

Confidentiality of Attorney Disciplinary Complaints in Tennessee

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Abstract: Tennessee law and public policy now coincide regarding the issue of confidentiality for attorney misconduct allegations, so that both the public and the judiciary may have disclosure and full knowledge.

Ever since the seminal decision in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) protecting the right of attorneys under the First Amendment and Fourteenth Amendment to advertise, there has been all but constant disputes between the state bar associations and the attorneys who choose to exercise their right to advertise. Usually the bar associations argue some variant of the public will be defrauded by unscrupulous and unethical attorneys. Yet at the same time most bar associations and boards of professional responsibility maintain a policy of no public disclosure of ethical complaints against attorneys.

The Tennessee Supreme Court is helping lead the nation on the rules to require disclosure, thus guaranteeing that both the public and the judiciary may have disclosure and full knowledge concerning attorneys.

In *Doe v. Doe*, 127 S.W.3d 728; 2004 Tenn. LEXIS 128 the Tennessee Supreme Court reviewed the impact of the First and Fourteenth Amendments on agency rules that try to make files and investigations "confidential" and held such rules unconstitutional.

The free speech clause of the First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech." Similarly, Article I, section 19 of the Tennessee Constitution states in relevant part that "the free communication of thoughts

and opinions is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty." Article 1, section 19 provides protection of free speech rights at least as broad as the First Amendment. *Leech v. Am. Booksellers Ass'n, Inc.*, 582 S.W.2d 738, 745 (Tenn. 1979).

Content-based restrictions are presumptively invalid, *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377, 382, 120 L. Ed. 2d 305, 112 S. Ct. 2538 (1992) and must be subjected to the most exacting scrutiny. *Boos v. Barry*, 485 U.S. 312, 321, 99 L. Ed. 2d 333, 108 S. Ct. 1157 (1988).

Under the strict scrutiny standard adopted in *Doe v. Doe*, the State and its attorney agencies has the burden of proving (1) that the restriction is necessary to serve a compelling state interest and (2) that it is narrowly drawn to achieve that end. *Burson v. Freeman*, 504 U.S. 191, 198, 119 L. Ed. 2d 5, 112 S. Ct. 1846 (1992). Traditional strict scrutiny standards make it extremely difficult to prove a "compelling state interest" absent a taxation or national defense justification.

In *Doe v. Doe*, supra, the court held that the state rule making attorney grievance complaints and investigations confidential violated the constitution: "We conclude that the three interests advanced by the Attorney General - protection of reputation of an attorney and the Bar from meritless complaints, protection of anonymity of complainants and other persons supplying information to the Board, and maintenance of the integrity of pending investigations - while legitimate, are not sufficiently compelling to justify the restriction on free speech ..., particularly considering the broad scope of its confidentiality requirement."

With *Doe v. Doe*, the initial promise of *Bates v. State Bar of Arizona* may finally be realized.