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IN THE TENNESSEE COURT OF THE JUDICIARY

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IN RE: **THE HONORABLE JOHN A. BELL**
JUDGE, GENERAL SESSIONS COURT
COCKE COUNTY, TENNESSEE

Docket No. M2009-02115-CJ-CJ-CJ

COMPLAINT OF DAVID PLEAU
FILE NO. 08-3508

MOTION TO COMPEL
and
MOTION IN LIMINE

COMES NOW Joseph S. Daniel, Disciplinary Counsel for the Tennessee Court of the Judiciary, pursuant to Rules 26, 30, 33, 34, 36 and 37, *Tennessee Rules of Civil Procedure*, and would respectfully move the Court for an Order compelling The Honorable John A. Bell to answer discovery heretofore propounded, and for remedies thereunder, including sanctions, and as grounds therefore would state as follows:

1. At his deposition, begun on January 12, 2010 and concluded January 19, 2010, deponent and party John A. Bell on numerous occasions asserted a claim of attorney client privilege and in addition invoked the 5th Amendment right against self-incrimination (transcript, heretofore filed; Appendix).

2. The privilege assertion was unfounded, improper, in violation of the applicable statute, the *Tennessee Rules of Civil Procedure* and wholly unsupported and in intentional derogation of rudimentary and established Tennessee jurisprudence and fundamental principles of law.

3. The pragmatic effect of the continuing effort of John A. Bell, if not remedied or otherwise tempered by the necessary intervention of this Court, would be to obstruct legitimate discovery efforts necessary to the prosecution of this matter.

4. Court intervention is further necessary and appropriate due to the ongoing obstreperous discovery tactics of John A. Bell.

Summary of Argument

- The Tennessee Rules of Civil Procedure govern the scope and practices incident to discovery.

- Tennessee embraces a broad policy favoring discovery.

- The attorney-client privilege is established in Tennessee by statute and the statute adopts common law principles.

- *Rule 26.02 (5), Tennessee Rules of Civil Procedure*, provides that in making a privileged claim, the party withholding information must follow specific steps in asserting the privilege , a fundamental and direct process that in this instance has been ignored by Judge Bell on now three (3) occasions.

- The attorney client privilege is by no means unlimited and most certainly does not by its mere invocation terminate relevant testimony unless multiple predicates are established by that claimant. Both Tennessee and general multi-jurisdictional standards agree. By way of example and not limitation, the burden is on the party claiming the privilege to establish its proper application.

- The leading Tennessee cases offer a decisional blueprint for analysis and scope of he attorney client privilege and utilization of those evaluative processes assuredly instructs that Judge Bell's conduct in discovery is unequivocally erroneous.

- The questions put to Judge Bell during discovery in by the far the majority of instances are, under applicable law, not susceptible to a plausible privilege claim.

- The privilege, to the extent it is valid may be waived, and was so waived in this action.

- The effect on discovery by Judge Bell's obstructive behavior have unduly delayed discovery and necessitated as of this moment two (2) Motions to Compel, and to the extent the instant Motion to Compel is granted, an additional trip to Knoxville for needlessly repetitive deposition testimony, as well as presenting enhanced logistical impediments to the trial preparation in this action.

- To the extent matters which are properly subject to the attorney privilege will prevent certain discovery items or issues, those items or issues will as a practical matter not be available to Disciplinary Counsel. Hence, those matters should be identified with clarity and to the extent asserted by Judge Bell, any such assertions as elected should be binding on Judge Bell at trial.

- Analysis of the ability of a witness to take the Fifth Amendment is similar in process and in any event requires court intervention. And, as with the privilege claim, a valid assertion of the Fifth Amendment should not be subsequently withdrawn as a strategy to obstruct discovery.

- A Motion in Limine is therefore a reasonable and proper tool to insure that discovery is thorough and not subject to being frustrated by an eleventh hour reversal of determination by Judge Bell.

Argument

Tenn. R. Civ. P. 26.02(1) states the general principle that parties may obtain discovery of any matter which is relevant to the subject matter of the litigation. The scope of discovery is not unlimited, however, and *Tenn. R. Civ. P. 26.02(1)* gives the court the authority to limit discovery if the court determines that the enumerated grounds for limiting discovery exist. *Tenn. R. Civ. P. 26.02(3)* and *Tenn. R. Civ. P. 26.02(4)* limit discovery of trial preparation materials, and, of course, privileged information is not discoverable.

