

**STATE OF TENNESSEE**  
**OFFICE OF THE**  
**ATTORNEY GENERAL**  
**PO BOX 20207**  
**NASHVILLE, TENNESSEE 37202**

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Opinion No. 10-24

Separation of powers with regards to the regulation of the practice of law

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**QUESTIONS**

1. Would an act requiring the Tennessee Supreme Court to establish guidelines regarding the consequences on attorney licenses for defaulting on a student loan violate Article II, Sections 1 and 2, or any other provision of the Tennessee Constitution? Similarly, would an act including attorneys within the license suspension, denial or revocation provisions of Chapter 476 of the 1999 Tennessee Public Acts violate Article II, Sections 1 and 2, or any other provision of the Tennessee Constitution?

2. Would Article II, Sections 1 and 2, or any other provision of the Tennessee Constitution be violated by legislation that made the prohibition of knowingly making false statements to a tribunal or failing to disclose pertinent information to a tribunal found in Rule 3.3 of the Tennessee Rules of Professional Conduct a criminal offense? Further, would legislation establishing a statutory criminal offense of knowing defamation by a lawyer in statements made relative to, but outside of, judicial proceedings in which the lawyer is professionally involved violate Article II, Sections 1 and 2, or any other provision of the Tennessee Constitution?

**OPINIONS**

1. Yes, an act *requiring* the Tennessee Supreme Court, which has primary authority to regulate the practice of law including the requirements for professional licenses, to establish such guidelines would be an unconstitutional violation of the separation of powers doctrine set forth in Article II, Sections 1 and 2. However, the question may prove moot because, since the submission of this opinion request, the Tennessee Supreme Court has proposed an amendment to Tennessee Supreme Court Rule 9 that sets forth guidelines for disciplinary action against attorneys who default on their student loans. Similarly, an act that *requires* the Supreme Court to suspend, deny or revoke the license of an attorney for a particular offense is unconstitutional. Legislation that directly conflicts with or diminishes the Tennessee Supreme Court's inherent constitutional authority to regulate the practice of law violates the separation of powers doctrine set forth in Article II, Sections 1 and 2, and is therefore unconstitutional.

2. It depends. The power to define what constitutes a criminal offense belongs to the Legislature, subject to constitutional limitations and safeguards. A criminal statute regarding the practice of law could be seen as a constitutional supplement or aid to the Supreme Court's regulation of the field. However, there is a risk that a criminal statute could be deemed to directly conflict with the Court's rule and thus unconstitutional since the punishment for such act occurring in the practice of law exceeds the range of punishment the Tennessee Supreme Court has established for the same conduct. Additionally, a statute criminalizing the conduct of attorneys could be unconstitutional if it is deemed to interfere with a defendant's constitutional right to effective assistance of counsel.

### ANALYSIS

1. The judicial supervisory power of the State lies with the Tennessee Supreme Court. Tenn. Const. art. VI, §1; *see also Belmont v. Board of Law Examiners*, 511 S.W.2d 461, 463-64 (Tenn. 1974). That inherent, constitutional power includes the "fundamental right to prescribe and administer rules pertaining to the licensing and admission of attorneys." *In re Petition of Burson*, 909 S.W. 2d 768, 773-74 (Tenn. 1994). There are areas in which both the judicial and the legislative branches have an interest and can therefore constitutionally exercise authority. *Newton v. Cox*, 878 S.W.2d 105, 111 (Tenn. 1994). Since the Legislature has an interest in protecting the public, the practice of law and regulation of attorneys is one such area. *See id.* However, this interest does not give the Legislature the power to supersede the Court's authority. If a statute supplements and aids the Supreme Court's regulation of the practice of law, it is constitutional. *Id.* However, when a "legislative enactment is in direct conflict with or totally abrogates the Court's authority with regard to the practice of law, the statute is unconstitutional." *Id.*

The first part of the request asks for an opinion on whether requiring the Supreme Court to establish guidelines regarding the consequences on attorney licenses for defaulting on student loans would violate Article II, Sections 1 and 2 or any other provision of the Tennessee Constitution. An act requiring the Court to establish such guidelines would be unconstitutional for the reasons stated above. Since the submission of this opinion request, the Supreme Court of Tennessee has proposed an amendment to Tennessee Supreme Court Rule 9 which, if passed, would establish such guidelines. Therefore, the first question in the request may be rendered moot.

The second part of the request hypothesizes an act that includes attorneys within the license suspension, denial or revocation provisions of Chapter 476 of the 1999 Tennessee Public Acts. Chapter 476 requires licensing authorities to suspend, deny or revoke the license of any person who has defaulted on a repayment or service obligation under student loan or service-conditional scholarship programs. 1999 Tenn. Pub. Acts 476. Therefore, the prospective act would *require* the Tennessee Supreme Court to take regulatory action against an attorney in certain circumstances.

The Legislature cannot usurp the Supreme Court's authority to regulate the practice of law by *requiring* it to discipline attorneys for certain behavior. Since the Supreme Court has not

yet enacted a rule which disciplines attorneys for defaulting on a loan program, such act by the Legislature would be in direct conflict with the Supreme Court's authority and therefore unconstitutional. Even if the Supreme Court creates such a rule, the Legislature could only constitutionally pass an act which would aid or supplement that rule, not one which required the Supreme Court to take any action.

