MARKEL & MAJOR
ATTORNEYS AT LAW

CHRISTOPHER D. MARKEL
ADAM S. MAJOR

735 BROAD STREET, SUITE 402
CHATTANOOGA, TN 37402
TEL: 423-756-3700
FAX: 423-756-6700
www.markelmajor.com

December 7, 2009

Michael W. Catalano, Clerk
100 Supreme Court Building
40 1 Seventh Avenue North
Nashville, TN 372 19- 1407

Re: Amendment to Rule 9, Section 34 Rules of the Tennessee Supreme Court, Docket No. M2009-02505-SC-RL2-RL

Dear Mr. Catalano:

After graduating law school, I joined the United States Army Reserve as a First Lieutenant in the JAG Corps in 1999. I also locked my interest rate on some $65,000 in student loans at 6.5%. I was mobilized to active duty in 2003, and received a very substantial pay cut transitioning from private practice to a First Lieutenant in the United States Army, with very little advance notice. I contacted my lender, only to find out that student loans were exempt from the Soldiers and Sailors Civil Relief Act (now the Servicemembers Civil Relief Act), including the loan interest rate cap provisions for soldiers taking a pay cut upon activation. The only possible available relief was deferment for one year. Mobilized reserve officers, generally, get no help with student loan debt while mobilized, unless sent directly to a "zone of imminent hostility." I spent my time at Ft. Campbell, Kentucky, which was not defined as such. Complicating matters was the fact that my wife was pregnant when I was mobilized, and had to quit her job after my son was born.

Please take this into consideration in contemplating the amendment to Rule 9, Section 34.

Very truly yours,

MARKEL & MAJOR

Christopher D. Markel, #20850

Thomas V. Testerman
Attorney at Law

301 E. Broadway
Newport, Tennessee 37821

Telephone 423-623-0375
Telefax 423-623-7187

January 4, 2010

Michael W. Catalano, Clerk
100 Supreme Court Building
40 1 Seventh Avenue North
Nashville, TN 372 19- 1407

Re : **Proposed rule**
Docket # M2009-02505-SC-RL2-RL
Student Loan Collection

A poor rule and it should not be adopted. It subjects the Board of Professional Responsibility to serving as a collection agency. Attorneys should be disciplined for ethical misconduct and not for failing to pay debts. There are many tools available to creditors to otherwise collect these debts. Holding professional licenses hostage should not be made such a debt-collection tool merely to placate the financial industry. The legal profession should make a stand !

Sincerely,

Tom Testerman

Cocke County Office
& Mailing Address:
466B Eastern Plaza
Shopping Center
Newport, Tennessee 37821

Sevier County Office:
412 New Riverside Drive
Sevierville, Tennessee 37862

S. JOANNE SHELDON, Attorney at Law
Criminal Defense, Family Law & Social Security
~A Sole Practitioner in the Practice of Law~

Cheryl Worex-Parker, Paralegal
Tracy L. Phillips, Secretary

January 11, 2010

Mr. Michael W. Catalano, Clerk
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

Re: Proposed Rule
Docket No. M2009-0205-SC-RL2-RL
Student Loans - TSAC

I am completely shocked at this proposed Rule. At what point does it seem necessary to extend the Board of Professional Responsibility's duties to that of a collection agency. Economic times are very hard right now and just like the majority of my clients, I too am struggling to make ends meet. I would like to know how a proposed rule of this nature came into existence. What makes it necessary to seek a formal Rule which would take away a person's license? Creditors have numerous tools at their disposal to ensure collection of their debts. What about teachers, nurses, doctors, CPAs, etc.? Are those licensed professionals with TSAC loans facing the same situation as attorneys? If not, there is a serious due process issue.

With all due respect, this proposed Rule is an abomination. Attorneys should be afforded the same protection as a regular individual. If the default were based upon fraud or something criminal, then ethical considerations would apply. A default due to economics, etc., is not something the BPR should police.

Sincerely,

S. Joanne Sheldon

S. JOANNE SHELDON
Attorney at Law

~Phone: (423) 625-1236 & (865) 453-7098 • Fax: (423) 625-1264 • email: sjoannesheldon@aol.com~

GOTTEN, WILSON, SAVORY & BEARD, PLLC
ATTORNEYS AT LAW
88 UNION AVENUE, 14TH FLOOR
MEMPHIS, TENNESSEE 38103
TELEPHONE 901-523-1110
FAX 901-523-1139

P. PRESTON WILSON
RUSSELL W. SAVORY
CRAIG M. BEARD

ASSOCIATED COUNSEL:
BETSY WARREN WILSON

OF COUNSEL:
DAVID A. VELANDER
105 S. SHERRIN AVENUE
LOUISVILLE, KY 40207
(877) 258-7609 TOLL FREE
(502) 896-2301

February 22, 2010

Michael W. Catalano, Clerk
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

Re: M2009-02505-SC-RL2-RL

Dear Mr. Catalano:

Please accept this comment to the proposed new Section 34 to Tennessee Supreme Court Rule 9 ("proposed Rule").

I have specialized in bankruptcy and debtor-creditor matters since 1990 and have represented many individuals who, through no fault of their own, defaulted in making student loan payments or were seeking to discharge their loans on grounds of undue hardship and disability. I have also served as a Board of Professional Responsibility District Committee member for the past several years. Based on this experience and a careful review of the proposed Rule and statute incorporated therein, I believe the Rule would work an injustice upon financially distressed attorneys and undermine the Court's authority to regulate the legal profession.

