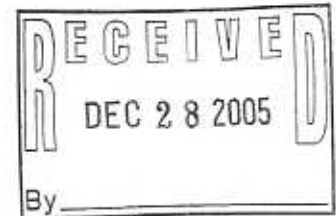


Anthony Gottlieb
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December 26, 2005

Michael W. Catalano, Clerk
Re: Comments to Rule 9 and to Rule 33
200 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

**IN RE: PROPOSED AMENDMENTS TO RULE 9,
SECTION 28, AND TO RULE 33, SECTION 33.08,
RULES OF THE TENNESSEE SUPREME COURT
M2005-02674-SC-OT-RL -**

The petition to the State Supreme Court by the Board of Professional Responsibility and the Tennessee Lawyer Assistance Program for amendments to Rule 9 and Rule 33 to establish an exculpatory category of unethical behavior by members of the Bar and approve the establishment of an Impaired Lawyer Assistance program is, "unconscionable." This is yet another escape route from discipline for unprincipled behavior of lawyers and judges at the expense of the public.

The cabal of ethics complaint dismissals from both the Board of Professional Responsibility and the Court of the Judiciary doesn't need a new category. The public needs more protection through enforcement of the categories which already exist and to expand them to include all types of cases in criminal and civil matters. Most notably absent are family law and domestic relations matters.

If adopted, the failure to include as mandatory in these provisions a funded program to redress complaints of aggrieved clients and litigants who are the victims of this unethical behavior and simply to add another confidentiality privilege with prosecutorial immunity to an already mollycoddled class of legal professional is what perpetuates the negative stereotype of legal and judicial systems and undermines the public's sense of justice and the rule of law.

Respectfully submitted:

A handwritten signature in cursive script that reads "Anthony Gottlieb".

Anthony Gottlieb

FILED

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

2005 FEB -7 AM 9:35
APPELLATE COURT CLERK
NASHVILLE

IN RE: PROPOSED AMENDMENTS TO
RULE 9, SECTION 28, AND TO
RULE 33, SECTION 33.08, RULES
OF THE TENNESSEE SUPREME
COURT

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M2005-02674-SC-RL1-RL

**COMMENT OF THE TENNESSEE BAR ASSOCIATION CONCERNING
PROPOSED AMENDMENTS TO TENNESSEE SUPREME COURT RULES 9 AND 33**

The Tennessee Bar Association ("TBA"), by and through its President, William H. Haltom, Jr., the Chair of its Ethics and Professional Responsibility Committee, Lucian T. Pera, its General Counsel, Gail Vaughn Ashworth, and its Executive Director, Allan F. Ramsaur, submit the following comment concerning the amendments to Rule 9, Section 28, and Rule 33, Section 33.08 of the Rules of the Tennessee Supreme Court, as proposed by the Tennessee Lawyers Assistance Program ("TLAP") and the Board of Professional Responsibility ("BPR"):

The TBA has long supported the work of TLAP and the lawyer assistance programs of local bars across the state. TLAP, with the active support of the BPR, does work that is critically important to the profession and to the public, and the current system in place to deliver, facilitate, and encourage lawyer assistance efforts is a robust and successful one.

From discussions with TLAP's Executive Director and a review of the proposed amendments under discussion, the TBA understands that the purposes of the proposed amendments are almost entirely intended to be of a "housekeeping" nature. Thus, the TBA understands that the proposal is not intended to fundamentally change the purpose, structure, or

operation of lawyer assistance efforts in Tennessee, but to appropriately update these Rules and conform them to established practice and other established rules governing the existing system.

For this reason, the TBA supports the adoption by this Court of the proposed amendments to Rules 9 and 33. In the course of adopting these amendments, the TBA urges the Court to consider the following comments, however, particularly in light of the fact that there are several areas touched on by the amendments that for the first time reduce to a rule practices that have, up to this point, been handled informally by TLAP.

1. Immunity.

The TBA urges the Court to explicitly confirm that the immunity afforded TLAP is likewise extended to all TLAP-approved local lawyer assistance programs, including all volunteer participants in their programs.

Based on communications with TLAP's Executive Director and our review of the proposed amendments, the TBA understands and believes that it is the intent of the proponents to continue what we believe to be the current regime of immunity.

