Mr. Sheppard's participation in cases involving trust funds exceeding $5,000 during the five-year probation period, unless he associated counsel to assist him."

"The hearing panel also considered, as a mitigating factor, the more lenient sanction of public censure given to Mr. Craft. We reject the Board's contention that considering the sanction imposed on Mr. Craft was improper."

"Given the hearing panel's findings that there were no aggravating factors and numerous mitigating factors, including the lighter sanction imposed on Mr. Craft, the hearing panel could have appropriately considered either disbarment or suspension as the presumptive sanction. We conclude that the hearing panel did not abuse its discretion in recommending that Mr. Sheppard

be suspended, and that the decision is supported by material and substantial evidence in the record."

"We now consider the sanctions imposed by this Court in factually similar cases to determine whether the hearing panel abused its discretion in recommending that Mr. Sheppard be suspended rather than disbarred. The Board contends that this Court has determined that disbarment is appropriate in cases involving mismanagement of client funds. Mr. Sheppard counters that this Court's imposition of disbarment in certain cases does not prevent a hearing panel from recommending a suspension in a case involving misuse of trust account funds. Under the abuse of discretion standard, the ruling of the hearing panel 'will be upheld so long as reasonable minds can disagree as to propriety of the decision made.' *Sallee*, 469 S.W.3d at 42 (internal citations omitted)."

"Mr. Sheppard's knowing mismanagement of client funds is a serious ethical violation that merits the imposition of discipline by this Court. A different hearing panel might have imposed a harsher sanction. Under our deferential standard of review, we conclude that substantial and material evidence in the record supports the hearing panel's decision to suspend rather than disbar Mr. Sheppard, and that the decision is not arbitrary, capricious, or characterized by an abuse of discretion. Under that same standard of review, the trial court erred in making new factual findings and substituting its judgment for that of the hearing panel, without any of the bases enumerated in Tennessee Supreme Court Rule 9, section 1.3."

"We hold that the hearing panel's decision was fully supported by substantial and material evidence and was not arbitrary, capricious, or an abuse of discretion. The chancery court therefore erred in modifying the sanction imposed by the hearing panel."

In re Allman, Board Release of Information.

Andy Lamar Allman of Hendersonville was disbarred and required to pay restitution of $322,898.85.

"This is the second order disbarring Mr. Allman and is based upon a Petition for Discipline involving forty-six separate disciplinary complaints filed against Mr. Allman, an unfiled Supplemental Petition for Discipline containing nine complaints and two disciplinary complaints under investigation.

"Mr. Allman knowingly and intentionally misappropriated client funds received in the settlement of litigation claims and life insurance proceeds held in trust for a minor child, knowingly, intentionally and systematically misappropriated unearned retainer fees and converted the funds to his personal or business use, failed to provide the substantive professional services for which he was retained, and misled clients regarding the status of their cases and the filing of pleadings. Mr. Allman failed to notify his clients of his temporary suspension, engaged in the unauthorized practice of law, and failed to respond to the Board regarding a disciplinary complaint."

Mr. Allman violated RPCs 1.1 (competence), 1.3 (diligence), 1.4 (communication), 1.5 (fees), 1.15 (safekeeping property and funds), 1.16 (declining or terminating representation), 3.3 (candor toward the tribunal), 3.4 (fairness to opposing party and counsel), 5.5 (unauthorized practice of law), 8.1 (disciplinary matters) and 8.4 (misconduct).

In re Allman, Board Release of Information.

Andy Lamar Allman of Hendersonville was disbarred and required to pay restitution of $511,386.50.

"This is the third order disbarring Mr. Allman and is based upon a Petition for Discipline, Supplemental Petition for Discipline, Second Supplemental Petition for Discipline, and Third Supplemental Petition for Discipline involving seventy-four separate disciplinary complaints.

"Mr. Allman submitted a Conditional Guilty Plea on June 8, 2018, admitting he knowingly and intentionally misappropriated client funds received in the sale of real estate and/or the settlement of litigation claims; knowingly, intentionally and systematically misappropriated unearned retainer fees and converted the funds to his personal or business use; failed to provide the substantive professional services for which he was retained; and misled clients regarding the status of their cases and the filing of pleadings. Mr. Allman failed to notify his clients of his temporary suspension, engaged in the unauthorized practice of law, and failed to respond to the Board regarding a disciplinary complaint."

Mr. Allman violated RPCs 1.1 (competence), 1.2 (scope of representation), 1.3 (diligence), 1.4 (communication), 1.5 (fees), 1.15 (safekeeping property and funds), 1.16 (declining or terminating representation), 3.2 (expediting litigation), 5.5 (unauthorized practice of law), 8.1 (disciplinary matters) and 8.4 (misconduct).

In re Bean, Board Release or Information.

Joseph Scott Bean, Jr., of Franklin was publicly censured.

"During the duration of his four-year disciplinary suspension, Mr. Bean has maintained a trust account and used it as his personal checking account. Although there was no evidence that client funds were involved, Mr. Bean's conduct was improper and violated Rule 1.15 regarding trust accounts."

Mr. Bean violated RPC 1.15 (safekeeping property and funds).

In re Hardison, Board Release of Information.

R. W. Hardison of Franklin was suspended for five years, retroactive to his temporary suspension on August 29, 2017, based on a conditional guilty plea.

"The Board of Professional Responsibility filed a Petition for Discipline on November 28, 2017, including three complaints of misconduct. Two of the complaints arose from overdraft notices in Mr. Hardison's trust account. The third complaint resulted from a closing transaction wherein Mr. Hardison assisted a client with the refinancing of a commercial loan but failed to pay off one of the lenders in the original loan transaction. Mr. Hardison's trust account balance for the months following the loan transaction remained below the amount that should have been in the account. Mr. Hardison refunded his client the unpaid loan amount and cites his negligent oversight of the trust account as the cause for him being unaware of the unpaid loan."

Mr. Hardison violated RPCs 1.15(a), (b) and (d) (safekeeping property and funds), 5.3(a) and (c) (responsibilities regarding non-lawyer assistance, 8.1(b) (disciplinary matters) and 8.4(a) and (c) (misconduct).

In re Iwu, Board Release of Information.

John Benneth Iwu of Antioch was publicly censured.

"In December 2017, Mr. Iwu authorized two electronic payments representing filing fees from his trust account knowing that his trust account contained personal funds that would not be sufficient to cover the amount of the payments. While Mr. Iwu anticipated depositing client funds into the account to cover the filing fees, he ultimately forgot resulting in an overdraft on the account."

Mr. Iwu violated RPCs 1.15 (safekeeping funds), 8.4(b) (criminal conduct) and 8.4(c) (conduct involving dishonesty).

In re Lee, Board Release of Information.

On July 9, 2018, Alan C. Lee of Morristown was publicly censured and required to attend the three-hour Trust Account Workshop of the Board of Professional Responsibility.

"Mr. Lee issued two checks from his trust account to two clients for settlement funds to those clients. At the end of the month, Mr. Lee mistakenly believed the two checks had been cashed by the clients, so Mr. Lee took the remaining funds on those matters as a fee. The two clients later cashed the checks, and the checks were covered by other funds in the account. Mr. Lee discovered the error, but did not replace the funds in his trust account which had been inadvertently taken as a fee for almost two months. Mr. Lee's conduct resulted in harm to his clients."

Mr. Lee violated RPC 1.15(e) (safekeeping funds).

In re Luethke, Board Release of Information.

Kay Jeffrey Luethke of Kingsport was publicly censured and required to attend the Board's Trust Account Workshop.

"Mr. Luethke improperly commingled trust funds into his operating account and personal funds into his trust account on several different occasions. Mr. Luethke also held funds in his trust account which were not related to any representation, withdrew funds without allowing adequate time for a check to clear, and inadvertently used trust funds to pay a personal debt without reconciling his account and correcting the problem."

Mr. Luethke violated RPC 1.15 (safekeeping property).

In re Mechem, Board Release of Information.

Everett Hoge Mechem of Kingsport was disbarred and required to pay restitution to one client, based on a conditional guilty plea.

"Mr. Mechem represented clients in a personal injury lawsuit and accepted a settlement that was not authorized by his clients. Further, after depositing the settlement funds into his trust account, no distribution was made to his clients and Mr. Mechem misappropriated the funds."

Mr. Mechem violated RPCs 1.1 (competence), 1.2(a) (scope of representation), 1.3 (diligence), 1.4 (communication), 1.15 (safekeeping property and funds), 8.1 (bar admission and disciplinary matters), and 8.4(a), (b), (c) and (d) (misconduct).

In re Weiss, Board Release of Information.

Martin Alan Weiss of Memphis was disbarred, based on a conditional guilty plea, and required to make restitution of $57,769, obtain an evaluation by the Tennessee Lawyers Assistance Program (TLAP) and enter into a monitoring agreement, if appropriate.

Mr. Weiss misappropriated funds from eighteen personal injury settlements. "When distributing the money upon settling these clients' cases, Mr. Weiss withheld an amount sufficient to pay what each client owed to the clinic where they had been treated. Rather than paying the money that had been withheld to the clinic, Mr. Weiss kept the money for his personal use."

Mr. Weiss violated RPCs 1.2(a) (scope of representation), 1.4 (communication), 1.5(c) (fees), 1.15(a) and (d) (safekeeping property and funds), 8.1(b) (bar admission and disciplinary matters), and 8.4(a) and (c) (misconduct).

J. Duties to Prospective Clients, Rule 1.18

In re Beguelin, 417 P.3d 1118 (Nev. 2018).

"This is an automatic review of a Southern Nevada Disciplinary Board hearing panel's recommendation that this court suspend attorney Mark A. Beguelin for six months and place him on probation for two years, with the suspension stayed during that probation, for violating RPC 1.18 (duties to prospective client)."

"Beguelin consulted with a prospective client about filing a divorce action and during that conversation the prospective client informed Beguelin that her husband was verbally abusive. When Beguelin learned during the consultation that the prospective client was the wife of a friend and sometimes client of his, he informed her that he could not represent her because it would be a conflict of interest. Beguelin then called his friend, the prospective client's husband, and informed him of the wife's call and that Beguelin could not represent either of them in the divorce. The prospective client testified at the hearing that after Beguelin called her husband, her husband telephoned her at work yelling and she was afraid to meet him to discuss the possible divorce that evening. The panel found that 'the substance of … the prospective client's [ ] communication with [Beguelin] was later revealed by [Beguelin], in violation of RPC 1.18.'

"RPC 1.18(b) provides that '[e]ven when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information.' This court has previously held that 'the substance of a consultation is protected by the attorney-client privilege and, therefore, must be maintained confidentially to comply with RPC 1.18(b).' *Pohl v. Ninth Judicial Dist. Court*, Docket No. 64725 (Order Denying Petition for Writ of Mandamus, Jan. 28, 2016). While Beguelin argues that he had a duty to disclose the consultation to the

husband under RPC 1.4, the panel chairman's finding that Beguelin did not have an attorney-client relationship with the husband concerning the divorce proceeding is supported by substantial evidence. Although Beguelin asserts that he was representing the husband in the divorce when he made the disclosure, the prospective client testified that her husband was refusing to consider a divorce at that time and was instead insisting the couple attend marital counseling. Additionally, Beguelin testified that he never prepared or filed a pleading for the husband or accepted any legal fees from the husband throughout their relationship, and that he was waiting for the husband to 'pull the trigger' in pursuing a divorce. Because the panel's findings of fact are supported by substantial evidence and are not clearly erroneous, we defer to them and based on those findings, we agree with the panel's conclusion that the State Bar established by clear and convincing evidence that Beguelin violated RPC 1.18."

"Accordingly, we hereby publicly reprimand Mark A. Beguelin for violating RPC 1.18 (duties to prospective client)."

II. Advocate (Rules 3.1 - 3.8)

A. Meritorious Claims and Contentions, Rule 3.1

In re Bowie, Board Release of Information.

Dawn Elaine Bowie of Hermitage was publicly censured.

"Ms. Bowie filed a guardianship action while a dependent and neglect petition was pending involving the same custody dispute. Ms. Bowie filed a motion for Rule 11 sanctions after being served with a motion to dismiss for lack of subject matter jurisdiction. Ms. Bowie did not provide opposing counsel with an opportunity to withdraw the motion to dismiss as required by the Tennessee Rules of Civil Procedure, and there was no merit to the motion for sanctions. Ms. Bowie also communicated with the opposing parties about the subject matter of the custody dispute despite being aware that they were represented by counsel."

Ms. Bowie violated RPCs 1.1 (competence), 3.1 (meritorious claims and contentions), 3.4(c) (knowing disobedience of an obligation under the rules of a tribunal), and 4.2 (communication with a person represented by counsel).

B. Expediting Litigation, Rule 3.2

In re Luthringer, Board Release of Information.

Lisa Bowman Luthringer of Chattanooga was publicly censured.

"After being retained in a child visitation case in November of 2012, Ms. Luthringer waited over seven months to file a motion for mediation. The case languished another thirteen months until October of 2014, when she finally filed a motion to modify the parenting plan. Ms. Luthringer waited another nineteen months to file a motion to set the case for a hearing. By the time the parties completed discovery, another year and a half had passed."

Ms. Luthringer violated RPCs 1.3 (diligence) and 3.2 (expediting litigation).

C. Candor Toward the Tribunal, Rule 3.3

In re Barnes, Board Release of Information.

William Jeffrey Barnes, of Boca Raton, Florida, was publicly censured. He was licensed in Florida and Colorado, but not Tennessee.

"Between May 2011 and August 2017, Mr. Barnes was admitted to practice pro hac vice in nine foreclosure actions in state and federal court in Tennessee. In each of the nine matters, Mr. Barnes' supporting affidavit stated that a copy of the filing was being sent to the Board of Professional Responsibility contemporaneously. Mr. Barnes, however, failed to send the materials to the Board of Professional Responsibility and failed to timely pay his pro hac vice registration fee as required under Tennessee Supreme Court Rule 19(f)."

Mr. Barnes violated RPCs 3.4(c) (fairness to opposing party and counsel), 3.3 (candor to the tribunal) and 8.4(c) (conduct involving misrepresentation).

In re Clayton, Board Release of Information.

Terry Renease Clayton of Nashville was publicly censured.

"Mr. Clayton represented the plaintiffs in a personal injury case. In a Court of Appeals brief, and a Court of Appeals oral argument, Mr. Clayton attributed a statement to defense counsel that does not appear in the record."

Mr. Clayton violated RPCs 3.1 (meritorious claims and contentions) and 3.3(a)(1) (candor toward the tribunal).

In re Springer, Board Release of Information.

Paul James Springer, Sr., of Memphis was disbarred.

"A Petition for Discipline consisting of three complaints was filed May 29, 2015.

"After a hearing upon the disciplinary petitions, a Hearing Panel determined Mr. Springer failed to reasonably communicate with his clients; made false representations to the court, his clients, and opposing counsel; failed to provide his clients with copies of their file; failed to comply with court orders; failed to issue summonses in a timely manner; engaged in fraud, deceit and misrepresentation; failed to file appropriate documents in court; failed to file timely appeals; filed frivolous appeals; and made material misrepresentations to the Board of Professional Responsibility."

Mr. Springer violated RPCs 1.1 (competence), 1.2 (scope of representation and allocation of authority between client and lawyer), 1.3 (diligence), 1.4 (communication), 1.16 (declining or terminating representation), 3.3 (candor toward the tribunal), 3.4 (fairness to opposing party and counsel), 8.1 (bar admission and disciplinary matters), and 8.4 (misconduct).

Lawrence v. City of New York, No. 15cv8947, 2018 U.S. Dist. LEXIS 126010, 2018 WL 3611963 (S.D.N.Y., July 27, 2018).

"The City of New York, Daniel Nunez, Daniel Beddows, Juan Rodriguez, Jens Maldonado, John Anzelino, and Michael Raso (together, 'Defendants') move for sanctions against Angela Lawrence and her former counsel Jason Leventhal stemming from their production of 67 photographs purporting to show the immediate aftermath of the events at issue in this action. Defendants contend that sanctions are warranted under Federal Rules of Civil Procedure 11, 26, and 37, and seek dismissal with prejudice and attorneys' fees. For the reasons that follow, Defendants' motion is granted in part and denied in part, and this case is dismissed."

"This Opinion & Order showcases the importance of verifying a client's representations. In November 2015, Leventhal filed this civil rights action on behalf of Lawrence. . . . The complaint alleged that in August 2014, NYPD officers entered Lawrence's home without a warrant, pushed her to the floor, damaged her property, and stole more than $1,000 in cash."

"In September 2016, Lawrence provided photographs that she claimed depicted the condition of her apartment several days after the incident. . . . Leventhal accepted his client's representations and after reviewing the photographs, saved them to a PDF, Bates-stamped them, and produced them to Defendants. . . . At that time, Leventhal was unfamiliar with electronically stored metadata and 'did not doubt [that] the photographs were taken contemporaneously with the occurrence of the damage.'"

"During a December 2016 deposition, Lawrence testified that her son or a friend took the photographs two days after the incident. . . . In a subsequent deposition in April 2017, Lawrence asserted that she had taken most of the pictures, that her son had taken a few, and that none of them were taken by the previously described friend. . . . At that juncture, Leventhal believed his client had memory problems but did not believe she was testifying falsely. . . . In view of Lawrence's conflicting testimony, Defendants requested the smartphones which Lawrence claimed were used to take the photos. . . . In August 2017, Leventhal objected, but agreed to produce the photographs' native files, which included metadata."

"When Defendants checked the photographs' metadata, they learned that 67 of the 70 photographs had been taken in September 2016—two years after the incident and immediately before Lawrence provided them to Leventhal. . . . In September 2017, Defendants sent a Rule 11 safe-harbor letter to Leventhal."

"In October 2017, Leventhal moved to withdraw as counsel, asserting that 'based upon facts of which [he] was not aware … [he] hereby disavow[ed] all prior statements made [regarding] the photographs.'. . . At an October 2017 conference, Leventhal's ethics counsel represented that at the time of production, Leventhal 'did not believe or have reason to believe that there was any question about the date or provenance of the photographs.'. . . Ethics counsel also stated that other events now compelled Leventhal to withdraw. . . . While Leventhal's motion was pending, Lawrence terminated Leventhal's representation."

"In December 2017, this Court granted Leventhal's motion to withdraw and afforded Lawrence two months to secure new counsel. . . . Lawrence was unable to engage a new lawyer and appeared pro se. By letter dated February 20, 2018, Lawrence claimed she provided the photographs to her attorney by accident because she had an eye infection. . . . At a status conference, this Court advised Lawrence that '[t]he issue here is whether the photographs that you submitted actually depicted the damages at the time or whether it was all staged by you and then given to your attorney.'. . . Further, this Court informed Lawrence that 'if evidence comes out

on [Defendants'] motion that in fact this is all fabricated, at a minimum, [the Court] may be duty bound to refer it to the United States attorney,' that her case could be dismissed, and that she 'may be subject to substantial monetary penalties.'. . . Lawrence elected to proceed.

"In the wake of Defendants' motion for sanctions, Lawrence forwarded numerous documents to this Court and attributed her production of the photographs to mental illness. . . . She also claims that her medications prevented her from testifying truthfully during depositions. . . . Lawrence's medical records evince a history of mental illness. . . . Most recently, Lawrence amended her deposition testimony and now contends that the photographs were taken by her grandchild for a book report."

"Rule 11 states that by signing a pleading, motion, or other paper, an attorney certifies that 'to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,' the document is submitted for a proper purpose, the legal claims are nonfrivolous, and 'the factual contentions have evidentiary support.' Fed. R. Civ. P. 11(b). 'Rule 11 imposes a duty on every attorney to conduct a reasonable pre-filing inquiry into the evidentiary and factual support for [a] claim….' *Capital Bridge Co. v. IVL Tech., Ltd.*, 2007 WL 3168327, at *10 (S.D.N.Y. Oct. 26, 2007)."

"Defendants attempt to cast what occurred here as conduct sanctionable under Rule 11. They contend that Leventhal failed to adequately investigate Lawrence's claims before filing this action and failed to drop those claims after learning that Lawrence had provided fraudulent photographs and given false testimony. But Rule 11 does not apply to this situation. Leventhal produced documents in discovery that turned out to be fraudulent. Defendants' sanctions motion rests entirely on that production. 'These incidents are not sanctionable under Rule 11 because they arose in the context of discovery and thus are not within the scope of Rule 11.' *Moeck v. Pleasant Valley Sch. Dist.*, 844 F.3d 387, 391 n.8 (3d Cir. 2016) (citing Fed. R. Civ. P. 11(d))."