Discovery is allowed in an effort to do away with trial by ambush. The purpose of discovery is to bring out the facts prior to trial so the parties will be better equipped to decide what is actually at issue. *Ingram v. Phillips, 684 S.W.2d 954 (Tenn.App.1984).*

In *White v. Vanderbilt University, 21 S.W. 3d 215, at 223 (Tenn. App. 1999),* Justice (then Judge) Koch summarized fundamental discovery policies as follows:

> The Tennessee Rules of Civil Procedure permit the discovery of relevant, non-privileged information. See *Wright v. United Servs. Auto Ass'n, 789 S.W.2d 911, 915 (Tenn. Ct. App.1990); Duncan v. Duncan, 789*

> *S.W.2d 557, 560 (Tenn. Ct. App.1990).* They strike a balance between two important policies. The first, and perhaps more important, policy is that discovery should enable the parties and the courts to seek the truth so that disputes will be decided by facts rather than by legal maneuvering. See *Harrison v. Greeneville Ready-Mix, Inc., 220 Tenn. 293, 302, 417 S.W.2d 48, 52 (1967); Pettus v. Hurst, 882 S.W.2d 783, 786 (Tenn. Ct. App.1993).* The second policy is that the discovery rules should not permit less diligent lawyers to benefit from the work of their more diligent opponents. See *Vythoulkas v. Vanderbilt Univ. Hosp., 693 S.W.2d 350, 357 (Tenn. Ct. App.1985).*

Tenn. R. Civ. P. 26.02(1) expressly provides that privileged information is not discoverable. The *Tennessee Rules of Evidence* do not provide for any privileges but instead rely on other laws for privilege. *Rule 501, TRE.* The attorney-client privilege as codified is noted in The Advisory Commission Comment to *Tenn. R. Evid. 501.* That section is as follows:

§ 23-3-105. Attorney-client privilege

> No attorney, solicitor or counselor shall be permitted, in giving testimony against a client or person who consulted the attorney, solicitor or counselor professionally, to disclose any communication made to the attorney, solicitor or counselor as such by such person during the pendency of the suit, before or afterward, to the person's injury. 1821 Acts, c. 66, § 3. Formerly 1858 Code, § 3973; Shannon's Code, § 5785; mod. 1932 Code, § 9978; § 29-305.

The original statute, similar in wording to T.C.A. § 23-3-105, was held to embody the common law principles. *Johnson v. Patterson, 81 Tenn. 626, 649 (1884).*

The procedure for claiming the privilege is also directed by the TRCP, and in addition has been disregarded by Judge Bell in two (2) written discovery responses and now in his deposition. *Rule 26.02 (5), Tennessee Rules of Civil Procedure* reads as follows:

> *(5) Claims of Privilege or Protection of Trial Preparation Materials.*
>
> When a party withholds information otherwise discoverable under the rules by claiming that it is privileged or subject to protection as trial

> preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege protection.

Multiple requirements exist prior to a privilege claim. To successfully invoke the attorney-client privilege, the party asserting the privilege is obligated to establish the communications were made pursuant to the attorney-client relationship and with the intention that the communications remain confidential. *State ex rel. Flowers v. Tennessee Trucking Ass'n Self Ins. Group Trust, 2006, 209 S.W.3d 602.* Judge Bell has made no such demonstration, and in fact the tone of the deposition strongly suggest that at times he is expressly denying that any attorney client relationship between he and Mr. Testerman was in place. There is also no showing that any communication was to remain confidential.

By making the repetitious blanket objections, Judge Bell simply appears to be taking the position that he need not implement the well-established groundwork for the privilege claim.

Moreover, the privilege is not absolute nor does it encompass all communications between the client and the attorney. For the privilege to apply, the client (in this instance Judge Bell) has the burden of showing that the communications were made in the confidence of the attorney-client relationship. Not only must the communication have occurred pursuant to the attorney-client relationship, it must have been made with the intention of confidentiality. *Hazlett v. Bryant, 192 Tenn. 251, 241 S.W.2d 121, 124 (1951).* An attorney may be required to testify about communications and transactions "that have no element of confidence in them." *Johnson v. Patterson, supra, 81 Tenn. at*

649.