In reviewing the proposed Rule, the Court must take into account dramatic changes in the student loan industry that have occurred since 1999 when TCA Section 63-1-141 was passed. Further, the Court should determine whether there are appropriate administrative procedures in place to guide whatever agency it wishes to empower so that determinations are made in a fair and reasonable manner. (The procedures set out in the 1999 statute are vague, except on the issue of whether a financial default has occurred.) Finally, to avoid injustice and maintain the central role of this Court in the regulation of the profession, attorneys should be afforded a meaningful opportunity to appear before the Board of Professional Responsibility and the Court prior to suspension.

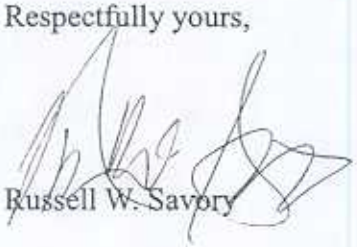
The General Assembly's request to the Court on this issue was made in 1999. The student loan industry has changed drastically since then. Many government sponsored and non-profit entities have converted to private for-profit enterprises. For example, the Student Loan Marketing Association ("Sallie Mae") was created as a government sponsored enterprise in 1972. However, it was totally privatized in 2004 and is now a publicly traded for-profit company known as SLM Corporation. Other large companies, such as Citibank, now provide and service guaranteed student loans. However, the Rule does not distinguish between government agencies and private student loan companies whose loans are guaranteed by the government. Therefore, under the legislature's definition that is incorporated into the proposed Rule, Citibank, SLM Corporation and a multitude of private, for-profit companies would be "guarantee agencies." I presume the Court would prefer not to delegate the power

to suspend and reinstate Tennessee attorneys to these companies. However, this is exactly what the proposed Rule would do.

TCA Section 63-1-141(b)(2) would effectively give the student loan collector sole discretion to formulate a payment plan required of an attorney in default. If the attorney requests, the collector would conduct a "hearing" to determine if suspension of a license to practice law would be "appropriate" based on several criteria, including whether the attorney has entered into a payment plan that is approved by the collector. Therefore, under the proposed Rule the student loan company would effectively have the unfettered power to suspend attorneys. The license of a financially distressed attorney would thus be placed at the mercy of a single call center employee.

It would be beneath the dignity of this Court and the Board to serve as collection agents for large, for-profit corporations that have more than adequate means to collect their own debts. If some Rule on this topic is to be promulgated, the Court should closely examine changes in the student loan industry that have taken place since the subject legislation was passed. Any revised Rule should place this Court at the center of a determination regarding the status of an attorney's license.

Respectfully yours,



Russell W. Savory

THE LAW OFFICE OF
DENNIS "WILL" ROACH II
ATTORNEY AND COUNSELOR AT LAW

1004 N. Hwy 92, Suite B
Jefferson City, TN 37760
www.roachlitigation.com

Email:will@roachlitigation.com
Phone: (865) 475-8339
Fax: (865) 381-1977

Date: March 1, 2010

To: Michael W. Catalano, Clerk

Fax Number: (615) 532-8757

Pages: 1 (Including Cover)

Re: *Comment Regarding Proposed Amendment to Rule 9*
Docket #M2009-02505-SC-RL2-RL

Dear Mr. Catalona:

Thank you for the opportunity to comment on this matter. The proposed amendment to Rule 9 would constitute a striking degree of over-reaching on behalf of the Court. I have yet to speak with one single attorney who is in favor of this amendment, and most are shocked by this intrusive proposal.

Attorneys in this great state spend four years in college and three years in law school for the opportunity to practice law. On the way we often necessarily assume incredible amounts of debt, which takes many years of hard work to repay. Once we enter the profession we assume the problems of our many and diverse clients, as well as the rigid standards for representing them under our Rules of Professional Responsibility. The last thing the attorneys in this state need is a black cloud of discipline or disbarment threatening at every financial downturn in the economy. It would place a degree of pressure upon attorneys that is completely unnecessary, and in the end take time and attention away from our clients, the very people whom our labor has led us to serve.

There are several other arguments which I will mention but not fully develop. For instance, how can we justify the argument that falling into an impoverished state makes one unethical or unfit to practice law? How can we condone punishing honest, hard-working attorneys in the time of their greatest financial need? How can we quell the suspicion that an incredibly potent lobby has forced the legislature to categorize one debt as supremely more important than other debts? This proposal should be flatly rejected.

Will Roach

Brent Heilig
200 Jefferson, Suite 950
Memphis, TN 38103

Michael W. Catalano, Clerk
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

Re: M2009-02505-SC-RL2-RL

Dear Mr. Catalano:

Please accept this comment to the proposed new Section 34 to Tennessee Supreme Court Rule 9 ("proposed Rule").

I am writing in strong opposition to the proposed amendment to Rule 9, section 34, Rules of the Tennessee Supreme Court. To begin, I respectfully submit that there is no clear substantial connection between an attorney's failure to make student loan payments and their moral character and fitness. An attorney is not exempt from economic hardship. These are difficult economic times we live in. There are many reasons an attorney may fail to make payments on his or her student loan debt. Perhaps, the attorney is experiencing economic hardship and finds it necessary to prioritize debt repayment (i.e., support family, pay mortgage, pay medical bills, pay child support). Perhaps, an attorney represents indigent clients and has difficulty getting paid for services rendered. There are a multitude of circumstances wherein an attorney could default on his or her student loan obligations, none of which rationally relates to the attorney's moral fitness or professional conduct. In my view, this proposed amendment makes the erroneous assumption that an attorney with unpaid debts is in essence *prima facia* unfit to practice law. I find this assumption flawed and dangerous. I can only wonder how an attorney who out of necessity incurs substantial student loan debt can earn the money to pay off the debt if denied the ability to practice the profession which was the *raison d'etre* for the incurrence of the debt.