"Further, the record does not support Defendants' contention that it was unreasonable for Leventhal to bring this action. '[U]nder Rule 11, an attorney has an affirmative duty to make reasonable inquiry into the facts and the law.' *In re Austr. & N.Z. Banking Grp. Ltd. Sec. Litig.*, 712 F. Supp. 2d 255, 263 (S.D.N.Y. 2010) (citation and marks omitted). Here, Leventhal made such an inquiry. Although Defendants allege the photographs constitute the only evidence of Lawrence's claims, Leventhal also: (1) requested Lawrence's medical records, which showed that she sought treatment for difficulty sleeping, nightmares, anxiety, depression, and weight loss from the alleged incident, (2) reviewed Civilian Complaint Review Board records regarding the incident and certain police officers' prior conduct, and (3) interviewed both Lawrence and her son. . . . This investigation was sufficient. '[A]n attorney is entitled to rely on the objectively reasonable representations of the client.' *Hadges v. Yonkers Racing Corp.*, 48 F.3d 1320, 1329–30 (2d Cir. 1995). . . ."

"This Court recognizes that the date the photographs were created became apparent only after Leventhal filed suit and Lawrence testified. 'When a district court examines the sufficiency of the investigation of facts and law, it is expected to avoid the wisdom of hindsight….' *Bradgate Assocs., Inc. v. Fellows, Read & Assocs., Inc.*, 999 F.2d 745, 752 (3d Cir. 1993) (citation and marks omitted). . . . Even if Lawrence contradicted herself in her deposition, 'submission of inconsistent statements alone is insufficient to establish that a statement was false, or was filed for an improper purpose.' *Brown v. Artus*, 647 F. Supp. 2d 190, 206 (N.D.N.Y. 2009). Based on the evidence supporting Lawrence's claims, including the 911 call produced in discovery, this

Court cannot conclude that Leventhal had a duty to withdraw Lawrence's claims. Cf. *Galin v. Hamada*, 283 F. Supp. 3d 189, 202 (S.D.N.Y. 2017) (sanctioning plaintiff after discovery revealed that he had no viable claim)."

"Rule 26 provides a parallel to Rule 11 for productions made in discovery. Under Rule 26(g), an attorney's signature on a discovery response or objection certifies that after reasonable inquiry, the production is: (1) 'complete and correct as of the time it is made'; (2) consistent with existing law; (3) 'not interposed for any improper purpose'; and (4) not unduly burdensome. Fed. R. Civ. P. 26(g)(1)."

"Defendants argue that Lawrence provided the photos nearly a year after this litigation commenced without ever mentioning them previously. However, as Leventhal explained in camera, Lawrence told him about photographs depicting damage to her apartment from the very beginning, but claimed that she was not 'tech-savvy' and did not know how to reproduce them. . . . Leventhal repeatedly attempted to gain access to the devices containing the photos. . . . Further, some of the photographs appear to show damage to Lawrence's apartment consistent with her testimony, including a mattress and couch torn open, and damage to other items. Therefore, a reasonable lawyer would not have doubted that they showed what Lawrence claimed. Finally, Leventhal explains that at the time he produced the photos he was unfamiliar with the process for checking a digital photograph's metadata, which entails right-clicking it and navigating to its properties."

"Based on these facts, Leventhal's production of the photos may have been careless, but was not objectively unreasonable. Cf. *Johnson v. BAE Sys., Inc.*, 307 F.R.D. 220, 226 (D.D.C. 2013) (sanctioning attorney for producing doctored medical records without any inspection or inquiry whatsoever). On the other hand, it is clear that Lawrence, or someone acting on her behalf, created these photographs to bolster her claims, and then she falsely testified about them. Accordingly, sanctions under Rule 26 are appropriate. See Fed. R. Civ. P. 26(g)(3) (sanctions under Rule 26 apply to both the signer and 'the party on whose behalf the signer was acting'). But as described below, Lawrence's conduct is more properly construed as an attempted fraud on this Court, and is therefore analyzed under that standard."

"Defendants also contend that Leventhal should have corrected the record before seeking leave to withdraw. But Leventhal spoke numerous times with Lawrence to understand what had happened and engaged ethics counsel to advise him. . . . Leventhal also disavowed his prior representations concerning the photographs. It appears that Leventhal's need to withdraw precluded him from taking certain steps such as voluntarily dismissing some or all of Lawrence's claims."

D. Fairness to Opposing Party and Counsel, Rule 3.4

In re Taylor, Board Release of Information.

Pamela Anderson Taylor of Nashville was publicly censured.

"In the representation of a client in a divorce action, Ms. Taylor issued a subpoena in noncompliance with applicable law. While representing a client in another divorce action, Ms. Taylor failed to comply with discovery deadlines established by the Court and otherwise failed

to expedite litigation. Ms. Taylor was also nonresponsive to requests for information from the Board in its investigation of these matters."

Ms. Taylor violated RPCs 1.1 (competence), 1.3 (diligence), 3.2 (expediting litigation), 3.4(c) (knowing violation of an obligation under the rules of a tribunal), and 8.l(b) (knowing failure to respond to a request for information from a disciplinary authority).

E. Trial Publicity, Rule 3.6

In re Perricone, 263 So.3d 309 (La. 2018) reh'g denied Jan. 30, 2019.

"This disciplinary matter arises from formal charges filed by the Office of Disciplinary Counsel ('ODC') against respondent, Salvador R. Perricone, an attorney licensed to practice law in Louisiana."

"The underlying facts of this case are largely undisputed. By way of background, respondent commenced employment as an Assistant United States Attorney ('AUSA') with the United States Attorney's Office for the Eastern District of Louisiana ('USAO') in 1991. At all times relevant to these proceedings, respondent was a Senior Litigation Counsel and the USAO's training officer.

"During the times pertinent to these proceedings, a New Orleans newspaper, *The Times-Picayune*, maintained an Internet website identified as nola.com. The website typically permitted readers to post comments to news stories using pseudonyms and/or anonymous identities.

"Beginning in or around November 2007 and continuing through March 14, 2012, respondent was a frequent poster of comments on a myriad of subjects on nola.com, including comments on cases which he and/or his colleagues at the USAO were assigned to prosecute. Of the more than 2,600 comments respondent posted, between one hundred and two hundred – less than one percent – related to matters being prosecuted in the USAO. None of the comments identified respondent by name or as an employee of the USAO. Rather, respondent posted on nola.com using at least five online identities: 'campstblue,' 'legacyusa,' 'dramatis personae,' 'Henry L. Mencken1951,' and 'fed up.'"

"Count I

"In 2009, the FBI and the USAO commenced an investigation into allegations of corruption against various Jefferson Parish officials. In particular, investigations included allegations involving improper health insurance contracts between government entities and/or contractors and an insurance company owned by Tim Whitmer, the Jefferson Parish Chief Administrative Officer. Among the insurance contracts under investigation was one with River Birch, Inc., a privately held landfill company owned by Fred Heebe, whose company had been awarded a $160 million landfill contract with Jefferson Parish.

"In February 2011, a federal grand jury indicted Henry Mouton, a former member of the Louisiana Wildlife and Fisheries Commission. The indictment charged that 'co-conspirator A' paid Mr. Mouton more than $400,000 to use his influence with the Commission to force the closure of the Old Gentilly Landfill, which competed with River Birch. In June 2011, Mr. Mouton pleaded guilty to conspiracy.

"An additional investigation alleged embezzlement by Dominick Fazzio, the chief financial officer for River Birch, and his brother-in-law, Mark Titus. Mr. Titus pleaded guilty and cooperated in the subsequent indictment of Mr. Fazzio for fraud and money laundering. Respondent was not on the prosecution team in that case, which was assigned to United States District Judge Ginger Berrigan in the Eastern District, but he did enroll for the limited purpose of disqualifying attorney Stephen London as Mr. Fazzio's trial counsel.

"During the pendency of these investigations and prosecutions, respondent began commenting on nola.com using the pseudonym 'Henry L. Mencken1951':

> If Heebe had one firing synapse, he would go speak to Letten's posse and purge himself of this sordid episode and let them go after the council and public officials. Why prolong this pain…perhaps Queen Jennifer has something to say about that.
> -December 18, 2011, 10:21 a.m.
>
> Heebe comes from a long line of corruptors.
> -September 3, 2011, 10:55 a.m.
>
> Heebe's goose is cooked.
> -September 4, 2011, 10:45 a.m."

"Count II

"Respondent prosecuted Mose Jefferson, the brother of Congressman William Jefferson, in a case in which he was indicted for bribing former Orleans Parish School Board president Ellenese Brooks-Simms. During the trial, respondent posted comments on nola.com about Mose Jefferson and his attorney, Mike Fawer, under the pseudonym 'campstblue':

> Fawer has screwed his client!!!! He revealed exactly what Mose needed on the board to get what Mose wanted.
> Good job Mike!!!! You're just as arrogant as Ellenese … and the jury knows it.
> -August 15, 2009, 9:19 p.m.
>
> They got the corrupted, now they have to get the corruptor.
> -August 16, 2009, 7:41 p.m."

"Count III

"On September 4, 2005, six days after Hurricane Katrina struck New Orleans, a group of New Orleans police officers shot at unarmed civilians crossing the Danziger Bridge. Two persons were killed and four others were wounded. In July 2010, six officers were indicted in federal court for their roles in either the shooting or the ensuing alleged cover-up of the shooting. United States District Judge Kurt Engelhardt presided over the trial which commenced on June 22, 2011 and ended on August 5, 2011, when the jury returned guilty verdicts against all defendants. On April 4, 2012, Judge Engelhardt sentenced the defendants to terms of incarceration ranging from 6 to 65 years.

"While respondent was not part of the prosecution team, he nevertheless posted comments on nola.com prior to and during the trial, including as the jury was deliberating. Posting as 'dramatis personae,' respondent stated:

> I agree with [nola.com poster] Cauane. The same hurricane that hit Orleans Parish, hit Jefferson, St. Bernard, Plaquemine, and St. Tammany. Yet, the only police force to use deadly force throughout the city was the venerable NOPD. Perhaps we would be safer if the NOPD would leave next hurricans and let the National Guard assume all law enforcement duties. GUILTY AS CHARGED.
> -August 3, 2011, 7:06 a.m.

"Even prior to the trial, in response to an article regarding a rumored plea by a police officer co-defendant, respondent, posting as 'legacyusa,' warned:

> Despite defense attorneys protestations to the contrary, It would be prudent for those involve to consider the track record of the US Attorney's Office. Letten's people are not to be trifled with.
> -February 23, 2010, 6:17 p.m.
>
> As regards police officer co-defendant Archie Kaufman, respondent wrote:
> The cover up is always worse than the crime. Archie, your time is up.
> -February 23, 2010, 10:44 p.m."

"When respondent's online commenting was discovered and reported to Judge Engelhardt, an investigation ensued. Following the investigation, Judge Engelhardt reversed the convictions of the Danziger Bridge defendants and granted their motions for new trial, citing 'grotesque prosecutorial misconduct,' including respondent's online commenting as well as other instances of prosecutorial misconduct by the USAO, by members of the Department of Justice, and by federal law enforcement. In finding defendants were denied due process, Judge Engelhardt stated:

> [I]t is difficult to conceive, much less accept, that this time-honored constitutional procedure successfully withstood an attack of the ferocity seen here, a campaign extending back to the commencement of the DOJ's active investigation of this case in 2008, and continuing through the acceptance of related plea agreements, the indictment, and the trial itself. To conclude that such misconduct was only a little unfair, but not enough to be harmful, turns the fundamental principle of due process on its head.

"Judge Engelhardt clearly found the conduct of Perricone to be intentional. Judge Engelhardt found Perricone 'viewed posting of highly-opinionated comments as a "public service."' The district court also found that the fact that the government's actions, including Perricone's actions, were conducted anonymously made 'it all the more egregious, and forces the Court, the defendants, and the public into an indecent game of "catch-me-if-you-can."'

"The Department of Justice appealed Judge Engelhardt's decision, and on August 18, 2015, the United States Fifth Circuit Court of Appeals affirmed the order and remanded the case for a new trial. In so doing, the court noted that the government acknowledged 'significant, repeated misconduct by Perricone,' and explained:

> The government concedes Perricone 'intentionally committed professional misconduct' violating (a) federal regulations restricting extrajudicial statements by DOJ personnel relating to civil and criminal proceedings, (b) DOJ policies and(c) court and state bar rules of professional conduct. The government acknowledges that besides his postings in this case, Perricone posted 'thousands' of anonymous comments on various topics over the course of several years.

"Following this ruling, Judge Engelhardt accepted a plea deal brokered by defense lawyers and the Department of Justice, which called for the Danziger Bridge defendants to plead guilty to significantly lesser offenses in exchange for substantially reduced prison sentences ranging from 3 to 12 years."

"Disciplinary Proceedings

"In April 2017, the ODC filed formal charges against respondent. The ODC alleged that because respondent's client (the Department of Justice and the USAO) forbid extrajudicial statements by an AUSA such as those set forth in the formal charges, respondent placed his own interests above those of his client, in violation of Rule 1.7(a)(2) of the Rules of Professional Conduct. The ODC further alleged that respondent made extrajudicial statements about the guilt or innocence of defendants and/or others under investigation or prosecution that had a substantial likelihood of materially prejudicing an adjudicative proceeding, in violation of Rule 3.6, and of heightening public condemnation of the accused, in violation of Rule 3.8(f); that respondent's conduct was prejudicial to the administration of justice, in violation of Rule 8.4(d); and that respondent violated or attempted to violate the Rules of Professional Conduct, or did so through another, in violation of Rule 8.4(a).

"Respondent answered the formal charges and admitted the factual allegations therein, including all of the quoted posts on nola.com. He stated that he made the anonymous online comments to relieve stress, not for the purpose of influencing the outcome of a defendant's trial. He further stated that his anonymous comments did not identify him as an AUSA, and as such, he did not intend, nor did he reasonably expect, that his conduct would influence the outcome of a trial, prejudice the fairness of any subsequent legal proceeding, or otherwise prejudice the administration of justice. Accordingly, respondent denied violating the Rules of Professional Conduct."

"A hearing in mitigation was conducted. Respondent presented the testimony of various character witnesses. Additionally, respondent called Dr. Ron Cambias, his treating psychologist since May 2016. Dr. Cambias testified that respondent suffered from complex post-traumatic stress disorder ('PTSD') triggered by numerous situations in which respondent, who was formerly employed as a police officer and FBI agent, had witnessed the gruesome deaths of others and had, himself, been threatened with physical harm, including gunfire. Dr. Cambias opined that respondent's online postings were the result of his PTSD."

"The committee accepted respondent's stipulations that his actions violated Rules 3.6, 3.8(f), 8.4(a), and 8.4(d). The committee found that respondent also violated Rule 1.7(a)(2) by placing his own interests, *i.e.*, his need to 'vent' about the criminal cases being prosecuted by the USAO, above the interests of that office, his client, in having those cases proceed unimpeded.

"The committee determined that respondent violated duties owed to his client, the public, the legal system, and the profession, and found he acted knowingly. The mistrial granted in the Danziger Bridge case was certainly an actual, serious injury, as was the harm done by respondent to the post-Katrina recovery in New Orleans. Considering the ABA's *Standards for Imposing Lawyer Sanctions*, the committee determined the applicable baseline sanction is suspension."

"The underlying facts of this matter are not in dispute. It suffices to say that beginning in November 2007 and continuing through mid-March 2012, respondent, under various pseudonyms, frequently posted comments on an online site. Although these comments concerned a myriad of subjects, some pertained to cases which he and/or his colleagues at the USAO were assigned to prosecute. When discovered, respondent's actions caused serious, actual harm in the River Birch and Danziger Bridge cases and, most profoundly, to the reputation of the USAO. There was a potential for harm in the Jefferson and Gill-Pratt cases."

"Respondent's arguments in this court center almost entirely on whether we should recognize the mitigating factor of mental disability due to his diagnosis of complex PTSD. In *In re: Stoller*, 04-2758 (La. 5/24/05), 902 So.2d 981, we cited four criteria which must be met for respondents to properly assert chemical dependency or mental disability as a mitigating factor: (1) there is medical evidence that the respondent is affected by a chemical dependency or mental disability; (2) the chemical dependency or mental disability caused the misconduct; (3) the respondent's recovery from the chemical dependency or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and (4) the recovery arrested the misconduct and recurrence of that misconduct is unlikely. The ABA commentary indicates that in considering issues of chemical dependency or mental disability offered as mitigating factors in disciplinary proceedings, the 'greatest weight' should be assigned when the disability is the sole cause of the offense."

"Respondent's own testimony reveals he was aware that he should not post these comments, yet he decided to do so anyway. Clearly, any mental disability from which respondent suffered did not prevent him from knowing his actions were wrong. Under these circumstances, we find absolutely no support for the conclusion that respondent has proven his mental condition caused the misconduct. Accordingly, we decline to consider his mental disability in mitigation.

"In formulating an appropriate sanction, we acknowledge the situation presented in this case is *res novo* in our jurisprudence, and our prior case law provides little useful guidance. However, we begin from the well-settled proposition that public officials (and prosecutors in particular) are held to a higher standard than ordinary attorneys. *In re: Griffing*, 17-0874 (La. 10/18/17), 236 So.3d 1213. Respondent was clearly in an important position of public trust. His actions betrayed that trust and caused actual harm to pending prosecutions. Once discovered, his conduct tarnished the reputation of the USAO and brought the entire legal profession into disrepute.

"In this age of social media, it is important for all attorneys to bear in mind that '[t]he vigorous advocacy we demand of the legal profession is accepted because it takes place under the neutral, dispassionate control of the judicial system.' *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1058, 111 S.Ct. 2720, 115 L.Ed.2d 888 (1991). As the Court in *Gentile* wisely explained, '[a] profession which takes just pride in these traditions may consider them disserved if lawyers use their skills and insight to make untested allegations in the press instead of in the courtroom.' *Id.*

"Respondent's conscious decision to vent his anger by posting caustic, extrajudicial comments about pending cases strikes at the heart of the neutral dispassionate control which is the foundation of our system. Our decision today must send a strong message to respondent and to all the members of the bar that a lawyer's ethical obligations are not diminished by the mask of anonymity provided by the Internet.

"In summary, considering respondent's position of public trust as a prosecutor, his knowing and intentional decision to post these comments despite his acknowledgment that it was improper to do so, and the serious harm respondent's conduct has caused both to individual litigants and to the legal profession as a whole, we must conclude he has failed to comply with the high ethical standards we require of lawyers who are granted the privilege to practice law in this state. The only appropriate sanction under these facts is disbarment."

Social Medial Ethics Guidelines, Commercial and Federal Litigation Section, New York State Bar Ass'n (revised April 29, 2019), available at: http://www.nysba.org/2019guidelines/

F. Lawyer as Witness, Rule 3.7

State v. Spears, No. E2017-01836-CCA-R9-CD (Tenn. Crim. App., Easter, July 23, 2018).

"The Knox County Grand Jury issued a presentment in August of 2016 charging Defendant and co-defendant Alex Spears with one count of exploiting an adult in violation of Tennessee Code Annotated section 39-14-111. The named victim, Virginia Wilson, was the mother of Defendant and the grandmother of the co-defendant.

"In April of 2017, the State filed a motion to disqualify trial counsel, Gregory Harrison. The State alleged that trial counsel had a conflict of interest that disqualified him from representing Defendant because he was a 'necessary witness' as set forth in Rule 3.7(a) of the Rules of Professional Conduct. In the motion, the State asserted that the victim lived in Kentucky and had been placed under a guardianship of another relative. Defendant, who was a registered nurse, and co-defendant served as the victim's caretakers. The State indicated that the proof at the trial on the exploitation charge would show that Defendant used the victim's resources, funds, and property to benefit herself to the victim's detriment all during the time that Defendant was acting as caretaker for the victim. The State referenced a quitclaim deed and a durable power of attorney with healthcare, prepared by trial counsel in 2011 and 2012, respectively, as evidence that would be introduced at trial. The State indicated that trial counsel would be called to testify regarding the preparation of these documents; the monetary compensation, if any, that trial counsel received for preparation of these documents; and the extent to which trial counsel had interactions with the victim. The State also indicated that Defendant used a credit card in the victim's name to pay $1000 to trial counsel and that trial counsel's testimony would be necessary at trial to explain the charge and/or payment. Thus, the State concluded that trial counsel was a necessary witness and should, therefore, be disqualified from representing Defendant."

