

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

FILED 11/28/2018 Clerk of the Appellate Courts
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IN RE: RULE 33
RULES OF THE TENNESSEE SUPREME COURT

No. ADM2018-01895

ORDER

On October 17, 2018, the Court filed an Order soliciting public comments on proposed amendments to Rule 33 of the Rules of the Tennessee Supreme Court. The deadline for submitting written comments was November 19, 2018. The Court received three written comments during the comment period, each in support of the proposed amendments.

After due consideration, the Court hereby adopts the amendments to Rule 33 of the Rules of the Tennessee Supreme Court as set out in the attached Appendix. The amendments shall take effect immediately upon the filing of this Order.

The Clerk shall provide a copy of this Order, including the Appendix, to LexisNexis and to Thomson Reuters. In addition, this Order, including the Appendix, shall be posted on the Tennessee Supreme Court's website.

IT IS SO ORDERED.

PER CURIAM

APPENDIX

AMENDMENT TO TENN. SUP. CT. R. 33

[New text is indicated by underlining/Deleted text is indicated by striking]

RULE 33: TENNESSEE LAWYER ASSISTANCE PROGRAM.

33.01 Establishment of Tennessee Lawyer Assistance Program (TLAP)

A. Establishment. There is hereby established a state-wide lawyer assistance program to be known as Tennessee Lawyer Assistance Program (or “TLAP”) which shall provide immediate and continuing help to lawyers, judges, bar applicants and law students (hereinafter “members of the legal profession”) who suffer from physical or mental disabilities that result from disease, disorder, trauma or age and that impair their ability to practice or serve.

B. Purpose. TLAP has three purposes:

- (1) to protect the interests of clients, litigants and the general public from harm caused by impaired lawyers or judges;
- (2) to assist impaired members of the legal profession to begin and continue recovery; and
- (3) to educate the bench and bar to the causes of and remedies for impairments affecting members of the legal profession.

C. Funding and Administration.

- (1) For the purpose of funding the program established under this rule, the Board of Professional Responsibility shall collect annually and deposit with the State Treasurer an annual fee from every attorney, in an amount set by the Court in Rule 9, Section 10.2(c).
- (2) All funds received by TLAP from gifts or bequests from any source shall be deposited with the State Treasurer.
- (3) All funds deposited with the State Treasurer pursuant to subparagraphs (C)(1) and (C)(2), and all earnings on investments and all interest and proceeds from said funds, if any, are deemed to be, and shall be designated as, funds belonging solely to TLAP. Subject to Rule 33.09(B), w~~Withdrawals~~ from those funds shall only be made by TLAP for the purpose of funding the program established under this rule, and for such other purposes as this Court may from time to time authorize or direct.

[Amended June 28, 2002, effective July 1, 2001; amended December 2, 2003, effective January 1, 2004; and amended by order filed August 30, 2013, effective January 1, 2014.]

33.02 TLAP Commission

A. Members. The Tennessee Supreme Court shall appoint Commission members to administer the TLAP. Officers of the Commission shall consist of a chair, vice chair and secretary treasurer. The chair shall be appointed by the Supreme Court. Each of the other officers shall be elected by the members of the Commission annually.

B. Composition. The Commission shall consist of fifteen (15) members, chosen on the basis of geography and diversity and shall include three (3) citizens who are not members of the legal profession. The members shall have diverse experience, knowledge and demonstrated competence in the problems of addiction and other common difficulties that impair members of the legal profession.

C. Terms. Members shall be appointed for a three-year term. Appointments shall be staggered so that the number of terms expiring shall be the same each year. No member shall be appointed for more than two consecutive, full three (3) year terms.

D. Duties of the Commission. The Commission shall have the following powers and duties:

(1) To establish TLAP policy and procedures consistent with this rule. Such policies and procedures shall be established after reasonable notice to the Tennessee bench and bar and opportunity for comment.

(2) To operate the program to achieve its purposes.

(3) To assure the duties listed under Rule 33.03 are carried out in the absence of a director of the program.

(4) To establish and administer a revolving loan fund as provided under and subject to the options granted in Rule 33.09.

(5) To make reports to the Tennessee Supreme Court annually or as otherwise required.

E. Meetings. The Commission shall meet quarterly, upon call of the chair or upon the request of five (5) or more members. The Commission may invite non-Commission members, including representatives from other branches of government, lawyers, and members of the public, to attend meetings and to participate as members of advisory committees to help further the work of the Commission.

