

TENNESSEE COUNTY ATTORNEY'S ASSOCIATION

PRESENTED BY LAURA CHASTAIN

ETHICS COUNSEL

BOARD OF PROFESSIONAL RESPONSIBILITY

APRIL 26, 2019



ETHICAL CHALLENGES FOR PUBLIC SECTOR LAWYERS

HOW ARE GOVERNMENT LAWYERS DIFFERENT ?



GOALS, AUTHORITY, APPLICABLE LAW

PRIVATE ENTITIES HAVE WELL DEFINED OBJECTIVES (GOALS)

GOVERNMENT'S GOAL IS BROAD AND VAGUE: ACT IN THE PUBLIC INTEREST.

PRIVATE ENTITIES HAVE RELATIVELY CLEAR LINES OF AUTHORITY.

GOVERNMENT MORE DIFFUSE AND GOVERNMENT LAWYERS MAY HAVE MORE DISCRETION IN SOME SITUATIONS THAN LAWYERS REPRESENTING PRIVATE ORGANIZATIONS.

FOR EXAMPLE:

TN RULES OF PROFESSIONAL CONDUCT, SCOPE(19)

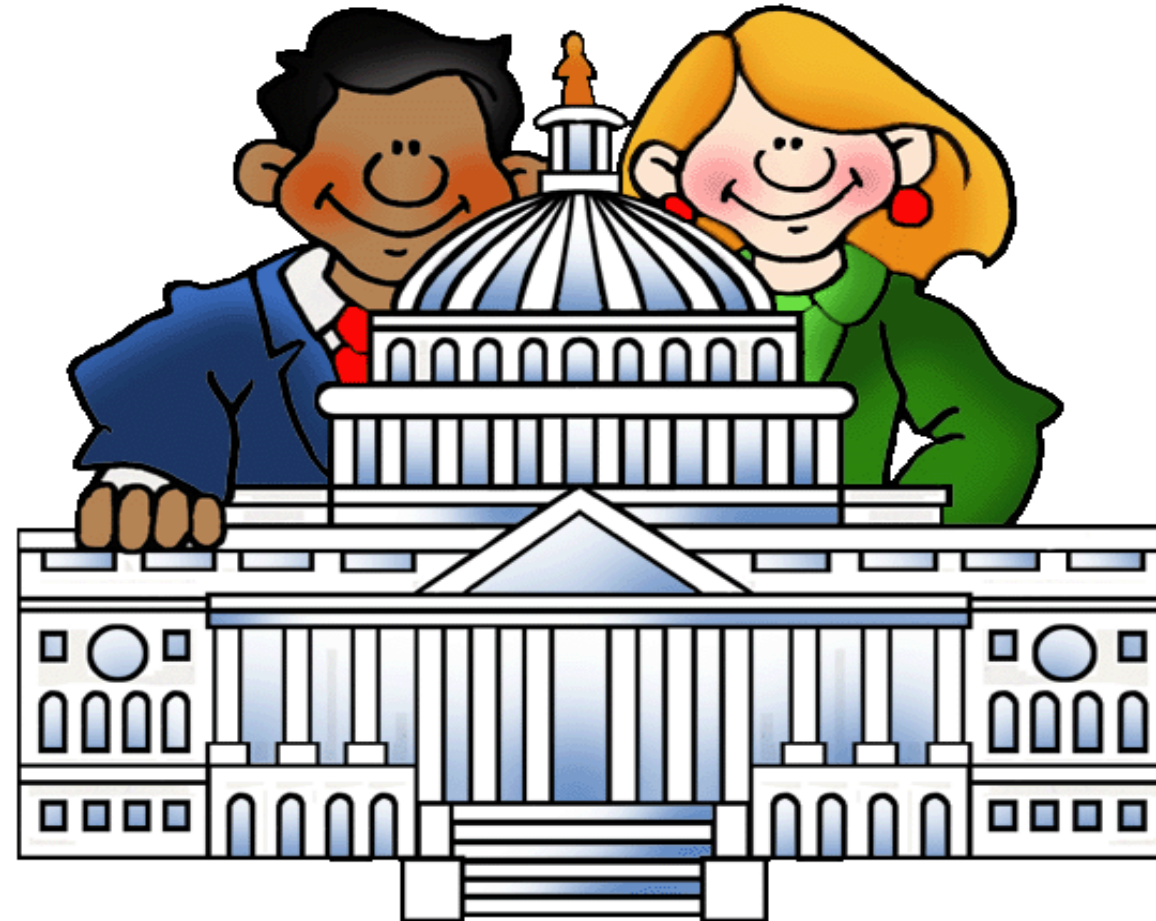
“...THE RESPONSIBILITIES OF GOVERNMENT LAWYERS MAY DIFFER FROM THOSE OF LAWYERS IN PRIVATE CLIENT-LAWYER RELATIONSHIPS. CERTAIN GOVERNMENT LAWYERS MAY BE AUTHORIZED TO REPRESENT SEVERAL GOVERNMENT AGENCIES, OFFICERS, OR EMPLOYEES IN LEGAL CONTROVERSIES IN CIRCUMSTANCES WHERE A PRIVATE LAWYER COULD NOT REPRESENT MULTIPLE CLIENTS.”

“...THEY MAY HAVE AUTHORITY TO REPRESENT THE ‘PUBLIC INTEREST’ IN CIRCUMSTANCES WHERE A PRIVATE LAWYER WOULD NOT BE AUTHORIZED TO DO SO.”

ENABLING AUTHORITY

MOST GOVERNMENT LAWYER' S OBLIGATIONS AND DUTIES ARE SET FORTH IN THEIR ENABLING AUTHORITY BY STATUTE OR CHARTER.

FOR MOST COUNTY ATTORNEYS, THE SCOPE OF REPRESENTATION IS SET OUT IN THE COUNTY CHARTER.



LEGISLATURE HAS NOT CREATED THE OFFICE OF COUNTY ATTORNEY AS A GENERAL LAW APPLICABLE TO ALL COUNTIES

IN COUNTIES HAVING A POPULATION OF LESS THAN 400,000 THAT ADOPT THE COUNTY MANAGER FORM OF GOVERNMENT ARE REQUIRED TO HAVE A COUNTY, ATTORNEY, BUT THERE IS NO SUCH REQUIREMENT OF OTHER COUNTIES.

THE DUTIES OF COUNTY ATTORNEYS DESCRIBED IN THE STATUTE APPLICABLE TO COUNTIES WHO ADOPT THE MANAGER FORM OF GOVERNMENT MIGHT OR MIGHT NOT INCLUDE REPRESENTING THE SHERIFF AND HIS DEPUTIES.

T.C.A. 5-15-305

NOT ALL TENNESSEE COUNTIES HAVE A COUNTY ATTORNEY.

T.C.A. 5-6-112 SET OUT THE POWERS AND DUTIES OF COUNTY EXECUTIVES AND PROVIDES: “IF THERE BE NO COUNTY ATTORNEY”, THE COUNTY EXECUTIVE MAY EMPLOY AN ATTORNEY TO ADVISE HIM AND THE LEGISLATIVE BODY OF THE COUNTY. ADDITIONAL DUTIES ARE LISTED WHICH APPARENTLY WOULD NOT INCLUDE REPRESENTING THE SHERIFF OR HIS DEPUTIES.

COUNTY ATTORNEYS HAVE MANY ETHICAL CHALLENGES

THE QUESTIONS THAT COUNTY ATTORNEYS ASK ME ABOUT THE MOST, INVOLVE CONFLICTS OF INTEREST.

LAST YEAR THERE WERE 705 CONFLICT OF INTEREST QUESTIONS POSED FOR ADVISORY OPINIONS.

CONFLICTS OF INTEREST—MAJOR CONCERN FOR COUNTY ATTORNEYS



WHO IS THE COUNTY ATTORNEY'S CLIENT ?

THIS IS AN IMPORTANT QUESTION FOR A COUNTY ATTORNEY TO ANSWER BECAUSE THE ATTORNEY HAS A DUTY TO SAFEGUARD HIS OR HER CLIENT'S CONFIDENCES.

ALSO THE COUNTY ATTORNEY HAS THE DUTY TO AVOID CONFLICTS OF INTEREST.

MANY CONFLICTS QUESTIONS CAN BE
RESOLVED BY KNOWING THE IDENTITY OF
YOUR CLIENT.