"The trial court held a hearing on May 12, 2017. At the hearing, the trial court noted that there was a potential conflict because the trial judge was a former law partner of trial counsel. During argument on the motion, trial counsel maintained that he was never paid for preparing the quitclaim deed or power of attorney, that he was not responsible for the actual execution of the documents he prepared, and that he had no idea whether the documents were actually even used

or filed. Moreover, trial counsel informed the trial court that he never had any contact with the victim. Trial counsel maintained that he was not a necessary witness.

"The State noted that the victim had been declared incompetent and later died. Thus, any proof that the State would be relying on at trial would likely be 'circumstantial.' The 'fact that [Defendant] directed the transactions and … that [trial counsel] did this transaction' were all part of a 'pattern of conduct' by Defendant. Thus, trial counsel was a 'necessary witness' to the prosecution. After this brief hearing, the trial judge recused himself from further participation in the case based on the fact that trial counsel was his former law partner. A new trial judge was appointed to hear the matter.

"After rescheduling the matter several times, the parties agreed to stand on the argument made at the initial hearing. The successor trial judge reviewed the argument and issued a written order. The trial court determined that the 'issues are not uncontested' as envisioned in Rule 3.7(a) of the Rules of Professional Conduct codified in Rule 8 of the Rules of the Supreme Court of Tennessee. Specifically, the trial court noted that the issue relevant to the prosecution of Defendant is not who prepared the documents but rather who paid for the services, who benefitted from the services, and who authorized the services and/or payments. The trial court opined that trial counsel was the only person who could provide this testimony and that the issues were 'central to the allegations in the case.' While recognizing Defendant's right to counsel of her own choosing, the trial court acknowledged that the issues raised by the motion, coupled with trial 'counsel's prior contact with Defendant overcome the deference to Defendant's choice of representation.' The trial court 'reluctantly' disqualified trial counsel, explicitly finding that there was 'no improper behavior' and taking no position on 'potential attorney/client privilege' matters."

"On appeal, Defendant argues that 'there is a presumption in favor of Defendant's choice of counsel and the trial court erred when it disqualified [trial] counsel without a showing of a serious potential for conflict.' Thus, Defendant insists that the trial court abused its discretion by disqualifying trial counsel where the issues are uncontested. The State responds that while trial counsel may testify to individually uncontested facts, the testimony relates to issues at trial which are contested—specifically as to whether Defendant was a caretaker and/or exploited the victim. Thus, the State insists that the trial court properly disqualified trial counsel from representing Defendant."

"In its order disqualifying trial counsel from representing Defendant, the trial court herein cited Rule 3.7 of the Tennessee Rules of Professional Conduct, which provides:

> A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a *necessary witness* unless:
> (1) the testimony relates to an uncontested issue;
> (2) the testimony relates to the nature and value of legal services rendered in the case; or
> (3) disqualification of the lawyer would work a substantial hardship on the client."

"A trial court's decision to disqualify an attorney is reviewed for an abuse of discretion. *Clinard*, 46 S.W.3d at 182."

"In order to determine if the trial court properly disqualified trial counsel, we must look at Rule 3.7 along with the proof that would be required at trial by the State. In this case, Defendant is charged with exploitation of an adult. T.C.A. § 39-14-111."

"On appeal, Defendant argues that trial counsel would only testify about uncontested issues. The State focuses their argument on whether trial counsel's testimony relates to 'contested issues.' The State contends that because trial counsel had knowledge of and prepared documents for Defendant that pertained to the victim, any testimony trial counsel would offer at trial would relate to a contested issue, 'even if the individual facts contained in [the testimony] were uncontested.' Therefore, the State insists that trial counsel was rightfully disqualified. The threshold inquiry, rather than looking at whether the issues are contested or uncontested, is whether trial counsel is a necessary witness. Indeed, the first part of the rule mandates that '[a] lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a *necessary witness.*' Tenn. R. Sup. Ct. Rule 8, RPC 3.7(a). If trial counsel is not a 'necessary witness,' it becomes unnecessary to determine whether parts (1), (2), or (3) of the rule permit him to testify anyway.

"We have been unable to find any Tennessee cases defining the term 'necessary witness' in the context of Rule 3.7. However, several courts within the Sixth Circuit have addressed what it means to be a 'necessary witness' for purposes of disqualification. In both Ohio and Michigan, whose rules of professional conduct pertaining to disqualification contain language identical to our own rule, there are cases interpreting what qualifies as a necessary witness for purposes of disqualification. *See e.g.*, MRPC 3.7(a); Ohio R. Prof'l Conduct 3.7(a). Ohio has defined a necessary witness as a witness whose 'proposed testimony was relevant, material and unobtainable elsewhere.' *Puritas Metal Prods., Inc. v. Cole*, 2008-Ohio-4653, 2008 WL 4193934, at *8 (Ohio Ct. App. 2008). In Michigan, 'attorneys are not necessary witnesses if the substance of their testimony can be elicited from other witnesses and the party seeking disqualification did not previously state an intent to call the attorney as a witness.' *People v. Tesen*, 739 N.W.2d 689, 698 (Mich. Ct. App. 2007) (citing *Smith v. Arc-Mation, Inc.*, 261 N.W.2d 713, 715 (Mich. 1978); *In re Susser Estate*, 657 N.W.2d 147, 151-52 (Mich. Ct. App. 2002)). Based on the marked similarities to our own rule, we confidently conclude the above-cited cases can and should be used as persuasive authority in rendering our decision.

"In this case, trial counsel's testimony is certainly material and relevant. He prepared a quitclaim deed giving property to Defendant from the victim and a power of attorney with healthcare giving Defendant power of attorney over the victim's affairs. This evidence is relevant regardless of whether the documents were actually executed. Trial counsel also confirmed that he received payment from Defendant on a credit card that the victim jointly owned with defendant. We conclude that the trial court properly determined that trial counsel is a necessary witness.

"Because we have determined that trial counsel is a necessary witness, we must now determine whether trial counsel's potential testimony fits within any of the three exceptions provided in Rule 3.7, which would allow trial counsel to 'act as an advocate' despite his qualification as a necessary witness. In this case, it is obvious that trial counsel's testimony would not 'relate to the nature and value of legal services rendered in the case.' Thus, part (2) of the rule does not apply. Moreover, there was no testimony that 'disqualification of the lawyer would work a substantial hardship on the client' as set forth in part (3). Trial counsel argued at the hearings that Defendant wanted him to continue to represent her in the criminal matter, but there was no evidence that disqualification of trial counsel would result in a hardship to Defendant. Thus, we must determine, as the parties have rightly framed the issue, whether trial counsel's 'testimony relates to an uncontested issue.'

"The trial court determined that the issues were 'not uncontested.' Specifically, the trial court noted that the 'material issues [were] who paid for the services; who did the services benefit; and did the alleged victim authorize the services and/or payments.… [T]hese issues are central to the allegations in this case.'"

"In our view, the contested issues at the trial of Defendant are the elements the State is required to prove to sustain a conviction—whether Defendant 'knowingly, other than by accidental means, exploit[ed] an adult.' T.C.A. § 39-14-111. This proof would necessitate an examination of whether Defendant used funds belonging to the victim and was a caretaker for the victim. Trial counsel informed the trial court at the hearing that he prepared the quitclaim deed and power of attorney at the request of Defendant. While he insists that he had no knowledge about if or when these documents were ever executed, it is for a jury to accept or reject that testimony. The very fact that a power of attorney was drafted could be used at trial to support or rebut a claim that Defendant exploited the victim. Trial counsel acknowledged that he received a payment of $1000 from Defendant for a divorce. Trial counsel did not know anything about the credit card from which the payment was received. Trial counsel was unaware whether Defendant was a caretaker for the victim. Trial counsel testified that he had never met the victim. Trial counsel's proposed testimony could either support or rebut a claim that Defendant knowingly exploited the victim, the contested issue at trial. Thus, trial counsel's testimony is so woven into the proof that would be required by the State at Defendant's trial, disqualification of trial counsel is necessary."

"We are in somewhat of a unique position, being required to determine whether trial counsel's testimony is necessary, material, and relevant without having anything other than an indictment charging Defendant with a crime. When placed in this position, the fact that trial counsel has potential testimony, which may be used by the State at trial to build its case, leads us to conclude that the trial court properly determined trial counsel should be disqualified. Thus, while we acknowledge that disqualification of trial counsel as a consequence of an appearance of impropriety is not per se barred, we conclude that the facts of this particular case qualify it as one of 'the rarest of cases' in which disqualification is an appropriate bar against that appearance. *See Tracy Watson*, 1997 WL 772865, at *5."

G. Special Responsibilities of Prosecutor, Rule 3.8

In re Petition to Stay the Effectiveness of Formal Ethics Opinion 2017-F-163, No. M2018-01932-SC-BAR-BP (Tenn., Bivins, Aug. 23, 2019).

"The Tennessee District Attorneys General Conference ('TNDAGC') filed with this Court a petition to vacate Formal Ethics Opinion 2017-F-163 ('Opinion') issued by the Board of Professional Responsibility ('Board') regarding ethical considerations for prosecutors under Rule 3.8(d) of the Tennessee Rules of Professional Conduct. The TNDAGC also requested that the Court stay the effectiveness of the Opinion pending review. This Court determined that a full and deliberate review of the issues was necessary and granted a stay of the effectiveness of the Opinion. Based on our review, we decline to interpret a prosecutor's ethical duty under Rule 3.8(d) as being more expansive than one's legal obligations under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny, or that 'timely' disclosure of the material should be interpreted as 'as soon as reasonably practicable.' Accordingly, we vacate Formal Ethics Opinion 2017-F-163 of the Board of Professional Responsibility. We also take this opportunity to interpret Rule 3.8(d) as coextensive in scope with a prosecutor's legal obligations under *Brady* and its progeny, as explained in this opinion."

"On March 15, 2018, the Board issued Formal Ethics Opinion 2017-F-163 to clarify the language in Rule 3.8(d) of the Tennessee Rules of Professional Conduct, which pertains to a prosecutor's duty of disclosure of information to a criminal defendant. The Opinion states that the Board 'has been requested to issue a Formal Ethics Opinion regarding the Prosecutors' Ethical Obligations to Disclose Information Favorable to the Defense.' The Opinion addressed the following two questions:

> I. Does a prosecutor's duty under RPC 3.8(d) to disclose to the defense 'all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigate the offense' and in connection with sentencing, 'all unprivileged mitigating information known to the prosecutor' extend beyond the 'material' standard as construed by federal or state constitutional decisions?
>
> II. What constitutes 'timely disclosure' under RPC 3.8(d)?

"The Opinion then provided the following answers in conclusion:

> Tennessee Rule of Professional Conduct 3.8(d) is a separate ethical obligation of prosecutors and was not meant to be coextensive with a prosecutor's legal disclosure obligations. This ethical duty is separate from disclosure obligations imposed under the Constitution, statutes, procedural rules, court rules, or court orders. A prosecutor's ethical duty to disclose information favorable to the defense is broader than and extends beyond *Brady*. Once a prosecutor knows of evidence and information that tends to negate the guilt of the accused, or mitigates the offense, or otherwise falls within RPC 3.8(d)'s disclosure requirement, the prosecutor ordinarily must disclose it as soon as reasonably practicable."

"On January 15, 2019, the TNDAGC filed a petition to vacate the Opinion 2017-F-163 and renewed its request that the Court stay the effectiveness of the Opinion. On February 4, 2019, this Court determined that public interest required a full and deliberate review of the issues raised, which would be furthered by delaying the effective date of the Opinion pending adjudication of this matter. Accordingly, this Court granted the TNDAGC's motion for stay, ordered additional briefing, and heard oral arguments on the petition to vacate."

"The TNDAGC first challenges the Opinion's requirement that a prosecutor must disclose 'information favorable to the defense,' rather than 'information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense,' as provided in Rule 3.8(d). The Board has conceded that the phrase 'information favorable to the defense' is different from the language used in Rule 3.8(d) and thus potentially confusing. The Board, accordingly, expresses its willingness to replace all references of 'information favorable to the defense' with 'information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense' so that the Opinion's language in this regard would be identical to the language used in Rule 3.8(d).

"Even with the above language mirroring that in Rule 3.8(d), the Opinion still provides that the rule provision's 'ethical duty is separate from disclosure obligations imposed under the Constitution, statutes, procedural rules, court rules, or court orders,' and that '[a] prosecutor's ethical duty to disclose information favorable to the defense is broader than and extends beyond *Brady*.' Thus, it is necessary to determine further whether this Court agrees with the Opinion's interpretation of a prosecutor's ethical obligations under Rule 3.8(d).

"In *Brady*, the United States Supreme Court held that 'the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.' 373 U.S. at 87. 'The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome.' *United States v. Bagley*, 473 U.S. 667, 682 (1985); see also *Johnson v. State*, 38 S.W.3d 52, 56 (Tenn. 2001) ('This Court has held on several occasions that in order to establish a *Brady* violation, four elements must be shown by the defendant: 1) that the defendant requested the information (unless the evidence is obviously exculpatory, in which case the State is bound to release the information whether requested or not); 2) that the State suppressed the information; 3) that the information was favorable to the accused; and 4) that the information was material.').

"Tennessee Rule of Criminal Procedure 16 also imposes obligations on a prosecutor for the disclosure of information to a criminal defendant. Additionally, the United States Supreme Court has stated in a footnote that 'the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations.' *Cone v. Bell*, 556 U.S. 449, 470 n.15 (2009) (citing *Kyles v. Whitley*, 514 U.S. 419, 437 (1995)). On July 8, 2009, the ABA issued Formal Opinion 09-454 ('ABA Opinion'), titled 'Prosecutor's Duty to Disclose Evidence and Information Favorable to the Defense.' The ABA Opinion states, in pertinent part,

> Rule 3.8(d) of the Model Rules of Professional Conduct requires a prosecutor to 'make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, [to] disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor.' This ethical duty is separate from disclosure obligations imposed under the Constitution, statutes, procedural rules, court rules, or court orders. Rule 3.8(d) requires a prosecutor who knows of evidence and information favorable to the defense to disclose it as soon as reasonably practicable so that the defense can make meaningful use of it in making such decisions as whether to plead guilty and how to conduct its investigation. . . .

"ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 09-454, at 1 (2009). The Opinion presently at issue adopts much of the same analysis and interpretation of the rule provision as that provided in the ABA Opinion. The ABA Opinion, however, provides for a good faith exception, which is not present in the Board's Opinion. See id. at 6 n.26. . . ."

"The TNDAGC argues that the Board's unwillingness to provide a good faith exception makes the Opinion all the more problematic. The Board, in response, states that it 'has no objection to modifying the Opinion to make clear that the ethical responsibilities created by [Rule] 3.8(d) only apply to 'information known to the prosecutor' as opposed to information known to the State and that all the circumstances, including a prosecutor's good faith, should be considered in determining a prosecutor's compliance with the Rules of Professional Conduct.'

"Similarly to the ABA Opinion, several courts have interpreted a prosecutor's ethical duty in that jurisdiction to extend beyond the obligations in *Brady*. See *United States v. Walker*, No. 17-cr-00570-EMC-1, 2018 WL 3023518, at *1 (N.D. Cal. June 18, 2018) ('In November 2017, a new California rule of professional conduct went into effect which goes beyond *Brady*.'). . . ."

"Other courts have interpreted their ethical rules as being coextensive with *Brady* obligations, mainly based on public policy reasons. See, e.g., *In re Att'y C*, 47 P.3d 1167, 1171 (Colo. 2002). . . ."

"We agree with the policy interests espoused in the line of cases determining their ethical rules for prosecutors as coextensive with the constitutional obligations under *Brady*. To say that our ethical rules require prosecutors to consider different standards than their constitutional and legal requirements has the potential to bring about a myriad of conflicts. See Michael D. Ricciuti, Caroline E. Conti & Paolo G. Corso, *Criminal Discovery: The Clash Between Brady and Ethical Obligations*, 51 Suffolk U. L. Rev. 399, 436 (2018) ('[H]aving two competing, mandatory and inconsistent sets of rules simply means that it remains ambiguous which rule prevails, and allows ethics rules to be used as tactical weapons in criminal cases and beyond.'). As an example, the United States' amicus brief filed with this Court cited a motion filed in a federal district court requesting that the United States disclose the names of confidential informants and 'all information about the Informant that could be useful to the defense.' The request for information was not based on the prosecutor's legal duty under *Brady* but pursuant to the prosecutor's ethical obligations under Rule 3.8(d). See *U.S. v. Darden*, 353 F. Supp. 3d 697, 722 (M.D. Tenn. 2018). Thus, based on our review, we decline to interpret Rule 3.8(d) as providing any greater ethical obligation upon prosecutors than the constitutional obligations under *Brady* and its progeny.

"Moreover, the history of Rule 3.8(d) in Tennessee supports our understanding of the rule provision's parameters. With the exception of the obligation to disclose the information to the tribunal at sentencing, no entity, including the Board, indicated through its comments to the proposed rule that the provision extended a prosecutor's ethical duties beyond the scope of a prosecutor's legal obligations under *Brady*. Therefore, to now interpret the provision as extending beyond *Brady* effectively amends the Rule. For the reasons provided above, we decline to do so. Accordingly, we vacate section I of the Opinion.

"Because we are vacating the Board's interpretation of Rule 3.8(d) as it relates to *Brady*, we take this opportunity to further clarify the rule provision. As the District of Columbia Court of Appeals addressed in *Kline*, we recognize that to say the obligations are completely coextensive could be interpreted to mean that a prosecutor could commit an ethical violation inadvertently. See *Kline*, 113 A.3d at 213 ('[A] *Brady* violation is not focused on the conduct of the prosecutor, only whether the evidence was potentially exculpatory and whether the outcome of the trial was seriously affected.'). Conversely, Rule 3.8(d) states that the ethical duty arises for 'information *known* to the prosecutor that tends to negate the guilt of the accused or mitigates the offense.' Tenn. Sup. Ct. R. 8, RPC 3.8(d) (emphasis added). We note, however, that although our Rules of Professional Conduct define 'known' as 'actual awareness of the fact in question,' the rule provision also provides that '[a] person's knowledge may be inferred from circumstances.' Tenn. Sup. Ct. R. 8, RPC 1.0(f). Furthermore, we agree with the Board as it provided in its appellate brief that, in reviewing these matters, 'all the circumstances, including a prosecutor's good faith, should be considered in determining a prosecutor's compliance with the Rules of Professional Conduct.'

"As noted above, the rule provision requires the disclosure to the defendant *and the tribunal* at sentencing, which differs from the obligations under *Brady*. See Tenn. Sup. Ct. R. 8, RPC 3.8(d). Thus, with this language being the only exception, we interpret Rule 3.8(d) as coextensive in scope with *Brady* and its progeny, recognizing that the prosecutor also must have knowledge of the information in order to establish an ethical duty to disclose."

"The TNDAGC also argues that the Opinion's interpretation of 'timely' as 'as soon as reasonably practicable' runs afoul of the ordinary meaning of 'timely' within the legal context.

"The ABA Opinion sets forth the same definition for timely as adopted in the Board's Opinion. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 09-454, at 6 ('Because the defense can use favorable evidence and information most fully and effectively the sooner it is received, such evidence or information, once known to the prosecutor, must be disclosed under Rule 3.8(d) as soon as reasonably practical.'). Likewise, other courts have adopted the same or similar definition. See, e.g., *In re Larsen*, 379 P.3d 1209, 1215 (Utah 2016) (holding that, where its rules of criminal procedure require disclosure 'as soon as practicable,' 'Rule 3.8(d) of the Utah Rules of Professional Conduct requires more than just disclosure; it requires "timely disclosure"'); *People v. Robinson*, No. 2010QN040333, 2011 WL 7112937, at *2 (N.Y. Crim. Ct. Dec. 9, 2011) (stating that the New York Rules of Professional Conduct 'require a prosecutor to make timely disclosure at the earliest feasible opportunity').

"Under *Brady* and its progeny, 'as long as a defendant possesses *Brady* evidence in time for its effective use, the government has not deprived the defendant of due process of law simply because it did not produce the evidence sooner.' *United States v. Coppa*, 267 F.3d 132, 144 (2d Cir. 2001); see also *State v. Vaughn*, M2006-01659-CCA-R3-CD, 2008 WL 110094, at *6 (Tenn. Crim. App. Jan. 9, 2008). . . ."