F. Advisory Committees. The Commission may create advisory committees to study specific issues identified by the Commission and to make such recommendations to the Commission as the members of the advisory committees deem appropriate.

33.03 Director of the Program

A. Appointment/Hire. The Court shall appoint the TLAP director, who shall serve at the pleasure of the Court. Following his or her appointment by the Court, the director shall report to the Ceommission, which shall conduct regular performance evaluations of the director and report such evaluations to the Court.

B. Qualifications. The director shall have sufficient experience and training to enable the director to identify and assist impaired members of the legal profession and to work well with the volunteers.

C. Duties and Responsibility. The director shall:

(1) Provide initial response to help line calls.

(2) Help lawyers, judges, law firms, courts and others to identify and intervene with impaired members of the legal profession.

(3) Help members of the legal profession and their families to secure expert counseling and treatment for chemical dependency and other illnesses, maintaining current information on available treatment services, both those that are available without charge as well as paid services.

(4) Establish and maintain regular contact with other bar associations, agencies and committees that serve either as sources of referral or resources in providing help.

(5) Establish and oversee monitoring services with respect to recovery of members of the legal profession for whom monitoring is appropriate under Rules 33.05(E) or 33.07.

(6) Plan and deliver educational programs for the legal community with respect to all sources of potential impairment as well as treatment and preventative measures.

(7) Provide information about TLAP services to members of the legal profession and their families.

(8) Recruit, select, train and coordinate the activities of volunteer counselors.

(9) To the extent authorized under Rule 33.09 below, and not prejudicial to fulfillment of the duties prescribed in the preceding subparagraphs (C)(1)-(8), participate in the

administration of the revolving loan fund established in Rule 33.09 and related functions assumed by any Supporting Organization established thereunder.

33.04 Volunteer Counselors

The program shall enlist volunteer counselors whose responsibility may include:

- A. Assisting in interventions planned by TLAP;
- B. Acting as twelve-step program sponsors;
- C. Acting as a contact between TLAP and law schools, courts, bar organizations and local committees;
- D. Providing compliance monitoring when appropriate; or
- E. Performing any other function deemed appropriate and necessary by the Commission to fulfill its purposes.

33.05 Services

TLAP shall provide the following services:

- A. Immediate and continuing assistance to members of the legal profession who suffer from physical or mental disabilities that result from disease, disorder, trauma or age and that impair their ability to practice;
- B. Planning and presentation of educational programs to increase the awareness and understanding of members of the legal profession to recognize problems in themselves and in their colleagues; to identify the problems correctly; to reduce stigma; and, to convey an understanding of appropriate ways of interacting with affected individuals;
- C. Investigation, planning and participation in interventions with members of the legal profession in need of assistance;
- D. Aftercare services upon request, by order, or under contract that may include the following: assistance in structuring aftercare and discharge planning; assistance for entry into appropriate aftercare and professional peer support meetings; and assistance in obtaining a primary care physician or local peer counselor; and
- E. Monitoring services under Rule 33.07 or under contract that may include the following: alcohol and/or drug screening programs; tracking aftercare, peer support and twelve step meeting attendance; providing documentation of compliance; and providing

such reports concerning compliance by those participating in a monitoring program as may be required by the terms of that program. There are three types of monitoring agreements.

(1) Voluntary Monitoring Agreement with no reporting party listed in the agreement.

The contract participant may request from TLAP letters of compliance addressed to the contract participant for the participant to provide to outside sources as he or she deems appropriate. TLAP or the contract participant may terminate the monitoring agreement at any time.

(2) Voluntary Monitoring Agreement with reporting to a non-disciplinary authority.

A contract participant may request monitoring with reporting to a non-disciplinary authority as the reporting designee. The reporting designee will receive a copy of the monitoring agreement and may request a status report at any time. The reporting designee will be notified if the client becomes substantially noncompliant. The contract participant, reporting designee, or TLAP may terminate the agreement at any time. If TLAP or the contract participant terminates the agreement, the reporting designee will be notified immediately.

(3) Monitoring Agreement requiring mandatory reporting to disciplinary or licensing authority.