I would also note that this proposed amendment affords special status to student loans over all other debt obligations. This elevated status is unnecessary as student loans ordinarily are excepted from discharge in bankruptcy. *See* 11 U.S.C. § 523(a)(8). Moreover, as noted, the underlying assumption in this proposed amendment is that those attorneys who default on a student loan are unfit to practice law. This assumption begs the question of what other debt obligations need to be paid in order for an attorney to keep his or her license and earn a living. Will the Court also find sacred – home mortgages, car loans, credit card balances, utility bills? Should the failure to pay any debt obligation be considered a violation of professional responsibility? Which debt obligations should hold priority and reflect the greater violation? Also, as a practical matter, is the Court through the Board of Professional Responsibility willing to assume the role of creditor? These are considerations the Court should take into account when deciding whether to amend Rule 9, section 34, Rules of the Tennessee Supreme Court.

In summary, I sincerely hope that the Court consider the relevance and practical implications of this proposed Rule.

Thank you for your consideration.

Sincerely,

Brent Heilig

Brent Heilig, Esquire

AWA Association for Women Attorneys

February 28, 2010

Michael W. Catalano, Clerk
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

Re: Amendments to Rule 9, Proposed New Section 34

Dear Mr. Catalano,

The Association for Women Attorneys (AWA), on behalf of its members, opposes the proposed new Section 34 of Supreme Court Rule 9. The AWA Board, at its February 2010 meeting, formally voted to object to the proposed amendments. AWA also solicited comments from its members and received only negative commentary regarding these proposed regulations. The following addresses AWA's concerns with the proposed amendments.

The new proposed Section 34 elevates student loan debt to a greater level of protection - in effect granting student loans a "super priority protection." Student loans currently enjoy an enhanced level of debt protection as they are not routinely subject to discharge in bankruptcy. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) provides that student loans are not dischargeable in bankruptcy without a finding of "undue hardship." *11 U.S.C.A. § 523 (a)(8).*

Although the Bankruptcy Code does not define undue hardship, the Sixth Circuit has adopted the three part Brunner test. *In re Barrett, 487 F.3d 353, 358 (6th Cir 2007).* The Brunner test requires in order for the debtor to meet the undue hardship requirement, the debtor must prove by the preponderance of the evidence: 1) that the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for [himself] and [his] dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans *Id. (quoting Brunner v. New York State Higher Educ. Serv. Corp., 831 F.2d 395, 396 (2d Cir.1987)).*

This very strict standard affords both the student loan provider and the guarantor a heightened level of payment assurance. Since a debtor cannot discharge a student loan if he/she can maintain even a minimal standard of living, any additional threat of law license suspension or revocation is overreaching, excessive and punitive. The General Assembly's request to the Tennessee Supreme Court was dated 1999. This request predates the protection that student loans now have under the United States Bankruptcy Code.

In addition, eleven years ago, a vastly different economic climate existed. In the current economic environment, lawyers are being laid off; recent law school graduates are having difficulty landing employment and established attorneys are struggling to maintain their practices. New law school graduates are starting out with debt levels that would have been unimaginable eleven years ago.

Student loans have also evolved in the last decade. No longer is the assumption correct that all student loans are reduced rate, reasonable term, government subsidized loans. The Federal Family Education (F.F.E.L) program was originally a direct federal student loan. Now, the program utilizes private for-profit lenders to originate and service the student loans. In addition, numerous other student loan private for-profit programs exist.

The United States Government Accountability Office (GAO) noted that private loans (including private sector and state sponsored loans) are typically more costly for students than loans through federal programs. *U.S. Gen. Accounting Office, Letter to Congressional Committees; Higher Education: Factors Lenders Consider in Making Lending Decisions for Private Education Loans, November 17, 2009.* The GAO was mandated by the Higher Educational Opportunity Act of 2008 to assess the impact of private lenders' use of nonindividual factors; whether the use of these factors may affect students' access to loans and whether these factors may have a disparate impact. *Id.* The GAO was unable to assess major components of this mandate because none of the major lenders contacted would allow the GAO access to their underwriting criteria or loan data. *Id. at 3.*

It appears that the private student loan providers may be benefitting from government assistance and yet unwilling to provide disclosure and accessibility to the federal government. To further favor the student loan lenders by endangering a lawyer's ability to work would be an injustice.

An example of the hazardous risk presented by this proposed rule is exemplified by the following true situation. In the spring of 2009, the Tennessee Indigent Defense Fund ran out of money. One Memphis attorney continued his duty to represent his clients in court appointed cases; but experienced personal economic peril without the state's payments. He requested a temporary hardship exception of his student loan payment based upon the state's lack of funds. He was denied this waiver. If the proposed rule had been in effect, this attorney potentially would have been jeopardizing his law license while continuing to perform his legal and ethical duties.

In summary, the proposed amendments would elevate an attorney's temporary economic peril to a situation whereby one could lose the very license that creates the vehicle to ensure that the loan is actually repaid. The lenders/guarantors are currently protected and do not need any additional patronage.

Thank you for the opportunity to comment on the proposed amendments. If you have any questions or would like any additional documentation, please contact me at 901.322.3025. Please direct any correspondence to my office, HF Law Group, 3257 Sarazen's Circle, Memphis, TN 38125.