"In *United States v. Ruiz*, 536 U.S. 622 (2002), the United States Supreme Court examined whether a prosecutor must disclose material impeachment evidence prior to entrance of a guilty plea. In concluding in the negative, the court provided the following reasoning:

> * * * *
> Consequently, the Ninth Circuit's requirement could force the Government to abandon its 'general practice' of not 'disclos[ing] to a defendant pleading guilty information that would reveal the identities of cooperating informants, undercover investigators, or other prospective witnesses.' Brief for United States 25. It could require the Government to devote substantially more resources to trial preparation prior to plea bargaining, thereby depriving the plea-bargaining process of its main resource-saving advantages. Or it could lead the Government instead to abandon its heavy reliance upon plea bargaining in a vast number—90% or more—of federal criminal cases. We cannot say that the Constitution's due process requirement demands so radical a change in the criminal justice process in order to achieve so comparatively small a constitutional benefit.

"Id. at 629-32 (alterations in original)."

"Because we already have interpreted Rule 3.8(d) as coextensive in scope with *Brady* and its progeny, we decline to interpret 'timely' as any other definition than what is required constitutionally as a timely disclosure. Accordingly, we hereby vacate section II of the Board's Opinion."

ABA Formal Opinion 486, Obligations of Prosecutors in Negotiating Plea Bargains for Misdemeanor Offenses (May 9, 2019).

"Model Rules 1.1, 1.3, 3.8(a), (b), and (c), 4.1, 4.3, 5.1, 5.3, and 8.4(a), (c) and (d) impose obligations on prosecutors when entering into plea bargains with persons accused of

misdemeanors. These obligations include the duty to ensure that each charge incident to a plea has an adequate foundation in fact and law, to ensure that the accused is informed of the right to counsel and the procedure for securing counsel, to avoid plea negotiations that jeopardize the accused's ability to secure counsel, and, irrespective of whether an unrepresented accused has invoked the right to counsel, to avoid offering pleas on terms that knowingly misrepresent the consequences of acceptance or otherwise pressure or improperly induce acceptance on the part of the accused."

III. Transactions With Persons Other Than Clients; Truthfulness in Statements to Others (Rule 4.1)

In re McCormack, Board Release of Information.

Clay M. McCormack of Collierville was suspended for five years, with one year on active suspension and the remainder to be served on probation, and required to engage a practice monitor.

"Mr. McCormack closed numerous real estate transactions involving Lee Bishop as the seller in which Mr. McCormack prepared settlement statements showing Mr. Bishop's mortgage being paid off from the purchase money. Mr. McCormack prepared checks payable to Mr. Bishop's lenders in order to pay off those mortgages. Following the closings, Mr. McCormack voided the payoff checks and wrote new ones to Mr. Bishop. Mr. McCormack wrote letters to the buyers' lenders stating that the sellers' mortgages had been paid off when they had not. Mr. McCormack incorrectly believed that Mr. Bishop was going to obtain a release of the liens on the property he was selling by substituting other pieces of property he owned as collateral for the loans. In many such transactions, Mr. Bishop failed to obtain a substitution of collateral. When his lenders foreclosed on those loans, the buyers' lenders did not have first liens."

Mr. McCormack violated RPCs 1.1 (competence), 4.1(a) (truthfulness in statements to others), and 8.4(a) and (c) (misconduct).

IV. Law Firms, Legal Departments, and Legal Service Organizations (Rules 5.5-5.6)

A. Unauthorized Practice of Law (Rule 5.5)

Green v. Board of Professional Responsibility, 567 S.W.3d 700 (Tenn., Clark, 2019).

"This direct appeal involves a lawyer disciplinary proceeding against a Memphis attorney arising from two client complaints and the lawyer's failure to satisfy fully Mississippi's requirements for pro hac vice admission before representing a criminal defendant in Mississippi. A Hearing Panel of the Board of Professional Responsibility ('Hearing Panel') determined that the lawyer had violated four provisions of the Tennessee Rules of Professional Conduct ('RPC'). After consulting the ABA Standards for Imposing Lawyer Sanctions ('ABA Standards') and considering the mitigating and aggravating circumstances, including the lawyer's seventeen prior disciplinary sanctions, the Hearing Panel suspended the lawyer for six months and directed thirty days of the sanction to be served on active suspension with the remainder to be served on probation with conditions, including a practice monitor, restitution, and continuing legal education focused on law office management, client communication, and client relations. The lawyer

appealed the Hearing Panel's judgment, and the Chancery Court for Shelby County affirmed. The lawyer then appealed to this Court. After carefully reviewing the record, we affirm."

"C. Mississippi Pro Hac Vice Noncompliance

"The parties stipulated to the material facts supporting this complaint and also noted that these facts are set forth in the Mississippi Supreme Court decision of Newberry v. State, 145 So.3d 652 (Miss. 2014). In short, in 2011, the State of Mississippi charged Weissenger Newberry with first offense DUI, possession of marijuana and cocaine, two counts of assaulting a law enforcement officer, and being a habitual offender. *Id*. at 653. Mr. Newberry hired Mr. Green to represent him, even though Mr. Green was not licensed to practice law in Mississippi.

"Mississippi allows foreign attorneys to be admitted pro hac vice by complying with Mississippi Rule of Appellate Procedure 46(b) ('Mississippi Rule 46(b)'). . . ."

"On May 14, 2012, Mr. Green made an appearance in the case, as that term is defined in Mississippi Rule 46(b)(1)(ii), when a scheduling order filed in court listed his name as counsel of record for Mr. Newberry. About a month later, on June 15, 2012, Mr. Green made another appearance in the case, as defined in Mississippi Rule 46(b)(1)(ii), when he filed a motion to dismiss and a request for discovery. He alone signed these pleadings as counsel of record and did not list the name of any associated local counsel as Mississippi Rule 46(b)(4) requires.

"Both of these appearances occurred before Mr. Green had been admitted pro hac vice. In fact, Mr. Green did not file his application for pro hac vice admission with the Mississippi Supreme Court pursuant to Mississippi Rule 46(b)(5) until June 15, 2012, the same day he filed the motion to dismiss and request for discovery. Mr. Green submitted the required verified application and affidavit to appear pro hac vice and correctly included both a certificate of local counsel signed by Daniel Lofton and a verification of payment of a $200 fee to the Mississippi Bar.

"The Mississippi trial court admitted Mr. Green to practice before it during conferences in chambers and in pre-trial proceedings. However, no written order admitting Mr. Green pro hac vice was ever entered, so Mr. Green failed to comply with Mississippi Rule 46(b)(7), which requires an attorney seeking pro hac vice admission to provide a copy of the order authorizing such appearance to the Clerk of the Mississippi Supreme Court and precludes the foreign attorney from appearing as counsel pro hac vice before any court 'until the foreign attorney certifies to the court … that a copy of the order' has been provided to the Clerk of the Mississippi Supreme Court.

"At the beginning of trial, Mr. Green appeared without local counsel, even though Mississippi Rule 46(b)(4) states that '[t]he local attorney shall personally appear and participate in all trials.' The prosecuting attorney noted that local counsel was not present but represented that 'the state ha[d] no objection whatsoever to Mr. Green proceeding without local counsel being present.' The trial court determined that Mr. Green had complied with the Mississippi rules concerning pro hac vice admission and again verbally approved his application to proceed pro hac vice in the criminal court. After the prosecuting attorney erroneously advised the trial judge that Mississippi Rule 46(b) allowed 'defense counsel to proceed without local counsel if the judge expressly allows that or makes a ruling as such,' the trial judge purported to excuse local counsel from participating. After a one-day trial at which Mr. Green alone represented Mr. Newberry, the jury convicted Mr. Newberry of possession of marijuana, possession of cocaine, and first offense DUI.

"Mr. Newberry appealed his convictions and argued that the verdict should be set aside because Mr. Green failed to comply fully with Mississippi Rule 46(b) and because local counsel was absent from the trial. The Mississippi Supreme Court agreed, reversed the convictions, and remanded the case for a new trial. Newberry, 145 So.3d at 659. In so holding, the Mississippi Supreme Court noted that its enforcement of Mississippi Rule 46(b) 'goes not only toward protecting clients' rights, but toward enforcing both society's and the profession's respect for this Court and the processes that have been established for seeking redress.' *Id*. at 658.

"The Hearing Panel found that Mr. Green did not knowingly fail to comply with Mississippi Rule 46(b) and that he did not intend to mislead anyone about his status as a Tennessee attorney or his pro hac vice admission to appear in the Mississippi courts. The Hearing Panel also found that: (1) Mr. Newberry knew that Mr. Green was not licensed to practice in Mississippi; (2) Mr. Newberry hired Mr. Green in part because he did not wish to be represented by a Mississippi attorney; (3) Mr. Green failed to comply with Mississippi Rule 46(b) in the several ways described above; and (4) Mr. Green's failure to have local counsel present at trial, as required by Mississippi Rule 46(b), was mitigated to some extent by the fact that both the Mississippi trial judge and prosecutor shared Mr. Green's mistaken belief that the presence of local counsel at trial could be waived. The Hearing Panel emphasized that the other ways in which Mr. Green violated Mississippi Rule 46(b), including his filing of the May 14, 2012 Scheduling Order and the June 15, 2012 motions, also constituted violations of Rule 46(b) and had no relation to the trial judge's or prosecutor's misunderstanding of the rule. The Hearing Panel found that Mr. Green violated RPC 5.5(a), which provides that '[a] lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction' and RPC 8.4(d), which provides that a lawyer shall not 'engage in conduct that is prejudicial to the administration of justice.'"

"C. Noncompliance with Mississippi Pro Hac Vice Rule

"Mr. Green also takes issue with the Hearing Panel's finding that his failure to comply with Mississippi Rule 46(b) violated RPC 5.5(a) (Unauthorized Practice of Law) and RPC 8.4(d) (Misconduct)."

"The Hearing Panel's finding that Mr. Green violated RPC 5.5(a) and engaged in the unauthorized practice of law by appearing in the Mississippi case without complying with Mississippi Rule 46(b) is grounded on a firm, material, and substantial evidentiary basis.

"Substantial and material evidence also supports the Hearing Panel's finding that Mr. Green's failure to comply with Rule 46(b) amounted to conduct prejudicial to the administration of justice in violation of RPC 8.4(d). It is undisputed that the Mississippi Supreme Court reversed Mr. Newberry's convictions and remanded for a new trial because of Mr. Green's failure to comply with Rule 46(b). We agree with the Hearing Panel and the Board that Mr. Green's failure to comply thus amounts to conduct prejudicial to the administration of justice. See *In re Hawver*, 300 Kan. 1023, 339 P.3d 573, 589 (2014) (stating that the attorney's incompetent representation of his client, which resulted in the retrial of a capital murder case, was a significant prejudice to the administration of justice in violation of Kansas's version of RPC 8.4(d)).

"Finally, Mr. Green's argument that the Hearing Panel should have merged the violation of RPC 5.5(a) with the violation of RPC 8.4(d) is without merit. Mr. Green is correct that merger is appropriate in criminal cases where, for example, a jury returns guilty verdicts on two counts of

an indictment which charge alternative theories of committing the same offense. See, e.g., *State v. Berry*, 503 S.W.3d 360, 362 (Tenn. 2015). But disciplinary hearings are not criminal trials and do not include all the due process protections that apply in criminal trials. *Moncier v. Bd. of Prof'l Responsibility*, 406 S.W.3d 139, 157 (Tenn. 2013). More importantly, RPC 5.5(a) and RPC 8.4(d) are separate and distinct, and a violation of one does not necessarily amount to a violation of the other. This argument is without merit."

In re Bates, Board Release of Information.

Charles Matthew Bates of Lawrenceburg was publicly censured.

"Mr. Bates practiced law by appearing in court on behalf of a number of clients while his license to practice law was administratively suspended for failure to comply with his annual registration and IOLTA reporting requirements."

Mr. Bates violated RPC 5.5 (unauthorized practice of law).

In re Bradley, Board Release of Information.

Joyce Diane Bradley of Memphis was publicly censured.

"On August 22, 2018, Ms. Bradley's license to practice law was suspended for CLE noncompliance. Notwithstanding the administrative suspension, Ms. Bradley continued to practice law thereafter by appearing in court and discussing clients' cases with other attorneys."

Ms. Bradley violated RPC 5.5 (unauthorized practice of law).

In re Johnson, Board Release of Information.

Earl Frank Johnson of Memphis was suspended for six months and required to submit to an evaluation by the Tennessee Lawyers Assistance Program, based on a conditional guilty plea.

"On March 26, 2018, a Petition for Discipline was filed against the Mr. Johnson including one complaint of misconduct alleging Mr. Johnson appeared in General Sessions Court on behalf of a client when his law license had been administratively suspended since August 2012."

Mr. Johnson violated RPCs 5.5 (unauthorized practice of law; multijurisdictional practice of law), 8.1 (bar admission and disciplinary matters), and 8.4(a) and (d) (misconduct).

In re Jones, Board Release of Information.

Jennifer Elizabeth Jones of Nashville was suspended for eighteen months, retroactive to her temporary suspension on July 31, 2017, based on a conditional guilty plea.

"The complaint alleged that Ms. Jones, while administratively suspended from the practice of law, notified opposing counsel in an administrative matter that she represented an individual. The signature line of Ms. Jones' e-mail included the word 'Esquire' after her name, included the name of the law firm where she purportedly worked, and was sent from the law firm's e-mail address.

Further, Ms. Jones filed and signed pleadings containing her attorney registration number and the name of her law firm. Ms. Jones entered a Conditional Guilty Plea in this matter."

Ms. Jones violates RPCs 5.5 (unauthorized practice of law) and 8.1(b) (bar and disciplinary matters).

In re Kennedy, Board Release of Information.

James Lester Kennedy of Knoxville was suspended for three years.

Mr. Kennedy knowingly made appearances in Knox County Probate Court and filed pleadings in cases pending in New York and Pennsylvania without informing the Court and opposing counsel of his one-year suspension on July 20, 2017. In addition to misleading courts and opposing counsel, Mr. Kennedy failed to provide substantive responses to the Board's requests for information regarding the disciplinary complaint.

Mr. Kennedy violated RPCs 5.5 (unauthorized practice of law), 3.3 (candor toward the tribunal), 8.1 (bar admissions and disciplinary matters), and 8.4(a), (c), (d) and (g) (misconduct).

In re Lampley, Board Release of Information.

Julie Williams Lampley of Nashville was publicly censured, based on a conditional guilty plea..

"On February 21, 2018, a Petition for Discipline was filed against Ms. Lampley based upon her self-report immediately following her discovery that she failed to pay her 2015 annual registration fee. Ms. Lampley was administratively suspended by the Tennessee Supreme Court on November 23, 2015, based upon non-payment of her 2015 annual registration fee. Thereafter, Ms. Lampley engaged in the unauthorized practice of law until the reinstatement of her license."

Ms. Lampley violated RPC 5.5 (unauthorized practice of law).

In re Roberts, Board Release of Information.

James D.R. Roberts, Jr., of Nashville was publicly censured.

"During a period of suspension from the practice of law, Mr. Roberts worked for the mailing service used by his law firm. While working for the mailing service, Mr. Roberts utilized his law firm email address to communicate with a client and to provide him with copies of letters being sent from his law firm through the mailing service. Mr. Roberts' conduct constituted the unauthorized practice of law."

Mr. Roberts violated RPC 5.5 (unauthorized practice of law).

In re Thompson, Board Release of Information.

Thomas W. Thompson, Jr., of Tampa, Florida, was publicly censured and required to withdraw from all Tennessee cases where he is attorney of record, based on a conditional guilty plea.

"On July 6, 2018, a Petition for Discipline was filed against Mr. Thompson alleging that he committed ethical misconduct by practicing law while suspended for failing to comply with continuing legal education requirements. Mr. Thompson resides in Florida where he is licensed to practice law. He is also licensed to practice law in Tennessee. He was suspended by the Tennessee Supreme Court on August 16, 2016, for failing to comply with continuing legal education requirements. While suspended, four lawsuits were filed in Tennessee naming him as the attorney for the plaintiffs. The lawsuits were prepared and filed by Mr. Thompson's nonlawyer staff without his knowledge. Mr. Thompson has not yet withdrawn from the cases."

Mr. Thompson violated RPCs 5.5(a) (unauthorized practice of law) and 8.4 (misconduct).

In re Turner, Board Release of Information.

Cleveland C. Turner of Clarksville was publicly censured.

"Mr. Turner practiced law for five business days when his license was administratively suspended, including an appearance in court at a hearing."

Mr. Turner violated RPC 5.5 (unauthorized practice of law).

Ohio State Bar Association v. Klosk, 155 Ohio St.3d 420, 122 N.E.3d 107 (Ohio 2018).

"Relator, Ohio State Bar Association, charged respondents, Michael J. Klosk, an attorney licensed to practice law in California, and Klosk Law Firm, Inc., a California law firm, with engaging in the unauthorized practice of law in Ohio. Relator alleged that Klosk and his firm provided legal advice to an Ohio resident and/or negotiated the resolution of an Ohio resident's debt with a creditor's counsel who was also located in the state of Ohio.

"Finding that Klosk and his firm practiced law in violation of Ohio licensure requirements, the Board on the Unauthorized Practice of Law recommends that we enjoin them from committing further illegal acts and assess a $2,000 civil penalty. We agree that Klosk and Klosk Law Firm, Inc., engaged in the unauthorized practice of law in Ohio and that an injunction and $2,000 civil penalty are warranted."

"Klosk has never been licensed to practice law in Ohio, and his firm is not eligible to be licensed to practice law in this state. And they are deemed to have admitted that no member of the firm is licensed to practice law in this state.

"Klosk and his firm provide counseling and assistance to individuals regarding the reduction of consumer debt as part of their practice. Once retained, they contact their clients' creditors and attempt to negotiate a reduction of the clients' outstanding debts.

"In January 2010, a debtor who resided in Ohio executed a power of attorney appointing Klosk and his firm as his 'true and lawful attorney' for purposes of communicating with the debtor's creditors. In his answer to relator's complaint, Klosk admitted that in May 2010, he sent a letter to Ohio counsel for CitiFinancial, on behalf of the Ohio debtor. In that letter, Klosk Law Firm, Inc., held itself out as the law firm representing the debtor and referred to the debtor as the firm's client. Klosk also admitted that he later sent the creditor's counsel a copy of the aforementioned power of attorney.

"Thus, it is undisputed that Klosk and Klosk Law Firm, Inc., contacted Ohio counsel for CitiFinancial and indicated that they represented an Ohio resident in debt negotiations without the benefit of any legal counsel licensed to practice in Ohio."

"We have defined the unauthorized practice of law in Ohio to include both the 'rendering of legal services for another' and the '[h]olding out to the public or otherwise representing oneself as authorized to practice law in Ohio' by any person who is not admitted or otherwise certified to practice law in Ohio. Gov. Bar R. VII(2)(A). . . . Therefore, an individual who is not licensed to practice law in Ohio who negotiates legal claims on behalf of Ohio residents or advises Ohio residents of their legal rights or the terms and conditions of settlement is engaged in the unauthorized practice of law. *Disciplinary Counsel v. Brown*, 121 Ohio St.3d 423, 2009-Ohio-1152, 905 N.E.2d 163. The fact that a respondent procured a power of attorney executed by his customer is no defense to a charge of engaging in the unauthorized practice of law in Ohio. *See, e.g.*, *Columbus Bar Assn. v. Am. Family Prepaid Legal Corp.*, 123 Ohio St.3d 353, 2009-Ohio-5336, 916 N.E.2d 784, ¶ 76; *Telford* at 113, 707 N.E.2d 462.

"Based on the facts in the record and the applicable law, there is no doubt that Klosk and the Klosk Law Firm, Inc., engaged in the unauthorized practice of law. They have conceded that neither Klosk nor the firm has ever been admitted to the practice of law in Ohio and that no other member of the firm is so admitted. Despite those facts, they represented an Ohio resident in debtor-creditor negotiations with the creditor's Ohio counsel. We therefore find that Klosk and the Klosk Law Firm, Inc., engaged in the unauthorized practice of law as defined in Gov. Bar R. VII(2)(A) and hold that summary judgment in relator's favor is appropriate."

B. Restrictions on Right to Practice, Rule 5.6

Formal Ethics Opinion 2019-F-167, Ethical Propriety of Settlement Agreement Requiring Destruction of Product in a Products Liability Case (April 15, 2019).

"The Board of Professional Responsibility has been requested to issue a Formal Ethics Opinion regarding the ethical propriety of a settlement agreement, in a products liability case, which contains as a material condition of the settlement that the subject vehicle alleged to be defective be destroyed within 180 days with certification to defendant's counsel of record of the destruction."