A Federal Court construing Tennessee privilege law has concluded that the requirements for Tennessee's attorney-client privilege to apply are: (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client. *T.C.A. § 23-3-105 Royal Surplus Lines Ins. v. Sofamor Danek Group, 1999, 190 F.R.D. 463* (attached).

Again, Judge Bell has not met his burden by demonstrating any of the predicates, i.e., that he was or about to be a client, that Testerman was acting as a lawyer, that the communication was not made in other(s)' presence, and naturally, what the purpose was. He instead has remained fully intransigent in the face of Tennessee law and the *Tennessee Rules of Civil Procedure.* A catalogue of Movant's claim as to Judge Bell's improper assertion is attached hereto as Appendix.

General legal principles are harmonious with the Tennessee privilege tradition. For example, *CJS, Witnesses, § 316* instructs:

> Communications between a client and his or her attorney are generally privileged when made in confidence for the purpose of seeking legal advice. As a general rule, communications between a client and his or her attorney are privileged when made in confidence for the purpose of seeking legal advice. The "attorney-client privilege," one of the oldest and most widely recognized evidentiary privileges is a traditional privilege

> mandated by common law bars the compelled disclosure, without the client's consent, of attorney-client communications made in confidence between an attorney and his or her client. In order to assert the attorney-client privilege, three main elements must be present: (1) both parties must contemplate that the attorney-client relationship does or will exist; (2) the advice must be sought by the client from the attorney in his or her capacity as a legal advisor; (3) the communication between the attorney and client must be intended to be confidential.
>
> The attorney-client privilege protects a client and any other person from disclosing confidential communications made to counsel relative to a legal matter. Such privilege generally applies only if: (1) the asserted holder of the privilege is, or sought to become, a client; (2) the person to whom the communication was made is a member of the bar of a court, or his or her subordinate, and in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed by the client, without the presence of strangers, for the purpose of securing primarily either an opinion on law or legal services or assistance in some legal proceeding, and not for the purpose of committing a crime or tort; (4) the privilege has been claimed, and not waived by the client; and (5) the communication was intended to be confidential when made. The attorney-client privilege is based on the premise that confidences shared in an attorney-client relationship are to remain confidential.
>
> *C.J.S. "Witnesses" § 316; see also § 331, § 332*

In Judge Bell's vision, no burden need be carried. No showing that an attorney-client relationship need be demonstrated. No indication that Testerman was to act as an attorney and not in some other capacity be made. No intent of confidentiality be premised. In fact, other testimony as well as the basic allegations in this action are that the very purpose of the Bell-Testerman conduct was to specifically approach the third party, Mr. Pleau—hardly an intimation that confidence was intended.

Two Tennessee cases appear to have emerged as perhaps the leading comprehensive instructive tools on the attorney client privilege issue. *Bryan v. State, 848 S.W.2d 72 (Tenn. App. 1992); State ex rel. Flowers v. Tennessee Trucking Ass'n Self Ins. Group Trust, 209 S.W.3d 602, (Tenn. App. 2006).*

In *Bryan*, the Court of Criminal Appeals recited the statute *(T.C.A. § 23-3-105)* and remarked that the attorney client privilege was also recognized at common law. *McMannus v. State, 39 Tenn. 213 (1858), Johnson v. Patterson, 81 Tenn. 626, 649 (1884),* concluding "Thus, the purpose of the privilege is to shelter the confidences a client shares with his or her attorney when seeking legal advice, in the interest of protecting a relationship that is a mainstay of our system of justice."

After identification of the purposes underling the privilege the *Bryan* Court elaborated on the limitations and requirements of asserting the privilege:

> However, *the privilege is not absolute nor does it encompass all communications between the client and the attorney.* For the privilege to apply, *the client has the burden of showing that the communications were made in the confidence of the attorney-client relationship.* That is, not only must the communication have occurred pursuant to the attorney-client relationship, *it must have been made with the intention of confidentiality. Hazlett v. Bryant, 192 Tenn. 251, 241 S.W.2d 121, 124 (1951).* An attorney may be required to testify about communications and transactions *"that have no element of confidence in them." Johnson v. Patterson, supra, 81 Tenn. at 649.* For example, the presence of a third party at the time of the communication or *the client's expectation that the substance of the communication is to be disclosed to others does not bring the privilege into play. Hazlett v. Bryant, supra, 241 S.W.2d at 124.*
>
> *Bryan, at 848 S.W. 2d 80 (emphasis supplied).*

