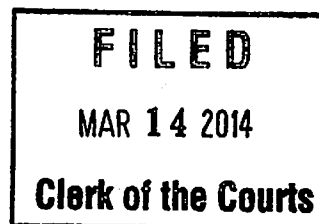


IN THE TENNESSEE BOARD OF JUDICIAL CONDUCT

**IN RE: THE HONORABLE JOHN A. DONALD
GENERAL SESSIONS JUDGE
SHELBY COUNTY, TENNESSEE**

Docket No. M2013-02204-BJC-DIS-FC

File No. 11-4762



MOTION FOR PROTECTIVE ORDER

Timothy R. Discenza, Disciplinary Counsel for the Tennessee Board of Judicial Conduct, pursuant to Rules 26-37, Tennessee Rule of Civil Procedure, inclusive, and would respectfully move the Board for a Protective Order as to the "Request for Discovery" heretofore filed by Judge John A. Donald, a copy of which is attached hereto as Exhibit A. As grounds therefore Movant would state as follows:

1. Request No. 1 of the "Request for Discovery" reads as follows:

1. The names, current addresses, and telephone numbers of all witnesses to be called to testify against the respondent, John Donald, at trial.

In addition to the reality that trial witnesses potentially to be called to testify against the respondent have not been determined, Rule 26.02, Tennessee Rules of Civil Procedure provides as follows:

26.02. Discovery Scope and Limits. — Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows: [Amended effective July 1, 2003.]

(1) **IN GENERAL.** Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party

seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and electronically stored information, i.e. information that is stored in an electronic medium and is retrievable in perceivable form, and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

While, the rule is direct in its terminology, it does not embrace or include trial witnesses. In *Strickland v. Strickland*, 618 S.W.2d 496, 499 (Tenn. App. 1981). the term "persons having knowledge of any discoverable matter" includes all persons having knowledge, whether or not eyewitnesses, who are potential witnesses. In inquiring about persons having knowledge of any discoverable matter, "the better form of the question would not use the word 'witness,' but rather the words 'person,' 'individual,' or 'people,'" since the deponent might not understand the meaning of the term "witness."

Here, while Disciplinary Counsel is aware of the term and meaning of the word "witness," the simple reality at this stage of the litigation, whether or not a person has "knowledge of any discoverable matter" differs from the fact that such person may be a witness.

2. Request No. 2 of the "Request for Discovery" reads as follows:

2. Any information relevant to impeachment of any witness that the Disciplinary Counsel intends to call at the trial, including any past suspension, or basis therefore by the Tennessee Board of Professional Responsibility, past convictions for crimes of moral turpitude, and any threats, promises, inducements, offers of reward or immunity, affirmative representations made or implied, of any witness to be called to testify against the respondent, including any statements, written or orally, given to the Disciplinary Counsel by each witness relevant to each witness impeachment.

As with the infirmity expressed with respect to Request No. 1, this request exceeds the scope of permissible discovery as any such potentially identified witness “the Disciplinary Counsel intends to call at the trial” has not been determined.

More critically, any such potential for “impeachment” would potentially require Disciplinary Counsel to share his legal opinion as to whether or not such potential witness is susceptible of “impeachment.” As such, the request seeks to invade Disciplinary Counsel’s mental processes and legal assessment and is properly considered “work product,” and thus not ordinarily discoverable.

Discovery of an attorney's mental processes has been provided special protection and the burden of establishing a need for opinion work product is more onerous than that for ordinary or fact work product. While the U.S. Supreme Court has, thus far, declined to hold that opinion work product is never discoverable, it has held that parties seeking opinion work product must make a "far stronger showing of necessity and unavailability by other means" than is required when seeking ordinary or fact work product. *Upjohn Co. v. United States*, 449 U.S. 383, 402, 101 S. Ct. 677, 689, 66 L. Ed. 2d 584, 599 (1981). The courts have not defined precisely when revealing opinion work product is warranted. A majority of courts have pointed out that it enjoys a nearly absolute immunity from disclosure and that it is subject to discovery only in rare, extraordinary circumstances.

Ordinary or fact work product consists of documents prepared in anticipation of litigation or for trial that do not contain the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party in the litigation. Opinion work product includes documents containing an attorney's mental impressions,

conclusions, opinions, or legal theories regarding the pending litigation. *Flowers v. Tenn. Trucking Assn. Self Ins.*, 209 S.W.3d 602, 618 at n. 16 (Tenn. Ct. App. 2006).

3. Request No. 5 is entirely improper. The request reads as follows:

5. The names and current addresses of the members of the investigative panel who authorized you to affix their signatures to the formal charges and any and all written correspondences between the Counsel and each of these members of the panel; in particular, the respondent requests a copy of all written statements to the panel members with regards to the Counsel's investigation of the formal complaint of Mr. David Gold.

The impropriety of this "Request" is multifactorial. First, the information sought to be elicited by "Request" No. 5 is precluded by T.C. A. Section 17-5-101 *et. seq.* and the Rules of the Board of Judicial Conduct, including but not limited to Rule 8, which provides:

"Except for hearings conducted pursuant to Tenn. Code Ann. § 17-5-308 or sanctions required to be public, matters that come before the Court are confidential. Individual members of the Court will not discuss any matter pending before the Court, except with other members of the Court and with Disciplinary Counsel. However, nothing in the Rule shall prohibit the complainant, respondent-judge, or any witness from disclosing the existence or substance of a complaint, matter, investigation, or proceeding under these Rules or from disclosing any documents or correspondence filed by, served on, or provided to that person."