"It is improper for an attorney to propose or accept a provision in a settlement agreement, in a products liability case, that requires destruction of the subject vehicle alleged to be defective if that action will restrict the attorney's representation of other clients."

"The inquiring lawyer has encountered a condition to settlement, in product liability cases against a certain defendant, which requires plaintiff to destroy the vehicle that was the subject of the claim.

"The parties agreed on a settlement amount, and the requirement of the destruction of the vehicle was only brought up after the Plaintiff agreed to settle. The client simply wanted to be paid their settlement monies and the lawyer's objections to the requirement were discarded because the client is the ultimate decision-maker to accepting settlement. [FN: Tennessee Rules of Professional Conduct, Rule 1.2(a).]

"This created a conflict between the lawyer and the client as well as other current and future clients. Such a provision indirectly restricts the lawyer's ability to fully and competently represent other current or future clients with similar claims against the Defendants.

"RPC 5.6(b) states 'A lawyer shall not participate in offering or making: (b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.' [FN: Tennessee Rules of Professional Conduct, Rule 5.6 (b).]

"In complex product liability cases involving an allegedly defective vehicle, the physical vehicle itself is the most important piece of evidence in the case. The most compelling evidence when establishing the existence of a defect in a vehicle is the existence of other similar incidents. That is, instances in which a comparable vehicle or vehicle component has displayed evidence of the same failure or defect that is the basis of the present claim. The ability to review and re-inspect a similar vehicle, which had previously exhibited a similar defect, is extremely valuable in prosecuting a potential future case.

"Vehicles, such as the one involved in the instant case, are routinely used in subsequent cases involving the same or similar vehicles or the same or similar components (such as seatbelts, airbags, seats, etc.) in otherwise dissimilar vehicles. The inquiring lawyer's firm catalogues and preserves defective vehicles in order to establish a physical information base to be used in subsequent cases.

"The firm has a policy of acquiring possession of the subject vehicle as part of its initial investigation into the case. This is normally done by purchasing the vehicle directly from an insurance company that has possession of the vehicle post-accident. In the rare case that the firm's client has possession of the vehicle (and title), the firm requests that the client allow the firm to retrieve the vehicle from them. If the client is not in possession of the vehicle, and the firm is unable to purchase the vehicle directly from an insurer, the firm purchases the vehicle at auction if possible.

"The firm covers the expense of securing the vehicle, and said expense is treated like any other case expense at that point. During the pendency of the case, the firm and the expert witnesses for the case or for any other case turning on the same defect/vehicle model inspect the vehicle, dissemble parts if need be, and catalogue the vehicle. It is the firm's practice at the end of the case to request from the client that the firm be allowed to retain ownership and possession of the vehicle.

"RPC 3.4(a) states: 'A lawyer shall not obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act…' 'Applicable law in many jurisdictions makes it an offense to destroy material for the purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen.' [FN: Tennessee Rules of Professional Conduct, Rule 3.4 Comment [2].] 'Tennessee Courts have long applied a prerequisite of intentional misconduct in the context of spoliation of evidence. This prerequisite originated with the common law "doctrine of spoliation" which allowed a trial court to draw a negative inference against a party who destroys evidence.' [FN: *Tatham v. Bridgestone Americas Holding, Inc.*, 473 S.W.3d 734, 738 (Tenn. 2015).]

"Clearly, in the context of a product liability case, the alleged defective product is key evidence in other current or subsequent cases of a similar defect.

"The firm has assured Defendant that the vehicle will not be placed back on the road, and that when the firm decides no longer to retain the vehicle, it will provide a certificate of destruction to Defendant, which should satisfy any safety concerns of Defendant. Given the nature of the Defendant's business and the practice area of the inquiring lawyer, demanding the destruction of key evidence can only be viewed as an attempt by the Defendant to disadvantage the firm in other current or future litigation. 'Any type of restriction of a plaintiff's attorney on representing future claimants against the same defendant are ethically inappropriate and violates RPC 5.6(b) which pertains to impermissible restrictions on a lawyer's practice.' [FN: Tennessee Formal Ethics Opinion 98-F-141 (Feb. 4, 1998), *citing* ABA Formal Ethics Opinion 93-371 (1993).]

"ABA Formal Opinion 93-371 articulates the three policy considerations underlying RPC 5.6(b). First, there is a risk that the public's access to the best attorney for a particular case will be curtailed. Second, such a restraint could be motivated by an effort to 'buy off' counsel rather than to resolve the dispute. Third, a restriction on an attorney's right to practice may place him or her in a position where the interests of the current client are in conflict with those of potential future clients.

"The American Bar Association has opined that the rule applies not only to such an explicit limitation, [FN: ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 93-371 (1993)] but also to other limitations that indirectly restricts a lawyer's right to practice. [FN: ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 00-417 (2000).]

"By requiring destruction of the alleged defective product after settlement in a products liability case, defense counsel would accomplish indirectly what they cannot accomplish directly by precluding the attorney from representing other plaintiffs with similar claims.

"Further, the firm's file retention policy includes retaining material pieces of evidence as part of the file because it may be evidence in any subsequent malpractice suit against the firm. Without the ability to review the most important piece of evidence in the underlying products liability suit, the law firm would be left essentially defenseless if a former client brought a professional malpractice claim.

"There is also a public policy consideration. The ability for plaintiffs' firms to act as industry watchdogs is both good public policy and was specifically addressed as a vested responsibility during Congress's enactment of the Federal Motor Vehicle Safety Standards. [FN: 49 U.S.C. Ch. 301; 49 U.S.C. § 30103(e) (2010); Tenn. Formal Ethics Opinion 2018-F-166 (2018).]"

"Settlement conditions are prohibited by Tennessee Rules of Professional Conduct 5.6(b), if such conditions will restrict the attorney's representation of other clients.

"It is improper for an attorney to propose or accept a provision in a settlement agreement that requires an attorney in a products liability lawsuit to destroy the product alleged to be defective, as a material condition of settlement, if that action will restrict the attorney's representation of other clients."

V. Information About Legal Services; Communication Concerning a Lawyer's Services (Rule 7.1)

In re Holmes, Board Release of Information.

Jerry D. Holmes, Jr., of Surf City, North Carolina was publicly censured, based on a conditional guilty plea.

"Mr. Holmes, while administratively suspended from the practice of law in Tennessee, prepared and sent an email in which he improperly designated himself as an attorney at law in Tennessee."

Mr. Holmes violated RPCs 7.1 (communications concerning lawyer's services) and 8.4 (misconduct of the Tennessee Rules of Professional Conduct).

VI. Consumer Protection Act Amendment Concerning Drug Ads

Chapter 119, Public Acts 2019, adding T.C.A. §§ 47-18-5601 through -5605 eff. July 1, 2019.

"47–18–5601.

"As used in this part:

"(1) 'Legal advertisement' means a solicitation of legal services through television; radio; internet, including a domain name; newspaper or other periodical; outdoor display; or other written, electronic, or recorded communication;

"(2) 'Person' means an individual or legal entity that advertises legal services or that identifies potential clients for attorneys or law firms;

"(3) 'Protected health information' has the meaning given that term in 45 C.F.R. § 160.103; and

"(4) 'Solicit' means offering to provide legal services by print; video or audio recording; or electronic communication or by personal, telephone, or real-time electronic contact.

"47–18–5602.

"(a) A person shall not do any of the following in a legal advertisement:
(1) Fail to disclose at the beginning of any recorded advertisement or display in a conspicuous location on any printed or electronic written legal advertisement that the legal advertisement is a paid advertisement for legal services;
(2) Present a legal advertisement as a 'medical alert,' 'health alert,' 'consumer alert,' 'public service announcement,' or other similar language;
(3) Display the logo of a federal or state government agency in a manner that suggests an affiliation with or the sponsorship by that agency;
(4) Use the word 'recall' to refer to a product that has not been recalled by a government agency or through an agreement between a manufacturer and government agency;
(5) Fail to identify the person responsible for the legal advertisement; or
(6) Fail to identify the attorney or law firm that will represent clients, or to disclose that cases may be referred to another attorney or law firm to represent clients if the sponsor

of the legal advertisement does not represent persons responding to the legal advertisement.

"(b) A person shall not use a legal advertisement to solicit clients who may allege an injury from a prescription drug or medical device approved, cleared, or the subject of a drug monograph authorized by the United States food and drug administration unless the legal advertisement also includes the information required in this section.

"(c) A legal advertisement soliciting clients who may allege an injury from a prescription drug approved, cleared, or the subject of a drug monograph authorized by the United States food and drug administration must:

(1) Include the following warning: 'Do not stop taking a prescribed medication without first consulting with your doctor. Discontinuing a prescribed medication without your doctor's advice can result in injury or death'; and

(2) Disclose that the drug or medical device remains approved by the United States food and drug administration, unless the product has been recalled by a government agency or through an agreement between a manufacturer and government agency.

"47–18–5603.

"(a) A person shall not use, cause to be used, obtain, sell, transfer, or disclose protected health information to another person for the purpose of soliciting an individual for legal services without written authorization from the individual who is the subject of the information.

"(b) In addition to any other remedy provided by law:

(1) A person who willfully and knowingly uses, causes to be used, obtains, sells, transfers, or discloses protected health information in violation of this section commits a Class A misdemeanor, punishable by a fine of one thousand dollars ($1,000), imprisonment, or both; and

(2) A person who violates this section with the intent to use, cause to be used, obtain, sell, transfer, or disclose protected health information for the purpose of financial gain commits a Class C felony, punishable by a fine not to exceed two hundred fifty thousand dollars ($250,000), imprisonment of not less than three (3) years nor more than ten (10) years, or both.

"(c) This section does not apply to the use or disclosure of protected health information to an individual's legal representative in the course of any judicial or administrative proceeding, or as otherwise permitted or required by law.

"47–18–5604.

"(a) Any words or statements required by this section to appear in a legal advertisement must be presented clearly and conspicuously.

"(b) Written disclosures must be clearly legible and, if televised or displayed electronically, displayed for a sufficient time to enable a viewer to easily see and fully read the disclosure.

"(c) Spoken disclosures must be plainly audible and clearly intelligible.

"47–18–5605.

"(a) A violation of this part constitutes a violation of the Tennessee Consumer Protection Act of 1977, compiled in part 1 of this chapter. Any violation of this part constitutes an unfair or deceptive act or practice affecting trade or commerce and is subject to the penalties and remedies as provided in the Tennessee Consumer Protection Act of 1977, in addition to the penalties and remedies in this part.

"(b) The attorney general and reporter has all of the investigative and enforcement authority that the attorney general and reporter has under the Tennessee Consumer Protection Act of 1977 relating to alleged violations of this part. The attorney general and reporter may institute any proceedings involving alleged violations of this part in Davidson County circuit or chancery court or any other venue otherwise permitted by law.

"(c) Costs of any kind or nature cannot be taxed against the attorney general and reporter or the state in actions commenced under this part.

"47–18–5606.

"Nothing in this part:

(1) Limits or otherwise affects the authority of the Tennessee Supreme Court to regulate the practice of law, enforce the Rules of Professional Conduct, or discipline persons admitted to the bar; or

(2) Creates or implies liability on behalf of a broadcaster who holds a license for over-the-air terrestrial broadcasting from the federal communications commission, or against a cable operator as defined in 47 U.S.C. § 522(5)."

VII. Maintaining the Integrity of the Profession (Rules 8.2 - 8.4)

A. Judicial and Legal Officials, Rule 8.2

Board of Professional Responsibility v. Parrish, 556 S.W.3d 153 (Tenn., Lee, 2018).

"This disciplinary action arises from pejorative statements made by attorney Larry E. Parrish in motions to recuse three judges on the Tennessee Court of Appeals after an adverse decision.

"Mr. Parrish represented David Morrow and Judy Wright, the nephew and niece of Helen Goza, regarding a trust Ms. Goza had established for her son, John Goza. Under the terms of the trust, any assets remaining in the trust after the death of Mr. Goza were to be disbursed to various charities. After Mr. Goza's death, Mr. Parrish, on behalf of Mr. Morrow and Ms. Wright, filed an action in the Shelby County Chancery Court seeking a declaratory judgment that the trust was not valid and that they were entitled to the trust's remaining assets. The chancery court granted summary judgment, finding that the trust was valid. The Court of Appeals affirmed. *Morrow v. SunTrust Bank*, No. W2010-01547-COA-R3-CV, 2011 WL 334507 (Tenn. Ct. App. Jan. 31, 2011) ('*Goza I*').

"While the appeal in *Goza I* was pending, Mr. Morrow was appointed administrator of the Estate of John Goza. Mr. Parrish, representing the Estate and Mr. Morrow as administrator, filed a

petition in probate court to require SunTrust Bank to turn over to the Estate the assets of the trust based on the asserted invalidity of the trust. Soon after, the Court of Appeals issued its ruling in *Goza I*, affirming the validity of the trust. SunTrust Bank then asserted that the probate case was barred by res judicata. The probate court denied the petition on that basis, and the Court of Appeals affirmed. *In re Estate of Goza*, 397 S.W.3d 564 (Tenn. Ct. App. 2012) ('*Goza II*').

"Next, Mr. Parrish, as attorney for the Estate, sued SunTrust Bank in the Shelby County Circuit Court. The circuit court dismissed that action, finding that the validity of the trust was res judicata and that it lacked subject matter jurisdiction. The Court of Appeals affirmed the circuit court in a memorandum opinion authored by Judge David Farmer and joined by Judge Steven Stafford and (then)-Judge Holly Kirby. The Court of Appeals also determined the appeal was frivolous and awarded SunTrust Bank its attorney's fees and costs. *Goza v. Wells*, No. W2012-01745-COA-R3-CV, 2013 WL 4766544 (Tenn. Ct. App. Sept. 4, 2013) ('*Goza III*'). Mr. Parrish moved for a rehearing and to recuse Judge Farmer. Mr. Parrish later filed motions to recuse Judges Stafford and Kirby.

"The judges submitted the recusal motions to the Board of Professional Responsibility ('the Board'). The motions include the following statements by Mr. Parrish:

- Estate's motion is grounded on Estate's contention that Estate has been denied access to indisputable organic law of Tennessee applied to indisputable facts, and that access has been denied because of a prejudicial and baseless bias, evidently the result of personal sympathies/sensitivities of Judge Farmer.
- In contrast, if Estate shows that Judge Farmer (1) ruled the opposite of what he knew undebatable law to be, (2) wrote as fact that which he knew not to be fact to avoid the effect he knew would be required, if he acknowledged what he knew to be fact, (3) ruled as if *ipse dixit* was a holding and decision, (4) gave *obiter dictum* preclusive effect, (5) used half-truths to fabricate justification for judicial misconduct, (6) without the slightest justification, demeaned counsel for Estate to create a scapegoat for his judicial misconduct, (7) used the Memorandum Opinion as a vehicle to include unnecessary *obiter dictum* as a means, practically speaking, to prejudge case-dispositive issues pending in trial courts and, thereby, usurp the role of the trial courts to adjudge the issue independently and, finally, (8) awarded attorney's fees against Estate based on fabrication, Estate will have established that Judge Farmer is serving, in this case, encumbered by a prejudice and bias against Estate to manufacture an outcome against Estate, in the teeth of indisputable organic law and indisputable fact that dictate the opposite.
- This is not about miscalling balls and strikes; this is about rigging the game. . . .
- There is absolutely no way under the sun for Estate to fail to prevail in the instant appeal, except by judges deciding the appeal to turn a deaf ear and blind eye to the clearest possible provisions of § 35-15-203.
- Judge Farmer has victimized Estate by saying of a statute, i.e. *Tennessee Code Annotated* § 35-15-203, that it divests circuit court of subject matter jurisdiction, even though a person minimally literate in the English language could very easily read the statute and know, without hesitation, that the statute does exactly the opposite.
- This is an aberrant misstatement of clear law known to Judge Farmer.…
- Placing the subject erroneous *ipse dixit* in Judge Farmer's Memorandum Opinion, in practical effect, is a prejudgment designed to prejudice Estate in cases not before Judge Farmer.

- Additionally, the erroneous *ipse dixit* in Judge Farmer's Memorandum Opinion is a setup, i.e., the point is to forewarn Estate not to exercise its right to an appeal in the case where the erroneous *ipse dixit* is dispositive and, if Estate exercises Estate's right to appeal, Judge Farmer is poised to punish Estate for not heeding Judge Farmer's forewarnings. . . .
- The repeated statements in Judge Farmer's Memorandum Opinion that the court of appeals, twice before, 'held' or 'decided' that the putative trust exists, for Judge Farmer, is a convenient and illegitimately purposeful fabrication.
- In an effort to provide a façade of legitimacy to Judge Farmer's inclusion about the putative trust, Judge Farmer builds a construct on the false presupposition that § 35-15-203 divests circuit court of subject matter jurisdiction, if the putative trust exists. . . .
- Judge Farmer has done a masterful job of covering up the fact that Judge Farmer has stepped out of Judge Farmer's role as an even-handed Judge and into the role of adversary of the Estate, willing to abuse the power of his judicial office to deny Estate's access to unexceptional organic law of Tennessee well-known to Judge Farmer.
- Many authors, among them Alfred Lord Tennyson, have observed that the half-truth is the most sinister of all deception. The point is that sprinkling into deception particles of truth, misused and taken out of context, makes it much harder to detect deception than a straight out misstatement of objective fact. Judge Farmer has used the half-truth in constructing Judge Farmer's Memorandum Opinion. Judge Farmer's Memorandum Opinion is a patchwork of snippets of truth glued together by adhesive design to close to Estate access to controlling organic law. . . .
- Judge Farmer knows the ropes as well as anybody. These characteristics make Judge Farmer's Memorandum Opinion in this case stand out as uncharacteristic. Only the most simpleminded person would conclude that, in this case, Judge Farmer made inadvertent mistakes. . . .
- Estate does not wish to create the impression that there is naiveté which keeps Estate from reading between the lines of Judge Farmer's Memorandum Opinion; indeed, Estate perceives that Judge Farmer intended the non-subtle message between the lines be received and headed [sic] as a shot over the bow. The loud message that bleeds through comes [sic] from between the lines is unmistakable and threatening to Estate. . . .
- What role does a judge's oath, practically speaking, play in the day-to-day functioning of a judge? Are there times when it is permissible for judges to lay aside their oath to render a judgment that, though not what the law dictates, is what the judge feels is the 'right' thing to do.
- From the outset, Estate makes it clear that Estate has no evidence, has looked for no evidence and makes no accusation that Judge Farmer has taken a bribe; this is completely out of the question. By this, Estate means that there is no evidence that Judge Farmer, in exchange for cash or any other thing of value, has agreed with another person to do what Estate accuses Judge Farmer of having done.
- Having said that, Estate takes note of the fact that money received by a bribe-taking judge is not the harm such a bribe wreaks on the legal system, on legal process and on the litigants who are victimized by a bribe.
- The harm a bribe wreaks on the legal system and the litigant-victims is what happens when a judge abandons his/her oath of office, surrenders up the impartiality that is essential to a judge functioning in an adjudicative role evenhandedly applying law to facts found from evidence adduced according to rules of evidence. . . .

- Otherwise stated, although there is no evidence that Judge Farmer received a bribe to do what he is doing, Judge Farmer is doing what a bribe-taking judge would do to victimize a litigant who was targeted by a bribe. To a litigant who is targeted, it is totally immaterial what caused the judge to victimize the litigant.

"Based on Mr. Parrish's statements in the recusal motions, the Board filed a Petition for Discipline against Mr. Parrish alleging violations of Rules of Professional Conduct 3.5(e), 8.2(a)(1), 8.4(a), 8.4(c), and 8.4(d). In July 2015 after an evidentiary hearing, a Board hearing panel issued a written decision finding that Mr. Parrish had violated:

- Rule 3.5(e) by including statements in the motions to recuse that 'constituted abusive and obstreperous conduct intended to disrupt the Tennessee Court of Appeals proceedings involving [Mr. Parrish's] client';
- Rule 8.2(a)(1) by making 'statements about the integrity of Judges Farmer, Kirby and Stafford that a reasonable attorney would believe were false' and making those statements 'with reckless disregard as to their truth or falsity';
- Rule 8.4(d) by making statements in the motions to recuse that 'were prejudicial to the administration of justice'; and
- Rule 8.4(a) by violating Rules 3.5(e), 8.2(a)(1), and 8.4(d).