The TBA understands that the intent would be for the immunity provisions that currently reside in Rule 9, Section 28.2, (and, by reference, the immunity provisions of Rule 9, Section 27) and those that reside in Rule 33, Section 33.11 (and, by reference, the statutory immunity afforded under Tenn. Code Ann. §§ 23-4-101, 23-4-102, and 23-4-103) to extend to and cover everyone who participates in either TLAP or a TLAP-approved local program. The TBA perceives some ambiguity in the proposed language, however, because (1) Rule 9, Section 28.2, would remain in the Rule, but contain what seems now to be an outdated reference to "the impaired lawyers committee;" and (2) proposed Section 33.08(h) would refer only to Rule 33,

Section 33.11, when that section does not appear to clearly cover participants in local, TLAP-approved programs.

The TBA urges the Court to clarify this possible ambiguity, by explicitly extending to all those participating in any way in TLAP or TLAP-approved local programs both (1) immunity parallel to Rule 9, Section 27, and (2) statutory immunity provided under Tenn. Code Ann. §§ 23-4-101, 23-4-102, and 23-4-103. To accomplish this purpose, the TBA suggests the following revisions to Section 33.11:

(redlined to show deletions by ~~strikethrough~~ and additions by underlining and italicization)

33.11 Immunity

A. Any person reporting information to commission members, employees or agents including volunteers recruited under Rule 33.04 or to committee members, employees, agents or volunteers of local impaired lawyer assistance programs approved under Rule 33.08 shall be entitled to the immunities and presumptions under Tenn. Code Ann. §§ 23-4-101, 23-4-102 and 23-4-103 and the immunity provided under Rule 9, Section 27.

B. Commission members, employees and agents including volunteers recruited under Rule 33.04, as well as committee members, employees, agents or volunteers of local impaired lawyer assistance programs approved under Rule 33.08, shall be entitled to the immunities and presumptions under Tenn. Code Ann. §§ 23-4-101, 23-4-102 and 23-4-103 and the immunity provided under Rule 9, Section 27.

C. Commission members, employees and agents including volunteers recruited under Rule 33.04 and committee members, employees, agents or volunteers of local impaired lawyer assistance programs approved under Rule 33.08 are relieved of ~~the~~ any duty of disclosure of information to authorities as imposed by Tennessee Supreme Court Rule 8, RPC 8.3(a).

In addition, since all of the provisions related to TLAP-approved local programs will now be embodied within Rule 33, it may be best to delete the provisions of Rule 9, Sections 28.2 and 28.3.

2. **Confidentiality.**

The TBA urges the Court to explicitly confirm that the current confidentiality afforded to the TLAP program is likewise extended to all TLAP-approved local lawyer assistance programs. Specifically, the current confidentiality afforded to the TLAP program itself, contained in Rule 33, Section 33.10.A., should be explicitly extended to local, TLAP-approved programs, with the only exception to confidentiality being by consent of the involved lawyer or pursuant to Section 33.07(B).

Under the proposed amendments, the level of confidentiality afforded under local programs, as set forth in proposed Rule 33, Section 33.08(g), appears lower, as this provision allows disclosure by the local program "to the impaired lawyer's family or other persons as in its judgment will be in the best interest of the impaired lawyer." The TBA urges the Court to extend the apparently stricter level of confidentiality now applicable to the TLAP program itself to all TLAP-approved local programs.

In order to accomplish this result, the TBA would suggest the following modification to Rule 33.10:

(redlined to show deletions by ~~strikethrough~~ and additions by underlining and italicization)

33.10 Confidentiality

A. Information and actions taken by TLAP *or by local impaired lawyer assistance programs approved under Rule 33.08* shall be privileged and held in strictest confidence and shall not be disclosed or required to be disclosed to any person or entity outside of TLAP *or the local impaired lawyer assistance program approved under Rule 33.08*, unless such disclosure is authorized by the member of the legal profession to whom it relates or as provided in Rule 33.07(B). Except as provided in Rule 33.07(B), such information and actions shall be excluded as evidence in any complaint, investigation or proceeding before the Tennessee Board of Professional Responsibility, Tennessee Court of the Judiciary, Tennessee Board of Law Examiners or disciplinary agency with jurisdiction.