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THE UNDERLYING RULE OF PROFESSIONAL CONDUCT IS 1.13

“A LAWYER EMPLOYED OR RETAINED BY AN ORGANIZATION REPRESENTS THE ORGANIZATION ACTING THROUGH ITS DULY AUTHORIZED CONSTITUENTS.”

WHO ARE THE CONSTITUENTS ?

COUNTY OFFICIALS

COUNTY EMPLOYEES

COUNTY COMMISSIONERS

AGENTS OF THE COUNTY

THE FOLLOWING HYPOTHETICALS
EXPLORE SOME OF THE CONFLICTS OR

POTENTIAL CONFLICTS COUNTY
ATTORNEYS FACE.

HYPOTHETICAL 1

ATTORNEY A IS PART TIME COUNTY ATTORNEY. HIS OFFICE HANDLES CRIMINAL DEFENSE WORK. DOES HIS POSITION AS A PUBLIC OFFICIAL CONFLICT HIS LAW FIRM OUT OF THE DEFENSE OF CRIMINAL CASES IN HIS COUNTY?

THE ANSWER: IT DEPENDS....



EACH CASE MUST BE EXAMINED ON A CASE BY CASE BASIS

STATE OF TENNESSEE VS. JESSE JONES, IN RE: LARRY S. BANKS, ATTORNEY, 726 S.W.2d 515 (TENN. 1987).

This case set aside Formal Ethics Opinion 83-F-41 which unequivocally declared “county attorneys cannot represent criminal defendants prosecuted by county officers.” It also held partners and associates of the county attorney were disqualified.

The Supreme Court held that county attorneys and their partners are not per se disqualified from representing criminal defendant, even though defendant is being prosecuted by county officers.

THE TENNESSEE SUPREME COURT FOUND THAT OPINION 83-F-41 WAS OVERBROAD

“CONFLICTS OF INTEREST, BOTH ACTUAL AND PERCEIVED, CANNOT BE DEALT WITH BY SUCH SWEEPING BLANKET PRONOUNCEMENTS. THERE MAY BE COUNTIES IN THIS STATE, WHERE, UPON EXAMINATION BY THE TRIAL JUDGE OF THE LAWYER-CLIENT RELATIONSHIP BETWEEN THE COUNTY ATTORNEY AND THE SHERIFF OR UPON EXAMINATION OF THE PERCEPTION OF THE COMMUNITY OF THAT RELATIONSHIP, DISQUALIFICATION OF THE COUNTY ATTORNEY WOULD BE NECESSARY. BUT, **UNLESS AND UNTIL SUCH AN ADJUDICATION IS MADE UPON AN ADEQUATE FACTUAL RECORD**, EACH APPOINTMENT SHOULD BE EXAMINED AND A DETERMINATION MADE CONCERNING WHETHER ANY ACTUAL OR PERCEIVED CONFLICT OF INTEREST EXISTS THAT WOULD PREJUDICE THE DEFENSE OF THE CASE UNDER CONSIDERATION.”

ONE ASPECT TO EXAMINE

THE COURT HELD THAT IN DECIDING WHETHER THE DEFENDANT IS “BEING PROSECUTED BY COUNTY OFFICERS”, SO THAT THE COUNTY ATTORNEY MIGHT BE APPROPRIATELY DISQUALIFIED FROM ACTING AS THE DEFENDANT’S ATTORNEY, THE TRIAL COURT SHOULD DETERMINE *THE MATERIALITY OF THE TESTIMONY OF THE SHERIFF AND DEPUTIES IN MAKING OUT THE STATE’S PROOF.*

A SECOND ASPECT TO EXAMINE:

WHAT IS THE ATTORNEY CLIENT RELATIONSHIP BETWEEN THE COUNTY ATTORNEY AND THE SHERIFF?

DOES THE COUNTY ATTORNEY **REPRESENT** THE SHERIFF'S OFFICE?

WHAT DOES THAT REPRESENTATION ENTAIL? REPRESENTATION OF SHERIFF'S OFFICE EMPLOYEES, STAFF, DEPUTIES ?

BASICALLY: WHO IS THE COUNTY ATTORNEY'S CLIENT ?

FINALLY THE ROLE OF THE SHERIFF AND/OR DEPUTIES IN THE CASE IS TO BE EXAMINED

IS THE SHERIFF A MATERIAL WITNESS?

IN THE BANKS CASE THE SHERIFF WAS NOT A MATERIAL WITNESS.

IS A SHERIFF'S DEPUTY A MATERIAL WITNESS ? DOES THE COUNTY ATTORNEY HAVE AN ATTORNEY CLIENT RELATIONSHIP WITH THE DEPUTY ?

AFTER BANKS THE BOARD OF PROFESSIONAL RESPONSIBILITY ISSUED

FORMAL ETHICS OPINION 86-F-107(a) WHICH HELD:

“IN ALL MATTERS INVOLVING GOVERNMENTAL INTERESTS AND DIFFERING INTERESTS THE QUESTION OF A CONFLICT OF INTEREST IS A FACTUAL ONE DEPENDING UPON THE USE OF THE *ATTORNEY’S INFLUENCE TO AFFECT THE OUTCOME* OR DECISION IN THE PARTICULAR MATTER UNDER CONSIDERATION, OR, WHETHER THE *ATTORNEY’S PROFESSIONAL JUDGMENT ON BEHALF OF A CLIENT WAS OR WILL BE IN FACT AFFECTED* BY HIS INTEREST AS A PUBLIC OFFICIAL OR GOVERNMENT ATTORNEY. THERE IS NO PRESUMPTION OF IMPROPRIETY.”

NOW BACK TO OUR HYPOTHETICAL 1

ATTORNEY A IS PART TIME COUNTY ATTORNEY. HIS OFFICE HANDLES CRIMINAL DEFENSE WORK. DOES HIS POSITION AS A PUBLIC OFFICIAL CONFLICT HIS LAW FIRM OUT OF THE DEFENSE OF CRIMINAL CASES IN HIS COUNTY?

WHAT WE KNOW....

WE HAVE TO EXAMINE EACH CASE ON A CASE BY CASE BASIS. THERE IS NO BLANKET RULE.

ADDITIONAL FACTS:

ATTORNEY A'S REPRESENTATION OF THE COUNTY CONSISTS OF PROVIDING GENERAL LEGAL ADVICE TO THE MAYOR, COUNTY COMMISSION, AND VARIOUS ELECTED OFFICIALS AND DEPARTMENT HEADS WITHIN COUNTY GOVERNMENT. HE PROVIDES LEGAL ADVICE TO THE COUNTY SHERIFF, BUT DOES NOT PROVIDE LEGAL ADVICE OR SERVE AS COUNSEL TO THE SHERIFF'S EMPLOYEES OR STAFF IN THEIR ROLE AS LAW ENFORCEMENT OFFICERS OR DEPUTIES. THE LEGAL COUNSEL TO THE SHERIFF IS REGARDING EMPLOYMENT MATTERS SUCH AS GIVING ADVICE ON DISCIPLINARY ACTIONS TO BE TAKEN AGAINST LAW ENFORCEMENT DEPUTIES AND PERSONNEL WITHIN THE SHERIFF'S OFFICE, RESPONDING TO EMPLOYMENT COMPLAINTS, REVIEWING AND DRAFTING CONTRACTS RELATED TO THE OPERATION OF THE DEPARTMENT AND COUNTY JAIL AND REVIEWING PERSONNEL POLICIES.

ADDITIONAL FACTS:

COUNTY ATTORNEY A DOES NOT PROVIDE TRAINING TO THE SHERIFF'S STAFF OR DEPUTIES ON THE HANDLING OF ANY PARTICULAR CRIMINAL MATTERS. RATHER, THE SHERIFF'S OFFICE RELIES ON THE DISTRICT ATTORNEY GENERAL'S OFFICE FOR SUCH ADVICE AND COUNSEL, OR ON OTHER LAW ENFORCEMENT AGENCIES.

COUNTY ATTORNEY A ACKNOWLEDGES THAT SO LONG AS HE SERVES AS COUNTY ATTORNEY, IT IS A CONFLICT OF INTEREST FOR HIS FIRM TO REPRESENT CRIMINAL DEFENDANTS IN ANY MATTER IN WHICH THE SHERIFF HIMSELF IS A MATERIAL WITNESS.