"After a subsequent evidentiary hearing in January 2016, the hearing panel issued a written decision stating that it 'considered the applicable provisions of the ABA Standards for Imposing Lawyer Sanctions,' and therefore had considered 'the duty violated; [Mr. Parrish's] mental state, the injury caused by [Mr. Parrish's] misconduct, and the existence of aggravating and mitigating factors.' Without identifying which of the ABA Standards for Imposing Lawyer Sanctions ('ABA Standards') it had applied, the hearing panel concluded that a public censure was the appropriate sanction for Mr. Parrish's conduct.

"The Board appealed by filing a Petition for Writ of Certiorari in the Shelby County Circuit Court. Following a hearing, the trial court affirmed the hearing panel's findings that Mr. Parrish had violated Rules 3.5(e), 8.2(a)(1), 8.4(a), and 8.4(d)."

"Based on ABA Standards 6.12 and 6.32 and the mitigating and aggravating factors, the trial court held that Mr. Parrish should be suspended for six months, with one month to be served on active suspension and the remaining five months on probation. Mr. Parrish appealed to this Court."

"Mr. Parrish contends that the statements he made in the motions to recuse are protected speech under the First Amendment of the United States Constitution and Article 1, § 19 of the Tennessee Constitution. Both the hearing panel and the trial court concluded that Mr. Parrish's statements in the motions to recuse violated Rules of Professional Conduct 3.5(e), 8(a), 8.2(a)(1), and 8.4(d) and are not entitled to constitutional protection. We agree.

"This Court has in past disciplinary proceedings distinguished between in-court and out-of-court statements in determining whether the First Amendment protects an attorney's speech. In *Board of Professional Responsibility v. Slavin*, 145 S.W.3d 538 (Tenn. 2004), we held that pejorative statements made by an attorney in motions and other pleadings filed in state and federal courts were not entitled to First Amendment protection.

"In *Ramsey v. Board of Professional Responsibility,* 771 S.W.2d 116, 121 (Tenn. 1989), the Court applied the subjective 'actual malice' standard established by the United States Supreme Court in *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), to determine whether the attorney's out-of-court statements to the media were constitutionally protected. There, we held that an attorney's out-of-court statements to the media were protected by the First Amendment, explaining that after a case has concluded, an attorney has the right to make statements that criticize the court and the judiciary, 'so long as the criticisms are made in good faith with no intent … to willfully or maliciously misrepresent the persons and institutions or bring them into disrepute.'

"In *Slavin*, we explicitly distinguished *Ramsey* because the statements at issue in *Slavin* were made during in-court judicial proceedings, and '[*i*]*n the context of judicial proceedings*, an attorney's First Amendment rights are not without limits.' *Slavin*, 145 S.W.3d at 549 & n.9 (emphasis added)."

"In *Slavin*, we noted that the United States Supreme Court has stated that 'during a judicial proceeding, whatever right to 'free speech' an attorney has is extremely circumscribed.' 145 S.W.3d at 549 (quoting *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1071, 111 S.Ct. 2720, 115 L.Ed.2d 888 (1991)). The distinction between in-court and out-of-court speech is supported by the rationale that '[a]lthough litigants and lawyers do not check their First Amendment rights at the courthouse door, those rights are often subordinated to other interests inherent in the judicial setting.' *Slavin*, 145 S.W.3d at 549."

"A majority of courts that have dealt with attorney speech in disciplinary proceedings have not drawn a distinction between in-court and out-of-court statements in considering the issue and have adopted an objective standard in determining whether attorney speech is entitled to First Amendment protection. *The Florida Bar v. Ray*, 797 So.2d 556, 559–60 (Fla. 2001). . . ."

"Under the objective standard, the court assesses the statements in terms of 'what the reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstances … [and] focus[ing] on whether the attorney had a reasonable factual basis for making the statements, considering their nature and the context in which they were made.' *Gardner*, 793 N.E.2d at 431 (citations omitted). 'It is the reasonableness of the belief, not the state of mind of the attorney, that is determinative.' *Holtzman*, 573 N.Y.S.2d 39, 577 N.E.2d at 34."

"We hold that the objective 'reasonable attorney' standard is the appropriate standard to apply in a disciplinary proceeding involving an attorney's in-court speech. Utilizing this objective standard, the hearing panel found that Mr. Parrish had made statements in the motions to recuse about the integrity of the judges on the Court of Appeals that a reasonable attorney would believe to be false, and that Mr. Parrish had made those statements with reckless disregard as to their truth or falsity.

"In sum, the in-court statements that Mr. Parrish made in the recusal motions were not protected by the First Amendment. The hearing panel's decision that these statements violated Rules of Professional Conduct 3.5(e), 8.2(a)(1), 8.4(a), and 8.4(d) is supported by material and substantial evidence."

"We conclude that the hearing panel acted arbitrarily and capriciously in finding that a public censure was warranted. Mr. Parrish made the statements in the recusal motion knowingly, not negligently. Therefore, ABA Standard 6.12 applies, not ABA Standard 6.13. Under ABA Standard 6.12, the presumptive sanction is suspension, not a reprimand. The hearing panel offered no explanation as to why it did not apply ABA Standard 6.12 and no reason is apparent from the record. *See Barry*, 545 S.W.3d at 425 (finding that the hearing panel's decision to impose suspension instead of the presumptive sanction of disbarment under the ABA Standards, in the absence of mitigating factors, was arbitrary or capricious). The hearing panel's decision 'seems at odds with the factual findings and assessment … of the level of intent and culpability found by the hearing panel.' *Id.*"

"Although Mr. Parrish claims that his statements were justified by his steadfast belief in judicial reform, attorneys who cross the line from tolerable criticism to unacceptable speech 'may not avoid punishment by claiming that their misconduct served the greater good or the interest of their clients, as such exceptions would overwhelm the rules.' *Bailey*, 441 S.W.3d at 237 (quoting *Slavin*, 145 S.W.3d at 551). Mr. Parrish's argument in that regard is much like the defense raised by John J. Hooker who was disciplined for filing 'frivolous lawsuits using the most baseless invectives.' *In re Hooker*, 340 S.W.3d 389, 392 (Tenn. 2011). According to the trial court, Mr. Hooker considered himself a 'constitutional warrior for the people' and believed that his lawsuits could not be frivolous for that reason. We noted that Mr. Hooker completely missed the point—the disciplinary proceeding concerned only the question of whether the attorney in fulfilling his perceived role as 'constitutional warrior' was subject to the Rules of Professional Conduct. *Id.* at 393.

"Likewise, Mr. Parrish's attempt to justify his conduct by claiming that he is on a crusade for judicial reform misses the point. This case is not about Mr. Parish's beliefs in judicial reform. Rather, this case involves Mr. Parrish's in-court derogatory statements about the integrity of three appellate court judges in violation of the Rules of Professional Conduct."

"We hold that Mr. Parrish's pejorative statements in the motions to recuse were not protected by the First Amendment. The hearing panel's decision that Mr. Parrish violated Rules of Professional Conduct 3.5(e), 8.2(a)(1), 8.4(a), and 8.4(d) is supported by material and substantial evidence. The hearing panel, however, acted arbitrarily and capriciously in determining that the appropriate sanction for Mr. Parrish's misconduct was a public censure rather than suspension. Thus, we affirm the judgment of the trial court imposing a six-month suspension, with one month served on active suspension and the remaining five months on probation. We tax the costs of this appeal to Larry E. Parrish, for which execution may issue if necessary."

B. Misconduct: Criminal Act, Rule 8.4(b)

In re Cooper, Board Release of Information.

Thomas Patrick Cooper of Miami Beach, Florida, was disbarred.

Mr. Cooper pled nolo contendere to one count of Grand Theft and one count of Defrauding a Financial Institution in the 17th Judicial Circuit Court in and for Broward County.

Mr. Cooper violated RPCs 8.4(a), (b), (c) and (d) (misconduct).

In re Felner, Board Release of Information.

Georgia A. Felner of Franklin was suspended three years with eighteen months to be served on active suspension and the remainder on probation.

"Ms. Felner sold cannabis (THC) to a confidential informant and was indicted for the sale and delivery of a Schedule VI controlled substance. Ms. Felner entered a plea of nolo contendere to both felony counts, received judicial diversion, was placed on two years supervised probation beginning October 10, 2018, and prohibited from practicing law."

Ms. Felner violated RPC 8.4(b) (misconduct).

In re Moreland, Board Release of Information.

Casey Eugene Moreland of Nashville was disbarred, based upon a conditional guilty plea.

"The Tennessee Supreme Court suspended Mr. Moreland on June 5, 2018, pursuant to Tennessee Supreme Court Rule 9, Section 22.3, based upon his guilty plea to obstruction of an official proceeding, conspiracy to retaliate against a witness, conspiracy to commit theft, destruction of records and tampering with a witness. The Board of Professional Responsibility instituted a formal proceeding to determine the extent of final discipline to be imposed."

Mr. Moreland violated RPCs 8.4(a) and (b) (misconduct).

In re St. Clair, Board Release of Information.

Judith-Anne Ross St. Clair of Manchester was suspended three years, with six months to be served on active suspension and the remainder on probation requiring compliance with a Tennessee Lawyers Assistance Program (TLAP) monitoring agreement, restitution, and a practice monitor, based on a conditional guilty plea.

Ms. St. Clair "was arrested for a schedule II drug violation in a drug free school zone. Ms. St. Clair entered a plea to amended lesser charges, received judicial diversion, and a suspended sentence of eleven months and 29 days. During the period of her arrest and subsequent drug treatment, Ms. St. Clair failed to communicate with her clients, failed to provide diligent legal services, and abandoned their cases. Ms. St. Clair has made restitution to two clients and has agreed to make restitution to a third client."

Ms. St. Clair violated RPCs 1.3 (diligence), 1.4 (communications), 1.5 (fees), 1.15 (safekeeping property), and 8.4(a), (b), and (d) (misconduct).

In re Threadgill, Board Release of Information.

John O. Threadgill of Knoxville was disbarred based upon his conviction for felony income tax evasion.

C. Misconduct: Failure to Comply with a Court Order, Rule 8.4(g)

In re Ownby, Board Release of Information.

Jere F. Ownby of Knoxville was publicly censured.

"Mr. Ownby's law license was suspended on July 7, 2017. Mr. Ownby did not timely notify a divorce client of the suspension, and he did not notify opposing counsel or the court of the suspension until September 2018. Mr. Ownby's conduct resulted in harm to his client, the opposing party, and the court. Mr. Ownby has also failed to provide a written response to this disciplinary complaint."

Mr. Ownby violated RPCs 8.4(d) (prejudice to the administration of justice), 8.4(g) (knowingly failing to comply with a court order in a proceeding in which attorney is a party), and Rule 8.1 (disciplinary matters).

VIII. Licensure

A. Transfer of Law License to Disability Inactive Status

Carla L. Arevalo, Antioch
Renfro Blackburn Baird, III, Rogersville
Robert C. Brooks, Memphis
James Douglas Busch, Knoxville
Josette Michelle Chambers, Smyrna, Georgia
Ryan Bradford Chambers, Memphis
Billy Dudley Cobb, Big Rock
J. Lester Crain, Memphis
John Harley Fowler, Knoxville
Monica Joy Franklin, Knoxville
Harry B. Gilley, Manchester
Lovemore Nyashadzashe Gororo, Nashville
Dayna A. Hulme, Nashville
Gilbert Henry Jacobson, Memphis
Kimpi King Kendrick, Shelbyville
John Lee Kennedy, Nashville
Cherie S. Monson Kingsport
Robert Mark Morgan Jacksonville, Florida
Samuel Lee Perkins, Memphis
Andrea Elaine Phelan, Goodlettsville
Charles Irvin Poole, Maryville
Barton F. Robison, Paris
Grant Wells Smith, Goodlettsville
George Ernest Skouteris, Memphis
David W. Spence, Okatie, South Carolina
Robert Barrow Sweeney, Columbia
Jerry Francis Taylor, Memphis
Michael Donald Treacy, Quincy, Massachusetts
Michael Leonard Underhill, Nashville
Lawrence Doyle Wilson, Nashville

B. Removal of Disability Inactive Status

Lovemore Nyashadzashe Gororo, Nashville
Patrick Michael Kelley, Nolensville

C. Disability Status Based on Inability to Defend Board Professional Responsibility Complaint

Mabry v. Board of Professional Responsibility, 563 S.W.3d 192 (Tenn., Page, 2018).

"Respondent attorney filed a notice with this Court that he was unable to respond to or defend against a disciplinary complaint because he suffered from a disability by reason of a mental illness [under Tenn. Sup. Ct. R. 9, § 27.4(a)]. Following a formal hearing, a hearing panel concluded that the respondent attorney was not incapacitated from responding to or defending against the complaint against him. Upon its review, the chancery court reached the same conclusion as the hearing panel. The respondent attorney has now filed a direct appeal to this Court. We agree with the hearing panel and chancery court that the attorney has not shown by a preponderance of the evidence that he lacked the capacity, by reason of mental illness, to respond to or defend against his disciplinary complaint."

D. Suspension for Failure to Respond to a Complaint of Misconduct

Jonathan Stephen Carlton, Nortonville, Kentucky
Daphne Michelle Davis, Mount Juliet
Matthew David Dunn, Brentwood
John Harley Fowler, Knoxville
Stephen Kenneth Perry, Evergreen Park, Illinois,
Candace Lenette Williamson, Southaven, Mississippi

E. Suspension for Posting a Threat of Substantial Harm to the Public

Benjamin S. Dempsey, Huntingdon
John Harley Fowler, Knoxville
Larry Joe Hinson, Jr., Hohenwald
William Branch Lawson, Erwin
Brian Phillip Manookian, Nashville
Judson Wheeler Phillips, Franklin
Travis Waymon Tipton, Nashville
Martin Alan Weiss, Memphis

F. Suspension for Conviction of Serious Crime

Thomas Patrick Cooper of Miami Beach, Florida
Jackie Lynn Garton, Burns

G. Contempt

In re Allman, Board Release of Information.

Andy Lamar Allman of Hendersonville was held in criminal contempt by the Supreme Court, upon the report of a special master, and sentenced to serve twenty days in jail and pay a fine of $100.

"Mr. Allman entered a plea agreement agreeing to plead nolo contendere to two separate counts of criminal contempt alleging he violated the Order of Temporary Suspension by undertaking new representation of two separate clients two months after the effective date of his temporary suspension from the practice of law and accepting retainer fees totaling $9,000.00."

H. Disbarment

Andy Lamar Allman, Hendersonville
Homer L. Cody, Memphis
Thomas Patrick Cooper, Miami Beach, Florida
Larry Joe Hinson, Jr., Hohenwald
Robert Alan Lenter, Boca Raton, Florida
Michael John McNulty, Cleveland
Everett Hoge Mechem, Kingsport
Casey Eugene Moreland, Nashville
Howard Robert Clyde Orfield, Bristol
Judson Wheeler Phillips, Franklin
Paul James Springer, Sr., Memphis
John O. Threadgill, Knoxville

I. Reinstatement

Erich Webb Bailey of Nashville
William Clark Barnes, Jr., Columbia
Jamaal L. Boykin, Nashville
Charles Edward Daniel, Knoxville
Gerald Stanley Green, Memphis
Brian Philip Manookian, Nashville
Larry Edward Parrish, Memphis
Ashley Denise Preston, Nashville
Michael Gibbs Sheppard, Nashville
Travis Waymon Tipton, Nashville
Candace Lenette Williamson, Southaven, Mississippi,

Brooks v. Board of Professional Responsibility, No. E2018-00125-SC-R3-BP (Tenn., Kirby, 2019).

"In 1998, the appellant attorney agreed to entry of a consent order suspending his law license for two years. In 2017, the appellant filed this petition for reinstatement of his suspended law license. Instead of the advance cost deposit required by Tennessee Supreme Court Rule 9, section 30.4(d)(9), he filed a pauper's oath and affidavit of indigency. Upon motion of the Board of Professional Responsibility of the Supreme Court of Tennessee, the hearing panel dismissed the appellant's petition without prejudice to his ability to file a new petition in compliance with Rule 9. On appeal, the chancery court affirmed. The appellant now appeals to this Court, arguing that a Tennessee statute entitles him to file his petition without paying the advance cost deposit, and

also that mandating payment of the advance cost deposit deprives him of his constitutional right to due process. Discerning no error, we affirm."

J. Reciprocal Discipline

In re Grubb, Board Release of Information.

Jason R. Grubb of Beaver, West Virginia, was disbarred retroactive to May 18, 2016, based on his earlier disbarment in West Virginia. His disbarment in West Virginia ("annulment") was based upon his plea of guilty to violating 26 U.S.C. § 7202, Failure to Collect, Account for, and Pay Over Employment Taxes.

In re Lenter, Board Release of Information.

Robert Alan Lenter of Boca Raton, Florida, was disbarred, as a matter of reciprocal discipline, based upon the Supreme Court of Louisiana's acceptance of Mr. Lenter's permanent resignation from the practice of law in lieu of discipline. The Office of Disciplinary Counsel in Louisiana was conducting an investigation into allegations he mishandled client settlement funds, among other misconduct.

In re Luethke, Board Release of Information.

Kay Jeffrey Luethke of Kingsport,, an attorney licensed in Tennessee and Virginia, was publicly censured. Mr. Luethke had been publicly reprimanded in Virginia for violations of Virginia Rules of Professional Conduct 1.3 (diligence) and 1.6 (declining or terminating representation).

In re McKinney, Board Release of Information.

William Lawrence McKinney, of Los Angeles, California, was disbarred retroactive to June 23, 2017, based on his disbarment by the Supreme Court of California on that date.

In re Pomrenke, Board Release of Information.

Kurt Joseph Pomrenke of Bristol was suspended for nine months. Mr. Pomrenke had earlier been suspended for nine months by the Disciplinary Board of the Virginia State Bar. Mr. Pomrenke did not contest the reciprocal imposition of discipline in Tennessee.

In re Schwartz, Board Release of Information.

Gregory Eric Schwartz, of Hollywood, Florida, was disbarred retroactive to January 20, 2019. Mr. Schwartz's license to practice law in Florida was revoked by the Supreme Court of Florida by order entered November 21, 2018.

K. Supreme Court Rules Amendments

Amendments to Rules 7, 6, and 19, Overall Revision of Various Provisions Governing Bar Admission, eff. March 29, 2019.

After numerous changes to Tennessee's bar admission rules, including adoption of the Uniform Bar Examination (UBE) and Tennessee Law Course, practice pending admission provisions, and temporary licensing for military servicemember spouses, the Court completed a review of all of Rule 7, and amended several provisions, including those concerning practice pending admission, in-house counsel registration by non-Tennessee lawyers, and the rules governing law students working under supervision of faculty.

Rule 7 was reformatted for consistent numbering and reorganized.

The limitation on admission by transferred UBE score or without examination for applicants who were previously unsuccessful on the Tennessee bar examination has been removed.

The Rule was amended to clarify that a transferred UBE score is valid for admission for otherwise expired UBE scores for up to, but no more than 5 years, if practice requirements are met.

Foreign-educated applicants who meet the eligibility requirements may now seek admission by transferred UBE score.

Several amendments were made to provisions affecting in-house counsel:

Under Tenn. Code Ann. § 23-2-106, foreign lawyers are permitted to serve as counsel in Tennessee for the purpose of providing counsel and opinions regarding the law of the country in which the foreign lawyer is licensed. Under amended Rule 7, foreign lawyers serving as in-house counsel must register as required of other in-house counsel not licensed in Tennessee; however, a foreign lawyer will not be permitted to provide pro bono service. Anyone presently serving as foreign legal counsel is allowed until September 30, 2019, to register as in-house counsel without penalty.

The Rule was amended to clarify that the protections against unauthorized practice of law apply only to those who timely register as in-house counsel. Those working in-house who choose to apply for admission by exam score or without examination must register for practice pending admission upon commencement of practice in Tennessee.

The amended Rule contains a new late registration provision, permitting in-house counsel who do not register within 180 days to register late and pay a late registration fee. Late registration does not preclude discipline for failing to timely register or filing of potential unauthorized practice of law charges.

Fees for in-house counsel applications have been reduced to $600 for a timely application; an additional late fee of $200 will now be assessed for late registration.

Provisions concerning and allowing limited law student practice associated with law school legal clinics have been rewritten on recommendation of and in cooperation with the clinical directors from all Tennessee law schools.

Provisions of the Rule governing show cause orders have been amended to incorporate current practice and provide more detail concerning the process, including identifying for the first time which actions of the Board require issuance of a show cause order and which do not.

Conforming amendments were made to Supreme Court Rules 6 (Admission of Attorneys) and 19 (Pro Hac Vice Admission).