Respectfully,

Michele Howard-Flynn
President
Association for Women Attorneys

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

**IN RE: AMENDMENT TO RULE 9, SECTION 34
RULES OF THE TENNESSEE SUPREME COURT**

M2009-02505-SC-RL2-RL

COMMENTS OF THE TENNESSEE DISTRICT PUBLIC DEFENDERS CONFERENCE TO THE PROPOSED AMENDMENT TO TENNESSEE SUPREME COURT RULE 9, SECTION 34

The Tennessee District Public Defenders Conference urges the Court to reject the proposed amendment to Tennessee Supreme Court Rule 9, Section 34, as drafted. The Conference believes the amendment, as drafted, will be detrimental to Tennessee's legal community and judicial system in the present economic climate.

Salaries of assistant district public defenders have been "frozen" and some are wondering if they will even have jobs in the future. The entry level salary for an assistant district public defender is $42,900.

A law degree is expensive and beyond the reach of prospective law students absent financial assistance. A 2003 report of the ABA Commission on Loan Repayment and Forgiveness states:

> *"The great majority of American law students pay for their education by taking out loans through federally subsidized and private loan programs. The typical law student today graduates with debts of around $80,000, which she expects to pay out of later earnings."*

A 2008 report from the ABA Standing Committee on Legal Aid and Indigent Defendants states:

> *"Many of today's law graduates are faced with law school debt of $80,000 or more upon graduation. For graduates following the standard 10-year repayment schedule, this results in monthly payments of more than $900 for 10 years following graduation. With the median starting public interest salary ranging from $36,000 in civil legal aid to $40,000 for public defenders to $44,000 for prosecutors, these mortgage-size debts bar most graduates from pursuing public service legal jobs. Among those graduates who do take such positions, many – when faced with major life decisions such as starting a family – are forced to leave after two to three years of employment."*

Now two and seven years after those reports, the country is facing the worst economic crisis since the Great Depression. Young lawyers are faced with a proposal that mandates the Chief Disciplinary Counsel of the Board of Professional Responsibility to initiate the suspension procedure set out in the proposed amendment to Rule 9, Section 34, against any attorney licensed to practice law in Tennessee who has defaulted on a repayment or service obligation under any loan listed in Tenn. Code Ann. §63-1-141(b)(2).

The Conference solicited and received comments from the District Public Defenders and other government attorneys that provide representation to indigent defendants. Some of those comments are:

- "Should the Board of Professional Responsibility be a debt collection agency? What about other debts we owe?"
- "...difference between willful failure to pay and someone who simply cannot afford it."
- "...punishing lawyers who have large student loan debts and who have been brave enough to choose a public interest career path anyway."
- "...keeps good students who graduate from good law schools from taking a job with a lower salary, like a public interest of government position."
- "This amendment tells me that I cannot have both a quality legal education at the school of my choice AND a legal career that I love, tells me that I am making a morally suspect decision to attempt to do both, because I am taking a risk that I might not meet my financial obligations."
- "...seemed counterintuitive, particularly if the person is defaulting simply due to the inability to find a job in these hard economic times, or because the rated on their variable interest rate loans has skyrocketed, or because they or a child/family member experiences a medical problem that caused unexpected bills."
- "...amendment would potentially harm young attorneys who choose to become public interest practitioners."
- "...would involve the disciplinary board and the Supreme Court in the personal financial affairs of an attorney."
- "Proposed rule would "strip" a lawyer of means to make a living even though failure to pay is not "willful."

The Tennessee District Public Defenders Conference opposes the adoption of the proposed change to Rule 9, Section 34. If the Tennessee Supreme Court insists on suspending, denying and/or revoking law licenses, based on a person defaulting on a repayment of service obligation under any student loan program, then the suspension, denial and/or revocation should be based on one's willful refusal to pay rather than the inability to pay.

Tennessee is a State on the rise, with more and more people interested in coming to live and work here. The Conferences believes that this proposed rule change will discourage law students from other States who are interested in government service and public interest law not to come to Tennessee. Additionally, it will encourage Tennessee

residents to attend out-of-state law schools and leave Tennessee, taking with them their talents, energy, and willingness to improve our criminal justice system. We urge the rejection of the proposed amendment to Supreme Court Rule 9, Section 34.

Respectfully submitted,
Tennessee District Public Defenders Conference

By: _____

Jeffrey S. Henry, BPR #002420
Executive Director
Tennessee District Public Defenders Conference
211 7th Avenue, North, Suite 320
Nashville, Tennessee 37219-1821
(615) 741-5562

MBA
MEMPHIS BAR ASSOCIATION

80 Monroe Avenue, Suite 220
Memphis, TN 38103
(901) 527-3573 • Fax (901) 527-3582
www.memphisbar.org

RECEIVED
MAR - 1 2010
Clerk of the Courts
Rec'd By MC/email

March 1, 2010

Mike Catalano
Appellate Court Clerk
Supreme Court Building
401 7th Ave. North
Nashville, TN 37219-1407
mike.catalano@tncourts.gov

Re: Proposed New Section 34 to Rule 9, Rules of the Tennessee Supreme Court

Dear Mr. Catalano:

This letter is being submitted on behalf of the Board of Directors of the Memphis Bar Association. The Board, and by extension the membership, has authorized me as its President to express our opposition to the proposed new Section 34 of Rule 9 of the Tennessee Supreme Court, which would provide for the summary suspension of a law license for delinquency or default of a guaranteed student loan (hereinafter "proposed rule").

At its annual retreat on January 9, 2010, and its meeting on January 28, 2010, the Board of Directors began and continued a thoughtful discussion of the proposed rule, which led to exploration of its implications. During this period, I have not heard a single positive response to the proposed rule from any attorney with whom I have spoken. In fact, the response has been quite outspoken against the proposed rule. At its February 25, 2010 meeting, the Board of Directors voted unanimously to comment in opposition to the proposed rule. We are concerned with the lack of due process protections built into the new rule, the disparate impact on attorneys over other professions in Tennessee, and other unforeseen implications of the proposed rule, such as a possible increase in bankruptcy filings by attorneys.