The Bryan Court concluded by stating, "In any event, what is clear is that whether the attorney-client privilege applies to any particular communication is necessarily question, topic and case specific. *See, e.g., Johnson v. Patterson, supra, 81 Tenn. at 649.* The *blanket application of the privilege by the trial court in this case was inappropriate.* (emphasis supplied) *Bryan,* at *848 S.W. 2d 80.*

Judge Bell by his conduct does not even purport to properly acknowledge the basic and seemingly understandable Tennessee jurisprudence as described in *Bryan.*

State ex rel. Flowers v. Tennessee Trucking Ass'n Self Ins. Group 209 S.W.3d 602

(Tenn.App. 2006), as did *Bryan*, also pronounced both an educational and pragmatic grasp of the nature and effect of the attorney client privilege.

Noting "The rules favor discovery," the logical result would be that "the party opposing discovery must demonstrate with more than conclusory statements and generalizations that the discovery limitations being sought are necessary to protect it from, among other things, oppression or undue burden or expense. "A trial court should balance the competing interests and hardships involved when asked to limit discovery and should consider whether less burdensome means for acquiring the requested information are available." *Duncan v. Duncan, 789 S.W.2d 557, 561 (Tenn.Ct.App.1990).*

Judge Bell does not deem it necessary to even object to discovery, by conclusory statements or otherwise. He simply refuses to participate more than cosmetically in the discovery process.

Construction of the privilege is to be "strictly construed." *COHEN, TENNESSEE LAW OF EVIDENCE § 5.01[4](e).* ("Since a privilege keeps relevant information from the trier of fact, courts typically hold that a privilege is to be strictly construed.").

The *Flowers* court then reaffirmed the *Bryan* teachings on the non-absolute tenor and limitations of the privileges in that it does not "encompass all communications" between client and attorney; that the communications "remain confidential;" the potential for waiver; and that the party asserting the privilege bears the burden of demonstrating that the privilege is applicable. *Flowers, id.*

As demonstrated throughout, the privilege may be waived, and of course does not even exist when the matters arguably subject to the privilege are communicated to third persons, *supra.*

In at least two respects, the privilege was abrogated by the nature of the communications thought to have occurred, and in addition waived.

Initially, and supported by the uncontroverted proof adduced in the deposition of David Pleau, attorney Testerman specifically discussed with Pleau the conversation topic preceding between Testerman and Pleau, stating that Bell wanted the Court of the Judiciary action dropped and and that Judge Bell know it would be "wrong" for him to approach Pleau directly. Testerman went so far as to offer to draw up the necessary papers. (see e.g., Pleau testimony and Exhibits).

Next, Testerman, according again to the unrefuted evidence, communicated the nature and content of his purportedly privileged communications with Disciplinary Counsel and the investigator (see e.g., deposition of James LaRue).

An instructive article in the *University of Memphis Law Review*, addressing primarily "inadvertent" disclosure of the attorney client privilege, nonetheless describes the unmistakable affirmation that a privilege may be waived and in its introductory material recasts the fundamental nature of the attorney client privilege and its potential for waiver. *Note, "Attorneys Beware: Metadata's Impact on Privilege, Work Product, and the Ethical Rules", 35 U. Mem. L. Rev. 911 a t914-918 (2005).*

A. Waiver of the Attorney-Client Privilege by Inadvertent Disclosure

> The attorney-client privilege is the most ancient and sacrosanct evidentiary privilege and is currently recognized in every U.S. jurisdiction as a means to protect confidential communications between the attorney and client from compelled disclosure. Professor Wigmore was one of the first to propose a test qualifying attorney-client communications as privileged:
>
> (1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by his

legal advisor, (8) except the protection be waived.

> The purpose of the attorney-client privilege is: to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.
>
> The right to waive the privilege is vested solely in the client. *But, the attorney, acting under the authority granted to him as agent, may also waive the privilege on the client's behalf.* The waiver may be express or implied "through words or conduct inconsistent with the confidentiality upon which the privilege is premised." As with all privileges, the client may expressly waive the attorney-client privilege. In the typical situation, however, the client impliedly waives the privilege through "conduct that is inconsistent with any reasonable claim of confidentiality and that would make maintenance of the privilege unfair." Implied waiver may occur when a client voluntarily discloses confidential communications to a non-essential third party. Id, (footnotes omitted)(emphasis supplied).