B. Commission members, employees, and agents including volunteers recruited under Rule 33.04, and committee members, employees, agents or volunteers of local impaired lawyer assistance programs approved under Section 33.08, shall be deemed to be participating in "a lawyers assistance program approved by the Tennessee Supreme Court" as provided in Tenn. Code Ann. § 23-4-103(1) and all information furnished to the program shall be governed by Tenn. Code Ann. §§ 23-4-104 and 23-4-105.

3. Referrals to TLAP.

The TBA understands that the addition of proposed Rule 9, Section 28.1, is essentially intended to codify an existing protocol in place between TLAP and BPR, which has generally worked well. As the Court is well aware, however, the codification of any procedure as important as this one must be undertaken with great care and often exposes the need for some change.

First, the TBA believes that the grounds for referral of a lawyer to TLAP should be more explicitly stated, using language already proposed by TLAP and the BPR, and that the BPR should be more clearly required to reach a clear determination that a referral is appropriate and necessary. Specifically, the TBA would propose that the following language be adopted in place of the language proposed by TLAP and the BPR for new Rule 9, Section 28.1:

(redlined to show deletions by ~~strikethrough~~ and additions by underlining and italicization)

(a) Pursuant to Rule 33.07(A) of the Rules of the Tennessee Supreme Court, the Board of Professional Responsibility, its Hearing Panels or Disciplinary Counsel (collectively "the BPR") may provide a written referral to TLAP of any attorney ~~who~~ where the BPR determines that the lawyer in question has exhibited or engaged in behavior that, in the judgment of the BPR, warrants consultation with or assessment by TLAP and, if recommended by TLAP, further assessment, evaluation, treatment, assistance, or monitoring, which behavior may include, but is not limited to, the following:

- (1) ~~has not responded~~ failure to respond to a disciplinary complaint;
- (2) ~~has received~~ receipt of three or more complaints within a period of 12 months;

(3) has receipt of a complaint that includes multiple failures to appear or to respond or to take any other action in compliance with established rules or time guidelines;

(4) pleads assertion of a plea of impairment or disability as a defense to a complaint;

~~(5) has exhibited behavior or engaged in behavior that, in the BPR's determination, warrants consultation and, if recommended by TLAP, further assessment, evaluation, treatment, assistance, or monitoring;~~

~~(6) (5) is seeking readmission or reinstatement and where there is a question of either prior or present impairment or disability; or~~

~~(7) (6) requests a request for TLAP's involvement by the lawyer in question, or in whose case TLAP's formal involvement is proposed by the BPR.~~

Consistent with this proposal, the TBA also proposes that Rule 33, Section 33.07.B. be amended in this fashion:

(redlined to show deletions by ~~strikethrough~~ and additions by underlining and italicization)

B. Progress Reports. When TLAP accepts a referral under Rule 33.07(A), if the member of the legal profession to whom it relates consents, TLAP may provide progress reports or reports of non-compliance. Notwithstanding Rule 33.10, these reports may be used as evidence in any proceeding or appeal relating to such referral from the Tennessee Board of Professional Responsibility, the Tennessee Court of the Judiciary, the Tennessee Board of Law Examiners or a disciplinary agency with disciplinary authority.

Further, the TBA urges the Court to amend the proposed Rule to clearly require that, if the lawyer is known to be represented before the Board, any such written referral be communicated through counsel for the lawyer in question, consistent with Tennessee Rule of Professional Conduct 4.2.

Although proposed Rule 9, Section 28.1(b) provides for review of any referral by the Executive Director of TLAP and provides for what the Executive Director should do if the Executive Director finds that assistance and monitoring of an attorney is appropriate, the proposed Rule is silent as to what TLAP or its Executive Director should do if, for whatever reason, TLAP's Executive Director finds that TLAP involvement is not appropriate. The TBA urges the Court to amend the proposed rule to clearly provide that, in the event that the Executive

Director of TLAP determines that TLAP involvement is not appropriate, for whatever reason, that fact – and that fact alone – should be communicated to the BPR. The TBA believes that such treatment is entirely consistent with the confidentiality regime long established for TLAP. Further, this treatment reflects appropriate respect for any privacy concerns of the lawyer involved. Of course, such additional language could certainly explicitly allow TLAP, with the consent of the lawyer involved, to provide otherwise confidential information to the BPR.