Amendment to Rule 21, Changes to Continuing Legal Education Requirements, eff. April 25, 2019.

In the first comprehensive revision of the CLE rules since 2015, the Court approved a number of amendments. The new Rule:

> Eliminates the requirement that five of the seven required live hours of CLE (as opposed to online hours) be earned from live traditional in-classroom courses, as opposed to by virtue of credit for doing pro bono work, indigent defense, public service and writing articles for legal publications.
>
> Clarifies and identifies in one place the twelve activities that provide attorneys with "live credit," including traditional in-classroom course attendance, teaching, pro bono representation and indigent defense, creating articles for legal publications, formal enrollment at educational institutions, and certain public services activities. Seven of the required fifteen hours must be earned in these activities.
>
> Confirms the two categories of activities eligible for "distance learning" credit: (1) "real time" or "streamed" seminars whether through conference calls or viewed through a computer or portable video device by way of internet (*e.g.*, webcast), and (2) online, computer-based audio or video presentations, whether pre-recorded or not, that provide some form of interactive component and a completion certification from the sponsor. Solely viewing or hearing pre-recorded material is not eligible for credit, including YouTube videos, self-study courses, pre-recorded courses without interactivity, courses delivered as on-demand without interactivity, and courses delivered through an electronic device without interactivity.
>
> Establishes a one-year deadline for submission of an activity for credit after the activity is completed, as well as a late fee of one additional dollar per credit hour for late-attendance submissions by providers.
>
> Provides guidance for exercising the military exemption.
>
> Slightly expands the exemption for attorneys holding public office to some government official not holding elective office who have not practiced law in the compliance year.

Amendment to Rule 25, Tennessee Lawyers' Fund for Client Protection, eff. Oct. 15, 2018.

The Court amended the previous limitation on reimbursement to a client who has suffered a loss as a result of dishonest conduct by a lawyer of $100,000 per claim or $250,000 for claims as to any one lawyer. These limits may now be exceeded upon a specific determination made by the Board and approved by the Court.

The Court also amended the prohibition on fees charged to a claimant against the fund, which previously only permitted such fees upon approval by the Board, to now prohibit contingent fees or fees in excess of $300. The amended language also provides "[t]he fee shall be earned at an

hourly rate to be approved by the Board and not above that provided" for indigent representation under Supreme Court Rule 13, Section 2(c).

Amendment to Rule 33, Section 33.09, Tennessee Lawyer Assistance Program Supporting Organization, eff. Oct. 15, 2018.

Authorizes the Tennessee Lawyer Assistance Program to establish an independent supporting charitable organization and to work with that supporting organization to establish a revolving loan fund, funded by gifts and bequests, to make loans to impaired lawyers and judges, under rules to be adopted by the TLAP Commission, as a low interest loan either for the purpose of maintaining client obligations or for defraying the cost of treatment.

IX. Judicial Ethics

A. Recusal

Beaman v. Beaman, No. M2018-01651-COA-T10B-CV (Tenn. Ct. App., Swiney, Oct. 19, 2018).

"This is an interlocutory appeal as of right, pursuant to Rule 10B of the Rules of the Supreme Court of Tennessee, from the denial of a motion for judicial recusal filed by Kelley Speer Beaman ('Wife') in the parties' high profile divorce proceedings. Having reviewed the Petition for Recusal Appeal filed by Wife, together with the supplement to the Petition and the response in opposition to the Petition filed by Lee A. Beaman ('Husband'), we conclude that the Trial Judge should have granted the motion. The Trial Judge in this case conducted an independent investigation into the facts surrounding how and when Wife's Trial Brief came into the possession of the online media outlet known as *Scoop: Nashville*, and his comments on the record regarding the results of his investigation create an appearance of prejudice against Wife and her counsel that require the Trial Judge's recusal. We therefore reverse the order of the Trial Court and remand the case for reassignment to a different judge."

"At 8:43 a.m. on September 7, 2018, Husband filed a motion to strike Wife's Trial Brief. As grounds for the motion, Husband alleged that Wife's Trial Brief contained 'immaterial, impertinent and scandalous matter only meant to harass [Husband]' and that its contents had 'little to no relevance on the issues' to be determined at trial."

"A hearing on Husband's motion to strike Wife's Trial Brief was held on the morning of Saturday, September 8, 2018. During his argument on the motion, counsel for Husband made reference in the following remarks to the fact that this case, and in particular, Wife's Trial Brief, had garnered some media attention:

> I don't know if the Court has been following social media, following the news, following Facebook, but [Wife] filed on Wednesday, the 5th --- I'm sorry --- filed her trial brief on Thursday, which was a late-filed brief anyway which was three days before the trial….
>
> It is not necessary to spread what we consider to be falsehoods on a public record, nor is it necessary to do what we believe happened here. And that was not what the point was with this filed with the Court and made public record. We think it was also provided to the media.

> I've had calls from reporters. I haven't responded to any of them. But we've had people asking us in emails and other things about some matters that weren't in the pretrial brief but were in her answers to discovery.

"At that point, the Trial Judge remarked:

> My thought is clearly this was scandalous. There's no way around addressing it. These issues [of grounds for divorce] could have been addressed without it.
>
> But be that as it may, my concern is we've got a child out there that's going to read this.

"Counsel for Husband interrupted to state that he had not 'gotten to that yet,' to which the Trial Judge responded:

> I'm going to cut you off.
>
> Now, I believe and if I find [Wife] has or anyone on her behalf has provided this to the media, that's going to go a long way in my deciding the relationship of the child between the child and [Husband]. Because under [Tennessee Code Annotated section] 36-6-106, one of the things, one of the big factors that I look at is promotion of the relationship of the minor child with the other parent.
>
> Now, I'm going to ask everybody in this courtroom under oath in a minute if they've leaked it, gave it to the press, or in any way had anything to do with it being handed to the press.
>
> Now with that said, I've had a discussion with the Clerk's Office regarding the file stamp copies. And it was my clerk[.] He did the investigation and came back with the results. He will testify Monday, if necessary. But there were two copies. There were two --- there was an original and a copy that was submitted to the Court to the Clerk's Office a minute apart. Probably just a few seconds, but it rolled over. And both were issued by Bill Riggs, who was the clerk that accepted the copy. The original was taken, the copy was given.
>
> Now, if you look at what was produced on social media, there is a blue stamp. Anything on CaseLink is black and white. That is the second copy that was given Mr. Riggs that he initialed, the second copy. Now, Mr. Riggs assures the clerk that he didn't do anything with it other than what was in the regular course.
>
> Now, at this point in time, I'm going to ask everybody to rise, even the lawyers, and I'm going to ask them to raise their right hands.

"All attorneys and both parties were then sworn. Upon questioning by the Trial Judge, both Husband and his attorneys denied having had any discussions with the media or having provided any copies to the media presumably of pleadings or other documents filed in this case.

"When the Trial Judge turned to questioning Wife's counsel, her attorney objected to being placed under oath and being made a witness to the proceeding. The Trial Judge overruled the objection by stating: 'Well, you're a witness. So answer the question.' At that point, counsel for Wife stated that he had been contacted by 'someone' at *Scoop: Nashville* after Wife's Trial Brief had been

filed and that he (counsel) had advised this individual that 'it had been filed.' Counsel for Wife further stated:

> He asked me for a copy and I provided him a copy of what had been filed already.
>
> And so I have been contacted a number of times by different social media, different media, the Tennessean, and I refused to comment. And I refused to comment to Mr. --- he asked me for a comment, whoever it was. I think Mr. [Steen]. I said I can't comment. But I did provide him a copy of what I had filed, yes, Your Honor, and that is the extent of my involvement with the media.

"The Trial Judge concluded the hearing by announcing that he would not be striking Wife's Trial Brief. The Trial Judge explained:

> It's out there. That's like putting the horse back in the barn. I will tell you I think it was disgusting. I think it was done to gain an advantage. And I think it was completely, in my opinion, unethical for that to be provided.
>
> Now, I will be looking at that as it relates to the relationship of this child with [Husband] and [Wife's] promotion of that relationship. Okay? Now, I've ruled on that."

"[T]he Trial Judge denied Husband's motion to strike Wife's Trial Brief.

"At 8:54 a.m. on the morning trial was set to begin (September 10, 2018), Wife filed a motion to disqualify the Trial Judge from further presiding over this case, and to stay all proceedings pending the Trial Judge's ruling on the motion. Wife asserted that the Trial Judge's impartiality had been 'called into serious question' as a result of the Trial Judge '(1) conducting an inappropriate independent investigation prohibited by the Code of Judicial Conduct, (2) making unequivocal statements that the results of [his] inappropriate independent investigation were going to heavily influence [his] deciding a central issue in this divorce and (3) making unfounded accusations and conclusions of unethical behavior [on the part of] Wife's counsel of record in the wake of said inappropriate independent investigation.' Wife further alleged that she was now unable to receive a fair and impartial hearing in this case as a result of the inappropriate independent investigation conducted by the Trial Judge. The motion stated that it was 'not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless[ly] increase the cost of litigation.'"

"Wife's motion argued that the Trial Judge had violated Rule 2.9(C) of the Tennessee Code of Judicial Conduct by conducting an independent investigation into the facts surrounding how Wife's Trial Brief came to be in the hands of *Scoop: Nashville*, and that the Trial Judge had announced on the record that he had used the results of that investigation to influence his view of Wife's counsel's ethics and would use the results of that investigation when considering the issue of custody of the parties' minor child. In her motion, Wife asserted:

> There is absolutely nothing unethical about the fact that counsel for Wife granted a media outlet's specific request to provide them with a copy of a pleading that had already been filed in this case in preparation for a trial that was only a few days [away] and which was already the subject of media coverage."

"At 4:48 p.m. on September 10, 2018, the Trial Judge entered a nineteen page order, with attachments, denying Wife's Rule 10B motion. After discussing the procedural history of this case, as well as the law governing judicial recusal, the Trial Judge determined subjectively that he was not actually biased or prejudiced in favor of or against either of the parties to this proceeding. The Trial Judge then embarked upon an analysis of whether 'a person of ordinary prudence in the Court's position, with full knowledge of the facts known to the Court, would find a reasonable basis to question the Court's impartiality.' The Trial Judge noted that he was 'concerned about several issues surrounding how and when the reporter [from *Scoop: Nashville*] received [Wife's] trial brief.' The Trial Judge then acknowledged that he 'became aware portions of [Wife's] trial brief had been posted on Twitter the afternoon of September 6, 2018.' The Trial Judge even attached to his order printouts of two posts from the Twitter account maintained by *Scoop: Nashville*, which posts made reference to Wife's Trial Brief, and which were time-stamped at 3:50 and 3:51 p.m. on September 6, 2018. From our review of the record, these printouts of the two posts are nowhere else in the record."

"Wife thereafter timely filed her Petition for Recusal Appeal in this Court pursuant to Rule 10B."

"The only issue before the Court in this appeal is whether the Trial Judge erred in denying Wife's Rule 10B motion. *See Duke v. Duke*, 398 S.W.3d 665, 668 (Tenn. Ct. App. 2012). Husband asserts in his answer to Wife's Petition for Recusal Appeal that, before this Court may evaluate the merits of the Trial Judge's stated reasons for denying Wife's motion, we first must consider any procedural defects in Wife's motion filed in the Trial Court and her petition filed in this Court that might provide a basis for affirmance."

"Husband argues first that Wife's Rule 10B motion was procedurally defective in that it was not accompanied by 'an affidavit under oath or a declaration under penalty of perjury *on personal knowledge*' as required by the rule. Tenn. Sup. Ct. R. 10B, § 1.01 (emphasis added). Specifically, Husband asserts that the unsworn declaration from Wife's counsel that accompanied her motion did not expressly state that it was based 'on personal knowledge' and that, for this reason alone, the Trial Judge could have denied the motion. While Husband is correct that the requirement of a supporting affidavit or declaration under penalty of perjury in compliance with the rule is mandatory and that the absence of such an affidavit or declaration would provide a basis on its own for affirming the denial of Wife's motion, *see, e.g.*, *Murray v. Miracle*, No. E2018-01530-COA-T10B-CV, 2018 WL 4520573, *2 (Tenn. Ct. App. Sept. 20, 2018); *Berg v. Berg*, No. M2018-01163-COA-T10B-CV, 2018 WL 3612845, *4 (Tenn. Ct. App. July 27, 2018); *Childress*, 2016 WL 3226316 at *3; *Elliott*, 2012 WL 5990268 at *3, we reject the notion that such an affidavit or declaration must contain the words 'on personal knowledge' for this Court to conclude that its contents are so based. *See Shook v. Associates in Ear, Nose, Throat, Head & Neck Surgery*, No. 03A01-9309-CV-00307, 1994 WL 25853, *2 (Tenn. Ct. App. Jan. 26, 1994)."

"In this case, recusal was sought by Wife on the basis that the Trial Judge had conducted an improper independent investigation into disputed issues of fact surrounding how and when *Scoop: Nashville* had obtained Wife's Trial Brief, thereby creating, at a minimum, the appearance of bias or prejudice on the part of the Trial Judge as evidenced by the conclusions reached by him as a result of his investigation."

"Husband centers his argument on the merits of this appeal on the contention that the Trial Judge in this case did not conduct an improper independent investigation into how and when *Scoop:*

Nashville obtained Wife's Trial Brief. Husband asserts that the Trial Judge's inquiries in this regard were confined to consultations with court staff and court officials, and the questioning of the parties and counsel on the record, none of which are prohibited by the Tennessee Code of Judicial Conduct. We agree with Husband that, if the Trial Judge's inquiries were so confined, then no improper independent investigation occurred. . . . However, these inquiries, by the Trial Judge's own admission as set forth in his order denying Wife's Rule 10B motion, came after the Trial Judge 'became aware portions of [Wife's] trial brief had been posted on Twitter the afternoon of September 6, 2018.'

"The comments to Rule 2.9 of the Tennessee Code of Judicial Conduct make clear that '[t]he prohibition against a judge investigating the facts in a matter extends to information available in all mediums, including electronic.' Tenn. Sup. Ct. R. 10, Rule 2.9, cmt. 6. As is clear from Wife's supplement to the Petition for Recusal Appeal filed in this Court, the printouts of the two posts from the Twitter account maintained by *Scoop: Nashville*, which were relied on by the Trial Judge in the order on review, and attached thereto, were never relied on or mentioned by the parties in the proceedings below, or attached to any pleading filed by the parties in the Trial Court. . . . As such, it is clear beyond question that the Trial Judge in this case improperly consulted Twitter in an effort to resolve disputed facts surrounding how and when *Scoop: Nashville* obtained a copy of Wife's Trial Brief.

"Relying on *Holsclaw v. Ivy Hall Nursing Home, Inc.*, 530 S.W.3d 65 (Tenn. 2017), Husband correctly points out in his response to the Petition for Recusal Appeal that a determination that the Trial Judge in this case conducted an improper independent investigation in violation of Rule 2.9(C) does not automatically require the Trial Judge's recusal. We note that it is not the job of this Court to determine whether the Trial Judge's conduct was in violation of Rule 2.9(C). We instead consider that conduct only in determining whether the Trial Judge erred in not granting Wife's Rule 10B motion. As the Supreme Court made clear in *Holsclaw*, we must determine whether the Trial Judge's 'impartiality might reasonably be questioned' as a result of the Trial Judge having conducted an independent investigation. *Id.* at 72. On this point, unlike the judge in *Holsclaw*, the Trial Judge in this case announced on the record and in his own orders that he had used the results of his independent investigation to influence his view of Wife's counsel's ethics and that he also would use the results of the investigation when considering the issue of custody and parenting time of the parties' minor child. We are constrained to conclude that these comments by the Trial Judge create an appearance of bias or prejudice against Wife and her counsel that now require the Trial Judge's recusal. Nothing about the providing of a copy of Wife's Trial Brief to *Scoop: Nashville* violated the Tennessee Rules of Professional Conduct, as correctly alluded to by the Trial Judge in his comments on the record and orders in this case. *See* Tenn. Sup. Ct. R. 8, Rule 3.6(b)(2) of the Tennessee Rules of Professional Conduct (stating that a lawyer may convey to the media 'information contained in a public record'). We agree with the Trial Judge in this case that 'the willingness and ability' of a parent 'to facilitate and encourage a close and continuing parent-child relationship between the child and both of the child's parents, consistent with the best interest of the child' is a statutory factor to be considered by a trial court in determining the issue of child custody in a divorce proceeding. *See* Tenn. Code Ann. § 36-6-106(2). However, we disagree that anything learned by the Trial Judge from his independent investigation into *Scoop: Nashville*'s posts should, in any way, color the Trial Judge's view of Wife with regard to this statutory factor."

"Accordingly, having determined that the record provided by Wife demonstrates that the Trial Judge erred in denying the motion seeking his recusal, we reverse and remand with directions that this case be assigned to a different judge in the 20th Judicial District."

Stark v. Stark, No. W2019-00901-COA-T10B-CV (Tenn. Ct. App., Stafford, June 18, 2019).

"Plaintiff/Appellant Pamela Diane Stark ('Wife') filed a complaint for divorce against Defendant/Appellee Joe Edward Stark ('Husband') on June 29, 2018. Wife is a licensed attorney working for the District Attorney General of the Thirtieth Judicial District. Husband works as a police officer for the Memphis Police Department. On November 28, 2018, Wife, after obtaining leave of court, filed an amended complaint to assert that Husband had committed battery and intentional infliction of emotional distress against her. According to Wife, the battery allegations result from an incident of domestic violence that occurred on June 17, 2018. Although Wife's employer recused from the matter and a special prosecutor was appointed, Wife asserts that the Memphis Police Department continues to investigate the matter.

"In support of the divorce and tort actions, Wife caused six subpoenas to be issued for the depositions of Husband and other witnesses, including a lieutenant from the Memphis Police Department. The notices indicated that five of the depositions, including Husband's, would be taken at the marital residence. The final deposition was to take place in Missouri where the witness resided. On January 9, 2019, Husband filed a motion for a protective order seeking that all in-person depositions be taken at the Shelby County courthouse, that a bailiff be present for Husband's deposition, and that the out-of-state deposition take place remotely.

"A hearing on Husband's motion was held on January 25, 2019. No transcript or statement of the evidence from this hearing is included in the record. On February 13, 2019, the trial court ruled that Husband's motion was 'reasonable under the circumstances.' As such, the trial court ordered that the depositions of Husband, as well as well as Sgt. Mote, Anthony Mullins, Daniel Cordero, and James Erwin would take place at the Shelby County Courthouse and that a bailiff would be present for Husband's deposition. The trial court denied, however, Husband's request that the deposition of the out-of-state witness be taken remotely, ruling that the deposition would take place in Missouri unless the witness agreed to be deposed in Shelby County.

"In the meantime, on January 15, 2019, Husband filed a petition for a restraining order under Rule 65.03 of the Tennessee Rules of Civil Procedure. Therein, Husband alleged that Wife was posting on her personal Facebook page allegations against Husband with regard to domestic violence. Additionally, Husband alleged that Wife 'disparaged the Memphis Police Department's internal handling and investigation of said case.' Husband argued that such dissemination of these allegations could cause immediate irreparable harm to Husband's reputation and employment. As such, Husband requested that the trial court enter an immediate temporary restraining order requiring Wife to remove the posts and to refrain from making similar posts or comments in the future. Wife responded in opposition to Husband's petition on May 21, 2019. Therein, Wife admitted to making the posts, but asserted that her comments concerned a matter of public concern protected by the United States and Tennessee Constitutions. Finally, Wife asserted that Husband's motion was an attempt to harass Wife and 'bias [the trial judge] into a belief that 'contentiousness' exists between the parties.'

"A hearing on Husband's petition was held on February 7, 2019."

"Following the argument of the parties, the trial court ruled that Wife's argument regarding the First Amendment was not well-taken because her allegations did not refer to corruption generally as a matter of public concern, but with regard to the allegations against Husband specifically, which action was prohibited by the mandatory divorce injunction. As such, the trial court ruled that Wife was to remove the offending posts the same day and that 'a mandatory injunction will go into effect that there will be no communication with employers.' The trial court also ruled that 'making any further allegations in social media is completely inappropriate and is being enjoined.'