Judge Bell's sweeping "objections" fail to meet his obligation to articulate even minimal facts necessary to invoke the privilege. His efforts to obfuscate and indeed, frustrate discovery under the cloak of an undefined "privilege" ignore basic law and serve only to shield him from reasonable and legitimate simple discovery.

The Fifth Amendment analysis yields a comparable analysis. The Fifth Amendment to the United States Constitution and *Article 1, § 9 of the Tennessee Constitution* create a privilege against self-incrimination. This privilege is available to witnesses and parties in civil as well as criminal actions and can be invoked, where appropriate, in discovery in civil cases. A valid assertion of this privilege exists where a witness has reasonable cause to apprehend a real danger of incrimination. The witness must, however, show a 'real danger,' and not a mere imaginary, remote or speculative possibility of prosecution."

This Court has been previously acquainted with the leading authority concerning privilege in Tennessee in Judge Bell's previous responses. *Floyd v. Prime Succession of*

TN 2007 WL 2297810 (Tenn. App. 2007) (previously discussed in prior Motions).

It is of more than passing interest to note the Judge Bell, while evidently aware of the extent of the Fifth Amendment protection, chooses to simply ignore the teachings of Floyd and assert a Fifth Amendment claim on multiple facially innocuous questions. Such a cynical approach by the witness, armed with full awareness of the nature of the requisites of the assertion, hardly can be construed as anything but a raw effort to frustrate legitimate discovery and manifests remarkable dismissiveness of the courts and the applicable Rules of Civil Procedure.

A witness cannot assert the privilege as a general matter to prevent discovery or to prevent discovery by a particular means, as, for example, by a motion for a protective order to prevent a deposition. Instead a witness wishing protection against self-incrimination must assert the privilege with respect to specific questions as they are asked. The court must have a record upon which to decide whether the privilege has been properly raised as to each specific question. The privilege is available only as protection from criminal liability.

The constant roadblocks by Judge Bell have now necessitated two (2) Motions, will require an unnecessary duplication of travel to Knoxville, fees for resuming the deposition, court reporting costs, and the costs of obtaining the relief to which Disciplinary Counsel is justly entitled, and therefore, sanctions under the auspices of Rule 37, Tennessee Rules of Civil Procedure are warranted.

It is perceived that indeed, Judge Bell may have a cognizable claim to the attorney client privilege in some fashion, once he has complied with the *Rule 26.02 (5)* and either grasps or is ordered to grasp the scope and limitations on that privilege as defined by

Tennessee law, *supra.* In the event Judge Bell then and properly continues to assert the privilege that election should remain with him through and including trial. Were Judge Bell to suddenly on the eve of or worse, at the actual trial, reverse his position and determine to waive or otherwise abandon the privilege shield, then and in that event Disciplinary Counsel would be prejudiced in his orderly trial preparation and presentation by any belated new or different testimony to which there had been no opportunity to discover. As noted, the entire focus on discovery in the first place is to prevent "trial by ambush."

A remedy for such maneuvering exists in Tennessee via a Motion in Limine. As with attorney-client law, Tennessee appellate courts have authored a comprehensive discussion of the nature and implementation of such a Motion. In *Pullum v. Robinette, 174 S.W.3d 124, (Tenn. App. 2004),* the Court of Appeals, Middle Section extensively discussed the history, standards and employment of Motions in Limine. The *Pullum* Court stated in pertinent part:

VI. THE LAW REGARDING MOTIONS *IN LIMINE*

> Objections to the admission of evidence are generally made when the evidence is offered. They may, however, be raised earlier, for example by pretrial motions *in limine.* " *In limine* " means "[o]n the threshold; at the beginning; or preliminarily." BLACK'S LAW DICTIONARY 787 (6th ed.1990). Motions that seek to exclude or to obtain a ruling on the admissibility of evidence may be brought at any time before the introduction of the evidence to which they pertain.
>
> The United States Supreme Court has used the term "in a broad sense to refer to any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered." *Luce v. United States,* 469 U.S. 38, 40 n. 2, 105 S.Ct. 460, 462 n. 2, 83 L.Ed.2d 443 (1984).
>
> Although neither federal nor Tennessee procedural rules specifically