THE SPECIFIC CASE:

COUNTY ATTORNEY A'S LAW FIRM WAS RETAINED BY A DEFENDANT IN A CRIMINAL CASE. THE MATERIAL WITNESS IS A COUNTY SHERIFF'S DEPUTY.

DOES COUNTY ATTORNEY A'S LAW FIRM HAVE A CONFLICT OF INTEREST ?

IS THE SHERIFF'S OR DEPUTY'S TESTIMONY MATERIAL EVIDENCE?

A SHERIFF'S DEPUTY'S TESTIMONY WILL BE MATERIAL
EVIDENCE.

BASED ON THE NATURE OF THE
PROFESSIONAL SERVICES PROVIDED TO THE
SHERIFF, DOES ATTORNEY A HAVE A
CONFLICT?

COUNTY ATTORNEY A DOES NOT HAVE A PERSONAL REPRESENTATIVE RELATIONSHIP WITH THE DEPUTIES. IN FACT, AT TIMES HE IS GIVING THE SHERIFF ADVICE ON DISCIPLINARY ACTIONS TO TAKE AGAINST LAW ENFORCEMENT DEPUTIES.

HE DOES NOT PROVIDE COUNSEL TO DEPUTIES ON CRIMINAL MATTERS

TENNESSEE FORMAL ETHICS OPINION 2002-F-107(b)

IN ALL MATTERS INVOLVING GOVERNMENTAL INTERESTS AND DIFFERING INTEREST EXCEPT FOR THE QUESTION OF DISTRICT ATTORNEYS' AND STATE PROSECUTORS' ABILITY TO REPRESENT CRIMINAL DEFENDANTS, THE QUESTION OF CONFLICT OF INTEREST IS A FACTUAL ONE TO BE EXAMINED AND DETERMINED ON A CASE BY CASE BASIS.

THERE ARE NO FACTS TO SUPPORT:

1. THAT COUNTY ATTORNEY A'S FIRM IS USING COUNTY ATTORNEY A'S INFLUENCE AS A PUBLIC OFFICIAL TO AFFECT THE OUTCOME OF THE CASES; OR

2. THAT THE FIRM'S JUDGMENT ON BEHALF OF THE DEFENDANT WILL BE AFFECTED BY ATTORNEY A'S INTEREST AS COUNTY ATTORNEY.

IN THIS SPECIFIC CASE THERE IS NO
CONFLICT.



HYPOTHETICAL 2

IN A CRIMINAL CASE THE DEFENDANT PLED GUILTY TO SECOND DEGREE MURDER AND AGGRAVATED ASSAULT. DEFENDANT APPEALS FROM DISMISSAL OF HIS PETITION FOR POST-CONVICTION RELIEF AND ARGUED HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS ATTORNEY HAD A CONFLICT OF INTEREST.

HE WAS REPRESENTED BY A PART-TIME PUBLIC DEFENDER WHO ALSO SERVES AS COUNTY ATTORNEY.

THE DEFENDANT ARGUES THAT:

DUE TO HIS ATTORNEY'S ROLE AS COUNTY ATTORNEY FOR THE SAME COUNTY AND HIS INTERACTION WITH VARIOUS DEPARTMENTS, INCLUDING THE SHERIFF'S DEPARTMENT, WHO ASSISTED IN THE APPREHENSION OF THE DEFENDANT, THE ATTORNEY HAD A DIRECT CONFLICT BETWEEN HIS DUTIES AS COUNTY ATTORNEY AND AS DEFENDANT'S APPOINTED ATTORNEY.

ADDITIONAL FACTS:

THE INVESTIGATION IN THE CASE WAS CONDUCTED
PRIMARILY BY THE CITY POLICE DEPARTMENT AND NOT BY
THE SHERIFF'S OFFICE.

DOES THE COUNTY ATTORNEY HAVE A CONFLICT OF INTEREST ?



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“NO SHOWING WAS MADE THAT AN ACTUAL OR PERCEIVED CONFLICT OF INTEREST EXISTED.” *SMITH V. STATE OF TENNESSEE 2002 WL 1482697 (March 8, 2002) (TENN. CRIM. APP. 2002).*

THE COURT OF CRIMINAL APPEALS FOUND THAT THE COUNTY ATTORNEY WHO WAS ALSO PART-TIME PUBLIC DEFENDER DID NOT HAVE A CONFLICT, BECAUSE THERE WAS NO EVIDENCE IN THE RECORD THAT A CONFLICT EXISTED.

HYPOTHETICAL 3

Law firm currently represents a City in various cases and also represents a County in several other cases unrelated to the litigation with the City. Recently, Law Firm received a request to represent the City in another case which also involves the County. The County and the City will most likely be required to allege fault against one another. The County has asked Law Firm to represent it.

Law Firm is trying to determine whether, pursuant to Rule 1.7(b), the firm would be able to take the newest case on behalf of the County if each entity signed a waiver?

If Law Firm keeps the City case, would the City still be able to allege fault against the County even though Law Firm would maintain unrelated cases on behalf of the County? The current litigation Law Firm handles for the County involves the Jail, while the new case involves a separate agency, the EMS Department.

RPC 1.7(a)

EXCEPT AS PROVIDED IN PARAGRAPH (b), A LAWYER SHALL NOT REPRESENT A CLIENT IF THE REPRESENTATION INVOLVES A CONCURRENT CONFLICT OF INTEREST. A CONCURRENT CONFLICT OF INTEREST EXISTS IF:

1. THE REPRESENTATION OF ONE CLIENT WILL BE DIRECTLY ADVERSE TO ANOTHER CLIENT.
2. THERE IS A SIGNIFICANT RISK THAT THE REPRESENTATION OF ONE OR MORE CLIENTS WILL BE MATERIALLY LIMITED BY THE LAWYER'S RESPONSIBILITIES TO ANOTHER CLIENT, A FORMER CLIENT, OR A THIRD PERSON OR BY A PERSONAL INTEREST OF THE LAWYER.

RPC 1.7(b)

NOTWITHSTANDING THE EXISTENCE OF A CONCURRENT CONFLICT OF INTEREST UNDER PARAGRAPH (a) A LAWYER MAY REPRESENT A CLIENT IF:

1. THE LAWYER REASONABLY BELIEVES THAT THE LAWYER WILL BE ABLE TO PROVIDE COMPETENT AND DILIGENT REPRESENTATION TO EACH AFFECTED CLIENT.
2. THE REPRESENTATION IS NOT PROHIBITED BY LAW.

3. THE REPRESENTATION DOES NOT INVOLVE THE
ASSERTION OF ONE CLIENT AGAINST ANOTHER CLIENT

REPRESENTED BY THE LAWYER IN THE SAME LITIGATION OR
OTHER PROCEEDING BEFORE A TRIBUNAL.

4. EACH AFFECTED CLIENT GIVES INFORMED CONSENT,
CONFIRMED IN WRITING.

WHAT IS “INFORMED CONSENT”



RPC 1.0 (e) INFORMED CONSENT

“INFORMED CONSENT” 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.

CAN A MUNICIPALITY GIVE INFORMED CONSENT ?

ALTHOUGH SOME STATES HOLD THAT A GOVERNMENTAL ENTITY CANNOT GIVE INFORMED CONSENT, TENNESSEE HOLDS THAT A “GOVERNMENT OFFICIAL OR ENTITY, LIKE ANY OTHER CLIENT, MAY WAIVE A CONFLICT OF INTEREST UNDER THIS RULE. Tenn. Sup. Ct. Rule 8 RPC 1.7 cmt. (19a).”

PFIZER, INC. and Pharmacia Corp v. Reagan FARR, Commissioner of Revenue, State of Tennessee, 2012 WL 2370619 (Tenn. Ct. App. 2012)

BACK TO HYPOTHETICAL 3

Law Firm is trying to determine whether, pursuant to Rule 1.7(b), the firm would be able to take the newest case on behalf of the County if each entity signed a waiver?

If Law Firm keeps the City case, would the City still be able to allege fault against the County even though Law Firm would maintain unrelated cases on behalf of the County? The current litigation Law Firm handles for the County involves the Jail, while the new case involves a separate agency, the EMS Department.

