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Opinion No. 04-165

Constitutionality of Confidentiality Provisions of Tenn. Code Ann. § 17-5-303(b) and Court of the Judiciary Rule 8

QUESTION

In view of the Tennessee Supreme Court's ruling in *Doe v. Doe*, 127 S.W.3d 728 (Tenn. 2004), are the confidentiality provisions of Tenn. Code Ann. § 17-5-303(b) and Court of the Judiciary Rule 8 unconstitutional?

OPINION

Because Tenn. Code Ann. § 17-5-303(b) and Court of the Judiciary Rule 8 are vaguely worded, it is not clear that those provisions would be read to constrain the speech of respondents, complainants, and other persons involved in proceedings before the Court of the Judiciary about the performance of judges. If those provisions were to be read to impose such restraints, then they would be unconstitutional under the reasoning in *Doe v. Doe*, which held that imposing restraints on persons who make complaints against attorneys violates the free speech protections of the United States and Tennessee Constitutions.

ANALYSIS

In *Doe v. Doe*, 127 S.W.3d 728 (Tenn. 2004), the Tennessee Supreme Court held that Supreme Court Rule 9, § 25, which required that proceedings before the Tennessee Board of Professional Responsibility on complaints against attorneys be kept confidential except in certain limited circumstances, violated the free speech protections of the United States and Tennessee Constitutions. U.S. CONST. amend. I, TENN. CONST. art. 1, § 19.

Tenn. Code Ann. § 17-5-303(b) and Court of the Judiciary Rule 8 address proceedings concerning complaints involving judges. Tenn. Code Ann. § 17-5-303(b) provides that all complaints before the Tennessee Court of the Judiciary under § 17-5-303(a) concerning the disability of a judge "shall be confidential and privileged." Rule 8 states:

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.

Neither of these provisions contains anything comparable to the statement in Supreme Court Rule 9, § 25, that “[a]ll participants in the proceeding shall conduct themselves so as to maintain the confidentiality of the proceeding.” Thus, it is not certain to what persons other than members of the Court the confidentiality provisions would apply. Should it be determined that these provisions do apply to respondents, complainants, and witnesses, the resulting restriction on their speech would be unconstitutional under the holding of *Doe v. Doe*.

Although *Doe v. Doe* involved complaints against attorneys, the Tennessee Supreme Court clearly indicated in that decision that the same reasoning applies, perhaps with even greater force, to complaints against judges. The Court relied in part on the decision in *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 98 S.Ct. 1535, 56 L.Ed.2d 1 (1978), in which the United States Supreme Court held that the First Amendment did not allow criminal punishment of third persons for publishing truthful information regarding confidential proceedings of Virginia’s Judicial Inquiry and Review Commission. The Court in *Landmark Communications* acknowledged several state interests that confidentiality could be said to maintain, but the Court held that “neither the Commonwealth’s interest in protecting the reputation of its judges, nor its interest in maintaining the institutional integrity of its courts is sufficient to justify the subsequent punishment of speech at issue.” 435 U.S. at 841, 98 S.Ct at 1543.

In *Doe v. Doe*, the Tennessee Supreme Court reasoned that if confidentiality requirements for complaints involving judges violate freedom of speech, then the same applies to confidentiality requirements in complaints involving attorneys. 127 S.W.3d at 734. In its proposed amendment to Rule 9, Section 25, the Supreme Court retains the statement that documents relating to all proceedings involving allegations of attorney misconduct or disability “are deemed to be non-public records” and “shall be kept confidential and privileged” except under certain circumstances. The Court also retains the requirement that “[a]ll participants in the proceeding shall conduct themselves so as to maintain the confidentiality of the proceeding.” The Court proposes adding the following language:

However, nothing in these rules shall prohibit the complainant, respondent-attorney, or any witness from disclosing the existence or substance of a complaint or proceeding under these rules or from disclosing any documents or correspondence filed by, served on, or provided to that person.

In re: Amendment to Rule 9, Rules of the Tennessee Supreme Court, Feb. 19, 2004. Thus, the Court retains its directive to the Board of Professional Responsibility and participants in Board proceedings to treat documents related to attorney disciplinary proceedings as confidential. Tenn.

Code Ann. § 17-5-303(b) and Court of the Judiciary Rule 8 are directed at the Court of the Judiciary itself and instruct the Court as to the treatment of documents in complaint or disability proceedings. As with the Court's proposed amendment to Rule 9, Section 25, this aspect of Tenn. Code Ann. § 17-5-303(b) and Court of the Judiciary Rule 8 is valid and would be unaffected by *Doe v. Doe*. However, under the ruling in *Doe v. Doe*, use of these provisions as a basis for sanctions against a respondent, complainant, witness, or third party in Court of the Judiciary proceedings would be unconstitutional.

In short, a requirement that the Court of the Judiciary or the Board of Professional Responsibility, like many other government agencies in particular settings, shall maintain the confidentiality of its proceedings is perfectly permissible. But the government cannot restrain the right of individuals to speak freely about the substance of complaints or information they have relating to the performance of judges or lawyers.

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