We would initially contrast the proposed rule with Rule 9, Section 32, which went into effect on January 1, 2010, and which deals with a licensure suspension procedure when Tennessee attorneys fail to pay the state Professional Privilege Tax. Under Section 32, if a lawyer does not pay the tax for two consecutive years, then the Tennessee Department of Revenue is to notify the Chief Disciplinary Counsel ("Counsel") of the Board of Professional Responsibility ("Board)". Upon receipt of such notification, Counsel will issue a notice to the attorney stating that the attorney's license is "subject to suspension." Notably, ***suspension is not automatic***. The attorney is given a 60-day period to cure the default and notify the Board, with sufficient documentation, that the attorney is in compliance. If the attorney does so, and the Board is satisfied, apparently that is the end of the process. If the attorney does not respond, or does not respond sufficiently, a proposed suspension order is then prepared by Counsel and forwarded to the Supreme Court for review and approval. If the Supreme Court approves, the lawyer's license is summarily suspended. To be reinstated, the lawyer must pay all delinquent taxes, interest and penalties, as well as fees imposed by the Court, and the license shall be reinstated.

In contrast, proposed Rule 34 is much harsher.

Proposed section 34.02 provides that the "Board and the Court shall accept any determination of default from TSAC or a guarantee agency after TSAC or the guarantee agency has afforded a debtor an opportunity to be heard." How is the Board or the Court to know that the debtor has been afforded the opportunity to be heard? Apparently as long as TSAC or the guarantee agency say so. We are also deeply concerned with Tennessee Code Annotated Section 63-1-141(b)(2)(C)(i)-(iii), which provides that "the only issues that may be determined in such a hearing are: The amount of the debt; whether the debtor is delinquent or in default; and whether the debtor has entered into a payment plan, or the debtor is willing to enter into a payment plan or to comply with a payment plan entered into and approved by TSAC or the guarantee agency." This is an overly narrow list of "issues" to be determined at such a hearing and is a far cry from the types of procedural protections afforded attorneys for just about every other disciplinary infraction.

Further, under proposed sections 34.03 and 34.04, once TSAC or a guarantee agency forwards its order of default to the Board, the Board "shall prepare a proposed order suspending the attorney's license" and shall notify the attorney. Afterwards, the proposed order of suspension is forwarded to the Tennessee Supreme Court for review and approval. In the interim, after receiving notice, what recourse does the attorney have to address the proposed suspension to the Board? The lawyer's recourse is to TSAC, for only if TSAC rescinds its order in the interim will the license suspension process be put on hold. The Rule does not provide any mechanism for an attorney to explain to the Board the circumstances of default, non-payment, hardship, or any other special circumstance which may justify *NOT* suspending the lawyer's license. In contrast to Section 32, the suspension is basically automatic upon the notification of the Board by TSAC. In essence, the Tennessee Supreme Court and the Board of Professional Responsibility would be handing over to the Tennessee Student Assistance Corporation or other guarantee agency the awesome responsibility of taking away a lawyer's license to practice law. The Board becomes only a messenger or a cipher rather than the body charged with the power and duty to "consider and investigate any alleged ground for discipline" as set forth in Rule 9, Section 5 of the Supreme Court Rules.

It is our understanding anecdotally that other licensing boards in the State of Tennessee are rarely enforcing Tennessee Code Annotated Section 63-1-141. In contrast, we would point to the very efficient manner in which the Tennessee Board of Professional Responsibility enforces Rule 9. The proposed rule would allow no leeway on the Board's part and would require that the Board take any determination from TSAC as prima facie instructions that the attorney's license should be suspended. We believe this efficient enforcement would have a disparate impact on attorneys over every other profession in Tennessee.

Taking away a lawyer's license because that lawyer is in default on a student loan, often incurred in order to attend law school and earn a law license, seems counterintuitive and counterproductive on several levels. Without a law license, a lawyer cannot earn a living and pay back his or her student loan obligations. Moreover, a student loan is generally considered an unsecured debt. This rule would seem to secure the loan by way of the lawyer's license, a way of forcing a lawyer into agreeing to a secured loan after the fact rather than on the front end.

The proposed rule also may be counterproductive to the student loan industry as well. Currently, in most situations, student loans are generally not dischargeable debts in a bankruptcy proceeding, barring rare hardships. It would be ironic indeed if a bankruptcy court were to discharge a lawyer's student loan in bankruptcy due to the hardship of the lawyer having had his or her license taken away by the very entity seeking to collect the debt. Further, there are provisions of the bankruptcy code which would allow a lawyer to preemptively protect his or her license or means of livelihood by initiating a bankruptcy proceeding. While such may not allow a discharge of the student loan, it would perhaps allow

the attorney to continue to practice law and fulfill his or her rightful financial obligations. Both scenarios would seem to encourage, rather than discourage, attorneys to seek protection in the bankruptcy courts of Tennessee.

In Tennessee Code Annotated Section 23-3-111, the Tennessee General Assembly encouraged this Honorable Court to "establish guidelines to suspend, deny or revoke the license of an attorney who is delinquent or in default. . . ." Notably, the General Assembly did not include lawyers in Tennessee Code Annotated Section 63-1-141, which applies to "members of the healing arts profession." It would seem that the proposed rule would, in effect, pass the burden over to TSAC to determine whether a lawyer's license should be suspended rather than instituting a sound guideline controlled by the Board of Professional Responsibility and the proposed rule would place a lawyer's livelihood in the hands of some group other than the Board and this Honorable Court.

