

TCAA ANNUAL MEETING



APRIL 26, 2019

*PRESENTED BY LAURA CHASTAIN, ETHICS COUNSEL
BOARD OF PROFESSIONAL RESPONSIBILITY*

ROUNDTABLE DISCUSSION



IS IT A CONFLICT FOR A COUNTY ATTORNEY
TO REPRESENT INCARCERATED CRIMINAL
DEFENDANTS IN CIVIL CLAIMS ?





WHAT DO YOU THINK ?



feedback

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ANSWER

- ➔ IF YOU AS COUNTY ATTORNEY ADVISE THE SHERIFF ON CIVIL MATTERS RELATED TO INMATES AND WHETHER THEY ARE BEING TREATED APPROPRIATELY BY JAILERS, THEN **YOU HAVE A CONFLICT** BECAUSE YOU HAVE CONFIDENTIAL INFORMATION (FROM ADVISING THE SHERIFF) THAT THERE HAD BEEN ACTUAL OR ALLEGED CIVIL RIGHTS VIOLATIONS IN THE PAST, AND YOUR CLIENT IS COMPLAINING OF SIMILAR TREATMENT. OR YOU FIND OUT ABOUT CIVIL RIGHTS ABUSES FROM YOUR CLIENT ABOUT WHICH YOU NEED TO ADVISE THE SHERIFF.

EXECUTIVE SESSIONS



WHEN CAN EXECUTIVE SESSIONS BE CALLED ?



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➤ WHEN DISCUSSING MATTERS THAT PEOPLE CONSIDER PERSONAL AND PRIVATE

Open meetings are not an appropriate forum for discussing matters that people consider personal and private. A host of reasons might trigger sending a board into executive session including:

- Employee discipline
- Employment contract
- Attorney consultation
- Key strategic moves like mergers or acquisitions
- Succession planning
- Senior staff performance
- Executive compensation
- Future retirement plans for management
- Executive performance
- Compensation review
- Personnel issues
- Peer-to-peer board discussions

FOR EXAMPLE:

- ▶ IF A COUNTY BOARD WANTED TO CONSULT WITH AN ATTORNEY ABOUT LEGAL QUESTIONS REGARDING A BUILDING AND ZONING MATTER. SHOULD AN EXECUTIVE SESSION BE CALLED?



ANSWER: YES

- ▶ THEY COULD GET THEIR QUESTIONS ANSWERED IN A PRIVATE EXECUTIVE SESSION AND THEN ONLY MAKE THEIR VOTES IN PUBLIC.



CAN A VIOLATION OF OPEN
MEETINGS LAW BE REMEDIED?

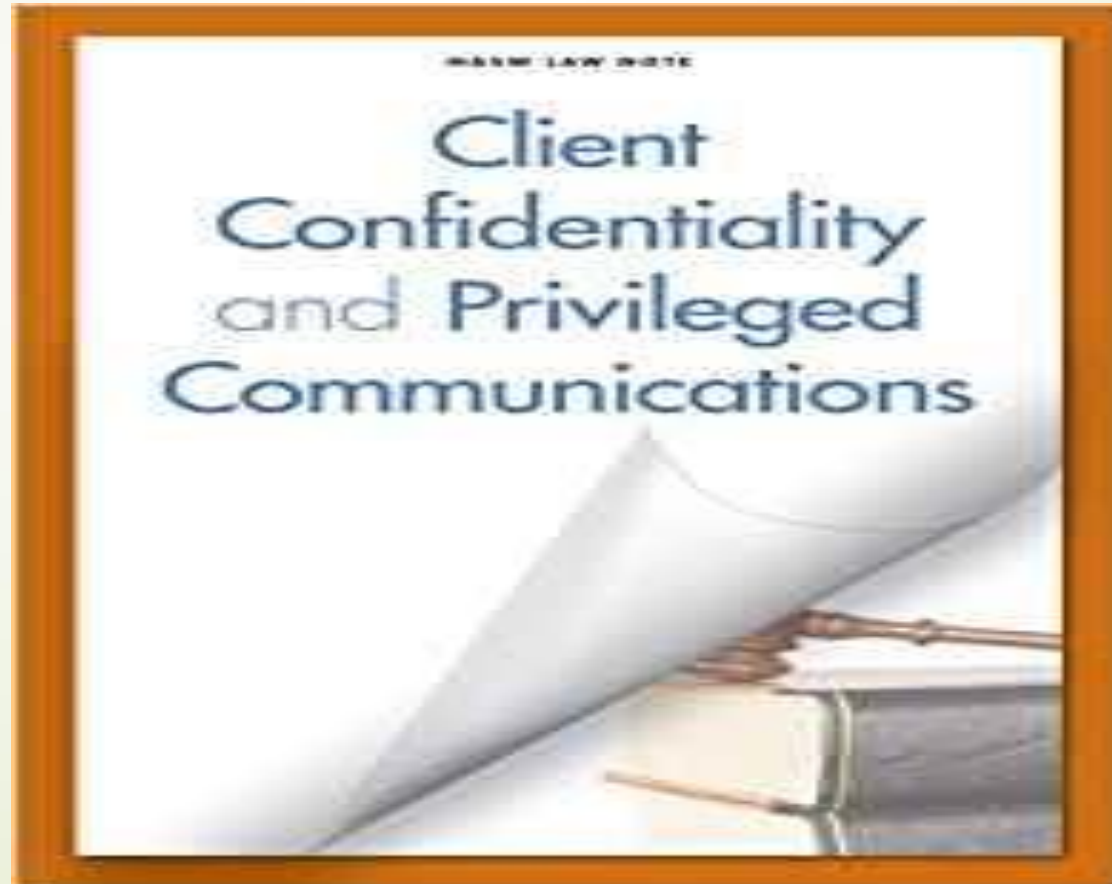
➔ IF SO, HOW?



