S T A T E O F T E N N E S S E E
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Opinion No. 03-053

Prohibiting an Attorney from Appearing in Court

QUESTIONS

1. Under what authority and what conditions may a judge prohibit an attorney from appearing in court?

2. Are there additional considerations when the attorney appears in an official capacity performing a government function?

OPINIONS

1. A judge has the inherent authority to suspend or disbar an attorney from his courtroom for misconduct directly affecting the proceedings of the court. Suspension or disbarment, however, cannot be ordered as a punishment for contempt, and should be used only with moderation and caution after clear misconduct. In criminal matters, after the commencement of adversarial proceedings, the right to counsel must also be considered before removal of an attorney.

2. Yes. Attorneys appearing in official, governmental capacities, such as members of the staffs of the District Attorneys General or the state Attorney General, are subject to Supreme Court disciplinary rules and the inherent powers of individual courts to discipline lawyers appearing before them. A court should exercise its authority to suspend or disbar government attorneys from practice before the court with due regard for the statutory and constitutional independence, discretion and duties of such attorneys.

ANALYSIS

1. Any attorney admitted to practice law in Tennessee is subject to the disciplinary jurisdiction of the Supreme Court, the Board of Professional Responsibility, and the Circuit and Chancery Courts. *See* Rule 9, Section 1.1, Rules of the Supreme Court. The Supreme Court has established rules and procedures for its disciplinary process in Rule 9. These rules expressly provide that they shall not be construed "to deny to any courts such powers as are necessary for that court to maintain control over proceedings conducted before it," such as the power of contempt. *See* Rule 9, Section 1.2, Rules of the Supreme Court.

Thus, in addition to provisions for disbarment and suspension of attorneys in the Supreme Court disciplinary process, there exists power for such action in the court before which a lawyer appears. This is an "inherent power to control the exercise of the administration of justice." *State v. Huskey*, 82 S.W.3d 297, 311 (Tenn. Crim. App. 2002).

In 1978, the Tennessee Supreme Court determined that its Rule 42 did not deny to any court the power to discipline any lawyer by suspension or disbarment from practice in that particular court, for misconduct directly affecting the processes and proceedings of that court. *Ex parte Chattanooga Bar Association*, 556 S.W.2d 880, 884 (Tenn. 1978). Rule 42 contained essentially the same language as the current Rule 9, entitled Disciplinary Enforcement. *See* Op. Tenn. Atty. Gen. 84-296 (1984) (copy attached). As this Office has noted:

> This recognition by the Supreme Court of the power of an individual court to discipline an attorney by suspension or disbarment from practicing before it for such misconduct accords with general authority elsewhere. Thus, it is said that "Generally, all courts of record have power in a proper case to suspend or annul the license of an attorney practicing in the particular court exercising the power." 7 C.J.S. *Attorney and Client* § 60 (1980), 941. This is a common law power of courts of record - the power of a motion or suspension of an attorney from the particular court, or striking his name from the court's roll of attorneys. *Legal Club of Lynchburg v. Light*, 137 Va. 249, 119 S.E. 55 (1923); *In re Daugherty*, 103 W.Va. 7, 136 S.E. 402 (1927). *See also, Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 20 L.Ed. 646, 649, 651-652 (1872).

Id.

"An attorney may be disciplined for conduct tending to bring reproach on the courts or the administration of justice, and professional misconduct authorizing suspension or disbarment includes misconduct toward the court or a judge in or out of court." 7 C.J.S. *Attorney and Client* § 82 (1980). Attorneys have an obligation to maintain at all times the respect due to the court and judicial officers. *Id*. However, this office has opined that suspension from practice before a court should not be imposed upon an attorney as a punishment for contempt. Op. Tenn. Atty. Gen. 84-296 (1984). The punishments for contempt in Tennessee are limited by statute to fines, imprisonment, or both. Tenn. Code Ann. § 29-9-103(a).

Use of inherent disciplinary authority to prohibit an attorney from appearing in court should be limited.

> The power to discipline attorneys is not an arbitrary one to be exercised at the pleasure of the court or because of passion, prejudice, or personal hostility; it is rather one to be used with moderation and

> caution, in the exercise of a sound judicial discretion, and only in a clear case, for the most weighty reasons, and upon clear legal proof[.]

7 C.J.S. *Attorney and Client* § 59 (1980).

A judge does have other methods of ensuring order in his courtroom, such as contempt. If a court has determined, after notice and hearing in a case in which the lawyer is a party, that a lawyer has willfully refused to comply with a court order, a certified copy of the court order may be filed with the Supreme Court, and upon filing of such an order, the Supreme Court will enter an order immediately suspending the lawyer from the practice of law. Rule 9, Section 31.1, Rules of the Supreme Court. Additionally, it is appropriate for judges to refer such attorneys to the Board of Professional Responsibility for disciplinary action. *See* Rule of Professional Conduct 8.3, Rule 8, Rules of the Supreme Court.[1]

While it is settled that a court may, under rare circumstances, prohibit a lawyer from appearing, there is authority that this power is further restricted when the attorney is representing an accused in a criminal case. Citing numerous cases from other jurisdictions, the Tennessee Court of Criminal Appeals reversed a trial court's removal of a lawyer for a criminal defendant on Sixth Amendment right to counsel grounds in *State v. Huskey*, *supra*.