The members of the Memphis Bar Association Board have the utmost respect for this Honorable Court and its members. We hope that the concerns expressed in this correspondence will be received, and addressed, in the spirit in which we have expressed them.

Sincerely,

Ricky E. Wilkins, President
Memphis Bar Association

TENNESSEE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
TACDL

121 21st Ave. N., Ste. 311
Nashville, TN 37203-5276
Phone: 615-329-1338 • Fax: 615-329-1339
office@tacdl.com • www.tacdl.com

February 22, 2010

Mr. Michael W. Catalano, Clerk
Tennessee Supreme Court
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

Re: Amendment to Rule 9, Section 34
Rules of the Tennessee Supreme Court
No. M2009-02505-SC-RL2-RL

Dear Mr. Catalano:

The Tennessee Association of Criminal Defense Attorneys submits the enclosed comments to the proposed amendment to Rule 9, Section 34.

Sincerely,

Jerry P. Black, Jr., President
Tennessee Association of Criminal
Defense Attorneys

JPB/cja

Enclosure

COMMENTS TO PROPOSED
SUPREME COURT RULE 9 § 34
No. M2009-02505-SC-RL2-RL

The Tennessee Supreme Court has been "encouraged" by the legislature "to suspend, deny, or revoke the license of an attorney who is delinquent or in default on a repayment or service obligation under a guaranteed student loan . . . ." Pursuant to the notice for comments by interested parties, the Tennessee Association of Criminal Defense Lawyers (TACDL) respectfully submits the following comments to the proposed rule. The proposed Rule 9 § 34 singles out a particular class of debt for special treatment, *i.e.* student loans. Student loans already receive preferred treatment because they cannot be discharged in bankruptcy. These loans will remain an obligation of the debtor until paid in full. The proposed rule to suspend the attorney's law license, if the attorney is in default, is counterproductive, unnecessary, and should not be adopted.

The proposed rule is limited to only one class of debt. It does not cover any other defaults of financial obligations by an attorney. As such, the policy behind the rule does not evidence a concern that the defaulting attorney may be more likely to violate his or her obligations concerning client funds, either client trust funds or monies received from others for the client's benefit. If this were the concern, the defaults would apply to other, if not all, defaults of financial obligations of the attorney.

The defaulting attorneys appear to fall into two broad categories: attorneys who have the resources to pay their respective student loan obligations but choose not to; and attorneys who are financially strapped and cannot meet all of their monetary obligations. Those attorneys who could but do not meet their financial obligations can easily be compelled to do so without the

benefit of the proposed rule. The lender has the old fashioned remedy of suing the defaulting debtor. The lender can obtain a judgment, including collection costs and attorney fees. The lender can then execute on the judgment. This remedy is employed in Tennessee courts daily. This proposed rule puts no money in the lender's hands. It is unnecessary if the debtor is solvent. And, if the problem is the jurisdictional limit in our courts of general session, the court could suggest that the legislature create an exception for student loans.

For the insolvent attorney, or at least the seriously financially struggling attorney, the rule appears to be unnecessary and unwise. Presumably the attorney/debtor has attended law school and incurred this debt in order to make a living practicing law. The effect of this rule is to deprive him or her of this opportunity. From the standpoint of the lender, it seems we have decreased the likelihood that the debtor will be able to repay the loan. We will force the person to make a living without practicing law. It may be that the person will make more money, be more successful financially outside of law practice. If that is the case, the person will not need a law license, and taking his or her license will not have assisted the lender – except maybe force the person into a more profitable line of work and, thus, judgment collectable. Suspending the attorney's law license provides no money to the lender.

The Tennessee Association of Criminal Defense Lawyers (TACDL) is not suggesting that lawyers should be allowed to default on their student loans. Far from it. We do, however, recognize that these are difficult financial times. Law graduates are leaving law school with substantial, significant debt. Law graduates are finding it increasingly difficult to find employment with law firms, with pubic defender offices, or with the state of federal government agencies. As a result, some choose, others are forced, to begin solo practice. And, if they are struggling, these lawyers likely cannot afford to join TACDL, the Tennessee Bar Association, or

local bar associations. They are out there alone, and we do not represent them. But we are concerned about them because they often seek and accept appointments in criminal cases.

The proposed rule is likely to add to the struggling lawyers' stress. It makes it more likely that lawyer will "borrow" his or her client's funds. The proposed rule increases the probability that the lawyer will pad his or her time sheets in court appointed cases.[1] The proposed rule may lead the attorney to reduce the stress through alcohol or drugs. Instead of solving a problem, the proposed rule may complicate the problem, making it less likely that the person will be able to satisfy his or her student loan obligations.

If the Court decides to enact a rule suspending a defaulting attorney's law license, TACDL urges the Court to consider adopting a procedure that is different from that enacted in Tenn. Code Ann. § 141(a) and (b). Under the proposed rule and Tenn. Code Ann. § 141(a) and (b), suspension is mandatory if the attorney is in default. TACDL advocates for a rule that limits suspension to willful defaults.