ANSWERS:

1. Law Firm is trying to determine whether, pursuant to Rule 1.7, the firm would be able to keep the newest case on behalf of the County if each entity signed a waiver?

ANSWER: NO WHY?

1.7(b) WAIVERS **CANNOT** BE USED WHEN ONE CLIENT IS DIRECTLY ADVERSE TO ANOTHER CLIENT REPRESENTED BY THE LAWYER IN THE **SAME LITIGATION OR PROCEEDING BEFORE A TRIBUNAL.**

2. If Law Firm keeps the City case, would the City still be able to allege fault against the County even though Law Firm would maintain unrelated cases on behalf of the County? The current litigation Law Firm handles for the County involves the Jail, while the new case involves a separate agency, the EMS Department.

ANSWER: YES

WHY?

If all the requirements of 1.7(b) can be met Law Firm could keep the newest case for the City, with waivers from the County and the City because the only thing that is not waivable is the “assertion of a claim by one client against another client represented by the lawyer in the **same** litigation or other proceeding before a tribunal.”

WHAT SHOULD LAW FIRM CONSIDER IN OBTAINING “INFORMED CONSENT” ?

1. HAVE A SEPARATE VERBAL COMMUNICATION WITH EACH CLIENT AND CLEARLY IDENTIFY EACH CLIENT TO THE OTHER AND ADVISE EACH CLIENT OF YOUR RELATIONSHIPS WITH THE OTHER.
2. INCLUDE IN YOUR COMMUNICATION A DISCUSSION THAT IS IN SIMPLE TERMS TO ASSURE THAT THE CLIENT UNDERSTANDS ALL OF THE ISSUES.

3. ASK CLIENTS IF THEY HAVE ANY QUESTIONS ABOUT THESE MATTERS.

4. ANSWER ALL OF THEIR QUESTIONS.

5. ADVISE THE CLIENTS THAT YOU WILL BE SENDING THEM A LETTER CONTAINING ALL THE INFORMATION CONTAINED IN YOUR VERBAL EXPLANATION AND THAT YOU WILL NOT BE ABLE TO PROCEED WITHOUT RECEIVING THEIR VERBAL CONSENT, TO BE FOLLOWED UP BY THEIR INFORMED WRITTEN CONSENT.

6. DESCRIBE THE CIRCUMSTANCES THAT CREATE A CONFLICT.

7. OBTAIN CLIENTS' INFORMED CONSENT IN WRITING.

8. ADVISE THE CLIENT OF THE SERIOUSNESS OF THE DECISION SO AS TO AVOID DISPUTES OR AMBIGUITIES THAT MIGHT LATER OCCUR.

9. ADVISE EACH CLIENT THAT ONCE THEY GIVE THEIR CONSENT, THEY MAY LATER REVOKE IT, AND LIKE ANY OTHER CLIENT, TERMINATE YOUR REPRESENTATION AT ANYTIME.

10. SUGGEST THAT EACH CLIENT SEEK INDEPENDENT LEGAL ADVICE AND GIVE THE CLIENTS OPPORTUNITY TO SEEK SUCH ADVICE.

HYPOTHETICAL 4

LAWYER X, THE COUNTY CRIMINAL COURT JUDGE, RESIGNS TO BECOME COUNTY DISTRICT ATTORNEY GENERAL. A CASE IN WHICH LAWYER X SIGNED SEVERAL INDICTMENTS THAT WERE RETURNED BY THE GRAND JURY AGAINST A CRIMINAL DEFENDANT. LAWYER X RULED ON SEVERAL MOTIONS IN THE CASE AGAINST THE DEFENDANT. AFTER LAWYER X BECAME THE COUNTY DISTRICT ATTORNEY HE HAD SEVERAL LENGTHY DISCUSSIONS WITH THE ASSISTANT DA ASSIGNED TO PROSECUTE THE DEFENDANT.

ADDITIONAL FACTS:

THE RECORD INDICATES THAT DEFENSE COUNSEL MADE SEVERAL EX PARTE APPEARANCES BEFORE LAWYER X AS JUDGE IN AN EFFORT TO OBTAIN THE FUNDS NECESSARY FOR THE ASSISTANCE OF EXPERT SERVICES. DEFENSE COUNSEL RECALLS SEVERAL BRIEF EX PARTE STATUS REPORTS TO LAWYER X, AS JUDGE.

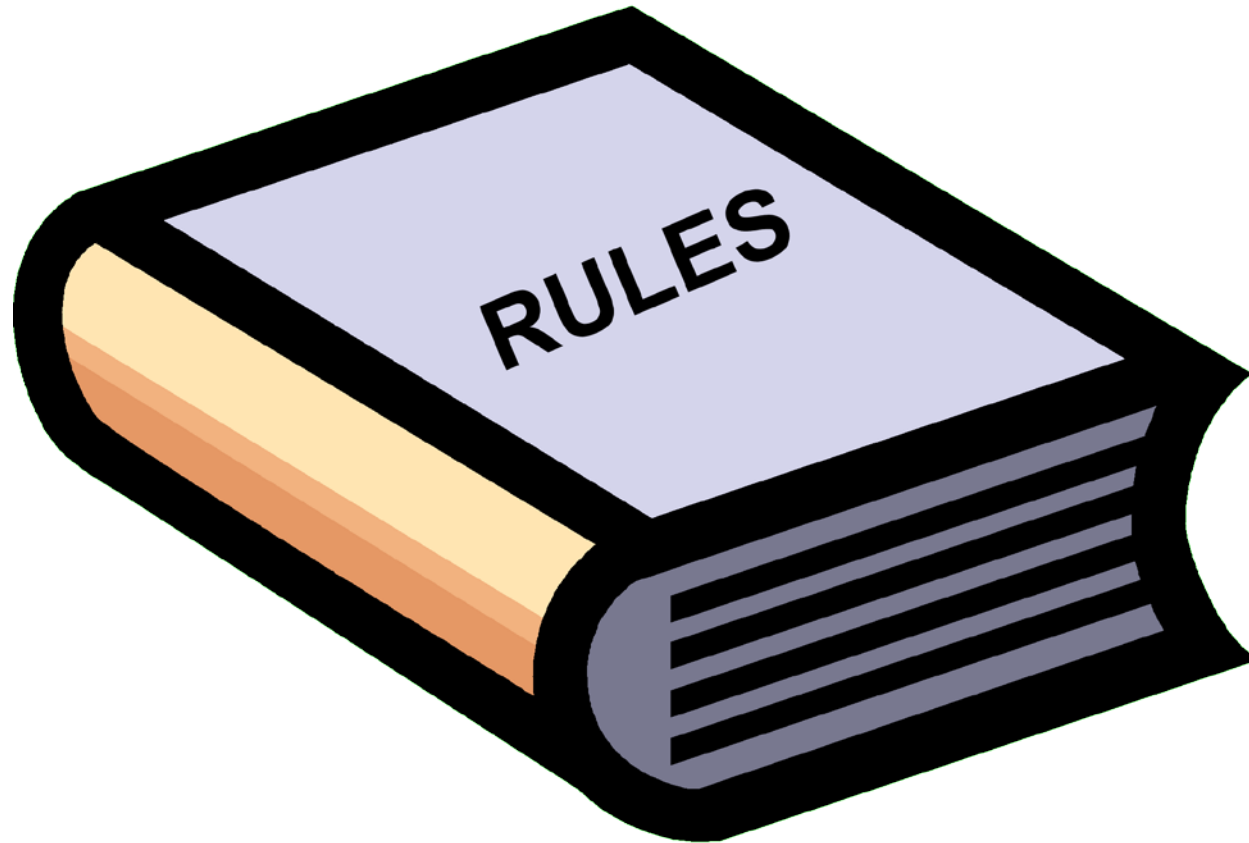
SOME OF THE INFORMATION REVEALED BY DEFENSE COUNSEL IN THE PRIVATE HEARING HAD BEEN PROVIDED BY THE DEFENDANT OR MEMBERS OF HIS FAMILY.

SHOULD THE ENTIRE OFFICE OF THE DISTRICT ATTORNEY GENERAL BE DISQUALIFIED FOR CONFLICT OF INTEREST ?



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WHICH RULE APPLIES ?