ANSWER

- “Even if members of a public body engage in conduct that violates the Open Meetings Act, the action of the public body will not be deemed void if, in the interim, there was a ‘new and substantial reconsideration of the issues involved, in which the public is afforded ample opportunity to know the facts and to be heard with reference to the matters at issue.’ “ Neese v. Paris Special School Dist., 813 S.W. 2d 432, 436 (Tenn. Ct. App. 1990)
- Cited by the TN Supreme Court in Johnston v. Metro Gov’t of Nashville and Davidson Cty., 320 S.W. 3d 299, 313 (Tenn. Ct. App. 2009).

CONFIDENTIALITY OF COUNTY ATTORNEY COMMUNICATIONS



CAN COMMUNICATION BETWEEN THE COUNTY ATTORNEY AND ONE GOVERNMENT OFFICIAL BE CONFIDENTIAL FROM OTHER GOVERNMENT OFFICIALS ?



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ANSWER

→ WHEN ONE OF AN ORGANIZATION'S CONSTITUENTS COMMUNICATES WITH THE ENTITY'S LAWYERS, THE COMMUNICATION IS PROTECTED BY THE CONFIDENTIALITY REQUIREMENTS OF RPC 1.6.

→ *“IF AN OFFICER OF AN ORGANIZATIONAL CLIENT REQUESTS ITS LAWYER TO INVESTIGATE ALLEGATIONS OF WRONGDOING, INTERVIEWS MADE IN THE COURSE OF THAT INVESTIGATION BETWEEN THE LAWYER AND THE CLIENT'S EMPLOYEES OR OTHER CONSTITUENTS ARE COVERED BY RPC 1.6” RPC 1.13 COMMENT [2]*




THIS DOES NOT MEAN THAT THE CONSTITUENTS OF AN ORGANIZATION ARE CLIENTS OF THE LAWYER.





“THE LAWYER MAY NOT DISCLOSE TO SUCH CONSTITUENTS INFORMATION RELATING TO THE REPRESENTATION EXCEPT FOR DISCLOSURES EXPLICITLY OR IMPLIEDLY AUTHORIZED BY THE ORGANIZATIONAL CLIENT IN ORDER TO CARRY OUT THE REPRESENTATION OR AS OTHERWISE PERMITTED BY RPC 1.6”

RPC 1.13 COMMENT [2]




WHEN THE CLIENT IS A GOVERNMENTAL ORGANIZATION, A DIFFERENT BALANCE MAY BE APPROPRIATE BETWEEN MAINTAINING CONFIDENTIALITY AND ASSURING THAT THE WRONGFUL ACT IS PREVENTED OR RECTIFIED, FOR PUBLIC BUSINESS IS INVOLVED. RPC 1.13 COMMENT [8].






WHEN THE ORGANIZATION'S INTEREST IS ADVERSE TO THOSE OF ONE OR MORE CONSTITUENTS, THE LAWYER SHOULD ADVISE THE CONSTITUENTS THAT LAWYER CANNOT REPRESENT SUCH CONSTITUENT AND THAT DISCUSSIONS MAY NOT BE PRIVILEGED.

➡ RPC 1.13 (e) AND COMMENT [9].



CAN THE COUNTY ATTORNEY ADVISE
MULTIPLE GOVERNMENT OFFICIALS OR
OFFICES WHO HAVE ADVERSARIAL
POSITIONS (OR DISAGREE) REGARDING
AN ISSUE ?