More problematic may be the transparent effort to eradicate the attorney-client relationship and with it, the non-recognition of the attorney client privilege. TC.A. § 17-5-301 provides:

(d) The board shall appoint an attorney as disciplinary counsel, who shall serve at the pleasure of the board, and who may be removed by a majority vote of the board. The disciplinary counsel shall have the authority to employ additional attorneys or staff for administrative support, subject to the approval of the board. Compensation for the disciplinary counsel and additional personnel shall be fixed by the board. Nothing in this section shall be construed to preclude the board of professional responsibility

from acting as disciplinary counsel or providing all necessary administrative support.

Lest there be any doubt regarding the reality that Disciplinary Counsel is indeed the attorney for the Board of Judicial Conduct, the authorizing statute goes on to describe the responsibilities of the Counsel, emphasizing the obligations to the Board, also delineated in T.C.A. § 17-5-301, as follows:

(e) Disciplinary counsel has the authority and duty to:

(1) Receive and screen complaints, refer complaints to other agencies when appropriate, conduct preliminary investigations, recommend to the investigative panel of the board and, upon authorization, conduct full investigations, notify complainants about the status and disposition of their complaints, make recommendations to the investigative panel on the disposition of complaints after full investigation, file formal charges subject to approval of the investigative panel when directed to do so by the investigative panel, and prosecute formal charges;

(2) Maintain permanent records of the operations of disciplinary counsel's office, including receipt of complaints, screening, investigation, and filing of formal charges in judicial discipline and incapacity matters;

(3) Draft decisions, orders, reports and other documents on behalf of the hearing and investigative panels if directed by the board;

(4) Compile statistics to aid in the administration of the system, including, but not limited to, a log of all complaints received, investigative files, and statistical summaries of docket processing and case dispositions, consistent with § 17-5-305;

(5) Only with concurrence of the applicable investigative panel, seek investigative assistance from the Tennessee bureau of investigation, or from any district attorney general and, in appropriate cases, employ private investigators or experts, as necessary, to investigate and process matters before the board; and

(6) Perform other duties at the direction of the presiding judge or a majority of the board.

It is therefore unmistakable that Disciplinary Counsel is the Board attorney and in that capacity, would have the formidable shield of the traditional attorney-client privilege to preclude the burden of responding to the subject Request No. 5.

T.C.A. § 23-3-105 sets forth Tennessee's attorney-client evidentiary privilege, and is starkly plain in its language and hence, meaning, reading as follows:

§ 23-3-105. Attorney-client privilege

No attorney, solicitor or counselor shall be permitted, in giving testimony against a client or person who consulted the attorney, solicitor or counselor professionally, to disclose any communication made to the attorney, solicitor or counselor as such by such person during the pendency of the suit, before or afterward, to the person's injury.

The attorney-client privilege protects communications regarding the subject matter of representation “made with the intention that the communication be kept confidential.” *State ex rel. Flowers v. Tenn. Trucking Ass'n Self Ins. Grp. Trust*, 209 S.W.3d 602, 616 (Tenn.Ct.App.2006) (citing Tenn.Code Ann. § 23-3-105). The common law privilege protecting certain communications between an attorney and client is recognized in Tennessee. It is a rule founded in the interest of the administration of justice and is intended to enable a client to place unrestricted and unbounded confidence in the attorney in matters affecting the client's rights and obligations without danger of having disclosures forced from the attorney on the witness stand. The rule is based upon the principle that no one is under a legal obligation to disclose facts or circumstances which would render questionable a demand for a particular right or impair the person's defense to another's demand. *Burch, Trial Handbook For Tennessee Lawyers, Section 18.6*. The attorney-client privilege is not absolute and it does not protect all communications between an attorney and a client. Rather, the communication must

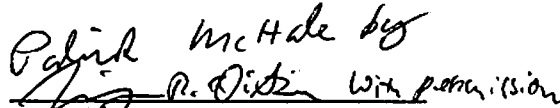
involve the subject matter of the representation and must be made with the intention that the communication will be kept confidential. Further, an attorney client privilege may be waived. For example, when the client testifies about alleged communications with his attorney, the privilege is waived as to the reported communication and the attorney may testify as to its contents. Further, confidentiality is destroyed when those communications take place in the presence of a third party. No waiver has occurred and no destruction of confidentiality has occurred.

WHEREFORE, Disciplinary Counsel, Tennessee Board of Judicial Conduct requests that a Protective Order be entered, granting the relief set forth herein, and accordingly striking and/or modifying the subject discovery requests

Respectfully submitted,



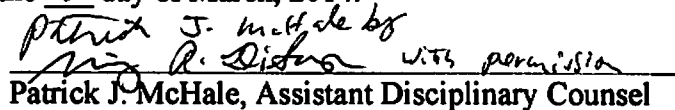
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*Patrick J. McHale by
Timothy R. Discenza with permission*

Patrick J. McHale, # 004643
Assistant Disciplinary Counsel
Tennessee Board of Judicial Conduct

Certificate of Service

I certify that a true and exact copy of the foregoing has been mailed, delivered, and/or sent via email to Honorable John A. Donald, 140 Adams Avenue, Suite 110, Memphis, Tennessee 38103, on this the 13 day of March, 2014.


*Patrick J. McHale by
Timothy R. Discenza with permission*
Patrick J. McHale, Assistant Disciplinary Counsel