Secondly, under the proposed rule, the Board of Professional Responsibility must accept the determination of default by the lender. Any arrangements to repay are at the sole discretion of the lender. Tenn. Code Ann. § 63-1-141(b)(2)(A). Even though the attorney has a right to a hearing, the only issues are (1) the amount of the debt; (2) whether the attorney is delinquent or in default; and (3) whether the attorney has entered into a plan approved by the lender. Tenn. Code Ann. § 63-1-141(b)(1)(C). There is no judicial review of the appropriateness of the lender's repayment requirements. In other civil debts, a debtor has the right to seek to pay a judgment by installments from the court issuing the judgment. Tenn. Code Ann. § 26-2-216. TACDL would urge a procedure that permits the Board to review the lender's determination of

[1] As the Court is aware, the rate of compensation for court appointed counsel in non-capital criminal cases has not been increased since 1994. The rate in 1994 did not meet overhead.

the amount of the debt and to review the proposed requirements by the lender for repayment of the debt. Judicial review of the Board's decision to suspend should be available.

We ask that the Court reconsider the proposed rule. We, respectfully suggest that it is unnecessary and potentially harmful to the lawyers who are in default, to the lenders who seek payment, and to the legal profession as a whole. Attached to these comments is a photocopy of an article by Bill Haltom in the January issue of the *Tennessee Bar Journal,* "Forgive Us Our Debts". TACDL believes it is an example of the unfairness that could result were the Court to adopt the proposed rule.

Respectfully submitted,

Jerry P. Black, Jr., BPR 002069
President
Tennessee Association of
Criminal Defense Lawyers

Forgive Us Our Debts

Thirty-two years ago when I started my career as a lawyer, I hardly had a penny to my name. I owned a 1968 Volkswagen Beatle, an eight-track tape player, and one blue suit that I had worn in law school moot court competition and in job interviews. I called it my law suit.

The bad news was that my net worth was zero. And the good news was that my net worth was zero!

This saga "should be a lesson to all working class kids who dream of growing up to be a lawyer: enroll in a good public school, work hard, keep your nose clean, and don't amass debt as if you were a member of Congress."

While I hardly had a penny in my pocket, I also did not have a single penny of debt. I had emerged from 19 years of schooling and one brutal two-day bar examination debt-free. The explanation? Two wonderful words: public education.

I attended public schools from first grade through law school. The first 12 years were absolutely free. No tuition, free textbooks, and even a free lunch if I couldn't afford it.

The next four years were spent at the University of Tennessee where during my freshman year, tuition was (I am not making this up) $125 a quarter, or a whopping $375 a year! Room, board, textbooks and an occasional pizza added a few hundred bucks more a year to the cost, but with summer jobs and work-study, even a kid from the poor side of Memphis (if that's not a redundancy) could afford it.

The Big Orange College of Law cost a little bit more, but not a lot.

And so on Aug. 15, 1978, as I arrived for my first day on the job as an associate with Thomason, Crawford and Hendrix, I was looking forward to my first paycheck. I was going to be paid the princely sum of $1,000 a month! Yes, I was a thousandnaire! True, the monthly grand would quickly be spent on rent, pizza and a few more law suits, as I started to build my impressive *Gentlemen's Quarterly* wardrobe. But student loans? Not one, thanks to the Memphis City Schools, good old State U, and the Big Orange College of Law!

But these days, your average (and even above average!) law school graduate walks away from her or his commencement holding not only a diploma, but a staggering $80,000 in student loan debts. And it's no wonder, given the fact that even in-state tuition at the Big Orange Law School is now more than $13,000 a year. And tuition at Vanderbilt Law School? Well, if you have to ask, you can't afford it!

It is bad enough to begin one's legal career as an indentured servant, with a debt approaching $100,000. But believe it or not, it could be worse. Your law school student loan debt could actually prevent you from becoming a lawyer, even after passing the bar. Just ask Robert Bowman.

Mr. Bowman is a graduate of the University of California Hastings College of Law in San Francisco. In February of 2008, he passed the New York Bar examination. He was then interviewed by a panel of three lawyers in Albany, who comprise the Committee on Character and Fitness for the New York Bar. They unanimously recommended his admission.

But Robert Bowman has a problem. He has unpaid student loans. A lot of them. Counting the penalties, he now owes over $400,000 in student loans. And it's a debt one can't discharge in bankruptcy.

Most of Mr. Bowman's debt was amassed during a 10-year period when he was pursuing his undergraduate degree at the State University of New York in Albany. But he spent nearly six of those 10 years in rehabilitation relearning how to walk after being in a motorcycle accident.

In November, Mr. Bowman discovered that his debt may actually cost him more than $400,000. It may cost him his law license and a chance to practice law. A panel of five New York judges denied his application for admission to the bar finding that his application "demonstrates a course of action amounting to a neglect of financial responsibilities with respect to student loans."

Bowman, whose student loan debt is now growing by about $10,000 a month, told *The New York Times*, "This has destroyed my life. Everything I've worked for, every effort, every fight that I've taken to make this progress, has been for nothing."

He has appealed to New York's highest court in the hopes that after graduating from law school, passing the bar exam, and being approved by the Bar Committee on Character and Fitness, he can now get the chance to hang out his shingle, practice law, and start repaying his loans — although with interest mounting at 10 grand a month, he'd better be a very successful plaintiff's lawyer.

While I am not ready to file an amicus curiae brief, I hope the New York State Court of Appeals gives Mr. Bowman a chance. This is not the classic case of killing the goose that lays the golden egg. It's a case of giving a gosling a chance to lay some eggs or at least be able to afford scrambled eggs.

But regardless of the outcome, the sad saga of Robert Bowman should be a lesson to all working class kids who dream of growing up to be a lawyer. Enroll in a good public school, work hard, keep your nose clean, and don't amass debt as if you were a member of Congress.

Neither a borrower nor a lender be. If you are not careful, you may graduate from law school, pass the bar exam, and be approved by the moral fitness committee, only to come face-to-face with a bar admissions committee that is unmoved by the prayer found in Matthew 6:12: Forgive us our debts, as we forgive our debtors.