YES


- “IT WAS THE DEPARTMENT OF LAW’S DUTY UNDER THE METROPOLITAN CHARTER TO FURNISH LEGAL ADVICE AND REPRESENTATION IN THIS MATTER.”
- Wood, et al. v. Metropolitan Nashville Board of Health, et al., 2007 Tenn. App. LEXIS 732 (November 28,2007)

State ex rel. Comm'r of Transp.v. Eagle, 63 S.W. 3d 734 (Tenn. App. July 11, 2001)


- “THERE IS, HOWEVER, A NEED FOR STUDIED APPLICATION AND ADAPTION OF THE ETHICS RULES IN THE CODE OF PROFESSIONAL RESPONSIBILITY TO THE ATTORNEY GENERAL AND HIS OR HER STAFF IN RECOGNITION OF THE UNIQUENESS OF THE OFFICE, THE ATTORNEY GENERAL’S OBLIGATION TO PROTECT THE PUBLIC INTEREST, AND THE ATTORNEY GENERAL’S STATUTORY OBLIGATION TO REPRESENT THE VARIOUS AND SOMETIMES CONFLICTING INTERESTS OF NUMEROUS STATE AGENCIES.”

DUTY OF LOYALTY

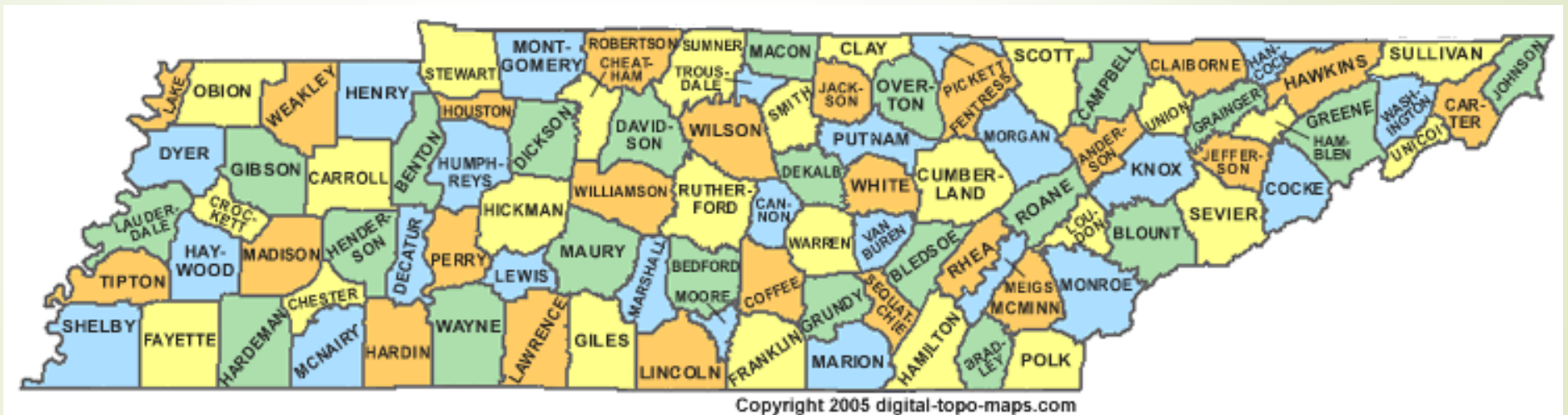




WHERE DOES THE COUNTY ATTORNEY'S
ULTIMATE DUTY OF LOYALTY LIE ?



THE COUNTY ATTORNEY'S ULTIMATE DUTY OF LOYALTY LIES WITH THE COUNTY AS A WHOLE. RPC 1.13



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WHAT COMMUNICATIONS FROM THE COUNTY ATTORNEY ARE SUBJECT TO OPEN RECORDS ?



ANSWER



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T.C.A. SECTION 10-7-503(A)(1)

- ➔ “PUBLIC RECORD OR RECORDS OR STATE RECORD OR RECORDS MEANS ALL DOCUMENTS, PAPERS, LETTERS, MAPS, BOOKS, PHOTOGRAPHS, MICROFILMS, ELECTRONIC DATA PROCESSING FILES AND OUTPUT, FILMS, SOUND RECORDINGS, OR OTHER MATERIAL, REGARDLESS OF PHYSICAL FORM OR CHARACTERISTICS MADE OR RECEIVED PURSUANT TO LAW OR ORDINANCE OR IN CONNECTION WITH THE TRANSACTION OF OFFICIAL BUSINESS BY ANY GOVERNMENTAL AGENCY.”



ARE COUNTY ATTORNEY'S
COMMUNICATIONS PUBLIC
RECORDS ?