2. While the Supreme Court has the authority to regulate attorneys and the practice of law, "the power to define what shall constitute a criminal offense is committed to the discretion of the Legislature, subject to constitutional limitation and safeguards. . . ." *See State v. Hale*, 840 S.W.2d 307, 314 (Tenn. 1992); *see also State v. Jackson*, No. M2008-00636-CCA-R3-CD, 2009 WL 3321179, at \*9 (Tenn. Crim. App. Oct. 14, 2009). Since the Supreme Court has the constitutional authority to regulate the practice of law, any criminal statute regarding such regulation must be consistent with the Supreme Court's rules. *See Newton*, 878 S.W.2d at 112.

Rule 3.3 of the Tennessee Rules of Professional Conduct specifically prohibits the behavior described by the part of the contemplated criminal statute. Under Rule 3.3(a), a lawyer shall not knowingly:

- (1) make a false statement of fact or law to a tribunal; or
- (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
- (3) in an ex parte proceeding, fail to inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

TRCP 3.3(a) (2008).

Although there is no Supreme Court Rule which specifically addresses knowing defamation by a lawyer in statements made outside of judicial proceedings, there are three Rules that address extrajudicial statements. With regards to trial publicity, Rule 3.6(a) of the Tennessee Rules of Professional Conduct states:

- (a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

TRCP 3.6(a) (2008). Rule 4.1(a) addresses truthfulness and candor in statements to others:

- (a) In the course of representing a client, a lawyer shall not knowingly make a false statement of material fact or law to a third

person.

TRCP 4.1(a) (2008). Finally, under Rule 8.4(c), it is considered professional misconduct for an attorney to:

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;

As previously discussed, a statute is constitutional if it is “supplemental to and in aid of” a Supreme Court regulation of the practice of law. *See Newton*, 878 S.W.2d at 112. Since the Tennessee Supreme Court has already declared that the conduct outlined in Rule 3.3(a) is prohibited, a statute making it a criminal offense for an attorney to knowingly making false statements to a tribunal could be viewed as a valid use of the Legislature’s police powers and an enhancement to the underlying policy of the Supreme Court rule. *See Chambers v. Stengel*, 37 S.W.3d 741, 741-44 (Ky. 2001); *upheld by Chambers v. Stengel*, 256 F.3d 397, 402 (6th Cir. 2001). However, some jurisdictions have found that the Legislature overstepped its boundaries by imposing a criminal sanction for violations of a comparable Supreme Court rule. *See Commonwealth v. Stern*, 701 A.2d 568, 570-73 (Pa. 1997). In *Commonwealth*, the Pennsylvania Supreme Court noted a criminal statute, which was a “word for word restatement” of a rule in the Pennsylvania Rules of Professional Conduct, effectively criminalized “the conduct of attorneys that is the subject of regulation by the Supreme Court.” *Id.* at 573. Since the Pennsylvania Supreme Court has the inherent authority to supervise the conduct of attorneys, the Court found that the criminal statute unconstitutionally infringed upon its authority. *Id.* The criminal statute in question attempts to further sanction an act already regulated by the Supreme Court. Therefore, it could be deemed to directly conflict with the Court’s rule, making it unconstitutional.

Since the Supreme Court has not imposed a rule that directly contemplates “knowing defamation” by an attorney outside of a judicial proceeding, an act by the Legislature attempting to regulate the practice of law by criminalizing such attorney conduct may be unconstitutional. If the Legislature enacted a statute with language similar to the that found in Rules 3.6(a), 4.1(a) and 8.4(c) of the Tennessee Rules of Professional Conduct, the statute may be mere support to the Supreme Court rules and thus constitutional. *See Newton*, 878 S.W.2d at 112. However, a statute that goes beyond the Tennessee Rules of Professional Conduct may be an abrogation of the authority of the Supreme Court. Therefore, a criminal statute addressing conduct by attorneys could constitute a violation of Article II, Sections 1 and 2 of the Tennessee Constitution.

Concerns about the validity of the statute also arise if it interferes with a defendant’s right to due process and effective assistance of counsel under the United States and Tennessee Constitutions. U.S. Const. amend VI & XIV; Tenn. Const. art I, §§ 8 & 9. “The Due Process Clause of the Fourteenth Amendment requires that criminal prosecutions ‘comport with prevailing notions of fundamental fairness’, and this standard of fairness requires that criminal defendants ‘be afforded a meaningful opportunity to present a complete defense.’” *State v. Ostein*, 293 S.W.3d 519, 535-7 (Tenn. 2009), quoting *California v. Trombetta*, 467 U.S. 479,

485 (1984). Included in the presentation of a complete defense is the right to the effective assistance of counsel. *See* U.S. Const. amend. VI; Tenn. Const. art. I, § 9. *See also Ostein*, 293 S.W.3d at 537. Defense counsel must present all substantial defenses in order to be effective. *Pylant v. State*, 263 S.W.3d 854, 868-9 (Tenn 2008). The Tennessee Supreme Court has held that the “adversary system requires all defenses to be raised so that the government is put to its proof.” *Id.* While there is no constitutional right for criminal defendants to knowingly present false evidence or knowingly make false statements, there is a risk that such a criminal statute could impose a punishment on the attorney so severe as to create a “chilling effect” and thereby interfere with the criminal defendant’s constitutional right to the effective assistance of counsel. Therefore, a criminal statute may violate the United States and Tennessee Constitutions if it is found to obstruct a criminal defendant’s right to present a complete defense by regulating the practice of law.

ROBERT E. COOPER, JR.  
Attorney General and Reporter

BARRY TURNER  
Deputy Attorney General

ANNE SIMMONS  
Assistant Attorney General

Requested by:

The Honorable Randy McNally  
State Senator  
307 War Memorial Building  
Nashville, TN 37243-0205