BILL HALTOM is a partner with the Memphis firm of Thomason, Hendrix, Harvey, Johnson & Mitchell. He is past president of the Tennessee Bar Association and is a past president of the Memphis Bar Association.

TENNESSEE BAR ASSOCIATION

August 2, 2010

The Honorable Michael Catalano
Clerk, Tennessee Supreme Court
Supreme Court Building, Room100
401 Seventh Avenue North
Nashville, TN 37219

IN RE: AMENDMENT TO RULE 9 SECTION 34, RULES OF THE TENNESSEE SUPREME COURT – Suspension of Law License for Delinquency or Default Under Guaranteed Student Loan

Dear Mike:

Attached for filing please find an original and six copies of the Recommendation for Continued Suspension of Rulemaking in reference to the above new matter.

As always, thank you for your cooperation. I remain,

Very truly yours,

Allan F. Ramsaur
Executive Director

cc: Sam D. Elliott, TBA President
Brian S. Faughnan, Chair, TBA Standing Committee on Ethics & Professional Responsibility
William L. Harbison, TBA General Counsel
Nancy S. Jones, Chief Disciplinary Counsel, Tennessee Supreme Court Board of Professional Responsibility
Peter J. Abernathy, Counsel, Tennessee Student Assistance Corporation
Service List

Tennessee Bar Center
221 Fourth Avenue, North, Suite 400
Nashville, Tennessee 37219-2198
(615) 383-7421 • (800) 899-6993
FAX (615) 297-8058
www.tba.org

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE: AMENDMENT TO RULE 9 SECTION 34, RULES OF THE TENNESSEE SUPREME COURT – Suspension of Law License for Delinquency or Default Under Guaranteed Student Loan	)	**No. M2009-02505-SC-RL2-RL**

RECOMMENDATION FOR CONTINUED SUSPENSION OF RULEMAKING

The Tennessee Bar Association ("TBA"), by and through its President, Sam D. Elliott; Chair of its Standing Committee on Ethics & Professional Responsibility, Brian S. Faughnan; General Counsel, William L. Harbison; and Executive Director, Allan F. Ramsaur; the Office of Disciplinary Counsel of the Tennessee Supreme Court Board of Professional Responsibility ("BPR"), by and through its Chief Disciplinary Counsel, Nancy S. Jones; and, Counsel to the Tennessee Student Assistance Corporation ("TSAC"), Peter J. Abernathy, the "Recommending Parties", hereby recommend a continued suspension of rulemaking in this matter until late Summer 2011.

When this matter was last before this Honorable Court in March 2010, the Court accepted the recommendation of the Recommending Parties to suspend its rulemaking pending the completion of further legislative and administrative action. The recommending parties were directed to advise the Court when these processes were complete. The predicate for the recommendation to suspend rulemaking was that the enactment of legislation and administrative rules to adequately address the process for determination by TSAC of delinquency or default by lawyers leading to possible suspension of their law licenses was needed. The legislative and administrative action to accomplish this purpose will not be completed until late into the Summer of 2011 at the earliest. While the legislation (SB 2650, HB 3014) received considerable support and included, as amended, a provision to authorize TSAC to promulgate the necessary rules and regulations to provide due process for determinations of lawyer default in student loan obligations, the legislation was not finally adopted. Therefore, the Recommending Parties continue to recommend that the Court hold its rulemaking in abeyance until and unless the Tennessee General Assembly and the necessary administrative agencies adopt the necessary legislation and rules. The earliest such action could be

complete is late Summer 2011. The Recommending Parties will advise the Court when the processes are complete.

RESPECTFULLY SUBMITTED,

By: /s/ by permission

SAM D. ELLIOTT (009431)
President, Tennessee Bar Association
Gearhiser, Peters, Cavett, Elliott &
Cannon, PLLC
320 McCallie Avenue
Chattanooga, Tennessee 37402
(423) 756-5171

By: /s/ by permission

BRIAN S. FAUGHNAN (019379)
Chair,
TBA Standing Committee on Ethics &
Professional Responsibility
Adams and Reese LLP
80 Monroe Avenue, Suite 700
Memphis, TN 38103
(901) 5245280

By: /s/ by permission

WILLIAM L. HARBISON (007012)
General Counsel,
Tennessee Bar Association
Sherrard & Roe, PLC
424 Church Street, Suite 2000
Nashville, Tennessee 37219
(615) 742-4200

By: 

ALLAN F. RAMSAUR (5764)
Executive Director,
Tennessee Bar Association
Tennessee Bar Center
221 Fourth Avenue North, Suite 400
Nashville, Tennessee 37219-2198
(615) 383-7421

By: /s/ by permission

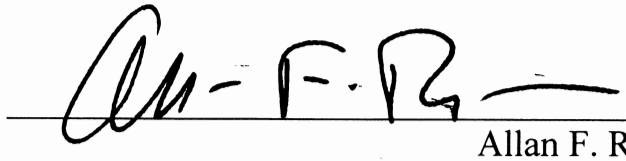
NANCY S. JONES (016369)
Chief Disciplinary Counsel,
Tennessee Supreme Court Board of
Professional Responsibility
1101 Kermit Drive, Suite 730
Nashville, Tennessee 37217
(615) 695-0927

By: /s/ by permission

PETER J. ABERNATHY (026163)
Counsel,
Tennessee Student Assistance Corporation
404 James Robertson Parkway, Suite 1510
Nashville, Tennessee 37243
(615) 741-1346

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing has been served upon the individuals and organizations identified in Exhibit "A" by regular U.S. Mail, postage prepaid on August 2, 2010.



Allan F. Ramsaur