*GRIFFIN V. CITY OF KNOXVILLE, 821
S.W.2d. 921, 924 (Tenn. 1991)*

- THE TEST FOR DETERMINING WHETHER A RECORD IS PUBLIC IS “WHETHER IT WAS MADE OR RECEIVED PURSUANT TO LAW OR ORDINANCE OR IN CONNECTION WITH THE TRANSACTION OF OFFICIAL BUSINESS BY AN GOVERNMENTAL AGENCY.”



ARE COUNTY ATTORNEY'S SOCIAL MEDIA
COMMUNICATIONS PUBLIC RECORDS ?





U.S. GOVERNMENT ACCOUNTABILITY OFFICE STATES:

- “AGENCIES MAY FACE CHALLENGES IN ASSESSING WHETHER THE INFORMATION THEY GENERATE AND RECEIVE BY MEANS OF THESE TECHNOLOGIES CONSTITUTES [PUBLIC] RECORDS.”


TENN. CODE ANN. SECTION 10-7-503(A)(1)

- ▶ THE RECORDS OF ANY GOVERNMENT AGENCY, WHETHER AT THE STATE, COUNTY, OR MUNICIPAL LEVEL, THAT WERE “MADE OR RECEIVED PURSUANT TO LAW OR ORDINANCE OR IN CONNECTION WITH THE TRANSACTION OF BUSINESS” ARE OPEN FOR PUBLIC INSPECTION.

MORE ETHICAL DILEMMAS



**THE ETHICAL
DILEMMA**



"The information contained in the following scenarios, including, but not limited to, the concepts, hypotheticals and answers were prepared by the American Bar Association's Government and Public Sector Lawyers Division and its Director Susan Kidd, and are used with permission."



SCENARIO 1

➤ BIG SCREEN PIZZA V. ST. MARY'S
COUNTY


➤ HANDOUTS






QUESTIONS TO CONSIDER

- 1. MAY EAGER REPRESENT THE COUNTY IN THIS ZONING MATTER WHILE AT THE SAME TIME, HIS OFFICE COLLEAGUE, FLICT REPRESENTS THE ADJUDICATIVE BODY THAT HE WILL APPEAR BEFORE?



The situation in which one employee of an office represents the adjudicative body that another employee of the same office must appear before is not specifically addressed by the rules. RPC 1.11, although not directly on point, gives some guidance regarding this situation in its discussion of screening (isolating a lawyer from participation in a matter).




Rule 1.11 (b) states that office colleagues of a former government lawyer may represent a client in connection with a matter in which the former government lawyer would be disqualified from participating under Rule 1.11 (a) if a screening system is used to prevent the former government lawyer from any involvement in the matter and if written notice is given to the appropriate government agency to ensure compliance with the rule. Thus if Flict is carefully screened, it would be permissible for her colleague to appear before the board that she represents.

(Former or current government lawyers are also subject to the prohibition against concurrent conflicts stated in RPC 1.7 as well as to protecting confidences of a former client under RPC 1.9(c).






2. IS IT ETHICALLY PERMISSIBLE
FOR EAGER TO APPROACH
FLICT FOR ASSISTANCE?

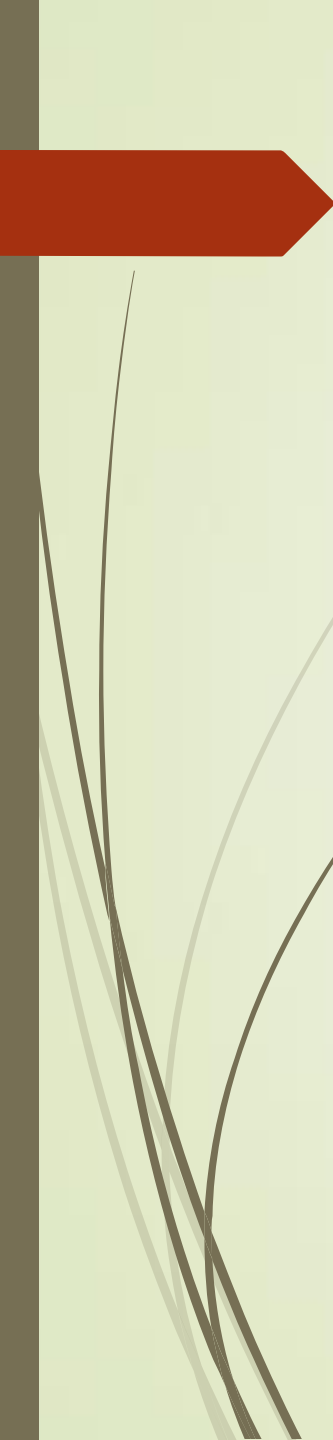




Eager may approach Flict for help if he makes it clear from the start that he is seeking only general help about the zoning ordinance and not confidential information related to the board's proceedings.