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RPC 1.12

A LAWYER SHALL NOT REPRESENT ANYONE IN CONNECTION WITH A MATTER IN WHICH THE LAWYER PARTICIPATED PERSONALLY AND SUBSTANTIALLY AS A JUDGE OR OTHER ADJUDICATIVE OFFICER OR LAW CLERK OR STAFF ATTORNEY TO SUCH A PERSON OR AS AN ARBITRATOR, UNLESS ALL PARTIES TO THE PROCEEDING GIVE INFORMED CONSENT, CONFIRMED IN WRITING.

*STATE V. TATE, 925 S.W.2d 548 (Tenn.
Crim. App. 1995)*

THE FACTS IN THIS HYPOTHETICAL WERE TAKEN FROM THE ABOVE CASE.

THE COURT ON INTERLOCUTORY APPEAL HELD: “...THE RECORD HAS ESTABLISHED AN ACTUAL CONFLICT OF INTEREST. IN OUR VIEW, THERE WAS AN ACTUAL CONFLICT OF INTEREST BECAUSE GENERAL NICHOLS, WHILE JUDGE, RECEIVED CONFIDENTIAL COMMUNICATIONS IN THE STATUTORILY AUTHORIZED EX PARTE PROCEEDINGS. DISQUALIFICATION MUST RESULT.”

THE COURT WENT FURTHER AND DISQUALIFIED THE ENTIRE OFFICE.

GENERAL NICHOLS ADMITTED THAT HE DID NOT SCREEN HIMSELF OFF BUT PARTICIPATED BY OPENLY DISCUSSING THE CASE WITH THE ASSISTANT ASSIGNED TO UNDERTAKE THE PROSECUTION.

“THE PERCEPTION OF A FAIR TRIAL IS JUST AS IMPORTANT AS THE REALITY. IN OUR VIEW, THE ONLY MEANS OF PRESERVING THE PUBLIC CONFIDENCE IN THE CONDUCT OF THIS TRIAL IS TO REQUIRE THE APPOINTMENT OF AN ENTIRELY NEW PROSECUTION TEAM.”

HYPOTHETICAL 5

A COUNTY COMMISSIONER WHO VOTES AND MAKES DECISIONS REGULATING AND MANAGING THE COUNTY'S LAW ENFORCEMENT PROGRAM, ASKS YOU, THE COUNTY ATTORNEY, WHETHER HE WOULD HAVE A CONFLICT IN REPRESENTING CRIMINAL DEFENDANTS BEING PROSECUTED BY COUNTY LAW ENFORCEMENT OFFICERS?

FORMAL ETHICS OPINION 86-F-105

THE PUBLIC BODY WHICH THE ATTORNEY SERVES AS AN ELECTED REPRESENTATIVE OF THE PEOPLE IS OBLIGATED TO PROVIDE THE CITIZENS WITH AN EFFECTIVE LAW ENFORCEMENT PROGRAM. THE PUBLIC BODY AND CRIMINAL DEFENDANTS HAVE INTERESTS THAT ARE DIVERSE. EACH HAS A RIGHT TO THE INDEPENDENT JUDGMENT AND LOYALTY OF THE ATTORNEY-COMMISSIONER FREE OF ANY IMPAIRMENT OR COMPROMISING INFLUENCES.

continued

THE ATTORNEY MAY NOT BREACH HIS FIDUCIARY DUTY AS A PUBLIC OFFICIAL IN REPRESENTATION OF PRIVATE INTERESTS AGAINST THE PUBLIC BODY HE REPRESENTS AND IS, THEREFORE, PROHIBITED FROM REPRESENTING CRIMINAL DEFENDANTS PROSECUTED BY COUNTY LAW ENFORCEMENT OFFICERS.

ANOTHER CHALLENGE FOR COUNTY ATTORNEYS IS CONFIDENTIALITY



IN ORDER TO ASSESS A COUNTY
ATTORNEY'S CONFIDENTIALITY
OBLIGATIONS THE QUESTION TO ASK :



WHO IS YOUR CLIENT ?



WHO HAS ATTORNEY CLIENT PRIVILEGE?



ATTORNEY-CLIENT
PRIVILEGE

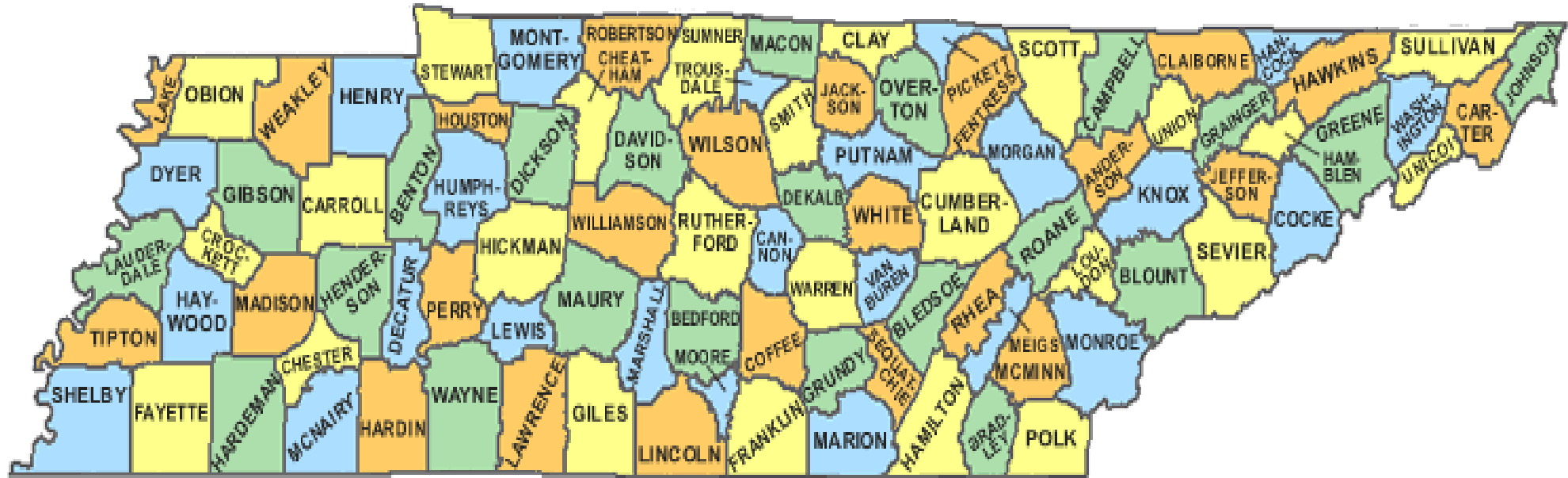
THE ANSWER MAY BE DIFFERENT IN
DIFFERENT COUNTIES.

IT DEPENDS ON YOUR ENABLING AUTHORITY.

THE STRUCTURE OF GOVERNMENTAL AUTHORITY MUST BE
EXAMINED.

IS ONE ENTITY SUBORDINATE TO ANOTHER OR DO THEY
ACT INDEPENDENTLY?

IN MOST CASES, THE COUNTY ATTORNEY REPRESENTS THE COUNTY RATHER THAN AN INDIVIDUAL GOVERNMENT EMPLOYEE OR OFFICER.



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WHY DOES IT MATTER?



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HYPOTHETICAL 6

WHITE FIREFIGHTERS BROUGHT AN ACTION ALLEGING THAT THE CITY VIOLATED TITLE VII BY PROMOTING AN AFRICAN-AMERICAN FIREFIGHTER TO THE RANK OF CAPTAIN WITHOUT REGARD TO THE RESPECTIVE QUALIFICATIONS OF CANDIDATES.

CITY COUNCIL MEMBERS PARTICIPATED IN A MEETING WITH CITY ATTORNEY, CITY MANAGER, AND FIRE CHIEF AS THIRD PARTIES, NOT AS CLIENTS OF CITY ATTORNEY, AND SUCH MEETING CALLED BY A COUNCIL MEMBER IN RESPONSE TO COMPLAINTS ABOUT A FIREFIGHTER'S PROMOTION.

DO YOU THINK THE MEETING WAS PRIVILEGED ?



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THE DISTRICT COURT FOUND THAT IT
WAS PRIVILEGED.

ATTORNEY-CLIENT PRIVILEGED

THE SIXTH CIRCUIT FOUND THAT IT WAS NOT PRIVILEGED.

THIS IS THE CASE OF *REED V. BAXTER* 134 F.3d 351 (6th Cir. 1998).