authorize motions *in limine,* they have long been used and have been recognized as useful in management of cases. The court's authority in Tenn. R. Civ. P. 16 to manage a case through pretrial conferences and orders includes the discretion to rule on evidentiary issues raised in pretrial motions. *See* Advisory Commission Comments (2003) to Rule 16.02(6) ("pretrial conferences may greatly facilitate the efficient use of juror time by encouraging the pretrial resolution of evidentiary and other issues...."). The United States Supreme Court has acknowledged that federal trial courts may allow motions *in limine* as an exercise of their "inherent authority to manage the course of trials." *Luce v. United States,* 469 U.S. 38, 41 n. 4, 105 S.Ct. 460, 463 n. 4, 83 L.Ed.2d 443 (1984).

Federal trial courts are not required to rule on motions *in limine. Jones v. Stotts,* 59 F.3d 143, 146 (10th Cir.1995) (stating that a motion *in limine* requests guidance that "the court may provide at its discretion.") Some courts may prefer to wait until the attempted introduction of the evidence at trial to better understand the context. *See Jonasson v. Lutheran Child & Family Servs.,* 115 F.3d 436, 440 (7th Cir.1997) (noting that trial judges may choose to defer an evidentiary ruling until trial for proper evaluation of the evidence). A factual context provided by events at trial is often necessary for a reviewing court to effectively rule on such evidentiary questions. *Luce,* 469 U.S. at 41, 105 S.Ct. at 463.

Additionally, a trial judge may issue a preliminary or conditional ruling on the motion *in limine,* subject to change depending on events at trial. In fact, the United States Supreme Court has stated that *in limine* evidentiary rulings "are not binding on the trial judge, and the judge may always change his mind during the course of the trial." *Ohler v. United States,* 529 U.S. 753, 758 n. 3, 120 S.Ct. 1851, 1854 n. 3, 146 L.Ed.2d 826 (2000). *See also* ***136** *Luce,* 469 U.S. at 41-42, 105 S.Ct. at 463 (holding that an *in limine* ruling is subject to change whether or not proof at trial differs from that proffered because a judge is free in the exercise of sound discretion to alter a previous *in limine* ruling).

United States v. Luce, 713 F.2d 1236, 1239 (6th Circuit 1983), aff'd., 469 U.S. 38, 105 S.Ct. 460, 83 L.Ed.2d 443 (1984).
However, a more recent amendment to *Fed.R.Evid. 103,* effective December 1, 2000, states that "once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal." *Fed.R.Evid. 103(a); see United States v. Gajo,* 290 F.3d 922, 927 (7th Cir.2002); *see also, Wilson v. Williams,* 182 F.3d 562, 565-66 (7th Cir.1999) (en banc) (explaining that a definitive ruling is one that completely and finally decides an issue and does not require further consideration or depend on how the trial proceeds; a conditional ruling requires the satisfaction of a condition before the court can render a

definitive ruling, *e.g.,* that a defendant testify before impeaching evidence will be excluded or limited; a tentative ruling is not final because the court needs more information or the admissibility question turns on later developments).

Tennessee courts have applied the same principles espoused in the amended federal rule. Where the record on a pre-trial motion to exclude evidence clearly presents an evidentiary question and where the trial judge has "clearly and definitively ruled," a party need not object again at trial in order to preserve the ruling for appeal. *State v. Brobeck,* 751 S.W.2d 828, 833-34 (Tenn.1988); *Grandstaff v. Hawks,* 36 S.W.3d 482, 488 (Tenn.Ct.App.2000). Thus, Tennessee courts recognize that some rulings on motions *in limine* are final, at least for purposes of appeal, if those rulings are clear and definitive.

Nonetheless, it is also clear that a trial court in Tennessee is not required to rule definitively on a pre-trial motion to exclude evidence. "With a few exceptions, ... the trial court is given broad discretion in the timing of its decisions on the admissibility of evidence." *State v. Caughron,* 855 S.W.2d 526, 541 (Tenn.1993). A trial court may in its discretion refuse to rule on a motion *in limine* to exclude evidence until there is an attempt to present the evidence in the context of trial. *State v. Gibson,* 701 S.W.2d 627, 629 (Tenn.Crim.App.1985) (holding that a trial court may refuse to rule on a motion to limit admission of evidence of a prior criminal conviction prior to the defendant taking the stand); *Hawkins v. State,* 543 S.W.2d 606, 607 (Tenn.Crim.App.1976) (referring to a motion *in limine* to exclude evidence of past conviction as a "premature" motion, stating "[t]he granting of premature motions to exclude evidence at trial addresses itself to the sound discretion of the court," and noting that the evidence at issue was never the subject of testimony at trial.)