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- 3. CAN FLICT HELP EAGER?
 - 4. IF SO, HOW MUCH?
 - 5. WHERE SHOULD SHE DRAW THE LINE?



Flict may assist Eager with general information about the ordinance and other information that is in the public domain. She may not provide confidential information relating to her client, the Board of Appeals or tell Eager how she will advise the board. If Flict is properly screened from lawyers in her office who business before the board, then confidential information of the board will be protected. Flict should acknowledge the obligation not to communicate with any of the other lawyers in the office with respect to the board's work, and other lawyers in the office should be formally informed that the screening is in place.



SCENARIO 2

➤ TUFFIE V. CITY OF MARLBORO


➤ *To Settle or Not to Settle---Is That the Question ?*

➤ HANDOUTS



QUESTIONS TO CONSIDER:

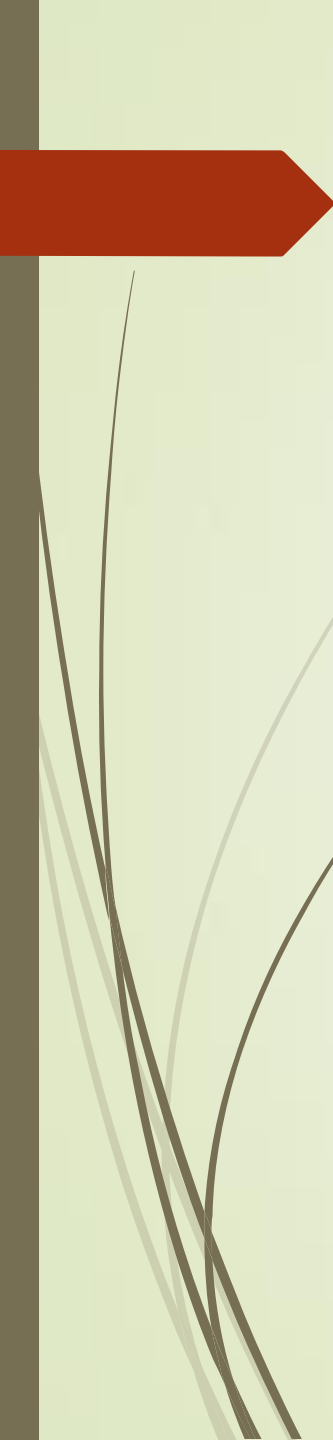
- ➔ 1. DOES THICKLE HAVE A CONFLICT OF INTEREST DUE TO THE DIVERGENT OBJECTIVES OF FERRELL AND FISTER ?
- 



Under RPC 1.8(g) differences in parties' willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement. A conflict, in violation of RPC 1.7 may arise because of a substantial discrepancy in settlement possibilities for the parties. If after Thickle thoroughly explains the chief's concerns to Fister and Fister remains opposed to settling the case, Thickle would have a conflict of interest under RPC's 1.7 and 1.8. Because Fister may decide to assert a claim against the city (such as improper training), it may be imprudent to attempt to resolve the conflict under RPC 1.7(b).



2. HOW SHOULD THICKLE
PROCEED ?




Thickle should carefully explain in a written memorandum to the city attorney the efforts that she made to communicate to Fister the chief's concerns about the case and the chief's reasons for wanting to settle. She should then set forth Fister's reasons for wanting to go forward. Then she should request that because of the conflict between the chief and the officer, the city should hire an outside counsel to represent Fister and that she should be relieved of the case because of RPC 1.9, unless Fister consents in writing allowing her to continue to represent the city. RPC 1.9(a) states that unless a former client gives informed consent, in writing, a lawyer may not represent anyone with materially adverse interest in the same or substantially related matter.



3. COULD THICKLE HAVE AVOIDED THIS?





Maybe. Better disclosure to her clients about her representation of them *at the beginning of the representation* may have avoided this situation. In any event, she should, as standard operating policy, advise all her clients, in writing, about the scope of her representation. This memorandum and discussion should include an indication of the process that will be used if a conflict occurs, and also whether the client will be personally responsible if the client refuses to settle.

QUESTIONS ?



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REMEMBER THE ETHICS HOTLINE IS THE PLACE TO GO WHEN YOU HAVE QUESTIONS ABOUT THE ETHICS OF A SITUATION IN WHICH YOU FIND YOURSELF.


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of the Supreme Court of Tennessee

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- 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



The End

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