To accomplish this purpose, the TBA would suggest that proposed Rule 9, Section 28.1(b), be modified as follows:

(redlined to show deletions by ~~strikethrough~~ and additions by underlining and italicization)

(b) The Executive Director of TLAP shall review any referral by the BPR. If the Executive Director of TLAP deems that assistance and monitoring of an attorney is appropriate, the Executive Director will make reasonable efforts to enter into a Monitoring/Advocacy Agreement ("Agreement") with the attorney pursuant to Rule 33.05(E) of the Rules of the Tennessee Supreme Court. *If the Executive Director of TLAP determines that TLAP assistance is not appropriate, for whatever reason, the Executive Director shall report that determination to the BPR, without further elaboration and without disclosure of information otherwise confidential under Rule 33.10.*

Further, the TBA urges the Court to amend the proposed Rule to clearly require that, if the lawyer is known to be represented before the Board, any such written referral be communicated through counsel for the lawyer in question, consistent with Tennessee Rule of Professional Conduct 4.2.

CONCLUSION

With these proposed amendments, the TBA encourages the Court to adopt the amendments proposed by TLAP and the BPR.

Respectfully Submitted,

Tennessee Bar Association

By: /s/ William H. Haltom, Jr. by permission

William H. Haltom, Jr.

Tenn. B.P.R. #6361

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Comment has been served on the attached list by placing a copy in the United States Mail, postage prepaid, this 7th day of February, 2006.

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IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

FILED

2006 FEB -8 PM 3:34

APPELLATE COURT CLERK
NASHVILLE

IN RE: PROPOSED AMENDMENT TO)
RULE 9, SECTION 28, AND TO)
RULE 33, SECTION 33.08, RULES)
OF THE TENNESSEE SUPREME)
COURT)

M2005-02674-SC-RL1-RL

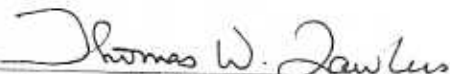
**COMMENT OF THE NASHVILLE BAR ASSOCIATION CONCERNING
PROPOSED AMENDMENTS TO TENNESSEE SUPREME COURT RULES 9
AND 33**

The Nashville Bar Association ("NBA"), by and through the Chair of its Ethics and Professionalism Committee, Thomas W. Lawless, submits the following comment concerning the amendments to Rule 9, Section 28, and Rule 33, Section 33.08 of the Rules of the Tennessee Supreme Court, as proposed by the Tennessee Lawyers Assistance Program ("TLAP") and the Board of Professional Responsibility ("BPR"):

The NBA Board of Directors, after consultation with its Ethics and Professionalism Committee, - and having considered the proposed Amendments to Rule 9, Section 28, and Rule 33, Section 33.08 of the Rules of the Tennessee Supreme Court, has concluded that the NBA does not have any suggested changes to said proposed Amendments at this time. However, the NBA would request that, if the proposed Amendments to Rule 9, Section 28, and Rule 33, Section 33.08 of the Rules of the Tennessee Supreme Court are adopted, the Court provide for a formal review of, and opportunity to comment on, the Rules as amended, and their impact on the local and statewide lawyer assistance programs, within a year of their effective date.

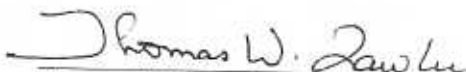
Respectfully submitted,

Nashville Bar Association

By: 
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Chair
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CERTIFICATE OF SERVICE

I certify that a true and exact copy of the foregoing Comment of the NBA has been placed in the United States mail, postage pre-paid to the Hon. Michael W. Catalano, Clerk of the Supreme Court of Tennessee, Re: Comments to Rule 9 and 33, 200 Supreme Court Building, 401 Seventh Avenue North, Nashville, TN 37219-1407 on this the 8th day of February, 2006.


Thomas W. Lawless

cc: Allan R. Ramsaur, Esq.
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