THE COURT FOUND THAT THE COUNCILMEN WERE NOT CLIENTS OF THE CITY ATTORNEY IN RESPECT TO THIS MEETING. BECAUSE THEY PARTICIPATED AS THIRD PARTIES AND THE MEETING WAS NOT HELD IN CONFIDENCE, THEIR DISCUSSION IS NOT SHIELDED FROM DISCLOSURE BY ATTORNEY-CLIENT PRIVILEGE.

CITY COUNSEL MEMBERS WERE
INVESTIGATING AN EXECUTIVE DECISION BY
THE CITY MANAGER HAD INTERESTS ADVERSE

TO THE CITY MANAGER AND THUS WERE
DEEMED NOT CLIENTS OF THE CITY
ATTORNEY.

THE CITY WAS UNSUCCESSFUL IN ITS BID TO ASSERT
ATTORNEY-CLIENT PRIVILEGE REGARDING A MEETING
BETWEEN IT'S LAWYER AND CITY COUNCIL MEMBERS.

ETHICS

update

CAN A GOVERNMENT WAIVE ITS SOVEREIGN IMMUNITY IN IT'S CHARTER?

A CONSTRUCTION COMPANY SUED METROPOLITAN GOVERNMENT. THE GOVERNMENT FILED A MOTION FOR SUMMARY JUDGMENT ALLEGING SOVEREIGN IMMUNITY. CHANCERY COURT GRANTED SUMMARY JUDGMENT AND CONSTRUCTION COMPANY APPEALED.

HOLDING:

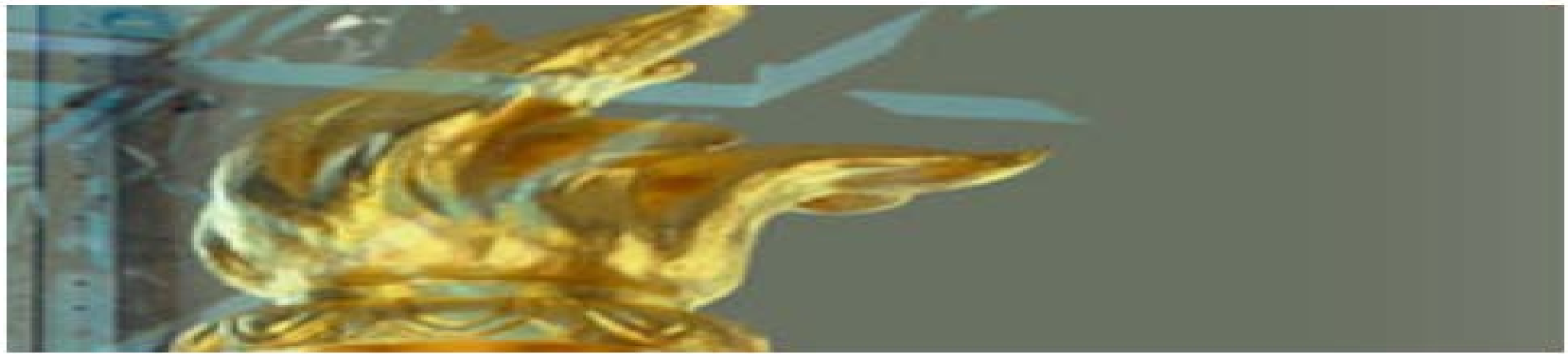
“THE COURT OF APPEALS WILL NOT FIND A WAIVER OF SOVEREIGN IMMUNITY IN THE ABSENCE OF AN ENACTMENT CLEARLY AND UNMISTAKABLY DISCLOSING AN INTENT UPON THE PART OF THE LEGISLATURE TO PERMIT SUCH LITIGATION.”

HARAKAS CONSTRUCTION, INC. V. METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et. al. 561 S.W. 3d 910 (Tenn.Ct.App. 2018).

BOARD NOTES

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Supreme Court of Tennessee

Fall 2018



TENNESSEE SUPREME COURT ADOPTS UNIFORM BAR EXAM AND TENNESSEE LAW COURSE

MULTI-JURISDICTIONAL OR CROSS BORDER PRACTICE IS MORE COMMON, ESPECIALLY IN TENNESSEE.

TENNESSEE BORDERS MORE STATES THAN ANY OTHER STATE IN THE UNION.

NEW FORM OF ADMISSION

APPLICANTS WITH A SCORE OF 270 OR HIGHER ON THE UBE IN ANOTHER JURISDICTION MAY BE ELIGIBLE FOR ADMISSION BASED ON THEIR UBE SCORE.

THESE APPLICANTS WILL HAVE TO UNDERGO A CHARACTER AND FITNESS INVESTIGATION AND MEET ALL OTHER TN ELIGIBILITY REQUIREMENTS

TENNESSEE LAW COURSE

ALL APPLICANTS FOR A TENNESSEE LAW LICENSE MUST TAKE THE TENNESSEE LAW COURSE ON DISTINCTIONS FOUND IN TN LAW.

TN SUPREME COURT PUTS LAWYER'S FUND FOR CLIENT PROTECTION WITH BPR.

TENNESSEE ATTORNEYS SUPPORT THE LAWYER'S FUND BY PAYING \$10 OF THEIR ANNUAL REGISTRATION TO THE FUND. NO TAXPAYER FUNDS ARE USED.

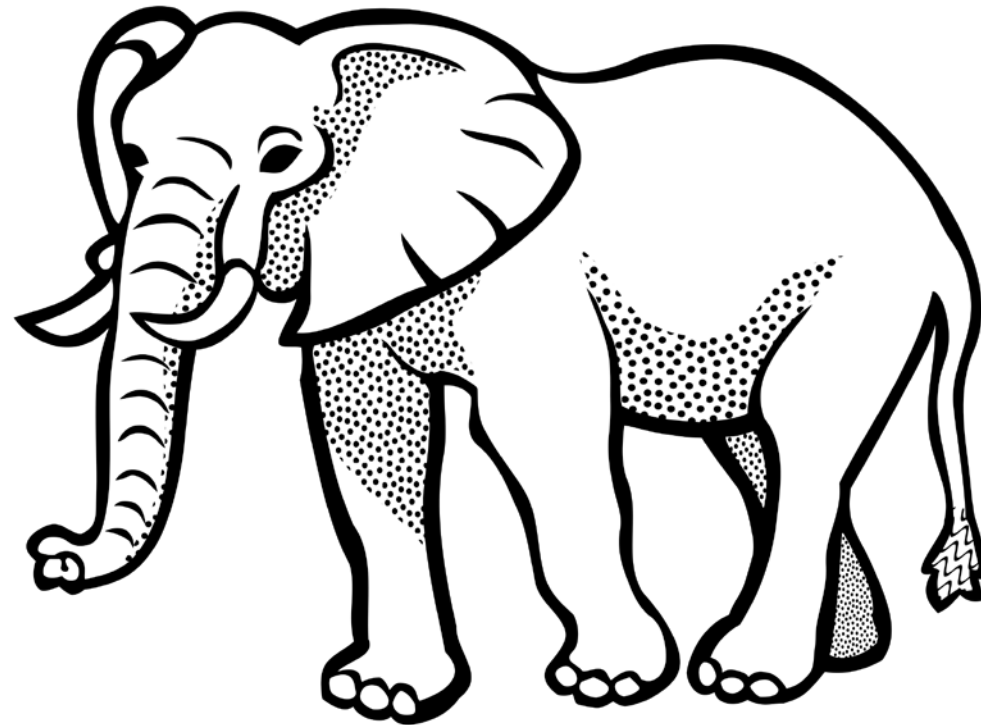
LAST YEAR THE FUND PAID OUT **\$815,197.38** TO 39 CLAIMANTS WHO LOST MONEY DUE TO DISHONEST CONDUCT BY ATTORNEYS.

BPR ISSUES NEW FORMAL ETHICS OPINION 2018-F-166

“IT IS IMPROPER FOR AN ATTORNEY TO PROPOSE OR ACCEPT A PROVISION IN A SETTLEMENT AGREEMENT THAT REQUIRES THE ATTORNEY TO BE BOUND BY A CONFIDENTIALITY CLAUSE THAT PROHIBITS A LAWYER FROM FUTURE USE OF INFORMATION LEARNED DURING THE REPRESENTATION OR DISCLOSURE OF INFORMATION THAT IS PUBLICLY AVAILABLE OR THAT WOULD BE AVAILABLE THROUGH DISCOVERY IN OTHER CASES AS PART OF THE SETTLEMENT, IF THAT ACTION WILL RESTRICT THE ATTORNEY’S REPRESENTATION OF OTHER CLIENTS.”