The *Huskey* decision essentially validated the accused's claim that while he was not entitled to the appointment of an attorney of his choosing at the beginning of an adversarial proceeding, once counsel is appointed, there attaches a right to continuity of counsel with which a court should rarely interfere. The trial court found the attorney in this death penalty case to have "an approach to litigation" that constituted "an abuse of the legitimate function of the legal system." *Huskey*, 82 S.W.3d at 303. "Countless motion hearings," "at least 24 separate appeals," unnecessarily lengthy pleadings, numerous amendments to motions, and continued raising of adjudicated issues were cited. *Id.*

The appellate court held that the removal of defendant's appointed counsel was improper, as such should be done only when no other practical alternative exists. *Id.* at 309. Also it was found "inappropriate for the trial court to remove counsel summarily without a hearing or prior warning of the court's concerns." *Id.* The Court, citing out-of-state authority, suggested censure, bar disciplinary action, fine or imprisonment under contempt power and rejection of counsel's claims for compensation as alternatives to removal. *Id.* at 311.

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[1] Rule of Professional Conduct 8.3, Reporting Professional Misconduct.

(a) A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the Disciplinary Counsel of the Board of Professional Responsibility.

The Rules of Professional Conduct replaced the Rules of Professional Responsibility on March 1, 2003. The Rule of Professional Responsibility which was applicable to this situation was DR 1-103, Disclosure of Information to Authorities.

According to *Huskey*, removal of counsel after adversarial proceedings have begun is justified only in cases involving such problems as conflict, physical or mental incapacity, the most flagrant circumstances of misconduct, or incompetence. *Id.* at 307.

In sum, it is the opinion of this Office that a judge has the inherent authority to suspend an attorney from appearing in his courtroom in order to preserve decorum and respect for the court's authority. However, the suspension cannot be a punishment for contempt, and suspending an attorney from the practice of law in a courtroom should be done with caution and moderation, after clear evidence of misconduct appears, and, in the context of a criminal case, should not be deployed so as to interfere with the defendant's right to counsel.

2. The above analysis applies to a court's power to expel attorneys in general and counsel in criminal cases. Yet other considerations are relevant when the attorney appears as or on behalf of an office such as the District Attorney General or state Attorney General.

The Supreme Court disciplinary rules of practice and procedure apply to attorneys acting as elected officials. *See* Rule 9, Section 1.1, Rules of the Supreme Court; *Ramsey v. Board of Professional Responsibility*, 771 S.W.2d 116 (Tenn.), *cert. denied*, 493 U.S. 917, 110 S.Ct. 278, 107 L.Ed. 2d. 258 (1989).[2]

As to the inherent power of individual courts over attorneys appearing before them, Tennessee law would seem to draw some parameters when the attorney is acting as a public official. For example, a judge cannot require that an assistant district attorney be present in his courtroom during all criminal proceedings. Op. Tenn. Atty. Gen. 00-001 (January 4, 2000) (copy attached). Such a requirement would interfere with a district attorney's discretion in the performance of duties and the allocation of resources. *Id.*; Tenn. Code Ann. § 8-7-103(6)(1998). Additionally, district attorneys have broad discretion in matters of prosecution. *See Ramsey v. Town of Oliver Springs*, 998 S.W.2d 207 (Tenn. 1999); *State v. Superior Oil, Inc.*, 875 S.W.2d 658 (Tenn. 1994); *State v. Gilliam*, 901 S.W.2d 385 (Tenn. Crim. App. 1995). There is no precedent discussing the circumstances under which it may be proper to prohibit a district attorney general or his assistants from appearing in the courtroom. It may be inferred from these cases, however, that this sanction may not be utilized to punish a district attorney general or his assistants for exercising the constitutional and statutory prerogatives of the office.

In sum, is it the opinion of this Office that a court's power to prohibit attorneys from appearing before it should be exercised in situations involving a public official attorney with due regard for the independence, discretion, and duties of such attorney as described in the constitution and statutes of the State of Tennessee.

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[2] "Any attorney" in the Supreme Court rules extends to attorneys who are district attorneys and judges. *See Ramsey*, 771 S.W.2d at 118. In addition, an attorney acting as a judge can be disbarred, as can a district attorney. *See Schoolfield v. Tennessee Bar Ass'n*, 209 Tenn. 304, 353 S.W.2d 401 (Tenn. 1961); *Ramsey*, 771 S.W.2d at 119.

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