"Thereafter the following exchange occurred:

> [Wife]: Well, Your Honor, I will just with all candor to the Court say you might as well take me into custody right now. I have contacted the FBI as well as having contacted the mayor of Memphis to try and get this addressed. I am saying that I am a victim of corruption from the Memphis Police Department, and I am going to pursue every course of action I have and –
> THE COURT: Ms. Stark, are you going to remove that post, yes or no?
> [Wife]: I am not.
> THE COURT: Officer Houston, take her into custody.
> We'll stand in recess.
> (Short break.)
> THE COURT: Ms. Stark, please stand. Are you going to comply with this Court's orders?
> [Wife]: No, I'm not.
> THE COURT: All right. I'm making a finding that you are in direct contempt of court by willfully refusing to comply with this Court's orders. You … will be held in custody until such time that you decide that you want to change your position and you apologize to this Court. We'll stand in recess until that time.

"Also on March 29, 2019, the parties appeared before the trial court on several unrelated matters. After the trial court ruled on various motions by Husband, Wife informed the trial court that she had a motion to recuse that had yet to be filed. The trial judge directed Wife to file her motion, set it for hearing, and that he would rule on it in due course. Wife filed her motion on the same day. Wife's recusal motion alleged that the trial court's actions in granting Husband's motion for protective order and petition for restraining order, as well as finding Wife in contempt showed an appearance of bias that warranted recusal. Additionally, Wife alleged that the trial judge had shown 'disdain' for pro se litigants. The motion was accompanied by Wife's affidavit stating that the facts contained in the motion were 'true to the best of my knowledge.'"

"No oral argument was ever had on the motion to recuse. Instead, the trial judge entered a lengthy written order denying the motion on May 3, 2019. Therein, the trial judge ruled that Wife's motion was procedurally deficient in that it was not accompanied by an affidavit stating that the facts contained therein were based on personal knowledge and the motion was untimely. Nevertheless, the trial judge went on to consider the merits of Wife's motion, finding that there was no basis for recusal either subjectively or objectively. In support, the trial judge noted that its rulings 'have been confined to the matters specifically before the [c]ourt and the [c]ourt has not prejudged any of the allegations raised by [Wife].' In particular, the trial court noted that its decision to grant the protective order relating to the location of the deposition was based on the allegations of domestic abuse contained in Wife's pleadings; the taking of depositions in a public place rather than Wife's home was therefore 'in everyone's best interest.' The trial court denied

that its decision was based on any finding crediting Husband's allegation that Wife had engaged in 'unpredictable and inappropriate behavior.'

"Wife thereafter filed a timely accelerated petition for recusal appeal to this Court pursuant to Rule 10B of the Tennessee Supreme Court Rules."

"Here, the trial court ruled that Wife's motion was procedurally defective in two aspects. First, the trial court found that the affidavit accompanying Wife's motion did not state that it was based on personal knowledge. Additionally, the trial court ruled that Wife's motion was untimely."

"Rule 10B states that a motion to recuse must be accompanied by 'an affidavit under oath or a declaration under penalty of perjury on personal knowledge and by other appropriate materials.' Tenn. Sup. Ct. R. 10B, § 1.01. Here, Wife's accompanying affidavit stated only that the information contained therein was 'true to the best of my knowledge.' The trial court ruled that this statement did not meet the high standard required of Rule 10B. Husband agrees with the trial court's assessment of Wife's affidavit, arguing that the affidavit in this case closely resembles the affidavit that was held insufficient in *Berg v. Berg*, No. M2018-01163-COA-T10B-CV, 2018 WL 3612845 (Tenn. Ct. App. July 27, 2018). As the panel in *Berg* explained:

> [The affidavit] clearly does not meet the standard set forth in Rule 10B. Instead of being made under oath on 'personal knowledge' as is required, the affidavit filed in this case includes an oath attesting that the statements included are 'true to the best of [Mother's] knowledge, information and belief.' Averring that something is true to the best of one's knowledge, information, and belief does not signify that it is based on personal knowledge. See *Bridgewater v. Adamczyk*, No. M2009-01582-COA-R3-CV, 2010 WL 1293801, at * 4 (Tenn. Ct. App. Apr. 1, 2010) (noting that personal knowledge is knowledge gained through firsthand experience or observation); *Seals v. Tri-State Defender, Inc.*, No. 02A01-9806-CH-00172, 1999 WL 628074, at *2 (Tenn. Ct. App. Aug. 16, 1999). . . .

"*Berg*, 2018 WL 3612845, at *3. As such, the *Berg* opinion holds that in light of the deficiencies in the affidavit, the trial court was not required to address the substantive merits of the recusal motion.

"Another panel of this Court came to the opposite conclusion in *Beaman v. Beaman*, No. M2018-01651-COA-T10B-CV, 2018 WL 5099778 (Tenn. Ct. App. Oct. 19, 2018). Therein, the panel concluded that use of 'magic words' was not necessary where '[a] fair interpretation of Wife's counsel's declaration in this case demonstrates that it was based on personal knowledge even though it did not expressly state that it was based "on personal knowledge."' *Id.* at 13."

"The statement in Wife's affidavit is substantially similar to that utilized in *Berg*, however, the affidavit itself and the recusal motion at issue both readily reveal that Wife's allegations are based on hearings where she was present and orders to which she was a party. In a similar situation, this Court has considered whether 'it [was] apparent from the substance of the disputed affidavits [ ] that they [were] based on the personal knowledge of the affiants.' *Ueber v. Ueber*, No. M2018-02053-COA-T10B-CV, 2019 WL 410703, at *3 (Tenn. Ct. App. Jan. 31, 2019) (involving an affidavit 'the same' as that filed in *Berg*). Likewise, even a limited and surface-level inspection of Wife's motion reveals that it is indeed based on personal knowledge. Moreover, Wife's affidavit in support of her petition for recusal appeal specifically states that the facts contained in both her motion and appeal are based on personal knowledge. Finally, despite the

trial court's finding that Wife's motion was defective, it did expressly and thoroughly consider the merits of Wife's motion and both parties have briefed the merits of the motion to this Court. As such, we conclude that the best practice in this case is to proceed to consider the remaining issues in this case notwithstanding Wife's failure to strictly comply with Rule 10B. We caution litigants, however, that we may not be so forgiving in the future."

"The trial court also found that Wife's motion was untimely."

"Here, the basis of Wife's recusal motion results from two requests filed by Husband. The first request, a motion for a protective order regarding the taking of depositions, was filed on January 9, 2019, with a hearing that took place on January 25, 2019. The second request, a petition for a restraining order related to social media posts, was filed on January 15, 2019, and heard on February 7, 2019. The trial court entered orders on both motions on February 13, 2019. Wife filed her recusal motion on March 29, 2019. Although Wife waited until the trial court had ruled on some of Husband's motions before bringing the recusal motion to the trial court's attention, it appears that Wife generally agreed to Husband's requests during the March 29 hearing. As such, the record does not demonstrate that Wife's decision to hold the recusal motion was 'experiment[al]' or strategic. *Kinard*, 986 S.W.2d at 228.

"Although we agree that Wife's decision to wait until the conclusion of the March 29, 2019 hearing is perplexing and serves to undermine her argument that she believes that the trial judge has an impermissible bias against her, we are reluctant to conclude that a delay of six weeks between the entry of the written order at issue and the recusal motion results in a waiver of her arguments. Rule 10B does not place a brightline rule on the timeliness of recusal motions, nor has this Court ever adopted such a rule. . . . We are not necessarily persuaded that the six week delay in this case renders Wife's motion untimely. In any event, however, we exercise our discretion to consider the merits of this appeal notwithstanding any allegations of delay."

"Tennessee Code of Judicial Conduct Rule 2.11 provides that '[a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned[.]' Tenn. R. Sup. Ct. 10, § 2.11. It is well-settled that '[t]he right to a fair trial before an impartial tribunal is a fundamental constitutional right.' *Bean v. Bailey*, 280 S.W.3d 798, 803 (Tenn. 2009) (quoting *State v. Austin*, 87 S.W.3d 447, 470 (Tenn. 2002))."

"Generally, the terms 'bias' and 'prejudice' refer to a state of mind or attitude that works to predispose a judge for or against a party. *Alley*, 882 S.W.2d at 821. . . . Bias is often divided into two types, each of which implicates a different standard for determining whether recusal is warranted. Where a bias stems from an extrajudicial source, rather than from events or observations during litigation of a case, it is may be sufficient to justify recusal if the judge's behavior raises 'reasonable questions about the judge's impartiality.' *Groves*, 2016 WL 5181687, at *5. . . . Where, however, 'the bias is alleged to stem from events occuring in the course of the litigation of the case, the party seeking recusal has a greater burden to show bias that would require recusal, *i.e.*, that the bias is so pervasive that it is sufficient to deny the litigant a fair trial.' *McKenzie*, 2014 WL 575908, at *3. Nothing in Wife's petition for recusal appeal suggests that the alleged bias of the trial judge results from any extrajudicial source. As such, Wife must meet the higher standard to show a bias so pervasive as to deny her the right to a fair trial.

"Here, Wife asserts that the trial judge's rulings with regard to Husband's motion for a protective order and petition for a restraining order show a pervasive bias against her sufficient to necessitate recusal."

"Wife first asserts that the ruling on the motion for protective order went beyond the relief requested by the motion by ordering that all depositions would take place in the Shelby County Courthouse. Specifically, Wife's petition for recusal appeal states as follows: 'Per the Order on Motion for Protective Order, Judge Weiss ruled that all depositions must be held at the Shelby County Courthouse. However, this form of relief was only sought as it pertained to the deposition of [Husband] within the Motion for Protective Order.' (Record citations omitted). Such statement is categorically false. Rather, Husband's motion contains the following request: 'Husband would request that this Court enter a protective order requiring Wife to take the depositions of Sgt. Mote, Anthony Mullins, Daniel Cordero, and James Erwin at the Shelby County Courthouse or some other conference room in a public place.' Thus, the trial court's decision to require these depositions to take place at the courthouse was not outside of the relief requested. Accordingly, Wife's claim that the trial court's decision to provide Husband with more relief than requested, thereby illustrating a bias against her, fails with regard to this order.

"Wife's other issues with the trial court's order on this topic are also unsupported by the record."

"Having determined that the trial court did not rule in excess of the relief requested, we must conclude that this order provides no evidence of a bias so pervasive as to deny Wife a fair trial.

"The same is true with regard to the ruling on Husband's petition for a protective order concerning the social media posts. With regard to this request, Wife takes issue with the fact that Husband's petition did not allege that Wife violated the mandatory injunction put in place upon the filing of the divorce, while the trial court's order finds that Wife's actions were 'directly in contravention of the mandatory injunction.' While we agree that Husband's motion was not in the nature of a contempt action seeking redress for Wife's alleged violation of the mandatory injunction, the existence of the mandatory injunction was cited in the hearing on Husband's petition without objection and was subject to judicial notice by the trial court. *See generally* Tenn. R. Evid. 201 (governing judicial notice of facts 'not subject to reasonable dispute'). Moreover, the trial court did not impose any penalty on Wife for the alleged violation of the mandatory injunction other than to explicitly extend the injunction to cover Wife's social media and other postings concerning Husband and the Memphis Police Department. This is exactly the relief that Husband sought in his motion. The simple fact that the proof at trial, in the trial court's view, indeed showed that Wife had violated the injunction already in place is simply not evidence of a pervasive bias against Wife, nor does it create an appearance of impropriety.

"Likewise, the trial court's ruling that Wife's purpose in making the social media posts was to harass Husband is not evidence of bias or impermissible prejudgment. Here, Wife chose not to submit any evidence to dispute Husband's testimony that Wife was harassing him through the dissemination of her allegations. Generally, the trial court's ruling after hearing evidence is simply not a basis for this Court to conclude that the trial court impermissibly prejudged the other issues remaining in this case. . . . Here, the record simply does not demonstrate any bias on the part of the trial judge, much less a bias of a pervasive nature.

"Finally, Wife takes issue with the trial court's ruling finding her in contempt. . . . While the correctness of the trial court's contempt decision may be evaluated by this Court in another

proceeding, the only question in this case is whether the record shows sufficient evidence of bias or an appearance of impropriety to necessitate recusal.

"We conclude that the transcript of this hearing contains no such evidence."

"In sum, after reviewing Wife's filing to this Court and the supporting documents, we conclude that Wife has failed to show a reasonable basis for questioning the trial judge's impartiality. In general, a trial court's unfavorable or even erroneous rulings are insufficient to show bias. Moreover, even if we were to assume *arguendo* that a trial judge's decision to grant more relief than requested by a party was a basis to question the judge's impartiality, the record does not show that this scenario occurred in this case. Here, the trial court's decision to require depositions to take place in a public forum was based on the fact that Wife raised serious allegations of domestic violence in her complaint. Likewise, the trial court's decision to grant Husband's request for a restraining order resulted from Husband's testimony that Wife's decision to disseminate those allegations in her chosen manner could affect his employment. Finally, the trial court's decision to hold Wife in contempt, regardless of whether it proves erroneous, occurred after Wife essentially invited the trial court to take that action. Wife has not shown that the any of these decisions were the product of pervasive bias or prejudgment. Simply put, nothing that occurred in this case would lead a reasonable person to question the judge's impartiality. As such, the trial court's denial of Wife's motion to recuse is affirmed."

B. Letters of Public Reprimand

In re Weiss, Board of Judicial Conduct (Aug. 16, 2018).

"This letter shall serve as a public reprimand pursuant to the agreed order entered in the above-captioned case filed with the Tennessee Board of Judicial Conduct and approved by the Hearing Panel in this case.

"The conduct involved arises from your actions in connection with two cases.

"In the first case, you were assigned as a judge in a domestic relations case that had been Initially flied in another division of Circuit Court. On November 29, 2015, you conducted a hearing in this case and indicated to the parties that you would issue an order in the case concerning the issues resolved at the hearing and granting the divorce. A party in this case made motions for entry of a final ruling in the case on August 26, 2017, and May 29, 2018.

"On June 15, 2018, your office received notice from the Office of the Disciplinary Counsel of the Tennessee Board of Judicial Conduct of the complaint filed in B17-7070 dealing with the subject matter of unreasonable delay in ruling on the divorce petition that was the subject matter of this first case. This notice advised you of the nature of the complaint, notified you that an Investigative Panel of the Board of Judicial Conduct had authorized a full investigation of this complaint, and required you to file a written response within 30 days after receipt of this notice. You failed to timely file a written response to this complaint as required by the provisions of the Tennessee Code Annotated and the Code of Judicial Conduct.

"The second case to which this letter of public reprimand applies involves a trial you presided over in which a verdict of $3,705,000 was awarded in favor of the plaintiff in a motor vehicle accident case. After this verdict, you suggested a remitter of this verdict of $1,605,000 leaving

a new verdict of $2,100,000. The case in question was eventually considered by the Tennessee Supreme Court which remanded the case for the purpose of obtaining from you an explanation of your reasons for the suggestion of remittitur. On December 6, 2017, the parties to the litigation appeared in front of you for a status conference and were told to return to court on January 3, 2018, for a ruling. On that day you told the parties that you would make a ruling by the end of that day. When no ruling was entered that day, counsel for the plaintiff delivered a letter asking for a ruling by the end of January 2018. A second letter was delivered to you by counsel for the plaintiff on February 8, 2018, again asking you to enter the order required by the remand of the Tennessee Supreme Court. You failed to timely enter an order as requested in these two appropriate requests by plaintiff's counsel.

"On June 15, 2018, your office received notice from the Office of the Disciplinary Counsel of the Tennessee Board of Judicial Conduct of the complaint filed in B18-7284 dealing with the subject matter of unreasonable delay in entering an order which was required by the remand of the Tennessee Supreme Court which was the subject matter of the second case. This notice advised you of the nature of the complaint, notified you that an Investigative Panel of the Board of Judicial Conduct had authorized a full investigation of this complaint, and required you to file a written response within 30 days after receipt of this notice. You failed to file a written response to this complaint as required by the provisions of the Tennessee Code Annotated and the Code of Judicial Conduct.

"Upon being served with a Formal Charge concerning these two complaints, your counsel promptly filed a response to the Charges and you and your counsel met with Disciplinary Counsel. In your answer and during the meeting with Disciplinary Counsel you candidly admitted your error in failing to promptly file the orders that were the subject matter of the complaints, and the responses to the Notices of Full Investigation that you received. You indicated that you did not realize initially that a further order was required in the case of the remittitur since the defendant in the case had paid an amount equal to the suggested judgment into court. Although you came to realize that this did not satisfy the requirement of the Tennessee Supreme Court remand, you became overwhelmed by the demands of fulfilling this requirement and the demands of the domestic case that resulted in complaint B17-7070. You have Indicated that you are determined not to let any matter become overdue for response in your court. You have now filed all appropriate orders.

"The violations of The Code of Judicial Conduct which are involved in the Public Reprimand are as follows:

> CANON 1 - A JUDGE SHALL UPHOLD ANO PROMOTE THE INDEPENDENCE, INTEGRITY, AND IMPARTIALITY OF THE JUDICIARY, AND SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY.
>
> Rule 1.1 Compliance with the Law
> A judge shall comply with the law, including the Code of Judicial Conduct.
>
> Rule 1.2 Promoting Confidence in the Judiciary
> A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and Impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

CANON 2 - A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY, COMPETENTLY, AND DILIGENTLY.

Rule 2.6 Competence, Diligence, and Cooperation
A judge shall perform judicial and administrative duties competently, promptly and diligently.

Rule 2.16 Cooperation with Disciplinary Authorities
(A) A judge shall cooperate and be candid and honest with judicial and lawyer disciplinary agencies.

"This letter constitutes a public reprimand for your actions in violation of these Canons and Rules and in the future you are to follow the Code of Judicial Conduct in promptly deciding case that are submitted to you."

C. Reconstitution of Board of Judicial Conduct

Chapter 496, Public Acts 2019, adding T.C.A. §§ 17-5-101 through 17-5-311 eff. July 1, 2019.

Enacted a number of reforms to the prior Board of Judicial Conduct, including changes to its composition.

The new Board will have 16 members, appointed as follows:

(1) Two current or former trial judges, to be appointed by the Tennessee trial judges association;
(2) One current or former general sessions court judge, to be appointed by the Tennessee general sessions judges conference;
(3) One current or former municipal court judge, to be appointed by the Tennessee municipal judges conference;
(4) One current or former juvenile court judge, to be appointed by the Tennessee council of juvenile and family court judges;
(5) One current or former court of appeals or court of criminal appeals judge, to be appointed by the Tennessee supreme court;
(6) Two members who are attorneys licensed to practice law in this state but who are not current or former judges, to be appointed by the governor;
(7) Four members, including three who are neither a judge nor an attorney and one who is a current or former judge, to be appointed by the speaker of the house of representatives; and
(8) Four members, including three who are neither a judge nor an attorney and one who is a current or former judge, to be appointed by the speaker of the senate.

Some changes were made to the operations and procedures of the Board, including:

Board procedural rules must now be in compliance with the Uniform Administrative Procedures Act (UAPA).

The complaint form has changed.

Procedural timeline for investigations, formal charges, and disposition have changed, largely speeding the process.

Chapter 406, Public Acts 2019, adding Tenn. Code Ann. § 4-29-242(a)(64) eff. May 21, 2019.

Extends termination date of Board of Judicial Conduct to June 30, 2021.

D. Supreme Court Rule Amendments

Amendment to Rule 10B, Section 1.04, and Rule 11, Designation of Successor Judge, eff. Nov. 1, 2018.

The Court amended its Rule 10B governing recusal procedure to clarify the process for identifying a successor judge in the event of recusal and establish a form for this purpose.

In the same order, the Court amended its Rule 11 concerning supervision of the judicial system to require that all judicial districts select one judge to serve as presiding judge *pro tempore* to serve for purposes of assignment duties in the event that the presiding judge recuses himself or herself.

E. ABA Ethics Opinion

ABA Formal Opinion 485, Judges Performing Same-Sex Marriages (Feb. 14, 2019).

"A judge for whom performing marriages is a mandatory obligation of judicial office may not decline to perform marriages of same-sex couples. A judge for whom performing marriages is a discretionary judicial function may not decline to perform marriages of same-sex couples if the judge agrees to perform opposite-sex marriages. A judge's refusal to perform same-sex marriages while performing opposite-sex marriages calls into question the judge's integrity and impartiality and reflects bias and prejudice in violation of Rules 1.1, 2.2, 2.3(A), and 2.3(B) of the Model Code of Judicial Conduct. In a jurisdiction in which a judge is not obligated to perform marriages but has the discretion to do so, a judge may refuse to perform marriages for members of the public. A judge who declines to perform marriages for members of the public may still perform marriages for family and friends. If a judge chooses to perform marriages for family and friends, however, the judge may not decline to perform same-sex marriages for family and friends."