THE ELEPHANT IN THE ROOM

CONTINUES TO BE THE CONTROVERSIAL FORMAL ETHICS
OPINION 2017-F-163



THE CONTROVERSY HAS CAUSED THE BOARD TO IMPLEMENT A NOTICE AND COMMENT PERIOD FOR FORMAL ETHICS OPINIONS.

DRAFT FORMAL OPINIONS ARE POSTED ON THE BPR WEBSITE AND THE PUBLIC IS ASKED FOR COMMENTS.

THIS IS A 30 DAY PERIOD FOR COMMENT.

THEREAFTER THE BOARD WILL VOTE ON WHETHER OR NOT TO ISSUE THE OPINION.

NEW NOTICE AND COMMENT PERIOD FOR FORMAL ETHICS OPINIONS

NEW DRAFT FORMAL ETHICS OPINIONS WILL BE RELEASED ON TBA TODAY AND THE BOARD OF PROFESSIONAL RESPONSIBILITY WEBSITE, SOLICITING COMMENTS FOR 30 DAYS BEFORE THE BPR VOTES TO ISSUE OR NOT TO ISSUE THE FORMAL OPINION.

CURRENTLY OUT FOR COMMENT FORMAL ETHICS OPINION 2019-F-167


THE OPINION IS:

“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.”



Board of Professional Responsibility

of the Supreme Court of Tennessee

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ABOUT THE BOARD

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Questions or concerns about an attorney's ethical conduct?

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Assistance and [information](#) for the legal community.

[GET STARTED](#)



Latest News

Board Soliciting Comments on proposed Formal Opinion 2019-F-167

The Board of Professional Responsibility hereby solicits written comments from any interested parties regarding proposed [Formal Ethics Opinion 2019-F-167](#). The deadline for submitting written comments is April 10, 2019. Written comments may be emailed to LChastain@tbpr.org or mailed to:

Board of Professional Responsibility of the Supreme Court of Tennessee
10 [Cadillac](#) Drive, Suite 220
Brentwood, TN 37027

and should reference the opinion number above.

Ethics Workshop 2018

The Board of Professional Responsibility would like to thank everyone involved in helping to make the recent annual Ethics Workshop at the Nashville School of Law a huge success. Based on the positive feedback from this year's 400 attendees, the speakers at the November 2nd workshop did a wonderful job and were extremely well-received. The following is a list of the speakers and the topics they covered:

- William T. Ramsey, Esq. and Jordan McQuown: "Attorney's Competent Use of Technology"
- Lisa Smith, Esq.: "Girl Walks Out of a Bar" (Substance Abuse issues)
- Krisann Hodges, Esq.: "Ethics from Hollywood"
- Judge Michael Binkley, Judge Phillip Robinson, and Judge Philip E. Smith:

"Ethical Issues in Domestic Relations"



Annual Reports

Review our Annual Reports and get the latest trends and analysis for each of the nine Tennessee Disciplinary Districts.

- [37th Annual Report](#)
(July 1, 2017 - June 30, 2018)
- [36th Annual Report](#)
(July 1, 2016 - June 30, 2017)
- [35th Annual Report](#)
(July 1, 2015 - June 30, 2016)
- [34th Annual Report](#)
(July 1, 2014 - June 30, 2015)
- [33rd Annual Report](#)
(July 1, 2013 - June 30, 2014)
- [32nd Annual Report](#)
(July 1, 2012 - June 30, 2013)
- [31st Annual Report](#)
(July 1, 2006 - June 30th, 2012)
- [30th Annual Report](#)
(July 1, 2005 - June 30th, 2006)
- [More ...](#)



Quarterly Reports

Pursuant to Tennessee Supreme Court Rule 9, Section 4.5(b), the Board quarterly posts a report demonstrating the Board's compliance with operating procedures.

- [Q4/2018 Quarterly Report](#)
- [Q3/2018 Quarterly Report](#)

DRAFT

BOARD OF PROFESSIONAL RESPONSIBILITY
OF THE
SUPREME COURT OF TENNESSEE

FORMAL ETHICS OPINION 2019-F-167

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.

OPINION

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.

DISCUSSION

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

OFFICE OF DISCIPLINARY COUNSEL RECOGNIZES THE SERVICE OF RECEIVER ATTORNEYS

WILLIAM BOYD ELIZABETHTON

JEFF CRANFORD MORRISTOWN

ART GRISHAM CHATTANOOGA

KYLE HECKMAN LEBANON

BRUCE HILL SEVIERVILLE

CALEB MCDANIEL ELIZABETHTON

DENNIS POWERS GALLATIN

GLENNA RAMER CHATTANOOGA

BRAXTON TERRY MORRISTOWN

GUIDE FOR RETIRING ATTORNEYS

TO REQUEST INACTIVE STATUS ATTORNEYS MUST FILE AN APPLICATION AND AFFIDAVIT UNDER PENALTY OF PERJURY THAT THE ATTORNEY IS NOT DELINQUENT IN ANY OF THE FOLLOWING OBLIGATIONS:

PAYMENT OF ALL FEES

COMPLETION OF ALL CLE REQUIREMENTS

SUBMISSION OF IOLTA FORM

PAYMENT OF PRIVILEGE TAX.




Attorney License Information

- Information for New Attorneys
- Active, Inactive & Exempt Status
- Reinstatement of Law License
- Letters of Good Standing



Rules

The Board is governed by the following rules.

- Board Policies and Rules 
- Tennessee Supreme Court Rule 8 - Rules of Professional conduct
- Tennessee Supreme Court Rule 9 - Disciplinary Enforcement
- Tennessee Supreme Court Rule 43 - Interest on Lawyers' Trust Accounts
- Tennessee Supreme Court Rule 44 - Regulation of Lawyer Intermediary Organizations



Ethics Opinions

Search below by keyword, phrase or year for Formal Ethics Opinions issued from 1980 to the present.

Keyword(s) or Opinion Number

- Formal Ethics Opinions
- Informal Ethics Inquiries
- Ethics Frequently Asked Questions




State Agencies

- Tennessee Lawyers Assistance Program (TLAP)
- Tennessee Commission on Continuing Legal Education
- Tennessee Board of Law Examiners
- Tennessee Bar Foundation



Trust Accounting

- Approved Banks and Credit Unions 
- IOLTA (Interest On Lawyers Trust Accounts)
- Attorney Trust Account Overdraft Notification Agreement





Pro Hac Vice Attorneys

- Pro Hac Vice Registration
- Pro Hac Vice Search
- Pro Hac Vice Frequently Asked Questions
- Supreme Court Rule 19 - Appearance Pro Hac Vice in Proceedings Before Tennessee Agencies and Courts by Lawyers Not Licensed to Practice Law in Tennessee