A disciplinary or licensing authority, such as the Board of Law Examiners, Board of Professional Responsibility, or Board of Judicial Conduct, may request TLAP to conduct an evaluation of a law student, attorney or judge. The request shall be in writing from the disciplinary authority or licensing authority to both TLAP and the referred attorney, and may be by court order. Following the evaluation, TLAP will provide the disciplinary or licensing authority with a written summary of TLAP's recommendations. If monitoring is recommended by TLAP, the disciplinary or licensing authority will be listed as the reporting designee. The disciplinary or licensing authority shall be notified if the referred law student, attorney or judge becomes substantially noncompliant with the terms of the agreement. The disciplinary or licensing authority may request a status update concerning substantial noncompliance at any time. TLAP shall provide an affidavit upon request of any party to the proceedings. Upon conclusion of a proceeding of any licensing or disciplinary authority, the monitoring agreement shall end, unless continued monitoring is specifically required in writing for a specified period of time following the conclusion of a proceeding.

33.06 Referrals

A. Self-referral. Any member of the legal profession may seek assistance from TLAP.

B. Other Referrals. TLAP shall receive referrals concerning any member of the legal profession from family members, colleagues, friends, law firms or any other source.

33.07 Referrals From Board of Professional Responsibility, Board of Judicial Conduct, Board of Law Examiners or Other Disciplinary Agencies

A. Referrals. TLAP may accept referral of lawyers, judges or bar applicants under investigational, provisional or probational status with the Tennessee Board of Professional Responsibility, Tennessee Board of Judicial Conduct, Tennessee Board of Law Examiners or any disciplinary agency with disciplinary authority.

B. Progress Reports. When TLAP accepts a referral under Rule 33.07(A), which results in a recommendation for a monitoring agreement, with a disciplinary agency as a reporting party, TLAP shall provide progress reports or reports of substantial 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 Board of Judicial Conduct, the Tennessee Board of Law Examiners or a disciplinary agency with disciplinary authority.

33.08 Local Impaired Lawyer Assistance Programs

Subject to this rule and approval by TLAP, any bar association or other approved entity may establish an impaired lawyer program for the purpose of assisting lawyers with substance abuse problems, mental illness, or other impairments that may affect the lawyer's professional conduct. These programs are not agents of TLAP and have no authority to bind TLAP by their actions. Such approved programs shall operate as follows:

A. The program shall be governed by a committee which consists of not less than five (5) members, one of whom shall be designated as chair and one as vice-chair.

B. No member of the impaired lawyer program shall be a member of a district committee of the Board of Professional Responsibility of the Tennessee Supreme Court.

C. The program may investigate and evaluate allegations of substance abuse or mental impairment brought to its attention. Should the investigation or evaluation indicate that the lawyer does in fact suffer from substance abuse or mental impairment, the program may confer with the lawyer who is the subject of such allegation and make a recommendation to such lawyer. Such recommendation may include the sources of help

for such problems.

D. The program may create and facilitate lawyer support groups and meetings.

E. The program shall provide peer assistance only and shall not accept referrals for monitoring as a probationary or provisional condition imposed upon a lawyer by any court or disciplinary authority. The program shall refer lawyers in need of monitoring to TLAP. However, any monitoring contract executed by a local impaired lawyer program prior to the effective date of this amendment may continue until the end of the term of the contract.

F. The program shall maintain statistics of the number of referrals it receives. These statistics shall be reported in writing to the Director of the Tennessee Lawyers Assistance Program not later than July 31 of each calendar year.

33.09 Revolving Loan Fund

A. From the funds received under Rule 33.01(c)(2), TLAP may establish a revolving loan fund. Such fund shall be made available to impaired lawyers and judges under rules and regulations established by the Ceommission, as a low interest loan either for the purpose of maintaining client obligations or for defraying the cost of treatment.

B. Upon a resolution adopted by vote of the Commission chair and a majority in number of the other members of the Commission serving current terms at the time of such resolution, and delivery of a copy of such resolution to the Supreme Court with written certification of its authenticity by the secretary of the Commission, the Commission may in its sole discretion transfer all or any portion of the loan funds referred to in subparagraph 33.09(A) above, together with other assets directly incidental thereto, to an independent supporting organization (the "Supporting Organization") established pursuant to Section 509(a)(3) of the Internal Revenue Code of 1986, as amended (the "Code"), provided that the following conditions are met:

(1) The Supporting Organization must be a corporation duly organized and in good standing under the Tennessee Nonprofit Corporation Act.

(2) The Supporting Organization must have received approval from the Internal Revenue Service as exempt from taxation under Section 501(c)(3) of the Code, and be structured as a "public charity" and "Type 2" supporting organization thereunder.