State courts may make pre-introduction rulings on evidence that are conditional or provisional in nature, and, where such conditions do not occur at trial, may change an earlier ruling regarding the admissibility**137* of the evidence. *See, e.g., State v. Bray,* 669 S.W.2d 684, 687 (Tenn.Crim.App.1983). We know of no authority suggesting a trial court could not change an *in limine* ruling for other reasons in the exercise of sound discretion.

An appellate court will not reverse a trial court's decision on the admissibility of evidence, including a ruling on a motion *in limine,* absent clear abuse. *Heath v. Memphis Radiological Prof'l Corp.,* 79 S.W.3d 550 (Tenn.Ct.App.2002). Similarly, an appellate court will not reverse a trial court's exercise of discretion in ruling on an evidentiary motion *in limine* unless the trial court abused the wide discretion given it to handle such motions.

Gleaning from *Pullum* lessons in this instance, the Disciplinary Counsel would seek a ruling in that the evidence to be presented at the trial of this action be consistent with that developed through discovery. Simply put, the decision of a party to properly exercise privilege regarding testimony remain such a decision so that coherent discovery may continue and trial surprise eliminated. To do otherwise would unfairly handicap and prejudice a party, in this case Disciplinary Counsel, and seriously undermine the policies and principles of discovery as expressed by our Courts decisionally and in the discovery Rules

Conclusion and Relief Sought

The Disciplinary Counsel would therefore respectfully ask that this Court enter an Order directing Judge John A. Bell to answer deposition questions as determined by the Court with respect to the proper procedure and scope of the asserted privilege; that appropriate sanctions be ordered and that a Motion in Limine be granted requiring Judge Bell to stand on his properly excluded testimony or in the alternative provide notice of intent to waive or otherwise abandon the privilege claim sufficiently in advance of trial to permit reasonable discovery, and for such other and further relief as me be just and proper.

NOTICE is hereby given that the undersigned will appear before the Honorable Don R. Ash, Presiding Judge, Court of the Judiciary, at his courtroom, 4th Floor, Judicial Bldg., Public Square, Murfreesboro, Tennessee on the 3rd day of March, 2010, at 10:00 a.m., central standard time, for a hearing on this Motion.

Respectfully submitted,

JOSEPH S. DANIEL #002799
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Certificate of Service

I certify that a true and exact copy of the foregoing has been mailed, delivered, and/or transmitted by facsimile to Mr. Gordon Ball, BALL & SCOTT Law Offices, Attorneys at Law, Attorney for The Honorable John A. Bell, 550 W. Main Street, Suite 601, Knoxville, Tennessee 37902, on this the 10th day of February, 2010.

Patrick J. McHale, Assistant Disciplinary Counsel

IN THE TENNESSEE COURT OF THE JUDICIARY

IN RE: **THE HONORABLE JOHN A. BELL**
JUDGE, GENERAL SESSIONS COURT
COCKE COUNTY, TENNESSEE

Docket No. M2009-02115-CJ-CJ-CJ

COMPLAINT OF DAVID PLEAU
FILE NO. 08-3508

Appendix

Disciplinary Counsel for the Tennessee Court of the Judiciary, by way of Appendix to his Motion to Compel Deposition Testimony heretofore filed, would submit this Appendix as to Questions not properly subject to a claim of privilege, or a 5th amendment claim, and questions which may in fact are so subject. All page and line numbers are taken from Volume 2 of the deposition of John A. Bell, taken January 19, 2010, subject to the signature to be affixed by the deponent. Copies of relevant pages are attached hereto for the benefit of the Court, however, the deposition itself has been filed with the Clerk.

1. Questions for which no valid attorney-client or 5th amendment claim exists:

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179	1	
179	7-11	
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180	7-10	
180	16-18	
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2. Questions for which no valid attorney-client privilege claim exists but for which there may be a valid 5th Amendment claim:

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3. Questions for which there may be a valid attorney-client privilege claim in the event the fundamental criteria of an attorney-client relationship is established:

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