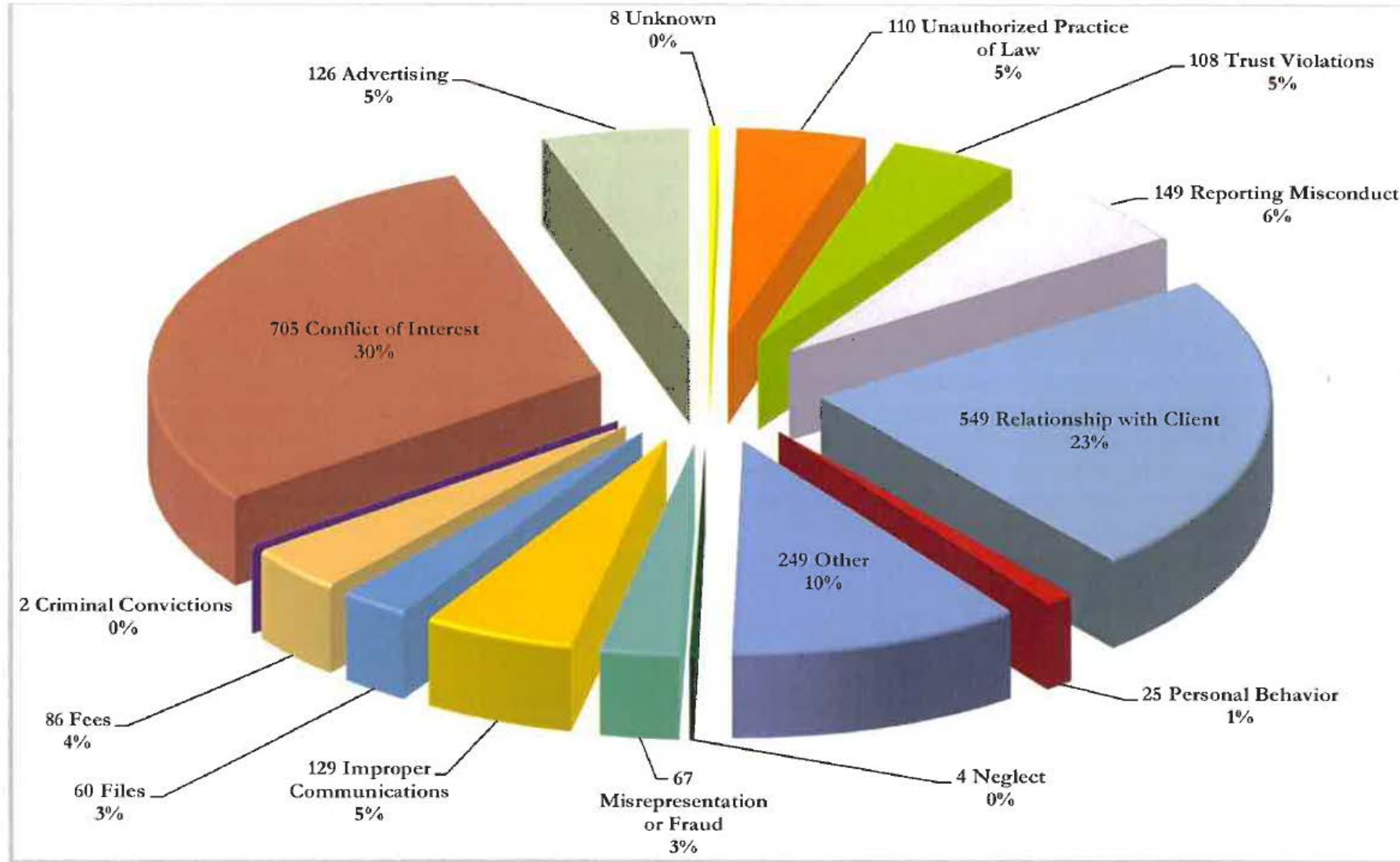


Resources

- TLAP (Tennessee Lawyers Assistance Program)
- Frequently Asked Questions regarding Suspended Attorneys
- Resources for When an Attorney is Unable to Practice Law 
- File your Professional Privilege Tax
- The Tennessee Attorney's Trust Account Handbook 
- Links of Interest

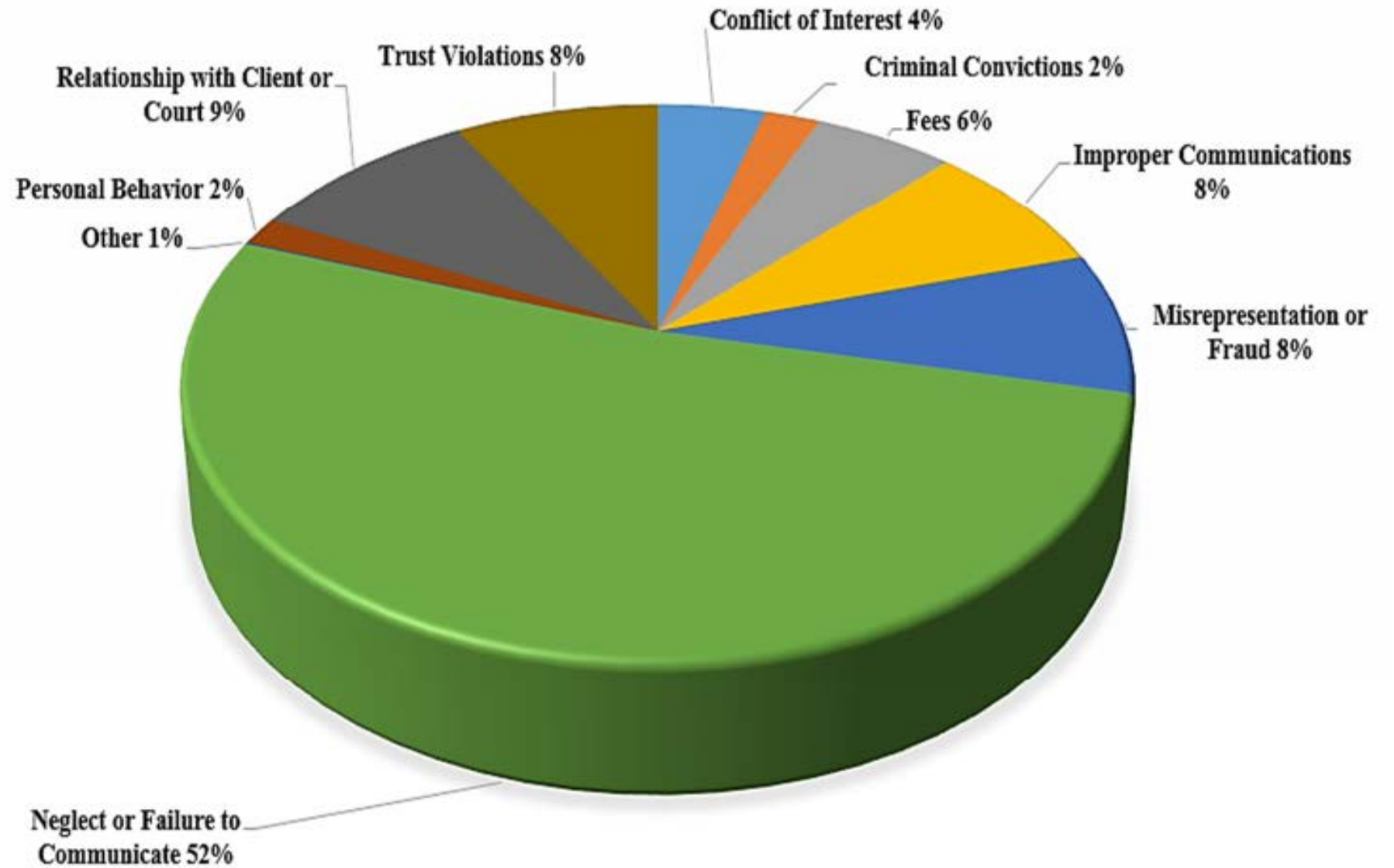
IN 2018 THERE WERE 2,377 ETHICS INQUIRIES ANSWERED

BPR Ethics Inquiries From 1/1/2018 to 12/31/2018



1542
complaints

A. Nature of Complaints



ABA ISSUES FORMAL OPINION 483

Lawyers' obligations after an electronic data breach or cyberattack.

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

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 THE DUTY TO NOTIFY CLIENTS OF THE BREACH AND TO TAKE OTHER REASONABLE STEPS CONSISTENT WITH THEIR OBLIGATIONS UNDER THESE MODEL RULES.

10 PAGE OPINION SETS OUT STEPS

A. DUTY OF COMPETENCE

1. OBLIGATION TO MONITOR FOR A DATA BREACH.
2. STOPPING THE BREACH AND RESTORING SYSTEMS
3. DETERMINING WHAT OCCURRED.

B. DUTY OF CONFIDENTIALITY

C. LAWYER'S OBLIGATIONS TO PROVIDE NOTICE OF DATA BREACH

1. CURRENT CLIENT
2. FORMER CLIENT
3. BREACH NOTIFICATION REQUIREMENTS



Questions

Contact information

ETHICS COUNSEL – LAURA CHASTAIN (615) 361-7500 EXT. 212

Consumer Assistance Program (615) 361-7500

Tennessee Lawyers Assistance Program (615) 741-3238

Tennessee Board of Law Examiners (615) 741-3234

Tennessee Commission on Continuing Legal Education (615) 741-3096

Tennessee Board of Judicial Conduct (615-649-8851)

Tennessee Attorney General's Office (615-741-3491)