(3) The Supporting Organization's charter must provide that it is organized to support TLAP and will engage solely in activities which support or benefit TLAP. These activities include (without limitation) administration of the loan funds transferred to and/or subsequently acquired by it; solicitation and acceptance of charitable contributions

for addition to pre-existing loan funds; financing the participation of TLAP clients, Commissioners, and staff in mission-relevant activities requiring payment of fees and/or incurrence of expense (such as the event currently known as “Camp TLAP” and activities of the American Bar Association Commission on Lawyer Assistance Programs); and such other activities reasonably deemed beneficial to the recovery of Tennessee lawyers, law students, bar admission applicants, and Judges from impairments that jeopardize their well-being, clients, or the administration of Justice.

(4) The Supporting Organization’s charter and bylaws (if applicable) must provide that a majority in number of its board of directors must be comprised of persons who, throughout their term on such board, are also members of the TLAP Commission serving current terms as such.

(5) The Supporting Organization’s charter must provide that it will keep all books and records and make all governmental filings required to maintain its good corporate standing and tax-exempt qualifications under applicable Tennessee and federal law; that it will keep such books of accounts including any financial statements compiled therefrom in conformity with accounting principles applicable to it (which if otherwise compliant need not be the same accounting principles or practices employed by the State of Tennessee with respect to the TLAP Commission itself); and that it will timely provide the Supreme Court with materially accurate and complete annual and quarterly statements of its assets, liabilities, income, and expenses for the period reported therein, and promptly furnish the Court with any and all other information relating to its operations which the Court may direct from time to time.

The certified copy of the resolution delivered to the Supreme Court to effectuate the funds transfer prescribed in this subparagraph 33.09(B) shall be duplicated and also provided to the Administrative Office of the Courts, together with identification of the bank account or accounts of the Supporting Organization to which the affected loan funds are to be transferred. Promptly upon receipt of such documents and information, the Administrative Office of the Courts shall, under authority of this Rule 33.09, transfer such funds by check or electronic means to the designated account(s).

The TLAP Commission may likewise assign, endorse (without recourse) and transfer to the Supporting Organization all assets constituting and/or directly related to transferred loan funds and loan program operations, including (without limitation) accounts receivable, promissory notes, security agreements, physically possessed collateral, payment records, loan applications and files, loan underwriting information, records of Commission loan committee approval and other relevant action, correspondence regarding default, modification and extension agreements, contracts with outside collection firms, and copies of cross-defaulting Monitoring Agreements. The Supporting Organization shall assume the Commission’s liability, if any, with respect to the funding of any loan which the Commission has committed to a borrower or directly-paid provider

(such as a treatment center) to fund but not yet funded at the time of the associated loan transfer, provided the Supporting Organization has received cash sufficient to perform such funding itself.

The TLAP Commission may, in its discretion, permit its staff members to assist the Supporting Organization in its mission and operations on any basis which does not impair any staff member's performance of his or her duties to the Commission or TLAP programming and does not cause any violation of any policy of the Court or the State of Tennessee requiring in substance that employees devote full time and attention to their duties as such. The TLAP Commission also may, in its discretion, permit the Supporting Organization to utilize the facility referred to in Rule 33.12 so long as such use does not impair TLAP's continuing operations or constitute or cause a breach of any lease agreement to which the Commission is either directly or indirectly a party.

All information received or generated by the Supporting Organization and its directors, officers, employees, and persons volunteering service in its operations shall be included in the scope of the confidentiality provisions in Rule 33.10; and all such persons shall be entitled to the immunity prescribed in Rule 33.11.

No funds transferred pursuant to this Rule 33.09(B) shall be or be deemed as, or have any relation to, the funds referred to in Rule 33.01(C)(1).

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 Board of Judicial Conduct, Tennessee Board of Law Examiners or other disciplinary agency with jurisdiction.

B. Commission members, employees, and agents, including volunteers recruited under Rule 33.04, and committee members, employees, and agents, including 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.

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, or agents, including 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 17.

B. Commission members, employees and agents, including volunteers recruited under Rule 33.04, as well as committee members, employees, and agents, including 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 17.

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

[Amended by order filed September 17, 2002.]

33.12 Facility

The TLAP office shall be so located as to be consistent with the privacy and confidentiality requirements of this rule.

33.13 Program review

TLAP shall be reviewed annually by the Tennessee Supreme Court and shall remain in full force and effect until otherwise ordered by the Tennessee Supreme Court.

[Added by order filed January 7, 1999, and amended by order filed April 25, 2006, effective July 1, 2006, by order filed December 7, 2006, by order filed February 26, 2013, effective March 1, 2013; and by order filed August 30, 2013, effective January 1, 2014; and amended by order filed August 18, 2014.]